

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 13534/16

Amended pursuant to Rule 378 of the Uniform Civil Procedure Rules 1999 (Qld).

Dated: 21 June 2018

Signed: 

Plaintiff: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (RECEIVER APPOINTED)

AND

First Defendant: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 (RECEIVER APPOINTED)

AND

Second Defendant: TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679 AS RESPONSIBLE ENTITY OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511

AND

Third Defendant: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868 (RECEIVER APPOINTED)

AND

Fourth Defendant: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461

AND

Fifth Defendant: THE TRUST COMPANY LIMITED ACN 004 027 749 AS CUSTODIAN OF THE PROPERTY OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511

SECOND FURTHER AMENDED STATEMENT OF CLAIM

SECOND FURTHER AMENDED STATEMENT OF CLAIM
Filed on Behalf of the Plaintiff
Form 16, Version 2
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Rules 22, 146

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This claim in this proceeding is made in reliance on the following facts:

Parties

1. LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ACN 077 208 461 (“**LMIM**”):
 - (a) is and was at all material times a company duly incorporated according to law;
 - (b) is and was at all material times the responsible entity (“**RE**”) of the LM First Mortgage Income Fund ARSN 089 343 288 (formerly the LM Mortgage Income Fund) (“**FMIF**”), a registered managed investment scheme under the *Corporations Act* 2001 (“**the Act**”);
 - (c) was placed into voluntary administration on 19 March 2013; and
 - (d) was placed into liquidation on 1 August 2013, and John Richard Park and Ginette Dawn Muller of FTI Consulting were appointed as its joint and several liquidators.
2. Pursuant to Orders of Dalton J dated 21 August 2013 (“**the Orders**”), LMIM was directed to wind up the FMIF, subject to, inter alia, the appointment of Mr David Whyte referred to in paragraph 3 below.
3. Pursuant to the Orders, Mr David Whyte:
 - (a) was appointed pursuant to section 601NF(1) of the Act to take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution;
 - (b) was appointed pursuant to s 601NF(2) of the Act as receiver of the property of the FMIF;
 - (c) has, in relation to the property of the FMIF, the powers set out in s 420 of the Act;
 - (d) is authorised to bring, defend or maintain any proceedings on behalf of the FMIF in the name of LMIM as is necessary for the winding up of the FMIF in accordance with clause 16 of its Constitution; and
 - (e) is entitled to bring and brings these proceedings in the name of LMIM as RE of the FMIF.

The Defendants

4. LMIM:
 - (a) is and was at all material times the RE of the LM Currency Protected Australian Income Fund ARSN 110 247 875 (“**CPAIF**”);
 - (b) was at all material times until 16 November 2012 the RE of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 (“**WFMIF**”); and

- (c) is and was at all material times the RE of the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (“ICPAIF”),
(together, known as the “Feeder Funds”).
5. At all material times each of the funds constituting the Feeder Funds was a unit trust and a registered managed investment scheme under the Act.
 6. On 16 November 2012, the RE of the WFMIF changed from LMIM to Trilogy Funds Management Limited (**Trilogy**), and thereby and pursuant to s.601FS of the Act the rights, obligations and liabilities of LMIM in relation to the WFMIF become rights, obligations and liabilities of Trilogy, except for:
 - (a) any right of LMIM to be paid fees for the performance of its functions before it ceased to be the RE of the WFMIF; and
 - (b) any right of LMIM to be indemnified for expenses it incurred before it ceased to be the RE of the WFMIF; and
 - (c) any right, obligation or liability that LMIM had as a member of the WFMIF; and
 - (d) any liability for which LMIM could not have been indemnified out of the property of the WFMIF if it had remained the RE of the WFMIF.
 7. At all material times from 16 November 2012, the RE of the WFMIF was Trilogy.
 8. On 18 October 2013, LMIM determined to wind up the CPAIF under s.601NC of the Act.
 9. On 18 October 2013, LMIM determined to wind up the ICPAIF under s.601NC of the Act.
 10. On 16 November 2015, Gayle Dickerson and Said Jahani of Grant Thornton were appointed by Custom House Currency Exchange (Australia) Pty Ltd (“**Custom House**”) as joint and several receivers and managers of LMIM in its capacity as RE of the CPAIF and the ICPAIF pursuant to security interests registered on the Personal Property Securities Register in favour of Custom House.

Custody Arrangements – the Feeder Funds

11. Pursuant to section 601FC(2) of the Act:
 - (a) the responsible entity for the CPAIF has held at all material times and continues to hold the scheme property of the CPAIF on trust for the unitholders in the CPAIF;
 - (b) the responsible entity for the WFMIF has held at all material times and continues to hold the scheme property of the WFMIF on trust for the unitholders in the WFMIF;

(c) the responsible entity for the ICPAIF has held at all material times and continues to hold the scheme property of the ICPAIF on trust for the unitholders in the ICPAIF.

12. At all material times, and pursuant to section 601FB(1) of the Act, each of the CPAIF, the WFMIF and the ICPAIF were governed by constitutions, each of which includes terms to the following effect:

(a) (ESTABLISHMENT OF TRUST – Appointment of Custodian) The RE may, but is not obliged to, appoint a Custodian as agent to hold the Scheme Property on behalf of the RE, in accordance with the terms and conditions of a Custody Agreement.

(b) (TITLE TO SCHEME PROPERTY – Custodian to hold as agent of RE) If a Custodian has been appointed, the Scheme Property will be held in the name of the Custodian as agent for the RE on the terms and conditions as detailed in the Custody Agreement.

If not, the Scheme Property will be held in the name of the RE.

Particulars

(i) The term pleaded in (a) is clause 2.3 of the Replacement Constitutions of the CPAIF, the WFMIF and the ICPAIF each dated 10 April 2008.

(ii) The term pleaded in (b) is clause 21.1 of the Replacement Constitution of the WFMIF, and clause 20.1 of the Replacement Constitutions of the CPAIF and the ICPAIF.

13. There was a custodian appointed to hold the scheme property of the CPAIF, namely The Trust Company (PTAL) Limited ACN 008 412 913 (formerly Permanent Trustee Australia Limited) (PTAL), in the following periods:

(a) from about 1 September 2004 until about 9 April 2008;

(b) from about 30 November 2011 until about 19 February 2016.

Particulars

(i) PTAL was appointed custodian of the CPAIF under a Custody Agreement between PTAL and LMIM dated 4 February 1999, as amended from time to time (“Custody Agreement”).

(ii) PTAL was initially appointed as custodian of the CPAIF by an Amending Deed dated 1 September 2004.

(iii) LMIM terminated PTAL’s custody of the property of the CPAIF on about 9 April 2008, but re-appointed PTAL into that role by Amending Deed dated 30 November 2011.

- (iv) Mr John Park, in his capacity as a liquidator of LMIM, caused LMIM to terminate PTAL's custody of the property of the CPAIF by letter dated 19 February 2016, with effect from 31 March 2016.

14. There was a custodian appointed to hold the scheme property of the WFMIF in the following periods:

- (a) from about 18 March 2002 until about 9 April 2008, namely PTAL;
(b) from about 30 November 2011 until about 16 November 2012, namely PTAL;
(c) from about 16 November until the date of this pleading, namely The Trust Company Limited ACN 004 027 749 ("TCL").

Particulars

- (i) PTAL was initially appointed custodian of the WFMIF under the Custody Agreement, by an Amending Deed dated 18 March 2002.
(ii) LMIM terminated PTAL's custody of the property of the WFMIF on about 9 April 2008, but re-appointed PTAL into that role by Amending Deed dated 30 November 2011.
(iii) In anticipation of replacing LMIM as the responsible entity for the WFMIF, and by an Amending Deed dated 1 November 2012, Trilogy appointed TCL as custodian of the property of the WFMIF under the existing Custody Deed between TCL and Trilogy dated 1 February 2005 ("Trilogy Custody Deed").

15. There was a custodian appointed to hold the scheme property of the ICPAIF, namely PTAL, in the following periods:

- (a) from about 1 September 2004 until about 9 April 2008;
(b) from about 30 November 2011 until about 19 February 2016.

Particulars

- (i) PTAL was initially appointed custodian of the ICPAIF under the Custody Agreement, by an Amending Deed dated 27 September 2006.
(ii) LMIM terminated PTAL's custody of the property of the ICPAIF on about 9 April 2008, but re-appointed PTAL by Amending Deed dated 30 November 2011.
(iii) Mr John Park, in his capacity as a liquidator of LMIM, caused LMIM to terminate PTAL's custody of the property of the ICPAIF by letter dated 19 February 2016, with effect from 31 March 2016.

16. The Custody Agreement between LMIM and PTAL included at all material times material terms to the following effect:-

- (a) (Clauses 2.1 and 2.2) LMIM appoints PTAL to provide custodian services on the terms of this agreement. PTAL accepts its appointment and agrees to provide custodian services to LMIM on the terms of this agreement.
- (b) (Clause 3.1) Subject to the provisions of this agreement, PTAL agrees to custodially hold the Portfolio and Title Documents as agent for LMIM in relation to each Scheme, including the FMIF.
- (c) (Clause 1.1) 'Custodially Held' means, in relation to an asset of a Scheme held by or on behalf of PTAL under this agreement means that PTAL or the person holding the asset on PTAL's behalf has one or more of the following:-
 - (i) legal title to the asset;
 - (ii) physical possession of the asset;
 - (iii) direct control of the asset;
 - (iv) is designated as mortgagee of the asset; or
 - (v) physical possession or direct control of the essential elements of title of the asset,

where in all the circumstances this results in PTAL or the person holding the asset on PTAL's behalf having effective control of the asset for the purpose of its safekeeping (whether or not PTAL or the person holding the asset on PTAL's behalf, as the case may be, also performs other services in relation to the asset).
- (d) (Clause 1.1) 'Portfolio' means property of a Scheme Custodially Held from time to time by PTAL or a Sub-custodian pursuant to this agreement.
- (e) (Clause 1.1) 'Scheme' means those schemes listed in schedule 2 and any other scheme included by mutual agreement in writing between PTAL and LMIM, which relevantly included from time to time the schemes as particularised to paragraphs 13 to 15 above.
- (f) (Clause 4.1) LMIM is responsible for taking all decisions in relation to the Portfolio and properly communicating to PTAL Instructions in relation to the assets of the Portfolio. Subject to this agreement, PTAL must act on LMIM's Instructions in relation to any assets of the Portfolio. If PTAL does not have Instructions, PTAL is not required, subject to this agreement, to make any payment or take any other action in relation to any matter concerning any asset in a Portfolio.
- (g) (Clause 4.3) PTAL is not responsible for reviewing or advising LMIM on the Portfolio or any part of it nor for any action or omission pursuant to a decision taken or mistakenly not taken by LMIM.

- (h) (Clause 4.8) PTAL is not obliged to see whether, in exercising any of its powers or performing any of its duties under this agreement in accordance with Instructions from an Authorised Person, the Authorised Person is acting in proper exercise or performance of his powers or duties.

17. The Trilogy Custody Deed between Trilogy and TCL included at all material times material terms to the following effect:-

- (a) (Clause 2.1) Trilogy appoints TCL and TCL accepts the appointment as the custodian of the Assets of each of the Trusts on the terms and conditions of this Deed.
- (b) (Clause 1.1) 'Assets' means the assets of each of the Trusts which TCL holds from time to time for Trilogy including those which may be transferred or delivered to TCL in accordance with the terms of this Deed;
- (c) (Clause 1.1) 'Trusts' means one or more of the trusts listed in Schedule 1 and such other funds as may be agreed in writing between Trilogy and TCL, which relevantly includes the WFMIF as particularised to paragraph 14 above.
- (d) (Clause 4.1) TCL's duties and responsibilities in respect of the Assets of each Trust include, in accordance with Proper Instructions:
- (i) (sub-paragraph (a)) to enter into Contracts or effect transactions in relation to the Assets of the Trust on Trilogy's behalf;
- (ii) (sub-paragraph (b)) to hold Assets of the Trust on Trilogy's behalf;
- (e) (Clause 4.4) TCL must hold the Assets of a Trust as follows:
- (i) (sub-paragraph (c)) In the case of Securities, in an Account or in its own name. If TCL is to hold Securities in its own name it must, to the extent permitted by the issuer of the Security and relevant Government Agencies, ensure that all registers and Certificates of Title record that the Securities are held by TCL on Trilogy's behalf. In the case of Securities recorded in an Account, ownership must be clearly recorded in TCL's books as belonging to the relevant Account and not for TCL's own interest.
- (f) (Clause 1.1) 'Securities' includes units or other interests in managed investment schemes;
- (g) (Clause 7)
- (i) (sub-paragraph (a)) TCL must not effect any transactions or grant any securities involving the Assets of a Trust unless it has received Proper Instructions and must only give effect to those transactions in accordance with those Proper Instructions.
- (ii) (sub-paragraph (d)) Trilogy will only provide Proper Instructions for proper purposes and TCL is not under any obligation to verify the purposes or the propriety of any purpose for which any transaction is being effected.

Governance of the FMIF

~~11.18.~~ At all material times, pursuant to section 601FC(2) of the Act, LMIM held the property of the FMIF on trust for its members.

Particulars.

- (a) LMIM held assets as trustee for the members of the FMIF;
- (b) LMIM, by its agent, held assets as trustee for the members of the FMIF;
- (c) LMIM held rights and interests in the property of the FMIF as trustee for the members of the FMIF.

~~12.19.~~ The terms of the trust on which LMIM held the assets of the FMIF were those contained in, *inter alia*:

- ~~(a)~~ the Product Disclosure Statement for the FMIF as it was from time to time;
- ~~(b)(a)~~ the Constitution of the FMIF;
- ~~(c)(b)~~ the Act, to the extent to which it applied the obligations of an RE of a managed investment fund, including the obligations set out in paragraphs 23 and 41 below.

~~13.20.~~ At all material times, and pursuant to section 601FB(1) of the Act, the FMIF was governed by a Constitution (hereinafter, the “**Constitution**”), which relevantly provided to the following effect:

- (a) by clause 1.1:
 - (i) ‘Member’ in relation to a Unit means the person registered as the holder of that Unit (including joint holders);
 - (ii) ‘Register’ means the register of Members maintained by the RE under clause 22;
 - ~~(iii)(iii)~~ the “Responsible Entity”, or “RE” means the company named in ASIC’s records as the responsible entity of the Scheme and referred to in this document as the RE who is also the Trustee of the Scheme;
 - ~~(iv)(iv)~~ the “Scheme” means the FMIF;
 - ~~(v)(v)~~ “Scheme Property” means assets of the Scheme;
 - (vi) ‘Unit’ means an undivided interest in Scheme Property created and issued under this Constitution;
- (b) by clauses 2.1 and 2.2, the RE is trustee of the Scheme and holds the property of the Scheme on trust for ~~m~~Members of the Scheme;
- (c) by clause 2.3, the RE has appointed PTAL The Trust Company (PTAL) Limited ACN 008 412 913 (formerly Permanent Trustee Australia Limited) (“**PTAL**”) as agent to hold the Scheme Property on behalf of the RE;

- (d) by clause 3.1, the beneficial interest in the Scheme Property is divided into Units and, unless the terms of issue of a Unit or a Class otherwise provide, all Units will carry all rights, and be subject to all the obligations of Mmembers under the Constitution;
- (e) by clause 3.2, different Classes (and sub Classes) with such rights and obligations as determined by the RE from time to time may be created and issued by the RE at its complete discretion and, if the RE determines in relation to particular Units, the terms of issue of those Units may eliminate, reduce or enhance any of the rights or obligations which would otherwise be carried by such Units.
- (f) by clause 9.1:
 - (i) Subject to the Constitution, a Unit may be transferred by instrument in writing, in any form authorised by the Law or in any other form that the RE approves;
 - (ii) A transferor of Units remains the holder of the Units transferred until the transfer is recorded on the Register.
- (g) by clause 22.1, the RE must establish and keep a register of Members, and if applicable, the other registers required by the Law.

21. Pursuant to the Orders of Jackson J dated 17 December 2015:

- (a) The liquidators of LMIM were directed not to carry out the functions of LMIM pursuant to clauses 9, 10 and 22 of the Constitution;
- (b) LMIM was relieved of the obligations imposed by clauses 9, 10 and 22 of Constitution;
- (c) Mr Whyte was authorised and empowered to exercise the powers of, and was made responsible for the functions of, the Responsible Entity as set out in Clauses 9, 10 and 22 of the Constitution.

~~14.22.~~ PTAL was at all material times the custodian of the assets of the FMIF, pursuant to the terms of the Custody Agreement. a Custody Agreement between PTAL and LMIM dated 4 February 1999 (as amended from time to time) ("Custody Agreement").

~~15.23.~~ At all material times, LMIM was obliged as RE and as trustee of the FMIF:

- (a) to act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests;
- (b) to treat the members who hold interests of the same class equally and members who hold interests of different classes fairly;

- (c) to ensure that all payments out of the property of the FMIF are made in accordance with its Constitution and the Act.

Particulars

- (i) LMIM was so obliged pursuant to section 601FC(1)(c), (d) and (k) of the Act, and pursuant to the general law of trusts.

Obligations of the RE of the FMIF upon the winding up of the FMIF

~~16.24.~~ By section 601NE of the Act, and in the premises of paragraph 2 above, LMIM as RE of the FMIF is obliged to ensure that the FMIF is wound up in accordance with the Constitution and the Orders.

~~17.25.~~ At all material times, the Constitution relevantly provided by clause 16.7 to the effect that, "[s]ubject to the provisions of this clause 16 upon winding up of the Scheme the RE must:

- (a) realise the assets of the Scheme Property;
- (b) pay all liabilities of the RE in its capacity as Trustee of the Scheme including, but not limited to, liabilities owed to any Member who is a creditor of the Scheme except where such liability is a Unit Holder Liability;
- (c) subject to any special right or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4; ..."

Particulars.

- (i) At all material times, the above terms were contained in the Replacement Constitution of the FMIF dated 10 April 2008.

~~18.26.~~ Further, the Constitution also included the following terms expressly by reference, or by necessary implication:

- (a) that the administration of the FMIF, including its winding up, is to be carried out pursuant to the principles of the law of trusts, except where those principles are inconsistent with the provisions of the Act concerning the obligations of an RE of a managed investment fund or the express terms of the Constitution;
- (b) that LMIM or its agent or assignee, by reference to those principles, is to be treated as a matter of accounting as having received by anticipation that part of the assets of the FMIF to which it or its agent or assignee will in due course become beneficially entitled, directly or through another party, as a Class B unitholder by anticipation, to the extent of its LMIM's unsatisfied obligation as RE and trustee of the FMIF to make good to the FMIF any breaches of trust or duty for which it is responsible;

- (c) that, by reference to those principles, and in relation to any person Unitholder who is liable to the FMIF:
 - (i) that Unitholder person or their agent or assignee cannot share in the FMIF, directly or through another party, without first contributing to the FMIF by satisfying any its liability to make a contribution in aid of the FMIF; and
 - (ii) that Unitholder's person's obligation to contribute to the FMIF is treated as being in satisfaction of their or their agent or assignee's its right to share, directly or through another party, in the income or assets of the FMIF to the extent of their the Unitholder's obligation or, in other words, that Unitholder's their or their agent or assignee's right to share in the income or assets of the FMIF is appropriated in payment of its their liability to contribute to the FMIF;
- (d) that, by reference to those principles, where LMIM as RE of the FMIF has made an overpayment or wrong payment to any Unitholder, LMIM is entitled to recoup any such overpayment or wrong payment from any capital or income remaining in, or coming into LMIM's hands, to which the overpaid or wrongly paid Unitholder or their agent or assignee would otherwise be entitled.

Particulars

- (i) The pleaded terms are incorporated into the Constitution expressly by the recognition in clause 2 of the Constitution that LMIM was the trustee of the FMIF for the members of the FMIF.
- (ii) In the alternative, the pleaded terms are to be implied in fact as being clear, obvious (in light of the law of trusts), reasonable and equitable, necessary to give business efficacy to the Constitution, and not inconsistent with any express term of the Constitution.

~~19.27.~~ Further and in the alternative the principles obligations and restrictions on LMIM referred to in sub-paragraphs (a) to (d) of paragraph 26 are were imposed on LMIM and its agents and assignees in Equity.

~~20.28.~~ As at 16 November 2012 when Trilogy became the RE of the WFMIF, the rights of Trilogy as RE of the WFMIF and of its agents and assignees and in that capacity as a Class B unitholder in the FMIF were thereafter qualified and limited by reference to the principles referred to in paragraphs 26 and 27 above, insofar as they those principles had applied to LMIM and its agents and assignees immediately before it LMIM ceased to be the RE of the WFMIF.

Unit holdings

~~21.29.~~ At all material times, there were three different classes of issued Units in the FMIF, as follows:

- (a) Class A units, which were held by ordinary unitholders of the FMIF;

- (b) Class B units, all of which were held for the Feeder Funds by LMIM, apart from those transferred to Trilogy on 16 November 2012 as RE for the WFMIF as pleaded in paragraph 6 above, and all of which were Australian dollar investments;
- (c) Class C units, which were held by unitholders of the FMIF who had invested in foreign currencies.

~~22.30.~~ At all material times, Class A and Class B units in the FMIF had the same paid up value, and the same rights and obligations.

- ~~23. LMIM held Class B units in the FMIF on behalf of one of the CPAIF, the ICPAIF or, before it was replaced by Trilogy as RE of the WFMIF, the WFMIF.~~
- ~~24. On and after 16 November 2012, Trilogy held all of its Class B units in the FMIF on behalf of the WFMIF.~~

CPAIF Units

- ~~31. At all material times the Class B units in the FMIF held for the CPAIF (“CPAIF Units”) were scheme property of the CPAIF, held by LMIM as the responsible entity for the CPAIF.~~

Particulars

- (a) On about 20 October 2004, PTAL applied for the issue to it of units in the FMIF as custodian for the CPAIF, i.e. as agent for LMIM as responsible entity for the CPAIF, not as a trustee of any trust as between PTAL and LMIM as responsible entity for the CPAIF.
- (b) From about April 2008 until about November 2011, the CPAIF Units were held in the register of members of the FMIF maintained by LMIM under Chapter 2C of the Act (“FMIF Unit Register”) in the name “LMIM atf, [as trustee for] LM Currency Protected Aust Income Fund”.
- (c) From then until 28 May 2018 the CPAIF Units were held in the FMIF Unit Register:
 - (i) initially in the name “The Trust Company (PTAL) Limited ATF [As Trustee For] LM Currency Protected Aust Income Fund”, the use of the acronym “ATF” instead of “ACF” (meaning As Custodian For) being a mistake in the FMIF Unit Register;
 - (ii) subsequently in the name “The Trust Company (PTAL) Limited ACF [As Custodian For] LM Currency Protected Australian Income Fund”.
- (d) On about 25 May 2018, Mr Whyte was first notified by PTAL that it had been removed as custodian of the property of the CPAIF with effect from 31 March 2016, and on 28 May 2018 LMIM and PTAL requested that the FMIF Unit Register be changed.

(c) From 28 May 2018, the CPAIF Units have been held in the FMIF Unit Register in the name “LM Investment Management Limited (In Liquidation) as RE for LM Currency Protected Australian Income Fund”.

32. In the alternative, the CPAIF Units:

- (a) were held by LMIM as responsible entity for the CPAIF at all material times until about November 2011;
- (b) were then assigned to PTAL to hold on trust for LMIM as responsible entity for the CPAIF on the terms of the Custody Agreement, at all subsequent material times until 28 May 2018;
- (c) are now held by LMIM as responsible entity for the CPAIF.

33. In the premises and further to paragraphs 31 and 32 above (including in the alternative):

- (a) at all material times LMIM as the responsible entity for the CPAIF was a beneficiary of the FMIF;
- (b) at all material times LMIM as the responsible entity for the CPAIF held a beneficial interest in the property of the FMIF;
- (c) LMIM’s rights in relation to the CPAIF Units are qualified by each of the principles referred to in paragraphs 26 and 27 above.

WFMIF Units

34. At all material times the Class B units in the FMIF held for the WFMIF (“WFMIF Units”) were scheme property of the WFMIF, held by the responsible entity for the WFMIF from time to time.

Particulars

- (a) From about April 2008 until about November 2011, the WFMIF Units were held in FMIF Unit Register in the name “LMIM atf [as trustee for] LM Wholesale Mortgage Income Fund”.
- (b) from then until 7 March 2013, the WFMIF Units were held in the FMIF Unit Register:
 - (i) initially in the name “The Trust Company (PTAL) Limited ATF [As Trustee For] LM Wholesale Mortgage Income Fund”, the use of the acronym “ATF” instead of “ACF” (meaning As Custodian For) being a mistake in the FMIF Unit Register;
 - (ii) subsequently in the name “The Trust Company Limited ATF [As Trustee For] LM Wholesale Mortgage Income Fund”, the use of the acronym “ATF” again being a mistake in the FMIF Unit Register;

- (c) from 7 March 2013 to the date of this pleading, the WFMIF Units have been held in the name "The Trust Company Limited As Custodian For LM Wholesale First Mortgage Income Fund".
- (d) The FMIF Unit Register presently records the WFMIF Units as being held by the business with ABN 59 080 383 679, being that ABN issued to the entity described as "TRILOGY FUNDS MANAGEMENT LIMITED".

35. In the alternative, the WFMIF Units:

- (a) were held by LMIM as responsible entity for the WFMIF at all material times until about November 2011;
- (b) were then assigned to PTAL to hold on trust for the responsible entity for the WFMIF from time to time on the terms of the Custody Agreement, at all material times until at least 16 November 2012;
- (c) were then held by TCL on trust for Trilogy as responsible entity for the WFMIF on the terms of the Trilogy Custody Deed, at all material times from a date on or after 16 November 2012 and on or before 7 March 2013;
- (d) are now held by TCL on trust for Trilogy as responsible entity for the WFMIF on the terms of the Trilogy Custody Deed.

36. In the premises and further to paragraphs 34 and 35 above (including in the alternative):

- (a) at all material times the responsible entity for the WFMIF from time to time was a beneficiary of the FMIF;
- (b) at all material times the responsible entity for the WFMIF from time to time held a beneficial interest in the property of the FMIF;
- (c) Trilogy and TCL's rights in relation to the WFMIF Units are qualified by each of the principles referred to in paragraphs 26 to 28 above.

The ICPAIF Units

37. At all material times the Class B units in the FMIF held for the ICPAIF ("ICPAIF Units") were scheme property of the ICPAIF, held by LMIM as the responsible entity for the ICPAIF.

Particulars

- (a) On about 28 November 2006, PTAL applied for the issue to it of units in the FMIF as custodian for the ICPAIF, i.e. as agent for LMIM as responsible entity for the ICPAIF, not as a trustee of any trust as between PTAL and LMIM as responsible entity for the ICPAIF.
- (b) From about April 2008 until about November 2011, the ICPAIF Units were held in the FMIF Unit Register in the name "LMIM acf [as custodian for] LM

Institutional CPAIF” , the use of the acronym ‘acf’ instead of ‘atf’ (meaning as trustee for) being a mistake in the FMIF Unit Register for that period.

- (c) From then until 28 May 2018, the CPAIF Units were held in the FMIF Unit Register in the name “The Trust Company (PTAL) Limited acf [as custodian for] LM Institutional CPAIF”.
- (d) On about 25 May 2018, Mr Whyte was first notified by PTAL that it had been removed as custodian of the property of the ICPAIF with effect from 31 March 2016, and on 28 May 2018 LMIM and PTAL requested that the FMIF Unit Register be changed.
- (e) From 28 May 2018, the ICPAIF Units have been held in the FMIF Unit Register in the name “LM Investment Management Limited (In Liquidation) as RE for LM Institutional Currency Protected Australian Income Fund”.
- (f) The FMIF Unit Register has at all material times and continues to record the ICPAIF Units as being held by the business with ABN 92 510 262 319, being that ABN issued to the entity described as “The trustee for LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND”.

38. In the alternative, the ICPAIF Units:

- (a) were held by LMIM as responsible entity for the ICPAIF, at all material times until about November 2011;
- (b) were then assigned to PTAL to hold on trust for LMIM as responsible entity for the ICPAIF on the terms of the Custody Agreement, at all subsequent material times until 28 May 2018;
- (c) are now held by LMIM as responsible entity for the ICPAIF.

39. In the premises and further to paragraphs 37 and 38 above (including in the alternative):

- (a) at all material times LMIM as the responsible entity for the ICPAIF was a beneficiary of the FMIF;
- (b) at all material times LMIM as the responsible entity for the ICPAIF held a beneficial interest in the property of the FMIF;
- (c) LMIM’s rights in relation to the ICPAIF Units are qualified by each of the principles referred to in paragraphs 26 and 27 above.

Redemptions

25-40. Pursuant to s.601KA of the Act, the Constitution of the FMIF was entitled to make provision for members to withdraw from the FMIF:

- (a) while the FMIF is liquid, as defined in s.601GA(4) of the Act; or
- (b) while the FMIF is not liquid, but only in accordance with the provisions of Part 5C.6 of the Act.

26.41. Pursuant to s.601KA(3) of the Act, the RE was not permitted to allow a member to withdraw from the FMIF:

- (a) if the FMIF is liquid – otherwise than in accordance with the Constitution; or
- (b) if the FMIF is not liquid – otherwise than in accordance with the Constitution and ss.601KB to 601KE of the Act.

27.42. Pursuant to s.601KA(4) of the Act, the FMIF was liquid if liquid assets account for at least 80% of the value of the property of the FMIF.

Particulars.

- (a) Pursuant to s.601KA(5) of the Act, the following were liquid assets unless it is proved that LMIM as RE of the FMIF cannot reasonably expect to realise them within the period specified in the Constitution for satisfying withdrawal requests while the FMIF is liquid:
 - (i) money in an account or on deposit with a bank;
 - (ii) bank accepted bills;
 - (iii) marketable securities (as defined in section 9);
 - (iv) property of a prescribed kind.
- (b) Pursuant to s.601KA(6) of the Act, any other property was a liquid asset if LMIM as RE of the FMIF reasonably expected that the property can be realised for its market value within the period specified in the Constitution for satisfying withdrawal requests while the FMIF is liquid.

28.43. The Constitution made no provision for members to withdraw from the FMIF while the FMIF was not liquid in accordance with the provisions of Part 5C.6 of the Act.

29.44. The Constitution made provision for members to withdraw from the FMIF while the FMIF was liquid in terms to the following effect:

- (a) by clause 7.1, while the Scheme was liquid as defined in s.601KA(4) of the Act, any Member may request that some or all of their Units be redeemed by giving the RE a Withdrawal Notice by the start of or within the relevant Withdrawal Notice Period (as required by the relevant definition of Withdrawal Notice);
- (b) by clause 7.2(a), the RE must, subject to clause 7.2(b), redeem Units the subject of a request made by any Member under clause 7.1 out of the Scheme Property for the Withdrawal Price (being the Net Fund Value divided by the total number of Units issued) within 365 days or 180 days (as provided therein), or within a shorter period in its absolute discretion (the “**Withdrawal Offer**”);

- (c) by clause 7.2(b), the RE may suspend the Withdrawal Offer as detailed in clause 7.2(a) for such periods as it determines where:
 - (i) the Scheme's cash reserves fall and remain below five per cent for ten consecutive days; or
 - (ii) if in any period of 90 days, the RE receives valid net Withdrawal Notices equal to 10 per cent or more of the Scheme's issued Units and, during the period of 10 consecutive days falling within the 90 day period, the Scheme's cash reserves are less than ten per cent of the total assets; or
 - (iii) it is not satisfied that sufficient cash reserves are available to pay the Withdrawal Price on the appropriate date and to pay all actual and contingent liabilities of the Scheme; or
 - (iv) any other event or circumstance arises which the RE considers in its absolute discretion may be detrimental to the interests of the Members of the Scheme;
- (d) by clause 7.3(b), a Unit is cancelled when the Member holding the Unit is paid the Withdrawal Price by the RE.

30-45 At all material times from 14 April 2009, LMIM as RE of the FMIF was the recipient of relief from ASIC under s.601QA(1) of the Act ("**ASIC Relief**") by which it was:

- (a) exempted from s.601FC(1)(d) of the Act in relation to allowing a member of the FMIF to withdraw in accordance with s.601KEA of the Act as inserted by the ASIC Relief;
- (b) conferred (by s.601KEA thereby inserted) with the power to allow a member to withdraw from the FMIF in accordance with the Constitution if that member was experiencing circumstances of hardship as defined by the ASIC Relief, which included the power to allow LMIM to withdraw in accordance with the Constitution insofar as a member of one of the Feeder Funds was experiencing circumstances of hardship as so defined, subject to the limits defined by the ASIC Relief;
- (c) exempted (by s.601KA(3AA) thereby inserted) from s.601KA(3) of the Act to the extent of the power thereby conferred.

Particulars

The ASIC Relief was granted by the following instruments:

- (i) ASIC Instrument 09-00278 dated 14 April 2009; and
- (ii) ASIC Instrument 09-00963 dated 11 November 2009.

31-46 From time to time after 14 April 2009, LMIM as RE of the FMIF permitted certain redemptions in accordance with the ASIC Relief (hereinafter referred to as "**Genuine Hardship Redemptions**").

~~42-47~~ On or about 11 May 2009, LMIM as RE of the FMIF suspended the Withdrawal Offer under clause 7.2(b) of the Constitution, purportedly with the exception of:

- (a) those approved under the ASIC Relief; and
- (b) those requested by ~~itself as a Class B unitholders~~ for distributions to investors in the Feeder Funds or for the expenses of the Feeder Funds, as the cash flow of the FMIF allowed.

Particulars

- (i) LMIM stated in its Second Supplementary Product Disclosure Statement dated 3 March 2009 that "... payment of investor withdrawals is likely to take 365 days. The Manager may also suspend withdrawals for such periods as it determines".
- (ii) LMIM stated in its Third Supplementary Product Disclosure Statement dated 30 October 2009 that "In order to protect all investments, the Manager has, as it determines, suspended withdrawals, with the exception of those approved under hardship provisions and feeder fund payments for investor distributions and fund expenses, as the cash flow allows".

~~32-48~~ In the premises, the exception to the suspension of the Withdrawal Offer referred to in paragraph ~~47(b)~~~~32(b)~~ above was not authorised by the Constitution, the Act or the ASIC Relief.

~~34-49~~ At no time after 11 May 2009, did LMIM as RE of the FMIF:

- (a) lift the suspension referred to in paragraph ~~47~~~~32~~ above; or
- (b) re-instate the Withdrawal Offer.

~~35-50~~ Despite the suspension of the Withdrawal Offer, between 11 May 2009 and 31 January 2013:

- (a) LMIM made or caused to be made requests to redeem CPAIF Units, WFMIF Units and ICPAIF Units~~as a Class B unitholder made requests to redeem Class B units~~, which were not Genuine Hardship Redemptions;
- (b) LMIM as RE of the FMIF granted such requests, and in satisfaction of each thereof:
 - (i) caused to be paid amounts from the assets of the FMIF at the direction of LMIM as responsible entity for the Feeder Fund for which the unit the subject of the request was held; or

- (ii) recognised or reconciled a prior payment of an amount or prior payments of amounts from the assets of the FMIF which it had previously caused to be paid for the benefit of that a-Feeder Fund at the direction of LMIM as its responsible entity;

Particulars of (i) and (ii)

- (1) the amounts paid, ~~or~~ recognised or reconciled by LMIM in respect of the redemptions of the Class B units equalled the value of the units the subject of that request, calculated as the Net Fund Value divided by the total number of units issued in the FMIF at that time, multiplied by the number of units the subject of the request;
- ~~(2)~~ the amounts were paid to various entities at the direction of LMIM as a Class B unit holder;
- ~~(3)~~ (2) LMIM as RE of the FMIF satisfied requests in respect of 45,240,212.36 units held for by LMIM as RE of the CPAIF for an aggregate value of \$42,510,704.06, of which all but \$24,830.41 was satisfied before 16 November 2012;
- ~~(4)~~ (3) LMIM as RE of the FMIF satisfied requests in respect of 11,271,272.09 units held for by LMIM as RE of the WFMIF for an aggregate value of \$9,796,090.76, the latest of which was satisfied on 15 November 2012;
- ~~(5)~~ (4) LMIM as RE of the FMIF satisfied requests in respect of 5,335,882.97 units held for by LMIM as RE of the ICPAIF for an aggregate value of \$5,069,118.30, the latest of which was satisfied on 13 November 2012;
- ~~(6)~~ (5) The amounts referred to in sub-paragraphs (2) to (4)(5) hereof include amounts which were reported by LMIM to ASIC as Genuine Hardship Redemptions in respect of the CPAIF of \$1,927,595, in respect of the WFMIF of \$364,000 and in respect of the ICPAIF of \$25,000;
- ~~(7)~~ (6) The amount referred to in sub-paragraphs (2)(3) hereof includes amounts which had previously been paid by LMIM as trustee of the MPF at its direction as RE of the CPAIF, which had been accounted for as being in satisfaction of liabilities owed by the MPF to the FMIF and as creating a receivable owed by the CPAIF to the FMIF, and which were then recognised or reconciled by and were recognised as being in satisfaction of redemption withdrawals requests in an aggregate amount of approximately \$12,191,153.59 across the financial years ended 30 June 2010 and 30 June 2011;
- ~~(8)~~ (7) The amount referred to in sub-paragraphs (3)(4) hereof includes amounts which had previously been paid by LMIM as trustee of the

MPF at its direction as RE of the WFMIF, which had been accounted for as being in satisfaction of liabilities owed by the MPF to the FMIF and as creating a receivable owed by the WFMIF to the FMIF, and which were then recognised or reconciled by and were recognised as being in satisfaction of redemption withdrawals requests in an aggregate amount of \$67,295.91 across the financial year ended 30 June 2011;

~~(9)(8)~~ The amount referred to in sub-paragraphs (4)(5) hereof includes amounts which had previously been paid by LMIM as trustee of the MPF at its direction as RE of the ICPAIF, which had been accounted for as being in satisfaction of liabilities owed by the MPF to the FMIF and as creating a receivable owed by the ICPAIF to the FMIF, and which were then recognised or reconciled by and were recognised as being in satisfaction of redemption withdrawals requests in an aggregate amount of \$677,439.07 across the financial year ended 30 June 2011.

- (c) in relation to each request, LMIM as RE of the the Feeder Funds for which the unit the subject of the request was held and a holder of Class B units accepted the payment, or recognition or reconciliation tendered as pleaded in sub-paragraph (b) above.
- (d) LMIM then purported to cancel CPAIF Units, WFMIF Units and ICPAIF Units, Class B units to the extent of each such request.

Breach in relation to Redemptions

~~36.51~~ As at 11 May 2009 and thereafter until it was wound up, around 94% or more of the value of the property of the FMIF comprised its loans and receivables.

Particulars

- (a) The audited accounts for the year ending 30 June 2008, record that at least around 96% of the value of the property of the FMIF comprised its loans and receivables.
- (b) The audited accounts for the year ending 30 June 2009, record that at least around 96% of the value of the property of the FMIF comprised its loans and receivables.
- (c) The audited accounts for the year ending 30 June 2010, record that at least around 98% of the value of the property of the FMIF comprised its loans and receivables.
- (d) The audited accounts for the year ending 30 June 2011, record that at least around 94% of the value of the property of the FMIF comprised its loans and receivables.
- (e) The audited accounts for the year ending 30 June 2012, record that at least around 97% of the value of the property of the FMIF comprised its loans and receivables.

~~37.52~~ As at 11 May 2009 and at all material times thereafter, LMIM as RE of the FMIF did not have any reasonable basis on which to expect that the loans and receivables of the FMIF could be realised for their market value within 365 days.

~~38.53~~ In the premises of paragraphs ~~5136~~ and ~~5237~~ above, on and from at least 11 May 2009 the FMIF was not liquid within the meaning of s.601KA(4) of the Act.

~~39.54~~ In the premises, by approving the withdrawal requests and making or causing to be made the payments referred to in paragraph ~~5035~~ above while the FMIF was not liquid and while the Withdrawal Offer was suspended, LMIM:

- (a) acted outside the scope of any power conferred on it by the Constitution or the Act, or otherwise by law;
- (b) made payments out of the property of the FMIF which were not authorised by the Constitution or the Act, in that:
 - (i) it approved withdrawal requests from itself of Class B units which were not Genuine Hardship Redemptions, while the FMIF was not liquid;
 - (ii) in the alternative, if the FMIF was liquid at the time any such request was approved, it approved that request without authority to do so under the Constitution;
- (c) gave priority to its own interests as a holder of Class B units in the FMIF over the interests of the members of the FMIF as a whole;
- (d) preferred the interests of the members of the Feeder Funds over the interests of the members of the FMIF;
- (e) failed to treat members who hold interests of different classes, namely Class A and Class B units, fairly; and
- (f) failed to act in the best interests of the members of the FMIF as a whole.

~~40.55~~ In the premises, LMIM as RE of the FMIF breached the terms of its trust, and the obligations set out in paragraphs ~~2345~~ and ~~4126~~ above.

~~41.56~~ In the premises, the FMIF suffered loss or damage by reason of LMIM's breaches and contraventions referred to in paragraph ~~5540~~ above.

Particulars

The FMIF suffered loss or damage in the following amounts:

- (a) \$40,583,109.06 referable to redemptions of Class B units held as RE of the CPAIF, plus interest;
- (b) \$9,432,090.76 referable to redemptions of Class B units held as RE of the WFMIF, plus interest;
- (c) \$5,044,118.30 referable to redemptions of Class B units held as RE of the ICPAIF, plus interest.

~~43-57.~~ In the premises, LMIM is liable to compensate the FMIF to the extent of the loss or damage referred to in paragraph ~~5641~~ above.

Particulars

- (a) LMIM is liable as pleaded both in equity, and pursuant to section 1317H of the Act.

~~43-58.~~ In the premises, LMIM's rights in relation to the CPAIF Units as a Class B unitholder ~~in the FMIF~~ are subject to the principles referred to in paragraphs ~~2618(a) to (d)~~ and 27 above to the extent of ~~its~~ LMIM's liabilities referred to in paragraphs ~~5641~~ and ~~5742~~ above, alternatively so far as they concern the CPAIF ~~and the ICPAIF~~.

~~44-59.~~ In the premises, ~~as at and from 16 November 2012 when Trilogy became the RE of the WFMIF, Trilogy's and, further and in the alternative, TCL's rights in relation to the WFMIF Units as a Class B unitholder in the FMIF were and remain are~~ subject to the principles referred to in paragraphs ~~2618~~ to ~~2820~~ above to the extent of the liabilities referred to in paragraphs ~~5641~~ and ~~5742~~ above (except for the \$24,830.41 referred to in paragraph 50(b)(ii)(2) above), alternatively so far as they concern the WFMIF.

60. In the premises, LMIM's rights in relation to the ICAPIF Units are subject to the principles referred to in paragraphs 26 and 27 above to the extent of LMIM's liabilities referred to in paragraphs 56 and 57 above, alternatively so far as they concern the ICPAIF.

~~45-61.~~ In the premises, each cancellation of Class B units referred to in paragraph ~~50(d)35(d)~~ of this Statement of Claim is void *ab initio* and of no effect, or alternatively voidable.

Indemnity against the assets of the Feeder Funds

~~46-62.~~ The Constitution of each Feeder Fund conferred on LMIM as RE thereof a right to be indemnified from the assets of that fund on a full indemnity basis, in respect of a matter unless, in respect of that matter, it had acted negligently, fraudulently or in breach of trust, in that capacity.

Particulars

- (a) Clause 18.3 of the Constitution of the CPAIF, clause 19.1(c) of the Constitution of the WFMIF, and clause 18.3 of the Constitution of the ICPAIF.

~~47-63.~~ In acting as pleaded in paragraph ~~5035~~ above, and in respect of each request for withdrawal of Class B units from the FMIF, LMIM:

- (a) was acting both as the RE of the FMIF and as the RE of a Feeder Fund;
(b) ~~conferred a financial benefit on the Feeder Fund in question;~~
(c) ~~(b)~~ acted in the proper performance of its duties to the Feeder Fund in question;

~~(e)(c)~~ became entitled to an indemnity out of the assets of the Feeder Fund in question in respect of its liability for the loss to the FMIF pleaded in paragraphs 5641 and 5742 above, insofar as that loss relates to each such request; and

~~(e)(d)~~ became entitled to a lien or charge over the assets of the Feeder Fund in question to secure and to the extent of that indemnity.

~~48.~~ Further and in relation to the loss and damage pleaded in paragraphs 41 and 42 above, LMIM as RE of the FMIF is entitled to exercise or be subrogated to LMIM's right to the indemnity referred to in paragraph 47(d) above, or to enforce the lien or charge referred to in paragraph 47(e) above.

~~49-64.~~ In the premises and further to paragraphs 5843 and 44 above, LMIM's rights in relation to the CPAIF Units as a Class B unitholder in the FMIF are subject to the principles referred to in paragraphs 2618(a) and (c) and thereby in paragraph 27 above to the extent of its LMIM's rights as RE of the FMIF as set out in paragraphs 63(c) and 63(d) 48 above, alternatively so far as they concern the CPAIF and the ICPAIF.

~~50-65.~~ In the premises and further to paragraph 59 above, as at and from 16 November 2012 when Trilogy became the RE of the WFMIF, Trilogy's and, further and in the alternative, TCL's rights in relation to the WFMIF Units as a Class B unitholder in the FMIF were and remain are subject to the principles referred to in paragraphs 2618(a) and (c) and thereby in paragraphs 27 to and 2820 above to the extent of the liabilities referred to in paragraphs 5641 and 5742 above so far as they concern the WFMIF.

66. In the premises and further to paragraph 60 above, LMIM's rights in relation to the ICPAIF Units are subject to the principles referred to in paragraphs 26(a) and (c) and thereby in paragraph 27 above to the extent of LMIM's rights as set out in paragraphs 63(c) and 63(d) above so far as they concern the ICPAIF.

Income Distributions

~~51-67.~~ The Constitution made provision for making income distributions to members of the FMIF, to the following effect:

- (a) by clause 11.1, the Income of the Scheme for each Financial Year will be determined in accordance with the applicable Accounting Standards;
- (b) by clause 11.2, for each Financial Year:
 - (i) (sub-paragraph a) the expenses of the Scheme will be determined in accordance with the applicable Accounting Standards; and
 - (ii) (sub-paragraph b) provisions or other transfers to or from reserves may be made in relation to such items as the RE considers appropriate in accordance with applicable Accounting Standards including, but not limited to, provisions for income equalisation and capital losses.

- (c) by clause 11.3, the Distributable Income of the Scheme for a month, a Financial Year or any other period will be such amount as the RE determines. Distributable Income is paid to Members after taking into account any Adviser fees or costs associated with individual Members' investments, to the extent those fees or costs have not otherwise been taken into account;
- (d) upon the true construction of clauses 11.1, 11.2 and 11.3, the Distributable Income could be no greater than the Fund's income less its expenses determined in accordance with the Australian Accounting Standards;
- (e) by clause 12.1, the Distribution Period is one calendar month for Australian dollar investments or as otherwise determined by the RE in its absolute discretion;
- (f) by clause 12.2, the RE must distribute the Distributable Income relating to each Distribution Period within 21 days of the end of each Distribution Period;
- (g) by clause 12.3, unless otherwise agreed by the RE and subject to the rights, restrictions and obligations attaching to any particular Unit or Class, the Members on the Register will be presently entitled to the Distributable Income of the Scheme on the last day of each Distribution Period;
- (h) by clause 12.4, the RE may distribute the capital of the Scheme to the Members. Subject to the rights, obligations and restrictions attaching to any particular Unit or Class, a Member is entitled to that proportion of the capital to be distributed as is equal to the number of Units held by that Member on a date determined by the RE divided by the number of Units on the Register on that date. A distribution may be in cash or by way of bonus Units;
- (i) by clause 12.6:
 - (i) (sub-paragraph a) the RE may invite Members to reinvest any or all of their distributable income entitlement by way of application for additional Units in the Scheme;
 - (ii) (sub-paragraph b) The terms of any such offer of reinvestment will be determined by the RE in its discretion and may be withdrawn or varied by the RE at any time;
 - (iii) (sub-paragraph c) The RE may determine that unless the Member specifically directs otherwise they will be deemed to have accepted the reinvestment offer;
 - (iv) (sub-paragraph d) The Units issued as a result of an offer to reinvest will be deemed to have been issued on the first day of the next Distribution Period immediately following the Distribution Period in respect of which the distributable income being reinvested was payable;
- (j) by clause 3.2, the RE may distribute the Distributable Income for any period between different Classes on a basis other than proportionately, provided that the RE treats the different Classes fairly.

~~52-68.~~ Upon the true construction of the clauses 11.3 and 12.2 of the Constitution, the power to distribute income of the FMIF was conditional on LMIM making a determination of the Distributable Income for the relevant Distribution Period.

~~53-69.~~ Upon the true construction of the power conferred by clause 11.3 of the Constitution, the RE in exercising its power to determine the Distributable Income of the FMIF for a Distribution Period was:

- (a) required to act in good faith and for a proper purpose;
- (b) required to consider and take into account:
 - (i) the income of the FMIF, determined in accordance with applicable Accounting Standards, pursuant to clause 11.1 of the Constitution; and
 - (ii) the expenses of the FMIF, determined in accordance with applicable Accounting Standards, pursuant to clause 11.2 of the Constitution; and
- (c) not empowered to determine that there was any Distributable Income for a Distribution Period where the said expenses exceeded the said income for that Distribution Period.

~~54-70.~~ LMIM as RE of the FMIF: ~~Between 31 July 2011 and 1 November 2012;~~

- (a) ~~LMIM as RE of the FMIF from time to time recognised further income distributions to the Class B unitholders for the CPAIF Units, the WFMIF Units and the ICPAIF Units on the last calendar day of each Distribution Period from 1 July 2011 to 31 October 2012;~~

Particulars

These distributions were recorded in the ledgers maintained by LMIM as RE of the FMIF ~~in respect of~~ in relation to the each of the Feeder Funds, as follows:

- (i) ~~it was recorded that PTAL as trustee for the CPAIF received income distributions~~ were recorded as having been made in relation to the CPAIF Units for each pleaded Distribution Period, and in the aggregate amount of \$12,231,875.90;
 - (ii) ~~it was recorded that PTAL as trustee for the WFMIF received income distributions~~ were recorded as having been made in relation to the WFMIF Units for each pleaded Distribution Period, and in the aggregate amount of \$6,219,464.37, the latest of which was recorded as at 31 October 2012; and
 - (iii) ~~it was recorded that PTAL as trustee for the ICPAIF received income distributions~~ were recorded as having been made in relation to the ICPAIF Units for each pleaded Distribution Period, and in the aggregate amount of \$1,131,173.50;
- (b) LMIM as RE of the FMIF recognised a re-investment of each of the income distributions referred to in sub-paragraph (a) in further units in the FMIF on the first day of the next Distribution Period in the ledger which it maintained in

respect of in relation to the relevant Feeder Fund, and in the FMIF Unit Register register of the members of the FMIF;

Particulars

- (i) ~~LMIM as RE of~~ The CPAIF increased its investment in the FMIF by an aggregate of 16,036,932.56 units therein.
 - (ii) ~~LMIM as RE (as it then was) of~~ The WFMIF increased its investment in the FMIF by aggregate of 8,190,010.02 units therein, the latest of which were issued on 1 November 2012.
 - (iii) ~~LMIM as RE of~~ The ICPAIF increased its investment in the FMIF by aggregate of 1,484,259.16 units therein.
- (c) ~~LMIM as RE of the FMIF~~ did not recognise any further distributable income payable to Class A unitholders.

Breach in relation to Distributions

~~55.71~~ From and including the financial year ended 30 June 2009 a significant number of the loans made on behalf of the FMIF were in default for non-payment or were otherwise impaired.

~~56.72~~ As a consequence including of the matters pleaded in paragraph ~~7155~~, at all material times between 1 January 2011 and 1 November 2012 the expenses of the FMIF exceeded the income of the FMIF, determined in accordance with the applicable accounting standards.

Particulars

- (a) The financial statements of the FMIF for the year ended 30 June 2011 recorded a net loss before distributions to unitholders of \$77,418,896.
- (b) The financial statements of the FMIF for the year ended 30 June 2012 recorded a net loss before distributions to unitholders of \$88,615,577.
- (c) The unaudited draft management accounts of the Fund for the half year ended 31 December 2012 recorded a net loss before distributions to unitholders of \$19,117,976.

~~57.73~~ Further:

- (a) LMIM suspended income distributions from the FMIF as from 1 January 2011;

- (b) by doing so, LMIM made a determination or determinations that the FMIF had no Distributable Income for the period 1 January 2011 to December 2011.

Particulars to sub-paragraphs (a) and (b)

This may be inferred from following facts:

- (i) the notes to the financial statements of the FMIF for the year ended 30 June 2012 which state that "Distributions have been suspended from 1 January 2011".
- (ii) The directors of LMIM stated in an update to investors dated 24 August 2011 that "The Fund will not be declaring or paying interest distributions for the period 1 January 2011 until 31 December 2011, at which time the distribution strategy will be reviewed dependent on performance of the Fund's assets."
- (iii) The directors of LMIM, in a letter to investors dated 14 September 2011, stated that "The Fund is declaring zero income from January 2011 to December 2011, in order to focus on unit price."

~~58.74.~~ Between 1 January 2011 and 1 November 2012, LMIM did not make any determination that the FMIF had any Distributable Income.

~~59.75.~~ In the premises, and as to each Distribution Period between 1 July 2011 and 28 February 2013, LMIM had no power under the Constitution or the Act, or otherwise at law:

- (a) to distribute any income of the FMIF to any unitholder of the FMIF; or
- (b) further and in the alternative, to make any determination that the FMIF had any Distributable Income.

~~60.76.~~ Further, the purpose of LMIM in recognising each of the distributions to and re-investments by Class B (but not Class A) unitholders referred to in paragraphs 70(a) and 70(b)~~54(b)~~ above was to increase the value of units in each of the Feeder Funds so that they remained the same as the value of units in the FMIF.

Particulars

This may be inferred from the following facts:

- (a) The statement in the notes to the financial statements of the FMIF for the year ended 30 June 2012 that "These distributions were declared to enable the feeder funds to recognise distribution income to match expenses incurred".
- (b) On 20 August 2012, Mr Grant Fischer, Executive Director and Chief Financial Officer of LMIM agreed in an email to Eryn Vannucci, Financial Controller of LMIM, that "we planning on running a Feeder Fund distribution from FMIF to the Feeder Funds for the period Jan to Jun 2012 to align their unit prices once the impairment figures are finalized like we did at December 11".

~~61-77.~~ The effect of LMIM recognising each of the distributions to and re-investments by Class B (but not Class A) unitholders referred to in paragraphs 70(a) and 70(b)~~54(b)~~ above was to increase the beneficial interest in the FMIF of one class of unitholders over another.

~~62-78.~~ The purpose set out in paragraph 7660 above was not a proper purpose to make a determination to:

- (a) recognise distributions to and re-investments by Class B and not Class A unitholders;
- (b) increase the beneficial interest of one class of unitholders over another.

~~63-79.~~ In the premises, LMIM:

- (a) acted outside the scope of any power conferred on it by the Constitution or the Act, or otherwise by law;
- (b) in the alternative to sub-paragraph (a), exercised the powers conferred by clauses 3.2, 11.3 and 12.6 of the Constitution for an improper or foreign purpose.

~~64-80.~~ Further, in the premises of the matters set out in paragraphs 2924 and 30 to 23 above, the recognition of the distributions to and re-investments in the FMIF for the CPAIF Units, the WFMIF Units and the ICPAIF Units and not for the Class A Units ~~by Class B and not Class A unitholders~~ referred to in paragraph 7054 above for the purpose set out in paragraph 7660 above and having the effect set out in paragraph 7764 above, was not fair to the Class A unitholders.

~~65-81.~~ Further and in the premises of the same matters referred to in paragraph 80 above, ~~In the premises of paragraphs 4, 21 to 23, 55 to 62 and 64 above, by recognising each of the distributions to and re-investments by Class B and not Class A unitholders in the circumstances set out in, LMIM as RE of the FMIF:~~

- (a) gave priority to its own interests as a holder of Class B units in the FMIF (as pleaded in paragraphs 29 to 39 above) over the interests of the members of the FMIF as a whole;
- (b) preferred the interests of the members of the Feeder Funds over the interests of the members of the FMIF;
- (c) failed to treat members who hold interests of different classes, namely Class A and Class B units, fairly.

~~66-82.~~ In the premises, LMIM as RE of the FMIF, in exercising a power to recognise each of the distributions ~~to and re-investments by Class B unitholders~~ referred to in paragraph 7054 above, breached the terms of its trust and the obligations set out in paragraph 2345 above.

~~67.83~~ In the premises, each issue of further units referred to in paragraph ~~70(b)54(b)~~ above is void and of no effect, or alternatively voidable.

The capital distributions

~~68.84~~ In around February and March 2013, LMIM as RE of the FMIF declared and paid a distribution of the capital of the FMIF to the ~~M~~members of the FMIF (**First Capital Distribution**).

Particulars

The following cash amounts were paid to the members of the FMIF:

- (a) on about 26 February 2013, \$2,062,739.66 in relation to the CPAIF Unitsto LMIM as RE of the CPAIF;
- (b) on about 8 March 2013, \$1,700,317.84 in relation to the WFMIF Unitsto Trilogy as RE of the WFMIF;
- (c) on about 26 February 2013, approximately \$159,799.91 in relation to the ICPAIF Unitsto LMIM as RE of the ICPAIF; and
- (d) \$4,466,923.68 to Class A and Class C unit holders.

~~69.85~~ In around June 2013, LMIM as RE of the FMIF declared a distribution of the capital of the FMIF to the members of the FMIF (**Second Capital Distribution**).

Particulars

The following cash amounts were paid to the members of the FMIF:

- (a) \$958,156.73 in relation to the CPAIF Unitsto LMIM as RE of the CPAIF;
- (b) \$789,645.73 in relation to the WFMIF Unitsto Trilogy as RE of the WFMIF;
- (c) \$74,228.16 in relation to the ICPAIF Unitsto LMIM as RE of the ICPAIF;
- (d) \$2,079,798.69 to Class A and Class C unit holders.

~~70.86~~ Further, ~~a~~At the time of the First and Second Capital Distributions, each of LMIM as RE of the ICPAIF, LMIM as RE of the CPAIF and Trilogy as RE of the WFMIF each of the CPAIF Units, the WFMIF Units and the ICPAIF Units:

- (a) were held their units in the FMIF-subject to the principles referred to in paragraphs 2618 to 2820 above, to the extent of LMIM's liability to the FMIF for loss and damage, as pleaded in paragraphs 5641 to 6044 above;
- (b) their respective holders were therefore not entitled to be paid either the First or the Second Capital Distribution in cash; and
- (c) LMIM as RE of the FMIF was entitled instead to account for the amounts to be paid in relation to those units in accordance with the principles referred to in paragraphs 26 to 28 above. were instead entitled to recognition of an amount in partial satisfaction of the said liability.

71. In the premises, LMIM's rights as a Class B unitholder in the FMIF are further subject to the principle referred to in paragraph 18(d) above, to the extent of the overpayment or wrong payments referred to in paragraphs 68, 69 and 70 above so far as they concern the ICPAIF and CPAIF.

72. In the premises, Trilogy's rights as a Class B unitholder in the FMIF are further subject to the principle referred to in paragraphs 18(a) and (d) above, to the extent of the overpayment or wrong payments referred to in paragraphs 68, 69 and 70 above so far as they concern the WFMIF.

73.87 Further and in the premises of paragraphs 4561 and 8367 above:

- (a) at the time of the First and Second Capital Distributions, respectively, the number of CPAIF Units, WFMIF Units and ICPAIF Units units held by each of LMIM as RE of the ICPAIF, LMIM as RE of the CPAIF and Trilogy as RE of the WFMIF was different to the numbers thereof recorded in the FMIF Unit Register unit register of the FMIF; at the time of the First and Second Capital Distributions;
- (b) accordingly, LMIM as RE of the FMIF's the entitlement of LMIM and Trilogy in such capacities in relation to the First and Second Capital Distributions, referred to in paragraph 86(c)70(e) above, was to different amounts than the amounts in fact paid as pleaded in paragraphs 84 and 85 above to them;
- (c) if this Honourable Court declares each cancellation of Class B units referred to in paragraph 50(d)35(d) above void, then the said entitlement will be for a greater amount than the amount in fact paid, which amount will depend on whether or not this Court declares each issue of further units referred to in paragraph 70(b)54(b) above to be void;
- (d) alternatively, if this Honourable Court does not declare each cancellation of Class B units referred to in paragraph 50(d)35(d) above void, but declares that each issue of further units referred to in paragraph 70(b)54(b) above to be void, then the said entitlement will be for a lesser amount than the amount in fact paid.

Particulars

- (i) Further particulars will be provided.

The plaintiff claims the following relief:

1. A declaration that the Plaintiff is entitled to withhold from distributions or payments otherwise payable in relation to the Class B units in the LMIM as a Class B unitholder in the LM First Mortgage Income Fund ARSN 089 343 288 (formerly the LM Mortgage Income Fund) (FMIF) held for the LM Currency Protected Australian Income Fund ARSN 110 247 875 ("CPAIF", "CPAIF Units") and for the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 ("ICPAIF", "ICPAIF Units"):
 - (a) the sum of \$55,059,318.12 plus interest, being the aggregate amount of the loss and damage referred to in paragraph 5644 of the Statement of Claim; and
 - (b) as adjusted for the difference between the sum paid in the First and Second Capital Distributions (as defined in paragraphs 8468 and 8569 of the Statement of Claim), and the amount which LMIM as RE of the CPAIF and ICPAIF would otherwise have been entitled as referred to in paragraph 8773 of the Statement of Claim.
2. A declaration that the Plaintiff is entitled to withhold from distributions or payments otherwise payable in relation to the Class B units in the FMIF held for the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 ("WFMIF", "WFMIF Units"): to the Second Defendant as a Class B unitholder in the FMIF:
 - (a) the sum of \$55,034,487.71, being the aggregate amount of the loss and damage set out in paragraph 5644 of the Statement of Claim accruing before 16 November 2012, plus interest; and
 - (b) as adjusted for the difference between the sum paid in the First and Second Capital Distributions, and the amount which the Second Defendant would otherwise have been entitled as referred to in paragraph 8773 of the Statement of Claim.
3. In the alternative to paragraphs 1 and 2, declarations that the Plaintiff:
 - (a) is entitled to withhold from distributions or payments otherwise payable in relation to the CPAIF Units: to the First Defendant as a Class B unitholder in FMIF:
 - (i) the sum of \$40,583,109.06, plus interest;
 - (ii) as adjusted for the difference between the sum paid in the First and Second Capital Distributions in relation to the CPAIF Units, and the amount which the First Defendant would otherwise have been entitled as referred to in paragraph 8773 of the Statement of Claim in relation thereto;

- (b) is entitled to withhold from distributions or payments in relation to the WFMIF Units otherwise payable to the ~~Second Defendant as a Class B unit~~holder in the FMIF:
 - (i) the sum of \$9,432,090.76, plus interest;
 - (ii) as adjusted for the difference between the sum paid in the First and Second Capital Distributions in relation to the WFMIF Units, and the amount which the ~~Second Defendant would otherwise have been entitled as referred to in paragraph 8773~~ of the Statement of Claim in relation thereto; and
- (c) is entitled to withhold from distributions or payments otherwise payable to in relation to the ICPAIF Units the ~~Third Defendant as a Class B unit~~holder in the FMIF:
 - (i) the sum of \$5,044,118.30, plus interest;
 - (ii) as adjusted for the difference between the sum paid in the First and Second Capital Distributions in relation to the ICPAIF Units, and the amount which the ~~Third Defendant would otherwise have been entitled as referred to in paragraph 8773~~ of the Statement of Claim in relation thereto.

4. Further and in the alternative, declarations that:

- (a) LMIM is liable to the FMIF for loss and damage in the amount of \$55,059,318.12 plus interest, being the aggregate amount of the loss and damage referred to in paragraph ~~5644~~ of the Statement of Claim; and
- (b) ~~the Plaintiff~~LMIM is entitled to exercise its or be subrogated to LMIM's rights to an indemnity from the assets of the respective Feeder Funds in satisfaction of that liability, in the following proportions:
 - (i) from the assets of the CPAIF, \$40,583,109.06 plus interest;
 - (ii) from the assets of the WFMIF, \$9,432,090.76 plus interest; and
 - (iii) from the assets of the ICPAIF, \$5,044,118.30 plus interest.

5. A declaration that each cancellation of Class B units referred to in paragraph ~~50(d)35(d)~~ of this Statement of Claim is void ab initio and of no effect, or alternatively voidable.

6. A declaration that the purported issue of each additional unit in the FMIF referred to in paragraph ~~70(b)54(b)~~ of the Statement of Claim is void and of no effect, or alternatively voidable.

7. Further to paragraphs 5 and 6, consequential orders under section 175(1) of the Corporations Act 2001 (Cth), or alternatively in the Court's equitable jurisdiction, for the correction or rectification of the register of members of the FMIF, as now maintained by Mr David Whyte pursuant to order 13(c) of the orders of this Honourable Court made on 17 December 2015.

~~7.8.~~ In the alternative to paragraph 6, a declaration that the additional units in the FMIF referred to in paragraph ~~70(b)54(b)~~ of the Statement of Claim are held on constructive trust for LMIM as RE of the FMIF.

~~8.9.~~ Interest.

~~9.10.~~ Costs.

~~10.11.~~ Such further or other order as this Honourable Court sees fit.

Signed: 

Description: Solicitor for the plaintiff

The further amendments to this pleading were settled by Mr Ananian-Cooper of Counsel in consultation with Mr McKenna of Queen's Counsel.

NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.