SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

IN THE MATTER OF **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS APPOINTED)**
ACN 077 208 461

First Applicant: **JOHN RICHARD PARK AS LIQUIDATOR OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

AND

Second Applicant: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGER APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

AND

Respondent: **DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001**

CERTIFICATE OF EXHIBIT

VOLUME 1 OF 3

Exhibit "**DW-126**" (pages 1 – 205) to the Affidavit of **DAVID WHYTE** sworn this 3rd day of December2018

Deponent

Solicitor/A Justice of the Peace

Alexander Philip Nase
Solicitor

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the Respondent
Mr David Whyte

TUCKER & COWEN
Solicitors
Level 15, 15 Adelaide Street
Brisbane, Qld, 4000
Tel: (07) 300 300 00
Fax: (07) 300 300 33

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"DW-126"

BDO AUSTRALIA

DAVID WHYTE

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+61 7 3237 5887
david.whyte@bdo.com.au
vCard

David is a Business Restructuring Partner with BDO in Brisbane.

David is a business turnaround and insolvency expert, with experience across a broad range of assignments, both locally and nationally. He has acted as a receiver and manager, administrator and liquidator, including court appointments. With a background in workouts and restructuring for a major bank in the United Kingdom, David has successfully steered distressed businesses back into the black through careful management and advice, particularly in negotiating terms. He has undertaken investigating accountant's reviews for major financiers and provides strategic financial advice.

David Joined BDO, as Partner, in 2008. Prior to this, he worked with a specialist corporate turnaround and insolvency firm and, previously, in the United Kingdom with a major bank. His roles included relationship, credit and corporate recovery.

Services

- Insolvency, receivership & administration
- Accounting and advice to businesses in financial difficulty
- Business turnaround

- Business reconstruction
- Investigating Accountant reviews

Sectors

- Food & agribusiness
- Property & construction
- Manufacturing
- Automotive
- Franchising
- Financial services

Key assignments

- Equititrust Income Fund & LM First Mortgage Income Fund (Regulated Managed Investment Schemes)
- GRS Contracting
- Independent Forklift Services Group
- Dreamy Donuts Group
- Asia Australia Developments Group
- Queensland Mushrooms Group
- Vertically integrated Chicken Group
- Specialised Trading House
- Numerous Property Receiverships across Australia
- Miandetta Farms
- Battery World Australia
- Major bank outsourcing project – managing problem loans
- Major Furniture Manufacturer & Dairy Company

Qualifications

- Insolvency Education Program
- Registered and Official Liquidator
- MCIBS (UK banking qualification)

Affiliations

- Associate, Australian Restructuring Insolvency & Turnaround Association (ARITA).
- Affiliate, Chartered Accountants Australia & New Zealand
- Member, ASIC Liaison Committee
- Member, Chartered Institute of Bankers in Scotland

BDO AUSTRALIA

LM INVESTMENT MANAGEMENT LIMITED

ABN 68 077 208 461

Australian Financial Services Licensee 220281

AND

THE MEMBERS AS THEY ARE CONSTITUTED

FROM TIME TO TIME OF THE

LM FIRST MORTGAGE INCOME FUND

ARSN 089 343 288

REPLACEMENT CONSTITUTION

DEED made this 10 day of April 2008

BETWEEN: LM INVESTMENT MANAGEMENT LIMITED ACN 077 208 461 a company duly incorporated in Queensland having its registered office at Level 4, RSL Centre, 9 Beach Road, Surfers Paradise in the State of Queensland (the Responsible Entity hereinafter referred to as the "RE")

AND: All those persons who from time to time apply for Units and are accepted as Unitholders of the Scheme ("the Members")

WHEREAS:

A. The RE holds a responsible entity's licence from the ASIC.

B. The RE established a pooled mortgage unit trust called the LM Mortgage Income Fund on 28 September 1999. From 31 May 2007 the LM Mortgage Income Fund will be known as the LM First Mortgage Income Fund.

C. By applying to invest in this Scheme through a PDS a person will become a Member and be bound by this Constitution.

D. Clause 26.1(b) and section 601GC(1)(b) of the Law allow the RE to modify or repeal and replace the Constitution where the RE reasonably considers the change will not adversely affect Members' rights. The RE is satisfied the amendments contemplated by this replacement Constitution will not adversely affect Members' rights.

E. Accordingly with effect from the date of this deed poll, the existing constitution of the Scheme is repealed and replaced with this Constitution.

F. This Constitution is made with the intent that the benefits and obligations hereof will enure not only to the RE but also to the extent provided herein to every person who is or becomes a Member.

IT IS AGREED:

1. **DICTIONARY AND INTERPRETATION**

1.1 **Dictionary of Terms**

In this Constitution:

"Accounting Standards" means the accounting standards and practices determined under clause 1.3;

"Adviser" means the financial adviser who has offered Unit/s in this Scheme to a Member;

"Applicant" anyone who submits an application for Unit/s in the Scheme in accordance with the PDS;

"Application" means a request from a Member to the RE to issue Units in a managed investment scheme pursuant to an Arrangement;

"Application Form" an application in writing for Unit/s in the Scheme attached to the PDS.

"Application Money" the amount received from an Applicant when lodging the

Application in respect of the Unit/s applied for in accordance with the PDS;

"Arrangement" means a written arrangement between the RE and a Member that sets out the circumstances in which Applications for Units in registered schemes operated by the RE, may be accepted;

"ASIC" the Australian Securities and Investments Commission;

"ASIC Instrument" means:

(a) an exemption or modification granted by ASIC in accordance with Part 5C.11 of the Law; or

(b) any other instrument issued by ASIC under a power conferred on ASIC which relates to the RE or the Scheme.

"Auditor" means the auditor of the Scheme appointed by the RE under clause 27.1 and shall be qualified to act as a registered scheme auditor pursuant to the Law;

"Authorised Investments" means

(a) monies deposited (whether secured or unsecured) with a Bank, or any corporation related to a Bank or other corporation or monies deposited with any trustee company, fund, bills of exchange, certificates of deposit and negotiable certificates of deposit issued by a Bank or similar instrument accepted and endorsed by a Bank;

(b) any investments the time being authorised by the laws of the Commonwealth of Australia or any State or Territory thereof for the investment of trust funds;

(c) monies deposited with an authorised short term money market dealer as such expression is used in section 65 of the Law;

(d) any investment in or acquisition of cash, stocks, bonds, notes or other securities or derivatives issued by the Government of Australia, any other country, any company, corporation, body corporate, association, firm, mutual fund or unit trust;

(e) any investment in or acquisition of options, entitlements or rights to any of the securities or derivatives referred to in clause (d) of this provision;

(f) real property or interests in real property whether by acquisition of units in unit trusts or otherwise;

(g) interests in any registered managed investment scheme (as defined in the Law) including but not limited to any scheme of which the RE acts as RE;

(h) making loans to any person or company with or without interest, whether secured or unsecured, and for any period whatsoever; and

(i) the acquisition of foreign currencies, hedging contracts, commodity contracts of any kind which are quoted on a financial market (as defined in the Law).

"**Bank**" has the meaning given to an ADI in section 5 of the Banking Act 1959 (Cth) and also includes an ADI constituted by or under a law of the State or Territory and a foreign ADI as that term is defined in section 5 of the Banking Act 1959 (Cth).

"**Borrower**" any person who applies to the Scheme to borrow Scheme Property and who is approved by the RE;

"**Business Day**" any day on which trading Banks are generally open for business on the Gold Coast, Queensland;

"**Class**" means a class of Units, being Units which have the same rights.

"**Commencement Date**" means the date of registration of the Scheme;

"**Compliance Committee**" the Compliance Committee of the RE.

"**Compliance Plan**" means the Compliance Plan for the Scheme lodged at the ASIC on Scheme registration;

"**Constitution**" this document including any Schedule, Annexure or Amendments to it and which also means the Unit Trust Deed;

"**Custodian**" Permanent Trustee Australia Limited ACN 008 412 913;

"**Custody Agreement**" an agreement dated the 4th day of February, 1999 and any further amendments entered into between the Custodian and the RE;

"**Development Loan**" a loan to fund the construction of a building on mortgaged property which is to be drawn down before completion of the building;

"Differential Fee Arrangement" means an arrangement pursuant to Class Order [CO 03/217] which provides an exemption from S601FC(1)(d) of the Law in relation to differential fee arrangements offered to investors investing in the Fund as a Wholesale Investor, within the meaning of Wholesale Client in Section 761G of the Corporations Act;

"**Distributable Income**" has the meaning given in clause 11.3;

"**Distribution Period**" is the relevant period referred to in clause 12.1;

"**Dollars**", "**A$**" and "**$**" mean the lawful currency of the Commonwealth of Australia;

"**Extraordinary Resolution**" means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by

at least 50% of the total votes that may be cast by Members entitled to vote on the resolution (including Members who are not present in person or by proxy);

"**Financial Year**" means the period of 12 months ending on the 30th day of June in each year during the continuance of this Constitution and includes the period commencing on the date the trust was established and expiring on the next succeeding 30th day of June and any period between the 30th day of June last occurring before the termination of the trust and the termination of the trust;

"FICS" means the Financial Industry Complaints Service Limited;

"**GST**" means a tax, impost or duty on goods, services or other things imposed by any fiscal, national, state, territory or local authority or entity and whether presently imposed or novel, together with interest or penalties either before or after the date of this Constitution;

"**Income**" means all amounts which are, or would be recognised as, income by the application of the Accounting Standards;

"**Issue Price**" means the price at which a Unit is issued calculated in accordance with clause 6.

"**Investment Term**" means the initial fixed investment term selected by the Member when they invest in the Scheme for a fixed term, and any subsequent fixed term for the investment where the investment is rolled over for that subsequent term, but does not include any fixed term under a Savings Plan Investment (and the initial fixed investment term and each subsequent fixed term will each be a separate Investment Term, and not a longer combined Investment Term);

"**Law**" means the Corporations Act 2001 and the Corporations Regulations.

"**Lender**" means the RE on behalf of the Members lending Scheme Property through the Scheme;

"**Lending Rules**" means the rules detailed in clauses 13.2 and 13.3;

"**Liabilities**" means at any time the aggregate of the following at that time as calculated by the RE in accordance with the Accounting Standards:

(a) Each liability, excluding Unit Holder Liability, of the RE in respect of the Scheme or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.

(b) Each other amount payable out of the Scheme, excluding Unit Holder Liability or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.

(c) Other appropriate provisions in accordance with the applicable Accounting Standards.

"**Liquid Scheme**" means a registered scheme that has liquid assets which

account for at least 80% of the value of scheme property.

"**LMM**" means Law Mortgage Management Pty Ltd ACN 055 691 426;

"**LVR**" means loan to valuation ratio and is the ratio of the amount of a loan to the valuation of the property offered as security for a loan in the Scheme;

"**Member**" in relation to a Unit, means the person registered as the holder of that Unit (including joint holders).

"**Minimum Investment**" means the minimum investment disclosed in the PDS from time to time unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment;

"**Minimum Subscription**" means any minimum amount of Application Money of a particular currency required by the RE to be received in respect of one or more Applicants, before the Application(s) will be accepted by the RE;

"**Mortgagee**" in all mortgages held by the Scheme the Mortgagee will be the Custodian as agent for the RE;

"**Mortgage Lending Valuation Policy**" means the RE's mortgage lending valuation policy as detailed in the Compliance Plan;

"**Net Fund Value**" at any time, means the value of the Scheme Property less the Liabilities at that time.

"**Power**" means any right, power, authority, discretion or remedy conferred on the RE by this Constitution or any applicable law;

"**Promoter**" for the purpose of the Law the promoter of this Scheme is the RE;

"**PDS**" means a Product Disclosure Statement or any Supplementary Product Disclosure Statement for the Scheme;

"**Register**" means the register of Members maintained by the RE under clause 22;

"**Responsible Entity**" or "RE" means the company named in the ASIC's records as the responsible entity of the Scheme and referred to in this document as the RE and who is also the Trustee of the Scheme;

"**Savings Plan Investment**" means an Australian dollar investment described as the "LM Savings Plan" in the PDS, with terms and conditions as disclosed in the PDS;

"**Scheme**" means a managed investment scheme to be known as the "LM First Mortgage Income Fund" that is to be registered under s601EB of the Law and also means the Trust;

"**Scheme Property**" means assets of the Scheme including but not limited to:

(a) contributions of money or money's worth to the Scheme; and

(b) money that forms part of the Scheme assets under the provisions of the Law; and

(c) money borrowed or raised by the RE for the purposes of the Scheme; and

(d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and

(e) the income and property derived, directly or indirectly from contributions, money or property referred to in paragraph (a), (b), (c) or (d);

"**Scheme Valuation Policy**" means the scheme valuation policy as detailed in the Compliance Plan;

"**Security Property**" means any property offered by a Borrower as security for a Mortgage in the Scheme;

"**Special Resolution**" means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by at least 75% of the votes cast by Members entitled to vote on the resolution;

"**Subscription Account**" an account opened and maintained by the RE into which is deposited all Application Moneys;

"**Tax**" includes, but is not limited to:

(a) stamp duty, excise and penalties relating to these amounts which are imposed on the RE in respect of any assets in the Scheme;

(b) taxes and duties and penalties relating to these items imposed as a result of any payment made to or by the RE under this Constitution;

(c) taxes imposed or assessed upon:

(i) any Application Money;

(ii) distributions of Income to Members, capital gains, profits or any other amounts in respect of the Scheme; or

(iii) the RE in respect of its capacity as responsible entity of the Scheme;

(d) imposts, financial institutions duties, debits tax, withholding tax, land tax or other property taxes charged by any proper authority in any jurisdiction in Australia in respect of any matter in relation to the Scheme, and every kind of tax, duty, rate, levy, deduction and charge including any GST;

"**Tax Act**" means the Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth);

"**Trustee**" means the RE;

"**Uncontrolled Event**" means an act of God, strike, lock out or other interference with work, war (declared or undeclared), blockage, disturbance, lightning, fire, drought, earthquake, storm, flood, explosion, government or quasi-government restraint, exploration, prohibition, intervention, direction,

embargo, unavailability or delay in availability of equipment or transport, inability or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licences, authorities or allocations, or any other cause whether of the kind specifically set out above or otherwise which is not reasonably within the control of the party relying on the Uncontrolled Event;

"**Unit**" means an undivided interest in the Scheme Property created and issued under this Constitution;

"**Unit Holder Liability**" means the liability of the Scheme to the Members for their undivided interest in the Scheme Property;

"**Unit Holding**" means the number of Units in the Scheme held by a Member as evidenced in the Register of Unit holders;

"**Unit Holding Statement**" means a statement issued by the RE to a Member pursuant to clause 5.9;

"**Valuation Date**" means the date which is the last day of each month or any date during each month at the RE's discretion or the date on which the RE determines there has been a material change in the value of the Scheme Property;

"**Withdrawal Notice**" means:

(a) for a Savings Plan Investment, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE, provided that only 4 such notices may be given within any 12 month period, and any notices in excess of this number will not be valid unless otherwise determined by the RE in its discretion;

(b) for any investment that is not a Savings Plan Investment nor for an Investment Term, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE;

(c) for all investments for an Investment Term, a notice in writing given by a Member and received by the RE before the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE,

and provided that if a notice in writing as referred to above is not received before 12 noon on a Business Day, the notice will be deemed to be received on

the next Business Day;

"Withdrawal Notice Period" means:

(a) for a Savings Plan Investment by a Member, the period commencing 1 Business Day after the first 12 month period of the Savings Plan Investment has expired, and continuing throughout the term of the Savings Plan Investment;

(b) for any investment that is not a Savings Plan Investment nor for an Investment Term, any period when the Member owns Units; or

(c) for all investments for an Investment Term, the period commencing 5 Business Days before the expiry of the relevant Investment Term (and where an Investment Term is created by the rollover of an existing investment, means the period commencing 5 Business Days before the expiry of that subsequent Investment Term); or

(d) any other time period as determined by the RE.

"Withdrawal Price" means the price at which a Unit is redeemed calculated in accordance with Clause 8.

1.2 **Interpretation**

In this Constitution, unless the context otherwise requires:

(a) headings and underlining are for convenience only and do not affect the interpretation of this Constitution;

(b) words importing the singular include the plural and vice versa;

(c) words importing a gender include any gender;

(d) other parts of speech and grammatical forms of a word or phrase defined in this Constitution have a corresponding meaning;

(e) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Governmental Agency;

(f) a reference to any thing includes a part of that thing;

(g) a reference to a part, clause, party, annexure, exhibit or schedule is a reference to a part and clause of, and a party, annexure exhibit and schedule to, this Constitution;

(h) a reference to any statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;

(i) a reference to a document includes all amendments or supplements to,

or replacements or novations of, that document;

(j) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the preceding Business Day except that any amount payable on demand where the demand is made on a day which is not a Business Day must be paid on the next succeeding Business Day;

(k) a reference to an agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing;

(l) a reference to a document includes any agreement in writing, or any statement, notice, deed, instrument or other document of any kind;

(m) a reference to a body (including, without limitation, an institute, association or authority), whether statutory or not:

(i) which ceases to exist; or

(ii) whose powers or functions are transferred to another body;

is a reference to the body which replaces it or which substantially succeeds to its powers or functions;

(n) a reference to any date means any time up to 5.00 pm (Queensland time) on that date; and

(o) a reference to dealing with a Unit includes any subscription, withdrawal, sale, assignment, encumbrance, or other disposition whether by act or omission and whether affecting the legal or equitable interest in the Unit.

1.3 **Accounting Standards**

In respect of any accounting practice relevant to this Constitution, the following accounting standards apply as if the Scheme were a company in accordance with:

(a) the accounting standards required under the Law; and

(b) if no accounting standard applies under clause 1.3(a), the accounting practice determined by the RE.

2. ESTABLISHMENT OF TRUST

2.1 **Trustee**

The RE continues to act as trustee of the Scheme.

s601FC(2) 2.2 **Role of Trustee**

The RE recognises that it continues to hold the Scheme Property on trust for the Members.

s601FB(2) 2.3 **Appointment of Custodian**

(a) The RE has appointed the Custodian as agent to hold the Scheme Property on behalf of the RE.

(b) The Custodian holds the Scheme Property as agent of the RE for the term of the Scheme on terms and conditions as detailed in the Custody Agreement.

2.4 **Name of Trust**

The name of the trust and Scheme is the LM First Mortgage Income Fund or any other name that the RE may determine from time to time.

2.5 **Initial Issue**

The Scheme commenced at such time after the Commencement Date when LMM or its nominee paid $100.00 to the RE to establish the Scheme Property. The RE issued to LMM or its nominee 100 Units in return for that payment.

3. **UNITS AND MEMBERS**

3.1 **Units**

The beneficial interest in Scheme Property is divided into Units. 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 Members under this Constitution.

3.2 **Classes**

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. Such rights and obligations may, but need not be, referred to in the PDS. 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. Without limitation, 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.

3.3 **Fractions**

Fractions of a Unit may not be issued. When any calculations under this Constitution would result in the issue of a fraction of a Unit, the number of Units to be issued must be rounded down to the nearest whole Unit.

3.4 **Equal value**

At any time, all the Units in a Class are of equal value unless the units are issued under a Differential Fee Arrangement.

3.5 **Interest**

A Unit confers an interest in the Scheme Property as a whole. No Unit confers any interest in any particular asset of the Scheme Property.

3.6 **Consolidation and re-division**

(a) Subject to clause 3.6(b) the RE may at any time divide the Scheme Property into any number of Units other than the number into which the Scheme Property is for the time being divided.

(b) A division of a kind referred to in clause 3.6(a) must not change the ratio of Units in a Class registered in the name of any Member to the Units on issue in the Class.

3.7 **Rights attaching to Units**

(a) A Member holds a Unit subject to the rights and obligations attaching to that Unit and (if applicable) pursuant to any Differential Fee Arrangement.

(b) Each Member agrees not to:

(i) interfere with any rights or powers of the RE under this Constitution;

(ii) purport to exercise a right in respect of the Scheme Property or claim any interest in an asset of the Scheme Property (for example, by lodging a caveat affecting an asset of the Scheme Property); or

(iii) require an asset of the Scheme Property to be transferred to the Member.

3.8 **Conditions**

The RE may impose such conditions on the issue of Units as it determines including that the Member may not give effect to any mortgage, charge, lien, or other encumbrances other than as expressly permitted by the RE.

3.9 **Rollover of Investments**

If the Member has invested for an Investment Term, and fails to complete and return a Withdrawal Notice before the start of the relevant Withdrawal Notice period that applies to the Investment Term, the Member will be deemed to have elected to renew their investment in the Scheme as specified in the PDS. Units issued in respect of such reinvestment must be issued at an Issue Price equal to the Current Unit Value.

4. BINDING ON ALL PARTIES

s601GB 4.1 This Constitution is binding on the RE and on all Members of the Scheme as they are constituted from time to time.

4.2 By executing the Application Form attached to the PDS the Members as are constituted from time to time agree to be bound by the terms and conditions of this Constitution.

5. ISSUE OF UNITS

s601GA(a) 5.1 **Offer and minimum investment**

(a) The RE may at any time offer Units for subscription or sale.

(b) The Minimum Investment must be lodged with an Application for Units.

(c) The RE may invite persons to make offers to subscribe for or buy Units.

5.2 **Minimum subscription**

(a) The RE may set a Minimum Subscription for the pool of funds of any one currency for the Scheme at its discretion.

(b) The RE will hold Application Money in a Subscription Account until the Minimum Subscription for the pool of funds is received, subject to clause 5.3.

5.3 **Insufficient Application Money received**

The RE will return or cause to be returned all Application Money to the persons who paid such Application Money, less any taxes and bank charges payable if:

(a) insufficient Application Money to meet the Minimum Subscription stipulated in Clause 5.2 is received within a period reasonably determined by the RE, or

(b) the RE withdraws a PDS (which the RE is entitled to do) before sufficient Application Money is received, or

(c) the RE does not believe there will be sufficient funds available to achieve the aims of the Scheme contemplated in this Constitution or the PDS.

5.4 **Form of Application**

(a) Subject to clause 5.10, each Application for Units must be:

(i) made by Application Form attached to a PDS (or as otherwise permitted by the Law); and

(ii) be accompanied by Application Moneys as required by any relevant PDS.

(b) If the Application Form is signed pursuant to a power of attorney, then if requested by the RE, a certified copy of the relevant power of attorney and a declaration that the power of attorney has not been revoked as at the date the Application Form is signed must be provided.

5.5 **Acceptance or rejection**

The RE may, without giving any reason:

(a) accept an Application;

(b) reject an Application; or

(c) reject part of the Application.

5.6 **Uncleared funds**

Units issued against Application Money in the form of a cheque or other payment order (other than in cleared funds) are void if the cheque or payment order is not subsequently cleared.

5.7 **Issue of Units**

Units are taken to be issued when:

(a) the Application Money for the Issue Price is received by the RE; and

(b) the RE accepts the Application and the Units are entered in the Register, or at such other time as the RE determines.

5.8 **Number of Units issued**

Subject to Minimum Investment, the number of Units issued at any time in respect of an Application for Units will be calculated as follows:

(a) by dividing the Application Moneys paid by the applicable Issue Price at that time;

(b) by rounding down to two decimal places.

5.9 **Unit Holding Statement**

The evidence of a Member's holding in the Scheme will be the latest extract from the Register as provided from time to time to a Member by the RE in a Unit Holding Statement.

5.10 **Additional Applications**

Additional Applications for investment in the Scheme by existing Members, not made on an Application Form may be accepted in an Australian dollar investment:

(a) from a Member;

(b) as a result of an Application;

(c) in accordance with an Arrangement for as long as and on condition that it complies with the requirements of the RE and the law or ASIC's policy including any relief granted to the RE from time to time; and

(d) are in multiples of $500 each unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment or agrees to accept an amount that is not a multiple of $500.

5.11 **Holding Application Money**

All Application Money must be held by the RE (or its agent, the Custodian) on trust for the relevant Applicant in the Subscription Account.

5.12 **Interest on Application Money**

The RE is not required to account to any Member for any interest earned on Application Money held in the Subscription Account.

5.13 **Responsible Entity to return Application Money**

Where the RE has rejected (in full or in part) an Application, the relevant Application Money (without interest) must be returned to the Applicant within 14 days.

5.14 **Incomplete Application Form**

The RE will, on receipt of any Application Money which is not accompanied by a completed Application Form, as soon as practicable return the Application Money to the relevant Applicant, or:

(a) attempt to obtain the Application Form from the Applicant; and

(b) bank the Application Money.

5.15 **No Application Form received**

(a) If the RE gives any Application Money to the Custodian pursuant to clause 5.11, then the Custodian will hold such Application Money in an account, as custodian for the Applicant in accordance with the Law until the Application Form is received.

(b) If the RE has not received the Application Form by the time the offer is closed, then the RE must use its best endeavours to return the Application Money, less any taxes and bank charges payable, to the Applicant as soon as practicable.

6. **ISSUE PRICE**

The issue price of a Unit shall be calculated as follows:

$$\left(\frac{\text{Net Fund Value}}{\text{number of Units on issue}}\right)$$

calculated on the last Valuation Date prior to the date of issue.

7. **WITHDRAWAL OF UNITS - WHILE THE SCHEME IS LIQUID**

7.1 **Withdrawal request - while the Scheme is liquid**

(a) While the Scheme is liquid as defined in S601KA (4) of the Law, 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).

7.2 **Withdrawal**

(a) (i) Within 365 days after the end of the Member's Investment Term (where the Member's investment is held for an Investment Term and the Member has given a valid Withdrawal Notice in respect of the Units) or within 365 days after receiving a valid Withdrawal

Notice from the Member (if the Member's investment is not held for an Investment Term or is a Savings Plan Investment), the RE must redeem the relevant Units out of the Scheme Property for the Withdrawal Price.

(ii) However, the RE must redeem the Units within 180 days after the relevant date (instead of 365 days) where it determines that none of the circumstances referred to in Clause 7.2(b)(i) to (iv) below exist at the time of withdrawal. This Clause 7.2(a) does not limit the independent operation of Clause 7.2(b).

(iii) To the extent that the Law does not allow more than one period to be specified in this Constitution for satisfying withdrawal requests while the Scheme is liquid, that one period will be 365 days after the RE receives a valid Withdrawal Notice. Paragraph (ii) above will also apply to the extent permitted by the Law.

(iv) The RE may allow redemption of Units within a shorter period than the 365 (or 180) days referred to above, in its absolute discretion, subject to its obligations under the Law.

(b) The RE may suspend the withdrawal offer as detailed in clause 7.2(a) above for such periods as it determines where:

(i) the Scheme's cash reserves fall and remain below 5% for ten (10) consecutive Business Days; or

(ii) if in any period of (90) days, the RE receives valid net Withdrawal Notices equal to 10% 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 10% 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.

(c) The RE is not required to process Withdrawal Notices where:

(i) the person seeking to redeem the Units cannot provide satisfactory evidence of the Member's title or authority to deal with the Units; or

(ii) the withdrawal would cause the Member's Unit Holding to fall below the Minimum Investment.

(d) If the RE allows a Member to withdraw an investment from the Scheme before the end of an Investment Term, the RE is also entitled to require the Member to pay an early withdrawal charge equal to the last three months interest distributions paid or payable on the amount being withdrawn (or if the investment has been for less than three months, the RE's estimate of what that amount would have been if the investment had been in place for the last three months), and where an Adviser has been paid an upfront commission in respect of the investment being withdrawn, the RE will also be entitled to require the Member to pay a further early withdrawal charge equal to the upfront commission paid, calculated on a pro-rata basis for the length of time remaining to the end of the Investment Term. The RE will also be entitled to require the Member to pay an amount equal to any other fees or charges arising from the early withdrawal (including fees and charges that may be payable to the financial institution which has organised the investment in the relevant currency). These early withdrawal charges will be deducted from the investment being withdrawn, and paid at the time of withdrawal. Such charges will become part of the Scheme Property.

(e) If the RE allows a Member to withdraw an investment, and that investment has been held for a period in respect of which no Distributable Income has been calculated in respect of that investment, the RE may pay to the Member the amount of Distributable Income that the RE estimates is payable to the member for that period, rather than delay payment to the member until the actual Distributable Income has been calculated.

7.3 **Cancellation**

(a) The RE must cancel the number of Units which have been redeemed under clause 7.2 and must not reissue them. Upon cancellation, the RE must immediately:

(i) remove the name of the Member from the Register in respect of the redeemed Units; and

(ii) provide the Member with a new Unit Holding Statement for any unredeemed Units.

(b) A Unit is cancelled when the Member holding the Unit is paid the Withdrawal Price by the RE.

8. **WITHDRAWAL PRICE**

The Withdrawal Price of each Unit pursuant to clause 7 shall be calculated as follows:

(Net Fund Value)

(number of Units issued)

calculated on the last Valuation Date prior to the date of withdrawal.

9. TRANSFER OF UNITS

9.1 Transferability of Units

(a) Subject to this 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.

(b) A transferor of Units remains the holder of the Units transferred until the transfer is recorded on the Register.

9.2 Registration of Transfers

(a) The following documents must be lodged for registration on the Register at the registered office of the RE or the location of this Register:

(i) the instrument of transfer; and

(ii) any other information that the RE may require to establish the transferor's right to transfer the Units.

(b) On compliance with clause 9.2(a), the RE will, subject to the powers of the RE to refuse registration, record on the Register the transferee as a Member.

9.3 **Where registration may be refused**

Where permitted to do so by Law or this Constitution, the RE may refuse to register any transfer of Units.

9.4 **Where registration must be refused**

(a) Registration must be refused if:

(i) the RE has notice that the transferor of Units has entered into any borrowing or other form of financial accommodation to provide all or part of the funds to subscribe for or acquire a Unit and has not received confirmation from the financier that the financier consents to the transfer of those Units; or

(ii) the transferor has given a power of attorney in favour of the RE and the Custodian in the form set out in an application form accompanying a PDS and the transferee has not executed and provided to the RE a similar form of power of attorney (with such adaptations as are necessary) in favour of the RE and the Custodian;

(b) In the case of (i) or (ii) above, the RE must refuse to register same and must continue to treat the seller or transferor as the case may be

as the registered holder for all purposes and the purported sale, purchase, disposal or transfer shall be of no effect.

(c) If the transferee is not a Member the RE must not consent to the registration until the RE is satisfied that the transferee has agreed to be bound by the Constitution.

9.5 **Notice of non-registration**

If the RE declines to register any transfer of Units, the RE must within 5 Business Days after the transfer was lodged with the RE give to the person who lodged the transfer written notice of, and the reasons for, the decision to decline registration of the transfer.

9.6 **Suspension of transfers**

The registration of transfers of Units may be suspended at any time and for any period as the RE from time to time decide. However, the aggregate of those periods must not exceed 30 days in any calendar year.

10. TRANSMISSION OF UNITS

10.1 **Entitlement to Units on death**

(a) If a Member dies:

(i) the survivor or survivors, where the Member was a joint holder; and

(ii) the legal personal representatives of the deceased, where the Member was a sole holder,

will be the only persons recognised by the RE as having any title to the Member's interest in the Units.

(b) The RE may require evidence of a Member's death as it thinks fit.

(c) This clause does not release the estate of the deceased joint Member from any liability in respect of a Unit that had been jointly held by the Member with other persons.

10.2 **Registration of persons entitled**

(a) Subject to the Bankruptcy Act 1966 and to the production of any information that is properly required by the RE, a person becoming entitled to a Unit in consequence of the death or bankruptcy (or other legal disability) of a Member may elect to:

(i) be registered personally as a Member; or

(ii) have another person registered as the Member.

(b) All the limitations, restrictions and provisions of this Constitution relating to:

(i) the right to transfer; and

(ii) the registration of a transfer;

for Units apply to any relevant transfer as if the death or bankruptcy or legal disability of the Unit Member had not occurred and the notice or transfer were a transfer signed by that Member.

10.3 **Distributions and other rights**

(a) If a Member dies or suffers a legal disability, the Member's legal personal representative or the trustee of the Member's estate (as the case may be) is, on the production of all information as is properly required by the RE, entitled to the same distributions, entitlements and other advantages and to the same rights (whether in relation to meetings of the Scheme or to voting or otherwise) as the Member would have been entitled to if the Member had not died or suffered a legal disability.

(b) Where two or more persons are jointly entitled to any Unit as a result of the death of a Member, they will, for the purposes of this Constitution, be taken to be joint holders of the Unit.

11. DISTRIBUTABLE INCOME

11.1 **Income of the Scheme**

The Income of the Scheme for each Financial Year will be determined in accordance with applicable Accounting Standards.

11.2 **Expenses and provisions of the Scheme**

For each Financial Year:

(a) the expenses of the Scheme will be determined in accordance with the applicable Accounting Standards; and

(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 the applicable Accounting Standards including, but not limited to, provisions for income equalisation and capital losses.

11.3 **Distributable Income**

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.

12. DISTRIBUTIONS

12.1 **Distribution Period**

(a) The Distribution Period is one calendar month for Australian dollar investments or as otherwise determined by the RE in its absolute

discretion.

(b) The Distribution Period is the Investment Term of the investment for non-Australian dollar investments or as otherwise determined by the RE in its absolute discretion.

12.2 **Distributions**

The RE must distribute the Distributable Income relating to each Distribution Period within 21 days of the end of each Distribution Period.

12.3 **Present entitlement**

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.

12.4 **Capital distributions**

The RE may distribute 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.

12.5 **Grossed up Tax amounts**

Subject to any rights, obligations and restrictions attaching to any particular Unit or Class, the grossed up amount under the Tax Act in relation to Tax credits or franking rebates is taken to be distributed to Unit Members in proportion to the Distributable Income for a Distribution Period as the case may be, which is referable to a dividend or other income to which they are presently entitled.

12.6 **Reinvestment of Distributable Income**

(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.

(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.

(c) The RE may determine that unless the Member specifically directs otherwise they will be deemed to have accepted the reinvestment offer.

(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.

13. NATURE OF RE POWERS

s601GA(1)(b) 13.1 The RE has all the powers:

(a) of a natural person to invest and borrow on security of the Scheme Property;

(b) in respect of the Scheme and the Scheme Property that it is possible under the Law to confer on a RE and on a Trustee;

(c) as though it were the absolute owner of the Scheme Property and acting in its personal capacity; or

(d) necessary for fulfilling its obligations under this Constitution and under the Law.

s601GA(3) 13.2 The RE must only invest Members' funds in:

(a) subject to clause 13.3 and 13.3A, mortgage investments provided that:

(i) all mortgages are secured over property and the amount which may be advanced to a Borrower does not exceed an LVR of 75% of the value of the security property on initial settlement.

(ii) the type of real estate offered for security is acceptable to the RE;

(iii) the value of the property offered as security has been established in accordance with the Mortgage Lending Valuation Policy of the RE ;

(b) other mortgage backed schemes in accordance with this clause and the RE's compliance standards;

(c) a range of interest bearing investments backed by Australian Banks, building societies, State or Federal governments, or foreign banks as approved by the RE.

(d) Authorised Investments.

s601GA(3) 13.3 Notwithstanding the provisions of clause 13.2(a), after a loan has settled and where the RE considers it is in the best interests of the Members of the Scheme, the RE may approve an LVR not to exceed 85% of the value of the security property.

13.3A Notwithstanding any other provision of this Constitution, the LVR of a loan that is in default may exceed 85%

s601GA(3) 13.4 Whenever a loan of Scheme funds involves a Development Loan, the RE shall ensure it has included amongst its officers or employees persons with relevant project management experience who are competent to manage loans of this kind.

s601GA(3) 13.5 To the extent allowed by law:

(a) any restriction or prohibition imposed upon the RE in relation to the investment from time to time of the Scheme Property or any part thereof is hereby excluded from the obligations imposed.

(b) without derogating from the generality of the foregoing this exclusion specifically applies to any "Prudent Person Rule" or the like which may be implied by any future enactment of legislation.

s601GA(3) 13.6 To the extent allowed by law:

(a) the RE may borrow or raise money with or without security over the Scheme Property or any part of it on any terms, including any rate of interest and any fees and expenses as the RE thinks fit;

(b) the RE may deal with any property to exercise all the powers of a mortgagee pursuant to the mortgage terms and conditions.

s601GA(3) 13.7 The RE must direct the Custodian to deal with the Scheme Property in accordance with this Constitution.

14. COMPLAINTS PROCEDURES

s601GA(1)(c) 14.1 If a Member has a complaint they should generally first contact their Adviser. If the Adviser is unavailable, unwilling, or unable to assist, or if the Member wishes to directly contact the RE, and the complaint relates to the Fund or the RE, then the Member should contact the RE at the registered office of the RE. Complaints may be made in writing or by telephone.

14.2 The RE may (if applicable) contact the Adviser for further background information and attempt to mediate a satisfactory resolution of the complaint or escalate as necessary. The RE has 30 days to respond to the complaint once it is received. The RE must attempt to resolve the complaint within a satisfactory time period as determined by the nature of the complaint and the Member's response.

14.3 The Complaints Officer of the RE will take responsibility for formal complaints and record them in the Complaints Register. In acknowledging or resolving formal complaints, the RE must make or cause to be made, a written response including:-

(a) the name, title and contact details of the person actually handling the complaint;

(b) a summary of the RE's understanding of the complaint;

(c) details of the RE's offer for resolution of the complaint and relevant time frame;

(d) where the complaint is not fully dealt with in the letter an estimate of time required for the RE to resolve the complaint.

14.4 Full details of each formal complaint and resolution thereof must be recorded in

the Complaints Register including:-

(a) the person responsible for resolving the complaint;

(b) the name of the Member making the complaint;

(c) the nature of the complaint;

(d) the product service or department in respect of which the complaint was made;

(e) the actual time required to resolve the complaint;

(f) the actual resolution of the complaint;

(g) recommendations, if any, for changes to products disclosures systems or processes to ensure similar complaints do not arise in the future.

14.5 The Complaints Register should be reviewed by the Complaints Manager of the RE as part of an ongoing review process to determine whether recommendations for change arising from resolved complaints have been effectively incorporated in the compliance program.

14.6 Where the RE believes it has either resolved the complaint, or it has not resolved the complaint but believes it can do nothing more to satisfy the complainant, and the Member feels their complaint has still not been satisfactorily resolved, the complainant must be referred to the FICS for mediation. The FICS adopts a three stage approach in resolving complaints as follows:-

(a) stage 1: initial opportunity for Member to resolve complaints;

(b) stage 2: complaints review, investigation and conciliation;

(c) stage 3: independent determination of complaints by adjudicator.

The full terms of reference for the FICS are held by the RE.

14.7 If a complaint cannot be resolved to the satisfaction of the Member by the RE or the FICS then the complainant Member may:-

(a) refer the matter to arbitration or the courts; or

(b) take whatever other action is open to the complainant Member under the general law.

14.8 The RE must disclose the details of its complaints procedure to all investors.

15. TERM OF TRUST

The Scheme begins on the Commencement Date and is to be wound up on the earlier to occur of:

(a) the date which is eighty years from the Commencement Date; and

(b) any earlier date which the RE, in its absolute discretion may appoint as the Vesting Date.

16. WINDING UP THE SCHEME

s601GA(1)(d) 16.1 The Scheme shall only be wound up in accordance with the Law and this

Constitution.

16.2 The RE must wind up the Scheme in the following circumstances:-

s601NE(1)(a) (a) if the term of the Scheme as detailed in this Constitution has expired;

s601NE(1)(b) (b) the Members pass an extraordinary resolution directing the RE to wind up the Scheme;

s601NE(1)(c) (c) the Court makes an order directing the RE to wind up the Scheme pursuant to the Law and in particular pursuant to section 601FQ(5) and section 601ND;

s601NE(1)(d) (d) the Members pass an extraordinary resolution to remove the RE but do not at the same time pass an extraordinary resolution choosing a company to be the new RE that consents to becoming the Scheme's RE;

s601NC(1) 16. 3 (a) If the RE considers that the purpose of the Scheme:

(i) has been accomplished; or

(ii) cannot be accomplished,

it may take steps to wind up the Scheme.

(b) If the RE wishes to wind up the Scheme pursuant to clause 16.3(a), the RE must give to the Members of the Scheme and to the ASIC a notice in writing;

(i) explaining the proposal to wind up the Scheme, including explaining how the Scheme's purpose has been accomplished or why that purpose cannot be accomplished; and

(ii) informing the Members of their rights to take action under Division 1 of Part 2G.4 of the Law for the calling of a Members' meeting to consider the proposed winding up of the Scheme and to vote on a special resolution Members propose about the winding up of the Scheme; and

(iii) informing the Members that the RE is permitted to wind up the Scheme unless a meeting is called to consider the proposed winding up of the Scheme within 28 days of the RE giving the notice to the Members;

(c) if no meeting is called within that 28 days to consider the proposed winding up, the RE may wind up the Scheme.

s601NE(2) 16.4 (a) The RE may wind up the Scheme in accordance with this Constitution and any orders under S601NF(2) of the Law if the RE is permitted by S601NC(3) of the Law to wind up the Scheme.

s601NF (3) (b) An order to wind up the Scheme pursuant to s601ND (1) or s601NF (1) or (2) of the Law may be made on the application of:

(i) the RE; or

(ii) a director of the RE: or

(iii) a Member of the Scheme; or

(iv) the ASIC.

s601NE(3) 16.5 The RE shall not accept any further Applications for Units in the Scheme or make any further loans from the Scheme Property at a time after the RE has become obliged to ensure the Scheme is wound up or after the Scheme has started to be wound up.

16.6 The RE shall manage the Scheme until such time as all winding up procedures have been completed.

16.7 Subject 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 rights or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4;

(d) The Members must pay the costs and expenses of a distribution of assets under clause 16.7(c) in the same proportion specified in clause 12.4.

(e) The RE may postpone the realisation of the Scheme Property for as long as it thinks fit and is not liable for any loss or damage attributable to the postponement.

(f) The RE may retain for as long as it thinks fit any part of the Scheme Property which in its opinion may be required to meet any actual or contingent liability of the Scheme.

(g) The RE must distribute among the Members in accordance with clause 16.7 anything retained under clause 16.7(f) which is subsequently not required.

s601NG 16.8 If on completion of the winding up of a registered Scheme, the RE or such other person who may be winding up the Scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the Scheme Property the RE or person winding up the Scheme must, as soon as practicable, pay the money or transfer the property to the

ASIC to be dealt with pursuant to Part 9.7 of the Law.

s601EE 16.9 If at any time the Scheme is operated while it is unregistered the following may apply to the Court to have the Scheme wound up:

(a) The ASIC

(b) The RE

(c) A Member of the Scheme

16.10 The RE shall arrange for an Auditor to audit the final accounts of the Scheme after the Scheme is wound up.

17. VALUE OF THE SCHEME FUND

17.1 **Valuation of the Scheme Property**

The RE may cause the Scheme Property to be valued at any time in accordance with the Scheme Valuation Policy of the RE.

17.2 **Valuation if required**

The RE must cause the Scheme Property or any asset of the Scheme Property to be valued if required by ASIC or under the Law and the valuation must be undertaken in accordance with those requirements.

17.3 **Determination of Net Fund Value**

The RE may determine the Net Fund Value at any time in its discretion, including more than once on each day.

18. FEES, TAXES, COSTS AND EXPENSES

s601GA(2) 18.1 **Taxes**:

The RE may use the Scheme Property to pay any Tax or other obligation, liability or expense required by any applicable law in relation to:

(a) this Constitution;

(b) any amount incurred or payable by the RE;

(c) a gift or settlement effected by this Constitution;

(d) the exercise by the RE of any Power; or

(e) money or investments held by or on behalf of the RE under this Constitution.

s601GA(2) 18.2 **Payment of Debts**:

The RE may set aside any money from the Scheme Property which, in the RE's opinion, is sufficient to meet any present or future obligation of the Scheme.

s601GA(2) 18.3 **Fees**:

The RE is entitled to receive out of the Scheme Property, a management fee of up to 5.5 % per annum (inclusive of GST) of the Net Fund Value in relation to the performance of its duties as detailed in this Constitution, the Compliance Plan and the Law. This fee is to be calculated monthly and paid at such times as the RE determines.

s601GA(2) 18.4 The RE shall be entitled to fees in relation to the following duties:

(a) the subscription and withdrawal of units;

(b) the transfer or transmission of Units;

(c) the establishment/loan application fees;

(d) the structuring or packaging of loan proposals;

(e) loan management;

(f) the rollover of a loan facility;

(g) due diligence enquiries generally;

(h) the sale of real estate or assets of the Scheme Property;

(i) the promotion and management of the Scheme;

(j) the appointment of the Custodian pursuant to the Custody Agreement;

(k) the winding-up of the Scheme;

(l) the performance of its duties and obligations pursuant to the Law and this Constitution.

s601GA(2) 18.5 **Costs and Expenses**

The RE shall be indemnified out of Scheme Property for liabilities or expenses incurred in relation to the performance of its duties; including:

(a) Auditor's fees;

(b) legal fees and outgoings in relation to settlement, rollover, default or recovery of loans

(c) barrister/QC - legal counsel fees;

(d) search fees including property searches, company, bankruptcy, CRAA searches and any other searches which may be necessary to enable location, identification and/or investigation of borrowers/guarantors/mortgagors;

(e) valuation fees;

(f) independent expert's or consultant's fees including but not limited to marketing agents, property specialists, surveyors, quantity surveyors, town planners, engineers;

(g) property report/property consultant fees;

(h) process servers' fees;

(i) private Investigator fees;

(j) fees in relation to the marketing and packaging of security properties for sale;

(k) real estate agent's sales commissions;

(l) costs of maintenance of mortgage securities;

(m) outstanding accounts relating to mortgage securities such as council rates;

(n) locksmith for changing locks of mortgage securities as appropriate;

(o) insurance (property and contents);

(p) removalists for removal of borrower's property as appropriate;

(q) security guards to attend mortgage securities as appropriate;

(r) building and/or property inspection report fees - i.e. building, town planning experts and the like;

(s) all ASIC charges;

(t) all costs of supplying Members with copies of this Constitution and any other documents required by the Law to be provided to Members;

(u) all costs and expenses incurred in producing PDS' and Supplementary PDS' or any other disclosure document required by the Law;

(v) reasonable costs incurred in protecting or preserving all assets offered as security;

s601FB(2) (w) all liability, loss, cost, expense or damage arising from the proper performance of its duties in connection with the Scheme performed by the RE or by any agent appointed pursuant to s601FB(2) of the Law;

(x) any liability, loss, cost, expense or damage arising from the lawful exercise by the RE and the Custodian of their rights under the Power of Attorney contained in clause 20;

(y) fees and expenses of any agent or delegate appointed by the RE;

(z) bank and government duties and charges on the operation of bank accounts;

(aa) costs, charges and expenses incurred in connection with borrowing money on behalf of the Scheme under the Constitution;

(bb) insurances directly or indirectly protecting the Scheme Property;

(cc) fees and charges of any regulatory or statutory authority;

(dd) taxes in respect of the Scheme but not Taxes of the RE [save and except any goods and services or similar tax ("GST")] which are payable by the RE on its own account;

(ee) costs of printing and postage of cheques, advices, reports, notices and other documents produced during the management of the Scheme;

(ff) expenses incurred in connection with maintaining accounting records and registers of the Scheme and of the Scheme Auditor;

(gg) costs and disbursements incurred in the preparation and lodgement of returns under the Law, Tax Act or any other laws for the Scheme;

(hh) costs of convening and holding meetings of Members;

(ii) costs and disbursements incurred by or on behalf of the RE in connection with its retirement and the appointment of a substitute;

(jj) costs and disbursements incurred by the RE in the initiation, conduct and settlement of any court proceedings;

(kk) costs of any insurance premiums insuring against the costs of legal proceedings (whether successful or not) including legal proceedings against Compliance Committee Members not arising out of a wilful breach of a duty referred to in S601JD of the Law;

(ll) costs of advertising the availability of funds for lending;

(mm) brokerage and underwriting fees;

(nn) if and when the RE becomes responsible to pay any GST in respect of any services provided to the Scheme or any payments in respect of GST to be made by the Members or the RE in respect of the Scheme or under the terms of this Constitution then the RE shall be entitled to be indemnified in respect of such GST from the Scheme Property;

(oo) If there is any change to the Law or ASIC policy whereby the RE is required to alter the structure of the Scheme or amend this Constitution, then the costs of the RE in complying with these changes will be recoverable out of the Scheme Property.

s601GA(2) 18.6 In the event that the RE has not performed its duties, the lack of entitlement to payment of fees pursuant to 18.3 is only in respect of that part of the payment which relates to the specific lack of proper performance on any given matter. Nothing in this clause shall be interpreted to mean that the RE is not entitled to be paid fees and expenses for work properly performed.

s601GA(2) 18.7 In the event of any dispute regarding the payment of fees and expenses, the RE shall be paid such fees and expenses until the dispute is fully determined. Any overpayment of the RE shall be repaid forthwith upon the identification of the overpayment.

18.8 The RE is entitled to recover fees and expenses from the Scheme provided they have been incurred in accordance with this Constitution.

18.9 The RE may waive the whole or any part of the remuneration to which it would otherwise be entitled under this clause.

18.10 Despite any other provision of this Constitution, the RE may pay a Member's Adviser a fee or fees as directed by the Adviser from time to time. These fees are to be paid out of Scheme Property, as an expense of the Scheme. Where income of the Scheme is not sufficient to pay in full an Adviser's fee and the relevant Member's expected income distribution, the RE may reduce the Adviser's fee and/or the expected income distribution on a pro rata basis, or on any other basis agreed with the Adviser.

19. INDEMNITY AND LIABILITY

s601GA(2) 19.1 The following clauses apply to the extent permitted by law:

(a) The RE is not liable for any loss or damage to any person (including any Member) arising out of any matter unless, in respect of that matter, it acted both:

(i) otherwise than in accordance with this Constitution and its duties; and

(ii) without a belief held in good faith that it was acting in accordance with this Constitution or its duties.

In any case the liability of the RE in relation to the Scheme is limited to the Scheme Property, from which the RE is entitled to be, and is in fact, indemnified.

(b) In particular, the RE is not liable for any loss or damage to any person arising out of any matter where, in respect of that matter:

(i) it relied in good faith on the services of, or information or advice from, or purporting to be from, any person appointed by the RE;

(ii) it acted as required by Law; or

(iii) it relied in good faith upon any signature, marking or documents.

(c) In addition to any indemnity under any Law, the RE has a right of indemnity out of the Scheme Property on a full indemnity basis, in respect of a matter unless, in respect of that matter, the RE has acted negligently, fraudulently or in breach of trust.

(d) The RE is not liable to account to any Member for any payments ma de by the RE in good faith to any duly authorised authority of the Commonwealth of Australia or any State or Territory of Australia for taxes or other statutory charges.

20. POWERS OF ATTORNEY

20.1 Each Member by execution of the Application Form or the transfer by which he/she/it acquires Units in the Scheme appoints the RE and the Custodian and any director officer attorney or substitute nominated by either the RE or the Custodian severally for this purpose as its attorney and agent with the right:

(a) at any time to:

(i) sign any document in relation to any subscription and withdrawal agreement;

(ii) sign any document in relation to the transfer or transmission of Units;

(iii) sign any variation of this Constitution;

(iv) sign any document required by ASIC to be executed by a Member in respect of the Scheme.

(b) at the request in writing of either the RE or the Custodian the Member must execute separate Powers of Attorney in a form reasonably required by the RE or the Custodian appointing the RE and/or the Custodian as its attorney for the purpose of this clause.

(c) any attorney may exercise its rights notwithstanding that the exercise of the right constitutes a conflict of interest or duty;

20.2 each Member indemnifies and shall keep indemnified any attorney against any liability, loss, cost, expense or damage arising from the lawful exercise of any right by the attorney under the Power of Attorney.

21. TITLE TO SCHEME FUND

21.1 **Custodian to hold as agent of RE**

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.

22. THE REGISTER

22.1 **Keeping registers**

The RE must establish and keep a register of Members, and if applicable, the other registers required by the Law.

22.2 **Information in registers**

To the extent applicable, the Register must be kept in accordance with, and contain the information required by the Law. Otherwise, the RE may decide what information is included in the Register. If the Law applies, the RE has the powers conferred under the Law in relation to the Register.

22.3 **Changes**

Every Member must promptly notify the RE of any change of name or address and the RE must alter the Register accordingly.

23. NOTICES

23.1 A notice or other communication connected with this Constitution has no legal effect unless it is in writing.

23.2 In addition to any other method of service provided by law, the notice must be:

(a) sent by post, postage prepaid, to the address for the Member in the RE's register of interests;

(b) sent by facsimile to the facsimile number of the Member; or

(c) otherwise delivered including via email, at the address of the addressee of the Member as is subsequently notified.

23.3 A notice must be treated as given and received:

(a) if sent by post, on the 2nd Business Day (at the address to which it is

posted) after posting;

(b) if sent by facsimile or electronically before 5.00 p.m. on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of delivery.

23.4 Despite clause 23.3(ii) a facsimile is not treated as given or received unless at the conclusion of the transmission the sender's facsimile machine issues a transmission report which indicates that the relevant number of pages comprised in the notice have been sent.

23.5 A notice sent or delivered in a manner provided by clause 23.2 must be treated as validly given to and received by the party to which it is addressed even if:

(a) the addressee has been liquidated or deregistered or is absent from the place at which the notice is delivered or to which it is sent; or

(b) the notice is returned unclaimed.

23.6 Any notice by a party may be given and may be signed by the solicitor for the party.

23.7 Any notice to a party may be given to the solicitor for the party by any of the means listed in clause 23.2 to the solicitor's business address or facsimile number as the case may be.

24. LIABILITY OF MEMBERS

(a) The liability of each Member, whether actual, contingent or prospective, is limited to the unpaid Issue Price of his/her/its Units except if the RE and the relevant Member agree otherwise in writing that the liability of a Member may be further limited or waived.

(b) A creditor or other person claiming against the RE as trustee of the Scheme has no recourse against a Member and no Member is personally liable to indemnify the RE, any creditor of the RE or any person claiming against the RE in respect of any actual, contingent, prospective or other liability of the RE in relation to the Scheme.

25. RETIREMENT AND APPOINTMENT OF RE

s601FL 25.1 The RE may retire as RE as permitted by s601FM of the Law.

s601FM 25.2 The RE must retire when required by s601FM of the Law.

s601FR 25.3 If the RE changes the former RE must comply with s601FR of the Law.

s601FS 25.4 The rights, obligations and liabilities of a former RE are as detailed in s601FS of the Law.

26. CHANGING THE CONSTITUTION

s601GC(1) 26.1 This Constitution may be modified or repealed or replaced with a new Constitution:

(a) by special resolution of the Members of the Scheme;

or

(b) by the RE if the RE reasonably considers the change will not adversely affect Members' rights.

26.2 In the event the RE wishes to change the Constitution the RE must:

s601GC(2) (a) lodge with the ASIC a copy of the modification or the new Constitution;

(b) the modification, or repeal and replacement, cannot take effect until the copy has been lodged;

s601GC(3) (c) the RE must lodge with the ASIC a consolidated copy of the Scheme's Constitution if the ASIC directs it to do so;

s601GC(4) 26.3 The RE must send a copy of the Scheme's Constitution to a Member of the Scheme within seven (7) days if the Member:

(a) asks the RE in writing for the copy; and

(b) pays any fee (up to the prescribed amount) required by the RE.

27. STATEMENTS, ACCOUNTS AND AUDIT

27.1 Appointment of auditors

(a) The RE must appoint an Auditor to regularly audit the accounts in relation to the Scheme and perform the other duties required of the Scheme's auditors under this Constitution and the Law.

(b) The RE must appoint an Auditor of the Compliance Plan (as defined in section 601HG of the Law).

27.2 Retirement of auditors

The Scheme Auditor and the Compliance Plan Auditor may each retire or be removed in accordance with the Law.

27.3 Remuneration of Auditor

The remuneration of the Scheme Auditor and Compliance Plan Auditor will each be fixed by the RE.

27.4 Accounts and reports

(a) The accounts of the Scheme must be kept and prepared by the RE in accordance with applicable Accounting Standards and the Law.

(b The RE must report to Members concerning the affairs of the Scheme and their holdings as required by the Law. Subject to the Law, the person preparing a report may determine the form, content and timing of it.

27.5 Audit

The RE will cause:

(a) the Scheme Auditor to audit and report on the Scheme's accounts;

(b) the Compliance Plan Auditor to audit and report on the Compliance Plan,

each in the manner required by the Law.

28. MEETINGS OF MEMBERS

28.1 **Convening Meetings**

The RE may at any time call and convene a meeting of Members and must call and convene a meeting of Members when required to do so by the Law.

28.2 **Calling and holding meetings**

s252G(4) (a) A notice of meeting sent by post is taken to be given the day after it is delivered.

s252R(2) (b) If, at any time, there is only 1 Member of the Scheme, the quorum for a meeting is 1 in all other cases the quorum for a meeting is 2.

s252R(3) (c) If an individual is attending a meeting as a Member and as a body corporate representative, the RE may in determining whether a quorum is present, count the individual more than once.

s252W(2) (d) A proxy is not entitled to vote on a show of hands.

s252W(3) (e) A proxy is entitled to speak and vote for a Member (to the extent allowed by the appointment) even if the Member is present (but only so long as the Member does not speak or vote, as the case may be).

s252Y(2) (f) An appointment of proxy:

(i) is valid even if it does not specify the Member's address; and

(ii) may be a standing one.

s252Z(5) (g) The RE may determine, in relation to a particular meeting or generally, that proxy documents may be received up to any shorter period before the meeting.

s253K(2) (h) A poll cannot be demanded on any resolution concerning:

(i) the election of the chair of a meeting; or

(ii) the adjournment of a meeting.

29. OTHER ACTIVITIES AND OBLIGATIONS OF THE RE

29.1 Subject to the Law, nothing in this Constitution restricts the RE (or its associates) from:

(a) dealing with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity);

(b) being interested in any contract or transaction with itself (as manager, trustee or responsible entity of another trust or managed investment scheme or in another capacity) or with any Member or retaining for its own benefit profits or benefits derived from any such contract or transaction; or

(c) acting in the same or similar capacity in relation to any other trust or managed investment scheme.

29.2 All obligations of the RE which might otherwise be implied by law are expressly excluded to the extent permitted by law.

30. **GOVERNING LAW**

This Deed is governed by the laws of the State of Queensland. The RE and the Members submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

31. **ASIC INSTRUMENT**

If relief from the provisions of the Law granted by an ASIC Instrument requires that this Constitution contain certain provisions, then those provisions are taken to be incorporated into this Constitution at all times at which they are required to be included and prevail over any other provisions of this Constitution to the extent of any inconsistency. However, if the relief is granted by Class Order (rather than specifically in relation to the Scheme) then the ASIC Instrument (and the provisions it requires) will only be taken to be incorporated if the RE declares in writing that this is the case.

32. **UNCONTROLLED EVENTS**

To the extent permitted by law, if the RE is prevented from performing its duties under this Constitution or the law due to the occurrence of an Uncontrolled Event then the RE is not liable to the Members and nor is the RE liable for any loss or decrease in value of the Scheme Property.

EXECUTED AS A DEED at the Gold Coast, Queensland:

GIVEN under the Common Seal of LM INVESTMENT MANAGEMENT LIMITED ACN 077 208 461 by authority of a resolution of the Board of Directors under the hands of two Directors who certify that they are the proper officers to affix this seal and in the presence of:

) .....
) Director
)
)
) .....
) Director

A Justice of the Peace/Solicitor

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Australian Securities & Investments Commission

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
027850151

Form 5101
Corporations Act 2001
601GC

Notification of change to managed investment scheme's constitution

If there is insufficient space in any section of the form, print additional copies of the relevant page(s) and submit as part of this lodgement

Scheme details

Managed investment scheme name
LM FIRST MORTGAGE INCOME FUND

ARSN
089 343 288

Responsible entity name
LM INVESTMENT MANAGEMENT LTD

ACN
077 208 461

Lodgement details

Who should ASIC contact if there is a query about this form?

Firm/organisation
LM INVESTMENT MANAGEMENT LTD

Contact name/position description
BRUCE MACKENZIE - COMPLIANCE

ASIC registered agent number (if applicable)
220281 - (22583)

Telephone number
07 5584 4500

Postal address or DX address
PO BOX 485
SURFERS PARADISE QLD 4217

Securities and Investments
16 MAY 2012

1 Details of change

		ASIC form code
☒	Modification of constitution authorised by special resolution of members — Date of resolution [D D] [M M] [Y Y]: 16/05/12	B
☐	Relacement of constitution authorised by special resolution of members — Date of resolution [D D] [M M] [Y Y]	C
☐	Modification of constitution authorised by responsible entity — Date authorised [D D] [M M] [Y Y]	B
☐	Replacement of constitution authorised by responsible entity — Date of replacement [D D] [M M] [Y Y]	C
☐	Consolidated constitution — Date of consolidation [D D] [M M] [Y Y]	D

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SUPPLEMENTAL DEED POLL

DATE 16 MAY 2012

PARTIES

LM Investment Management Limited ACN 077 208 461 of Level 4, RSL Centre, 9 Beach Road, Surfers Paradise, Queensland 4217 (**Responsible Entity**)

BACKGROUND

(A) The LM First Mortgage Income Fund ARSN 089 343 288 (**Trust**) was established under a constitution dated 24 August 1999 made by the Responsible Entity, as amended.

(B) The Responsible Entity is the responsible entity of the Trust.

(C) Clause 26 of the constitution of the Trust (**Constitution**) provides that the Responsible Entity may modify the Constitution by special resolution of the Members of the Trust, subject to law (including the *Corporations Act 2001* (Cth) (**Corporations Act**).

(D) On 16 May 2012 the Members of the Trust resolved by special resolution to modify the Constitution in accordance with the provisions of this deed.

(E) The Responsible Entity may give effect to the amendments by executing a supplemental deed. Pursuant to section 601GC(2) of the Corporations Act, the amendments to the Constitution do not take effect until a copy of this deed is lodged with ASIC.

OPERATIVE PROVISIONS

1. **INTERPRETATION**

A term defined in the Constitution has the same meaning in this deed unless it is defined differently in this deed.

2. **AMENDMENTS TO THE CONSTITUTION**

The Constitution is modified in the manner set out in Schedule 1 to this deed.

3. **EFFECTIVE DATE**

The amendments to the Constitution set out in Schedule 1 to this deed will take effect on the later of:

(a) the date that a copy of this deed is lodged with ASIC, and

(b) the date that the Members of the Trust resolve by special resolution to confirm the special resolution passed on 16 May 2012 to modify the Constitution in accordance with the provisions of this deed

(such date being the **Effective Date**).

4. **BINDING PROVISIONS**

The provisions of this deed are binding on the Responsible Entity, each Member and all persons claiming through them as if each were a party to this deed.

5. **NO RESETTLEMENT**

Other than as expressly amended by this document, the Constitution is unchanged and the amendments to the Constitution made under this deed do not constitute a resettlement of the trust which has been established under the Constitution.

6. **GENERAL**

6.1 **Governing law and jurisdiction**

(a) This deed is governed by the laws of New South Wales.

(b) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales.

6.2 **Further actions**

The Responsible Entity must do all things and execute all further documents necessary to give full effect to this deed.

EXECUTED as a deed poll.

EXECUTED by **LM Investment Management Limited** ACN 077 208 461

in accordance with section 127(1) of the *Corporations Act 2001* (Cth):

Signature of director

SIMON TICKNER

Name

Signature of director/~~secretary~~

EKHARD VAN DER HOVEN

Name

SCHEDULE 1

Amendments to the Constitution

1. **NEW CLAUSE 9A**

With effect on and from the Effective Date, the Constitution is amended by inserting a new clause 9A (Transfer Facility) as follows:

"**9A TRANSFER FACILITY**

Definitions

9A.1 In this clause 9A, unless the context indicates otherwise:

Actual Unit Sale Price means, as at any Trigger Date for a Unit Sale Program, the price per Unit calculated in accordance with the following formula:

$$\frac{(NP \times BP) + NID - SD}{(BV}$$

where:

NP means the amount in the Net Proceeds Account as at that Trigger Date,
BV means the Book Value of the Sale Assets whose sale contributed to the Net Proceeds held in the Net Proceeds Account as at the Invitation Date of that Unit Sale Program,
BP means the Book Price of a Unit as at the Invitation Date of that Unit Sale Program,
NID means the Net Income Distributions as at that Trigger Date divided by the number of Sale Units (where that number is as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23),
SD means the duty (if any) payable to any Office of State Revenue on the transfer of a Unit under the Transfer Facility as at the Liquidity Date for that Trigger Date;

Asset Sale Program means the program for sales of Assets of the Scheme determined by the RE from time to time;

Assets of the Scheme means all assets of the Scheme including the properties over which the RE holds a mortgage or other security for the loans that are assets of the Scheme but (for the avoidance of doubt) excluding all Held Cash and all amounts held on trust for Buying Members under clause 9A.18(a);

Available Hold Income Reserve has the meaning given to that expression in clause 9A.14;

Available Sale Income Reserve has the meaning given to that expression in clause 9A.13;

Base Unit Sale Price means, for any Unit Sale Program, the price per Unit calculated in accordance with the following formula:

$$\frac{(NP \times BP)}{(BV}$$

where:

NP means the Expected Net Proceeds from the Sale Assets as at the Invitation Date of that Unit Sale Program,

BV means the Book Value of those Sale Assets as at the Invitation Date of that Unit Sale Program,
BP means the Book Price of a Unit as at the Invitation Date of that Unit Sale Program;

Book Price of a Unit means, as at any date ("Calculation Date"), the price calculated in accordance with the following formula as at the last Valuation Date prior to that Calculation Date:

$$\frac{NFV}{NOU}$$

where:

NFV means the Net Fund Value as at that Valuation Date,
NOU means the number of Units on Issue as at that Calculation Date;

Book Value means, for any Sale Assets as at any date ("Calculation Date"), the value of those Sale Assets as recorded in the books of the Scheme as at the date of the most recent audited accounts of the Scheme issued before that Calculation Date, taking into account any provision made in relation to those assets;

Buying Member has the meaning given to that expression in clause 9A.7;

Buying Member's Proportion of the Sale Units has the meaning, for any Buying Member, given to that expression in clause 9A.24;

Deutsche Bank Facility Agreement means the facility agreement dated 1 July 2010 made between LM Investment Management Limited in its capacity as responsible entity for the Scheme and Deutsche Bank AG, Sydney Branch;

Disposal Units has the meaning, for any Unit Sale Program, given to that expression in clause 9A.20;

Distributable Net Proceeds has the meaning, given to that expression in clause 9A.11;

Distribution Date means, for any Trigger Date in a Unit Sale Program, the Business Day immediately following the Liquidity Date for that Trigger Date;

Expected Net Proceeds means the net cash proceeds that the RE expects to receive from the sale of the Sale Assets under the Asset Sale Program, after deducting all costs of sale (including all brokerage, marketing expenses and transaction taxes);

Expected Sale Discount means, for any Investment Allocation Request, the fraction (expressed as a percentage) calculated in accordance with the following formula:

$$\frac{BV - NP}{BV}$$

where:

NP means the Expected Net Proceeds from the Sale Assets as at the Invitation Date of that Investment Allocation Request,
BV means the Book Value of those Sale Assets as at the Invitation Date of that Investment Allocation Request;

Facility Accounts means the Net Proceeds Account, Sale Asset Income Account and Hold Asset Income Account;

Final Completion Date means, in relation to any Unit Sale Program, the date on which the sale of all of the Sale Assets relating to that Unit Sale Program has been completed;

Held Cash has the meaning, as at any Trigger Date, given to that expression in clause 9A.26(d);

Hold Assets means all Assets of the Scheme that are not Sale Assets;

Hold Asset Income means, for any Unit Sale Program, the net income received by the RE from the Hold Assets after the Invitation Date for that Unit Sale Program;

Hold Asset Income Account means the account into which the Hold Asset Income is credited under clause 9A.10;

Invitation Date means, in relation to any Unit Sale Program and any Investment Allocation Request, the date of the Investment Allocation Request that initiated that Unit Sale Program;

Investment Allocation Request has the meaning given to that expression in clause 9A.2;

Liquidity Date means, for any Trigger Date in a Unit Sale Program, the 5th Business Day after that Trigger Date;

Member Election has the meaning given to that expression in clause 9A.3;

Net Income Distributions means, as at any date, the amount held as at that date in the Available Sale Income Reserve *plus* the amount held by the RE as at that date in accordance with the directions under clauses 9A.17 and 9A.18 in respect of distributions out of the Available Sale Income Reserve to Members;

Net Proceeds means the net cash proceeds received by the RE from the sale of the Sale Assets, after deducting all costs of sale (including all brokerage, marketing expenses and transaction taxes);

Net Proceeds Account means the account into which the Net Proceeds are credited under clause 9A.10;

Offer Closing Date has the meaning, in relation to any Investment Allocation Request, given to that expression in clause 9A.3;

Office of State Revenue means the Office of State Revenue of Queensland and any similar office in any other State or Territory of Australia;

Pro Rata Buyer Proportion has the meaning given to that expression in clause 9A.20;

Pro Rata Seller Proportion has the meaning given to that expression in clause 9A.20;

Release Date means the third anniversary of the date on which this clause 9A comes into effect or such earlier date (if any) as the RE determines;

Sale and Purchase Notice has the meaning given to that expression in clause 9A.20;

Sale Assets means, for any Unit Sale Program and any Investment Allocation Request, the assets identified in that Investment Allocation Request as the Assets of the Scheme that will be sold for the purposes of that Unit Sale Program under the Asset Sale Program (as adjusted under clause 9A.9);

Sale Asset Income means, for any Unit Sale Program, the net income received by the RE from the Sale Assets after the Invitation Date for that Unit Sale Program;

Sale Asset Income Account means the account into which the Sale Asset Income is credited under clause 9A.10;

Selling Member has the meaning given to that expression in clause 9A.6;

Selling Member's Disposal Units means, for any Selling Member and any Unit Sale Program, the Disposal Units for that Unit Sale Program that are held by that Selling Member;

Selling Member's Sale Units has the meaning, for any Selling Member and any Unit Sale Program, given to that expression in clause 9A.22;

Transfer Facility means the process for the sale and purchase of Units set out in this Clause 9A;

Trigger Date has the meaning, for any Units Sale Program, given to that expression in clause 9A.20;

Unit Sale Program means a program for the sale and purchase of Units under the Transfer Facility that is initiated by the issue by the RE of an Investment Allocation Request under this clause 9A.

Member Election

9A.2 At any time the RE may give a notice to the Members (**Investment Allocation Request**) inviting each Member to notify the RE:

(a) whether it wishes to sell its Units under the Transfer Facility or to continue to hold them, and

(b) if it wishes to sell its Units, the percentage of its Unit Holding that it wishes to sell (which may be 100% or such lesser percentage as the Member notifies the RE).

9A.3 The RE must specify in the Investment Allocation Request:

(a) the date (**Offer Closing Date**) by which the Member's notice (**Member Election**) must be received, which must not be less than [20] Business Days after the Invitation Date;

(b) the Sale Assets;

(c) the Base Unit Sale Price; and

(d) the Expected Sale Discount.

9A.4 Notwithstanding any other provision of this clause 9A:

(a) a Member is not entitled to indicate in its Member Election that it wishes to sell less than 1,000 Units or an integral multiple of 1,000 Units, except that it may indicate that it wishes to sell all of its Unit Holding even where its total Unit Holding is less than 1,000 Units or is not an integral multiple of 1,000 Units; and

(b) the RE may at any time reject a Member Election in which the Member notifies the RE is wishes to sell all or some of its Units, and deem the Member Election to be a notice that the Member wishes to hold all of its Units and deem the Member to be a

Buying Member, if the Member cannot provide satisfactory evidence of the Member's title or authority to deal with the Units which it wishes to sell.

9A.5 If a Member does not give the RE a Member Election by the Offer Closing Date it will be deemed to wish to hold all of its Units for the purposes of the Transfer Facility.

9A.6 A Member which notifies the RE in its Member Election that it wishes to dispose of all or any of its Units is a **Selling Member** in respect of those of its Units which it has elected to dispose of (as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23).

9A.7 A Member which notifies the RE in its Member Election that it wishes to hold all or any of its Units (or which is otherwise deemed under this clause 9A to wish to hold its Units) is a **Buying Member** in respect of those of its Units:

(a) which it wishes to hold (or is deemed under clause 9A.4 to wish to hold), or

(b) which are otherwise not transferred under this clause 9A due to any adjustments under clauses 9A.21, 9A.22 and 9A.23.

9A.8 A Member Election:

(a) will be taken to be an offer by that Member to the other Members to sell the Units confirmed for sale in its Member Election on the terms and in accordance with the procedures (including adjustments) of this clause 9A,

(b) will be taken to have been accepted by the Buying Members on the terms and in accordance with the procedures (including adjustments) of this clause 9A (and in the case of each Buying Member in respect of the Sale Units which the RE determines under clause 9A.23 are to be transferred to it) when the RE issues a Sale and Purchase Notice in respect of that Member's Sale Units, and

(c) will be binding on that Member in relation to the number of its Units that it elects to sell in its Member Election (as adjusted under clauses 9A.4, 9A.21, 9A.22, 9A.23 and 9A.43).

9A.9 After the Offer Closing Date specified in an Investment Allocation Request the RE may exclude one or more assets from the Sale Assets identified in that Investment Allocation Request if the RE considers that the net sale proceeds from the remaining Sale Assets are likely to be sufficient to fund the payment in full of the Base Unit Sale Price for the Units that are confirmed for sale in the Member Elections (taking into account the adjustments noted in this clause 9A).

Net Proceeds and Income Accounts

9A.10 The RE will:

(a) establish a separate account in its books for each Unit Sale Program for each of (1) the Net Proceeds, (2) the Sale Asset Income, and (3) the Hold Asset Income relating to that Unit Sale Program;

(b) credit amounts received in respect of the Net Proceeds, the Sale Asset Income, and the Hold Asset Income for a Unit Sale Program to their respective accounts for that Unit Sale Program as and when those amounts are received; and

(c) apply the amounts held in those accounts consistently with the requirements of this clause 9A.

Allocation of Net Proceeds

9A.11 The RE may at any time and from time to time as it considers fit allocate the balance at that time in the Net Proceeds Account to the following reserves:

(a) all amounts then payable or repayable under the Deutsche Bank Facility Agreement in relation to the Sale Assets from which the Net Proceeds then held in the Net Proceeds Account have been derived,

(b) the amount required for redemption of Units permitted by ASIC on "hardship" grounds,

(c) the amount required to pay distributions to Members previously determined by the RE but not yet paid,

(d) the amount required for feeder fund payments for distributions and expenses allowed under the Deutsche Bank Facility Agreement,

(e) the amount that in the RE's opinion should be held in cash reserve for any Liabilities (including operational costs, provisions and contingencies) or other purposes, and

(f) the amount of the Net Proceeds that is available (after deducting the amounts referred to in paragraphs (a) to (e) above) for distribution to Members (**Distributable Net Proceeds**).

9A.12 The RE may at any time and from time to time as it considers fit apply out of the Net Proceeds Account any amount credited to a reserve referred to in paragraphs 9A.11(a) to (e) above towards the payments contemplated by that reserve.

Allocation of Income

9A.13 Subject to clause 9A.15, the RE may at any time and from time to time as it considers fit:

(a) allocate the balance at that time in the Sale Asset Income Account to any of the reserves noted in paragraphs (a) to (e) of clause 9A.11,

(b) apply any amount so credited to any of those reserves towards the payments contemplated by that reserve,

(c) allocate the balance after such allocations and applications to a reserve for distribution to Members (**Available Sale Income Reserve**), and

(d) distribute to Members out of the Available Sale Income Reserve in cash any amount that in the RE's opinion should be distributed to Members to assist them to pay Australian tax liabilities expected to be incurred on distributions in respect of the Sale Asset Income.

9A.14 Subject to clause 9A.15, the RE may at any time and from time to time as it considers fit:

(a) allocate the balance at that time in the Hold Asset Income Account to any of the reserves noted in paragraphs (a) to (e) of clause 9A.11,

(b) apply any amount so credited to any of those reserves towards the payments contemplated by that reserve,

(c) allocate the balance after such allocations and applications to a reserve for distribution to Members (**Available Hold Income Reserve**), and

(d) distribute to Members out of the Available Hold Income Reserve in cash any amount that in the RE's opinion should be distributed to Members to assist them to pay Australian tax liabilities expected to be incurred on distributions in respect of the Hold Asset Income.

9A.15 No amount credited to the Sale Asset Income Account or the Hold Asset Income Account or distributed under clauses 9A.13 and 9A.14 will constitute Distributable Income until it is determined to be Distributable Income under clause 11.3.

9A.16 Where an amount is distributed to Members under this clause 9A, the determination of whether that distribution is a distribution of capital or income will not be affected by the crediting of that amount to or distribution out of any of the accounts referred to in clause 9A.10 or any of the reserves referred to in clause 9A.11.

Distribution Directions

9A.17 Each Selling Member irrevocably directs the RE:

(a) to invest on its behalf all amounts distributed to it out of the Available Sale Income Reserve or the Available Hold Income Reserve (other than cash amounts distributed under clauses 9A.13 or 9A.14) into a separate account of the RE to be held (together with any interest earned on those amounts) on trust for that Selling Member; and

(b) to pay those amounts (together with any interest earned on those amounts) on its behalf upon completion of the transfer of its Sale Units in accordance with the directions in clause 9A.28.

9A.18 Each Buying Member irrevocably directs the RE:

(a) to invest on its behalf all amounts distributed to it out of the Available Sale Income Reserve (other than cash amounts distributed under clause 9A.13) into a separate account of the RE to be held (together with any interest earned on those amounts) on trust for that Buying Member;

(b) to pay those amounts (together with any interest earned on those amounts) on its behalf upon completion of the transfer of Sale Units to it in accordance with the directions in clause 9A.28;

(c) to reinvest all distributions made to it out of the Available Hold Income Reserve before the Release Date (other than cash amounts distributed under clause 9A.14) by way of application for additional Units in the Scheme under, and on the terms of, clause 12.6 on the basis that, for the purposes of that clause, the RE is deemed to have invited the Buying Member to make that reinvestment, and the Buying Member is deemed to have accepted that reinvestment offer; and

(d) to pay or apply all distributions made to it out of the Available Hold Income Reserve on or after the Release Date in accordance with clauses 11 and 12 as applying at that time.

9A.19 Each Member irrevocably directs the RE to distribute on each Distribution Date the Distributable Net Proceeds as at that date to the Members in accordance with this clause 9A pro rata to their Unit Holdings as at that Distribution Date.

Sale and Purchase of Units

9A.20 On the 5th Business Day after the Final Completion Date for a Unit Sale Program, and on such other earlier date or dates as the RE considers appropriate, (each a **Trigger Date**) the RE must give a notice (**Sale and Purchase Notice**) to Members setting out:

(a) the number of Units that have been confirmed for sale in Member Elections (as adjusted under clause 9A.43) that have not previously been transferred under the Transfer Facility or otherwise since the Invitation Date for that Unit Sale Program (and excluding Member Elections rejected under clause 9A.4) (**Disposal Units**),

(b) the amount of the Distributable Net Proceeds as at the Trigger Date,

(c) the number of Units to be sold and purchased (as whole Units) under this clause 9A in relation to those Member Elections as at that Trigger Date (**Sale Units**), where that number is calculated (subject to clauses 9A.4, 9A.21, 9A.22 and 9A.23) by dividing the amount of the Distributable Net Proceeds as at that Trigger Date by the Actual Unit Sale Price as at that Trigger Date, rounded down to the nearest whole Unit,

(d) the proportion of each Selling Member's Disposal Units as at that Trigger Date that will be sold under this clause 9A (subject to rounding down to whole Units under clause 9A.22), where that proportion (**Pro Rata Seller Proportion**) is the fraction calculated by dividing the number of Sale Units as at that Trigger Date (as adjusted under clauses 9A.4, 9A.21 and 9A.23 but before adjustment for rounding down under clause 9A.22) by the number of Disposal Units as at that Trigger Date, expressed as a percentage,

(e) the number of Sale Units to be bought by each Buying Member under this clause 9A as at that Trigger Date, expressed as a number per Unit held by a Buying Member (**Pro Rata Buyer Proportion**), where that number is calculated by dividing the number of Sale Units as at that Trigger Date (as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23) by the number of all Units held by Buying Members as at that Trigger Date, rounded down to two decimal points,

(d) the Liquidity Date for that Trigger Date, and

(e) the Distribution Date for that Trigger Date.

9A.21 If the number of Sale Units calculated under clause 9A.20(c) for a Trigger Date plus the aggregate number of Sale Units calculated under clause 9A.20(c) for each previous Trigger Date in the same Unit Sale Program is greater than or equal to the number of Disposal Units for that Unit Sale Program:

(a) the number of Sale Units as at that Trigger Date will be deemed to be the number equal to the balance of the Disposal Units for that Unit Sale Program then remaining unsold (whether under the Unit Sale Program or otherwise);

(b) the Pro Rata Seller Proportion will be deemed to be 100%; and

(c) the amount of the Distributable Net Proceeds that is attributable to the number of Sale Units that is greater than the number of Disposal Units will be reallocated to the cash reserve referred to in clause 9A.11(d).

9A.22 The number of a Selling Member's Disposal Units that will be sold under this clause 9A in relation to a Trigger Date (**Selling Member's Sale Units**) will be the number calculated by multiplying the number of that Selling Member's Disposal Units remaining unsold as at that Trigger Date (whether under the Unit Sale Program or otherwise) by the Pro Rata Seller Proportion, adjusted (where applicable) under clause 9A.23, and rounded down to the nearest whole Unit. The number of Sale Units calculated under clause 9A.20(c) will be reduced to reflect any such adjustment and rounding down so that the total number of Sale Units equals the sum of all of the Selling Members Sale Units.

9A.23 In addition to the adjustment under clauses 9A.21 and any rounding down under clause 9A.22, and without limiting clauses 9A.34 and 9A.37, the RE may reduce the number of a

Selling Member's Sale Units for a Trigger Date by any number (including to zero) if the RE considers that such reduction is necessary to ensure that the implementation of the Transfer Facility does not have a material adverse financial effect on the Scheme. In determining whether to make any such reduction and, if so, how to apply it to a Selling Member's Sale Units for a Trigger Date, the RE may take into account:

(a) the implications of the sale of the Selling Member's Sale Units for that Trigger Date under the Transfer Facility on the tax treatment of the Scheme (including in relation to the trading history of Units and the change in the members of the Scheme during relevant periods),

(b) the principle that priority should be given to Member Elections in terms of the chronological order in which they have been received by the RE, and

(c) such other factors as in the RE's opinion are relevant to the potential material adverse financial effect on the Scheme in relation to which such reduction is necessary.

9A.24 The number of the Sale Units (as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23) to be bought by a Buying Member under this clause 9A as at any Trigger Date (**Buying Member's Proportion of the Sale Units**) will be the number calculated by multiplying the number of Units held by the Buying Member as at the Trigger Date by the Pro Rata Buyer Proportion, rounded down to two decimal points .

9A.25 The amount of the Distributable Net Proceeds that is attributable through the calculations in clause 9A.20 to:

(a) any fraction of the Selling Member's Disposal Units that is excluded from the Selling Member's Sale Units by the rounding down in clause 9A.22,

(b) any fraction of a Unit that is excluded from the Sale Units by the rounding down in clause 9A.20(c), or

(c) any Unit that is excluded from the Sale Units by a reduction under clause 9A.23,

will be reallocated to the cash reserve referred to in clause 9A.11(e).

9A.26 On each Trigger Date in a Unit Sale Program a binding agreement will be deemed to have come into effect between the Members under which:

(a) each Selling Member agrees to sell its Selling Member's Sale Units as at that Trigger Date to the Buying Members for that Unit Sale Program, allocated between them in accordance with the Pro Rata Buyer Proportion for that Trigger Date, and

(b) each Buying Member agrees to buy from the Selling Members its Buying Member's Proportion of the Sale Units as at that Trigger Date,

in each case:

(c) at a price per Unit equal to the Actual Unit Sale Price as at that Trigger Date,

(d) on the basis that:

(i) at Completion all amounts held for Selling Members in accordance with their direction in clause 9A.17 in respect of the Sale Units as at that Trigger Date (**Held Cash**) will be applied in accordance with the directions in clause 9A.28, and

(ii) the transfer of any Sale Units includes all rights to distributions of capital and income in respect of the Sale Units paid on or after that Trigger Date (irrespective of when the distribution was determined by the RE),

(e) with completion of the transfer of the Sale Units to occur on the Liquidity Date for that Trigger Date but on the basis that payment of the price for the Units will be paid on the Distribution Date for that Trigger Date ,

(f) on the basis that each Member appoints the RE its attorney to complete the sale and purchase on its behalf with full authority to do so as more specifically described in clause 9A.30,

(g) on the basis that each Selling Member warrants to each Buying Member and to the RE that, at the time of completion of the transfer under this clause 9A:

(i) the Selling Member's Sale Units will be fully paid and free from all mortgages, charges, liens, encumbrances, pledges, security interests and other interests of third parties of any kind, whether legal or otherwise, and restrictions of any kind, and

(ii) it has full power and capacity to sell and transfer its Selling Member's Sale Units (together with any rights and entitlements attaching to those Units) to the Buying Members under the Transfer Facility, and

(h) otherwise on the terms and conditions of this clause 9A.

Completion of Sale and Purchase

9A.27 Each Member directs the RE to take all steps, including execute and deliver all documents (whether under seal or otherwise) and make all payments, in the name of and on behalf of the Member, that the RE considers necessary or desirable to confirm and complete any sale and purchase of Units that is referred to in clause 9A.26.

9A.28 Without limiting clause 9A.27:

(a) each Selling Member directs the RE to pay to the Buying Members (or as they direct) all of the Held Cash attributable to its Sale Units as at the relevant Trigger Date; and

(b) each Buying Member directs the RE to apply the Distributable Net Proceeds that are distributed to it on a Distribution Date under clause 9A.19 (including any amount distributed to it in respect of its Buying Member's Proportion of the Sale Units) and the amount held for it in relation to its Units in accordance with its directions in clause 9A.18 and all Held Cash distributed to it in accordance with the Selling Members' directions under clause 9A.28(a) towards:

(i) payment on that date of the price payable by it under clause 9A.26 for those Units until that price is paid in full, and

(ii) payment on that date to the relevant Office of State Revenue of any duty payable by it on the transfer of those Units,

and to reinvest any remaining surplus by way of application for additional Units in the Scheme under, and on the terms of, clause 12.6 on the basis that, for the purposes of that clause, the RE is deemed to have invited the Buying Member to make that reinvestment, and the Buying Member is deemed to have accepted that reinvestment offer.

These directions are irrevocable.

9A.29 The RE must register each transfer of Units completed in accordance with clause 9A.26 on the Liquidity Date for the relevant Trigger Date.

Appointment of RE as attorney

9A.30 Without limiting clause 20, each Member appoints the RE and any director, officer, attorney or substitute nominated by the RE severally for this purpose as its attorney and agent with the right and authority to take all steps, including execute and deliver all documents (whether under seal or otherwise) and make all payments, in the name of and on behalf of the Member to confirm and complete any sale and purchase of Units under this clause 9A, including (without limitation):

(a) to determine as it sees fit (consistently with the agreement set out in clause 9A.26) the particular Sale Units that are to be transferred on completion by a particular Selling Member to a particular Buying Member,

(b) to execute and deliver on the Liquidity Date on behalf of the both the relevant Selling Member and the relevant Buying Member all instruments of transfer of Units necessary or desirable to give effect to that determination;

(c) to pay to a Selling Member on the Distribution Date the price payable to that Selling Member under clause 9A.26 out of the distributions that it is directed by the Buying Members to apply towards that purpose under clause 9A.28;

(d) to pay to each relevant Office of State Revenue on behalf of the relevant Buying Member any duty payable by that Buying Member on the transfer of Units to it under the Transfer Facility; and

(e) to enforce on behalf of any Member at the cost of the Scheme any of its rights under the Transfer Facility (including in relation to any breach of the warranty set out in clause 9A.26(g)).

9A.31 At the request in writing of the RE a Member must execute separate powers of attorney in a form reasonably required by the RE appointing the RE as its attorney for the purposes of this clause.

9A.32 Any attorney may exercise its rights under clause 9A.30 or any power of attorney executed under clause 9A.31 notwithstanding that the exercise of the right constitutes a conflict of interest or duty.

9A.33 Each Member indemnifies and shall keep indemnified each attorney against any liability, loss, cost, expense or damage arising from the lawful exercise of any right by the attorney under clause 9A.30 or any power of attorney executed under clause 9A.31.

Termination of Unit Sale Program

9A.34 Notwithstanding the other provisions of this clause 9A, if at any time the RE considers that it is not in the best interests of Members to continue to implement the Transfer Facility in relation to a particular Investment Allocation Request issued under this clause, the RE may terminate the Unit Sale Program initiated by that Investment Allocation Request by a determination to that effect.

9A.35 Upon making any such determination under clause 9A.34:

(a) all notices, elections, agreements and other steps taken or deemed to have occurred under this clause 9A in relation to that Unit Sale Program will cease to have effect except for steps relating to transfers of Units which have been completed under this clause before the determination was made, and

(b) the RE must take all steps necessary (including in relation to allocations in, and distributions out of, the Facility Accounts) to put the Members back into the same position in relation to the Units they continue to hold that that they would have been in if the Unit Sale Program had not been initiated.

9A.36 A determination in relation to a Unit Sale Program under clause 9A.34 does not affect the implementation of any other Unit Sale Program. For the avoidance of doubt, any determination under clause 9A.34 does not affect any determinations made by the RE under clauses 11.3 or 12.1 in relation to the Distributable Income of the Scheme for a Distribution Period and does not affect Members present entitlement to that Distributable Income under clause 12.3.

Acknowledgements and authorities

9A.37 Without limiting any of its rights, powers, discretions, authorities and indemnities under this clause 9A, it is expressly acknowledged and the RE is expressly instructed that it is authorised to initiate and implement any Unit Sale Program, including the issue of Investment Allocation Requests and Sale and Purchase Notices, notwithstanding that doing so may or will result in a material adverse financial effect on the Scheme (whether in relation to the tax treatment of the Scheme or otherwise).

9A.38 The Buying Members authorise the RE to appoint itself or the Custodian or such other person as the RE determines as their nominee to hold the Sale Units transferred to the Buying Members under any Unit Sale Program on their behalf in the name of the nominee on such terms as the RE considers appropriate.

9A.39 The Buying Members acknowledge that all administrative options selected by a Buying Member in relation to its Units (including as to currency conversion, investment term and distribution reinvestment directions) will be deemed to apply also to all Units transferred to the Buying Member under this clause 9A, and that any costs incurred in providing and administering those options are expenses of the Scheme.

Further Unit Sale Programs

9A.40 The RE may from time to time issue a further Investment Allocation Request under clause 9A before the Final Completion Date for an earlier Investment Allocation Request provided that:

(a) the assets identified for sale in the further Investment Allocation Request do not include assets that comprise Sale Assets in any earlier Investment Allocation Request;

(b) a Member is not entitled to elect to dispose in its Member Election in response to a further Investment Allocation Request any Units that it has confirmed for disposal in its Member Election in response to an earlier Investment Allocation Request (other than Units that it continues to hold due to the rejection of its Member Election under clause 9A.4 or due to any adjustment under clauses 9A.21, 9A.22, 9A.23 or 9A.43);

(c) the sale and purchase of Units resulting from that further Investment Allocation Request (and all steps relating to it) will be taken to be a separate Unit Sale Program under this clause 9A;

(d) the RE must establish separate Facility Accounts for each Unit Sale Program; and

(e) each of the definitions in clause 9A.1 will apply separately in relation to each Unit Sale Program by reference to the Investment Allocation Request, Sale Assets,

Member Elections Trigger Dates and other elements of and steps in that Unit Sale Program.

Withdrawal Notices

9A.41 All Withdrawal Notices given by Members to the RE which remain unprocessed as the date on which this clause 9A comes into effect (other than Withdrawal Notices permitted by ASIC on hardship grounds) are deemed to be of no effect.

9A.42 Unless the RE determines otherwise and notifies the Members accordingly, a Member may not give a Withdrawal Notice in relation to any of its Units before the Release Date (other than a Withdrawal Notice permitted by ASIC on hardship grounds).

Adjustment of Member Elections

9A.43 A Member may at any time by notice to the RE ask the RE to adjust its Member Election for a Unit Sale Program by increasing or reducing (as set out in the Member's notice) the percentage of the Member's Unit Holding that it wishes to sell.

(a) The RE may accept (in whole or in part) or reject any such request in its absolute discretion.

(b) If the RE decides to accept the request (in whole or in part) it may only do so in accordance with and to the extent permitted by this clause 9A.43.

(c) The RE may not reduce the Member's Election in a way that would affect the sale of any Units that have already, as at the date of the RE's decision (**Adjustment Date**), been sold under that Unit Sale Program or that are included in the Sale Units for that Unit Sale Program notified in a Sale and Purchase Notice issued on or before the Adjustment Date.

(d) The RE may not increase the Member's Election in a way that would increase the number of Sale Units for that Unit Sale Program notified in a Sale and Purchase Notice issued on or before the Adjustment Date.

(e) Where a Member wishes to increase the percentage of its Unit Holding that it wishes to sell in a Unit Sale Program, and distributions have been made, between the Invitation Date for that Unit Sale Program and the Adjustment Date, out of the Available Sale Income Reserve or Available Hold Income Reserve on Units which would be included in that Member's Disposal Units if the RE accepted the Member's request (**Additional Sell Units**):

(i) the Actual Unit Sale Price for that Member's Sale Units in that Unit Sale Program must be reduced to the extent necessary to ensure that the RE is able to implement the Transfer Facility for other Members in accordance with the principles on Unit value and cash payments on Completion set out in the other clauses of this clause 9A as if the Additional Sell Units had been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE, and

(ii) the RE must take all other steps necessary to put the Members into the same position on and from the Adjustment Date that they would have been in if the Additional Sell Units had been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE.

(f) Where a Member wishes to reduce the percentage of its Unit Holding that it wishes to sell in a Unit Sale Program, and distributions have been made, between the

Invitation Date for that Unit Sale Program and the Adjustment Date, out of the Available Sale Income Reserve or Available Hold Income Reserve on Units which would cease to be included in that Member's Disposal Units if the RE accepted the Member's request (**Additional Hold Units**):

(i) the RE must deal (or adjust its dealings) with those distributions as necessary to ensure that they are held or reinvested as they would have been under this clause 9A (including the directions in clauses 9A.17 and 9A.18) if the Additional Hold Units had not been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE, and

(ii) the RE must take all other steps necessary to put the Members into the same position on and from the Adjustment Date that they would have been in if the Additional Hold Units had not been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE.

Facilitating Implementation

9A.44 Notwithstanding any other provision of this clause 9A, if the RE encounters any administrative difficulty when it implements the Transfer Facility (whether due to lack of express guidance in this clause 9A, or inconsistency between provisions or any other factor) the Members authorise the RE to take all steps the RE considers necessary or desirable (including making adjustments to the number or allocation of Disposal Units and Sale Units, or the calculations of the Actual Unit Sale Price, or to allocations in, and distributions out of, the Facility Accounts) to enable the RE to implement the Transfer Facility for Members in a way that in the RE's opinion is most consistent with the principles in this clause 9A."

2. **NEW CLAUSE 3.3A**

With effect on and from the Effective Date, the Constitution is amended by inserting a new clause 3.3A as follows:

"3.3A Notwithstanding clause 3.3, a fraction of a Unit up to two decimal places may be transferred under clauses 9 or 9A. Without limiting clause 9A, where a sale and purchase under clause 9A would result in the transfer of a fraction of a Unit, the number of Units to be transferred must be rounded down to the nearest two decimal points."

3. **NEW CLAUSE 5.1A**

With effect on and from the Effective Date, the Constitution is amended by inserting a new clause 5.1A as follows:

"5.1A Notwithstanding clause 5.1(a), the RE does not have power to, and must not, issue any Unit between the last Business Day of a Sale Period and the Distribution Date for that Sale Period."

4. **MODIFY CLAUSE 9.1**

With effect on and from the Effective Date, the Constitution is amended by modifying clause 9.1(a) to read as follows:

"9.1(a) Subject to this Constitution, a Unit (including a fraction of a Unit up to two decimal places) may be transferred by instrument in writing, in any form authorised by Law or in any other form that the RE approves. In this Constitution any reference to the transfer or transmission of a Unit will be taken to include a reference to a fraction of a Unit up to two

decimal places, and the interest of a Member will include any interest represented by any such fraction of a Unit that the Member holds."

Australian Securities & Investments Commission

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
028183017

Form 5101
Corporations Act 2001
601GC

Notification of change to managed investment scheme's constitution

If there is insufficient space in any section of the form, print additional copies of the relevant page(s) and submit as part of this lodgement

Scheme details

Managed investment scheme name
LM First Mortgage Income Fund

ARSN
089 343 288

Responsible entity name
LM Investment Management Limited

ACN
077 208 461

Lodgement details

Who should ASIC contact if there is a query about this form?

Firm/organisation
Norton Rose Australia

Contact name/position description
Peter Schmidt - Partner

ASIC registered agent number (if applicable)
27628 (Brisbane)

Telephone number
(07) 3414 2888

Postal address or DX address
GPO Box 407, Brisbane, QLD 4001

1 Details of change

		ASIC form code
☐	Modification of constitution authorised by special resolution of members — Date of resolution [D D] [M M] [Y Y]	B
☐	Replacement of constitution authorised by special resolution of members — Date of resolution [D D] [M M] [Y Y]	C
☒	Modification of constitution authorised by responsible entity — Date authorised 26/10/12 [D D] [M M] [Y Y]	B
☐	Replacement of constitution authorised by responsible entity — Date of replacement [D D] [M M] [Y Y]	C
☐	Consolidated constitution — Date of consolidation [D D] [M M] [Y Y]	D

2 Documents to be attached

- A copy of the modification or the new constitution.
  The modification, or repeal and replacement, cannot take effect until the copy has been lodged.

OR

- A consolidated copy of the scheme's constitution if directed to do so by ASIC.

Signature

This form must be signed by a director or secretary of the responsible entity

I certify that the information in this form is true and complete.

Name

Francene Mulder

Capacity

☒ Director of responsible entity

☐ Secretary of responsible entity

Signature

Date signed

2 6 / 1 0 / 1 2

[D D] [M M] [Y Y]

Lodgement

Send completed and signed forms to:
Australian Securities and Investments Commission,
GPO Box 9827 in your capital city.

For more information

Web	www.asic.gov.au
Need help?	www.asic.gov.au/question
Telephone	1300 300 630

NORTON ROSE

Dated 26 OCTOBER 2012

Supplemental Deed

LM First Mortgage Income Fund
ARSN 089 343 288

LM Investment Management Limited
ACN 077 208 461

John Moutsopoulos
Norton Rose Australia
Level 18, Grosvenor Place, 225 George Street
Sydney NSW 2000
Telephone: +61 2 9330 8166
www.nortonrose.com
Our ref: 2789191

Supplemental Deed dated 26 OCTOBER 2012

Parties **LM Investment Management Limited** ACN 077 208 461
of Level 4, RSL Centre, 9 Beach Road, Surfers Paradise, Queensland 4217
(Responsible Entity)

Introduction

A By a replacement constitution lodged with the Australian Securities & Investments Commission dated 10 April 2008, as amended **(Constitution)**, the scheme currently known as LM First Mortgage Income Fund ARSN 089 343 288 **(Scheme)** is registered as a managed investment scheme and the Responsible Entity is appointed as the responsible entity of the Scheme.

B Pursuant to clause 26.1(b) of the Constitution and section 601GC(1)(b) of the Law, the Constitution may be modified by the Responsible Entity if it reasonably considers the change will not adversely affect Members' rights.

C At the request of the responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875, the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868, the Constitution of the Scheme is to be amended to recognise and acknowledge the intent of See Through Voting provisions which have been inserted into their respective constitutions.

D The Responsible Entity reasonably considers that the modifications to the Constitution proposed to be made by this supplemental deed will not adversely affect Members' rights.

Operative provisions

1 Interpretation

Except to the extent that it is given a special meaning in this supplemental deed, any word or expression which has a particular meaning in the Constitution must, when used in this supplemental deed, be given the same meaning as it has in the Constitution.

2 Operation of this deed

This deed takes effect as a supplemental deed to the Constitution on the day it is lodged with ASIC pursuant to section 601GC(2) of the Law.

3 Amendments to the Constitution

3.1 Subject to clause 2, the Constitution is modified by including the following:

(a) Insert new definition into the Directory of Terms at clause 1.1:

"Feeder Funds" means the LM Currency Protected Australian Income Fund ARSN 110 247 875, the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (each a **"Feeder Fund"**)."

(b) Insert new clause 33 into the Constitution:

"33. **See Through Voting Covenants**

The Scheme's RE recognises and acknowledges the intent and effect of the See Through Voting provisions contained within Schedule 1 of the respective Feeder Funds' constitution."

3.2 The provisions of the Constitution are not otherwise affected.

4 Binding provisions

The provisions of this supplemental deed are binding on the Responsible Entity, each Member and all persons claiming through them as if each were a party to this deed.

5 No resettlement

Nothing in this deed constitutes a resettlement or redeclaration of the Scheme.

6 Governing law

This deed is governed by and is to be construed according to the laws of Queensland.

Executed as a deed and delivered on the date shown on the first page

Executed by **LM Investment Management Limited** ACN 077 208 461 in accordance with section 127 of the *Corporations Act 2001*:

Director/company secretary	Director
Francene Maree Mulder	PETER CHARLES DRAGE
Name of director/company secretary (BLOCK LETTERS)	Name of director (BLOCK LETTERS)

PERMANENT TRUSTEE AUSTRALIA LIMITED

and

LM INVESTMENT MANAGEMENT LTD

CUSTODY AGREEMENT

PERMANENT TRUSTEE AUSTRALIA LIMITED
23-25 O'Connell Street
SYDNEY NSW 2000
DX 383 SYDNEY
Tel: (02) 9321 1600
Fax: (02) 9321 1659
#140216/v2

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CUSTODY AGREEMENT

THIS AGREEMENT is made the 4 day of February 1999

BETWEEN: **PERMANENT TRUSTEE AUSTRALIA LIMITED** (ACN 008 412 913) a company duly incorporated in New South Wales having its registered office at 23-25 O'Connell Street, Sydney, in the said State, and an office at Level 8, 410 Queen St, Brisbane, Queensland ('Permanent')

AND: **LM INVESTMENT MANAGEMENT LTD** (ACN 077 208 461) a company duly incorporated in Queensland having its registered office at Level 4, RSL Centre, 44A Cavill Avenue Surfers Paradise in the State of Queensland (the 'Client')

OPERATIVE PROVISIONS:

1. INTERPRETATION

1.1 In this agreement, unless the context otherwise requires:

'Austraclear' means the system operated by Austraclear Limited performing the role of central depository for securities traded in the Australian financial market, and which provides a real-time system for clearing and settling corporate and semi-government debt securities and financial derivatives.

'ASIC' means the Australian Securities and Investments Commission or such other government authority that performs the role undertaken by ASIC in relation to managed investment schemes at the date of this agreement.

'Authorised Person' means the persons nominated by each of the Client and Permanent respectively who are authorised to make any written communication or take action on behalf of the Client or Permanent respectively in relation to the performance of the relevant party under this agreement. The Client may nominate as its Authorised Persons any officers or employees of a Manager employed by the Client. A party may impose restrictions on the authority of any Authorised Person by written notice to the other party. The Authorised Persons and any restrictions on authority as at the date of this agreement are specified in schedule 1 and may be varied upon written notice by the respective party to the other party.

'Business Day' means a day on which banks are open for business in Brisbane, but excludes Saturdays, Sundays, public holidays and bank holidays.

'CHESS' stands for 'Clearing House Electronic Subregister System' and means the clearing house established and operated by Securities Clearing House ('SCH') for the clearing, settlement, transfer and registration of securities approved by SCH.

'Custodially Held', in relation to an asset of a Scheme held by or on behalf of Permanent under this agreement means that Permanent or the person holding the asset on Permanent'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 Permanent or the person holding the asset on Permanent's behalf having effective control of the asset for the purpose of its safekeeping (whether or not Permanent or the person holding the asset on Permanent's behalf, as the case may be, also performs other services in relation to the asset).

'Instructions' has the meaning set out in clause 5.

'Law' means the Corporations Law.

'Manager' means a person appointed by the Client to provide management services in respect of all or part of the Portfolio.

'Portfolio' means property of a Scheme Custodially Held from time to time by Permanent or a Sub-custodian pursuant to this agreement.

'RITS' stands for 'Reserve Bank Information and Transfer System' and means the real time computerised settlement and information system established by the Reserve Bank of Australia for settlements, electronic trading and bidding, and cash transfers for parties with Reserve Bank accounts.

'SCO' means the Client's Senior Compliance Officer.

'Scheme' means those schemes listed in schedule 2 and any other scheme included by mutual agreement in writing between Permanent and the Client.

'Sub-custodian' means any person engaged pursuant to clause 6.1 to Custodially Hold some part or all of the Portfolio on behalf of Permanent.

'SWIFT' stands for 'Society for Worldwide Interbank Financial Telecommunications' and means the international store and forward network system which processes a range of financial transactions relating to, inter alia, bank transfers, foreign exchange, loans, deposits and securities.

'Taxes' means all taxes of whatever nature lawfully imposed, including income tax, recoupment tax, land tax, sales tax, fringe benefits tax, group tax, capital gains tax, profit tax, interest tax, tax on the provision of goods or services, property tax, undistributed profits tax, withholding tax, municipal rates, financial institutions duty, bank account debit tax, stamp duties and other taxes, charges and liens assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, Territory or municipal taxation or excise governmental agency, including any interest or fee imposed in connection with any such tax, rates, duties, charges or liens.

'Title Documents' means the written evidence of title to or interest in any of the assets forming part of the Portfolio.

1.2 In this agreement, unless the context otherwise requires:

(a) words importing one gender include the other genders;

(b) the singular includes the plural and vice versa;

(c) a reference to a party is a reference also to that party's respective successors or assigns;

(d) a reference to a *person* includes an individual, firm, company, corporation or unincorporated body of persons, or any state or government or any agency thereof (in each case, whether or not having separate legal personality) and reference to a *company* includes a person;

(e) a reference to an *agent* does not include any pricing service or supplier of pricing information used by Permanent for valuation or pricing purposes;

(f) headings are for convenience only and shall not affect interpretation;

(g) mentioning anything after, *include, includes* or *including* does not limit what else may be included;

(h) references to sections, clauses and schedules are references to sections, clauses and schedules of this agreement;

(i) a reference to Permanent or the Client includes, where the context permits a reference to their respective officers, employees and agents or any of them;

(j) a reference to the *knowledge, belief or awareness* of any person in relation to a matter means the knowledge, belief or awareness that the person would have if they had made all reasonable enquiries of others who could reasonably be expected to have information relevant to the matter and, where those enquiries would have prompted a reasonable person to make further enquiries, made those further enquiries;

(k) a reference to any legislation or to any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued relating to it;

(l) references to dollar and '$' refer to amounts in Australian currency; and

(m) the schedules to this agreement form part of this agreement.

2. APPOINTMENT OF PERMANENT

2.1 The Client appoints Permanent to provide custodial services on the terms of this agreement.

2.2 Permanent accepts its appointment and agrees to provide custodial services to the Client on the terms of this agreement.

2.3 Permanent acknowledges that the Client will assess Permanent's performance on a regular basis in accordance with the methods and standards identified in schedule 3.

3. FUNCTION AND POWERS OF PERMANENT

3.1 Subject to the provisions of this agreement, Permanent agrees to custodially hold the Portfolio and Title Documents as agent for the Client in relation to each Scheme.

3.2 The Client authorises Permanent to:

(a) purchase, acquire, issue, release, sell or dispose of property to form or forming part or all of any Portfolio on receipt of Instructions from the Client and execute all transfers, releases, and assurances and other documents necessary for any such purpose;

(b) receive and hold or procure the receipt and holding of any property so purchased or acquired and any interest, dividend, rent or other income accruing in respect of it and any document of title to it in safe custody;

(c) procure safe custody of property of the Portfolio in bearer form;

(d) procure registration in the name of Permanent or of a Sub-custodian, as the case requires, of property of the Portfolio in a registrable form unless it is otherwise impractical or inconsistent with market practice or otherwise permitted with the consent of the Client; and

(e) provide the custody services and other administrative services as set out in this agreement or as agreed from time to time between Permanent and the Client. In such circumstances Permanent is entitled to receive additional fees as agreed between the parties.

3.3 Permanent may establish an account in the name of the Client designating a Scheme or, if otherwise instructed by the Client, some other name, with any bank or company approved by the Client and operate on the account in accordance with Instructions from the Client.

3.4 Permanent may refuse to purchase, acquire, issue, release, sell, accept the deposit or transfer of a security, document or other property, and the Client must accept a return of the document or transfer of the security or other property at the request of Permanent. In particular, Permanent has no obligation to accept into the Portfolio or acquire any partly paid investment unless the Client has made arrangements satisfactory to Permanent to set aside in the name of Permanent money or other property sufficient to provide for payment of the investment in full.

3.5 The Client agrees that, in relation to property held on a pooled basis or in an omnibus account, the transfer or delivery of property in accordance with this agreement of the same type and number as the property so held will constitute a proper performance by Permanent of its obligations under this agreement.

3.6 Permanent may execute or make on behalf of the Client any certificates, declarations or affidavits which are required to receive into or transfer out of its custody any property of or for any Portfolio.

3.7 The Client agrees that Permanent or any Sub-custodian may hold any property included in a Portfolio on a pooled basis or in an omnibus account in accordance with any class order issued by ASIC or any specific relief from the requirements of section 601FC(1)(i) of the Law granted by ASIC in relation to the relevant Scheme.

3.8 Permanent may appoint or engage at the Client's expense accountants, auditors, barristers, solicitors, advisers, consultants, brokers, counterparties, couriers or other persons (not being persons appointed under clause 6.1) where it reasonably considers their appointment or engagement necessary or desirable for the purposes of exercising its powers or performing its duties under this agreement. Permanent is not liable for any loss, damage or expense suffered or incurred as a result of any act of omission whatever (including a negligent act or omission) of a person appointed or engaged under this clause 3.8.

3.9 Persons appointed or engaged in accordance with clause 3.8 or 6.1 may be related to or associated with Permanent and may be paid and receive their normal fees or commissions.

3.10 Permanent may in the ordinary course of its business, without reference to the Client, effect transactions in which Permanent has directly or indirectly a material interest, or a relationship of any kind with another person, which may involve a potential conflict with Permanent's duty to the Client, and Permanent is not liable to account to the Client for any profit, commission or remuneration made or received in relation to those transactions or any connected transactions. A reference in this clause 3.10 to Permanent includes a Sub-custodian, and Permanent shall in any event act in a bona fide manner in relation to any such transaction.

3.11 Permanent and its Sub-custodians may for convenience or expedience use Austraclear, RITS, CHESS, SWIFT and/or any other electronic funds or assets transfer system whether within Australia or overseas.

3.12 Permanent is authorised to comply with any obligations imposed on it by law.

3.13 Permanent may do any other things which it considers necessary, desirable, incidental to or in furtherance of the matters referred to in this clause 3 or clause 4.

3.14 Subject to this agreement, Permanent has absolute discretion as to the exercise of all powers, authorities and discretion vested in it under this agreement.

4. DUTIES OF PERMANENT

4.1 The Client is responsible for taking all decisions in relation to the Portfolio and properly communicating to Permanent Instructions in relation to the assets of the Portfolio. Subject to this agreement, Permanent must act on the Client's Instructions in relation to any assets of the Portfolio. If Permanent does not have Instructions, Permanent 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.

4.2 Permanent must promptly forward to or notify the Client or the relevant Manager of all forms of proxy, notices of meetings and other material letters, notices or announcements received by Permanent relating to the assets of a Portfolio.

4.3 Permanent is not responsible for reviewing or advising the Client on the Portfolio or any part of it nor for any action or omission pursuant to a decision taken or mistakenly not taken by the Client.

4.4 Permanent disclaims any knowledge of the terms on which securities are issued or the constituent documents of the issuer and the Client undertakes to investigate and satisfy itself as to those matters and to ensure that any Instructions to Permanent are in conformity and reasonable having regard to them.

4.5 Permanent is not responsible for the accuracy or completeness of any information received from third parties and passed to or assessed by the Client or a Manager.

4.6 Permanent is not obliged to institute or defend legal proceedings unless requested by the Client and indemnified by the Client to its satisfaction.

4.7 The services of Permanent under this agreement are not exclusive. Permanent is free to provide similar services to others, and is not obliged to disclose to the Client anything which comes to its notice in the course of providing services to others or otherwise than in the performance of this agreement.

4.8 Permanent 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.

4.9 To the extent required by section 601FC(1)(i) of the Law as modified by any relief granted by ASIC, Permanent shall ensure that the assets of each Portfolio are:

(a) clearly identified as property of the respective Scheme; and

(b) held separately from Permanent's own assets, the assets of any other Scheme or any other assets held by Permanent in any other capacity whatsoever.

4.10 Permanent is not responsible for checking or ascertaining the value of any property or whether the price to be paid for any property is proper or reasonable or whether any transaction which it is instructed to effect accords with the constitution, compliance requirements, prospectus, investment policy or limit for the time being established for or in force in relation to the Scheme.

4.11 Permanent must notify the Client in writing immediately if Permanent becomes aware that it no longer satisfies the requirements of ASIC Policy Statement 131 or 133.

4.12 Permanent must provide to the Client at least annually at a time as agreed between the parties a certificate signed by two directors stating that Permanent has met the requirements of ASIC Policy Statements 131 and 133 during that financial year and must (if the Client reasonably requires such certificate) also provide annually at a time as agreed between the parties a certificate signed by Permanent's external auditor confirming that, in the auditor's opinion, Permanent continues to meet the financial requirements of ASIC Policy Statements 131 and 133.

4.13 Subject to clause 4.15, Permanent must not take a charge, mortgage, lien or other encumbrance over, or in relation to, the assets of a Scheme other than in respect of expenses and outlays made within the terms of this agreement.

4.14 Permanent must not exercise any right in the nature of a charge, mortgage, lien, or other encumbrance over or in relation to assets of the Scheme in relation to unpaid custodian fees pursuant to clause 8.1, but otherwise Permanent is entitled to exercise any rights in relation to the assets of the Scheme available to it at law in the nature of a charge, mortgage, lien or other encumbrance and is additionally granted by this agreement rights of lien and set off as against the assets of a Portfolio in relation to any liability, loss, cost, claim or expense incurred or arising on account of the Scheme in the proper performance of Permanent's powers or duties under this agreement. In the exercise of rights pursuant to this clause Permanent may sell any

asset from the relevant Portfolio and enforce its rights under this agreement against the proceeds of such sale.

4.15 If Permanent receives Instructions to take a charge, mortgage, lien or other encumbrance over or in relation to any assets in a Portfolio, Permanent need only act on those Instructions if it is satisfied that its liability pursuant to such charge, mortgage, lien or encumbrance is limited to the assets available to it pursuant to this agreement.

4.16 If the Client instructs Permanent to Custodially Hold any real property pursuant to this agreement, Permanent need not agree to do so unless Permanent is satisfied that its liabilities in relation to the holding of such real property are limited to the assets available to it pursuant to this agreement. In this regard, Permanent may require the Client to effect and maintain insurances identified by Permanent in Permanent's name or to provide additional indemnities to Permanent.

4.17 In the event that Permanent has breached a term of this agreement which entitles the Client to exercise rights against Permanent, the existence of such rights does not entitle the Client to prevent Permanent from relying on the provisions of this agreement to seek indemnification or other rights in order to meet or satisfy any claim or demand made by a third party on Permanent.

4.18 Permanent agrees to compensate a Scheme by making a payment to that Scheme in the event of Permanent being required by law to make such payment if there is a loss to a Scheme as a result of Permanent failing in its obligations under this agreement.

5. INSTRUCTIONS

5.1 Permanent is authorised to act, or to cause any other person to act, on any Instructions given to it in accordance with this clause 5.

5.2 Permanent is authorised to act on Instructions in writing which bear or purport to bear the signature or a facsimile of the signature of any of the Client's Authorised Persons or Instructions provided by electronic means using security codes or procedures agreed between Permanent and the Client.

5.3 Permanent is not liable for acting on any Instructions which appear to it to have been properly and regularly signed or given and is under no duty to inquire whether any such Instructions have been so signed or given. However, Permanent may require written confirmation from the Client before acting on any Instructions.

5.4 Permanent is not liable for acting on any Instructions given in accordance with this clause 5 which contain any error or ambiguity.

5.5 Nothing in this clause 5 obliges Permanent to obtain Instructions where the other provisions of this agreement do not impose any such obligation.

5.6 Permanent may record electronically telephonic discussions relating to this agreement or any transaction effected under it with the prior consent of the Client for each discussion intended to be recorded.

6. SUB-CUSTODIANS

6.1 Permanent may, where it considers their appointment necessary or desirable for the purpose of exercising its powers or performing its duties under this agreement, appoint Sub-custodians (including any person related to or associated with Permanent) to perform any of its duties under this agreement with any or all of its powers under this agreement, including this power of delegation, and any delegate appointed by the exercise of such power shall be included in the term Sub-custodian. Any appointment of a Sub-custodian by Permanent is not an assignment of Permanents rights or obligations under this agreement.

6.2 Permanent must supply to the Client on request a description of property included in the Portfolio which is held by or registered in the name of a Sub-custodian, together with the name and address of the Sub-custodian.

6.3 Permanent shall be responsible for the actions and omissions of its Sub-custodian appointed by Permanent pursuant to clause 6.1.

7. BOOKS, RECORDS AND STATEMENTS

Permanent must:

(a) properly maintain adequate books and records, accounts of all receipts, disbursements and other transactions relating to the Portfolio in accordance with generally accepted accounting principles to the extent such principles are relevant;

(b) provide the Client with the reports and statements relating to the Portfolio described in schedule 4 at the intervals mentioned in schedule 4; and

(c) provide any auditor of the Client with any reasonably available information in Permanent's possession about the Portfolio which the auditor requires to enable it to perform any audit or investigation involving the Portfolio.

8. FEES AND EXPENSES

8.1 The Client agrees to pay to Permanent during the continuance of this agreement fees in the amounts described and at the time set out in schedule 5.

8.2 Permanent is entitled to recover from the Client the amount of all Taxes and bank charges, and all other liabilities, costs, charges and expenses which it suffers or incurs (including fees and other amounts payable to Sub-custodians) in connection with the performance of its duties and the exercise of its powers under this agreement including, without limitation, settlement, delivery, registration and transaction charges and foreign currency costs and charges including any reasonable expenses incurred as a result of the Client requesting a certificate pursuant to clause 4.1.

8.3 The Client agrees that Permanent may deduct from any part of a Portfolio any amount payable to Permanent under this clause 8 or any other provision of this agreement and with the consent of the Client, the amounts payable under clause 8.1. The Client authorises Permanent in the name of the Client or Permanent to do any thing (including, but not limited to, executing any document) that is required for that purpose. Permanent agrees to record any such deduction in the records maintained under clause 8.

8.4 All monies owing to Permanent including fees under this agreement accrues from day-to-day.

9. INDEMNITIES AND LIMITATIONS OF LIABILITY

9.1 Without limiting any other indemnity or limitation of liability in this agreement, and without prejudice to any indemnity allowed by law, but subject to this agreement and to any law to the contrary, and to the maximum extent permitted by law, it is agreed and declared that:

(a) the Client indemnifies Permanent against any liability, demand, loss, costs, Taxes charges and expenses which may be incurred by Permanent in connection with:

(i) this agreement and the acts and omissions of Permanent in performing services pursuant to this agreement, except those attributable to the negligence or fraud of Permanent.

(ii) all actions, suits, claims and demands which may be brought or threatened against or suffer or sustained by Permanent by reason of Permanent complying with any Instruction by an Authorised Person; and

(iii) neglect or fraud on the part of the Client, any Manager or any of their employees, servants or agents.

(b) Permanent does not incur any liability in respect of any thing done or not done in reliance on any Instruction, notice, resolution, direction, consent, certificate, receipt, affidavit, statement, holding out, certificate for stock, shares or other security, plan or reorganisation, or other document or information which Permanent reasonably believed to be genuine or to have been passed, signed or endorsed by the proper parties, where liability but for this provision would attach because that document or matter was not in fact genuine or so passed, signed or endorsed.

(c) Permanent does not incur any liability in respect of any failure to do any thing which, because of any present or future law or of any order or judgement of any court, it is hindered, prevented or forbidden from doing.

(d) Permanent will not be responsible or have any liability for any obligations imposed on the Client, a Scheme or Permanent as custodian of the Portfolio or any transaction under this agreement by the tax law of Australia or any State or Territory of Australia. Permanent will be kept indemnified by and be without liability to the Client for any such obligations including Taxes (but excluding any income taxes assessable in respect of compensation paid to Permanent pursuant to this agreement), withholding, certification and reporting requirements, claims for exemption or refund, additions for late payment, interest, penalties and other expenses (including legal expenses) that may be assessed against the Client, a Scheme or Permanent as custodian of the Portfolio except those attributable to the negligence or fraud of Permanent.

(e) Permanent may act on the opinion or advice of, statements of or information obtained from barristers, solicitors, bankers, accountants, brokers or other persons believed by it in good faith and on reasonable grounds to be expert in relation to the matters on which they are consulted (whether they are instructed by the Client, Permanent or a third party), and Permanent is not liable for anything done or not done by it in good faith in reliance on that opinion, advice, statements or information.

(f) where Permanent relies in good faith on any opinion, advice, statements or information from any barrister, solicitor or other expert it is not responsible for any misconduct, mistake, oversight, error of judgement, forgetfulness or want of prudence on the part of any such barrister, solicitor or other expert;

(g) in the event of the liquidation, dissolution or bankruptcy of any person, or if for any other reason it becomes impossible or impracticable to carry out the provisions of this agreement in respect of that person or otherwise, Permanent is not liable for anything done or not done by Permanent, where Permanent has acted in good faith;

(h) Permanent is entitled to rely on statements or information from the Client or Manager as to the validity of any signature on any transfer, form of application, request or other document which Permanent reasonably believed to be genuine;

(i) Permanent is not responsible for the loss of any property during transmission between the Client or a Manager and Permanent or Permanent and a third party or fraud on the Client by a third party, nor for the corruption or loss of any data that is transmitted electronically or to which access is given by Permanent to the Client or a Manager or vice versa;

(j) Permanent is not liable for any act or omission that is believed by Permanent to be in accordance with local market practice;

(k) Permanent is not liable for the failure of any person to carry out any agreement or obligation on that person's part;

(l) Notwithstanding any other provision of this agreement, Permanent's liability is limited to the property for the time being comprised in the Portfolio except for a liability arising as a result of Permanent's own negligence or fraud; and

(m) Permanent, is not liable for any loss, damage or expense suffered or incurred as a result of any delay in executing an Instruction where the delay has occurred as a result of Permanent waiting for the receipt of the written confirmation from the Client pursuant to clause 5.3.

9.2 Permanent is not responsible for insuring the Portfolio or any part of it.

10. WARRANTIES AND UNDERTAKINGS BY CLIENT

10.1 The Client represents and warrants to Permanent that:

(a) it has the power to enter into and perform this agreement and has obtained all necessary consents to enable it to do so;

(b) the entry into and performance of this agreement by the Client does not constitute a breach of any obligation (including, but not limited to, any statutory, contractual or fiduciary obligation) or default under any agreement or undertaking by which the Client is bound;

(c) property transferred or delivered by the Client to Permanent from time to time to form part of a Portfolio will be the property of a Scheme the subject of this agreement and, unless the consent of Permanent is obtained prior to the transfer, free from any mortgage, charge, lien, pledge, encumbrance or other security interest;

(d) the Client will, at all times during the term of this agreement, hold any licences or approvals required to be held by it under any law governing its activities relating to this agreement and comply with all conditions of any such licence or approval;

(e) it is the only responsible entity for each Scheme and no action has been taken or is proposed to remove it as responsible entity of any Scheme;

(f) the copy of each Scheme constitution provided by the Client to Permanent discloses all the terms of each Scheme and it is not in default under the terms of any Scheme constitution or the Law in relation to any Scheme; and

(g) it has a right to be fully indemnified out of the relevant Scheme's assets in respect of all obligations and liabilities which it incurs under this agreement.

10.2 The Client undertakes:

(a) to notify Permanent promptly if the Client appoints or terminates the appointment of a Manager;

(b) to provide Permanent on request with any documents, information or Instructions reasonably required by Permanent to enable it to perform obligations imposed on Permanent under this agreement or by law;

(c) to perform its obligations pursuant to this agreement as soon as reasonably practicable and in accordance with the requirements of any relevant Scheme's constitution and the Law;

(d) to give Permanent notice of any communication from any person including ASIC forthwith upon receipt which relates to the possibility or likelihood of the Client being suspended or removed in relation to a Scheme or that affects or might affect Permanent or any of its Sub-custodians in relation to the performance of their obligations or exercise of their powers under this agreement or otherwise;

(e) to give Permanent prompt notice of any alteration to a Scheme's constitution.

10.3 The Client undertakes on request to provide and certify to Permanent any information in relation to the Client's status or assessibility for taxation purposes in any country which is relevant to the performance of this agreement.

10.4 The Client acknowledges that it enters into this agreement both in its individual capacity and in its capacity as responsible entity for each Scheme and all agreements, warranties and obligations of the Client in this agreement bind the Client in both capacities.

10.5 The Client agrees to inform Permanent promptly if:

(a) the terms of a Scheme are varied;

(b) there is any change of responsible entity of a Scheme;

(c) there is any change of status for taxation purposes of a Scheme; or

(d) when a Scheme is terminated.

11. TERMINATION OF AGREEMENT

11.1 Subject to clauses 11.2, 11.3 and 11.4, this agreement shall continue for the minimum term specified in schedule 6 and after the expiry of the minimum term shall continue on the same terms unless terminated by either party upon giving to the other party notice for no less than the notice period specified in schedule 6.

11.2 A party may terminate this agreement by notice to the other party: -

(a) if a receiver or a receiver and manager of the undertaking (or any part) of the other party is appointed either in relation to the capacity in which it acts pursuant to this agreement or where such receiver or receiver and manager is reasonably likely to affect materially such other party's performance pursuant to this agreement, or

(b) if the other party:-

(i) goes into liquidation (other than for the purposes of a reconstruction or amalgamation on terms previously approved in writing by the other party) either in relation to the capacity in which it acts pursuant to this agreement or where such liquidation is reasonably likely to affect such other party's performance pursuant to this agreement;

(ii) is subject to a scheme of compromise or arrangement with its creditors or has an administrator appointed to its affairs either in relation to the capacity in which it acts pursuant to this agreement or where such scheme or administration is reasonably likely to affect such other party's performance pursuant to this agreement;

(iii) ceases to carry on business in relation to its activities as responsible entity in relation to a Scheme in the case of the Client (in which case Permanent may terminate this agreement in relation to a Scheme) or as a provider of custodial services in the case of Permanent;

(iv) breaches any provision of this agreement in a material respect or fails to observe or perform any representation, warranty, indemnity or undertaking pursuant to this agreement in a material respect **PROVIDED THAT** if the breach or failure is capable of remedy in the reasonable opinion of the party not in default, this agreement may not be terminated unless the party in default is given a period of no less than 14 days within which to remedy the breach or failure and if not remedied within such period the party not in default may terminate this agreement;

(v) sells or transfers or makes any agreement for the sale or transfer of its principal business and undertaking, or of a beneficial interest therein, other than to a related body corporate for the purposes of a corporate reconstruction upon at least 7 days' notice to the other party; or

(c) by Permanent if ASIC or a Court having jurisdiction makes a written order vesting any property of the Client in relation to any Scheme in ASIC or some other body other than the Client.

11.3 The termination of this agreement does not affect any claim which either party may have against the other.

11.4 If after two (2) years from the date of execution of this agreement, the Law and/or ASIC Policy Statements are such that the Client is no longer required to engage the services of a custodian for the Schemes, then the Client may terminate this agreement on not less than three (3) months notice in writing to Permanent.

11.5 Subject to this agreement, on termination of this agreement Permanent must, at the expense of the Client, promptly transfer, or cause any Sub-custodian to transfer, the assets of the Portfolio, to or according to the Instructions of the Client (subject to any contrary direction given to Permanent which has the lawful effect of overriding this provision), and the Client agrees promptly to accept the transfer or give the necessary Instructions for the transfer of those assets. Permanent must also, at the expense of the Client, promptly deliver or cause any Sub-custodian to deliver, any documents evidencing title to those assets which it is holding, to or according to the Instructions of the Client. Notwithstanding the provisions of this clause, Permanent may retain any assets which it is lawfully permitted to retain in the exercise of its rights under this agreement.

11.6 Upon termination of this agreement pursuant to clause 11.2(c), Permanent shall act upon the instructions of ASIC or an entity properly appointed in relation to a Scheme to the exclusion of the rights of the Client and shall deal with the Portfolio and all books, records, or other material held by it in relation thereto in accordance with the instructions of ASIC or such other entity to the exclusion of any orders, requests or directions from the Client.

11.7 Notwithstanding any other provision of this agreement, if ASIC or a Court having jurisdiction has made a written order vesting the property of the Client in relation to a Scheme in another person, Permanent may, upon the receipt of notice of such vesting order, disregard any future Instructions of the Client in relation to a Scheme and any existing Instructions of the Client in relation to a Scheme which have not been fully performed and take instructions in relation to any matter affecting a Scheme from ASIC or such other person.

12. COSTS AND STAMP DUTY

12.1 The Client shall pay Permanent's reasonable professional costs, including external legal expenses in connection with the preparation, execution and completion of this agreement and of other documentation related to this agreement.

12.2 The Client agrees to bear any stamp duty payable or assessed in connection with this agreement and the transfer of any property to Permanent to form part of the Portfolio. The Client must indemnify Permanent on demand against any liability for that stamp duty (including fines and penalties).

13. NOTICES

Any notice under this agreement shall be in writing and:-

(a) may be sent to the address, or facsimile number set out in schedule 7 or to any other address or facsimile number that either party may specify in writing to the other;

(b) is taken to have been given or made:-

(i) (in the case of delivery in person) when delivered to the address set out in schedule 7;

(ii) (in the case of delivery by post) on the second Business Day after posting; or

(iii) (in the case of delivery by facsimile) on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the correct number,

but if the notice is taken to have been given or made on a day which is not a Business Day or is later than 5.00pm (local time) it will be taken to have been duly given at the commencement of the next Business Day.

14. EXERCISE OF RIGHTS

A party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or of any other right, power or remedy. Failure by a party to exercise or delay in exercising a right, power or remedy does not prevent its exercise.

15. NO WAIVER

No failure to exercise or any delay in exercising any right, power or remedy under this agreement operates as a waiver. No single or partial exercise of any right, power or remedy precludes any other or further exercise of that right or any other right, power or remedy.

16. SURVIVAL OF INDEMNITIES

Each indemnity in this agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives termination of this agreement.

17. ENFORCEMENT OF INDEMNITIES

It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by this agreement.

18. ASSIGNMENT

A party may not assign any of its rights or obligations under this agreement without the prior written consent of the other party.

19. CONFIDENTIALITY

19.1 All information exchanged between the parties under this agreement or during the negotiations preceding this agreement is confidential to the party supplying the information and may not be disclosed to any person except:-

(a) to employees, legal advisers, auditors and other consultants of either party or its related bodies corporate requiring the information for the purposes of this agreement;

(b) with the consent of the party who supplied the information;

(c) if the information is, at the date this agreement is entered into, lawfully in the possession of the recipient of the information through sources other than the party who supplied the information;

(d) if required for the purposes of implementing transaction, dealing or matter pursuant to this agreement or by law or a stock exchange;

(e) if required in connection with legal proceedings relating to this agreement; or

(f) if the information is generally and publicly available other than as a result of breach of confidence by the person receiving the information.

19.2 A party disclosing information under clause 19.1(a) or clause 19.1(b) must use all reasonable endeavours to ensure that persons receiving confidential information from it do not disclose the information except in the circumstances permitted in clause 19.1.

20. FURTHER ASSURANCES

Each party agrees on the request of the other party to do everything reasonably necessary to give effect to this agreement and the transactions contemplated by it (including the execution of documents) and to use all reasonable endeavours to cause relevant third parties to do likewise.

21. FORCE MAJEURE

Where a party is unable, wholly or in part, because of any thing which is not reasonably within its control other than lack of funds ('force majeure') to carry out any obligation under this agreement, and it:

(a) gives the other party prompt notice of that force majeure with reasonably full particulars and, in so far as known, the probable extent to which it will be unable to perform or be delayed in performing that obligation; and

(b) uses all reasonable endeavours to remove that force majeure as quickly as possible,

that obligation is suspended so far as it is affected by the continuance of that force majeure. Any obligation to pay money is not excused by force majeure, save for any obligation of Permanent to pay money where Permanent is entitled to an indemnity from the Client under this agreement in relation to the Portfolio and there is insufficient money in the relevant Portfolio to pay such money.

22. ENTIRE AGREEMENT

This agreement contains the entire agreement between the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct by them or prior agreement between them with respect to its subject matter.

23. AMENDMENT

This agreement may be amended only by another document signed by both the parties.

24. DISPUTES OR CONFLICTING CLAIMS

24.1 Where there is a dispute between Permanent and the Client in relation to any matter under this agreement, then any party may refer the matter for decision to an independent expert agreed to by the parties, and failing agreement, an independent expert nominated by the President of the Queensland Law Society. The costs incurred in the determination of the matter by the expert (including the costs of the appointment of the expert) shall be borne by the party or parties as determined by the expert. The decision of the expert shall be final and binding on the parties.

24.2 If any dispute or conflicting claim is made by any person or persons with respect of any asset Custodially Held, Permanent shall be entitled to refuse to act in respect of that asset until either:

(a) such dispute or conflicting claim has been finally determined by a court of competent jurisdiction or settled by agreement between conflicting parties, and Permanent has received written evidence satisfactory to it of such determination or agreement; or

(b) Permanent has received an indemnity, reasonably satisfactory to it, to hold it harmless from and against any and all loss, liability and expense which Permanent may incur as a result of its actions.

25. SEVERABILITY

Each part of this agreement is severable from the balance of this agreement. If any part of this agreement is illegal, void, invalid or unenforceable, then that will not affect the legality, effectiveness, validity or enforceability of the balance of this agreement.

26. GOVERNING LAW AND JURISDICTION

This agreement is governed by the laws of Queensland. The parties submit irrevocably and unconditionally to the non-exclusive jurisdiction of the courts of Queensland and courts of appeal from them in relation to any matter or dispute concerning this agreement or the transactions contemplated by this agreement.

27. COUNTERPARTS

This agreement may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one agreement.

EXECUTED as an agreement.

THE COMMON SEAL of)
PERMANENT TRUSTEE AUSTRALIA)
LIMITED ACN 008 412 913)
is affixed in accordance with)
its articles of association in the presence of:)

6583(1)

▲ ~~Director~~ Secretary
Raelene Harrison

▲ ~~Secretary/or appointed person~~ Director
David Davis

THE COMMON SEAL of)
LM INVESTMENT MANAGEMENT)
LTD ACN 077 208 461)
is affixed in accordance with)
its constitution in the presence of:)

▲ ~~Director~~

▲ ~~Secretary~~
Director

SCHEDULE 1

Authorised Persons
(Clause 1.1)

Client

The Client's Authorised Persons are each of the group "A" signatories and the group "B" signatories appearing on the attached authorised signatories list dated 18 January 1999 and marked "AA" or such later corresponding lists as may be forwarded by the Client to Permanent from time to time.

The Client will clearly identify instructions to Permanent as either Level 1 or Level 2 instructions.

Level 1 - any "A" signatory together with any "B" signatory are authorised to give Level 1 instructions.

Level 2 - any "B" signatory together with any other "B" signatory are authorised to give Level 2 instructions.

Permanent

Permanent's Authorised Persons are each of the group "A" attorneys and the group "B" attorneys appearing on the attached specimen signature list dated 23 September 1998 and marked "BB" or such later corresponding lists as may be forwarded by Permanent to the Client from time to time.

AA

Group "A" Signatories

Peter Drake	Initials	Michael Dwyer	Initials
Peter Aetrer	Initials	Adrien Armes	Initials

Group "B" signatories

John Burt	Initials	Shelley Chalmers	Initials
Matthew McCarthy	Initials	Sarah Mahaffey	Initials
Valda McMeekin	Initials	[illegible]	Initials
Lisa Jensen	Initials		

"BB"

PERMANENT TRUSTEE COMPANY LIMITED
A.C.N. 000 000 993
Subsidiary Companies:
Permanent Registry Limited A.C.N. 000 334 636
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Permanent Trustee Australia Limited A.C.N. 008 412 913
Permanent Nominees (Aust.) Limited A.C.N. 000 154 441
Superannuation Nominees Pty. Limited A.C.N. 000 305 233
Permanent Property Management Limited A.C.N. 002 232 573
Permanent Trustee Company (Canberra) Limited A.C.N. 008 390 387
Rental Housing Custodians Limited A.C.N. 003 284 437

THIS LIST OF AUTHORISED SIGNATORIES

IS FOR

A) Operation of Bank Accounts

Authority to operate on a bank account will be as specified in the Authority to Operate held by the bank for the account.

B) Dealings With Inscribed Stock

Any two "A" signatories jointly or any "A" signatory together with any "B" signatory are authorised to sign documentation and give instructions.

C) Signing As An Attorney

Pursuant to Power of Attorney dated 2 June 1993 any two "A" signatories jointly or any "A signatory together with any "B" signatory, unless otherwise specified, may exercise the power and authorities given by the Power of Attorney.

I, Peter Ham, Company Secretary, certify that this document is a true photographic copy of the specimen signatures of the persons designated pursuant to authority delegated by the Board on 20 October 1993 as signatories and attorneys of Permanent Trustee Company Limited and its subsidiary companies.

Peter Ham, Company Secretary Dated 23 September 1998

authsigs

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GROUP "A" SIGNATORIES

GLUSKIE Laurence John	THAME John Michael
N.H. GRACE	C.C.J. STEWART
T. R. MORLING	R. B. WILLING
SAVILLE Duncan Paul	

THE SIGNATORIES SET OUT IN THIS PAGE ARE APPLICABLE ONLY IN RESPECT OF THE COMPANIES' BANK ACCOUNTS

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Rental Housing Custodians Limited A.C.N. 003 284 437

GROUP "A" SIGNATORIES

BALL Steven S.B. INITIALS	DIXON Faye ..... INITIALS
BERKLEY Greg ..... INITIALS	EZRA Evan ..... INITIALS
BOURKE Kim ..... INITIALS	GAUNT David ..... INITIALS
CAMERON Bruce ..... INITIALS	GEORGE Sandra ..... INITIALS
CUMBERS Helen ..... Initials	GRIME Elaine E.G. INITIALS
DANIS Tania T.K.D. INITIALS	GUTHRIE Clive ..... INITIALS
DAVIS David ..... INITIALS	HALL John ..... INITIALS

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Rental Housing Custodians Limited A.C.N. 003 284 437

23.9.98

GROUP "A" SIGNATORIES

MEYER Irene ..... INITIALS	OVERALL Wayne ..... INITIALS .....
MONAHAN Peter ..... INITIALS	PAGE Christine ..... INITIALS .....
MURPHY Sean ..... INITIALS	POLITO Giuseppe ..... INITIALS .....
NEWBY John ..... INITIALS	QUAN Garry ..... INITIALS .....
NILON Terence ..... INITIALS	RAJU Devi ..... INITIALS .....
O'CONNELL John ..... INITIALS	

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GROUP "A" SIGNATORIES

HAM Peter	INITIALS	KENNEDY Seamus	INITIALS
HEATHER David	INITIALS	LIM Soniwaty	INITIALS
HOGAN Andrew	INITIALS	MACKRELL Geoffrey	INITIALS
ISAACS Ashley	INITIALS	McINTOSH Pamella	INITIALS
JONES Suzanne	INITIALS	McKASKILL Grant	INITIALS
KENNEDY Paul	INITIALS	MEAGHER Mark Philip	INITIALS

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23.9.98

GROUP "A" SIGNATORIES

RAPHAEL Stephen ..... INITIALS	SILAVECKY Stenick ..... INITIALS
RAVI Sai ..... Initials	STEELE Anthony ..... INITIALS
SCOTT Edward ..... INITIALS	STEWART Rodney ..... INITIALS
SCOTT Janine ..... INITIALS	SZEGHO Howard ..... INITIALS
SCOTT Julia ..... INITIALS	TSOTSOS Michael ..... Initials
SHAW Graham Ian ..... INITIALS	WALL John ..... INITIALS

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GROUP "A" SIGNATORIES

.... WATSON Christopher Francis Int.	
.... WELLENS Richard INITIALS	
.... WILLIAMS Guy INITIALS	
.... WILLIAMS Tracy INITIALS	
.... WONG Ivan INITIALS	
.... WOOD Derek INITIALS	

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Rental Housing Custodians Limited A.C.N. 003 284 437

GROUP "B" SIGNATORIES

ANNETTA Michael ..... INITIALS	CARROLL Michael ..... INITIALS .....
ASSAF Richard ..... INITIALS	CASTLE Rachel Jane ..... Initials .....
AYRES, Peter James ..... INITIALS	CAUCHI Lucy ..... INITIALS .....
BEAVERS Jennie ..... Initial	DAVIS Phillip ..... INITIALS .....
BESSELINK TIM ..... INITIALS	FARRELL Sandra ..... INITIALS .....
BOYCE Kenneth ..... INITIALS	FIRKIN Joanne ..... Int. .....
BRADBURY Debra ..... INITIALS	FOULKES John ..... INITIALS .....

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GROUP "B" SIGNATORIES

GLOVER Stephen ..... INITIALS	LU Mandy ..... INITIALS .....
HAYES Lindall ..... INITIALS	MACKIE Bruce ..... INITIALS .....
HYNARD Fiona ..... INITIALS	MARTIN Richard ..... INITIALS .....
JACKSON Noleen ..... INITIALS	McBEAN Julie ..... INITIALS .....
~~KEIR Harry~~ ..... Initials	McDONALD Martin ..... INITIALS .....
LAST Pauline ..... INITIALS	MENEGOTTO Frank ..... INITIALS .....
LYALL David ..... Int.	MEYER John ..... INITIALS .....

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GROUP "B" SIGNATORIES

MORGAN Kelli ..... INITIALS	SEMMENS Ashley ..... Initials
NICHOLS Gregory ..... INITIALS	SIAMOA Toula ..... INITIALS
OSBORNE Robert ..... INITIALS	TCHOPOURIAN Jean-Pierre ..... INITIALS
RANIGA Pratibha ..... INITIALS	WITTON Susan ..... INITIALS
RICHARDSON Michael ..... INITIALS	WRIGHT Mark Anthony ..... INITIALS
SCHEIBMAIR Michelle ..... INITIALS	WRIGHT Michael ..... INITIALS
SCHIMPL Doris ..... INITIALS	

SCHEDULE 2

LIST OF SCHEMES SUBJECT TO THIS AGREEMENT
(Clause 1.1)

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund

SCHEDULE 3

METHODS AND STANDARDS FOR ASSESSING PERMANENT'S PERFORMANCE

(Clause 2.3)

(a) The Client will monitor the performance of Permanent and will ensure that Permanent continues to meet its commitments for holding the Portfolio of each Scheme the subject of this agreement. The Client will ensure that the contractual arrangements with Permanent remain current and reflect the requirements of each Scheme and the law and that Permanent maintains appropriate arrangements with respect to information providers, registries, Sub Custodians and clearing systems (if relevant).

(b) Any or all of the policies and procedures developed by the Client in the monitoring of external service providers may be applied to the monitoring of Permanent.

(c) While Permanent is the custodian of a Scheme, to satisfy these requirements the SCO will meet with an Authorised Person of Permanent on a quarterly basis. In addition to the above matters, in that meeting the SCO will review any other matters with Permanent relating to a Scheme that has arisen in the course of the delivery of services by Permanent.

(d) The SCO will report any matters of concern that arise during the course of discussion with Permanent to the Client's compliance committee.

(e) The Client's compliance auditor will also have regard to the performance of Permanent in its assessment of the performance of the Client in meeting the requirements of its compliance plan. In particular the Client's compliance auditor will assess whether Permanent has appropriate compliance and control systems in place. To do so the Client's compliance auditor will liaise with Permanent's auditors to determine the status and appropriateness of Permanent's compliance and control systems on an ongoing basis.

(f) The Client's compliance auditor will assess whether Permanent has complied with its obligations under this agreement and include the assessment in its annual report to the Client as required by Section 601HG(3)(c) of the Law.

(g) A copy of any report by the SOC or the Client's compliance auditor prepared in accordance with this schedule, will be provided to Permanent.

SCHEDULE 4

REPORTS AND STATEMENTS
(Clause 7(b))

1.	(a) Bank reconciliation as at each month end	10 days after month end
	(b) List of any cheques cancelled in the month	10 days after month end
2.	Listing of all assets as at each month end	10 days after month end
3.	Bank reconciliation as at each Friday	The following Monday morning
4.	List of documents outstanding or intransit	10 days after month end
5.	List of insurance policies due to expire	10 days after month end

SCHEDULE 5

FEES
(Clause 8.1)

A Basic custody for mortgage Schemes:

The greater of either:

(a) $400.00 per $1 million of the gross value of the assets of each Scheme (plus GST) per Year; or

(b) $20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

PLUS

An execution fee of $20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

B Basic custody for property Schemes:

The greater of either:

(a) $400.00 per $1 million of the gross value of the assets of each Scheme (plus GST) per Year; or

(b) $15,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

PLUS

An execution fee of $20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

Where:

Commencement Date means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

Document includes but is not limited to a mortgage, discharge of a mortgage, variation of a mortgage, or a contract of sale;

GST means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, or Territory government agency; and

Year means twelve (12) months commencing on the Commencement Date of each Scheme.

SCHEDULE 6

MINIMUM TERM AND NOTICE PERIOD
(Clause 11.1)

The minimum term is the period five (5) years from the date of execution of this agreement.

After expiry of the minimum term, termination may occur on not less than three (3) months notice by either party.

SCHEDULE 7

ADDRESS AND FACSIMILE DETAILS
(Clause 14)

Permanent's Address:	Level 8, 410 Queen St, BRISBANE QLD 4000
Facsimile:	(07) 3842 7159
Client's Address:	LM INVESTMENT MANAGEMENT LTD Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise QLD 4217
Facsimile:	(07) 55 922 505

140216/v2

16 JUN 1999

FAXED

Permanent Trustee
Company Limited
A.C.N. 000 000 993

8th Floor
410 Queen Street
Brisbane Qld. Australia 4000
G.P.O. Box 667
Brisbane Qld. 4001

DX 286 Brisbane

Telephone (07) 3842 7100
Fax (07) 3842 7159

14 June 1999

Our ref:tw:cor:lm

Mr P. Aubort
LM Investment Management Limited
P.O. Box 485
SURFERS PARADISE. QLD. 4217

Dear Peter,

RE: CUSTODY AGREEMENT

As you are aware, the relationship between LM Investment Management Limited (LMIM) and Permanent trustee Australia Limited (Permanent is governed by the Custody Agreement (the Agreement) dated 4 February 1999, together with subsequent amendments as agreed.

Following discussions, the parties have agreed to amend the Agreement so as to authorise:

- Permanent to execute periodic debit documents and forms (as requested by LMIM); and

- LMIM to automatically deduct or pay amounts from accounts held by Permanent containing assets of the portfolio.

Accordingly, the Agreement requires amendments to include and reflect these changes. The proposed amendment is attached for your review (refer Clause 3.15 of the attached Agreement).

Acceptance

If all is in order, we would appreciate it if two authorised persons of LMIM would sign this letter confirming acceptance of the above. The signing of this letter by both parties will amend the Agreement under clause 23 of the Agreement. Please return the signed letter and the amended Agreement to the writers as soon as possible.

Yours sincerely,

Paul Kennedy
Business Development Manager (Qld)

Tracy Williams
Manager – Corporate Services (Qld)

Authorised person
LM Investment Management Limited

Peter Alcott

Authorised person
LM Investment Management Limited

3.8 Permanent may appoint or engage at the Client's expense accountants, auditors, barristers, solicitors, advisers, consultants, brokers, counterparties, couriers or other persons (not being persons appointed under clause 6.1) where it reasonably considers their appointment or engagement necessary or desirable for the purposes of exercising its powers or performing its duties under this agreement. Permanent is not liable for any loss, damage or expense suffered or incurred as a result of any act of omission whatever (including a negligent act or omission) of a person appointed or engaged under this clause 3.8.

3.9 Persons appointed or engaged in accordance with clause 3.8 or 6.1 may be related to or associated with Permanent and may be paid and receive their normal fees or commissions.

3.10 Permanent may in the ordinary course of its business, without reference to the Client, effect transactions in which Permanent has directly or indirectly a material interest, or a relationship of any kind with another person, which may involve a potential conflict with Permanent's duty to the Client, and Permanent is not liable to account to the Client for any profit, commission or remuneration made or received in relation to those transactions or any connected transactions. A reference in this clause 3.10 to Permanent includes a Sub-custodian, and Permanent shall in any event act in a bona fide manner in relation to any such transaction.

3.11 Permanent and its Sub-custodians may for convenience or expedience use Austraclear, RITS, CHESS, SWIFT and/or any other electronic funds or assets transfer system whether within Australia or overseas.

3.12 Permanent is authorised to comply with any obligations imposed on it by law.

3.13 Permanent may do any other things which it considers necessary, desirable, incidental to or in furtherance of the matters referred to in this clause 3 or clause 4.

3.14 Subject to this agreement, Permanent has absolute discretion as to the exercise of all powers, authorities and discretion vested in it under this agreement.

3.15 Permanent is authorised to execute periodic debit documents and third party bank account access forms, principal and third party on-line operation forms and similar forms or agreements (the "Forms"), as requested by the Client from time to time, which authorise and or allow the Client to automatically deduct or pay amounts from accounts held by Permanent containing assets of the portfolio. Notwithstanding Clause 3.3, Permanent may allow amounts to be deducted from accounts containing assets of the Portfolio pursuant to the Forms without obtaining Instructions from the client. Other than where Permanent is fraudulent the Client indemnifies Permanent for any indemnity, warranty or obligation given by or imposed on Permanent in or pursuant to any such Form or arrangement.

4. DUTIES OF PERMANENT

4.1 The Client is responsible for taking all decisions in relation to the Portfolio and properly communicating to Permanent Instructions in relation to the assets of the Portfolio. Subject to this agreement, Permanent must act on the Client's Instructions in relation to any assets of the Portfolio. If Permanent does not have Instructions, Permanent 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.

Amending Deed

Date: 1st day of September 2004.

Parties: **PERMANENT TRUSTEE AUSTRALIA LIMITED** (ACN 008 412 913) of Level 4, 35 Clarence Street, Sydney NSW (**"Permanent"**) and,

LM INVESTMENT MANAGEMENT LTD (ACN 004 027 749) of Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise, Queensland (**"Client"**).

Recitals:

A. The Client and Permanent entered into a Custody Agreement dated 4 February 1999 (the "Custody Agreement").

B. The Custody Agreement appointed Permanent as custodian of the Assets of those Schemes specified in the Custody Agreement.

C. The Custody Agreement was amended by including additional Schemes on 20 May 1999, 24 May 2000, 18 March 2002 and 19 November 2002.

D. The Client wishes to appoint Permanent as custodian of an additional scheme not included in the Custody Agreement or subsequent amendments and the Custodian has agreed to accept the appointment in relation to the additional scheme on the terms and conditions of the Custody Agreement

E. Under clause 23 of the Custody Agreement, the Client and Permanent may amend the Custody Agreement by deed. The parties have agreed to amend the Custody Agreement to include the additional appointment as set out herein.

Terms:

1. In this Deed, the words and phrases shall have the same meaning as in the Custody Agreement.

2. The Custody Agreement is amended by deletion of Schedule 2 and its replacement with the Schedule 2 set out as Annexure "A".

3. The Custody Agreement is amended by deletion of Schedule 3 and its replacement with the Schedule 3 set out as Annexure "B".

4. The Custody Agreement is amended by deletion of Schedule 5 and its replacement with the Schedule 5 set out as Annexure "C".

5. The amendments set out in this Deed shall take effect on and from the date of this Amending Deed.

6. Except as expressly stated in Clauses 2 , 3 and 4 of this Amending Deed, the terms of the Custody Agreement are not amended by this Amending Deed.

Executed as a Deed on the date first stated:

EXECUTED BY LM INVESTMENT MANAGEMENT LTD ACN 077 208 461 in accordance with section 127 (i) of the Corporation Act by the authority of its directors:

....

Signature of Secretary/Director Signature of Director

PERMANENT TRUSTEE AUSTRALIA LIMITED A.C.N. 008 412 913 by its Attorneys who state that they have no notice of revocation of the Power of Attorney dated 2nd June 1993, whereby they execute this deed document or instrument.

Power of Attorney No.....

Group A Attorney Group A Attorney

Signature.....

Annexure A

Schedule 2

LIST OF SCHEMES SUBJECT TO THIS AGREEMENT

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund
3. LM Cash Performance Fund
4. LM Special Performance Fund
5. LM Wholesale Mortgage Income Fund
6. LM Property Performance Fund
7. LM Currency Protected Australian Income Fund

ANNEXURE B

SCHEDULE 3

METHODS AND STANDARDS FOR ASSESSING PERMANENT'S PERFORMANCE

(a) The client will monitor the performance of Permanent and will ensure that Permanent continues to meet its commitments for holding the Portfolio of each Scheme the subject of this agreement. The Client will ensure that the contractual arrangements with Permanent remain current and reflect the requirements of each Scheme and the law and that Permanent maintains appropriate arrangements with respect to information providers, registries, Sub Custodians and clearing systems (if relevant).

(b) Any or all the policies and procedures developed by the Client in the monitoring of external service providers may be applied to the monitoring of Permanent.

(c) While Permanent is the custodian of a Scheme, to satisfy these requirements the SCO will meet with an Authorised Person of Permanent on a yearly basis or more frequent as required. In addition to the above matters, in that meeting the SCO will review any other matters with Permanent relating to a Scheme that has arisen in the course of the delivery of services by Permanent.

(d) The SCO will report any matters of concern that arise during the course of discussion with Permanent to the Client's compliance committee.

(e) The Client's compliance auditor will also have regard to the performance of Permanent in its assessment of the performance of the Client in meeting the requirements of its compliance plan. In particular the Client's compliance auditor will assess whether Permanent has appropriate compliance and control systems in place. To do so the Client's compliance auditor will liaise with Permanent's auditors to determine the status and appropriateness of Permanent's compliance and control systems on an ongoing basis.

(f) The Client's compliance auditor will assess whether Permanent has complied with its obligations under this agreement and include the assessment in its annual report to the Client as required by Section 601HG(3)(c) of the law.

(g) A copy of any report by the SOC or the Client's compliance auditor prepared in accordance with this schedule, will be provided to Permanent.

Annexure "C"

Schedule 5

FEES:
(Clause 8.1)

A Basic Custody for mortgage Schemes;

The greater of either:

(a) $400.00 per $1 million of the gross value of the assets of each Scheme (plus GST) per Year; or

(b) $20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

PLUS

An execution fee of $20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

B Basic custody for property Schemes:

The greater of either:

(a) $400.00 per $1 million of the gross value of the assets of each Scheme (plus GST) per Year; or

(b) $15,000 per Year (plus GST) for each Scheme.

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

PLUS

An execution fee of $20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

C Basic Custody for the LM Cash Performance Fund (LMCPF Scheme):

The greater of either:

(a) $300.00 per $1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per year up to and including $500 million; plus $200.00 per $1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year for the amounts over $500 million; or

(b) $15,000 per Year (plus GST),

payable quarterly in arrears (and pro rated for the first quarter) from the Commencement Date of the LMCPF Scheme.

D Basic Custody for the LM Special Participation Fund

(a) $10,000.00 per Year (plus GST),

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the Scheme.

E Basic Custody for the LM Wholesale Mortgage Income Fund:

The greater of either:

(a) $400.00 per one million gross value of the assets of each Scheme (plus GST) per Year; or

(b) $10,000 per year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

F Basic Custody for the LM Currency Protected Australian Income Fund:

The greater of either:

(a) $400.00 per one million gross value of the assets of each Scheme (plus GST) per Year; or

(b) $20,000 per year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

In making the calculation of 4 bps, the Total Assets of the Fund is to exclude funds invested in the LM Mortgage Income Fund, so as to avoid "double-counting" (as the Fund will only invest in the LM Mortgage Income Fund and cash). As such, the minimal annual fee of $20,000 is likely to always apply.

Where:

Commencement Date means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

Document includes but is not limited to a mortgage, variation of a mortgage or a contract of sale;

GST means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any National, Federal, State , or Territory government agency; and

Year means twelve (12) months commencing on the Commencement date of each Scheme.

SUPREME COURT OF QUEENSLAND

CITATION:	*RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192
PARTIES:	**RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE** (Applicants) **v** **LM INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND** (First Respondent) **and** **THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (Second Respondent) **and** **ROGER SHOTTON** (Third Respondent) **and** **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** (Intervener)
FILE NO/S:	BS 3383 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	15, 16, 17 and 30 July 2013
JUDGE:	Dalton J
ORDER:	**1. Application filed 15 April 2013 dismissed** **2. Order that the first respondent wind up the LM First Mortgage Income Fund.** **3. Order that Mr David Whyte, liquidator, is appointed to take responsibility for the winding-up of the LM First Mortgage Income Fund.**

4. **Order that Mr David Whyte, liquidator, be appointed receiver of the property of the LM First Mortgage Income Fund.**

5. **Consequential Orders and directions.**

CATCHWORDS:

Corporations Act 2001 (Cth)
Corporations Regulations 2001 (Cth)

ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor [2002] NSWSC 310
ASIC v Wellington Investment Management Limited & Anor [2008] QSC 243
Capelli v Shephard (2010) 77 ACSR 35
Everest Capital Limited v Trust Company Ltd [2010] NSWSC 231
Handberg v Cant [2006] FCA 17
In Re Gordon [2005] FCA 950
Re Giant Resources Limited [1991] 1 Qd R 106, 117
Re Orchard Aginvest Ltd [2008] QSC 2
Re Stacks Managed Investments Ltd [2005] NSWSC 753
Re Stewden Nominees No 4 Pty Ltd [1975] 1 ACLR 185, 187
Shanahan v Scott (1957) 96 CLR 245, 250
Shephard v Downey [2009] VSC 33

CORPORATIONS – MANAGED INVESTMENT SCHEME – RESPONSIBLE ENTITY – where the applicants applied to have a temporary responsible entity appointed pursuant to ss 601FN and 601FP or reg 5C.2.02 – whether the application ought to be granted

CORPORATIONS – MANAGED INVESTMENT SCHEME – WINDING-UP – APPLICATIONS FOR WINDING-UP BY THE COURT – where a member of the fund and ASIC applied for orders pursuant to ss 601ND and 601NF – whether the first respondent should be directed to wind up the fund – whether it was necessary for an appointment pursuant to s 601FN(1) – appointment of receiver pursuant to s 601FN(2)

COUNSEL:

PH Morrison QC, with P Ahern, for the applicants
JC Sheahan QC, with S Cooper, for the first respondent
P Hastie for a member of the second respondent
DR Tucker (Solicitor) for the third respondent
RM Lilley QC, with SJ Forrest, for the intervener

SOLICITORS:

Piper Alderman for the applicants
Russells for the first respondent
Synkronos Legal for a member of the second respondent
Tucker & Cowen for the third respondent
Australian Securities and Investments Commission for the intervener

[1] This matter was commenced by originating application, adjourned twice, and came on in the civil list. By the time of the hearing two further applications had been made, one by ASIC, intervening, and one by a unit holder, Shotton. All applications were heard together over three days.

[2] The originating application was directed to the first respondent, a company in voluntary administration, which is the responsible entity of a managed investment scheme under the *Corporations Act* 2001 (Cth) (the Act), First Mortgage Income Fund, (FMIF or the fund). FMIF invested by lending on the security of mortgages to borrowers who developed real property. There are three associated feeder funds to FMIF, one is controlled by Trilogy Funds Management Limited (Trilogy) as responsible entity. Two are controlled by the first respondent as responsible entity, one of these is named Currency Protected Australian Income Fund (CPAIF). As well, there is a service company to the funds, LM Administration Pty Ltd (Administration). The same voluntary administrators were appointed to Administration as the first respondent. In a coda to the principal hearing the matter was mentioned again on 30 July 2013 and new material showed that at the second meeting of creditors of Administration, held on 26 July 2013, liquidators unconnected with the current administrators of the first respondent were appointed to Administration.

[3] The fund was established in 1999, it was successful in attracting investment – in February 2008 it was said to be worth over $700 million. It was adversely affected by the GFC. By June 2011 it had assets of $450 million; by June 2012 this had declined further to around $340 million, and again to $320 million by 31 December 2012. The only assets of the scheme are loans made to borrowers and all of those are in default. The net loss attributable to unit holders in 2011 was $77 million, and in 2012, $88 million.

[4] From 2009 the scheme had greatly reduced activities: in March it declined new applications to buy units; in October it suspended redemptions from the fund, the applicant concedes this was apparently on the basis that the fund was illiquid. Its unit value in November 2012 was said to be 59 cents; each unit had been worth one dollar on issue. In December 2012, before administrators were appointed, the responsible entity of the fund implemented a "go forward" strategy. The name was Orwellian in that this strategy involved an orderly sale of all remaining fund assets and a pro rata distribution of the proceeds (after repaying debt) to unit holders with the aim of returning investors' capital investment to them as quickly as commercially possible. In announcing this new strategy the responsible entity said that it had determined that the fund was not liquid for the purpose of the withdrawal provisions under the Act.

[5] Voluntary administrators were appointed to the first respondent, responsible entity of the fund, on 19 March 2013, on the basis of a board resolution that the company was insolvent or likely to become insolvent. I accept that the administrators are independent of the previous directors – Court Document 46, paragraphs 35-36.

[6] The administrators held a first meeting of creditors on 2 April 2013. No deed of company arrangement has been proposed and there is little likelihood of one being proposed. The second meeting has not yet been held. The likelihood appears that

the first respondent company will be put into liquidation within a month. It is expected that the current administrators will act as its liquidators.

[7] On 11 July 2013 Deutsche Bank AG appointed receivers over the assets and undertakings of the scheme. Deutsche Bank is owed around $30 million. There are sufficient assets in the scheme to found an expectation that Deutsche Bank will recover all amounts owing and depart, leaving significant assets still in the scheme. The current administrators of the first respondent have resolved to wind up FMIF, but are restrained from doing so until this proceeding is determined.

Trilogy Originating Application

[8] The originating application was filed on 15 April 2013. It sought, pursuant to ss 601FN and 601FP of the Act or alternatively reg 5C.2.02 of the *Corporations Regulations* 2001 (Cth), that Trilogy be appointed as temporary responsible entity of the FMIF.[1] It was common ground at the hearing of the application that Trilogy had indemnified the named applicants to this proceeding. The named applicants are small unit holders of the scheme (0.029 per cent of the issued units). Counsel appearing for the applicants expressly said that he was providing the view of Trilogy to the Court.[2] I will refer to the originating application as the Trilogy application.

Competence

[9] Section 601FN of the Act provides:

> "ASIC or a member of the registered scheme may apply to the Court for the appointment of a temporary responsible entity of the scheme under section 601FP if the scheme does not have a responsible entity that meets the requirements of section 601FA."

[10] Section 601FA of the Act provides:

> "The responsible entity of a registered scheme must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme."

[11] The applicant said the first respondent no longer held an Australian financial services licence which authorised it to operate a managed investment scheme. This was said to be due to ASIC's having issued a notice to the first respondent:

> "TAKE NOTICE that under s 915B(3)(b) of the Corporations Act 2001 (**Act**), the Australian Securities and Investments Commission (**ASIC**) hereby suspends Australian financial services licence number 220281 held by LM Investment Management Limited ... (**Licensee**) until 9 April 2015.
>
> Under s 915H of the Act, ASIC specifies that the licence continues in effect as though the suspension had not happened for the purposes of the provisions of the Act specified in schedule B regarding the matters specified in Schedule A.
>
> **Schedule A**

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1 The application sought alternative relief under the *Trusts Act* 1973 which was not pursued before me.
2 t 3-25.

> The provision by the Licensee of financial services which are reasonably necessary for, or incidental, to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of ... LM First Mortgage Income Fund ..."

[12] The word "operate" is not defined in the Act. It was considered by Davies AJ in *ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor.*[3] In that case ASIC brought proceedings against the defendant which had duped investors into paying large amounts of money purportedly as investments in something which was held to be a managed investment scheme within the meaning of s 9 of the Act. An issue in the case was whether or not the sole director of Pegasus had contravened the Act by operating the unregistered managed investment scheme. Davies AJ noted that the word "operate" should be given its ordinary English meaning; referred to the Oxford English Dictionary, and remarked that, "The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme."[4] The conclusion that the sole director and directing mind of Pegasus, the person who formulated and directed the scheme and the sole person involved in its day-to-day operations, was the person who operated it was unremarkable.

[13] The applicant relied upon the definition of "managed investment scheme" in s 9 of the Act; the constitution of the first respondent company, and various other provisions, including various of the s 601 provisions of the Act to show that a very wide range of matters could be comprehended by, or included in, the concept of operating a managed investment scheme. No doubt that is so. It does not follow that, because under the terms of ASIC's suspension of 9 April 2013, the first respondent was limited in the activities it could perform, that it did not operate the managed investment scheme after 9 April 2013. Its operation of the scheme after 9 April 2013 was limited, but continuing. The word "operate" is a word of wide import and it must take its meaning in any particular case from all the relevant circumstances, including the nature of the fund, and the financial position of the fund. From 2009 there had been significant limits on the operation of the fund as financial circumstances excluded more and more of the potential activities open to an operator of the fund. No doubt the ASIC notice of 9 April 2013 further limited what could be done by way of operation of the fund, but as a matter of ordinary English and practical reality that notice did not bring the first respondent's operation of the fund to an end. What it has done since then no doubt falls within the concept of operation of a managed investment scheme, and the first respondent no doubt continues to bear the obligations and duties associated with such operation. It follows that the applicant is not able to rely upon s 601FN to bring this application.

[14] The alternative basis relied upon by the applicant was reg 5C.2.02 of the *Corporations Regulations* which provides:

> "ASIC, or a member of a registered scheme, may apply to the Court for the appointment of a temporary responsible entity of the scheme if ASIC or member reasonably believes that the appointment is necessary to protect scheme property or the interests of members of the scheme."

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3 [2002] NSWSC 310.

4 Above, [55].

[15] The structure of the regulations is such that Part 5C.2, headed "The responsible entity" corresponds, on its face, with Part 5C.2, Division 2 of the Act headed "Changing the responsible entity", ss 601FJ-601FQ. The only provision of the Act allowing ASIC or a member to apply for the appointment of a temporary responsible entity is s 601FN, just discussed. It would seem therefore that reg 5C.2.02 goes beyond the Act in that it purports to give rights greater than, or inconsistent with, those provided for in s 601FN – see s 1364 of the Act, and *Shanahan v Scott*.[5] This point is reinforced by the fact that the regulation provides only that a member may apply to the Court, and s 601FP of the Act gives the Court power to appoint a temporary responsible entity only on application under s 601FL (not relevant to this part of the argument) or s 601FN.

[16] The position is somewhat complicated by the last section in Chapter 5C of the Act, s 601QB, which provides that:

> "The regulations may modify the operation of this Chapter or any other provisions of this Act relating to securities in relation to:
> (a) a managed investment scheme; or
> (b) all managed investment schemes of a specified class."

[17] Regulations 5C.1.03 and 5C.11.02 both expressly purport to modify the operation of Chapter 5C of the Act in accordance with s 601QB of the Act. However, there is no requirement in s 601QB that any regulation made pursuant to it expressly state that it is modifying the operation of the chapter pursuant to the section. Having regard to the plain terms of s 601QB, I do not think it is necessary that a regulation expressly do this before it can be valid.

[18] Nonetheless s 601QB is not a plenary power to modify, but only a power to modify provisions, "relating to securities". Securities is defined at s 92(1)(c) to include "interests in a managed investment scheme". Other securities, as defined by s 92 include debentures, stocks, bonds, shares or units. At s 9 a managed investment scheme is defined as having (inter alia) the feature that "people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme ...". While the word "interest" or "interests" is not strictly defined, this part of the definition of managed investment scheme, together with the other types of securities defined by s 92 of the Act, shed some light on how the word "interests" in s 92(1)(c) is to be understood. An interest in a managed investment scheme is something analogous to (if less defined than) a share in a company.

[19] Turning again to the terms of s 601QB, I cannot see that reg 5C.2.02 is a regulation which purports to modify a provision of the Act relating to securities. I do not think that s 601FN could be characterised as a provision of the Act relating to securities, notwithstanding it gives rights to members of managed schemes, who no doubt have interests in them, which would amount to securities within the meaning of s 92(1)(c) of the Act. Again by way of analogy, were the provisions dealing with companies, I would not characterise a provision along the lines of s 601FN as a provision relating to shares in a company merely because it gave a remedy to shareholders (along with ASIC). My view therefore is that reg 5C.2.02 does not authorise the application brought by the Bruces.[6] The applicant relied upon a short report, *In Re Gordon*.[7]

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5 (1957) 96 CLR 245, 250.

6 See the doubts expressed by Applegarth J in *Re Equititrust Ltd* [2011] QSC 353 [7], correctly in my view.

7 [2005] FCA 950.

The report does not contain any of the reasoning processes of the judge who made the order and does not reveal whether or not the validity of reg 5C.2.02 was in issue before him. For these reasons, I do not regard the report as helpful.

[20] Having regard to my conclusions in relation to s 601FN and reg 5C.2.02, the application brought by the Bruces ought to be dismissed as incompetent.

Discretion

[21] Even had I power to do so I would not appoint Trilogy as temporary responsible entity. Section 601FP(1) allows the Court to appoint a company as temporary responsible entity if the Court is satisfied that the appointment is in the interests of members. If reg 5C.2.02 were valid, it would additionally direct my attention to whether or not it was necessary to protect scheme property.

[22] Section 601FQ(1) provides that a temporary responsible entity is just that. It must call a members' meeting for the purpose of the members choosing a company to be a new responsible entity. This meeting must be held "as soon as practicable" and in any event within three months of it becoming the temporary responsible entity. This will inevitably involve cost for the fund. Section 601FQ(2) provides the opportunity for more than one meeting and for applications to be made to Court. Independently, s 601FQ(5) provides that if the temporary responsible entity forms the view that the scheme ought to be wound up, it must apply to Court for such an order. There is a likelihood that any person objectively looking at this scheme would need to make such an application. Further, having regard to the way this litigation has been conducted and the history of the 13 June 2013 meeting (see below for both topics), in my view there is a distinct possibility that there would be contention and indeed litigation about any meeting held to appoint a new responsible entity.

[23] Trilogy hoped that it would be appointed as a permanent responsible entity by the meeting required by s 601FQ(1). However, I cannot see it is in the interests of the members of the FMIF to become caught up in a process which provides an interim solution which will inevitably involve more expense by way of meeting (s 601FQ(1)), and may involve further expense by way of Court action, with the inevitable disclocation, uncertainty and expense which any interim solution must involve.

[24] There are other reasons why I do not regard the appointment of Trilogy as responsible entity as being in the interests of the members of this fund. One very practical one is that the current administrators swear that there is a considerable overlap between the staff of the first respondent and the company Administration which would make it difficult, and I infer, expensive, to hand over to a new responsible entity – Court Document 46, paragraph 63. It seems to me that prima facie those staff who have long knowledge of the business of the fund ought to be working for or with the responsible entity as much as possible in order to preserve corporate memory, competence and save cost.[8] Employees of the first respondent will have a good background knowledge of the loans which are its primary assets,

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[8] I note that this is a different argument conceptually from that advanced by the administrators of the first respondent to the effect that if this fund is to be wound up, they ought wind it up because otherwise the time they have spent as administrators since March will, in some part, be lost to the first respondent and this will involve waste of costs. I deal with that argument below at [128].

the properties which provide the first respondent its mortgage securities, and the history of the first respondent's dealing with the borrowers who are currently in default. Further, these employees will have knowledge of the documents and systems of the first respondent. From a practical point of view, it seems to me that this is all very valuable. I accept that uncertainty as to the longevity of this arrangement results from the decision to place Administration into liquidation, and thus to some extent diminishes the weight of this consideration.

[25] Trilogy puts itself forward as having an advantage over other persons proposed to take control of the fund by reason of the fact that it is not staffed by insolvency practitioners, but is a fund manager, with particular experience of distressed funds. I deal with these matters in detail at [37] below. In the end I do not see that there is any great advantage provided by the slightly different perspective which Trilogy's control would provide to the responsible entity. In fact, given that my view is that this fund ought to be wound up – [34]-[43] – it seems to me there is probably a disadvantage in Trilogy not having as much insolvency experience as the other contenders for control, particularly when it seems that there may be contention and litigation involved in the winding-up.

[26] In this case there is no evidence before me that the assets of the FMIF are in danger and need particular protection, except, indirectly, because of conflicts of interests which it is said will become evident if either the first respondent or Trilogy winds up FMIF.

[27] To the extent that the Trilogy application to be appointed temporary responsible entity is based on the idea that someone independent of the first respondent and its administrators ought to be appointed to control the FMIF, that will be achieved by the orders which I propose to make, although they differ from those which the applicant and Trilogy seek. In that regard, I have dealt with the applicant's arguments as to conflicts of interest and the need for independence at [97]ff below.

[28] To some extent, Trilogy will have potential conflicts of interest if it is in charge of the fund because it is the responsible entity of a feeder fund to FMIF. Further, Trilogy has a view that there ought to be litigation by members of the FMIF against the first respondent or its directors. It has engaged Piper Alderman to investigate such claims (as far back as November 2012) and has touted the idea publicly of a class action. There may be claims to be made, and it may be that it is rational to make them, depending on their prospects of success, likely cost and the likely prospect of recovering anything at the end of the day. At present, however, Trilogy has not investigated the matters to any extent[9] and I must say I find its advocacy of such claims prior to any proper assessment rather disconcerting. The first respondent says that Trilogy as a member has a right to claim against the first respondent and its directors if it wishes, but says that it seeks to become responsible entity of the fund so that it does not have to bear the cost of doing this, but can use the fund essentially to bear the expense of such actions. There is I think potential conflict of interest in this.

[29] The applicant advanced a general argument that it was undesirable for the responsible entity of the FMIF to be a company under external administration. There may be arguments to be made in cases where the fund itself will continue to

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9 For example, Court Document 91, paragraph 31.

trade as a going concern (for want of better terms). However, where the fund itself is to be brought to an end and its assets realised for the benefit of members (which should happen even in Trilogy's view), I cannot see that it is particularly undesirable for a responsible entity under external administration to have charge of this fund. It certainly does not outweigh the other factors which I consider bear upon my decision in this regard.

[30] Further, it was argued in a general way that ASIC might in the future act to further limit or wholly cancel the first respondent's financial services licence: there is the potential for breaches of the licence conditions due to the insolvency of the first respondent – see e.g., s 915B(3) of the Act. I do not think there is any realistic basis for present concern about that in circumstances where ASIC is an intervener in this litigation and is content for orders to be made which leave the first respondent as responsible entity, subject to another body being given responsibility for ensuring oversight of the winding-up of the fund.

[31] For all these reasons, I do not think it is in the interest of the members that Trilogy be appointed as temporary responsible entity. Nor, to deal with a submission made by counsel for Trilogy outside its application, do I think Trilogy ought to be appointed to wind up the FMIF, be receiver of the property of the FMIF, or to take responsibility for seeing that the FMIF is wound up.

ASIC Application and Shotton Application

[32] On 29 April 2013 Mr Shotton, a member of the FMIF, filed an application seeking an order pursuant to s 601ND of the Act that the first respondent be directed to wind up the FMIF and that an independent liquidator be appointed to take responsibility for ensuring that the FMIF was wound up in accordance with its constitution – s 601NF(1) of the Act.

[33] The ASIC application is similar. On 3 May 2013 ASIC filed an application seeking orders that the administrators of the first respondent be directed to wind up the fund pursuant to s 601ND(1)(a); that independent liquidators be appointed to take responsibility for ensuring that the fund was wound up in accordance with its constitution pursuant to s 601NF(1); that those liquidators be appointed as receivers of the property of the fund, either pursuant to s 1101B(1) or s 601NF(2) of the Act, and that they have wide powers to exercise as receivers. By the end of the hearing Mr Shotton joined with ASIC in proposing that receivers be appointed as proposed by ASIC.

Winding-up

[34] On 6 May 2013 the administrators of the first respondent resolved to wind up the fund on the basis that it cannot accomplish its purpose – s 601NC of the Act. They have been restrained from commencing the winding-up until this proceeding is resolved. Their position in relation to the first order sought by Shotton and ASIC is that it was unnecessary on the basis that the fund will in any event be wound up.

[35] All parties before the Court except the applicant agreed that the FMIF ought to be wound up. The current administrators depose at some length to the process undertaken by them in making the decision that the fund ought to be wound up. There was no real challenge to the substance of this evidence. Counsel for the

applicant asserted from the bar table that the fund was not insolvent.[10] I cannot determine that on the material before me, and no party advanced a case based on insolvency.

[36] Pursuant to s 601ND(1)(a) I have power to direct a responsible entity to wind up a scheme if it is just and equitable to do so. In this case it seems to me just and equitable to do so. The case law is to the effect that the principles concerning winding-up of companies on the just and equitable ground inform the Court's thinking in applications pursuant to s 601ND.[11] The financial position of the fund has already been outlined. From the end of 2012, if not before, those in charge of the company have been liquidating its assets with a view to returning capital to members. The fund was originally established to provide an investment which would provide regular income to unit holders and a return of capital at maturity – cll 11 and 12 of the constitution. This purpose has failed: there is no income and members can no longer exercise their rights to withdraw their investments in accordance with the constitution.[12]

[37] Trilogy does not advance the case that the fund should continue in a plenary way as a going concern. The point of difference between it and the other parties to this proceeding is that Trilogy puts itself forward as a more suitable person to take charge of the FMIF. It is a fund manager, unlike all the other persons proposed to take charge of the fund, who are insolvency practitioners. Trilogy has put material before the Court which shows that it has experience in dealing with distressed funds, including selling distressed assets to best advantage and dealing with claims against former fund managers. Against this background it is sworn – Court Document 29, paragraph 17 – that Trilogy would seek to: (a) consider selling the assets of the FIMF as appropriate and (b) obtain finance (either by external borrowing or on the sale of assets) to enable the development of some real properties, of which FIMF is mortgagee, to be completed. It is hoped that this second approach might provide higher sale prices than an insolvency practitioner might provide on a liquidation of the fund. In this regard Trilogy has a joint venture with a company named CYRE Trilogy Investment Management Pty Limited which specialises in marketing distressed property assets and assessing whether or not to complete incomplete development projects with a view to obtaining the best purchase price. Trilogy says that it would be advantageous if it were appointed as responsible entity for it would have an untrammelled financial services licence and full powers to pursue development of appropriate assets before sale, including borrowing for this purpose. It says that under its limited licence, the first respondent does not have sufficient power to act in this regard. For the same reason it says that I should not order the FMIF to be wound up.

[38] On behalf of the first respondent, a Mr Corbett swears that he has already performed a great deal of work, as leader of a team which has prepared a detailed analysis of the 27 groups of property over which the FMIF is mortgagee. He says that as part of that exercise he has considered development proposals for the properties. Neither he, nor Mr Wood, on behalf of Trilogy, identifies any particular property which should be developed prior to sale, or gives any detail as to even a class of properties which might be so developed.

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10 See *Capelli v Shephard* (2010) 77 ACSR 35 at [89]ff as to the colloquial concept of insolvency of a managed investment scheme.

11 *Equititrust* (above) at [29] and the cases cited there.

12 cf [13] *Equititrust,* above.

[39] It seems common ground before me that the winding-up of FMIF will take place over years. I do not think that the words of the limited financial services licence granted to the first respondent prohibit it developing property of which the fund is mortgagee in order to obtain a better price for that property in the course of winding-up. ASIC does not agitate such a limitation on this application, and in fact expressly does not prefer Trilogy or the first respondent as responsible entity. If there were to be doubt as to the first respondent's power to borrow or develop a particular property in the course of a winding-up, and there were a plainly sensible proposal in the interests of the fund, I cannot see that ASIC could not either clarify or modify the extent of powers under the limited financial services licence it has granted the first respondent.

[40] Nor am I convinced that making an order that the FMIF be wound up would remove from the person charged with winding-up the power to develop a particular property with a view to sale in the course of winding-up if it were in the interests of the fund. The fund was set up to invest in "mortgage investments" – cl 13.2 of its constitution – and cl 13.6 of the constitution makes it clear that in the ordinary course of its business it could exercise all the powers of a mortgagee. Indeed one would have thought that was a necessary and incidental part of running a business which invested in mortgage investments. The liquidator of a company would normally have the right to carry on the business of a company "so far as is necessary for the beneficial disposal or winding-up of that business" – see s 477(1)(a) of the Act. Here the constitution gives the responsible entity power to "manage the scheme" during the time of a winding-up until such time as all winding-up procedures have been completed and cl 16.7(e) gives such a responsible entity power to postpone the realisation of scheme property "for as long as it thinks fit". Again, if doubt arose about a particular proposal in the future s 601NF(2) allows the Court to make an appropriate direction. At the moment, there are no specific proposals, just some conceptual thinking.

[41] The second activity which Trilogy is keen to pursue is investigation of claims on behalf of the FMIF against the first respondent and/or the previous directors of the first respondent for conduct which is more fully detailed below, but which claims concern changes made to the first respondent's constitution being beyond power; related party transactions between the first respondent and Administration, and claims, perhaps in negligence, for the financial losses which were suffered by the FMIF during 2008 and 2009. These are the type of claims which are normally investigated, and if necessary, pursued by insolvency practitioners during the course of a company winding-up – cf s 477(2)(a) – and I cannot see that the limited financial services licence granted to the first respondent would prevent it from doing this. Nor is the potential existence of such claims a reason why I should not direct that the FMIF be wound up now. Clause 16.7(a) of the constitution obliges a responsible entity winding-up the fund to realise its assets. If there are claims to be made on behalf of the fund (and Trilogy has not investigated the position) then those choses in action would constitute property which the responsible entity, winding-up the scheme, would have power to pursue.

[42] In my view, it is desirable that the FMIF be wound up and its assets realised for unit holders. Further, I think it is desirable that I make an order that this occur. If I do not, the administrators will either need to call a meeting pursuant to cl 16.2(d) of the constitution or give members an opportunity to meet pursuant to cl 16.3(a) of the constitution; see also ss 601NB and 601NC which have very similar requirements.

At a general level, I should not be taken as opposing consulting the members as to the fate of the fund. However, for reasons which will appear from the discussion below, I anticipate at least the possibility that any meeting held pursuant to cl 16 of the constitution would be subject to contention between rival factions within the fund and litigation to test those rival contentions. Further, as my discussion of the 13 June 2013 meeting shows, there is a real possibility that the members will be showered with a great deal of information about rival contentions and that some of it may be misleading. Those circumstances must reduce the quality of the "democracy" invoked, and in my view make it desirable that I ought make an order.

[43] For all the above reasons I will make an order pursuant to s 601ND(1)(a) of the Act.

Appointments under s 601NF(1) and (2)

[44] The real issue joined between ASIC and Shotton on the one hand, and the first respondent on the other, was who ought to wind up the company, or take responsibility for the winding-up, as s 601FN(1) has it.[13]

[45] The first respondent submits that the provisions of Part 5C.9 of the Act make it clear that it is generally to be the responsible entity which winds up a managed investment scheme – ss 601NB, 601NC, 601ND and 601NE. I think this is right.

[46] Sections 601NE and 601NF(1) provide that the scheme is to be wound up "in accordance with its constitution and any orders" which the Court makes under s 601NF(2). There has been some consideration in the cases as to the width of the Court's power under s 601NF(2) to make directions (by order) about how a registered scheme is to be wound up, and I am grateful to Applegarth J for the review which is found in *Equitrust* (above) at [42]-[49], and his own views expressed at [50]ff in that case. While the scope of the power may not yet be fully explored, it is clear that there is not a wholesale importation of the scheme of company liquidation into the area of managed investment schemes. This is consistent, in my view, with the idea that it is generally the responsible entity which winds up the scheme in accordance with its constitution. Certainly this contrasts with e.g., the public aspects of a liquidation.

[47] Section 601NF(1) confers a jurisdiction in the Court to appoint a person other than the responsible entity to take responsibility for the winding-up of a scheme, "if the Court thinks it is necessary to do so". The first respondent submitted that the power of the Court to appoint was more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so. Again I think this correct, as a matter of plain English, against the background that the statute establishes a general regime where it is the responsible entity which will wind up a scheme in accordance with the constitution. It was the view taken by Fryberg J in *Re Orchard Aginvest Ltd.*[14] It was also the view of White J in *Re Stacks Managed Investments Ltd.*[15] Both these judges refused orders which might have been convenient or desirable, but were not necessary. Applegarth J took the

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13 In fact to a large extent this was also the point of the litigation for Trilogy whose primary position was that it would (eventually) have the task of realising the assets of the fund and who the applicant submitted ought be the person who was responsible for liquidating the fund if (contrary to its primary submission) an order to wind up the fund was made.

14 [2008] QSC 2, pp 8 and 9.

15 [2005] NSWSC 753 [50].

same view as to necessity in *Equititrust* at [51], and so did Judd J in *Shephard v Downey.*[16] The circumstances in which it is necessary to appoint will include a case where the responsible entity no longer exists or is not properly discharging its obligations in relation to a winding-up – s 601NF(1).

[48] Both ASIC and Shotton say that it is necessary to appoint someone to oversee the winding-up of FMIF pursuant to s 601MF because the first respondent cannot be relied upon to act in a balanced and impartial way in winding-up a fund where there are potential conflicts of interests and complex questions associated with them. ASIC in particular is concerned about the attitude of the first respondent demonstrated in relation to its calling a meeting of members of the FMIF; its dealings with ASIC, and its conduct in this proceeding. On behalf of Shotton various potential conflicts of interest between the interests of the FMIF, on the one hand, and the first respondent company; and the administrators themselves, on the other hand, were relied upon.[17] Trilogy also made criticism of the meeting and advanced submissions based on potential conflicts for the present administrators, and I deal with these in this part of the judgment. I now deal with each of these factual matters in turn.

Meeting 13 June 2013

[49] In response to receipt of Trilogy's application, the administrators of the first respondent caused a meeting of members of the fund to take place.

[50] Section 252B of the Act provides that the responsible entity of a registered scheme must hold a meeting of the scheme's members to vote on a proposed special or extraordinary resolution, if (inter alia) members with at least five per cent of the votes "that may be cast on the resolution" request it. It might be recalled that, in addition to being the responsible entity of FMIF, the first respondent is the responsible entity of two feeder funds which hold units in FMIF, and that one of the feeder funds is CPAIF. In fact the assets of CPAIF are held by a custodian trustee, the Trust Company. The administrators of the first respondent (as responsible entity of CPAIF) directed the Trust Company to request a meeting of members of FMIF pursuant to s 252B of the Act on the basis that it held 24 per cent of the issued units in FMIF. The Trust Company complied with that request without question, almost immediately, by sending the administrators (in their capacity as responsible entity for FMIF) a request in terms provided to the Trust Company by the administrators. The meeting request proposed two extraordinary, and interdependent, resolutions: (1) to remove the first respondent as the responsible entity of FMIF and (2) to appoint Trilogy in its stead. On this basis the administrators of the first respondent sent a notice convening a meeting.

[51] The administrators' purpose in calling the meeting was made plain in the notice of meeting. They wished to use the meeting as a strategy to defeat or damage Trilogy's prospects on its originating application. The introductory words of the covering letter to the notice of meeting are:

> "A Meeting is being called for the Fund by LM, the current manager.
> LM decided to call the Meeting because a unitholder has made an

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16 [2009] VSC 33 [132]-[133].

17 After the hearing on 30 July 2013, dealing in part with the appointment of independent liquidators of Administration, the conflict points relating to Administration fell away.

application to the Supreme Court of Queensland for Trilogy to be appointed as the Manager of the Fund in place of LM.

LM does not believe that the power of the Court to appoint a temporary or replacement manager can or should be exercised in the circumstances relied upon by Trilogy in its Court application. However, LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy. This is considered preferable to a court determined outcome where over 99% of investors, by value, will have no say in the outcome."

[52] The introduction to the notice of meeting is similar:

"The Meeting is being called by LM Investment Management Limited (Administrators Appointed), the current Manager of the Fund (LM). LM decided to call the Meeting because, following receipt from two unitholders of an application to the Supreme Court of Queensland for Trilogy Funds Management Limited (Trilogy) to be appointed as the Manager of the Fund in replacement of LM, and immediate consultations with ASIC, LM wished to consult Members in the proper forum, with adequate notice.

LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy. LM also wishes to avoid the costs and delay of multiple Court appearances, perhaps appeals, and multiple meetings which are the practically inevitable result of Trilogy's Court application. For example, it is doubtful that the Court has, or will exercise the power to appoint a temporary manager. Appeals are possible. This Meeting is considered preferable to a court determined outcome where there is no meeting, no vote and where, at present, over 99% of members, by value, will have no say in the outcome unless they wish to participate in legal proceedings." (my underlining)

[53] Neither the administrators of the first respondent, the Trust Company nor CPAIF wanted the meeting to pass the two resolutions proposed. The first respondent argued strenuously against the resolutions in material which it distributed to the members of the scheme. For example:

(a) "LM expects that if it remains as manager investors will recover distributions faster and in a greater amount."

(b) "LM also notes that Trilogy (unlike LM) does not hold the correct Corporations Act licence in order to be able to manage your Fund" and "LM has taken legal advice on the adequacy of Trilogy's AFSL. LM is confident that Trilogy's AFSL does not authorise it to operate the Fund."[18]

(c) "Further, in a recent court action involving another Fund managed by LM where there was a proposal to change the Trustee, the court ordered that the full legal costs of each party to the court proceedings should be met from the

[18] Trilogy (at that stage) had no licence to manage foreign currencies which was necessary for management of the FMIF. Trilogy now has an appropriate licence.

assets of the underlying Fund (even though the lawyers had promised they would not charge their clients).

Thus by calling a meeting to vote on the appointment of Trilogy as a replacement Responsible Entity LM is also cognisant that such a move is likely to save significant legal costs for the Fund."

(d) Under the heading "Does LM have the licence to manage the fund?":

"As you may be aware, on 9 April 2013 the Australian Securities & Investments Commission temporarily suspended LM's AFSL for a period of 2 years. However ASIC allowed LM's AFSL to continue in effect as though the suspension had not happened for all relevant provisions of the Corporations Act 2001 (Cth) so to permit LM, under the control of FTI as Administrators, to remain as the responsible entity of all LM's registered managed investment schemes for certain purposes which include investigating and preserving the assets and affairs of, or winding-up, LM's registered management investment schemes.

ASIC's decision to suspend the AFSL but allow LM and FTI to continue in this way, ensures that FTI as administrators may perform their statutory and other duties.

LM has, of course, taken legal advice on its position. LM is confident that its AFSL adequately authorises LM through FTI to continue to control the Fund."

(e) "Deutsche Bank has provided the fund with a secured loan facility since 2010. LM's obligations under the Deutsche Bank facility are secured in favour of Deutsche Bank under an ASIC registered charge over all the assets and undertaking of the Fund. The facility has been progressively reduced by approximately $0.5m per month and now has a loan balance of approximately $26.5m.

If the resolutions are approved in this Notice of Meeting, that will be an Event of Default under the facility agreement with Deutsche Bank, entitling it, for example, to appoint receivers to the Fund. The consequences upon the existing financial arrangements with Deutsche Bank are unknown at this stage.

FTI has the ongoing operational support of Deutsche Bank following the appointment as Voluntary Administrators (even though the appointment of administrators was an Event of Default)."

(f) "There are only three possible outcomes of the administration of LM – a Deed of Company Arrangement, a creditors' voluntary winding-up or (unlikely) LM is returned to the control of the directors. If LM is wound up, its liquidators will have access to the claw-back provisions of the Act – for example, recovery of unreasonable director-related transactions etc. There is room for debate as to whether these provisions could be invoked for the benefit of the Fund; and the administrators have not yet completed the investigation as to any transactions which might be available for the benefit of Members. On 12 April, 2013, the Chief Justice extended the time for the administrators to convene a second meeting of creditors until 25 July, 2013.

> While those matters are not clear, what is clear is that if Trilogy replaces LM as the Responsible Entity of the Fund, it will have no access at all to those provisions for the benefit of Members."

[54] Other less controversial arguments were made, for example, that LM had more familiarity with the assets of the fund than Trilogy, and that changing responsible entities might be expected to slow the process of recovery of assets in the fund. The administrators, using existing LM staff, it was said, were more familiar with the affairs of the fund and less likely to be taken advantage of by those owing money to the fund.

[55] The notice of meeting stated that Trilogy had been invited to participate in the process leading up to the meeting and provide information about itself to members.

[56] The above statements all come from the initial notice of meeting and covering letter dated 26 April 2013. That contemplated a meeting being held on 30 May 2013. However, there intervened correspondence between the first respondent and ASIC, and correspondence between the first respondent and Trilogy, regarding the information given to members, and the validity of the meeting. ASIC and Trilogy rely upon this as further showing that the first respondent, by its administrators, is unsuitable to wind up the FMIF. I deal with that correspondence now. As to the calling of the meeting, it is sufficient to note that the process was technical and somewhat artificial, and that the administrators (in effect) called a meeting to consider two resolutions they opposed.

Dealings with ASIC

[57] The ASIC correspondence needs to be read against a particular background. On 19 April 2013 ASIC became aware of the Trilogy application and was concerned as to the impact that might have on the "efficient resolution of the future of the various funds" of which the first respondent was responsible entity. On 23 April 2013 ASIC met with one of the administrators and the administrators' solicitors. At that meeting the administrators' solicitors suggested that the administrators could call a meeting of members to consider the appointment of a new responsible entity. He said that given a choice between the first respondent and Trilogy, "the first respondent would win".

[58] ASIC too said it preferred a solution not involving litigation and suggested the use of an enforceable undertaking issued by ASIC which obliged the administrators to call a meeting to vote on "resolutions for the appointment of a new responsible entity or that the funds be wound up". There was discussion as to how quickly the administrators could call a meeting and make a final decision as to winding-up. ASIC was concerned that if the enforceable undertaking solution was to be of utility to members it would need to occur sooner rather than later in order to save costs in the litigation, and associated with the appointment of a temporary responsible entity. As part of its discussions with the first respondent on 23 April, ASIC had informed the first respondent that it planned to intervene in the Court proceeding and that if ASIC and the first respondent could agree on the terms of an enforceable undertaking, ASIC would take the position in the litigation that it was preferable for the first respondent to remain as responsible entity.

[59] The next day, 24 April 2013, ASIC forwarded a draft enforceable undertaking to the administrators' solicitors, "for discussion purposes". The draft involved the administrators' undertaking to call meetings of the members of FMIF and:

> "At the meetings referred to in subparagraphs (a) and (b) above, the resolutions put to the unitholders for determination will include resolutions for:
>
> (i) the appointment of a responsible entity over each of the funds; and
>
> (ii) whether the fund should be wound-up and, if so, by whom."

ASIC asked, "Please let me know your clients' comments and proposed amendments. It may be that we think of some additional amendments from our end as well as we consider it further over the public holiday [25 April]."

[60] On 26 April 2013 the first respondent issued the notice of meeting and covering letter discussed above. It informed ASIC of this briefly. It did not give ASIC the material sent to members. The meeting actually convened would not, as ASIC had wanted, deal with the question of winding-up, and it dealt with the question of who would be the responsible entity in a much more specific way than ASIC had proposed. Plainly enough it contradicted ASIC's expectation that the administrators would work with ASIC as to what would be put at the meeting. It also contradicted their solicitor saying to an ASIC solicitor earlier on 26 April that he would send a re-drafted version of the enforceable undertaking – affidavit Gubbins filed 15 July 2013, paragraph 6. As well, when ASIC received the notice of meeting it had concerns it was misleading.

[61] On 29 April 2013 the first respondent informed ASIC that it was not willing to enter into an enforceable undertaking and not willing to seek a resolution as to wind up the FMIF – affidavit Hayden filed 15 July 2013, paragraph 31(a). When asked to explain, the administrators said there would be negative connotations for them in entering into an enforceable undertaking and that they did not think it appropriate to seek a resolution from the meeting as to winding-up of the FMIF before a vote on who the FMIF desired as responsible entity. They said that if the meeting rejected Trilogy they would convene another meeting "promptly" to consider and approve any decision they might make to wind up the fund. These decisions were said to have been taken by the administrators after "two days of intensive consultation" with two firms of solicitors and with "other expert advisors".

[62] In an affidavit filed 2 May 2013 the administrator, Ms Muller, swears to a desire to "ensure that our conduct of the [first respondent] was to the extent possible, satisfactory to ASIC ..." – Court Document 46, paragraph 12. And further, "... Mr Park and I have been discussing with ASIC a proposal for undertakings to meet any concerns of ASIC and any 'bona fide' (concerns) of members in relation to the conduct of the fund", paragraph 16. I find it difficult to see this as consistent with the reality of the first respondent's interactions with ASIC. On 21 May 2013, solicitors for the administrators sent an amended draft enforceable undertaking to ASIC. The time for a co-operative solution had well since passed.

Correspondence Prior to 13 June Meeting

[63] To return to correspondence dealing with the proposed meeting, on 8 May 2013 ASIC wrote to the administrators' solicitors calling for an explanation as to various matters raised in the notice of meeting including, as to those matters I have summarised above, how it was that the first respondent thought calling a meeting would save legal costs in relation to the Trilogy application and how the ability of the first respondent to use Part 5.7B of the Act (clawback provisions) was a genuine point of differentiation between the first respondent and Trilogy so far as the FMIF was concerned. The letter also objected to the first set of underlined words at [52] above, which it said implied that ASIC had approved the first respondent's calling the meeting.

[64] As to the saving of costs point, no convincing explanation was provided by the first respondent. It pointed out that at the time of publishing the notice of meeting the Trilogy application had been made but the ASIC and Shotton applications had not. It was said against that background that:

> "It was our client's view that the court would adjourn the Original Proceedings until after the Meeting (at this time we understand that no party to the proceedings suggested that the proceedings were urgent). It was expected that the results of the vote at the Meeting would strongly inform the court proceedings. In addition, it was also thought possible that by convening the Meeting the two unitholders who had commenced the Original Proceedings might discontinue those proceedings and certainly would have if the meeting resolved to appoint Trilogy." – Norton Rose letter 10 May 2013, Court Document 73, p 35 exhibits.

[65] The only realistic way that legal costs would have been saved by calling a meeting was if the meeting voted to appoint Trilogy as temporary responsible entity. The notice distinctly does not say this. Indeed, this is the very result which the first respondent strongly urged members to reject. I think the notice was misleading about cost savings initially and became more so as events unfolded – see the following discussion.

[66] The letter of 10 May 2013 provided no convincing explanation in relation to the concern expressed by ASIC as to the clawback point and rejected ASIC's concern as to the notice implying that the first respondent had ASIC's sanction for its calling the meeting.

[67] ASIC was unconvinced and called upon the first respondent to issue an amended notice addressing its concerns. The first respondent proposed to put further information about the meeting on its website. It provided a draft of the further information it proposed to use to ASIC. By that stage concerns had been raised as to the legal basis on which a meeting seeking to change the responsible entity could be convened. Solicitors acting for the first respondent relied upon ss 601FL and 601FM of the Act.

[68] On 21 May 2013 ASIC called on solicitors acting for the first respondent to either adjourn their meeting until after the date (then) allocated to hear both the Trilogy application and the ASIC and Shotton applications, or alternatively cancel the meeting altogether. ASIC made its request on the basis that the vote of the meeting

would not impact on the majority of competing claims to be determined in the litigation so that the stated reason for convening the meeting – avoiding costs, delay and uncertainty – were inapplicable. It questioned whether s 601FL was applicable to the meeting.

[69] On 27 May lawyers for the first respondent rejected the idea that they would adjourn or cancel the meeting saying:

> "The Meeting will provide an opportunity for members to democratically vote on the direction and future of their fund. There is no logical reason why that opportunity should be taken away from members. Members only other chance to let their views be known to the Court is to appear at the Court hearing which would be a significant financial burden on members, as well as being totally impractical considering the number of members holding units in the FMIF." (my underlining)

Later in the same communication, "Our client's objective in calling the Meeting has been to allow investors to democratically determine who they wish to manage their fund. Our client is committed to this." (my underlining). It was said that if the resolutions were passed that would be the end of the Trilogy application, and if they were not passed, the results would inform the Court on the Trilogy application. The solicitors reiterated reliance on ss 601FL and 601FM of the Act as a basis for the proposed meeting. The solicitors said that the meeting would be adjourned to allow the further explanatory material they proposed to be considered by members and provided further drafts (amended) of that material to ASIC.

[70] From 6 May 2013 solicitors for Trilogy raised matters which went to the validity of the proposed meeting organised by the first respondent – see exhibits 4ff to Court Document 91. Their letters set out clearly, succinctly, and in my view correctly, the reasons why ss 601FL and 601FM of the Act do not allow the proposed meeting (see below). Solicitors for the first respondent made little attempt to meet the legal substance of the points advanced against them, but would not concede the point.

[71] From 6 May 2013 Trilogy actively encouraged members of the feeder fund of which it was responsible entity (around 20 per cent of membership of FMIF) not to participate in the proposed meeting. Further, on 23 May 2013 Trilogy adopted the position that it did not consent to being appointed by any meeting held as a consequence of the first respondent's notice, and called on the administrators to abandon the meeting which it said was not validly called, inutile and an attempted circumvention of Trilogy's court proceedings.

[72] Supplementary information was posted by the first respondent on the FMIF website in the form of a question and answer document dated 27 May 2013. As to the costs and utility of the proposed meeting, the additional information, at question one, rather seems to concede the point that there was little chance that the meeting would, at that stage, save costs or avoid litigation, but a further justification – informing the Court as to the wishes of the members – was raised. For the first time it was stated that the main cost saving would result if the meeting appointed Trilogy as responsible entity. It was still not plainly acknowledged that this was the only realistic scenario in which cost savings could ever have been made. Although Trilogy's lack of consent to being appointed at the meeting was raised, nothing

express was said as to any remaining utility in the meeting given Trilogy's attitude. Instead it was said:

> "It seems that Trilogy prefers to put both you (should you elect to put your views to the Court) and your fund to the significant costs associated with the Court proceedings rather than allow the matter to be determined in the more usual and democratic manner in a meeting of members. This is particularly so given the Court adjourned the proceedings till 15 July in part to allow the meeting to run its course." – Court Document 73, exhibit bundle 15. (my underlining)

[73] While submissions were apparently made on behalf of the first respondent at an interlocutory stage, that the proceeding ought to be adjourned to allow the proposed meeting to occur, I have not seen anything to show that the Court granted an adjournment of the proceeding for this purpose. In fact, counsel for the first respondent conceded it did not.[19]

[74] For the first time, at question six of the 27 May 2013 document, the first respondent clearly stated the limited nature of the licence granted to it by ASIC – i.e., to investigate and preserve, in train of either winding-up the scheme or transferring to a new responsible entity. Until then the information given to members was, in my view, misleading because it implied that the first respondent had a licence which enabled it to continue to manage the FMIF short of a winding-up – see [53(d)] above – and nowhere stated that unless the first respondent wound up FMIF it was obliged to appoint another responsible entity. These were very relevant matters for members to know prior to a vote on the appointment of a new responsible entity.[20]

[75] I assume, in response to ASIC's complaint that the notice of meeting implied ASIC had approved the course, material at question nine of this document stated that the first respondent was "solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting. Prior approval of such Notices by ASIC is not required." That may (or may not) have been apt to dispel the implication of which ASIC originally complained. By the time this statement was published ASIC disapproved in the plainest terms of the meeting and had called upon the first respondent to cancel it. The new statement did not reveal the true position regarding ASIC's attitude to the meeting.

[76] No reference was made to either Trilogy or ASIC's questioning the statutory basis for the meeting. Earlier in the document (at question two) it was stated, "The reason that Trilogy has provided for not consenting is that they believe that the matter should be determined by the Court". In fact Trilogy relied upon its assertions of invalidity as well.

[77] Some information was provided as to the clawback provisions and moderated the statements made in the notice of meeting which claimed that members would be advantaged if the first respondent remained as responsible entity. I note however that the information was not as frank as the view provided to ASIC about this on 1 May 2003, "It is at least hypothetically possible ...". Why the members were being given information about a legally novel, hypothetical advantage is not clear. I

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19 t 1-25.

20 Ms Muller conceded this – tt 1-52-53.

think the clawback information was initially, and remained, misleading in that it implied some real point of distinction between the first respondent and Trilogy.

[78] On 28 May 2013 ASIC again called upon the first respondent to cancel the proposed meeting. It called for more information in train of enquiries as to whether or not the meeting could validly have been called having regard to ss 252B, 601FL and 601FM of the Act.

[79] The meeting was held on 13 June 2013.

Validity of Meeting

[80] The first respondent relied upon two sections of the Act as allowing the meeting of 13 June 2013. Section 601FL(1) provides:

> "If the responsible entity of a registered scheme wants to retire, it must call a members' meeting to explain its reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new responsible entity. ..."

[81] Section 601FM provides:

> "If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity."

[82] Neither s 601FL or 601FM allowed the meeting which took place on 13 June 2013. The opening words of each of those sections describe a circumstance which did not exist. Section 601FL allows a meeting, "if the responsible entity of a registered scheme wants to retire". The first respondent did not want to retire as responsible entity, it wanted to test, or defeat, Trilogy's application to the Court to be appointed as new responsible entity. Section 601FM allows a meeting "if members of a registered scheme want to remove the responsible entity". Here no members of the registered scheme who wished to remove the responsible entity called the meeting. Insofar as there was any relevant state of mind of any member of this scheme, it was the state of mind of the administrators of the first respondent in their capacity as responsible entity of the CPIAL feeder fund, expressed on their behalf by the Trust Company. The desire of the administrators was to remain as responsible entity.

[83] Counsel for the first respondent argued that these introductory words in ss 601FL(1) and 601FM(1) could not possibly be read as a real requirement that there be a subjective intention in terms of the literal meaning of the words. He asked rhetorically how the subjective intention of numerous members who purported to act pursuant to s 601FM(1) might be determined, and what might occur if the intention of some members was different from the intention of others. In terms of s 601FL(1), I think it is quite clear that a subjective intention on the part of the responsible entity is required, for the responsible entity must explain to the members' meeting the reason for its wanting to retire.[21] I do not see any reason for interpreting the introductory words at s 601FM(1) differently.

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[21] See *ASIC v Wellington Investment Management Limited & Anor* [2008] QSC 243, per McMurdo J.

[84] In addition, as to s 601FM(1), ASIC says that the feeder fund CPIAL (whether through the Trust Company or otherwise) was not entitled to take action under Division 1 of Part 2G.4 for the calling of a members' meeting because, returning to the words of s 252B(1), above at [50], although CPIAL was a member with more than five per cent of the units in the scheme, it did not have "at least five per cent of the votes that may be cast on the resolution". ASIC says CPIAL was an "associate" of the first respondent within s 15(1)(a) of the Act: it was a person who was in concert with the first respondent in calling the meeting and voting at it. Thus CPIAL was precluded from voting because of the provisions of s 253E:

> "The responsible entity of a registered scheme and its associates are not entitled to vote their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter other than as a member. ..."

[85] It may be accepted that the first respondent had an interest as, and in remaining as, responsible entity of the scheme, which is an interest "other than as a member" for s 253E of the Act.[22] Sections 12, 15 and 16 of the Act, set up a horribly complex scheme for deciding who is an "associate" within the meaning of s 253E. However, it seems to me that the decision of White J in *Everest Capital Limited v Trust Company Ltd*[23] is determinative of the position here. In my view, Trust Company was not entitled to vote at the 13 June 2013 meeting because in voting its interest it was acting as agent of the first respondent. Further, in any event, having regard to the provisions of ss 12, 15 and 16 of the Act, it seems to me that s 15(1)(a) of the Act applies and that the first respondent and Trust Company were relevantly acting in concert, and that, in accordance with the decision in *Everest*,[24] s 16(1)(a) would not apply.

Conclusions as to Meeting and Related Conduct

[86] In my view it is plain that calling the meeting was a tactic by the first respondent which had the aim of seeing off its rival for control of FMIF.[25] Real concerns are raised in my mind by the misleading statements given in the information to members. It is difficult to see any explanation for these matters other than that the first respondent was pursuing its continuing control of the FMIF in a manner which was at odds with the interests of the members. In the absence of any other convincing explanation, I see the choice not to work with ASIC and not to hold a meeting at a time which allowed resolutions as to winding-up at the same time as resolutions as to the responsible entity, in the same light. The initial failure to properly disclose to members the true nature of the limited financial securities licence bears on this last point.

[87] I think it is very significant that when Trilogy's lawyers made a reasoned attack on the statutory basis for the meeting, and when ASIC attacked both the material given to members and the statutory validity of the meeting, the first respondent refused to

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22 This is conceded by Ms Muller – Court Document 79, paragraph 66.

23 [2010] NSWSC 231 [77]ff.

24 [89]ff above.

25 I should be careful in interpreting this (in isolation) as a marker of self-interest in the first respondent's administrators, rather than action in the interests of the members of the fund, because ASIC certainly had a similar strategy in the interests of the members of the fund. Perhaps it is a hindsight view to say that had an applications judge been persuaded to hear the point dealt with at [9] to [20] of this judgment, a much simpler and cheaper solution was available.

moderate its position, except inadequately in the question and answer document. The law as to the validity of the meeting is complex, and misinterpretation of it could readily be forgiven. However, the first respondent made little substantial response to the matters raised by Trilogy and ASIC. I cannot understand why a responsible entity acting solely in the interests of members would not attempt to accommodate or moderate its position in light of those arguments and the objective facts. Certainly by the time Trilogy had refused to consent to any appointment via the meeting,[26] there was no utility in the meeting except perhaps as a poll to inform the Court of what the members wanted. However, given the information which had been provided to members, including the misleading information; the information that Trilogy was not licensed to perform as responsible entity, and the information that Trilogy would not consent to perform as responsible entity if appointed by the meeting, any objective observer must have doubted the meeting's use even as a poll.

[88] From the underlined passages in the extracts at [52], [69] and [72] above, it can be seen that the administrators insisted on the meeting as some sort of democratic right in the members which the Trilogy application was designed to subvert. The evidence of Ms Muller in cross-examination as to the justification for, utility of, and likely outcome of the meeting was similar. She swore, as she had in her affidavit, that she thought there was "an appreciable chance" that Trilogy would be elected as responsible entity by the meeting. In cross-examination she said that was her view at all times up until the vote closed.[27] Unless Ms Muller was using the word "appreciable" to mean "very slight", I have difficulty accepting that was her genuine belief by the time members had been informed that Trilogy (a) did not have a licence to operate as responsible entity; and (b) did not consent to do so. That the first respondent insisted as it did on its position in relation to the meeting when objectively it had become quite untenable to my mind demonstrates that the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions.

Conduct of the Litigation

[89] ASIC made a separate but connected submission that the first respondent's conduct of this proceeding has been over-zealous. It pointed to the volume of material filed on behalf of the first respondent and the scope of issues sought to be agitated.[28] ASIC submitted that there was a disproportion evident when the interests of the unit holders were considered. It was said that a *Beddoe*[29] application ought to have been made. It is right that a responsible entity is a trustee under the Act. It is probably also right that this matter has more of an urgent and commercial flavour than the type of trust matter in which a *Beddoe* application is usually made. Nonetheless, in my view the conduct of the first respondent in this litigation was combative and partisan in a way which I see as reflective of the administrators acting in their own interests to keep control of the winding-up of the FMIF, rather than acting in the interests of the members.

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26 I accept there is no criticism of Trilogy to be made in relation to this stance, it was correct in saying that the meeting was invalidly called.

27 t 1-54.

28 The Court file in this matter to 12 July 2013 showed 102 documents filed. These included affidavits of expert accountants and affidavits of considerable (some unjustifiable) size. There were many more filed by leave at the hearing before me.

29 [1893] 1 Ch 547.

[90] The affidavit of Hellen (Court Document 40) was relied upon by ASIC as an illustration of the attitude it complains of. It was said that the affidavit was at no time likely to provide much assistance to the Court. Mr Hellen gives expert evidence as a forensic accounting specialist, with extensive experience as a liquidator. He was briefed to prepare a report regarding Trilogy's financial position. From Mr Hellen's recitation of his instructions, it appears that solicitors acting for the administrators of the first respondent were concerned about a contingent liability in the amount of $81 million in Trilogy's accounts, and were concerned otherwise to have Mr Hellen identify avenues of further investigation, either in relation to that matter or otherwise, as to whether Trilogy had a sound financial position. Mr Hellen was briefed "on the evening of 29 April 2013" and expresses reservation that he has had "very limited time" to undertake his assessment. His affidavit was filed on 2 May 2013. He heavily qualifies his report saying that it is based on interim and annual financial reports but he has seen few underlying documents.

[91] Mr Hellen comes to the unremarkable conclusion that if litigation against Trilogy, in which an amount of $81 million was claimed, were to go against Trilogy, Trilogy would be driven either to rely upon insurance or seek indemnity from a managed fund of which it was responsible entity. Mr Hellen could not assist with an opinion as to whether those sources would allow Trilogy to pay a judgment of $81 million. Nor could he give any further useful information about Trilogy's financial position: it had an excess of assets over liabilities and made a small operating profit.

[92] Before the conclusion of the hearing before me, judgment was given in Trilogy's favour in the litigation concerned and an appeal against that judgment was lodged and then withdrawn, so the substance of Trilogy's financial position did not concern me. Had it concerned me, Mr Hellen's report would not have been any more use to me than my own examination of the financial accounts with which he was briefed. Nor really could it have been expected to be. It seems an extravagant use of members' funds.

[93] An associated point is that in contrast to the highly qualified and inconclusive report by Mr Hellen, one of the administrators, Muller, swears at Court Document 46, paragraph 74, that Trilogy will not be able to pay the judgment debt if it loses the relevant litigation. It is hard to see this statement as anything other than unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions. It is significant that it is a statement squarely within Ms Muller's area of professional expertise as a liquidator. Not only that, it is in a part of her affidavit where she swears that material published by Trilogy and its solicitors contains "numerous statements" that are "either false or misleading" – Court Document 46, paragraph 68. There was no argument before me that Trilogy and its solicitors have published false or misleading statements. These are serious allegations, especially when made against professional people. More material of similar flavour is found in the same affidavit at paragraph 77.

[94] Solicitors acting for the first respondent filed an affidavit of over 800 pages – Court Documents 16, 17 and 18 – which was of such marginal relevance that it was not referred to in either written or oral submissions by any party. Further, Court Document 52, which itself has over 100 pages of exhibits, is a solicitor's affidavit which was read on the hearing before me but was little more than combative and querulous commentary on the litigation. Separately, the description in this affidavit of the enormous amount of affidavit material exchanged and the late hours and

weekend work by solicitors, reveals a worrying scenario as to litigation costs in circumstances where the first respondent ought firmly to be keeping in mind the interests of members of an illiquid, and perhaps insolvent, fund.

[95] Ms Muller's affidavit, which is Court Document 79, is characterised by the sort of sniping and argumentative passages which one would hope not to find in any affidavit, let alone an affidavit of someone who is an officer of the Court and a trustee acting on behalf of others – see for example paragraphs 11, 14(c), 22, 66, 75 and 81. It is evident from that affidavit that she is acting very much in the legal arena – she swears responses to written submissions on interlocutory applications and swears to circumstances where she and her solicitor participate in telephone conversations with other solicitors, the content of which conversations was contentious before me.

[96] I will not go on to multiply examples. However, there are many, both in the affidavits filed on behalf of the first respondent, and in the correspondence it and its solicitors undertook.

Conflicts and Potential Conflicts of Interest

[97] In *Re Stewden Nominees No 4 Pty Ltd*[30] Bowen CJ in Eq rejected the appointment of a liquidator who was a member of a firm which had audited the company's accounts in the past. He said that there was the potential for conflict if, for example, the liquidator had to take action which called into question the prior accounts of the company. He said, "It is important that a liquidator should be independent, and should be seen to be independent (*Re Allebart Pty Ltd* [1971] 1 NSWLR 24, at p 30)."

[98] Similarly in *Re Giant Resources Limited*[31] Ryan J said:

> "... a liquidator should not be put in a position where his independence might be open to challenge. It is of the greatest importance that there should be no possibility of criticism attaching to one of the Court's own officers on the ground of a conflict of interest. The liquidator needs to be seen to be independent in any matter which his duties as liquidator may require him to investigate."

[99] Lastly, in *Handberg v Cant*[32] Finkelstein J said:

> "If there are, or are likely to be, disputes between companies in liquidation that are under the control of one liquidator then as a general rule different persons should be appointed as liquidator to each company [authorities omitted]. This is not to say that it is inappropriate to appoint one person as a liquidator of a group of companies or companies that are closely connected [authorities omitted]. But once the likelihood of conflict becomes apparent it is necessary to take action."

[100] Both Shotton and Trilogy advance a number of factual scenarios as illustrating that if the current administrators of the first respondent were to wind up FMIF they would face actual and potential conflicts of interest.

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30 [1975] 1 ACLR 185, 187.
31 [1991] 1 Qd R 107, 117.
32 [2006] FCA 17, [14].

[101] Under the constitution of FMIF the responsible entity is entitled to a management fee of up to 5.5 per cent per annum of the value of the assets of the fund. The administrators swear that they will not pay the first respondent this management fee from FMIF. There would no doubt be difficulties and expense involved in valuing, and throughout the course of a winding-up, revaluing, the assets of FMIF in order to calculate the management fee, but it would not be impossible. In circumstances where both the first respondent and FMIF are being wound up and there is doubt as to the solvency of both, there is at least a potential conflict to be resolved between the desire of the creditors of the first respondent and the interests of the FMIF.

[102] The evidence as to what the administrators will do as to this fee is rather vague and not adequately documented.[33] While the administrators say they have "agreed" not to charge a management fee, I do not know who that agreement was with. I am not convinced that any arrangement they have made in relation to management fees would be sustainable if there were real pressure exerted by creditors of the first respondent.

[103] It has been mentioned that there are three feeder funds to FMIF, two controlled by the first respondent as responsible entity, and one by Trilogy as responsible entity. FMIF categorises its feeder fund members as a separate class of investors (class B investors), as it is entitled to do under its constitution. While the first respondent (before administration) suspended distributions to unit holders from 1 January 2011, there were distributions of nearly $17 million to class B unit holders in the year ending 30 June 2012. From the evidence given before me,[34] it appears this was an accounting exercise, undertaken because the feeder funds accounts did not balance without such a distribution. This rather illustrates that the first respondent (before administrators were appointed) was facing a conflict between its duties as responsible entity of FMIF and as responsible entity of the feeder funds.

[104] It is no criticism of the current administrators that they have not, in the short time available to them, formulated their position in relation to this distribution. The administrators concede that it may need to be investigated and that it may give rise to a claim on behalf of some unit holders of FMIF. "Undoing" the transaction would be difficult because almost $16 million of the distribution has been reinvested into the FMIF on behalf of class B unit holders, diluting the interests of other members. This was conceded by Mr Park in cross-examination, though he swore to the contrary in his affidavit.[35]

[105] I think this issue of distribution to B class shareholders illustrates the potential for conflict between the interests of the feeder funds and the FMIF if one responsible entity has charge of all of them. There is potential for this type of conflict to arise again, including in attempts to undo the 2012 transaction should it be found necessary. In this respect, Trilogy is the responsible entity of one of the feeder funds owning 20 per cent or so of units in the FMIF and the potential for conflict would apply as much if Trilogy were the responsible entity of FMIF, or the liquidator of FMIF.

[106] There are further issues which may arise as between FMIF and the first respondent. In both 2011 and 2012 the fund paid around $5 million to the first respondent as

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33 tt 2-14 – 2-16.

34 See Note 3 to the accounts at p 173 of the exhibit bundle to Court Document 2 and t 2-18.

35 t 2-19.

"loan management fees". There may be a question as to the legitimacy of these payments under the constitution of FMIF, as they seem to be in addition to management fees, and on their face do not seem to have been expenses. Once again the administrators have not yet formed a concluded position as to this, but acknowledge the potential for an overpayment, and acknowledge that the process of reversing the entries may prove to be complex,[36] though again Mr Park originally swore to the contrary.

[107] Trilogy relies upon an affidavit read by the first respondent sworn by Mr Corbett. He swears that the first respondent had not obtained valuations for most of the properties over which FMIF had mortgage security "for at least two years preceding the appointment" of the current administrators. It may thus be that management fees have been based on valuations which are too high. Any claim to recover such overpayments may involve a conflict between duties to the creditors of the first respondent and duties to the members of FMIF if the person liquidating both the first respondent and FMIF is the same person.

[108] Further Trilogy says that from 2002 there were changes made to the constitution of the FMIF without meetings of members, which increased the maximum loan to value ratio for lending by FMIF. It increased from 66 per cent in 2002 to 85 per cent in 2006. The power of the responsible entity to make changes to the constitution without a meeting of members was a limited one – it could only make changes which would not adversely affect unit holders' rights. Trilogy points to this as a potential basis for a claim on behalf of members of the fund against the first respondent, or its directors.

[109] With a broad brush, Trilogy identifies around $168 million of related party transactions which it says, in a very general way, might give rise to the possibility of conflicts between the fund and the first respondent.

[110] Trilogy also says that because of the spectacular collapse of the value of assets under management during 2008-2009 there may be legal claims, for example in negligence, which the FMIF has against the first respondent as responsible entity. On the material before me this seems quite speculative. No proper investigations have been undertaken by any party at this stage. Obviously there is the potential for conflict if such a claim were to be made because it appears that the current administrators will be the liquidators of the first respondent and will have to adjudicate on any proof of debt lodged by or on behalf of investors in FMIF. Were there to be litigation, they would be on both sides of the record. In that regard I note that the Trilogy interests have been active in lodging proofs in the administration but cannot give any idea as to the quantum of the amounts claimed, or the basis upon which they are said to be owing.

[111] On behalf of Shotton it was said that the responsible entity may have engaged in joint lending between FMIF and other funds controlled by the first respondent as responsible entity before administrators were appointed. On the material before me, this seemed a rather academic proposition.

[112] Counsel for the first respondent emphasises the fact that in all the cases discussed above the conflict of interest identified is potential only, and in some of the cases very little material can be put before the Court. That may be accepted, but I am not

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[36] t 2-21.

of the view that the matters raised by Trilogy or Shotton are academic or theoretical only.

[113] The administrators say that if it became necessary, because of a conflict, various measures could be put in place to deal with any conflict which actually arose. If a conflict were identified by the administrators, they swear that they would seek legal advice. They swear that an option would be to approach the Court. They swear that a special purpose liquidator could be appointed to the first respondent company if that became necessary. Counsel for the first respondent said that if there were to be litigation between the feeder funds and the first respondent, Trilogy could be appointed as a representative defendant for the feeder funds so that the litigation could continue with an independent contradictor. In any given scenario the administrators postulate solutions involving their preferring to continue as liquidators of the FMIF and jettisoning any other role.

[114] The solicitor appearing for Mr Shotton points out this is consistent with the administrators' desire to retain control of the FMIF. The endeavours of the first respondent do have this flavour about them. At the conclusion of the hearing one of the alternative draft orders they proposed was that the ASIC and Shotton applications be dismissed on the administrators' undertaking to do all things necessary to secure independent liquidators to the first respondent company and to Administration. No notice of any such thing had been given at any prior time during the proceeding, and I was not convinced that there had been any consideration of the separate interests of the first respondent company or Administration,[37] and the effect that such a proposed order would have on those companies in terms, for example, of wasted costs to date. It may be that those companies have less assets than the fund, but I was told that the first respondent company had assets of around $7 million. I had no basis to assess how much of the administrators' planned charges related to the first respondent company and to Administration; what proportion of that would be wasted if new administrators or liquidators were appointed to those companies, and what proportion that waste of cost would bear to the overall picture of those companies' liquidations. It seemed to me that the administrators were acting without regard to the interests of those companies in order to propose a situation where there could be no possibility of potential conflicts clouding their continuing control of FMIF.

[115] Counsel for the first respondent made a submission that it is a fundamental part of any liquidator's task to deal with conflicts of interest which may arise from time to time, including on the adjudication of claims, and in that respect, a liquidator's role can involve adjudication. That is right no doubt as a general proposition. I note that in *Shephard v Downey*[38] Judd J preferred to appoint an independent liquidator rather than a liquidator with similar potential conflicts as raised here. He made the point that, even though it might be possible to manage potential conflicts through undertakings and directions in the future should they arise, his preference was to forestall such a process by having the appointment of someone independent from the start.[39]

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37 See argument as to this at tt 3-40ff.

38 [2009] VSC 33 [134].

39 Note: This discussion of Judd J occurred in circumstances where he had determined (and it was uncontroversial in the case before him) that an appointment ought to be made under s 601NF(1), viz it was necessary that someone be appointed to take responsibility for the liquidation other than the responsible entity because the responsible entity itself conceded it was not capable of undertaking the

[116] The first respondent submitted that the administrators would have a statutory duty as liquidators of the fund to properly investigate and pursue claims against the first respondent and that there was no basis for thinking they would not pursue this duty "independently, professionally and with due care".[40] In my view, the material discussed as to the conduct of the members meeting on 13 June 2013; interaction with ASIC, and the conduct of this litigation do give a basis for thinking otherwise. At paragraph 33 of Court Document 79 Ms Muller swears that she is aware of the need to, "remain astute to ensure that, as the administration continues, no conflicts arise, whether potential or actual. We intend to seek advice from solicitors ..." She names the two firms of solicitors who had charge of the correspondence relating to the 13 June 2013 meeting. At paragraph 34 of that affidavit Ms Muller says, "As I have explained in paragraphs 12-30 above, my and Mr Park's current understanding is there are no such conflicts exist or are likely to arise". I do not think it can be said on any objective view of the evidence that conflicts are not likely to arise. I do not have confidence that the administrators would adequately identify and deal fairly with conflicts if they were to arise.

[117] Were it just that there was a real potential for conflicts of interest to arise in the future, I like Judd J in *Shephard v Downey* – see [115] above – would prefer an independent liquidator for the fund. Like Fryberg J in *Re Orchard Aginvest Ltd* (above), I would see this as desirable. But I would accept, as he did in that case, that that would not be enough to give me power to make an order pursuant to s 601NF(1). It would not be necessary. In this case there is more. The administrators of the first respondent have, in my view, demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*. My view is that they have preferred their own commercial interests to the interests of the fund. This is demonstrated in the conduct I have outlined above in relation to the 13 June 2013 meeting; their dealings with ASIC, and their conduct with this litigation. It extends to the point where both administrators have sworn to matters which they either conceded were wrong in cross-examination – [104] and [106] above – or in my view are not consonant with reality – [62], [88], [93] and [116] above. In a winding-up where conflicts might well arise, and may involve questions of some complexity, I feel no assurance that the current administration would act properly in the interests of members of the fund in identifying those issues or in dealing with them. In my view, that makes it necessary that someone independent have charge of winding-up FMIF pursuant to s 601NF(1) of the Act.

[118] In a submission alternative to his main submission on the hearing, counsel for the first respondent advanced a draft order which would provide for an independent person to have some oversight of the first respondent during the time that the first respondent as responsible entity wound up the FMIF. The idea was that the first respondent would consult with, and report to, that independent person and that the first respondent would not, without the consent of that independent person, bring or defend legal proceedings or dispose of any secured property. The independent person was to be given, "on receipt" any written claim or demand against the fund and have full power to inspect the books and records of the fund. The first

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liquidation. Thus the discussion to which I refer by Judd J occurred in the context where he had found it was necessary to appoint someone, and in those circumstances preferred to appoint someone independent. He did not come to the conclusion that it was necessary to appoint somebody under s 601NF(1) because of potential conflicts of interest.

40 Written submissions, paragraph 60.

respondent offered to comply with any written directions of the independent person as to winding-up of the fund. The submission was that this was the minimum necessary direction to be given under s 601NF(2).

[119] The difficulty I have with the type of reporting envisaged by that order is that it depends, except in some few defined circumstances, on the administrators recognising that a matter is one worthy of report to the independent person, and making a full and fair report of the facts which the independent person would need to judge whether or not action should be taken on behalf of the fund, and whether or not there were conflicts arising which might necessitate action being taken. In addition, it is easier to compel the administrators in such a situation to report positive acts to the independent supervisor than to attempt to define circumstances in which they ought to discuss issues and concerns arising in the winding-up where they propose to take no action. For these reasons I am not convinced that such an order would allay the concerns which the administrators' conduct raises. I think that more is necessary to ensure that the winding-up of the first respondent proceeds regularly in accordance with the constitution of the fund and the law.

Who Ought to be Appointed

[120] There was some controversy as to who ought to be appointed. ASIC nominated liquidators who had the lowest schedule of rates of all those before me. That is certainly something in their favour. Although, when fees are charged on an hourly basis, efficiency and effectiveness in work practices will probably have more impact on the overall bill than rates alone. The costs of ASIC's nominee were not much less than the person put forward by Mr Shotton – David Whyte, liquidator. Trilogy, a major interested party, supported Mr Whyte in the event that it was not appointed, and I think that is of some significance. Mr Whyte, like all the proposed candidates, is well qualified for the job but I note that he has particular experience in a similar fund winding-up pursuant to s 601NF(1) – Equititrust. It was faintly suggested that he had a conflict which would prevent him acting but I do not accept that is so. In all the circumstances, I think he ought to be appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution pursuant to s 601NF(1).

[121] The provision at s 601ND(1) which allows a Court to direct that the responsible entity winds up a scheme, and the provision at s 601NF(1) which allows a Court to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution do not, to my mind, sit happily together. In particular they give the distinct potential for two separate sets of insolvency practitioners to charge a distressed fund. My view in this case is that Mr Whyte should in substance and effect conduct the winding-up of the fund. In *Equititrust* that was the view of Applegarth J and he used a mechanism – constituting the person charged with winding the scheme up as receiver – to give that person the necessary powers. It was not contended by Shotton or Trilogy that I should make any different order in this case. Trilogy said I ought not appoint a receiver because to do so would damage the way the fund was perceived by creditors and by those who might potentially buy its assets. In circumstances where Deutsch Bank has already been appointed as receiver and where the responsible entity of the fund is itself in administration, and likely to be in liquidation, I am not deterred by this consideration. The fact of the matter is that the fund has reached a point where it

must be wound up. I will appoint Mr Whyte receiver of the property of the fund under s 601NF(2) of the Act.

[122] The first respondent argued that receivers ought not be appointed under s 1101B of the Act (on ASIC's application) because the breach which ASIC relied upon to give it power to ask for the appointment of receivers was one committed before administrators were appointed and one which itself did not justify this relief. For those reasons I do not rely upon s 1101B of the Act in appointing Mr Whyte as receiver.

[123] I now deal with two remaining matters raised in argument.

Wishes of the Members

[124] It is uncontroversial that the Court should have regard to the wishes of members of a scheme such as this when deciding its fate. In this regard the first respondent urged that I should interpret the results of the vote of the meeting of 13 June 2013 as indicating that the members did not want Trilogy as responsible entity. Only about 45 per cent of those eligible to vote at the meeting participated in it. Of that group 20 per cent abstained (almost entirely the feeder funds). Of the 25 per cent of members who voted, around 24 per cent voted against the motions. I find the result of the meeting of very limited assistance. Information given to the members by the first respondent before the meeting was misleading in several respects. As well, it was to the effect that Trilogy did not have the correct financial services licence required to run the fund. That was correct at the time but is no longer correct. The members voting at the meeting had been told that Trilogy did not consent to be appointed as responsible entity at the meeting. In those circumstances one wonders that any votes were cast in favour of Trilogy.

[125] Some members of the fund appeared on the hearing. The Bruces have an investment of around $144,000 in the fund. Mr Shotton also has a relatively small investment in the fund. Two additional members – Nunn and Byrne – have small investments in the fund. They supported the first respondent on the application. Mr Nunn apparently worked for the first respondent for eight or nine years.

[126] As responsible entity of the wholesale mortgage income fund Trilogy has around 20 per cent of the total units in the fund, equating to around $74 million worth of units. The balance of the fund (somewhat over 50 per cent) is held by individual investors with investments ranging between $1,000 and $8 million. Trilogy's views are therefore significant.[41]

[127] While I have been astute to recognise the interests of members of the fund, it must be acknowledged that my decision is grounded more on substantive matters than on attempting to implement the wishes of any particular member or group of members.

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41 Trilogy relies upon an affidavit of a solicitor which purposes to show that members support Trilogy as responsible entity. However, it is remarkable for what it does not say. There is no information as to how the members were prompted to express their views or what information they had about the issues in dispute before me. It is of little assistance.

Waste of Work

[128] On behalf of the first respondent it is said that to charge any person other than the current administrators with the winding-up of FMIF would be to waste the cost of the work which the administrators have performed to date. Quite clearly when the nature of the work performed to date is considered, not all of it would be wasted.[42] The current administrators say they would co-operate with anybody who is charged with responsibility of winding-up the fund, and indeed it would be absolutely extraordinary if they did not. The current administrators were appointed in March 2013. They have been restrained from commencing a winding-up pending the outcome of this proceeding. It appears that any winding-up will take some years,[43] so that while there may indeed be waste, the proportion is likely to be small in the overall cost of the winding-up. Fees to date have not been charged, but it is sworn that as at 27 June 2013 the administrators propose to charge the fund $960,756 and an unspecified part of $1,174,399 they have notionally charged to the first respondent company. There is nothing to show what has been achieved for those proposed charges. The administrators accept their charges must be approved by the company or the Court. I very much doubt that most of the costs of the 13 June 2013 meeting would be approved as necessary and appropriate and I have doubts as to some of the costs of this litigation.

[129] Bearing all these points in mind, I cannot see that the potential for some wasted fees would deter me from making an appointment under s 601NF(1).

[130] I will ask the parties to bring in minutes of order. I will hear submissions on costs.

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42 See cross-examination, tt 2-23ff.

43 Ms Muller swears an estimate of three years.

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383/13

Applicants: **PATRICIA BRUCE**	**RAYMOND EDWARD BRUCE AND VICKI**
	AND
First Respondent: **CAPACITY** **MORTGAGE**	**LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) ACN 077 208 461 IN ITS AS RESPONSIBLE ENTITY OF THE LM FIRST INCOME FUND**
	AND
Second Respondent: **MORTGAGE**	**THE MEMBERS OF THE LM FIRST INCOME FUND ARSN 089 343 288**
	AND
Third Respondent:	**ROGER SHOTTON**
	AND
Intervener: **COMMISSION**	**AUSTRALIAN SECURITIES & INVESTMENTS**

ORDER

Before: Justice Dalton

Date: 21 August, 2013

Initiating document: Application filed 29 April, 2013 by Roger Shotton and Application filed 3 May 2013 by Australian Securities and Investments Commission ("Applications").

THE ORDER OF THE COURT IS THAT:

1. Pursuant to section 601ND(1)(a) of the Corporations Act 2001 (Cth) ("the Act") LM Investment Management Limited (Administrators

SUPREME COURT OF QUEENSLAND REGISTRY BRISBANE

Appointed) ACN 077 208 461 ("LMIM") in its capacity as Responsible Entity of the LM First Mortgage Income Fund is directed to wind up the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") subject to the orders below.

2. Pursuant to section 601NF(1) of the Act, David Whyte ("Mr Whyte"), Partner of BDO Australia Limited ("BDO"), is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution ("the Appointment").

3. Pursuant to section 601NF(2), that Mr Whyte:-

   (a) have access to the books and records of LMIM which concern the FMIF;

   (b) be indemnified out of the assets of the FMIF in respect of any proper expenses incurred in carrying out the Appointment;

   (c) be entitled to claim remuneration in respect of the time spent by him and by employees of BDO who perform work in carrying out the Appointment at rates and in the sums from time to time approved by the Court and indemnified out of the assets of the FMIF in respect of such remuneration.

4. Nothing in this Order prejudices the rights of:

   (a) Deutsche Bank AG pursuant to any securities it holds over LMIM or the FMIF; or

   (b) the receivers and managers appointed by Deutsche Bank AG, Joseph David Hayes and Anthony Norman Connelly.

5. Pursuant to sections 601NF (2) of the Act, Mr Whyte is appointed as the receiver of the property of the FMIF.

6. Pursuant to sections 601NF (2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to paragraph 5 above, the powers set out in section 420 of the Act.

7. Without derogating in any way from in any way from the Appointment or the Receiver's powers pursuant to these Orders, Mr Whyte is authorised to:

   (a) take all steps necessary to ensure the realisation of property of FMIF held by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF in relation to the property, including but not limited to:

(i) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate and/or finalise the sale of the property;

(ii) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;

(iii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property;

(iv) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and

(v) executing contracts, transfers, releases, or any such other documents as are required to carry out any of the above; and

(b) bring, defend or maintain any proceedings on behalf of FMIF in the name of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as is necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, including the execution of any documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions.

8. The First Respondent must, within 2 business days of the date of this Order:

(a) send an email to all known email addresses held by the First Respondent for Members of the FMIF notifying of Mr Whyte's appointment, and a copy of this Order; and

(b) make a copy of this order available, in PDF form, on:

(i) its website www.lmaustralia.com, together with a link to the www.bdo.com.au website;

(ii) its website www.lminvestmentadministration.com, together with a link to the www.bdo.com.au website.

9. The costs of the Third Respondent, Roger Shotton, of and incidental to the Applications, including reserved costs, shall be assessed on the indemnity basis, and shall be paid from the FMIF.

10. All other questions of costs of or incidental to the Applications and the Application filed 15 April 2013 by Raymond and Vicki Bruce are adjourned to a date to be fixed by the Court.

IT IS DIRECTED THAT:

11. Any party wishing to contend that the First Respondent is not entitled to indemnity from the ~~FMIF~~ fund in relation to the Applications shall file an application to be heard and determined at the same time as the other issues as to costs.

12. Any application for the costs of complying with subpoenas issued in the proceedings are adjourned to a date to be fixed, and any time limitation imposed by rule 418 (5) of the UCPR is extended pursuant to rule 7 of the UCPR, to allow for the hearing of any such application at the date to be fixed.

Signed: nll

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: **Brisbane**
NUMBER: **3508 of 2015**

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)(RECEIVERS APPOINTED) ACN 077 208 461

First Applicants:	**JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**
	AND
Second Applicant:	**LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**
	AND
Respondent:	**DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001**

ORDER

Before:	Jackson J
Date:	17 December 2015
Initiating document:	Originating Application filed 8 April 2015; Amended Originating Application filed 20 July, 2015; Further Amended Originating Application filed 16 December, 2015

THE ORDER OF THE COURT IS THAT:-

1. In respect of the 60 members of the LM First Mortgage Income Fund ARSN 089 343 288 ("**FMIF**") to whom reference is made in paragraph 26 of the Affidavit of Murray Daniel sworn on 17 July 2015 and filed on 20 July 2015, the notice sent to those members in the manner described in paragraphs 27 to 30 of the Affidavit of Mr Daniel is taken to be sufficient notice for the purposes of Order 4(ii) of the Order of this Court made on 7 May 2015.

2. Subject to the matters expressly set out in this Order, nothing in this Order derogates from the powers and rights conferred upon David Whyte ("**Mr Whyte**") by Order of this Court dated 21 August 2013 in proceeding BS3383 of 2013 (the "**existing Order**") as the person appointed:

   (a) to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution ("the **Appointment**"); and

   (b) as the receiver of the property of the FMIF.

3. Pursuant to section 601NF(2) of the *Corporations Act 2001* ("the **Act**") Mr Whyte is empowered to determine, in accordance with paragraphs 4 to 10 herein, whether, and if so to what extent, the Second Applicant ("**LMIM**") is entitled to be indemnified from the property of the FMIF in respect of any expense or liability of, or claim against, LMIM in acting as Responsible Entity of the FMIF.

4. The First Applicants ("the **Liquidators**") are directed to:-

   (a) ascertain the debts payable by, and the claims against, LMIM in accordance with the Act;

   (b) adjudicate upon those debts and claims in accordance with the provisions of the Act;

   (c) identify whether LMIM has a claim for indemnity from the property of the FMIF in respect of any, or any part of any, debt payable by or claim against LMIM which is admitted by the Liquidators in the winding up of LMIM (each such claim for indemnity referred to below as a "**Creditor Indemnity Claim**");

   (d) identify whether LMIM has (at the date of this Order and from time to time) a claim for indemnity from the property of the FMIF in respect of any, or any part of any, expense or liability incurred by John Richard Park and Ginette Dawn Muller in acting as administrators or liquidators of LMIM (whether incurred in their own name or in the name of LMIM) insofar as the expense or liability was or is incurred in connection with LMIM acting as Responsible Entity for the FMIF (each such claim for indemnity referred to below as an "**Administration Indemnity Claim**"); and

   (e) identify whether LMIM has a claim for indemnity from the property of the FMIF in respect of any, or any part of any, other expense or liability incurred and paid by LMIM in its capacity as Responsible Entity for the FMIF or by John Richard Park and Ginette Dawn Muller in acting as administrators or liquidators of LMIM (whether incurred in their own name or in the name of LMIM) insofar as the expense or liability was or is incurred in connection with LMIM acting as Responsible Entity for the FMIF (being an expense or liability to which paragraphs 4(c) and 4(d) above do not apply) (each such claim for indemnity referred to below as a "**Recoupment Indemnity Claim**").

5. Within sixty days of the date of this Order the Liquidators must notify Mr Whyte in writing of any Administration Indemnity Claim and any Recoupment Indemnity Claim identified by the Liquidators as at the date of this Order.

6. Within 14 days after:-

   (a) any debt or claim is admitted by the Liquidators in the winding up of LMIM and, in respect of such debt or claim, a Creditor Indemnity Claim is identified by the Liquidators;

   (b) any Administration Indemnity Claim (being one to which paragraph 5 of this Order does not apply) is identified by the Liquidators; or

   (c) any Recoupment Indemnity Claim (being one to which paragraph 5 of this Order does not apply) is identified by the Liquidators,

   the Liquidators must notify Mr Whyte in writing of such claim.

7. When notifying Mr Whyte of a claim in accordance with paragraphs 5 or 6 of this Order (each such claim for indemnity referred to below as an "**Eligible Claim**"), the Liquidators must:-

   (a) Provide Mr Whyte with:-

      (i) (if the Eligible Claim is a Creditor Indemnity Claim) a copy of the relevant proof of debt and supporting documentation relating to the Eligible Claim; and

      (ii) Such other information the Liquidators consider relevant to LMIM's claim for indemnity from the property of the FMIF;

   (b) Within 14 days of receipt of a request from Mr Whyte pursuant to paragraph 8(a) below for further information in respect of an Eligible Claim, provide such reasonably requested further information to Mr Whyte.

8. Mr Whyte is directed to:-

   (a) Within 14 days of receipt of an Eligible Claim, request any further material or information he reasonably considers necessary to assess the Eligible Claim;

   (b) Within 30 days of receipt of an Eligible Claim or of the information requested in accordance with paragraph 8(a) above (whichever is the later):-

      (i) accept the Eligible Claim as one for which LMIM has a right to be indemnified from the property of the FMIF; or

      (ii) reject the Eligible Claim; or

      (iii) accept part of it and reject part of it;

and give to the Liquidators written notice of his determination; and

(c) If Mr Whyte rejects an Eligible Claim, whether in whole or in part, provide the Liquidators with written reasons for his decision when, or within 7 days after, giving notice of his determination.

9. Within 28 days of receiving notification from Mr Whyte of the reasons for rejecting, in whole or in part, any Eligible Claim ("**Rejected Claim**"), the Liquidators:-

(a) may make an application to this Honourable Court for directions as to whether or not the Eligible Claim is or is not one for which LMIM has a right of indemnity out of the scheme property of the FMIF; or

(b) must notify the relevant creditor for any Rejected Claim of:-

(i) Mr Whyte's decision;

(ii) any reasons provided by Mr Whyte for that decision;

(iii) any material provided pursuant to paragraphs 6, 7 or 8 hereof; and

(iv) whether they intend to make an application for directions in respect of the Rejected Claim pursuant to paragraph 9(a) hereof.

10. Mr Whyte has liberty to apply to the Court for direction in respect of any question arising in connection with his consideration or payment of an Eligible Claim.

11. Pursuant to section 601NF(2) of the Act, the parties are directed that for so long as the Appointment and the appointment of Mr Whyte as receiver of the property of the FMIF continue, LMIM shall not be responsible for, and is not required to discharge, the functions, duties and responsibilities set out in clauses 16.7(c), 16.7(f), 16.7(g) and 18.2 of the constitution of the FMIF.

12. Pursuant to section 601NF(2) of the Act, Mr Whyte is directed not to make any distribution to the members of the FMIF, without the authority of a further Order of the Court.

13. Pursuant to section 601NF(2) of the Act:-

(a) the Liquidators are directed not to carry out the functions of LMIM pursuant to clauses 9, 10 and 22 of the constitution of the FMIF;

(b) LMIM is relieved of the obligations imposed by clauses 9, 10 and 22 of the constitution of the FMIF; and

(c) Mr Whyte is authorised and empowered to exercise the powers of, and is responsible for the functions of, the Responsible Entity as set out in Clauses 9, 10 and 22 of the constitution of the FMIF.

14. Pursuant to section 601NF(2) of the Act:

    (a) Mr Whyte is directed to apply to ASIC to obtain relief from the financial reporting and audit obligations imposed by Part 2M.3 of the Act and section 601HG of the Act; and

    (b) in the event that the parties are unable to obtain relief from those financial reporting and audit obligations, then Mr Whyte is directed to provide to LMIM all reasonably requested information as is necessary to enable LMIM to comply with the financial reporting obligations imposed on LMIM as responsible entity of the FMIF under Part 2M.3 of the Act and the constitution of the FMIF.

15. Pursuant to section 1322(4)(c) of the Act, Mr Park and Ms Muller are relieved in whole from any civil liability in respect of a contravention or failure to discharge LMIM's financial reporting obligations under Part 2M.3 of the Act for the period from 19 March 2013 to 31 December 2015.

16. Nothing in this Order prejudices the rights of:

    (a) Deutsche Bank AG pursuant to any securities it holds over LMIM or the FMIF; or

    (b) The receivers and managers appointed by Deutsche Bank AG, Joseph David Hayes and Anthony Norman Connelly.

17. The Liquidators are directed to notify any claim for the reasonable costs and expenses of LMIM of carrying out the work it is required to do by and under this order as an Administration Indemnity Claim under paragraph 4 and may make such a claim from time to time.

18. The Liquidators are entitled to claim reasonable remuneration in respect of the time spent by them and employees of FTI Consulting who perform work in carrying out the work they are required to do by and under this order in connection with the FMIF at rates and in the sums from time to time approved by the Court and to be indemnified out of the assets of the FMIF in respect of such remuneration.

19. Service of the Further Amended Originating Application dated 16 December, 2015 ("**the Further Application**") under s.96 of the Trusts Act be effected on the members of the LM Cash Performance Fund ARSN 087 304 032, the LM Currency Protected Australian Income Fund ARSN 110 247 875, the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868, the LM Australian Income Fund ARSN 133 497 917 and the LM Australian Structured Products Fund ARSN 149 875 669 ("**Other Funds**") and on the members of the FMIF as follows:-

    (a) by the First Applicants uploading to the website www.lminvestmentadministration.com copies of this application, the statement of facts to be filed, the Notice to Members in the form of Schedule 7 to the Further Application ("**the Notice**"), any order made as to service and the substantive affidavits (including all the exhibits) that the First Applicants intend to rely upon in support of the Further Application;

(b) by the Respondent sending by email to those members of the FMIF for whom an email address is recorded, the Notice and stating that they may view all substantive Court documents upon which the First Applicants intend to rely on the website www.lminvestmentadministration.com;

(c) by the First Applicants sending by email to those members of the Other Funds for whom an email address is recorded, the Notice and stating that they may view all substantive Court documents upon which the First Applicants intend to rely on the website www.lminvestmentadministration.com;

(d) where the First Applicants receive a response to an email that indicates the email was not received, or if the First Applicants do not hold an email address for any member, and the First Applicants have a postal address for those members, the First Applicants are to post the Notice to the postal address of those members; and

(e) where the Respondent receives a response to an email that indicates the email was not received, or if the Respondent does not hold an email address for any member, and the Respondent has a postal address for those members, the Respondent is to post the Notice to the postal address of those members.

20. That service of the Further Amended Originating Application under s.511 of the Act be effected on the creditors of the Second Applicant as follows:-

(a) by the First Applicants uploading to the website www.lminvestmentadministration.com copies of this application, the statement of facts to be filed, the Notice to Creditors in the form of Schedule 8 to the Further Application (**"the Creditors' Notice"**), any order made as to service and the substantive affidavits (including all the exhibits) that the First Applicants intend to rely upon in support of the Further Application;

(b) by sending by email to those creditors of the Second Applicant, for whom an email address is recorded, the Creditors' Notice and stating that they may view all substantive Court documents upon which the First Applicants intend to rely in support of the Further Application on the website www.lminvestmentadministration.com; and

(c) where the First Applicants receive a response to an email that indicates the email was not received, or if the First Applicants do not hold an email address for any creditor, and the First Applicants have a postal address for those creditors, the First Applicants are to post the Creditors' Notice to the postal address of those creditors.

21. That service of the Further Application in accordance with any orders made be deemed to be effective on each of the members of the FMIF and Other Funds and the creditors of the Second Applicant.

22. That, where the First Applicants propose to rely on further material in support of the Further Application, they may serve that material by uploading the material to the website and sending notice by email or, where the First Applicants do not hold a

valid email address, by post to those members or creditors, with such notice to direct the members or creditors to the further material which has been uploaded at the website www.lminvestmentadministration.com.

23. That the First Applicants and Respondent not be required to take further steps to serve the members of the FMIF, the Other Funds or creditors of the Second Applicant whose email addresses return permanent undeliverable receipts and for whom the First Applicants or the Respondent (as the case requires) do not have a postal address.

24. That the Respondent be at liberty to upload any material served by the Applicants on the website lmfmif.com.

25. Directions for the hearing of the relief sought by the Further Application as follows:-

(a) by no later than 27 January, 2016, the Applicants are to file any affidavit material in support of the Further Application;

(b) by no later than 27 January, 2016, the Applicants are to serve, pursuant to Part 4 of Chapter 4 of the Uniform Civil Procedure Rules 1999 (Qld), this Further Amended Originating Application and any supporting affidavit material on which the Applicants intend to rely, on the Respondent;

(c) by no later than 4 February, 2016, any party other than the Respondent who wishes to appear at the hearing of the Further Application shall file and serve, at the Applicants' address for service, a Notice of Appearance in Form 4;

(d) by no later than 18 February, 2016, the Respondent is to file and serve any affidavit upon which he intends to rely at the hearing of the Further Application;

(e) by no later than 18 February, 2016, any party other than the Respondent who has filed a Notice of Appearance in accordance with sub-paragraph (c) herein is to file any affidavit upon which it intends to rely at the hearing of the Further Application.

26. The parties' costs of and incidental to this application, including the costs reserved by Orders of this Court on 7 May 2015, be paid out of the assets of the FMIF on the indemnity basis.

27. Any person affected by these Orders has liberty to apply.

28. The Further Amended Originating Application filed 15 December, 2015 is otherwise adjourned to 10am on 22 February, 2016.

Signed: _____

Deputy Registrar

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SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: BSBS3508/2015

Applicant: **JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATOR OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 007 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

AND

Second Applicant: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

AND

Respondent: **DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001**

ORDER

Before: Jackson J

Date: 18 July 2018

Initiating document: Application filed on 13 July 2018.

THE ORDER OF THE COURT IS THAT:

1. The Second Applicant be included as an applicant in respect of this application.

2. Pursuant to section 601NF(2) of the *Corporations Act* 2001 (Cth) (**"the Act"**), it is directed that:

   (a) any further claim by the Liquidators for an indemnity and/or payment from the FMIF for their reasonable costs or expenses of carrying out the work they or

LMIM are required to do by and under the Order of Justice Jackson dated 17 December 2015 ("**the December Orders**") in connection with the FMIF (not being the subject of a claim already made under the December Orders) be submitted to the Court for approval under paragraph 3 of this order, and not to Mr Whyte under paragraph 6 of the December Orders; and

(b) paragraph 17 of the December Orders ceases to have effect on and from the date of this Order, except as to any claims already notified thereunder.

3. The Liquidators are entitled to claim their further reasonable costs and expenses of carrying out the work they or LMIM are required to do by and under the December Orders in connection with the FMIF, not being the subject of a claim already made under the December Orders, and to be paid therefore out of the assets of the FMIF, in such amounts as are approved by the Court from time to time.

4. The Liquidators notify Mr Whyte of any application to the Court for approval of:

(a) reasonable remuneration under paragraph 18 of the December Orders; or

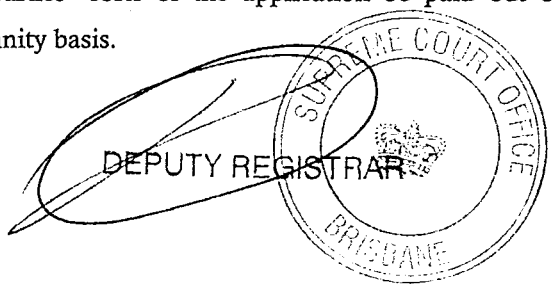
(b) costs or expenses under paragraph 2 of this order.

at least 14 days in advance of the hearing of that application.

5. Pursuant to rule 69(1) of the *Uniform Civil Procedure Rules 1999* (Qld), Ginette Dawn Muller be removed as a party to the proceeding, with effect from 18 July 2018.

6. The parties' costs of the application be paid out of the assets of the FMIF on the indemnity basis.

Signed:



SUPREME COURT OF QUEENSLAND

CITATION:	*LM Investment Management Limited (in liq) v Bruce & Ors* [2014] QCA 136
PARTIES:	**LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND** (appellant) **v** **RAYMOND EDWARD BRUCE** **VICKI PATRICIA BRUCE** (first respondents) **ROGER SHOTTON** (second respondent) **DAVID NUNN** **ANITA JEAN BYRNES** (third respondents) **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (fourth respondent)
FILE NO/S:	Appeal No 8895 of 2013 SC No 3383 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2013
JUDGES:	Fraser and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the respondents' costs of the appeal.**
CATCHWORDS:	CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where the appellant is the responsible entity of the LM First Mortgage Income Fund ("the Fund") – where the primary judge concluded it was necessary to appoint a person independent of the appellant to take responsibility for ensuring the Fund is wound up in accordance with its Constitution pursuant to s 601NF(1) of the *Corporations Act*

2001 (Cth) ("the Act") – where the primary judge made that appointment upon finding that given the complexity of the winding up, the administrators of the appellant ("the administrators") would not act properly in the interests of members in identifying and dealing with potential issues of conflict – where the primary judge found the appellants had conducted the litigation in a partisan and combative manner, and the administrators had preferred their own interests to those of the Fund – whether those findings and other supporting findings were reasonably open on the evidence – whether setting aside any of those findings vitiates the primary judge's ultimate conclusions

CORPORATIONS – MANAGED INVESTMENTS – RESPONSIBLE ENTITY – where the primary judge found the administrators had acted in a way inconsistent with those owing duties as responsible entity and trustee under the Act, conducted the litigation in a partisan and combative manner, and had preferred their own interests to the interests of the Fund – where the appellant argues those conclusions and supporting findings were not open because they were not put to appropriate witnesses in cross-examination or the appellant was not otherwise given adequate notice to meet those imputations – whether the administrators were cross-examined about those imputations or were otherwise given sufficient notice – whether there was a breach of the rule in *Browne v Dunn* so as to require those findings be set aside – whether setting aside any of those findings vitiates the primary judge's ultimate conclusions

CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where the primary judge found that if the administrators were permitted to wind up the Fund, there would be a real potential for conflicts of interest to arise – where the second respondent argued there would arise actual and not merely potential conflicts of interest – whether the primary judge erred on that basis – where the primary judge concluded that the real potential for conflicts of interest to arise did not of itself make it "necessary" to appoint an independent person to wind up the Fund under s 601NF(1) of the Act – where the second respondent argued the primary judge misconstrued s 601NF(1) and that those potential conflicts did make it "necessary" to appoint an independent person – whether the primary judge erred on those bases

Corporations Act 2001 (Cth), s 253E, s 601FL, s 601FM, Pt 5C.9, s 601NE(1)(d), s 601NF(1)

Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1, cited
Browne v Dunn (1894) 6 R 67, applied
MWJ v The Queen (2005) 80 ALJR 329; [2005] HCA 74, considered

Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110, cited
Re Association of Architects of Australia; Ex parte Municipal Officers Association of Australia (1989) 63 ALJR 298; [1989] HCA 13, cited
Re Orchard Aginvest Ltd [2008] QSC 2, considered
Smith v Advanced Electrics Pty Ltd [2005] 1 Qd R 65; [2003] QCA 432, cited
West v Mead (2003) 13 BPR 24,431; [2003] NSWSC 161, cited

COUNSEL: J C Sheahan QC, with S R Cooper, for the appellant
No appearance for the first respondents
D Clothier QC, with G W Dietz, for the second respondent
G J Litster (*sol*) for the third respondents
W Sofronoff QC SG, with S J Forrest, for the fourth respondent

SOLICITORS: Russells for the appellant
No appearance for the first respondents
Tucker & Cowen solicitors for the second respondent
Synkronos Legal for the third respondents
Australian Securities and Investments Commission for the fourth respondent

[1] **FRASER JA: Introduction** The appellant is the responsible entity of the LM First Mortgage Income Fund ("the Fund"). It challenges an order made in the Trial Division pursuant to s 601NF(1) of the *Corporations Act* 2001 appointing a person independent of the appellant to take responsibility for ensuring that the Fund is wound up in accordance with its constitution, and related orders.

[2] The business of the Fund was to invest by lending on the security of mortgages to borrowers who developed real property. There were three "feeder funds" to the Fund, one controlled by Trilogy Pty Ltd ("Trilogy") as responsible entity and two controlled by the appellant as responsible entity. One of the latter two feeder funds was called Currency Protected Australia Income Fund ("CPAIF"). There was also a service company to the funds, LM Administration Pty Ltd ("Administration"). The Fund was established in 1999 and by February 2008 it was apparently worth more than $700,000,000. Its fortunes subsequently waned. By the end of 2012 its assets had declined to $320,000,000. The assets were loans made to borrowers. All of the loans were in default. The net loss attributable to unit holders was then $88,000,000. The appellant, as responsible entity of the Fund, had embarked upon an orderly sale of Fund assets and a pro rata distribution of the net proceeds to unit holders. Deutsche Bank AG appointed receivers over the assets and undertakings of the scheme in July 2013. It was expected that Deutsche Bank would recover the money owing to it (about $30,000,000) leaving significant assets still in the scheme.

[3] The appellant suspended redemptions in 2009. The present voluntary administrators of the appellant, Ms Muller and Mr Park, were appointed to the appellant as responsible entity of the Fund on 19 March 2013. By the time of the hearing in the Trial Division it was anticipated, as subsequently occurred, that the appellant would be placed in liquidation with Ms Muller and Mr Park as liquidators. The primary judge accepted that the administrators were independent of the appellant's previous directors. Ms Muller and Mr Park were also appointed as voluntary administrators to Administration, but on 26 July 2013 liquidators unconnected with them were appointed to Administration at a meeting of its creditors.

[4] The proceeding in the Trial Division was commenced by an originating application in the name of the first respondents, Mr and Mrs Bruce. They were nominal applicants, the real applicant being Trilogy. The order sought was that Trilogy be appointed as a temporary responsible entity of the Fund in place of the appellant, pursuant to ss 601N and 601FP of the *Corporations Act* 2001 and a regulation. The primary judge dismissed that application on the ground that it was incompetent and also held that it would in any event have been inappropriate to make the order sought by Trilogy. No party challenges that order.

[5] The second respondent, Mr Shotton (a unit holder in the Fund), and the fourth respondent, ASIC, applied for orders winding up the Fund and for the appointment of a person under s 601NF(1) to take responsibility for ensuring that the Fund was wound up in accordance with its constitution.

[6] The hearing occupied three days. Subsequently, the primary judge ordered that, subject to further orders, the appellant in its capacity as a responsible entity for the Fund wind up the Fund. The winding up order is not contentious. The appellant's challenge is to the order made by the primary judge under s 601NF(1) that Mr David Whyte be appointed to take responsibility for ensuring that the Fund is wound up in accordance with its constitution, and the further orders made under s 601NF(2) on the application of ASIC appointing Mr Whyte as the receiver of the property of the Fund and conferring broad powers upon him as receiver to ensure the realisation of the property of the Fund.

[7] Mr Shotton and ASIC resisted the appeal. The other respondents did not play an active part in the appeal. No separate argument was directed to the appropriateness of the orders under s 601NF(2). The fate of those orders turns upon the fate of the order under s 601NF(1). Accordingly, these reasons concern only the order made under s 601NF(1).

Statutory context

[8] Part 5C.9 of the *Corporations Act* 2001 regulates the winding up of registered schemes. Provisions are made for winding up of a registered scheme where that is required by the scheme's constitution (s 601NA), where the members of the scheme want it to be wound up (s 601NB), and where the responsible entity of the registered scheme considers that a purpose of the scheme has been or cannot be accomplished (s 601NC). Provisions are also made for winding up by order of the Court where the Court thinks it is just and equitable to make the order or where execution or other process on a judgment, decree or order of a Court in favour of a creditor against the responsible entity of the scheme in that capacity has been returned unsatisfied (s 601ND). (In this case the winding up order was made on the just and equitable ground). Where the scheme must be wound up, s 601NE(1) requires that the responsible entity of the registered scheme "must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2)...".

[9] The critical provision for the purposes of this appeal is s 601NF(1). Section 601NF provides:

> "(1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if

the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).

(2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme's constitution are inadequate or impracticable).

(3) An order under subsection (1) or (2) may be made on the application of:
(a) the responsible entity; or
(b) a director of the responsible entity; or
(c) a member of the scheme; or
(d) ASIC."

The primary judge's conclusions

[10] The primary judge accepted that under Pt 5C.9 of the Act, it is generally the responsible entity which will be responsible for winding up the scheme in accordance with its constitution. Taking that into account, the primary judge held that the power conferred upon the Court to appoint a person other than the responsible entity to take responsibility for the winding up of a scheme "if the Court thinks it necessary to do so" was "more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so."[1]

[11] Before the primary judge, Mr Shotton and Trilogy argued that if the present administrators of the appellant were to wind up the fund they would face actual and potential conflicts of interest. The primary judge did not find any actual conflict of interest but found that there was real potential for conflicts of interest to arise. The primary judge held that although the potential conflicts made it preferable and "desirable" for an independent liquidator to be appointed, there was no power to make an order under s 601NF(1) because such an appointment was not necessary on that basis.[2]

[12] The primary judge concluded that what did make such an order necessary was that in this winding up of some complexity where conflicts might well arise, the administrators might not act properly in the interests of members of the Fund in identifying the issues or in dealing with them. That conclusion was based upon findings that, by the administrators' conduct in relation to a meeting of members, their dealings with ASIC, and their conduct in the litigation, they had "demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*" and had "preferred their own commercial interests to the interests of the fund".[3]

Issues in the appeal

[13] The main arguments advanced by the appellant are that the primary judge erred in making those findings because the administrators were not confronted with the

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1 *RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192 at [47].
2 [2013] QSC 192 at [117].
3 [2013] QSC 192 at [117].

imputations in cross-examination and the findings were in any event not supported by the evidence. Pursuant to a notice of contention Mr Shotton argued that, contrary to the primary judge's conclusion, the power to make an order under s 601NF(1) was enlivened by conflicts of interest which the appellant would or might face in the winding up and the power should have been exercised on that ground.

[14] Before discussing those and the other issues it is convenient to summarise the primary judge's conclusions about the administrators' conduct.

Conduct of the administrators in relation to the 13 June 2013 meeting and their dealings with ASIC

[15] The first respondents filed their originating application for the appointment of Trilogy as temporary responsible entity of the Fund on 15 April 2013. At a meeting on 23 April between ASIC and one of the administrators (Ms Muller) and the administrators' solicitors, the administrators' solicitors suggested that the administrators could call a meeting of members to consider the appointment of a new responsible entity, and that in a choice between the appellant and Trilogy, the appellant "would win".[4] ASIC suggested the use of an enforceable undertaking issued by ASIC to oblige the administrators to call a meeting to vote on resolutions for the appointment of a new responsible entity or that the funds be wound up. ASIC told the appellant that it planned to intervene in the proceedings and that, if there were agreement upon the terms of an enforceable undertaking, ASIC would support the appellant remaining as responsible entity.[5] On the following day, 24 April 2013, ASIC forwarded a draft enforceable undertaking to the administrators' solicitors for the purpose of discussion. The draft provided for the administrators to undertake to call meetings of the members of the Fund and to put to the unit holders for determination resolutions for the appointment of a responsible entity over each fund, whether the Fund should be wound up, and if so, by whom. ASIC sought the appellant's comments and any proposed amendments.[6] The administrators' solicitor told an ASIC solicitor that he would send a re-drafted version of the undertaking to ASIC.[7]

[16] Also on 24 April, the first respondents' solicitor informed the administrators that the first respondents would seek to have their application for the appointment of Trilogy heard on 29 April 2013. The appellant then issued a notice of meeting of members and a covering letter on 26 April 2013. It informed ASIC of this but it did not give ASIC the material sent to the members. The notice of meeting proposed resolutions as extraordinary resolutions which differed from those in ASIC's draft:

> "Resolution 1...
>
> ...
>
> "That, subject to the passage of Resolution 2, LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 be removed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."
>
> Resolution 2...
>
> ...

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4 [2013] QSC 192 at [57].
5 [2013] QSC 192 at [58].
6 [2013] QSC 192 at [59].
7 [2013] QSC 192 at [60].

> "That, subject to the passage of Resolution 1, Trilogy Funds Management Limited ACN 080 383 679 be appointed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288.""[8]

[17] The primary judge pointed out that the notice did not deal with the question of winding up as had been sought by ASIC and dealt with the question of who would be the responsible entity much more specifically than had been proposed by ASIC. The primary judge found that the administrators' conduct contradicted ASIC's expectation that the administrators would work with ASIC about what would be put to the meeting and the statement by the administrators' solicitors to ASIC's solicitor on 26 April that he would send a re-drafted version of the enforceable undertaking to ASIC.[9] The primary judge also found that on 29 April 2013 the appellant informed ASIC that it was not willing to enter into an enforceable undertaking.[10]

Misleading representations by the administrators

[18] On 8 May 2013 ASIC sought from the appellant's solicitor an explanation about various matters raised in the notice of meeting and associated documents. Three matters assumed significance at the hearing in the Trial Division.

[19] First, the appellant represented that holding a meeting would save legal costs in relation to the Trilogy application. The introduction to the notice of meeting referred to the application and stated that the appellant "wishes to avoid the costs and delay of multiple court appearances, perhaps appeals, and multiple meetings which are the practically inevitable result of Trilogy's Court application". In addition, material which the appellant distributed to members of the scheme included a statement that:

> "... in a recent court action involving another Fund managed by [the appellant] where there was a proposal to change the Trustee, the court ordered that the full legal costs of each party to the court proceedings should be met from the assets of the underlying Fund (even though the lawyers had promised they would not charge their clients). Thus by calling a meeting to vote on the appointment of Trilogy as a replacement Responsible Entity, [the appellant] is also cognisant that such a move is likely to save significant legal costs for the Fund."

[20] The primary judge found that no convincing explanation was provided by the appellant in its solicitor's letter of 10 May 2013 in response to ASIC's detailed letter of 8 May 2013 asking for an explanation. (I interpolate that the appellant argued that when it published the notice of meeting, the Trilogy application had been made but the applications by ASIC and Mr Shotton had not been made; it was expected that the Court would adjourn Trilogy's proceedings until after the meeting and that the results of the vote at the meeting would inform the proceedings; and it was thought possible that the first respondents might discontinue the application for the appointment of Trilogy and that certainly would occur if the meeting resolved to appoint Trilogy. However, as the primary judge pointed out, legal costs would have been saved by calling a meeting only if the meeting voted to appoint Trilogy as

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8 AB 2308.
9 [2013] QSC 192 at [60].
10 [2013] QSC 192 at [61].

a temporary responsible entity, the notice did not say that, and the appellant strongly urged the members against such a result. In this respect the notice was misleading, as the primary judge found.)

[21] Secondly, the appellant represented that its ability to use "claw-back provisions" in Pt 5.7B of the *Corporations Act* 2001 was a point which differentiated it from Trilogy in relation to the Fund. In material distributed to the members the administrators referred to the prospect of a winding up and stated:

> "If [the appellant] is wound up, its liquidators will have access to the claw-back provisions of the Act – for example, recovery of unreasonable director-related transactions etc. There is room for debate as to whether these provisions could be invoked for the benefit of the Fund; and the administrators have not yet completed the investigation as to any transactions which might be available for the benefit of Members. On 12 April, 2013, the Chief Justice extended the time for the administrators to convene a second meeting of creditors until 25 July, 2013.
>
> While those matters are not clear, what is clear is that if Trilogy replaces LM as the Responsible Entity of the Fund, it will have no access at all to those provisions for the benefit of Members."[11]

[22] The primary judge found that the notice was misleading in this respect and that the appellant's solicitor's 10 May letter provided no convincing explanation for the representation.[12]

[23] Thirdly, the administrators represented that ASIC had approved the appellant's calling of the meeting. The introduction to the notice of a meeting included the following statement:

> "The Meeting is being called by LM Investment Management Limited (Administrators Appointed), the current Manager of the Fund (LM). LM decided to call the Meeting because, following receipt from two unitholders of an application to the Supreme Court of Queensland for Trilogy Funds Management Limited (Trilogy) to be appointed as the Manager of the Fund in replacement of LM, and immediate consultations with ASIC, LM wished to consult Members in the proper forum, with adequate notice."[13]

[24] The 10 May letter simply rejected ASIC's concern about this. The implication that the appellant had ASIC's sanction for holding a meeting was misleading.[14]

Continuing misrepresentations by the administrators

[25] ASIC asked the appellant to issue an amended notice of meeting which addressed its concerns. On 21 May 2013 ASIC asked the appellant's solicitor to adjourn the meeting until after the applications by Trilogy, ASIC, and Mr Shotton had been heard or to cancel the meeting. ASIC's expressed view was that the vote at the meeting would not impact on most of the claims in the litigation so that the meeting would not result in savings in costs, delay or uncertainty. ASIC also questioned the applicability of s 601FL of the *Corporations Act* 2001 upon which the administrators relied as the legal basis for convening the meeting.

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11 [2013] QSC 192 at [53](f).
12 [2013] QSC 192 at [66], [77].
13 [2013] QSC 192 at [52] (the underlining was in the judgment).
14 [2013] QSC 192 at [66], [75].

[26] On 6 May 2013 Trilogy's solicitor sent a letter to the appellant's solicitor which "set out clearly, succinctly, and... correctly, the reasons why ss 601FL and 601FM of the Act do not allow the proposed meeting ...".[15] The letter explained that s 601FL authorised a meeting only where the responsible entity wanted to retire (which was not the case) and s 601FM applied only where members of a registered scheme wanted to remove the responsible entity, and no scheme member sought a meeting for that purpose. Nevertheless, the appellant's solicitor's letters to Trilogy's solicitor on 8 May and to ASIC on 27 May confirmed that the appellant relied on those sections as the legal basis for calling the meeting.

[27] The appellant declined to adjourn or cancel the meeting. The administrators emphasised the contention, repeatedly made to the scheme members, that the members had a democratic right to determine who should manage the Fund. The appellant's solicitor conveyed that the meeting would be adjourned only to permit further explanatory material to be considered by members. There were subsequent exchanges of correspondence but, although the appellant's solicitors denied that the statutory provisions upon which the appellant relied did not authorise it to call the meeting, no sensible explanation of that view was advanced. The primary judge observed that the appellant's solicitors "made little attempt to meet the legal substance of the points advanced against them, but would not concede the point".[16] Thereafter, Trilogy unequivocally communicated its view that the meeting was not validly called. It communicated that it would not consent to be appointed at such a meeting. It encouraged members of the feeder fund of which it was the responsible entity, who comprised approximately 20 per cent of the membership of the Fund, not to participate in the meeting. It asked the administrators to abandon the meeting.

[28] On 27 May 2013 the appellant posted supplementary information on the Fund website. It stated that the main cost saving would occur if Trilogy was appointed as responsible entity, but it again did not acknowledge this was the only case in which costs would be saved. The fact that Trilogy did not consent to being appointed at the meeting was mentioned but no explanation was given as to why there was any utility in the meeting in that context. Furthermore, Trilogy was criticised as being responsible for the significant costs associated with court proceedings instead of a meeting, "particularly so given the Court adjourned the proceedings till 15 July 2013 in part to allow the meeting to run its course".[17] (At the hearing in the Trial Division the appellant conceded that the adjournment was not granted for that purpose.)

[29] The supplementary information stated that the appellant was "solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting. Prior approval of such Notices by ASIC is not required." However, the supplementary information did not inform the members that by this time ASIC had disapproved of the meeting and had asked the appellant to cancel it. The primary judge therefore found that the new information again "did not reveal the true position regarding ASIC's attitude to the meeting".[18]

[30] The 27 May 2013 supplementary information also stated that Trilogy had given the reason for not consenting to being appointed by the meeting as that it believed that

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15 [2013] QSC 192 at [70].
16 [2013] QSC 192 at [70].
17 [2013] QSC 192 at [72].
18 [2013] QSC 192 at [75].

the matter should be determined by the Court, but there was no reference to Trilogy's reliance upon the invalidity of the notice of meeting on the basis that the sections of the Act relied upon by the appellant were inapplicable. The primary judge also found that whilst the 27 May 2013 supplementary information moderated the statements in the notice of meeting about the claw-back provisions, the information was "not as frank as the view provided to ASIC about this on 1 May 2013 [that] "it is at least hypothetically possible"".[19] The primary judge found that the implication that there was a real point of distinction between the appellant and Trilogy in relation to the claw-back provisions remained misleading.

[31] In addition, the primary judge referred to the statement made for the first time in the 27 May 2013 supplementary information that the licence granted by ASIC to the appellant was limited to the provision of financial services "which are reasonably necessary for, or incidental, to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of ... LM First Mortgage Income Fund ...".[20] The primary judge found that, until this time, the information given to members was misleading because it implied that the appellant had a licence to manage the Fund short of a winding up and did not state that, unless the appellant wound up the Fund, it was obliged to appoint another responsible entity.[21] (The statement found by the primary judge to be misleading was made in information originally distributed by the appellant with the notice of meeting:

> "As you may be aware, on 9 April 2013, the Australian Securities & Investments Commission temporarily suspended LM's AFSL for a period of 2 years. However ASIC allowed LM's AFSL to continue in effect as though the suspension had not happened for all relevant provisions of the Corporations Act 2001 (Cth) so as to permit LM, under the control of FTI as Administrators, to remain as the responsible entity of all LM's registered managed investment schemes for certain purposes which include investigating and preserving the assets and affairs of, or winding up, LM's registered managed investment schemes.
>
> ASIC's decision to suspend the AFSL but allow LM and FTI to continue in this way, ensures that FTI as administrators may perform their statutory and other duties.
>
> LM has, of course, taken legal advice on its position. LM is confident that its AFSL adequately authorises LM through FTI to continue to control the Fund").

The manner in which the administrators organised the meeting

[32] The primary judge found that the process by which the meeting was called was "technical and somewhat artificial" and that the administrators organised for the meeting to be called to consider two resolutions which they opposed.[22] Section 252B of the *Corporations Act* 2001 requires a responsible entity of a registered scheme to hold a meeting of the scheme's members to vote on a proposed special or extraordinary resolution if, amongst other matters, members with at least five per cent of the votes "that may be cast on the resolution" requested it. However the

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19 [2013] QSC 192 at [77].
20 Notice by ASIC to the appellant under s 915B(3)(b) of the *Corporations Act* 2001.
21 [2013] QSC 192 at [74].
22 [2013] QSC 192 at [56].

administrators themselves initiated the meeting. Assuming to act in their capacity as administrators of the appellant as responsible entity of the feeder fund CPAIF, the administrators directed the custodian trustee of CPAIF's assets ("the Trust Company") to request the administrators, in their capacity as the administrators of the appellant as responsible entity of the Fund, to convene a meeting to consider the resolutions. The Trust Company immediately complied with that request by sending to the administrators a request in the terms which the administrators had given to the Trust Company. No underlying investor in the Fund sought the meeting. And the covering letter with the notice of the meeting, the notice of meeting itself, and other material which the appellant distributed to the scheme members about the meeting strenuously advocated against the resolutions proposed by the appellant.[23]

[33] On 28 May 2013 ASIC sought from the appellant's solicitor details of the 26 May 2013 request for a meeting signed for the Trust Company and pointed out that ss 12, 13, 15, 16 and 253 of the *Corporations Act* 2001 (dealing with "associates") might preclude the Trust Company promoting its interests at the proposed meeting. Section 253E precludes a responsible entity "and its associates" from voting their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter "other than as a member". The appellant had an interest "other than as a member", as Ms Muller conceded.[24]

[34] On 4 June 2013, the appellant's solicitor acknowledged, amongst many other matters, that the meeting request was not made at the direction of an underlying investor but at the direction of the administrators in their capacity as administrators of the responsible entity of CPAIF. ASIC responded on 6 June 2013 expressing "grave concern".[25] ASIC contended, amongst other matters, that by operation of s 253E of the *Corporations Act* 2001 votes of the Trust Company would not satisfy the description in s 252B of the votes of members with at least five per cent of the votes "that may be cast on the resolution" so that the notice of meeting was void. ASIC also stated that:

> "Aside from the technical arguments you have put forward, erroneously in ASIC's view, as to your clients' entitlement to orchestrate the requisition of the proposed meeting, ASIC is most concerned that your clients would seek to do so in circumstances in which there is no evidence that even a single underlying feeder fund investor was consulted.
>
> The unavoidable inference that must be drawn is that Ms Muller and Mr Park coordinated the calling of the proposed meeting in order to achieve a forensic advantage in the Supreme Court proceeding and without any reference to underlying feeder fund investors.
>
> It is ASIC's position that the notice of meeting is void, having been issued purportedly pursuant to s 252B of the Act in circumstances in which that provision was not invoked. [For the reasons set out in previous correspondence, the calling of the proposed meeting also does not accord with the requirements of s601FL of the Act. It is immaterial that the proposed resolution(s) might accord with a meeting convened in accordance with that provision. What is clear

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23 [2013] QSC 192 at [50] – [54].

24 [2013] QSC 192 at [85].

25 Letter from ASIC to appellant's solicitors, 6 June 2013, at 2, AB 2187.

> is that the responsible entity of the FMIF does not "want to retire" nor has it set out, in any of the disclosure published either in or subsequent to the Notice of Meeting, "its reason for wanting to retire"]."[26]

[35] The primary judge described ss 12, 15, and 16 of the *Corporations Act* 2001 as setting up a "horribly complex scheme for deciding who is an "associate"" and concluded, with reference to *Everest Capital Limited v Trust Company Ltd*,[27] that the Trust Company was not entitled to vote at the 13 June 2013 meeting because it was acting as agent of the appellant and that the appellant and the Trust Company were relevantly acting in concert.

The primary judge's conclusions about the appellant's conduct in relation to the meeting and in its meetings with ASIC

[36] The primary judge expressed the following conclusions about the appellant's conduct in relation to the meeting and its dealings with ASIC. The meeting was a "tactic" aimed at the appellant "seeing off its rival for control" of the Fund, although the primary judge did not interpret that in isolation "as a marker of self-interest".[28] The misleading statements in information given to members raised real concerns. They indicated that the appellant was pursuing its continuing control of the Fund in a manner which was at odds with the interests of members. The choice to not work with ASIC and to not hold a meeting which allowed resolutions about winding up to be put at the same time as resolutions about the responsible entity should be seen in the same light, and the initial failure properly to disclose the true nature of the limited financial securities licence bore upon that point. That "the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions"[29] was demonstrated by conduct which was subsequent to the appellant's initial failures. The appellant refused to moderate its position, except inadequately in the 27 May 2013 supplementary information after Trilogy's lawyers explained why the statutory bases for the meeting upon which the appellant relied did not exist and when ASIC complained about misleading statements in the appellant's material given to members. Where Trilogy did not have a licence to operate as responsible entity and did not consent to do so there was no utility in the meeting as a forum for considering whether Trilogy should be appointed as responsible entity. Ms Muller's evidence in cross-examination about the justification for the meeting that there was an "appreciable chance" that Trilogy would be elected as responsible entity did not reflect her genuine belief once members had been informed that Trilogy did not have a licence to operate as responsible entity and did not consent to do so. In light of the misleading statements in the information provided to members, and the information that Trilogy was not licensed to perform as responsible entity and would not consent to perform as responsible entity if appointed at the meeting, "any objective observer must have doubted the meeting's use even as a poll".[30]

The primary judge's conclusions about the appellant's conduct of the litigation

[37] The primary judge also accepted ASIC's submission that the appellant's conduct of the proceedings had been over-zealous, finding that it was "combative and partisan

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26 AB 2187 – 2188.
27 (2010) 238 FLR 246.
28 [2013] QSC 192 at [86] and fn 25.
29 [2013] QSC 192 at [88].
30 [2013] QSC 192 at [87].

in a way which I see as reflective of the administrators acting in their own interests to keep control of the winding-up of the [Fund], rather than acting in the interests of the members."[31] The primary judge went on to give some examples of that conduct.[32]

Browne v Dunn

[38] I referred earlier to the primary judge's conclusions that, by that conduct of the administrators in relation to the members' meeting held on 13 June 2013 and their dealing with ASIC, and by their conduct in the litigation, they had "demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*" and "they have preferred their own commercial interests to the interests of the [F]und".[33] Some of the numerous grounds of appeal include contentions that those conclusions and the findings from which they were derived should be set aside because they were not put to the administrators or other witnesses in cross-examination. After explaining my conclusions about those contentions in this section of the reasons, I will relate those conclusions to each ground of appeal.

[39] The appellant argued that in light of the seriousness of the imputations found against the administrators, the failure to put those imputations to the administrators in cross-examination contravened the rule in *Browne v Dunn*[34] and required that the findings and ultimate conclusion be set aside. In *MWJ v The Queen*[35] Gummow, Kirby and Callinan JJ described the essence of rule in *Browne v Dunn* as being that "a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit." The appellant quoted from the following passage in the reasons:

> "One corollary of the rule is that judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it. A further corollary of the rule is that not only will cross-examination of a witness who can speak to the conduct usually constitute sufficient notice, but also, that any witness whose conduct is to be impugned, should be given an opportunity in the cross-examination to deal with the imputation intended to be made against him or her."[36]

[40] The rule is a rule of practice designed to secure fairness to witnesses.[37] The purposes of the rule in *Browne v Dunne* which are significant in the present context are to ensure that the party calling the witness is alerted to any need to call evidence to corroborate the witness's evidence and to give the witness the opportunity to rebut a challenge by the witness's own evidence or by reference to the evidence upon which the challenge is based.[38]

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31 [2013] QSC 192 at [89].
32 [2013] QSC 192 at [90] – [96].
33 [2013] QSC 192 at [117].
34 (1894) 6 R 67.
35 (2005) 80 ALJR 329 at 339 [38].
36 (2005) 80 ALJR 329 at 339 [39].
37 *Smith v Advanced Electrics Pty Ltd* [2005] 1 Qd R 65 at 81 – 82 [46], referring to *R v Birks* (1990) 19 NSWLR 677 at 688, 689.
38 *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* (1983) 1 NSWLR 1 at 16, 22, 23; referred to in *Smith v Advanced Electrics Pty Ltd* [2005] 1 Qd R 65.

[41] ASIC referred to Lord Herschel LC's observation in *Browne v Dunn* that the rule applied "upon a point which it is not otherwise perfectly clear that [the witness] has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling...there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it."[39] In *West v Mead*,[40] Campbell J referred to Lord Herschel LC's reasons and subsequent authority before concluding that "the circumstances in which *Browne v Dunn* will require matter to be put to a witness in cross-examination will depend upon the nature of the pre-trial preparation there has been, and whether that pre-trial preparation has been sufficient to give notice to a witness of the submission ultimately intended to be put to the court." ASIC and Mr Shotton argued that clear and detailed notice of the imputations was given in ASIC's outline of submissions delivered before the hearing, in opening submissions at the commencement of the hearing on behalf of ASIC and others, and in the cross-examination of Ms Muller. They also argued that the appellant did not object to the primary judge making the findings but instead acknowledged both in the opening and closing submissions on its behalf that the relevant matters were in issue and should be decided upon their merits.

[42] The trial commenced on Monday 15 July 2013. ASIC served upon the appellant and the other parties an outline of submissions on the preceding Friday. The appellant accepted in its initial outline of argument in this appeal that ASIC's outline delivered on 12 July raised allegations of impropriety,[41] but in the appellant's outline of argument in reply and in oral submissions the appellant argued that ASIC's outline was insufficient to satisfy the rule in *Browne v Dunn*. The appellant argued that ASIC's outline relevantly made the point only that the winding up of the Fund should be carried out by those nominated by ASIC because the zeal of the appellant in responding to the first respondents' application for the appointment of Trilogy distracted the appellant from its proper focus on the interests of the unit holders.[42] The appellant acknowledged that other statements in ASIC's outline "raised issues concerning whether the meeting of members of the [F]und...was likely to be useful...[and] whether it had been properly called [and]...[w]hether they had responded appropriately or quickly enough to ASIC's indication of its position...". The appellant argued that there was no "plain statement that they had breached their duties as administrators or breached their duties as trustees or fiduciaries or officers" and the cross-examiner did not put to Ms Muller that the administrator had preferred their own interests to the interests of members.[43]

[43] The appellant's submissions substantially understated the nature and extent of the imputations of misconduct made against the administrators in ASIC's outline. The context in which that outline was delivered included a statement in a letter from ASIC to the administrators' solicitors of 6 June 2013 that the administrators had an interest in the proposed meeting in relation to Trilogy's application "that would effectively see Ms Muller and Mr Park, in their capacity as administrators of [the appellant], lose the opportunity of acting in the winding up of the [Fund] – a process

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39 (1894) 6 R 67 at 71.
40 (2003) 13 BPR 24,431 at [96] – [98].
41 Appellant's outline of argument, at [8].
42 Transcript, 28 November 2013, at 1-8.
43 Transcript, 28 November 2013, at 1-8, 1-9.

likely to generate significant professional fees for the persons or entity so involved." Similarly, Trilogy's solicitors wrote to the appellant's solicitors on 3 June 2013 that their client was "concerned that your client is furthering its own interest in holding the Meeting, and not those of the members of the Fund...".[44] That the appellant appreciated that this allegation was in issue is suggested by Ms Muller's statement in an affidavit she swore some weeks before the hearing (on 27 June 2013), in which she referred to ASIC's letter and deposed that "...the matter of professional fees formed no part of [Mr Park's] or my reasons in convening the meeting of members."[45]

[44] ASIC's outline delivered before the hearing then set out a series of contentions in support of its claim that it was appropriate to appoint a person independent of the appellant to be responsible for the winding up of the Fund.[46] Relating those contentions to the primary judge's findings which are challenged in this appeal:

(a) The finding that the appellant's conduct in issuing the notice of meeting contradicted ASIC's known expectation that the administrators would work co-operatively with ASIC[47] was foreshadowed in ASIC's outline:

"[20] Instead of providing the enforceable undertaking suggested by ASIC the administrators chose instead, on 26 April 2013, to issue a notice of meeting at which resolutions would be put that the First Respondent be removed as responsible entity and that Trilogy be appointed in its place ...".

(b) The findings that the administrators adopted a technical and artificial process to call the meeting,[48] that calling the meeting was a tactic by the [appellant] which had the aim of seeing off its rival for control of [the Fund],[49] and that the appellant pursued its continuing control of the Fund "in a manner which was at odds with the interests of the members"[50] were foreshadowed in the following passages of ASIC's outline:

"[1](c)(i) the zealousness [sic] of the [appellant's] response to the [first respondents'] application appears to have distracted it from... its proper focus namely, the interests of the unitholders of the [Fund]... " and "(iii) the person(s) responsible for the winding up should be appropriately independent...".

"[14] ASIC is concerned that the zealousness [sic] of the [appellant's] response to the [first respondents'] application has distracted it from its proper focus, namely the interests of the unitholders...";

"[15](a)...the administrator's [sic] purported use of the procedures in Part 2G.4 of the Act to fend off the Trilogy challenge was inappropriate" and "(b)... the administrator's [sic] level of engagement in the adversarial process of this proceeding is surprising in the circumstances...".

"[19]...on 23 April 2013 [at the meeting between representatives of ASIC and of the administrators] the solicitor for the [appellant]

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44 AB 1904.
45 Affidavit of Ms Muller, at [79], AB 1077.
46 Submissions on behalf of ASIC, at [52], AB 2536.
47 [2013] QSC 192 at [60].
48 [2013] QSC 192 at [56].
49 [2013] QSC 192 at [86].
50 [2013] QSC 192 at [86].

expressed confidence that if a meeting were called in which unitholders of the [Fund] were given a choice between the [appellant] and Trilogy, the [appellant] would win...".
"[27]...these circumstances lead to the inference that the administrators of the [appellant] sought to utilise the procedure in Part 2G.4, Division 1 to orchestrate a meeting in respect of which they expected the [appellant] to prevail, not for the purpose of acting upon a genuine request for a meeting by underlying investors in the [Fund], but for the purpose of staving off Trilogy's challenge to its position as responsible entity."
"[40] The [appellant] did not bring the nature and extent of its interest in the resolutions to the attention of the unitholders with full disclosure ...". (That paragraph went on to draw an analogy with a director's fiduciary obligation to a company to disclose any benefits which the director might derive from the passing of any resolution at the company's general meeting.)

(c) The findings that misleading statements were made in the notice of meeting and other documents[51] were foreshadowed in a section in ASIC's outline headed "Content of the notice of meeting", including:

"[28] ASIC has expressed concern to the administrators...that a number of statements made in the notice [of meeting] had the potential to confuse or mislead investors...".
"[32] That statement [in the notice of meeting] was misleading"...[in respects including that it wrongly implied that ASIC had endorsed the calling of the meeting].
"[34] That statement [that the appellant was "strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy"]...was likely to mislead unitholders" and a subsequent statement "was itself cast in terms calculated more to proselytise than inform...".
"[42] The notice was neither balanced nor neutral...".
"[37] The notice suggested (at 5) that the calling of the meeting was "likely to save significant legal costs for the Fund". That was never likely to be the result of the meeting, and in the event has proven to be inaccurate."
"[39]...that statement [in the notice of meeting] implied that the potential of a liquidator of the [appellant] to utilise Part 5.7B of the Act, is a genuine point of differentiation between the [appellant] and Trilogy... [but] there was no reasonable basis for drawing that implication".

(d) The primary judge's rejection of Ms Muller's justification for the meeting that she thought at all times up until the vote closed that there was "an appreciable chance" that Trilogy would be elected as responsible entity by the meeting and consequential finding that this demonstrated that the interests of the members of the scheme were not at the forefront of the administrators' thinking[52] was to some extent foreshadowed in the paragraphs of ASIC's outline identified in

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51 [2013] QSC 192 at [65], [66], [72], [73], [74], [75], [76] and [77] and the reference to "misleading statements" in [86].

52 [2013] QSC 192 at [88].

subparagraph (b) (including the submission in [27] that "the administrators of the [the appellant] sought to utilise the procedure in Part 2G.4, Division 1 to orchestrate a meeting in respect of which they expected [the appellant] to prevail, not for the purpose of acting upon a genuine request for a meeting by underlying investors in the [Fund], but for the purpose of staving off Trilogy's challenge to its position as responsible entity.")

(e) The finding that Ms Muller's affidavit evidence that she wished to ensure that the appellant's conduct "was, to the extent possible, satisfactory to ASIC" was not "consistent with the reality of the [appellant's] interactions with ASIC" was not clearly sought in ASIC's outline, but it reflected the inconsistency between her affidavit evidence and the findings which were sought in ASIC's outline (for example, in paragraph [20]) that the administrators did not in fact co-operate in those respects with ASIC.

(f) The finding that the appellant's conduct in the litigation was combative and partisan was foreshadowed in ASIC's outline:

"[15](b)...the administrator's [sic] level of engagement in the adversarial process of this proceeding is surprising...".
"[47] The [appellant] has...resisted [the first respondents' application]...in a partisan manner".
"[48] ASIC is concerned that the zealousness [sic] of the [appellant's] conduct of this proceeding, exemplified by the volume of material filed on behalf of the [appellant] and the scope of the issues sought to be agitated, is disproportionate to the extent to which the interests of unitholders of the scheme are likely to be advanced."
"[50] ... It is surprising therefore that the administrators have been so strenuous with the [appellant's] defence to Trilogy's challenge to its position as responsible entity.
[51] An example of that strenuousness can be found in the commission and preparation, on behalf of the administrators by their solicitors, of the affidavit of Bradley Vincent Hellen... That affidavit, and the report exhibited to it was, in the circumstances in which it was prepared, never likely to provide much assistance to the Court given:
a. the limited information upon which the opinions expressed in the report were based; and
b. the limited relevance of the assumption upon which those opinions were predicated, namely the "maturity" of a contingent liability that was the subject of proceedings in this Court in respect of which judgment had at that time been reserved by Applegarth J. ..."

[45] The following discussion relates to the appellant's challenges to the findings in (a) – (e). The appellant's challenges to the finding in (f) and other findings about the administrators' conduct in the litigation are discussed under headings referring to the relevant grounds of appeal.

[46] There was considerable emphasis in the appellant's argument upon the contention that ASIC's outline did not give the administrators clear and express notice of an imputation that the administrators preferred their interests to the interests of scheme members in the way found by the primary judge. The primary judge's conclusion to that effect is the only finding which is not clearly expressed in ASIC's outline.

However, that imputation was implicit in the outline, particularly in the contentions that the appellant was distracted from its proper focus upon the interests of the unit holders, it orchestrated a meeting for the purpose of staving off Trilogy's challenge to its position as responsible entity, and it failed to disclose its interest in the resolutions to the scheme members. Also taking into account the context described in [43] of these reasons, it is difficult to accept that the administrators did not understand well before the hearing that ASIC and the first respondents would seek a finding that the administrators preferred their interests to the interests of members. That this is so is confirmed by subsequent events at the hearing.

[47] In opening the first respondents' case, senior counsel described the administrators' conduct in calling the meeting as wasting the unit holders' time and money and as a good example of "the administrators using the shareholders' time and money to pursue their own personal interests, namely, to preserve their ability to get fees as administrators from administering this company and fund ...".[53] In response, the appellant's senior counsel did not object that this was not in issue. Rather, he acknowledged that the first respondents wished to raise an issue "which goes to the motivations of my clients in calling a meeting ...".[54] He also observed that the first respondents and ASIC were critical of the administrators in relation to the meeting, and he advanced arguments upon the merits of the serious imputations advanced for ASIC and the first respondents, justifying the administrators conduct as "good corporate governance ... notwithstanding all the criticisms that have been raised."[55] He argued that the appellant's conduct in calling the meeting was "perfectly proper".[56] ASIC's counsel opened next. He referred to the dealings between the administrators and ASIC and submitted that the steps taken by the administrators were taken "to protect their position and to ensure that they remain in the fund and that they're not acting in the interests of the members of the fund, and that's why ... an independent party should be appointed to wind up the fund."[57] The following opening on behalf of Mr Shotton endorsed ASIC's counsel's further submission that the administrators were "more focused on ... maintaining control of the winding up of that fund."

[48] The appellant argued that the cross-examination of Ms Muller by the first respondents' senior counsel did not challenge the statement in her affidavit that fees formed no part of her or Mr Park's reasons for convening the meeting. It was submitted that the cross-examination essentially concerned only two matters: first, that the real reason for calling the meeting was to create evidence that would assist the appellant's response to the first respondents' application for the appointment of Trilogy and, secondly, that Ms Muller was not sincere in her evidence that she believed that there was an appreciable chance that a result of the meeting was that Trilogy would replace the appellant as the responsible entity. Both propositions were certainly put to Ms Muller, but the cross-examiner also put to Ms Muller the matters upon which ASIC relied for the inference that the administrators preferred their interests to the unit holders' interests. In particular, the cross-examiner put to Ms Muller that calling the meeting was "a ploy" because she thought that she would control the numbers and "get rid of Trilogy",[58] she thought that Trilogy would be defeated and that would "induce Trilogy to depart",[59] the statement in the appellant's

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53 Transcript, 15 July 2013, at 1-17.
54 Transcript, 15 July 2013, at 1-21.
55 Transcript, 15 July 2013, at 1-24.
56 Transcript, 15 July 2013, at 1-27.
57 Transcript, 15 July 2013, at 1-31.
58 Transcript, 15 July 2013, at 1-41.
59 Transcript, 15 July 2013, at 1-42.

solicitor's letter to ASIC on 27 May 2012 that the appellant's objective in calling the meeting was to allow investors to democratically determine who they wished to manage their fund was not true,[60] and the meeting was pursued "to shore up your own position" and "to fend off Trilogy".[61]

[49] Furthermore, contrary to the appellant's argument, senior counsel for the first respondents did cross-examine Ms Muller upon her statement that fees formed no part of her or Mr Park's reasons for convening the meeting. Most of the cross-examination was directed to the various aspects of the administrators' conduct upon which ASIC relied for the inference that the administrators had preferred their own interests to the interests of the scheme members. That amounted to an indirect challenge to the statement. Furthermore, Ms Muller's attention was specifically directed to the relevant paragraph of her affidavit, together with preceding paragraphs in which Ms Muller swore that she believed that there was an appreciable chance that Trilogy "would carry the day",[62] and senior counsel suggested to her that "you are not really being sincere in those paragraphs...because your solicitor had announced at the meeting with ASIC on 23 April the confidence that the resolutions would be defeated and you told ASIC in May that it [sic] the overwhelming majority of the proxies were against the resolutions...". That suggestion inappropriately combined two questions, but no objection was taken. (Ms Muller disagreed with the suggestion.)

[50] The imputations of misconduct were clearly put in the final submissions for ASIC. In particular, counsel for ASIC submitted that the Court should not permit the administrators to conduct the winding up because "there is sufficient for your Honour to be concerned but [sic] that they may not act always in the interests of the unit holders and not in their own interests."[63] Similarly, senior counsel for the first respondents submitted that this was a very clear case of administrators "pursuing their own commercial interest at the expense of members."[64] Senior counsel for the appellant did not object that the primary judge should not consider those and related submissions of misconduct by the administrators. Rather, he acknowledged in terms that ASIC's case included an allegation that the administrators had exercised their powers as fiduciaries to call a meeting for an improper purpose and he met ASIC's case on its merits. Thus, for example, he argued that there was no evidence to support ASIC's complaint that there had been a distraction from the proper focus of the administration of the Fund,[65] that the serious allegations made by ASIC were wrong, that the administrators acted on legal advice, and that the administrators' conduct in arranging the meeting did not amount to evidence of bad faith.[66] That the appellant always appreciated that ASIC and the first respondents sought a finding that the administrators had preferred their own interests to the interests of members is also suggested by the appellant's senior counsel's criticism of the submission in paragraph 40 of ASIC's outline (see [44](b) of these reasons) that it reflected an excessive desire to find fault because the interests of the administrators in the appellant remaining the responsible entity were "blindingly obvious".[67]

[51] The appellant contended that ASIC should have given earlier notice of the imputations it made against the administrators. On 7 May 2013 Peter Lyons J directed

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60 Transcript, 15 July 2013, at 1-48.
61 Transcript, 15 July 2013, at 1-51.
62 Affidavit of Ms Muller, at [69] and [75], AB 1074, 1075.
63 Transcript, 16 July 2013, at 2-57.
64 Transcript, 17 July 2013, at 3-21.
65 Transcript, 17 July 2013, at 3-44 to 3-45.
66 Transcript, 17 July 2013, at 3-55 to 3-58.
67 Transcript, 17 July 2013, at 3-57.

ASIC to file and serve on all parties by 10 June 2013 a statement identifying the grounds on which ASIC relied for the relief sought in paragraphs 3, 5 and 7 of its interlocutory application, including any contraventions alleged under s 1101B(1) of the *Corporations Act* 2001.[68] Those paragraphs sought orders for and relating to the appointment of receivers "[p]ursuant to section 1101B(1) of the Act".[69] The application under s 601NF(1) was made instead in paragraph 2 of the interlocutory application. ASIC proceeded on the basis that the required statement was confined to the grounds said to justify orders specifically for and relating to the appointment of receivers and it was not required to identify the grounds upon which the other orders were sought. Its statement referred only to a failure by the appellant to lodge a required financial report with ASIC.[70] In other respects, ASIC proceeded on the basis that the relevant grounds were to be identified in the outline of submissions which the same order of Peter Lyons J directed it to it file, and which it did file, on Friday 12 July 2013. ASIC's construction of the directions was not unreasonable. In any event it must have been immediately apparent that ASIC's statement in relation to paragraphs 3, 5 and 7 of its application did not set out the grounds upon which ASIC relied for an order under s 601NF(1).

[52] The appellant pointed out that it was senior counsel for the first respondents rather than counsel for ASIC who conducted the relevant cross-examination of Ms Muller. Those parties sought different orders and advanced separate cases, but it must have been apparent that the first respondents' and ASIC's cases coincided in the respects put by the first respondents' senior counsel in cross-examination. Repetition of that cross-examination by ASIC's counsel would have been a pointless and wasteful exercise. In this case at least, the identity of the party whose barrister conducted the cross-examination does not bear upon the question whether the purposes underlying the rule in *Browne v Dunn* were satisfied.

[53] Contrary to another submission made for the appellant, in the unusual circumstances of this matter the fact that Mr Park was not cross-examined about the imputations of misconduct is not a ground for setting aside the primary judge's findings. The appellant originally did not file an affidavit by Mr Park even though ASIC and the first respondent had given notice in correspondence and in ASIC's outline of serious criticisms of the conduct of the administrators. Ms Muller's oral evidence was completed on the first day of the hearing. Mr Park swore his affidavit on the same day. The appellant's senior counsel made it clear that Mr Park's evidence concerned only different issues recently raised in new submissions for Mr Shotton. Mr Park's affidavit included statements to the effect that Ms Muller had the primary carriage of the administration and that his affidavit responded only to the new issues raised by Mr Shotton. As Mr Shotton argued, the inference is that the appellant was content to meet the imputations of misconduct by relying only upon the evidence of Ms Muller. That explains why the appellant's senior counsel did not at the hearing object that the primary judge should not make any findings adverse to Mr Park. As ASIC argued, if (which was not contended) the administrators' reliance only upon the affidavit of Ms Muller and her answers in cross-examination did not take the best advantage of the opportunities which the rule in *Browne v Dunn* is designed to secure, that does not establish that there was any breach of the rule.[71]

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68 AB 2585.

69 AB 2399.

70 AB 2403.

71 *Re Association of Architects of Australia; ex parte Municipal Officers Association of Australia* (1989) 63 ALJR 298 at 305 per Gaudron J, referring to Deane J's observations in *Sullivan v Department of Transport* (1978) 1 ALD 383 at 403.

[54] In the result (again putting aside the imputations about the administrators' conduct in the litigation dealt with elsewhere in these reasons), with one arguable exception the primary judge's findings adverse to the administrators were made only after the administrators had been given such clearly expressed notice of the imputations as allowed them the opportunity of responding to them by their own evidence (as Ms Muller did) and any other evidence they might obtain. The arguable exception concerns the primary judge's conclusion that the administrators preferred their own interests to the interests of scheme members. An imputation to that effect was clearly made in ASIC's and Trilogy's solicitors' correspondence before the hearing and it was implicit in ASIC's outline, but notice of it was given to Ms Muller in cross-examination only indirectly, by questioning upon other imputations from which this conclusion was sought to be inferred, and obliquely, by a double-barrelled suggestion in cross-examination about the sincerity of Ms Muller's denial that the administrators were motivated by fees.

[55] If the appellant's conduct of its case were not taken into account, the proper conclusions might be that the rule in *Browne v Dunn* was contravened and that the finding should be set aside because an imputation of this seriousness should have been put in cross-examination in direct and unambiguous terms to each of Ms Muller and to Mr Park. If the administrators had occupied the role of independent witnesses, the manner in which the appellant conducted its case might not have been relevant in deciding whether the rule was contravened, or in deciding whether a contravention required the finding to be set aside,[72] but the administrators were not independent witnesses. Because they controlled the appellant, the appellant's conduct of the litigation should be taken into account.

[56] If the rule in *Browne v Dunn* is breached, the party affected by the breach ordinarily should take that point at the hearing.[73] The administrators could have caused the appellant to seek a remedy at the hearing for the points which the appellant now takes for the first time on appeal. As Gummow, Kirby and Callinan JJ said in *MWJ v The Queen*, reliance on *Browne v Dunn* can be "misplaced and overstated"; their Honours gave the example of a case in which, where the evidence has not been completed, "a party genuinely taken by surprise by reason of a failure on the part of the other to put a relevant matter in cross-examination, can almost always, especially in ordinary civil litigation, mitigate or cure any difficulties so arising by seeking or offering the recall of the witness to enable the matter to be put."[74] Instead of taking that course, the appellant relied upon Ms Muller's evidence to oppose the findings it now challenges.

[57] The appellant's conduct of the litigation confirms that the administrators did have sufficient notice to meet ASIC's and the first respondents' cases that the administrators preferred their own interests to the interests of scheme members. That should be inferred from an accumulation of circumstances: the clear notice of that imputation in ASIC's and the first respondents' solicitors' correspondence to the appellant's solicitor well before the hearing, the fact that Ms Muller addressed that imputation in her affidavit, the indirect notice of that imputation given in ASIC's outline delivered before the hearing, the clear notice of it given in the

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72 See *Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor* [2009] NSWCA 287 and *Bale v Mills* (2011) 81 NSWLR 498 at 515 [66].

73 See, for example, *Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor* [2009] NSWCA 287 at [69].

74 (2005) 80 ALJR 329 at 339 [40].

openings for ASIC and the first respondents, the oblique notice of it given in the cross-examination of Ms Muller, the unmistakable notice of it given in ASIC's and the first respondents' final submissions, and the appellant's omission to object to the primary judge considering this aspect of ASIC's and the first respondents' cases or to require the administrators to be recalled for the imputation to be put to Mr Park and to be put more clearly and directly to Ms Muller. In those circumstances the essential purposes of the rule in *Browne v Dunn* were fulfilled.

[58] Before leaving this topic I should add that, contrary to what may have been implicit in aspects of the argument for the administrators, the primary judge did not hold that the administrators had breached their duties as officers of the appellant as responsible entity under s 601FD(1)(c) of the *Corporations Act* 2001 to give priority to the members' interests in a conflict between those interests and the interests of the responsible entity (the primary judge did not refer to that provision or express any conclusion in relation to it), or that they had in fact breached an applicable statutory duty, or that they had intentionally preferred their own interests to the interests of the members in a situation in which the administrators were conscious that there was a conflict between those different interests.

[59] I refer now to the grounds of appeal.

Ground 1

[60] Ground 1 in the notice of appeal challenges the primary judge's conclusions that the administrators had demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act* 2001, they had preferred their own commercial interests to the interests of the Fund, the Court could not be assured that they would act properly in the interests of the members of the Fund in identifying conflicts during the course of the winding up or in dealing with those conflicts, and the conduct of the administrators made it necessary that the Court appoint someone independent to have charge of the winding up of the Fund pursuant to s 601NF(1) of the *Corporations Act* 2001.

Ground 1(e)

[61] The first basis of that challenge is expressed in ground 1(e). It is that the first two of those findings were not put to either of the administrators in cross-examination. The first finding is a reformulation of the second finding. This ground of appeal fails for the reasons given in relation to *Browne v Dunn*.

Ground 1(f)

[62] Ground 1(f) contends that none of the findings took into account unchallenged evidence of the administrators that they believed that it was in the best interests of the members of the Fund that the appellant remain the responsible entity and that the appointment of Trilogy as responsible entity of the Fund was not in the best interests of members (as the primary judge found), and the existence of a reasonable basis for both beliefs in the findings and the evidence. The appellant submitted that the reasonableness of the administrators' belief was demonstrated by evidence that staff of Administration (which was related to the appellant) and the administrators' firm had done a great deal of complex work in familiarising themselves with the Fund assets and in developing strategies to dispose of those assets in a way which achieved the greatest return for members over the shortest period of time, that the administrators had developed a sound working relationship with the secured creditor Deutsche Bank AG, that they had sought to ensure that the bank did not take action prejudicial to the interests of members, and that there was a risk that the

proceedings might prompt the bank to appoint receivers (a risk which eventuated shortly before the trial).

[63] The inferences drawn by the primary judge were not inconsistent with the administrators having believed on reasonable grounds that it was in the members' interests that the appellant should not be replaced by Trilogy as responsible entity of the Fund. Rather, those inferences were drawn from the cumulative effect of findings about the particular ways in which the administrators went about responding to Trilogy's challenge.

Ground 1(g)

[64] The remaining paragraph of ground 1, ground 1(g), contends that the findings were not the proper inferences to be drawn from the evidence. That should not be accepted. Those findings were justified by the cumulative effect of the following interrelated circumstances:

(a) The administrators organised the meeting in the circuitous and technical way described by the primary judge.

(b) They did so upon their own initiative, without any request for a meeting by any underlying investor.

(c) They did so in the midst of discussions with ASIC about calling a meeting to consider its initial draft resolutions, where the administrators' conduct had conveyed an intention to cooperate with ASIC in the drafting of those resolutions, and upon giving only perfunctory notice of the proposed meeting to ASIC.

(d) They did so without disclosing the technique they had used in organising the meeting until ASIC later elicited that information from them.

(e) The resolutions in the notice of meeting which the administrators caused to be issued differed significantly from those in ASIC's initial draft. Instead of open-ended questions which allowed the members to decide whether the appellant should remain as responsible entity and whether the Fund should be wound up, the proposed resolutions were framed in a way which ensured that the appellant's appointment as responsible entity would be endorsed if the appointment of Trilogy was rejected.

(f) The administrators then appreciated that it was unlikely that Trilogy would be appointed. (On 23 April 2013 the administrators' solicitor stated to a representative of ASIC that the appellant would prevail in a contest with Trilogy[75] and, in an affidavit sworn on 2 May 2013 in support of an application for an adjournment of the hearing of the first respondents' application, Ms Muller referred to the meeting convened for 30 May 2013 and deposed that the "matters of fact that will need to be resolved in the present proceeding include... (e) That a substantial body of members is in favour of the [appellant] remaining as Responsible Entity... (f) That a substantial body of members is opposed to Trilogy becoming a temporary or permanent Responsible Entity...").

(g) The administrators strenuously opposed the resolution for the appointment of Trilogy which they had themselves proposed in the notice of the meeting.

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[75] Affidavit of Ms Hayden, at [14], AB 2290.

(h) The notice of meeting and other documents included misleading statements, all of which advocated the rejection of Trilogy as responsible entity in favour of the appellant.

(i) The administrators did not adequately modify those misleading statements when they were drawn to their attention.

(j) The administrators persisted with the meeting even when it must have seemed to them to be inevitable that Trilogy would not be appointed because, in addition to the administrators advocating against its appointment, Trilogy itself advocated against it by refusing to accept any appointment purportedly made at the meeting on the grounds that the appointment would be invalid, that Trilogy did not have the necessary licence, and that it did not consent to an appointment made at the meeting.

(k) The grounds for Trilogy's contention that any appointment of it at the meeting would be invalid were explained in clear and cogent terms to the administrators, but the administrators rebutted that contention without advancing any substantial argument to the contrary.

(l) The meeting lacked utility as a poll for use in evidence in Trilogy's proceedings in light of Trilogy's opposition to the resolutions and the misleading statements advocating rejection of the appointment of Trilogy.

(m) Ms Muller repeatedly denied that the primary purpose of the meeting was for use as evidence in the proceedings by the first respondents for the appointment of Trilogy.[76]

(n) Convening and persisting with the meeting involved expenditure, but (subject to (o)) the meeting could save the members the costs of resisting Trilogy's application only if Trilogy were appointed at the meeting, which could not realistically be expected.

(o) The only other way in which costs might be saved by convening and persisting with the meeting was if (as ASIC submitted in its outline delivered before the hearing was the administrators' purpose in pursuing the meeting), the rejection of the resolutions at the meeting deterred Trilogy from pursuing appointment as responsible entity.

[65] The appellant argued that it was entitled to call a meeting of members without first obtaining ASIC's approval. That is so. The appellant as responsible entity of the Fund was empowered by s 252A of the *Corporations Act* 2001 to call a meeting of members, but (as I understood the appellant to accept in argument) the members' power to remove the appellant as responsible entity and appoint a replacement responsible entity by resolution was confined to s 601FL and s 601FM. There was in this case no suggestion that there was any other source of power.[77] Accordingly, any vote by the members upon the resolutions proposed in the appellant's notice of meeting could have effect, if at all, only as a poll which the appellant might seek to put in evidence in Trilogy's application – but Ms Muller denied that this was the administrators' motivation in convening the meeting and the administrators maintained throughout the correspondence that the relevant source of power lay in s 601FL or s 601FM.

[66] The appellant also argued that the meeting was not called without prior notice to ASIC. It is correct, as the appellant submitted, that Ms Muller and Mr Russell gave unchallenged evidence that the appellant consulted ASIC before calling the meeting

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76 Transcript, 15 July 2013, at 1-44, 1-48, 1-52.

77 Cf *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* (2000) 158 FLR 121 at 128 – 132.

and that ASIC did not object to the appellant calling the meeting, but the evidence nonetheless supports the primary judge's descriptions of the appellant's conduct. The consultation at the meeting of 23 April was accurately described by the primary judge: see [15] of these reasons. It did not concern possible resolutions in the form subsequently published by the administrators. That meeting was followed by ASIC forwarding a draft enforceable undertaking for discussion purposes on 24 April 2013. It contemplated resolutions about the appointment of a responsible entity over the Fund and about whether the Fund should be wound up and, if so, by whom. On 25 April 2013 there were communications between ASIC and the administrators' solicitor, Mr Russell, in which Mr Russell was invited to forward any changes to the initial draft undertaking. Ms Gubbins deposed to a telephone conversation with Mr Russell on the morning of 26 April in which Mr Russell responded to Ms Gubbins' request to forward a proposed amended draft undertaking for ASIC's review by indicating that he should have something for ASIC by lunch time; Mr Russell did not mention that the administrators intended to issue a notice of meeting without further discussion about the draft undertaking.[78] (This was not in issue: senior counsel for the appellant put to Ms Gubbins and she agreed, that Mr Russell ended up by saying that he would send her a fresh draft.[79]) Mr Russell's affidavit evidence did not contradict Ms Gubbins' evidence on that topic. In another affidavit Mr Russell referred to a conversation in the afternoon of 26 April in which he told Ms Gubbins that he had done some work on the draft enforceable undertaking and he had some concerns about it; Ms Gubbins said that the enforceable undertaking was no longer urgent (Trilogy's application had been adjourned from 29 April to 2 May), and that "we could take more time to talk about the terms of the undertaking".[80] In cross-examination by the appellant's senior counsel, Ms Gubbins agreed that her understanding was that the enforceable undertaking was still under consideration on the administrators' side.[81]

[67] As the primary judge accepted, the evidence revealed that the appellant briefly informed ASIC of the notice of meeting, but the appellant did not give ASIC the material sent to members.[82] The consultations could not possibly be regarded as an endorsement by ASIC of the appellant's conduct in issuing the notice of meeting, of doing so in the terms in which that notice was issued, or of interrupting the previous cooperative approach in those respects. The evidence to which the appellant referred justified the primary judge's finding that the appellant contradicted ASIC's expectation that the administrators would work with ASIC about what would be put at the meeting.[83] As the appellant submitted, there was no legal impediment to the appellant acting in that way. But in the context of other conduct it suggested that "the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions".[84]

[68] It is not helpful to consider the brief submissions made about the power of ASIC to seek an enforceable undertaking and the efficacy of the resolutions as they appeared in ASIC's draft. ASIC put its draft forward only for the purposes of discussion and the discussion was not concluded before it was interrupted by the administrators'

78 Affidavit of Ms Gubbins, at [6] – [8], AB 2248.
79 Transcript, 15 July 2013, at 1-63, AB 176.
80 Affidavit of Mr Russell, 15 July 2013, at [7] – [12], AB 1507 – 1508.
81 Transcript, 15 July 2013, at 1-63, AB 176.
82 [2013] QSC 192 at [60].
83 [2013] QSC 192 at [60].
84 [2013] QSC 192 at [88].

unilateral decision to convene a meeting for the members to consider the resolutions framed by the administrators.

[69] In relation to [64](e), ASIC argued that the effect of the resolutions in the appellant's notice of meeting was to "put Trilogy on the spot because the removal of LM depends upon the members being satisfied that Trilogy should be appointed in its stead"; this should be contrasted with the "open question" drafted by ASIC which inquired whether the members wanted the appellant to be removed, for reasons of conflict, for example, and replaced by somebody else.[85] The appellant argued that ASIC's argument was new and in any event could not succeed because the expressed interlinking of the resolutions merely gave express notice to the scheme members of what was in any event required by the *Corporations Act* 2001. The appellant referred to the provision in s 601NE(1)(d) that the responsible entity of a registered scheme must ensure that the scheme is wound up in accordance with its constitution if the members remove the responsible entity by resolution but do not at the same meeting pass a resolution choosing a new responsible entity which consents to becoming the scheme's responsible entity.

[70] The point about the interlinking of the resolutions was not new. The first respondents' senior counsel put to Ms Muller that the two resolutions, which Ms Muller believed were not in the interests of unit holders, were to be put at the meeting, each resolution was dependent upon the other, calling the meeting was a ploy because Ms Muller thought that she would control the numbers and get rid of Trilogy, she thought that Trilogy would be defeated at the meeting and that would induce Trilogy to depart, she would not have put the resolutions to the meeting if there was a risk of them succeeding, nothing put forward at the meeting was considered by her to be in the members' interests, it was not true that the administrators' objective in calling the meeting was to allow investors to democratically determine who they wished to manage their Fund, that could not be true because Trilogy had made it plain that it would not consent to be appointed by the meeting, and the meeting was being pursued to shore up the appellant's position as responsible entity and to fend off Trilogy. The primary judge referred to the interlinking of the resolutions in finding that the appellant unilaterally departed from its foreshadowed co-operation with ASIC by convening a meeting which proposed "much more specific" resolutions than those which ASIC had proposed.[86] The inference that this meeting was a tactic to defeat a rival for control of the Fund was not negatived by the fact that a similarly framed resolution would be required in a different case.

[71] In relation to [64](l) and (m), the appellant argued that even if the resolutions were not authorised by s 601FL or s 601FM, the appellant validly called the meeting and the votes cast at the meeting could be used in evidence in Trilogy's application. The appellant emphasised the primary judge's acceptance that the scheme for deciding who was an "associate" within the meaning of s 253E was complex, so that the administrators could not be criticised, and were not criticised by the primary judge, for making an error about that. The appellant also argued that the only possible reason for the administrators' attempt to engage s 601FL or s 601FM was to make effective any resolution passed by the members to remove the responsible entity and appoint Trilogy in its stead. These arguments do not suggest any flaw in the primary judge's conclusion that the meeting was a tactic to defeat a rival for control of the Fund. The weight of the argument about ss 601FL and 601FM was distinctly

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85 Transcript, 18 November 2013, at 1-38.

86 [2013] QSC 192 at [60].

reduced by the circumstances that the artifice used by the administrators to organise the proposed meeting came to light only as a result of the active pursuit of the relevant documents by ASIC and that the appellant continued to rely upon ss 601FL and 601FM to justify the meeting without making any serious attempt to rebut Trilogy's arguments against the applicability of those provisions.

[72] ASIC argued that the representations made by the administrators lacked candour and were inaccurate "in ways that it is difficult to ascribe to oversight or mistake."[87] The appellant responded that the evidence did not support a conclusion that the administrators deliberately made the misleading representations. The primary judge did not find that the administrators deliberately mislead the members. Nevertheless, the failure of the administrators to appreciate that their advocacy against Trilogy's appointment was misleading in the rather obvious respects found by the primary judge supports the conclusions that " ...the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions".[88]

[73] The appellant also argued that the primary judge's findings were inconsistent with and did not take into account the evidence given by Ms Muller in paragraph 79 of her affidavit that "...the matter of professional fees formed no part of [Mr Park's] or my reasons in convening the meeting of members".[89] The appellant referred to *Pollard v RRR Corporation Pty Ltd*[90] and argued that the primary judge impermissibly rejected Ms Muller's evidence without grappling with it in the reasons. In the cited paragraph McColl JA said that "[w]here it is apparent from a judgment that no analysis was made of evidence competing with evidence apparently accepted and no explanation is given in the judgment for rejecting it, it is apparent that the process of fact finding miscarried". Ms Muller's evidence on this point was not susceptible of analysis of the kind contemplated by McColl JA. It was in the form of a conclusion which was either correct or incorrect. The detailed evidence about the administrators' conduct in relation to the meeting and their dealings with ASIC did require analysis. That was reflected in the focus upon that body of evidence in the final submissions at the hearing. Ms Muller was cross-examined at length about the administrators' conduct and dealings and her state of mind and the primary judge carefully analysed the evidence and explained in detail why ASIC's and the first respondents' cases should be accepted and the appellant's case rejected. The primary judge's reasons and conclusion sufficiently explained why the primary judge did not accept Ms Muller's statement. (I note also that no ground of appeal challenged the judgment on the ground that the primary judge's reasons were inadequate).

[74] Ground 1(g) is not made out.

Ground 2

[75] Ground 2 contends for error in the primary judge's ultimate conclusions on the basis of challenges to some of the findings which informed those conclusions.

Ground 2(a)

[76] Ground 2(a) challenges the primary judge's finding that the administrators' purpose was "to use the meeting as a strategy to defeat or damage Trilogy's prospects on its

87 Transcript, 28 November 2013, at 1-44.
88 [2013] QSC 192 at [88].
89 Affidavit of Ms Muller, at [79], AB 1077.
90 [2009] NSWCA 110 at [66], a passage quoted with approval in *Coote v Kelly* [2013] NSWCA 357 at [39].

originating application"[91] or as "a tactic by the [appellant] which had the aim of seeing off its rival for control of [the Fund]"[92] on the ground that those findings were not the proper inferences to be drawn from all of the evidence. This ground fails for the reasons given in relation to ground 1(g).

Ground 2(b)

[77] Ground 2(b) contends that the finding that the appellant pursued continuing control of the Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witnesses in cross-examination and that it was not the proper inference to be drawn from all of the evidence. The first contention fails for the reasons given in relation to *Browne v Dunn*. The second contention fails for the reasons given in relation to ground 1(g).

Ground 2(c)

[78] Ground 2(c) contends that the finding that the appellant's choice not to work with ASIC and not to hold a meeting at a time which allowed resolutions as to winding up at the same time as resolutions as to the responsible entity meant that the appellant was pursuing its continuing control of the Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witness in cross-examination and was not the proper inference to be drawn from all of the evidence.

[79] The first contention invoked non-compliance with the rule in *Browne v Dunn*. That contention fails for the reasons given under that heading. In relation to the second contention, the appellant's dealings with ASIC formed only one of the many circumstances from which the primary judge inferred that the appellant pursued its continuing control of the Fund in a manner which was at odds with the interests of the members. The first contention fails for the reasons given in relation to ground 1(g).

Ground 2(d)

[80] Ground 2(d) challenges the primary judge's rejection of Ms Muller's evidence that there was "an appreciable chance" that Trilogy might be elected at the 13 June 2013 meeting. Ground 2(d)(i) contends that Ms Muller was not cross-examined on the facts about which she gave evidence as the basis for her belief and ground 2(d)(ii) contends that there was no evidence which controverted those facts.

[81] As ASIC argued, both contentions are based upon the false premise that Ms Muller's evidence concerned her state of mind when the administrators caused the meeting to be convened. The primary judge's finding was expressly related to the later time when members had been informed that Trilogy did not have a licence to operate as responsible entity and did not consent to do so. The relevant part of Ms Muller's affidavit appeared under a heading "The Meeting of Members held on 30 May 2013". The appellant's submissions identified the relevant facts as those set out in paras 69, 76 and 77 of her affidavit. Those alleged facts were that, as a member of the fund, Trilogy was entitled to attend a meeting of members and advocate and vote for its own appointment; it had become the responsible entity of a related fund earlier upon a vote of the members of that fund; it was interested in becoming the responsible entity of the Fund; a mortgagee of one of the member's units in the Fund might have exercised its security rights to vote in favour of Trilogy; and

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91 [2013] QSC 192 at [51].
92 [2013] QSC 192 at [86].

Trilogy might have made various legal arguments about its and others' entitlements to vote. Ms Muller summarised her resulting belief as being that:

> "...**before convening the meeting**, I believed that there was an appreciable chance that Trilogy may have responded to the Notice of Meeting (including by litigation either before or after the meeting) to secure voting rights in respect of approximately 45% of the required vote and, in that event, it may easily secure the requisite 50% majority."[93]

[82] The first respondents' senior counsel asked Ms Muller when she held her belief in that respect. She responded that she held the belief "right up until the time that the votes closed".[94] Ms Muller was then cross-examined about her state of mind at the time specified in the primary judge's finding. Senior counsel for the first respondent cross-examined Ms Muller in detail upon the appellant's solicitor's letter of 27 May 2013. Ms Muller disagreed that the purpose in calling the meeting was to get evidence for the court. It was put to her that **by this time** she already knew that Trilogy was not going to participate in a meeting. Her response was that they might have changed their mind, but she could not identify any facts which might support that view. When it was put to Ms Muller that it could not be true that the appellant's objective in calling the meeting was to allow investors to democratically determine who they wished to manage their fund because Trilogy had made it plain they would not consent to be appointed at the meeting, she responded that Trilogy could have consented after the results of the vote, but she acknowledged that there had not been any facts to suggest that Trilogy had changed its view.[95] The primary judge was entitled to treat those answers as unconvincing. In cross-examination on subsequent correspondence, it was put to Ms Muller that the proxies received before the meeting were overwhelmingly against the resolutions. Her response was that she did not know whether Trilogy might place a number of proxies at the last minute. That too seems unconvincing.

[83] It was put to Ms Muller in terms that "the meeting was being pursued to shore up your own position...to help... to fend off Trilogy". Ms Muller denied that. It was put to her that the administrators' true motive was "to achieve a forensic advantage in these proceedings". After further detailed cross-examination upon the correspondence it was put to Ms Muller that she was not being sincere. Ms Muller agreed that she did not tell the members of the Fund that the administrators had organised the Trustee to requisition the meeting or that ASIC's view was that the meeting was void, had been called for an ulterior purpose, and should be cancelled. She agreed that this could have affected the members' voting. Her explanation was that "...in my view, my solicitors were still working with [ASIC] right up until the day of the meeting in relation to disagreeing with their position...".[96] That the administrators' solicitor expressed disagreement with the statements made by ASIC is not a persuasive explanation for the administrators' failure to correct the misleading impression conveyed to the members that ASIC was not opposed to the meeting.

[84] Ms Muller denied the suggestion that she was not sincere in her statement that, up to the time when the voting closed, "I believed that there was an appreciable chance that Trilogy would carry the day".[97] When it was put to her that she was not being sincere because she knew that the overwhelming majority of proxies were against

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93 Affidavit of Ms Muller, at [78], AB 1076 (emphasis added).
94 Transcript, 15 July 2013, at 1-54.
95 Transcript, 15 July 2013, at 1-48, 1-49.
96 Transcript, 15 July 2013, at 1-53, line 20.
97 Affidavit of Ms Muller, at [15], AB 1075; Transcript, 15 July 2013, at 1-54, lines 20 – 41.

Trilogy and she knew what her solicitor had stated to ASIC on 23 May (that the overwhelming majority of the proxies were against the resolutions), Ms Muller responded that those were just the proxies which had been received and "a substantial amount of proxies could be received which would exceed the number that had been received...".[98] The appellant relied upon this answer and upon what was submitted to be the absence of evidence contradicting Ms Muller's statements forming the factual foundation for her opinion. The primary judge was entitled to consider that the mere assertion of a possibility that the trend of proxies might be reversed was unpersuasive.

[85] The statements of Ms Muller identified in the appellant's argument concerned Ms Muller's state of mind at the earlier time when the meeting was called. Thus, for example, Ms Muller's statement that, for various reasons, she believed that Trilogy "was well able to promote its case for election to members"[99] had been superseded by Trilogy's subsequent conduct in advocating against its own election and stating that it did not consent to appointment, it did not hold a requisite licence, and it considered that the meeting was invalid. The same was true of the other paragraphs in Ms Muller's affidavit upon which the appellant relied. They depended upon a view that Trilogy might take steps designed to procure its appointment at the meeting,[100] a view which was well and truly falsified by Trilogy's subsequent conduct.

[86] The evidence to which the primary judge referred justified the primary judge in rejecting Ms Muller's evidence that there was an appreciable chance that Trilogy would be elected at the 13 June 2013 meeting. Nor was there any contravention of the rule in *Browne v Dunn* in that respect.

Ground 2(e)

[87] Ground 2(e) contends that the finding that the interests of the members were not at the forefront of the thinking of the administrators was not put to the administrators in cross-examination and was not the proper inference to be drawn from all of the evidence. The first contention fails for the reasons given in relation to *Browne v Dunn*. The second contention fails for the reasons given in relation to ground 1(g).

Ground 2(f)

[88] Ground 2(f) contends that the findings in relation to the meeting failed to have sufficient regard to the desirability of ascertaining the views of the members as to which entity they wished to act as responsible entity of the Fund. The primary judge did have regard to that matter, ultimately finding that "any objective observer must have doubted the meeting's use even as a poll".[101] That finding was correct for the reasons given by the primary judge. In any case, Ms Muller repeatedly denied that the administrators were motivated to convene the meeting for the purpose of ascertaining the members' views for use as evidence in the court proceedings.

Ground 2(g)

[89] Ground 2(g) contends that the primary judge erred in failing to have regard to the consideration that once a meeting was called the responsible entity had no power to cancel the meeting. The appellant referred to the provision in s 252A of the *Corporations Act* 2001 that a responsible entity of a registered scheme may call a meeting of the scheme's members and argued that, the meeting having been relevantly called, the appellant had no power to cancel it.

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98 Transcript, 15 July 2013, at 1-54.
99 Affidavit of Ms Muller, at [69], AB 1074.
100 Affidavit of Ms Muller, at [76] and [77], AB 1076.
101 [2013] QSC 192 at [87].

[90] The administrators had confirmed in their solicitors' correspondence of 27 May 2013 that they relied upon ss 601FL and 601FM as the legal basis for the meeting. They did not invoke s 252A or any legal impediment to cancelling the meeting. Rather they insisted upon the meeting proceeding in the face of cogent arguments, with which the administrators did not engage in a meaningful way, which suggested that the meeting was pointless and a waste of the members' time and money.

Ground 2(h)

[91] Under ground 2(h) the appellant contended that the primary judge failed to have regard to the activities of two firms of solicitors in relation to issues concerning the 13 June meeting. The appellant argued[102] that the reasons and ASIC's submissions on appeal did not explain a series of events established by the evidence:

> "(a) the retainer of solicitors by the administrators to assist them to draw and settle the meeting materials and in their dealings with ASIC;
>
> (b) numerous statements by the solicitors in the correspondence that they wished to cooperate with ASIC;
>
> (c) Norton Rose's request to meet with ASIC to restore good relations;
>
> (d) Mr Russell's and Ms Muller's evidence that he was not instructed to refuse any undertaking;
>
> (e) Mr Russell's evidence that he would have advised against such a course;
>
> (f) Mr Russell's contemporaneous reports to the administrators and counsel after his last conversation with Ms Gubbins before the hearing on 2 May, 2013;
>
> (g) Mr Russell continuing to work on the terms of the draft EU after that conversation;
>
> (h) the immediate attempt to settle the terms of the draft EU with ASIC, once Mr Russell learned that ASIC did want the undertakings;
>
> (i) why evidence of Ms Muller was rejected;
>
> (j) why evidence of Mr Russell was rejected."

[92] Subparagraphs (d) – (h) relate to ground 3(a) and are considered under that heading. Subparagraph (i) relates to ground 1(g) and is considered under that heading. As ASIC argued, the appellant did not contend that the solicitors acted otherwise than on the administrators' instructions. The appellant's approach at the hearing was instead to argue that the administrators' conduct, including that engaged in by the solicitors on behalf of the administrators, was appropriate. In those circumstances, the evidence about the appellant's solicitors' conduct upon which the appellant relied does not suggest any error in the primary judge's findings.

Ground 3(a)

[93] Ground 3(a) challenges the primary judge's finding that on 29 April 2013 the appellant informed ASIC that the appellant was not willing to enter into an enforceable undertaking. For that finding the primary judge referred to an affidavit by Ms Hayden. Ms Hayden was special counsel in the chief legal office of ASIC. The paragraph of her affidavit to which the primary judge referred contained a statement that her ASIC colleague, Ms Gubbins, informed her that the administrators' solicitor

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102 Appellant's outline of argument in reply to that of ASIC, at [20].

Mr Russell had just telephoned Ms Gubbins and advised that the administrators were no longer willing to enter into an enforceable undertaking. There was no objection to the admission in evidence of this hearsay statement, but the appellant argued that it had no weight. The appellant also argued that the primary judge failed to have regard to Mr Russell's and Ms Muller's evidence that he was not instructed to refuse any undertaking, and other aspects of Mr Russell's evidence (including that he would have advised against such a course).

[94] The effect of Ms Hayden's hearsay statement was that it was the administrators rather than the appellant who were unwilling to give an enforceable undertaking. Mr Russell gave evidence that he told Ms Gubbins that he did not think that the administrators could sign the enforceable undertaking but the appellant could do so. He did not tell Ms Gubbins that the administrators were not willing to enter into an enforceable undertaking. Ms Gubbins said that the appellant and ASIC could, in view of an adjournment of the Trilogy application, take more time to talk about the terms of the enforceable undertaking. He continued to work on those terms following his discussion with Ms Gubbins on 26 April 2013. After a directions hearing on 2 May 2013 there was a discussion between Ms Muller, Ms Gubbins and himself in which a question was asked about whether, as a result of the trial taking place before the meeting, the enforceable undertaking had fallen by the wayside. Ms Gubbins agreed with that assessment. It was not until 20 May that he learned indirectly that Ms Hayden still wanted the enforceable undertakings.

[95] In Ms Gubbins' affidavit in reply, she did not refer to Mr Russell's evidence and on this topic she said only that Mr Russell told her on 26 April 2013 that the administrators had some concerns about signing an enforceable undertaking but were happy to sign some other form of public undertaking. (That is similar to evidence which Ms Hayden gave in her affidavit that on 29 April 2013 Ms Gubbins informed her that Ms Gubbins had spoken to either Ms Muller or one of Ms Muller's lawyers who had told Ms Gubbins that "she and/or [the appellant]...does not want to sign an EU due to the negative connotations, but is willing to sign a public undertaking in some other form..."[103]). Ms Muller gave evidence to similar effect; she did not ever give instructions that the administrators were unwilling to sign an enforceable undertaking, as a result of the conversation on 2 May 2013 she understood that ASIC no longer required an enforceable undertaking; and she did not become aware until 20 May 2013 that ASIC still sought an enforceable undertaking from the appellant. In cross-examination, Ms Gubbins accepted Mr Russell's and Ms Muller's versions of the conversation which occurred after the directions hearing on 2 May 2013.

[96] This evidence is inconsistent with the primary judge's finding that on 29 April 2013 the appellant informed ASIC that the appellant was not willing to enter into an enforceable undertaking.

Grounds 3(b) and (c)

[97] Ground 3(b) contends that the error identified in ground 3(a) vitiated the primary judge's conclusion that Ms Muller's statement in an affidavit of the administrators' desire to "ensure that our conduct of [the appellant] was, to the extent possible, satisfactory to ASIC..." and that "...Mr Park and I have been discussing with ASIC a proposal for undertakings to meet any concerns of ASIC and any (bona fide) concerns of members in relation to the conduct of this Fund" were not "consistent with the reality of the [appellant's] interactions with ASIC".[104] That should not be

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103 Affidavit of Ms Hayden, at [31](b)(i), AB 2293.

104 [2013] QSC 192 at [62].

accepted. The primary judge's conclusion was amply supported by the findings that although ASIC had sought the administrators' comments and amendments to the draft enforceable undertaking forwarded by ASIC on 24 April 2013, instead of the appellant responding to ASIC as it had foreshadowed, on 26 April 2013 the appellant adopted a circuitous and technical approach to convene the meeting without reference to any underlying investor for the purpose of putting resolutions which differed from those discussed with ASIC and it did not give to ASIC the material sent to members.

[98] Ground 3(c) contends that errors identified in "paragraph 1 above" affected the primary judge's findings in relation to the 13 June 2013 meeting upon which the primary judge's conclusion depended. This contention fails for the reasons given in relation to grounds 1 and 3(b).

Ground 4

[99] Ground 4 contends that, for the reasons set out in grounds 4(a) – (f) the primary judge's conclusion that the administrators had preferred their own commercial interests to the interests of the Fund was in error because it was based upon errors in findings adverse to the appellant about its conduct in the litigation.

[100] I note that the respondents did not address arguments against most of these contentions.

Ground 4(a): introduction

[101] Ground 4 (a) contends that the conclusion that the appellant conducted the litigation in a combative and partisan way reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members was not put to either of the administrators or any other witness, it did not have regard to the matters in ground 2(h),[105] and was not the proper inference to be drawn from the evidence.

[102] I will return to ground 4(a) after discussing the findings challenged in grounds 4(b) – (f).

Ground 4(b)

[103] Ground 4(b) contends that the primary judge erred in finding that it was not argued that Trilogy had published false or misleading statements because (4(b)(i)) the appellant adduced evidence of such statements and (4(b)(ii)) the appellant made submissions at the trial.

[104] The relevant finding was that Ms Muller's statement in one of her affidavits that Trilogy made false or misleading statements was a serious allegation made against professional people which was not supported in argument at the hearing.[106] Ms Muller's statement was that "numerous statements" in material circulated by Trilogy and its solicitor "are either false or misleading".[107] The appellant argued that it did advance argument in support of this evidence in paragraphs 134 and 135 of its written outline at the trial.[108] ASIC pointed out, however, that those paragraphs referred to only one allegedly misleading statement made on 17 May 2013,[109] which was after the date (2 May 2013)[110] when Ms Muller swore her affidavit. There was no error in the finding challenged in grounds 4(b)(i) and (ii).

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105 The ground refers to "1(h)". There is no ground 1(h).
106 [2013] QSC 192 at [93].
107 Affidavit of Ms Muller, at [68], AB 720.
108 AB 2477 – 2478.
109 AB 1093.
110 Affidavit of Ms Muller, AB 723.

[105] However, Ground 4(a) raises an issue about the use of that finding in relation to the primary judge's conclusion that the appellant conducted the litigation in a combative and partisan way which was reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members. It was not put to Ms Muller (or any other witness) that the error in the statement in Ms Muller's affidavit was indicative of the administrators preferring their own interests to the members' interests. That was far from being an obvious conclusion.

[106] In [44](f) of these reasons I noted that the finding that the appellant's conduct in the litigation was combative and partisan was foreshadowed in the following paragraphs of ASIC's outline delivered before the hearing:

> "[15](b)...the administrator's [sic] level of engagement in the adversarial process of this proceeding is surprising...".
> "[47] The [appellant] has...resisted [the first respondents' application]...in a partisan manner".
> "[48] ASIC is concerned that the zealousness [sic] of the [appellant's] conduct of this proceeding, exemplified by the volume of material filed on behalf of the [appellant] and the scope of the issues sought to be agitated, is disproportionate to the extent to which the interests of unitholders of the scheme are likely to be advanced."
> "[50] ... It is surprising therefore that the administrators have been so strenuous with the First Respondent's defence to Trilogy's challenge to its position as responsible entity.
> [51] An example of that strenuousness can be found in the commission and preparation, on behalf of the administrators by their solicitors, of the affidavit of Bradley Vincent Hellen... That affidavit, and the report exhibited to it was, in the circumstances in which it was prepared, never likely to provide much assistance to the Court given:
> a. the limited information upon which the opinions expressed in the report were based; and
> b. the limited relevance of the assumption upon which those opinions were predicated, namely the "maturity" of a contingent liability that was the subject of proceedings in this Court in respect of which judgment had at that time been reserved by Applegarth J. ..."

[107] Some of those paragraphs were expressed too generally to amount to the notice required by the rule in *Browne v Dunn* about serious allegations in the circumstances of this case. No paragraph in ASIC's outline advocated the particular finding challenged in ground 4(b). So far as I can tell, the appellant also had no notice before the judgment was delivered that the primary judge might rely upon such a finding for a conclusion that the administrators were acting in their own interests rather than in the members' interests.

[108] It follows that the rule in *Browne v Dunn* was contravened in that respect: see [39] – [40] of these reasons. The imputation that the error in the allegation in Ms Muller's affidavit suggested the administrators were acting in their own interests rather than in the members' interests was serious. Had it been put to Ms Muller, she might have been able to explain why it should not be accepted. Mr Park and the administrators' solicitor might also have been able to give evidence opposed to the primary judge's conclusion. In these circumstances, the appropriate remedy is to treat the finding challenged in ground 4(b) as supplying no support for the primary judge's conclusion.

Ground 4(c)

[109] Ground 4(c) challenges a finding in paragraph 93 of the primary judge's reasons that Ms Muller's affidavit evidence that Trilogy would not be able to pay a debt of $81 million if litigation about the claimed debt went against Trilogy was "unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions". The grounds of the challenge are that this was not put to Ms Muller and it was not the proper characterisation of her evidence.

[110] Mr Hellen concluded that if Trilogy lost the litigation it would be driven to rely either upon insurance or to seek indemnity from a managed fund of which it was responsible entity. Mr Hellen could not assist upon the question whether those sources would allow Trilogy to pay a judgment of $81 million. Ms Muller deposed that she had reviewed the documents provided to Mr Hellen and his report and that she believed that if judgment went against Trilogy in that litigation "it will be unable to pay that debt...".[111] Ms Muller did not explain in any more detail the basis for that unqualified opinion. She was not asked to do so in oral evidence.

[111] It may be that Ms Muller was not challenged about this evidence because the issue became moot when judgment was given in Trilogy's favour in the relevant litigation. In any event the contention in ground 4(c) that there was no such challenge is correct. Furthermore, although ASIC's outline contended that the appellant had conducted the proceeding in a strenuous, partisan and zealous manner, it did not impute to Ms Muller conduct of that kind in relation to this particular statement in her affidavit. So far as I have been able to discover, no party contended for such a conclusion at the hearing before the primary judge. For reasons similar to those given in relation to ground 4(b), the finding that Ms Muller's affidavit evidence was "unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions" should be set aside.

Ground 4(d)

[112] Ground 4(d) contends that the primary judge's finding in paragraph 94 of the reasons that an affidavit sworn by the appellant's solicitor "was little more than combative and querulous commentary on the litigation" was not put to the solicitor in cross-examination and was not the proper characterisation of the affidavit evidence in light of the application in support of which it was sworn.

[113] ASIC's outline did not make this imputation against the solicitor, it was not put to him in cross-examination and, so far as I have been able to discover, it was not contended for by any party in at the hearing. This finding should be set aside.

[114] In any case, such a finding could not be relied upon to support the primary judge's conclusion challenged in ground 4(a). The appellant filed affidavits in response to the contentions in ASIC's outline about the administrators' conduct in the litigation. Ms Muller was not cross-examined upon the statements in her affidavit sworn on 16 July 2013 that she had "relied entirely on our solicitors for the proper conduct of these proceedings" and she had not instructed them "to increase costs, complicate the proceedings, delay the proceedings, or to conduct the proceedings other than perfectly properly." It was not suggested to her or Mr Park that they endorsed or even knew of the contents of their solicitor's affidavit. Nor was their solicitor, Mr Russell, cross-examined. In his affidavit of 15 July 2013 he denied in detail the

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[111] Affidavit of Ms Muller, at [74], AB 721.

contentions in ASIC's outline that the conduct of the proceedings was improper (including in relation to Mr Hellen's report). In the absence of any challenge to that body of evidence, the inference drawn by the primary judge (that the content of the solicitor's affidavit indicated that the administrators conducted the litigation in a combative and partisan way which was reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members) was not open, even if the finding about the character of that affidavit could be sustained.

Ground 4(e)

[115] Ground 4(e) contends that a finding that an affidavit sworn by Ms Muller was characterised by "sniping and argumentative passages" was not the proper characterisation of the affidavit evidence and was in any event irrelevant. The imputation challenged in this ground was not made in ASIC's outline of submissions or in any other submissions at the hearing and it was not put to Ms Muller in cross-examination. She presumably relied upon her solicitor to exclude any irrelevant material from the draft affidavit she executed, and it was necessary for ASIC to grapple with Mr Russell's evidence if it wished to seek this finding. It must be set aside.

Ground 4(f)

[116] Ground 4(f) challenges the primary judge's finding that the appellant did not give any prior notice of a proposal made at the conclusion of the hearing that the ASIC and Shotton application should be dismissed on the administrators' undertaking to do all things necessary to secure independent liquidators to the appellant and to Administration. In support of this ground, the appellant referred to a paragraph in an affidavit of Ms Muller in which she deposed that if a conflict arose between the appellant and the Fund, the administrators would seek the appointment of special purpose liquidators to the assets of the appellant held in its own right and the appointment of other practitioners as administrators or liquidators of Administration.[112] ASIC did not respond to this argument. It seems that the primary judge overlooked this evidence. This finding must also be set aside.

Ground 4(a): discussion

[117] It follows that none of the findings challenged in grounds 4(b) – 4(f) are available as support for the primary judge's conclusion that the appellant conducted the litigation in a combative and partisan way reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members.

[118] It is then necessary to refer to other findings made by the primary judge as support for that conclusion.

[119] The primary judge made a finding (which related to the finding challenged in ground 4(f)) that it appeared that no consideration had been given to the separate interests of the appellant or Administration or the effect of the order proposed in the appellant's alternative submission upon those companies in terms of wasted costs, for example. The primary judge inferred from that finding that "the administrators were acting without regard to the interests of those companies in order to propose a situation where there could be no possibility of potential conflicts clouding their

112 Affidavit of Ms Muller, at [36], AB 1065.

continuing control of [the Fund]."[113] That inference was not put to the administrators or otherwise foreshadowed at the hearing, so far as I have been able to discover. For the reasons given in preceding paragraphs this finding is not available as support for the primary judge's conclusion challenged in ground 4(a).

[120] The primary judge also made the finding contended for in paragraph [51] of ASIC's outline (see [106] of these reasons) and relied upon that finding as support for the conclusion challenged in ground 4(a). This finding cannot stand against the body of unchallenged evidence summarised in [114] of these reasons. The same applies in relation to the finding that the appellant had filed an affidavit of over 800 pages "which was of such marginal relevance that it was not referred to in either written or oral submissions by any party."[114] This is an example of ASIC's argument in its outline of submissions delivered before the hearing that the volume of material filed on behalf of the appellant exemplified the zeal of the appellant's conduct of the proceeding,[115] but that argument was implicitly abandoned when ASIC decided not to cross-examine any of Ms Muller, Mr Park and Mr Russell upon their evidence to the contrary.

[121] It follows that ground 4 succeeds in relation to all of the findings concerning the administrators' conduct in the litigation.[116] Those findings are not available as support for the primary judge's ultimate conclusions.

Ground 5

[122] After concluding that the administrators' conduct in the litigation was one of the matters which demonstrated that the administrators had preferred their own commercial interests to the interests of the Fund, the primary judge observed that this extended to the administrators swearing to matters which they either conceded were wrong in cross-examination or which were not consonant with reality.[117] Ground 5 challenges the conclusion on the basis that it was drawn from incorrect findings that the administrators had sworn to matters which they conceded in cross-examination were wrong.

[123] The findings were not incorrect for any reason given in ground 5. My reasons for that conclusion are given in the discussion relating to the notice of contention at paragraphs [148] to [156].

Ground 6

[124] Ground 6 challenges the primary judge's conclusion that the administrators had preferred their own commercial interests to the interests of the Fund. The ground of this challenge is that the primary judge erred in finding that the administrators had sworn to matters which they conceded were not consonant with reality. That finding is said to be vitiated by errors identified in grounds 6(a) – (f).

Grounds 6(a) and (b)

[125] Ground 6(a) and (b) fail because they rely upon challenges made in grounds 2(c), 2(d)(ii), and 3(a) which fail for the reasons given in relation to those grounds.

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113 [2013] QSC 192 at [114].
114 [2013] QSC 192 at [94].
115 Submissions on behalf of ASIC, at [48], AB 2536.
116 [2013] QSC 192 at [89] – [96].
117 [2013] QSC 192 at [117].

Ground 6(c)

[126] Ground 6(c) relies upon the challenge in grounds 4(a) and 4(b)(ii). The challenge in ground 4(b)(ii) fails for the reasons given in relation to that ground. Ground 4(a) succeeds, but for reasons given in relation to grounds 6(e) and (f) that does not justify setting aside the conclusion that the administrators had preferred their own commercial interests to the interests of the Fund.

Ground 6(d)

[127] Ground 6(d) contends that a finding that a statement in Ms Muller's affidavit (that her and Mr Park's current understanding was that there were no conflicts which existed or were likely to arise) could not objectively be held was not put to Ms Muller in cross-examination and overlooked the balance of her evidence about how the administrators intended to monitor the acknowledged potential for conflict and deal with conflicts.

[128] Under this ground of appeal the appellant argued that, in referring to Ms Muller's statement that there were no conflicts existing or likely to arise, the primary judge referred only to part of Ms Muller's evidence; reference should also have been made to other statements in which Ms Muller recognised that the current state of affairs might change and that there was potential for conflict to arise. The appellant referred to paragraphs of Ms Muller's affidavit to that effect. Ms Muller implicitly acknowledged in cross-examination,[118] as she had in her affidavit, that conflicts might arise. As was submitted for ASIC, however, the primary judge's challenged finding concerned only Ms Muller's unqualified statement that there were no conflicts which existed or which were likely to arise.

[129] The appellant did not argue that there was a contravention of the rule in *Browne v Dunn* in this respect. The finding that Ms Muller's statement that no conflict existed or was likely to arise was wrong and not consonant with reality should not be set aside.

Grounds 6(e) and (f)

[130] Grounds 6 (e) and (f) challenge the primary judge's conclusions that the conduct of the 13 June 2013 meeting, the appellant's interactions with ASIC, and the appellant's conduct in the litigation supported the conclusions that the appellant's administrators would pursue their duties otherwise than independently, professionally and with due care, and might not adequately identify and deal fairly with conflicts if they were to arise. The first basis of each challenge is that the adverse imputations about the administrators' conduct were not put to either of them in cross-examination. The other bases for each challenge are that the conclusion was not the proper inference to be drawn from the evidence and the conclusion did not follow from the premise.

[131] Apart from the primary judge's conclusion about the appellant's conduct in the litigation, the first basis of challenge fails for the reasons given in relation to *Browne v Dunn* and the other bases of challenge fail for the reasons given in relation to other grounds of appeal, particularly ground 1(g).

[132] For the reasons given in relation to ground 4, the primary judge's findings about the appellant's conduct in the litigation are not available as support for her Honour's ultimate conclusions. That does not justify setting aside those ultimate conclusions or the orders challenged in this appeal. The primary judge derived the findings set

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[118] Transcript, 15 July 2013, at 1-55.

out in [36] of these reasons from matters which were unrelated to the administrators' conduct in the litigation. The appellant has not established any error in those findings. In the context of the primary judge's conclusions about the potential conflicts which the appellant would face in winding up the Fund, those findings themselves justified the primary judge's ultimate conclusions and the challenged orders.

Ground 7

[133] Ground 7 contends that the primary judge erred in appointing Mr Whyte to take control of the winding up because evidence that he was the liquidator of a company which was a debtor of the Fund established that his appointment placed him in a position of conflict. By the time the appeal was heard Mr Whyte had embarked upon the winding up of the Fund. In an affidavit filed by leave granted at the hearing of the appeal without opposition, Mr Whyte stated that on 20 September 2013 the Court made an order upon his application that he and his partner be removed as liquidators of the relevant companies. The appellant did not argue that Mr Whyte thereafter remained affected by the suggested conflict or any conflict, or that he should be replaced by a different appointee if the appellant failed on its other grounds of appeal. The appellant argued instead that no appointment should have been made under s 601NF(1) for reasons which are articulated in the remaining grounds of appeal. The appellant's arguments upon ground 7 do not justify the Court setting aside the primary judge's orders.

Conclusion

[134] For those reasons the appeal should be dismissed.

[135] Although that conclusion renders it strictly unnecessary to consider the notice of contention, I will explain my conclusions upon that topic.

Notice of contention: conflicts or potential conflicts of interest

[136] Mr Shotton contended that the judgment should be upheld on the ground, which the primary judge had rejected, that conflicts of interest which the appellant would face in winding up the Fund made it necessary to make the order under s 601NF(1) of the *Corporations Act* 2001 appointing an independent person to take responsibility for ensuring that the Fund was wound up in accordance with its constitution. Mr Shotton argued that the primary judge erred in characterising the relevant matters as potential rather than actual conflicts of interest,[119] in holding that "necessary" in the expression "if the Court thinks it necessary to do so" in s 601NF(1) of the *Corporations Act* means "essential",[120] and in failing to find that the matters found by the primary judge empowered the Court to make, and made it appropriate to make, the order.[121] The appellant argued that the primary judge correctly construed s 601NF, that the distinction between actual conflicts and potential conflicts did not correspond with what was and what was not "necessary" for the purposes of s 601NF(1), and that the primary judge's conclusion appropriately gave effect to the relevant factors.

[137] It is useful first to deal with Mr Shotton's arguments about the meaning of the word "necessary" in s 601NF(1). Mr Shotton argued that the primary judge treated *Re Orchard Aginvest Ltd*[122] as authority for the proposition that a real potential for conflicts is not sufficient under s 601NF(1) and as requiring instead that an order is shown to be "essential" for the purpose of the winding up. I accept the appellant's argument that

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119 Notice of contention, at [3].
120 Notice of contention, at [4](1)–(c).
121 Notice of contention, at [4](d) and [4](e).
122 [2008] QSC 2.

this is not a correct description of the primary judge's reasoning. In *Re Orchard Aginvest Ltd*, Fryberg J accepted that because the particular conflict in issue in that case was "only potential, it may be that the winding-up can be carried out without any conflict actually arising, and therefore the statutory test of necessity can not be satisfied" and that "in all probability" an order under s 601NF(1) could be made only if the order was necessary in the sense of being essential to enable the winding up to occur.[123] The primary judge did not adopt that approach. The primary judge held that the power conferred upon the Court to appoint a person other than the responsible entity to take responsibility for the winding up of a scheme "if the Court thinks it necessary to do so" was "more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so."[124] The primary judge observed that the same view was taken in *Re Orchard Aginvest Ltd*,[125] *Re Stacks Managed Investments Ltd*,[126] *Re Equititrust Ltd*,[127] and *Re Environinvest Ltd*.[128]

[138] It is not necessary to discuss all of the provisions in the *Corporations Act* which use the words "necessary" and "desirable" as alternatives, which were cited for the appellant: ss 961N(1)(b), 983D(1)(a), 1022C(1)(b) and 1323(1). Numerous statutory provisions confer upon courts discretionary power to make an order where that is "convenient" or "desirable". Another common formulation is used in s 601ND(1)(a), which confers a power to make orders where the Court considers it "just and equitable". The word "necessary" imposes a more stringent test than those other expressions. The appellant submitted that "necessary" bears the ordinary meaning of "that [which] cannot be dispensed with" (as given in the *Macquarie Dictionary*). It may not be very helpful to substitute other words for the words actually used in the provision, but that definition does seem to convey the sense of "necessary" in this provision. That comprehends the situation described in parentheses in the provision where the responsible entity is "not properly discharging its obligations in relation to the winding up". Because a Court acting under s 601NF(1) is more directly concerned, not so much with what has happened in a winding up, but what will happen in a winding up, an order may be made where the Court is satisfied that there is an unacceptable risk that the responsible entity will not properly discharge its obligations in conducting the winding up.

[139] The primary judge referred to three matters as amounting to potential conflicts. Mr Shotton described the first of those matters as requiring the appellant to investigate distributions it made as responsible entity of the Fund to itself as responsible entity of other funds. The appellant was the responsible entity for two of the three feeder funds which were Class B unit holders in the Fund; individual unitholders were in a different class. The matter arose out of disproportionate distributions of Fund money as between Class B unit holders and others. The constitution of the Fund permitted the appellant as responsible entity to "distribute the Distributable Income for any period between different Classes on a basis other than proportionately, provided that the [responsible entity] treats the different Classes fairly."[129] Mr Shotton's argument raised the question whether the different classes of unit holders were treated fairly for the purposes of the constitutional provision.

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123 [2008] QSC 2 at 8 – 9.
124 *RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192 at [47].
125 [2008] QSC 2 at 8 – 9.
126 (2005) 219 ALR 532 at [50].
127 (2011) 288 ALR 800 at [51].
128 (2009) 69 ACSR 530 at[132] – [133].
129 Constitution of the Fund, cl 3.2, AB 1572.

[140] In the annual report for the Fund for the year ended 30 June 2012, the "statement of comprehensive income" for year ended 30 June 2012 referred to "distributions paid/payable to unitholders" as $17,024,389, with the reference to Note 3(a). The "statement of changes in net assets attributable to unitholders" for the same year attributed $15,959,774 to "units issued on reinvestment of distributions". Note 3(a) referred to a total of "distributions to unitholders" of $17,024,389, made up of $12,318,354 "Distributions paid/reinvested" and $4,806,035 "Distributions payable". Note 3(b) referred to nil distributions "paid and payable" to Class A unit holders and an insignificant amount to Class C unit holders. It referred to $16,904,211 "Distributions paid and payable" to Class B unit holders. The text of the note referred to $5,572,054 distributions payable being related to distributions requested to be paid before 30 June 2012 and that distributions had been suspended from 1 January 2011. The note recorded that the distributions of $16,904,211 were declared to Class B unit holders "to enable the feeder funds to recognise distribution income to match expenses incurred. All feeder funds have reinvested back into the Scheme during the period. Compliance with the Trust Deed and Corporations Act in relation to these distributions is a matter of legal interpretation and the Responsible Entity believes it has an arguable position to support the declaration of these distributions as being fair and reasonable to all classes of unitholders".

[141] Note 10 referred to "related parties". It recorded details of the holdings in the relevant scheme by the appellant and its affiliates. Those holdings had increased from 44.09 per cent of the total interest in the scheme at 30 June 2011 to 47.07 per cent at 30 June 2012. Thus it appeared that the feeder funds' reinvestments in the scheme of the distributions made to them as Class B unit holders resulted in an aggregate increase of about three percentage points of the total interest in the relevant scheme over the 12 month period. The auditors' report referred to the distributions of $16,904,211 to Class B unit holders described in Note 3, substantially repeated the text I have quoted, and recorded that this was "an area of significant judgment and accordingly, we bring it to your attention."

[142] As Mr Shotton submitted, the accounts suggest that at a time when distributions were generally suspended the appellant in effect distributed substantial amounts of money to itself and did not distribute money to the individual investors, and that the distributions were effected in a way which increased the proportion of the interest in the Fund of the appellant as responsible entity of two feeder funds and correspondingly decreased the proportion of others' interests in the Fund. Mr Shotton contended that the constitutional provision did not authorise that conduct, or at least that the appellant was obliged to investigate that issue, and that gave rise to an actual conflict of interest.

[143] The primary judge concluded that before the administrators were appointed the appellant had faced a conflict between its duties as responsible entity of the Fund and as responsible entity for the feeder funds, the administrators had conceded that the distributions might need to be investigated and might give rise to a claim on behalf of some unit holders of the Fund, and, although Mr Park swore to the contrary in his affidavit, he conceded in cross-examination that undoing the transaction would be difficult because of the reinvestment into the Fund on behalf of the Class B unit holders of almost $16,000,000 of the distribution.[130] The primary judge held that this issue illustrated the potential for conflict between the interests of the feeder funds and the interests of the Fund if one responsible entity had charge of them all

130 [2013] QSC 192 at [103] – [104].

and that there was a potential for the same type of conflict to arise again, including in any attempt to undo the 2012 transaction.[131]

[144] Mr Park described the transaction as involving an actual net cost to the Fund of a maximum of about $900,000 (the difference between the dividend declared of $16,900,000 and the units credited on reinvestment of $15,900,000 referred to in Notes 3 and 6). The appellant argued that where the accounts disclosed that the distribution was made because the feeder funds were in need of distributions to match expenses, Mr Park's unchallenged evidence was that the distributions were used by the feeder funds to pay for audit fees, hedging losses and the like, independent accounting and legal advice was taken, the distributions occurred when the Fund was illiquid, and the funded expenses had to be paid, Mr Shotton had not fulfilled his onus of proof of identifying circumstances which suggested that the distributions were unfair. In addition, the appellant argued that it was significant that the transaction had been the subject of independent accounting and legal advice, that the resultant increase in the proportion of units in the Fund held by Class B members was not unfair to other unit holders because the different classes of units did not carry equal rights, that the imbalance could be rectified by similarly disproportionate distributions in favour of the holders of ordinary units, and that the "actual disproportion" involved only a net payment of about $900,000, which was very small in comparison to the net assets of the Fund at that time of about $289,000,000.

[145] However Mr Park conceded that the transaction was "controversial" and did call for an investigation. He agreed in cross-examination that the transaction was "another example of a transaction that, I agree, should be investigated now that it has been (very belatedly) drawn to our attention" and that "[a]s with all other controversial transactions, should a conflict emerge, then we will take appropriate action – independent legal advice and, if the conflict is sufficiently acute, we will approach the Court."[132] That evidence was consistent with the highly qualified terms in which the transaction was described in the notes to the accounts and in the auditor's report. The proposition that the various matters to which the appellant referred in argument established that there was no arguable conflict is not readily reconcilable with the combined effect of the qualifications by the appellant and its auditors in its accounts and Mr Park's concessions in evidence as to the necessity for an investigation of this "controversial" transaction. Nor does the fact, if it be a fact, that the effect of the transactions might be readily capable of remedy if they are found to be inappropriate deny the existence of a conflict in the appellant in one capacity investigating transactions which benefited the appellant in different capacities. The conceded necessity of the appellant as responsible entity of the Fund investigating its own conduct in making payments to the appellant as responsible entity of two feeder funds involved an actual conflict of interest.

[146] The issue is not without significance. After Mr Park referred to the net cost to the Fund as being a maximum of about $900,000 he deposed that, since the Fund had a capital of several hundred million dollars, "these book entries will be relatively easy to reverse, should an investigation show that they were improper; and an overpayment of $900,000.00 to the three Feeder Funds will easily be able to be offset, as the assets are converted to cash and appropriate distributions made."[133] A very different picture emerged in cross-examination. Mr Park then accepted that it was

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131 [2013] QSC 192 at [105].
132 Affidavit of Mr Park, at [13], AB 1516.
133 Affidavit of Mr Park, at [12], AB 1516.

necessary to distribute income in accordance with the unit holdings. He would need to obtain advice about what could be done to take the units back from the funds to whom the units had been issued. He had not formed a view about whether this was merely a book entry. He did not know and he would have to seek advice about the options in relation to unilaterally taking units from others, such as Trilogy. After making those concessions, Mr Park agreed that it was "not relatively easy" to reverse and that this might involve the various funds in litigation with each other.[134] There was no re-examination on that point.

[147] It was that evidence to which the primary judge referred in finding that Mr Park conceded in cross-examination the difficulty of undoing the transactions although he had sworn to the contrary in his affidavit.[135] Ground 5(a) in the notice of appeal contended that the finding was incorrect because the matter upon which Mr Park was cross-examined did not properly reflect the content of his affidavit and it was not put to Mr Park that he had contradicted his affidavit evidence. As to the first contention, the appellant argued that whilst Mr Park's affidavit evidence concerned reversing the net effect of the disproportionate distribution by making offsetting future distributions, the answer in cross-examination concerned the difficulty of reversing the issue of the units, which was the means by which the distribution had been effected. That should not be accepted. The relevant paragraph of the affidavit appeared under a heading "alleged feeder fund conflict". It was Mr Park's response[136] to written submissions by Mr Shotton under a similar heading. Mr Shotton's submissions concluded that if the appellant were left to wind up the Fund and to act as responsible entity for each of the other feeder funds, it "will have the same possible feeder fund conflicts that Trilogy may have, described above at paragraphs 30, 31 and 32... as each feeder fund participated in the disproportionate distribution of $16.9 million as at 30 June 2012".[137] The cited paragraphs referred to both the approximately $900,000 of distributed funds which were not reinvested and the dilution of the interests of Class A and C unit holders and the corresponding increase in the interests of the Class B unit holders.[138] Mr Park's affidavit thus conveyed that the transaction about which Mr Shotton complained – which included the allotment of the units – could be reversed relatively easily. That proposition was unequivocally contradicted by Mr Park in cross-examination.

[148] The second proposition in ground 5(a) is also wrong. Mr Park's affidavit comprised only 22 substantive paragraphs and it was sworn on the day preceding the cross-examination. The cross-examiner directed Mr Park's attention to the paragraph in which Mr Park had asserted that the book entries would be relatively easy to reverse. That Mr Park understood he was being challenged about the accuracy of that assertion is evident from his own answer to a different question about the same paragraph, in which Mr Park referred to what was "outlined in" that paragraph.[139] The immediately following question elicited the answer about the possible reversal of the relevant transaction that it was "not relatively easy".

[149] This matter involved the appellant in a position of actual conflict by reason of its accepted obligation to investigate transactions between itself in one capacity and itself in different capacities, but it is not possible to decide upon the limited material

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134 Transcript, 16 July 2013, at 2-19, AB 205.
135 [2013] QSC 192 at [104].
136 See Affidavit of Mr Park, at [4], AB 1514.
137 Mr Shotton's outline of submissions, 14 July 2013, at [47], AB 2520.
138 Mr Shotton's outline of submissions, 14 July 2013, at [31] – [33], AB 2514 – 2515.
139 Transcript, 16 July 2013, at 2-19, AB 205.

before the Court whether or not the investigation would reveal grounds for taking action or whether it ultimately would prove relatively easy to reverse the effect of the transactions if that were required. (The appellant posited that the transactions could be reversed by making further disproportionate issues of units to reverse the effect of the impugned issues of units.) As to the significance of the issue, the amounts involved are significant but they are not large in the context of this very substantial administration.

[150] As to the second matter found to amount to a potential conflict, the primary judge made the following succinct findings:

> "...In both 2011 and 2012 the fund paid around $5 million to the first respondent as "loan management fees". There may be a question as to the legitimacy of these payments under the constitution of [the Fund], as they seem to be in addition to management fees, and on their face do not seem to have been expenses. Once again the administrators have not yet formed a concluded position as to this, but acknowledge the potential for an overpayment, and acknowledge that the process of reversing the entries may prove to be complex, though again Mr Park originally swore to the contrary."[140]

[151] Under 5(b) in the notice of appeal the appellant contended that the finding in the last sentence was not the proper inference to be drawn from the evidence and that the primary judge did not take into account Mr Park's evidence in re-examination and documents to which he referred in re-examination.

[152] Mr Park's affidavit made it plain that he had not been able to gain a proper understanding of these transactions and did not defend or impugn them, but he believed that, like the distributions of income that were declared, management fees amounting to $9,100,000 were declared but not paid. Mr Park deposed that if the fees were not properly charged, "it will be a relatively simple matter of righting the situation." After the cross-examiner referred Mr Park to the relevant paragraph of his affidavit, and asked some questions about that, the following exchange occurred:

> "Well, you said it's a relatively simple matter of righting the situation.
> Tell me the relatively simple matter? --- Obtaining legal advice.
> Well, judging by the...? --- It's a play on words, yes."[141]

[153] Although the cross-examination had focussed upon the "loan management fees" of about $5,000,000 paid to the appellant to which the primary judge's finding referred, rather than upon the additional "management fees" of about $9,100,000, the terms of Mr Park's answer plainly justified the primary judge in taking this evidence into account adversely to the appellant.

[154] The accounts recorded that the "[m]anagement fees" were "paid or payable" to Administration and that the "[l]oan management fees" were "paid" to the appellant "for loan management and receivership services provided by the Responsible Entity on behalf of the Scheme in replacement of appointing external receivers. Those fees are charged directly to the borrower to facilitate future possible recovery."[142] The appellant argued that it emerged in re-examination that the account which had been shown to Mr Park were prepared on an accruals rather than a cash basis and that the evidence of the cash accounts revealed that the relevant amounts had not been paid. The directly relevant question in re-examination was whether a page of the accounts

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140 [2013] QSC 192 at [106].
141 Transcript, 16 July 2013, at 2-21, AB 207
142 LM First Mortgage Income Fund Annual Report for the year ended 30 June 2012, at 5, AB 1679.

headed "Statement of Cash Flows" showed that a sum of $9,100,000 had been paid by way of management fees to anyone; Mr Park answered that it did not.[143]

[155] As is apparent from the terms of the primary judge's finding, the issue upon which Mr Park was cross-examined instead concerned the total amount of about $5,000,000 (recorded in the accounts as about $4,800,000) for "loan management fees" that were "paid" by borrowers to the appellant in addition to the "management fees" of about $9,100,000 that was "paid or payable" to Administration. It was in relation to the approximately $4,800,000 "loan management fees" that Mr Park acknowledged that "they're in addition to the management fee, which gives us cause for concern". Mr Park's evidence in re-examination that the accounts did not show the $9,100,000 as having been paid did not detract from his evidence in cross-examination that he was not throwing doubt on whether the amounts about which he was cross-examined had been paid.[144] The re-examination did not deal with those amounts. In the result, the arguments under appeal ground 5(b) disclosed no error in the primary judge's reasons.

[156] The evidence before the primary judge suggested at least a potential conflict between the appellant's interest in retaining the loan management fees of about $4,800,000 paid to itself – a company in administration and apparently destined for liquidation – and its duty to investigate those payments. The appellant argued that there was no conflict for four reasons: s 601FC(1)(c) and s 601FC(3) provided that the interests of the members took priority over the interests of the responsible entity; payment of all fees (including the management fees and loan management fees) were outside the related party provisions of Chapter 2E as modified by Part 5C.7 (particularly s 601LC(3) and s 601LD); the total of the impugned fees ($13.9 million) did not exceed the amount of 5.5 per cent of the Net Fund Value of $288,980,628 ($15,893,934) authorised by the constitution; and because the fees were authorised by the constitution, their payment or non-payment could not create a conflict. The first two propositions, that by statute the interests of members take priority over the interests of the appellant and that the fees are outside the related party provisions, do not deny the possibility of a conflict in relation to the fees. The third and fourth propositions do suggest that there was no conflict such as might justify relieving the administrators of responsibility for the winding up. Any conflict involved in a responsible entity charging fees authorised by the constitution is inherent in the scheme of the Act. However, it would be necessary in that respect to consider the reduction of the fee mentioned in the constitution from 5 per cent to 1.5 per cent, the absence of up to date valuations with reference to which the fee could be charged, and the effect of the decision or agreement by the administrators that they would charge their usually hourly rates rather than management fees.[145]

[157] It is not necessary to reach any final conclusion about this topic. The primary judge did not express any firm conclusion about it, but referred to the administrators' acknowledgement of a potential for overpayment and observed only that there "may be a question" about the legitimacy of the payments.[146] On the limited state of the

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143 Transcript, 16 July 2013, at 2-26.

144 Transcript at 2.21.

145 In the final submissions for the appellant, senior counsel observed that the management fee of 5.5 per cent was unexceptionable in legal terms because it was in the constitution, but the fee was practically excessive, as was demonstrated by the fact that the appellant had voluntarily reduced the fee to 1.5 per cent before the administrators were appointed – but even that amount could not be justified on a commercial basis because there were not up to date valuations for all the properties, so something else had to be done instead of charging a percentage of value.

146 [2013] QSC 192 at [106].

evidence that was the correct conclusion. Mr Shotton's contention that this matter should be characterised as an actual conflict of interest rather than a potential conflict of interest should not be accepted.

[158] The primary judge dealt with the third matter concerning conflicts in the following passage:

> "Under the constitution of [the Fund] the responsible entity is entitled to a management fee of up to 5.5 per cent per annum of the value of the assets of the fund. The administrators swear that they will not pay the [appellant] this management fee from [the Fund]. There would no doubt be difficulties and expense involved in valuing, and throughout the course of a winding-up, revaluing, the assets of [the Fund] in order to calculate the management fee, but it would not be impossible. In circumstances where both the first respondent and [the Fund] are being wound up and there is doubt as to the solvency of both, there is at least a potential conflict to be resolved between the desire of the creditors of the [appellant] and the interests of [the Fund].
> ...
>
> The evidence as to what the administrators will do as to this fee is rather vague and not adequately documented. While the administrators say they have "agreed" not to charge a management fee, I do not know who that agreement was with. I am not convinced that any arrangement they have made in relation to management fees would be sustainable if there were real pressure exerted by creditors of the [appellant]."[147]

[159] This topic was not discussed in the oral submissions for Mr Shotton. His written outline substantially repeated the primary judge's reasons and asserted that there was a conflict between the administrators' decision that they would not pay a management fee to the appellant and the interests of the appellant's creditors. That suggests that the administrators may have preferred the unit holders' interests over the interests of the appellant's creditors in the appellant being paid fees to which it was entitled. It is difficult to see how Mr Shotton could legitimately complain about that in circumstances in which, as was pointed out for the appellant, it was Mr Shotton's own solicitor who suggested to Ms Muller, who agreed, that the appellant should not charge the management fees but should charge only at an hourly rate.[148] There was no error in the primary judge's comment that this arrangement was vague and not adequately documented – Mr Park agreed that there was no resolution or minute to that effect and it arose only out of discussions[149] – but Mr Shotton's contention in this appeal that the transaction itself, or the possibility that it might be challenged by the appellant's creditors (or shareholders), involves the administrators being in a position of actual conflict is unsustainable.

[160] Accordingly, the only transaction which might properly be described as involving the appellant in a position of actual conflict is the first matter, and then only to the extent that the appellant acknowledged its obligation to investigate transactions involving distributions of some $17 million, part of which was distributed to the appellant in different capacities, and apparently involving a maximum net cost to the Fund of about $900,000. The primary judge did not describe the necessity to investigate the transactions as involving an actual conflict, but did refer to the possible need for

147 [2013] QSC 192 at [101], [102].
148 Affidavit of Ms Muller, at [46], [49], AB 1067, 1068.
149 Transcript, 16 July 2013, at 2-14, AB 200.

investigation and the possibility that it might give rise to a claim on behalf of some unitholders of the Fund.[150] My limited acceptance of the contentions made for Mr Shotton does not justify the conclusion that the primary judge was in error in finding that the real potential for conflicts of interest to rise in the future did not of itself make it "necessary" to appoint a person other than the responsible entity under s 601NF(1). Any liquidator's task is likely to involve dealing with conflicts of interest which might arise from time to time, including in the adjudication of claims, and it might be possible to manage potential conflicts through undertakings and directions should those conflicts arise.[151]

[161] Mr Shotton's arguments under the notice of contention should not be accepted.

Proposed orders

[162] The appeal should be dismissed. The appellant should be ordered to pay the respondents' costs of the appeal.

[163] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[164] **DAUBNEY J**: I respectfully agree with Fraser JA.

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150 [2013] QSC 192 at [104].
151 See [2013] QSC 192 at [115].