SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508 of 2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)

First Applicant: **JOHN RICHARD PARK 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 AND MANAGERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF 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**

AFFIDAVIT

I, **JULIAN THOMSON WALSH** of, Level 18, 300 Queen Street, Brisbane, Queensland, Solicitor states on oath:

1. I am a Special Counsel employed by the firm Russells and have the day to day conduct of this proceeding on behalf of the Liquidator of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) under the supervision of my principals.

Deponent ..... Taken by .....

AFFIDAVIT
Filed on Behalf of the Applicant
Form 46, Version 1
Uniform Civil Procedure Rules 1999
Rule 431

Russells
Level 18 300 Queen Street
Brisbane, 4000
Phone: 07 3004 8888
Fax: 07 3004 8899
Email: JWalsh@RussellsLaw.com.au
Ref: JTW: OCB: 20180543

2. Now produced and shown to me and marked "**JTW-4**" is a paginated and indexed bundle of documents to which I shall refer to in my affidavit. References to numbers in **[ ]** are references to page numbers in **JTW-4**.

7 December Affidavit of Mr Whyte

3. I refer to the affidavit of Mr Whyte sworn on 7 December 2018 filed in this proceeding and in particular paragraph 8(a) in respect of a discussion between Ms Patricia Hu of ASIC Insolvency Practitioners Stakeholders Team and me of 4 December 2018. That paragraph refers to a sentence of an email from Mr Copley that attributes to me a statement that *"the purpose of Mr Park's application under section 90-15 of Schedule 2 of the Corporations Act 2001 is to defer Mr Whyte's remuneration."*

4. I did have a telephone conversation with Ms Patricia Hu of ASIC on 4 December. I did not say to Ms Hu the words that are attributed to me in respect of the purpose of this Application as stated in paragraph 2 above. Rather, during my discussion with Ms Hu I explained in summary form the orders that are being sought by this Application that is returnable before the Honourable Justice Jackson on 10 December 2018. I did not specify the purpose of this Application in that telephone conversation. Rather, I explained the relief being sought by the Application and to the best of my recollection used words to the effect:

> *"Remuneration approval is deferred to conclusion of the winding up. Approval of budgets is being sought. 50% of the budgets are to be paid in advance with the other 50% at the conclusion of the winding up."*

5. I made a contemporaneous file note of my discussion by entering the details of the conversation into Russells' time costing system immediately after the telephone

conversation with Ms Hu. I have today caused a copy of that file note to be printed out. At **[1]** is that print out of the file note.

29 May 2018 hearing before Justice Jackson

6. I have obtained a copy of the transcript of the hearing before Jackson J dated 29 May 2018 in relation to the mediation of the Feeder Fund Proceeding. At **[2]** to **[32]** is a copy of that transcript.

Correspondence in respect of Queens Counsel's invoice

7. I have collated correspondence passing between Russells and Tucker & Cowen in respect of an outstanding invoice of John Peden QC. At **[33]** to **[77]** is a copy of that correspondence.

8. All the facts and circumstances deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit.

Sworn by **JULIAN THOMSON WALSH** on 7 December 2018 at Brisbane in the presence of:

Deponent

Solicitor/~~Justice of the Peace~~

SUPREME COURT OF QUEENSLAND

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CERTIFICATE OF EXHIBIT

Bound and marked exhibit "**JTW-4**" are the exhibits to the Affidavit of **JULIAN THOMSON WALSH** sworn 7 December 2018:

Deponent

Solicitor/~~Barrister/Justice of the Peace~~

CERTIFICATE OF EXHIBIT
Filed on Behalf of the Applicant
Form 47, Version 1
Uniform Civil Procedure Rules 1999
Rule 431

Russells
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INDEX OF EXHIBIT

RUSSELLS

FILE NOTE

Date:	04/12/2018	**Author:**	JTW
File No:	20180543		
Client Name:	FTI CONSULTING (AUSTRALIA) PTY LTD		
RE:	Application for directions as to the future conduct of the winding up of LMIM and the LM Funds		

Time	**Narrative**
14:08	Telephone call to Patricia Hu - Left message for Hugh Copley - Discussed application returnable on 10 December 2018 - Explained application - Defer rem approval to conclusion - referred to 11.4 million approved to date and further approval sought for 1.9 mil (last week hearing) - Conscious of finite resources - seek letter of support for application - She will discuss with Hugh and get back to me (14:08 to 14:59)

AUSCRIPT AUSTRALASIA PTY LIMITED
ACN 110 028 825

T: 1800 AUSCRIPT (1800 287 274)
W: www.auscript.com.au
E: clientservices@auscript.com.au

AUSCRIPT
FAST PRECISE SECURE

Ordered by: Renee Cunningham
For: Gadens Lawyers (QLD)
Email: renee.cunningham@gadens.com

TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JACKSON J

No 13534 of 2016

LM INVESTMENTS MANAGEMENT LIMITED **Plaintiff**

and

LM INVESTMENTS MANAGEMENT LIMITED and OTHERS **Defendant**

BRISBANE

10.03 AM, TUESDAY, 29 MAY 2018

DAY 1

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

MR J. McKENNA QC: May it please the court, my name is McKenna, M-c-k-e-n-n-a. I appear with MR ANANIAN-COOPER, A-n-a-n-i-a-n C-o-o-p-e-r. We're instructed by Gadens and we appear for the applicant, who is the plaintiff in the proceedings.

HIS HONOUR: Mr McKenna.

MR D. O'SULLIVAN QC: If your Honour pleases, O'Sullivan, O-apostrophe-s-u-l-l-i-v-a-n, initial D., appearing with MR TURNER, T-u-r-n-e-r, initial D., instructed by Ebsworth, and we are instructed on behalf of Said Jahani, S-a-i-d J-a-h-a-n-i, as the receiver and manager of the assets and undertakings of the first and third defendants, your Honour.

HIS HONOUR: Mr O'Sullivan.

MS P. AHERN: May it please the court, my surname is Ahern, A-h-e-r-n, initial P. I appear for the second defendant and also for the proposed fifth defendant, instructed by Squire Patton Boggs.

HIS HONOUR: Ms Ahern.

MR O'SULLIVAN: Your Honour, I should mention there's only one other party on the record, which is the fourth defendant, being the company in liquidation.

HIS HONOUR: Yes.

MR O'SULLIVAN: And in our supplementary submissions we've included the letters from the liquidator's solicitors explaining their position. They don't propose to appear, but they have asked that various things be passed on to your Honour.

HIS HONOUR: Mr McKenna.

MR McKENNA: Your Honour, can I read, please, the material on a list, two copies of which I'm about to hand up, and in handing them up I'm also handing up draft orders and – which are, to a large extent, I think, common ground, and working copies of our submissions.

HIS HONOUR: Yes. Mr O'Sullivan.

MR O'SULLIVAN: Your Honour, can I hand up a copy of our list of materials, and I read the two items on our list, which is the affidavit of Mr Jahani and our submissions. Two copies of the list, a copy of – a working copy of submissions which we apprehend have been provided to your Honour's Associate, and a draft order.

HIS HONOUR: Yes. I'll give you leave to file the submission. I don't think they've been filed yet. Is that right?

MR O'SULLIVAN: That's probably the case, your Honour.

HIS HONOUR: All right.

MR O'SULLIVAN: Thank you. The only difference between mine and our learned friend Mr McKenna's is paragraph 5, which we can address your Honour on in due course, otherwise the document I've given you is the same.

HIS HONOUR: Yes. I'll just note which came from where.

MR O'SULLIVAN: Thank you, your Honour. Yes, Ms Ahern.

MS AHERN: Your Honour, my client does not oppose the orders sought by the plaintiff today, so I have no written submissions in light of that. The only thing I wish to do is to hand up a further proposed draft order to your Honour. The only difference from my client's perspective relates to the date of a proposed mediation, and I have underlined that paragraph for ease of reference.

HIS HONOUR: Right. Mr McKenna.

MR McKENNA: Your Honour, thanks to – we're grateful to our learned friends for the productive discussions over the last few days. The purpose, from my client's point of view, we're seeking to achieve is a procedural framework which will allow us to seek to mediate this dispute as between trustee and these three feeder fund unit holders as soon as possible and with maximum efficiency and minimum cost. If that can't be settled by mediation, then we have a procedural framework to go forward to determine this matter. In relation to whether this matter should be on the commercial list, there's no dispute between us that it is suitable for the list if your Honour's prepared to accede to that proposal.

HIS HONOUR: Yes.

MR McKENNA: We have – one of the draft orders deals with that. As to whether it's appropriate for leave to proceed to be granted against a company in liquidation, we'd respectfully submit that this is really a paradigm case for that to occur because it has a proprietary component to it in the sense that one of the orders we're seeking is to, as it were, rectify the register of unit holders, as well as dealing with monetary issues, and there's a level of complexity, factual complexity and legal complexity, that makes it appropriate to be before a court rather than trying to deal with it some other way. So unless your Honour wished to hear from me further about that, there's no dispute at the bar table that this is an appropriate case for leave to proceed.

HIS HONOUR: The leave to proceed aspect is against LMIM in liquidation.

MR McKENNA: Yes.

HIS HONOUR: So, in relevant terms, it's only leave to proceed against the company in its own right, isn't it, really?

MR McKENNA: Well, I must say I've been approaching it on the basis that because numerous defendants are LMIM in liquidation in particular capacities, I still need to seek leave to proceed against them.

HIS HONOUR: All right. Well, we'll come to deal with that in due course, I think. But I suppose I should flag my concern in a sense LMIM, through its liquidators, is spent, and so I'm concerned that we not create a structure that has, in a practical sense, a false assumption built into it.

MR McKENNA: I understand your Honour's point, and may I say we are not proposing that any orders be sought – sorry, interlocutory orders be sought to compel the liquidator to do things. They need to be a party to these proceedings because they are a necessary party, but - - -

HIS HONOUR: I don't have any difficulty with that.

MR McKENNA: Yes.

HIS HONOUR: But how their case unfolds in the leave to proceed sense may be a matter that needs to be kept in sight. That's why – that's the only hesitation I have about that.

MR McKENNA: Yes. Thank you, your Honour.

HIS HONOUR: All right.

MR McKENNA: So then the next question really is the complication arising from the fact that the one company remains trustee of the FMIF, the plaintiff's trust, and also continues to be the trustee of two of the feeder funds.

HIS HONOUR: And this is the section 59 question.

MR McKENNA: Yes.

HIS HONOUR: And, as you will be aware, I previously granted leave under section 59, though in different sorts of cases to the present one. A concern that I have, though – and, again, this without expressing any views as to whether I will or won't make orders – is in those cases there were active – what I would describe as – to use some of the language of the correspondence here, contradictors, or parties against whom adverse orders were sought who were resisting the subject matter of the claim brought by Mr White as the receiver of the FMIF. For example, the claim against the auditors obviously had their and their insurers' interests involved. The claim against

the MPF had the new trustee or responsible entity of the MPF and also, of course, a substantial trust corpus that was relevant and represented. Who would represent here, in the way this is to be proceeded with, the funds of which LMIM is still the RE other than the FMIF?

MR McKENNA: Well, your Honour will hear from our learned friends about that, but the way that the matter has unfolded since the material that your Honour has seen is that they are not opposed the orders sought because it is proposed that they will, at least to the point of mediation and perhaps to the point of pleading, represent those interests, and then they're, of course, not binding themselves to – well, I'm now speaking about - - -

HIS HONOUR: Well, but Mr O'Sullivan represents a receiver for a secured creditor of one or other – well, I'm not sure of all of those funds. That's – I mean, that gives the receiver, ordinarily, the entitlement to conduct the proceedings in the corporation's name, but it doesn't give the receiver the same interest, because the receiver has the purpose of preserving the assets for the purpose of collection and payment of the secured creditor. Some of the interests here are not, as I would apprehend it, necessarily assets that are secured. Why would the units that are held by LMIM for the members of the feeder funds necessarily be within the scope of the securities?

MR McKENNA: My understanding is that the only asset to speak of of the two feeder funds that the receiver has been appointed to, the only assets, are the units in the – property assets, if I can put it that way, are the units in the FMIF, and so this litigation is sort of intimately concerned with what fruits there are there.

HIS HONOUR: But one of the difficulties about that is, as between a mortgagor and mortgagee, there are specific relationships and structures where a receiver for a mortgagee or chargee appears. Who represents the unit holders of the feeder funds?

MR McKENNA: I understand your Honour's question. Mr Jahani does, in the sense that, as you will see in Mr O'Sullivan's submissions, as a receiver, he owes duties to LMIM which go – secondary duties to the duty that he owes to his charge holder, but they do exist, and so that's the proposed approach. And it's something we can't really avoid, your Honour, because the only alternative from Mr White's point of view is to take on the burden of making a decision himself, unilaterally, without going to the court.

HIS HONOUR: I understand that.

MR McKENNA: If that were to happen, the persons who got – the only person who could sue on behalf of those unit holders is the receiver, so we'd be in precisely the same - - -

HIS HONOUR: How could the receiver sue on behalf of them?

MR McKENNA: Sorry, on behalf of the unit holder, which is LMIM.

HIS HONOUR: The unit holders of the feeder funds.

MR McKENNA: Yes, I understand. Yes. Yes.

HIS HONOUR: That's my point. That's – the units and the feeder funds are not the security.

MR McKENNA: No, no, that's so. The units in the FMIF are the security, yes.

HIS HONOUR: Yes. And, see, if I take your pleading, if you take your latest version, which I think is the one exhibited to the last affidavit - - -

MR McKENNA: Yes, your Honour.

HIS HONOUR: - - - paragraph 31 is one of the illustrations of this dealing with the CPAIF – the allegation is that the units in the FMIF held for the CPAIF were scheme property of the CPAIF, and equitable title thereto was held by LMIM.

MR McKENNA: Yes.

HIS HONOUR: Why would that be right? Let me just tell you why I ask that question. I don't have any difficulty with the idea that a unit holder in the FMIF is a person who's got a chose in action, that is, a legal chose in action that's transferable. The Property Law Act applies to it. I can sell it, subject to the rules, which are contractual as well as any equitable overlays in the trust structure. And that that legal chose in action is held by LMIM on trust for the members of the CPAIF. I don't have any difficulty with the idea either that what the unit represents in equity is a beneficial interest in the assets of the FMIF, but those two concepts, which are different, seem to me to be collapsed in paragraph 31.

The units which are held by LMIM are not things in which LMIM has got equitable title to. It's the legal holder of the units in the FMIF that it holds on trust for other people, and they've got equitable title to them. The equitable title is to the property of the FMIF - - -

MR McKENNA: Yes.

HIS HONOUR: Not to the unit.

MR McKENNA: No, that's – I understand your Honour's point.

HIS HONOUR: So 31 seems to me to be wrong in – and it's a collapsing of conceptual framework that infects this, because – and I'm not expressing any final views, but my initial reaction is there's a problem with the way this case is structured in some aspects. So if you go back to paragraph 27, it sets up what are equitable

principles as terms of a contract. Again, that's not conventional. The role and scope of the rule in Cherry v Boultbee or the clear accounts rule or the principles that apply in relation to the setting off of the obligation to contribute of a beneficiary are all equitable principles. They don't have anything to do with contract implied terms.

MR McKENNA: Well, I suppose we're trying to deal with the engraftment of a statutory managed investment scheme and contractual arrangements where they've chosen as a managed investment scheme a – the form of the managed investment scheme could have been a trust or it may not have been, but they chose a trust, and I guess we're trying to respond to that, those three different concepts that are - - -

HIS HONOUR: But what I'm saying is, for example, paragraph 26 sets up what I think is a completely unconventional way of analysing these relationships in law, and if you go to setting them up as implied terms and if you go to the particulars, they're said to be implied because of an express incorporation because – but you've been made a trustee. Well, that's an extraordinary step. And then secondly because it's necessary to give business efficacy to the constitution. But these principles can operate without - - -

MR McKENNA: Separately. I understand. I understand your Honour's point.

HIS HONOUR: Without the need for contract or business efficacy.

MR McKENNA: Yes. Yes.

HIS HONOUR: So paragraph 26, which seems to be, as it were, a founding plank of the way in which this structure is built up, may be a false step. As I say, 31 has got in it a collapsing, it seems to me, of two separate sets of interest holding, and when I get to the end I get fairly confused as well, because if you look at paragraph 1 of the relief, it's saying that all of the units in the CPAIF and the ICPAIF are responsible for, first, discharge of $55 million, when in fact the CPAIF didn't receive that full amount and the ICPAIF didn't receive all that full amount, so that's sort of making people jointly liable for an aggregated amount. That seems to me to be an absolutely extraordinary concept as well. How could that get to be the law?

MR McKENNA: Well, it follows from the problem about having a common party acting as both trustee and as, we say - - -

HIS HONOUR: But under which of your three principles is that the law?

MR McKENNA: It's the first two.

HIS HONOUR: Well, let me just take you to your submissions given to me today. Paragraph 27. I can't believe that if I'm a beneficiary in receipt of, let's say, $10, and the other beneficiaries get $90, I become responsible for 100 before I get any more of my interest under the trust. That is as inequitable an outcome as I could imagine, and yet that's the claim you're making. In paragraph 27, it says that the

rule in Cherry v Boultbee is most commonly implied where the person the subject has a direct entitlement, and the question I've got is have you got any case where it's not? Because here, the problem is that the role of LMIM as trustee for the feeder funds is a disclosed trust entitlement for whoever the beneficiaries of those funds are. Has there ever been a case where a trustee has had the rule in Cherry v Boultbee applied to them not in respect of their own interest but in respect of another trust interest?

MR McKENNA: Yes. I think that's one of the difficulties in the case, your Honour.

HIS HONOUR: Well, but – you see, you choose the language most commonly applied. I'm not aware of any case which is the other. That said, I don't have any difficulty with the idea that where there's a mistake in distribution – put aside even the deliberate breach of duty – a mistaken distribution to a beneficiary that when you come to the subsequent dealings with that beneficiary, either on capital or income account, the amount of mistaken overpayment is taken into account. That's just - - -

MR McKENNA: For that beneficiary, yes.

HIS HONOUR: That's done every time.

MR McKENNA: Yes.

HIS HONOUR: And, again, this case as pleaded is quite complex in some ways in terms of what might be described as the breaches. Reading your submissions, it became much clearer to me what the subject is. There seem to be three propositions. Proposition 1 is that because the funds were liquid, there was no authority to redeem.

MR McKENNA: Yes.

HIS HONOUR: Full stop.

MR McKENNA: Yes.

HIS HONOUR: And I'm not even sure if there's any controversy about that. If there's not, why are we having a civil trial about it? Proposition 2 is that because there was no net income, you could make distributions of income. Now, let's just take those two first. Unless, again, there's any controversy about that as to the real income, they're just distributions – they're just redemptions made under a power to redeem by a trustee beyond the terms of the trust instrument. That's just a normal breach of trust in terms of acting beyond the authority of the trust instrument, the Yuyang type of breach.

MR McKENNA: Yes.

HIS HONOUR: You don't need anything else, do you, beyond that? I mean, you've got all sorts of permutations and combinations of obligation, but the essential duty of the trustee is to adhere to the terms of the trust.

MR McKENNA: Yes.

HIS HONOUR: And you don't – if you've got one of those, ordinarily, unless they get excused under the Trusts Act power, the law was so clear you simply said, "Well, that's a breach of trust," and you said to the trustee, "You have to make it good," and the trustee had to – themselves, this is a personal claim – had to themselves rely on an excuse, if they could, under the Trusts Act, then in terms of the beneficiaries you went via the claim for recovery by way of mistake, and, of course, the equitable claim didn't face the same problems that mistake of law used to generate for the common law claims, even though they don't exist any more, and subject to the guarded language of the decision of the House of Lords in Ministry of Health v Simpson, the equitable species was, "Well, get the money back from the – the wrongly distributed money or property if it's property – back from the beneficiary who received it, subject to any equitable defences."

They're just relatively, I think, straightforward steps, but this pleading is constructed in a way that's a very complex case, and my fear is this: you say to me, "Well, Mr White might have to make a decision." Well, one of the things I have to tell you is in my mind: how much money has Mr White made out of this administration so far? And you're not made an administrator in his role of such a complex and difficult administration as this one in order not to make the hard decisions and to run complex and expensive cases in the court to protect yourself to the ultimate degree. You're made to have that responsibility and to take its rewards in terms of profit cost, because you act on good advice and do things.

Now, that's not saying I don't think this case should be in any way run, but I think it should be a case that doesn't exercise more legal theories and more complex solutions than it needs to in order to achieve whatever is ultimately – when I look at the root of this, it ultimately seems to be a way of saying, "Well, you need to adjust the beneficiaries' interests within the FMIF among themselves in order to get the right relationships for the distribution. That seems to be its purpose, unless I've misunderstood something. So I have some concerns along those lines. That said, coming back to the orders that you're seeking, I do think it should go on the list. I think that's a good idea. I'm very happy to let the parties go off to mediation, because they're all represented by extremely competent lawyers, and that's the best opportunity to solve the problem.

You've mentioned another problem that I think is real and which worries me. I should raise it now. The process of winding up provided for by the statute is complex and, in my view, I think as a matter of policy, effective. That creates difficulties for Mr White as exemplified by the fact that the company in liquidation effectively has run out of steam altogether. Under the powers that were granted to Mr White by Justice Dalton, I haven't checked them again. He has power to institute

all proceedings in the company's name. I have previously had to touch once before on what happens as you get to the end or towards the end of this administration in terms of what's to be done. I don't think the powers that were conferred by – on Mr White by Justice Dalton's order necessarily dealt with that, did they?

MR McKENNA: The specific problem your Honour has in mind is the end of the – when your Honour says the end of the - - -

HIS HONOUR: Getting towards the end of this, just so, for example, you can settle the list of those who are going to share in the distributions and make some of the distributions.

MR McKENNA: Yes.

HIS HONOUR: There's been a question of interim distributions in some of the disputes along the way. The liquidators have charged Mr White in being too taciturn, and he's responded to that positively and said, well, you know, it's more complicated than just simply making distributions now, and this case is an illustration of why that's true. But what I'm concerned about is how to actually get this administration closer towards its end with fewer steps and less cost.

MR McKENNA: Yes.

HIS HONOUR: If I can – and this might be the right word and illustrate a wrong attitude – interject something that will achieve that. Also, say, some of the other parties who are potentially parties to this proceeding costs, costs for which, for example, Mr Jahani wants to lay at the feet of the FMIF. There are inherent complexities that are not easily avoided. One that crossed my mind, for example, is what if you were to lose the proceeding? What would the beneficiaries of the CPAIF or ICPAIF then say about Mr White saying, "Well, my costs should come out of the FMIF, including out of your share of the units that are held on trust for you." There's no easy solution to these problems.

MR McKENNA: Well, can I explain the approach Mr White's proposing to take, which I hope meets your Honour's concern. The approach was to formulate our claim – and I accept what your Honour says about it being perhaps too elaborate; it could have been expressed simpler – as soon as we possibly can to sit down with those who can represent the unit holders and seek to work constructively to resolve this. If we can resolve it, we would be proposing to come back to court to seek the court's approval of a settlement agreement that would settle the relevant entitlements of unit holders. To the extent that there are receivers or other people involved, they can make their own application to get similar approval, and that would settle the question of who was entitled as between A, B unit holders to the entitlement, and then it's just a question of trying to - - -

HIS HONOUR: Administration after that.

MR McKENNA: Yes. That's the approach we were taking, and can I say, your Honour, we have no intention of prosecuting this matter without having sought approval from the court to do so with a full and frank disclosure of - - -

HIS HONOUR: I appreciate that too, but as I say, what I'm trying to do is to see whether there are, because of the structural complexities of winding up an MIS, whether there are things that, in a sense, with the way we're proceeding, that can be done more simply and less expensively. The company in liquidation remains the trustee. Mr White, as the receiver, has, effectively, the receiver's powers of the trustee and subject to the arguments we've had previously about those differences that I had to deal with. Ordinarily in a trust case, when you're dealing with a single layer trust, the means of an administration action or the summary procedures that were developed in lieu of enabled the court to take what I would describe as ultimate control of the trust and therefore to make the orders that needed to be made to bring the trust back into either a regular footing or, if it had to be wound up in the way in which these things can be done by way of distributions, dealt with in that fashion.

A problem is that section 601NF(2) gives statutory powers to the court to do things by way of direction as to how the scheme's to be wound up but limits those who can make the application for a further order to the nominated people under subsection (3). I think that subsection's not drawn, frankly, with the reality that if a person's appointed under subsection (1) then they're an obvious person who's got an interest or carrying out functions who should have an interest in applying for further orders. But I'm not sure if Mr White can, in a sense, get further directions of the kind that might be made in that administration action, although he's got the powers of the trustee under the equivalent powers, which were conferred by Justice Dalton's order. When I say equivalent, equivalent to the ones that are conferred on a procedure under section 420.

MR McKENNA: Your Honour, if we can get over that procedural difficulty, does your Honour have some view about how we can more efficiently - - -

HIS HONOUR: Well, my point about it is, if that can be done, there is no reason why, if there are questions that need to be resolved and advice that needs to be given, that those things can't be done in a relatively summary way - - -

MR McKENNA: Yes.

HIS HONOUR: - - - without necessarily airing them through the process of what we once would have called the action, the claim process.

MR McKENNA: Yes.

HIS HONOUR: I'm not throwing that up to say here and now we must abandon what's been done, because I don't think what's been done is useless. That's not my point at all. But my point is there may be, as a result of this mediation, something that needs – that Mr White might need direction about in the form of what I would

describe as a trustee's direction, in broad terms, as to what's to happen. That would be the sort of thing the court would do in what I'll describe as the administration action. To give you an example, one of the problems that emerges in this pleading – and I don't mean it's a problem with the pleading; I mean one of the problems of the case – is the question of what's void and what's voidable, and I am – I can tell you know, I am not hurtling with enthusiasm towards the idea of trying to decide the application of Pitt v Holt in Australia, but depending on which of the pathways is the appropriate pathway to the relief that might be sought, it may be necessary at some point to confront one of those questions.

If you take the redemptions, if they're void, then the consequence is that the alteration of the registers that were made on the basis of the redemptions was one that was false in law, and the payments that were made were made without a legal basis and therefore the sums would be said to be recoverable or in the form of a counter-liability that can be offset. I deliberately use complex language so that people don't think I'm talking about setoff in the traditional form. If they're voidable, then it's potentially a different set of questions that might have to be answered, so I see, for example, that as being one of those sorts of questions that might need some form of decision-making, or might not. I'm not suggesting it has to be. and there's a similar issue in relation to the distributions on the question of void and voidable.

Now, I haven't – as I say, I don't have an anxiety to decide something that doesn't need to be decided, but it occurs to me there are questions along the way in this pleading is structured that might usefully be decided along the way in the form of a summary proceeding short of a trial of a claim.

MR McKENNA: Yes.

HIS HONOUR: And that may itself be a function of whether further orders can be made under section 601NF(2), to give directions of that kind.

MR McKENNA: Yes.

HIS HONOUR: It may be that they can be done under the Trusts Act, because the reality is the Trusts Act operates in parallel alongside these provisions of the Corporations Act, and there can be no other purpose in creating the statutory trust that's provided for in the Corporations Act provisions than to engage the relationship and therefore the powers and responsibilities of trusts in terms of trustees and beneficiaries. The extent to which they operate consistently or inconsistently has been a further statutory question that gets called up from time to time, as I say, and all of that then operates, if you've got a trust relationship, against what I would describe as traditional trust law.

If I could – I'm sorry for that long speech, and I don't have a clear solution in what I'm suggesting, but I do have a concern, which I hope I've expressed in a way that's understandable, that going down the pathway of each of the issues that are raised by

this statement of claim may not be the best way and the quickest way and the cheapest way of getting to a solution to the problem.

MR McKENNA: Well, it's precisely the same issue that Mr White's struggling with, your Honour, so we're grateful for that assistance.

HIS HONOUR: There are other things, for example, the power under section 8 of the Trusts Act is, in Queensland, a relatively wide power. I think Mr Clary might be about to publish a book about the subject matter in general, but our '73 Act has had, in a sense, a wider power in this respect than other places. Does it operate? If it does, is it a way of potentially dealing with the review of a decision that is one of those you're challenging? I don't know. But I do know, for example, in paragraph 86(c) of your pleading you say, well, the way this all pans out is that the trustee, if I can use trust language, should account for the amounts paid in accordance with the principles that are those set out in paragraph 26, which are the contractual casting of the equitable principles.

MR McKENNA: Although I should mention 27 pleads the equity.

HIS HONOUR: Yes. So – I mean, that's the sort of thing that might be done on a review of the decision, or the power on review of a decision under section 8 might be engaged when you get into this territory as well.

MR McKENNA: Which contemplates a decision – rather than referring it to the court in ordinary proceedings, a decision further and then - - -

HIS HONOUR: But if you've got a decision that's unauthorised outside the terms of the trust, well, you'd need to go there is the point I would start off, but the point being that even if you've got a voidable decision which may be reviewable under section 8, that's another potential way of doing it - - -

MR McKENNA: I understand.

HIS HONOUR: - - - in what I would describe as a trusts model of analysis as opposed to some of the things that are raised here. My point is it seems to me that we should try or at least keep in mind that the objection of this point is to work out, as it seems, mostly, among the beneficiaries, including the beneficiaries of the subtrusts – it's a bad description applied to this primary and secondary trustees – what people's entitlements are, and hence my concern that apart from Mr O'Sullivan, who's here for a secured creditor of those subtrust beneficiaries' entitlements, who speaks for them in the way in which we're doing it? There are always constitutional difficulties with cases of this kind. Even Simpson's case was dealt with on the footing that nobody was going to talk about the war as to what the proper constitution of that case was.

MR McKENNA: Yes.

HIS HONOUR: And sometimes these questions just become too hard. They don't deter a course of equity, though, ordinarily coming to a practical result.

MR McKENNA: A practical problem we will see from the material is that Mr White doesn't actually know who the unit holders in the feeder funds are, so the ability to canvass their interest and see if they wish to be heard is – that's just a – it's obviously a difficulty we can easily overcome with the assistance of those who have access to that information.

HIS HONOUR: It seems to me it's one that should be overcome, and in the sense we need to know who's really got the interest in value in this; otherwise, it's just, in a sense, a whole lot of lawyers and accountants – and I don't say that negatively – worrying about all of the range of interests without a view to who's got how much in terms of value interests in the outcome of the questions. There isn't all that much interest in terms of value interest. How much we should spend on this process is, again, the critical question. For all of that, as it seems to me, you're going to go to a mediation as an early process, and you're talking about that before pleading, aren't you?

MR McKENNA: Well, that was our preferred – our preferred position was rather than spending money on digging ourselves further into this particular piece of litigation, we would actually engage with people who can speak for the various unit holders about the substance of the issue and see whether we can either narrow the issues or resolve the whole matter, and then if we have to go back to pleadings, then we can do so. Our learned friends for whom Mr O'Sullivan appears I think would prefer to put a defence on before the mediation, and I believe that Trilogy would prefer not to.

HIS HONOUR: All right. Mr O'Sullivan?

MR O'SULLIVAN: There are just three things at our end. The first is Mr Jahani is anxious that your Honour apprehends his view of his duties. He's an officer of the court and wants your Honour to know how he intends to conduct himself so that you're armed with that information, and so for that reason we've put his view of his duties before your Honour and our submission, so that's the first observation. We ask your Honour to have regard to those submissions.

The second matter from Mr Jahani's perspective is that he apprehends that the effect of the order that your Honour is being invited to make in paragraph 2(b) and (c) is that it's an order speaking of Mr Said Jahani of Grant Thornton in his capacity as receiver and manager of the company in those capacities, but if the charge or custom house decides for its own reasons to terminate the receivership, the effect of your Honour's order, he apprehends, would be that it won't be effective in relation to him personally for the reason that he no longer satisfies the description to be found in paragraphs (b) and (c).

The third matter from his point of view is that he's agnostic as to the best way to achieve a resolution of the matter. At the moment, his view is that putting on a defence first will assist, because it will enable the arguments to be made on behalf of the companies to whom he's appointed receiver to be ventilated fully, but we're not wedded strongly to that view. It's simply his current thinking is that it would conduce to a settlement if a defence was to be put on, and in relation – on that matter, in terms of timing, your Honour, he's still investigating the material, and one thing he doesn't yet have are the exhibits to the public examination process, and he's – there's no difficulty with him being provided with them, we apprehend, but he doesn't yet have them and he's minded to look at those, brief them and have regard to them in crafting his defence, and in those circumstances he's inviting your Honour to consider any date for a defence be the end of July so he can have time to do that.

So those are the matters in relation to Mr Jahani, but we're content to make some submissions about the matters that have fallen from your Honour, if your Honour's minded to hear them.

HIS HONOUR: I'm happy to hear whatever you want to say, Mr O'Sullivan. I haven't had a chance yet to read your outline or submissions. I should do that, I think.

MR O'SULLIVAN: Yes. Thank you, your Honour.

HIS HONOUR: Let me just do that before you continue. Yes, I've read that.

MR O'SULLIVAN: May I address your Honour briefly on some matters that have fallen from your Honour. The interests of the beneficiaries of the subtrust is a matter that your Honour has raised as a matter that's exercising your Honour's mind. Mr Jahani's view is reflected in the submissions that his primary duty is to Customs House, and if he were to settle proceedings he would be required to do so on terms that didn't recklessly sacrifice the interests of the company, which, relevantly, in our submission, would be the beneficiaries of the subtrust. They have, in substance, the same sort of interests as a shareholder, so their interests could not be recklessly sacrificed. That's equally true of the unsecured creditors. Now, the practical difficulty for him is that he needs to make sure that he properly and correctly complies with the duty that he owes to them in that way, your Honour, and - - -

HIS HONOUR: So just making sure I understand what we're talking about, his interest as receiver is to preserve the value of the units in the FMIF and the distributions that might be made - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: - - - to the holder of those units, which is as secured property.

MR O'SULLIVAN: Yes.

HIS HONOUR: And so, in that capacity, he has the ability of the receiver to defend the proceeding against the holder for relief.

MR O'SULLIVAN: Yes.

HIS HONOUR: It starts to get complex when you look downwards as opposed to upwards.

MR O'SULLIVAN: Can I put some – that's right. Can I just put some – because I think we're going to be back before your Honour anyway, Mr Jahani – his current view is that he wouldn't agree a settlement because of his secondary duty without coming before your Honour and seeking a direction that it's in order to settle it, so we will be back, and so for that reason I feel somewhat unconstrained in what I'm going to say, because I think we'll be ventilating this issue anyway. There's about 55 million in cash which potentially might flow to the feeder funds that Mr - - -

HIS HONOUR: Yes.

MR O'SULLIVAN: The receiver might, in theory, be able to take, and his charge would attach, and I think his secure debt is about 2 or 3 million, your Honour, so it's a small portion. If the matter, say, were settled – I'm just making this up, your Honour, but for 5 million - - -

HIS HONOUR: I understand what you're saying.

MR O'SULLIVAN: - - - he would take, say, 3, and he would give it to Customs House, and for the other 2, he would account to the company, and that, too, would go either to any unsecured creditors of the company or – and if there was any residue, assuming the unsecured creditors had priority – I don't know, but assuming they do, if there were none, the 2 million would then go down to the owners of the feeder funds, the beneficiaries of the feeder funds, so that 2 million would then be distributed to those investors in the feeder funds. So if it's 55 million, it was settled for a payment of 5, he would take 3 and then the other 2 on this scenario, your Honour, would be dealt with in that way.

Now, his duty will be to account for the 2 million to the company. A practical problem then arises from the court's point of view, and it's this: as our learned friend says, Mr White doesn't know the identity of those individuals, and my client also doesn't know the identity of those individuals.

HIS HONOUR: Because LMIM is still the RE and therefore still has the register.

MR O'SULLIVAN: Yes, and I'm not sure that we're even allowed to have that information, so I'm just thinking forward. The position might be - - -

HIS HONOUR: It has already occurred to me that it may be that it's necessary as part of this process to get an order that the register be made available to both Mr White and also to your client as to be able to know what's going on there.

MR O'SULLIVAN: That's right.

HIS HONOUR: And when we're dealing with Trilogy, I assume it's got control of the register for the fund it represents, but you two are both in that same position, aren't you?

MR O'SULLIVAN: We're in the dark, and that may cause a problem for the court in due course, so the other issue to do with these investors in the feeder funds – let's assume for the sake of argument there are four of them – your Honour spoke of Ministry of Health v Simpson, and you might recall that in Queensland that sort of doctrine which applies to deceased estates also now applies to inter vivos estates under our Trusts Act, and I think it's now 113. It used to be somewhere else. And that has a defence - - -

HIS HONOUR: I do.

MR O'SULLIVAN: And your Honour might recall the defence is a kind of like the Diplock defence and it says if you have – if you mistakenly receive trust property, but I think it says something like if you've changed your position on the faith of the receipt, you've got a defence. Now, those individuals, they're the ones who've got the real economic interest in these alleged mistaken payments, because it, as we apprehend the case, it flowed through - - -

HIS HONOUR: The feeder funds.

MR O'SULLIVAN: It flowed through the second and third defendants – or the first and third defendants who really are the feeder funds – it flowed through them straight through to these investors. So they would have an interest in raising the 113(3) defence to say, well, I don't have – you can't undertake the process that your Honour referred to before debiting my entitlements, because I've got a good defence. Now, the - - -

HIS HONOUR: This is what I had in mind when I raised - - -

MR O'SULLIVAN: That's right.

HIS HONOUR: - - - paragraph 31 with Mr McKenna.

MR O'SULLIVAN: Absolutely. And the problem that may emerge is – there's another problem potentially pregnant, and I feel unconstrained because I think we're going to be back here again. The other problem that might emerge is that when you're thinking about in this way, do these people who have got the true economic interest have the defence of this kind. One thinks, well, what truly is the trust? Are

there really a trust and a sub-trust, or is there only one trust where LMIM, as responsible entity for the FMIF, effectively holds it on trust for the investors in the feeder fund, because your Honour is aware of that doctrine that one can't hold property on trust for oneself.

HIS HONOUR: There'd be a trust problem.

MR O'SULLIVAN: Absolutely. And one, if you tried to, there's no trust. And that problem may well infect this relationship. We've had a look in the Corporations Act to see if it permits an answer to that problem – the collapsing trust problem, and at the moment we can't see that it does. So if one ends up in a situation where the true analysis is there aren't two trusts, but there's just one, because the LMIM as trustee of the feeder funds is effectively not a trustee. If the true trust is of that kind, and the beneficiaries are the feeder fund investors - - -

HIS HONOUR: It effectively means the feeder fund's just a sub-register.

MR O'SULLIVAN: That's right. And then you would have, on the face of it, a significant issue about whether the defence under Ministry of Health v Simpson would apply, because they would be directly claiming. And it might apply even if you don't have a collapsing trust, even if you've still got the sub-trust the defence might still apply. And a practical issue is this, your Honour: it would be in my client's interest to plead that defence, and it can speak of – it could speak of the mind and knowledge of LMIM as responsible entity of the feeder funds. It can make a case that, insofar as its knowledge and good faith is relevant, it can make that case.

But if the better case was to be made on behalf of the beneficiaries, it doesn't know who they are. And they, at the moment, aren't even represented before your Honour, and so one issue we've been tossing around – because it's in our interest to try and have it – our client's interest to try and have it resolved quickly and cheaply and fairly as possible – is whether there's a requirement for some sort of notification of the beneficiaries of these proceedings and whether they ought be given an entitlement to be heard. And we have a self-interest in that occurring, your Honour. And our own self-interest, it seems, with respect, to be a matter that - - -

HIS HONOUR: It will make any decision you make more robust if it's done with – in circumstances where those people are on notice - - -

MR O'SULLIVAN: Exactly.

HIS HONOUR: - - - and therefore could have participated if they wanted to.

MR O'SULLIVAN: Exactly right, your Honour. And that's our self-interest and our duty as an officer of the court is to draw that to your Honour's attention so that if your Honour's minded to have regard to those interests – if your Honour is concerned to ensure those interests adequately represented, that gives an opportunity if they wish to be heard. A practical issue arises to how you notify them. We don't

have the register. We don't have their addresses. We know nothing about them. But it's a matter that your Honour might want to consider.

HIS HONOUR: Although they've chosen not to come, LMIM is here in terms of being made a party to this proceeding - - -

MR O'SULLIVAN: That's right.

HIS HONOUR: - - - and there's no reason I know of why I could not make orders of – for disclosure, and, equally, for that matter, why I couldn't make orders for notification of the proceeding in a, what I would describe, as a simplified form - - -

MR O'SULLIVAN: That's right.

HIS HONOUR: - - - to those who are the unit holders in the feeder funds.

MR O'SULLIVAN: Yes.

HIS HONOUR: I mean, I'm not purporting to close off anybody else's position about this, but – particularly Ms Ahern, for example, but there's no reason why, in principle, that can't be done. And there've been orders of that kind made before. There are - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: In this proceeding in relation to those who are affected within the FMIF. I don't know – I can't remember. I think there might have been orders for those who are affected by the feeder funds as well.

MR O'SULLIVAN: Yes.

HIS HONOUR: That process isn't all that overwhelming, provided it doesn't become too expensive.

MR O'SULLIVAN: Yes.

HIS HONOUR: It does seem to me that that's an appropriate thing to do, but it also – it has the potential for making the proceeding even more complex and therefore more expensive.

MR O'SULLIVAN: That's right. And it may be if an advertisement was put out there would be no response and that it might be, if there is a response, I suppose those persons would have a right to appear, but it might become more complicated, that's right.

HIS HONOUR: In a sense, what you need to do is to work out, from that information, whether there are obvious targets who would be likely to carry any

consensus or be able to achieve any consensus among those who are the holders of the relevant units, but until you have the information to start with - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: - - - this is all theoretical.

MR O'SULLIVAN: Yes.

HIS HONOUR: One of the concerns – so for present purposes, you are entitled, as it seems to me by virtue of your security if it contains the usual provisions, to run any defence which you would think is appropriate. But that, in terms of your security position, would stop at the LMIM line as opposed to the beneficiaries of the feeder trusts. This is the section 113 point that you raised before.

MR O'SULLIVAN: Yes, no - - -

HIS HONOUR: Would you be entitled to raise that?

MR O'SULLIVAN: We are looking at trying to bring ourselves within the language of 113(3) - - -

HIS HONOUR: Right.

MR O'SULLIVAN: - - - as a company who, in substance, falls within it. Now, whether we can seek to latch upon the good faith change of position of the defendants, we still have an open mind about that, because, as your Honour knows, ordinarily a trust deed can advance on behalf of the beneficiaries any claim that they have, and, at the moment, we don't actually know who they are.

HIS HONOUR: Yes, I understand.

MR O'SULLIVAN: And we don't actually know whether we properly could plead that, because we don't have any at the moment. And I'm being very open with your Honour. We don't have enough visibility about who got what and what they did with it.

HIS HONOUR: By definition, Mr McKenna's claim doesn't stop at the LMIM line. It says I am entitled to treat – or maybe he says it does.

MR O'SULLIVAN: His claim is - - -

HIS HONOUR: I'm entitled to treat the redemptions and the distributions as having been made to you beneficially.

MR O'SULLIVAN: That's right. He treats my client as the beneficiary of a trust. And he says, in that capacity, he can deploy his equitable principles.

HIS HONOUR: And he doesn't have to look any further.

MR O'SULLIVAN: That's right.

HIS HONOUR: He can say the sub-trust from there is of no concern to him, he says.

MR O'SULLIVAN: And there are two potential issues. One is there's actually not two trusts. In fact, his only beneficiaries are the investors in the feeder funds. That's one potential issue. And the other is it's – we're a very strange form of beneficiary, because we're only receipting it on trust for others. So we're not asserting any beneficial interest in it.

HIS HONOUR: Well, of course, so far as he's talking about a, what I'll describe as an offsetting of liabilities. I'm not conscious of any of the cases working in the sub-trust field - - -

MR O'SULLIVAN: No.

HIS HONOUR: - - - if that makes sense. If one talks about a liability that will go against LMIM but not against the assets it holds on trust, it's of no interest to him.

MR O'SULLIVAN: That's right.

HIS HONOUR: It has – the units which are held on trust have to be his target.

MR O'SULLIVAN: That's right. And ordinarily a creditor of a trust isn't entitled to look at those assets, as your Honour knows. So he needs something more than just a debt claim. And so - - -

HIS HONOUR: My head's starting to hurt and I've only - - -

MR O'SULLIVAN: I know.

HIS HONOUR: - - - been thinking about it for a minute or so.

MR O'SULLIVAN: Don't worry, mine was too, your Honour.

HIS HONOUR: Well - - -

MR O'SULLIVAN: And I should say, also, that my clients have sort of been running very fast to try and come up to speed without spending too much money, so it may be that the position – it may be the issues that I've outlined may well develop further. But we thought it would be proper to - - -

HIS HONOUR: Or differently.

MR O'SULLIVAN: Or differently.

HIS HONOUR: Can I say this. It seems to me, though, whatever else is true, and I think we're probably not the first whose heads hurt over trying to analyse - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: - - - this particular problem, given the history of the proceeding to date. It seems to me what three things ought happen. One is – the first is the easy one, which is let's put it on the list so that we can manage it.

MR O'SULLIVAN: Yes.

HIS HONOUR: The second thing is I do think it's a good idea that there be at least a position exchange before you have your mediation. Whether it's a formal pleading I'm not particularly concerned, but it seems to me that, relevantly, the discussion, or the subject matters that are to be dealt with at the mediation, need to have some definition - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: - - - and that therefore people need to at least articulate their positions beforehand. And the third thing which I think intrudes on the second is this process needs to be one, if it's going to be effective, that brings in the outstanding interests of those who are the beneficiaries of the feeder funds. So I think there needs to be a notice process to them, and on the footing that they have the opportunity to apply for a direction to the courts so that if they wish to be heard or represented in the mediation they can be. And - - -

MR O'SULLIVAN: I think that notice – I'm sorry, your Honour.

HIS HONOUR: And I think also that notice should invite them to – and this is a question whether your client's prepared to do this. I'm conscious of his limited interest, but invite them to contact your solicitors so that they can find out what your clients or provide any information that they want to your clients about. I think, in addition to that, though, the company in liquidation should be required to disclose copies of the registers for the feeder funds to – so far as they're relevant to you, Mr O'Sullivan, to your clients. And also I think this should be done to Mr White so that everybody's dealing with the same information about who - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: Who may have an outstanding interest.

MR O'SULLIVAN: Yes.

HIS HONOUR: So far as Trilogy's concerned, then, the – it seems to me relevantly that any notices to be given to them – to their beneficiaries, could be dealt with by them as opposed to needing separate notice processes, the reason being that it's LMIM that is the ship that's steady in the water. I don't know there's any reason to think of Trilogy as being in that position, subject to what Ms Ahern might say. But they are, I think, the things we need to achieve as a result of this - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: This interlocutory process and then, as I say, there may be other procedural ways of trying to shortcut some of the steps that occur along the way. And I'm – my rant to Mr McKenna about this - - -

MR O'SULLIVAN: No, no, I understand.

HIS HONOUR: It was designed to try and simply generate thinking that might produce some shortened ways of trying to - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: - - - solve any of the questions that might be decided along the way.

MR O'SULLIVAN: Yes, your Honour. The only observation I'd make about that is in terms of three – this notice. My client's perfectly content to assist. His anxiety, as expressed to his solicitors and me, is that he is essentially asking Customs House to put him in funds. There's been some agreement like that, and he did go into about some limited other funding, but he's essentially having to put his hand out for Customs House, as the steward creditor, apart from this separate agreement. And what I think his response is will be he's perfectly content to be involved in the process.

HIS HONOUR: I'm not proposing any form of order that makes him responsible for the interests of the beneficiaries of the feeder funds.

MR O'SULLIVAN: No, I understand that, your Honour. I absolutely understand that. But if the burden was to fall on – if your Honour's – your Honour hasn't made any decision, but if insofar as your Honour's minded for the burden of putting the advertisements out to fall on him and for the solicitors – for his solicitors to be responsible for - - -

HIS HONOUR: No, I actually thought that one, as it were, side of this should have the carriage of doing it. I thought it ought to be Mr White.

MR O'SULLIVAN: I see, your Honour.

HIS HONOUR: But that built into it should be these steps that I have in mind.

MR O'SULLIVAN: Thank you, your Honour. The only issue is going to be – because our chap doesn't have any claim to indemnity from the funds, but if Mr White's - - -

HIS HONOUR: But Mr White – Mr White - - -

MR O'SULLIVAN: He does.

HIS HONOUR: - - - regularly does. And it seems to be that so far as we're talking about giving notice of the questions to the beneficiaries of the feeder funds, their interest is because they've got an interest in the units in the FMIF and - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: And to the extent that we're dealing with what the entitlements are of the unit holders of the FMIF inter se. That's all proper subject matter for Mr White.

MR O'SULLIVAN: I understand.

HIS HONOUR: So hence, it seems to me, that the carriage of it should be with him.

MR O'SULLIVAN: It may be – in terms of what's fallen from your Honour, the practical thing may be to modify the orders that have been made to add to them appropriate orders for the four matters that have fallen from your Honour. We can put flesh around that. Our submission would be that the notice to be given should be part of your Honour's orders so that - - -

HIS HONOUR: I agree.

MR O'SULLIVAN: - - - it has the [indistinct] of the court.

HIS HONOUR: And that's what we've done before. We've had forms of notice that have been attached to the orders - - -

MR O'SULLIVAN: Thank you, your Honour.

HIS HONOUR: - - - that show – and a text for that should be provided.

MR O'SULLIVAN: Yes.

HIS HONOUR: That gives both proper supervision, but, also, proper protection.

MR O'SULLIVAN: Thank you, your Honour. And in terms of the first – sorry, the second point position paid for pleadings, we'll try and work that out between ourselves and we'll try and obtain a draft order. At the moment there's some difference in the rival orders. My paragraph 5 is different to Mr McKenna's. I don't

think it – well, your Honour can look at it if you want to. But it's – I don't want to spend lots of your Honour's time - - -

HIS HONOUR: Yes.

MR O'SULLIVAN: - - - on it.

HIS HONOUR: But it can - - -

MR O'SULLIVAN: Mr – the paragraph I've – Mr McKenna - - -

HIS HONOUR: It can be a different process than that if you want. I mean, I don't particularly mind, but, as I said, I had some questions about whether the current pleading in a sense is – when one sets out on a voyage of discovery around the world, you tend to take all of the things with you that you might need, but it may be that in terms of what the centre of the case is, the quickest and most direct route to the tea ports of China, we don't have to go around all of the voyages. Sorry for the metaphors. But this is also subject to hearing from Ms Ahern.

MR O'SULLIVAN: I understand. And so our proposal would be that rather than your Honour making an order, your Honour's given some indications. We will, having taken those on board, try and agree a form of order and bring it back to your Honour. Is your Honour content to receive that in chambers, or would your Honour - - -

HIS HONOUR: I am, subject to agreement among the parties.

MR O'SULLIVAN: If there's agreement. And if there's not agreement - - -

HIS HONOUR: And if I have any difficulty with it I'll call you back. It may be that I – there's something about the form of notice, but - - -

MR O'SULLIVAN: Quite.

HIS HONOUR: But, generally speaking, my memory is that the prior processes have been fairly exhaustive about this, but my view is that it's an appropriate case for the notice to be sent as informality and cheaply as it can. So if we're talking about people with email addresses we should be using those addresses on the register. No doubt, some of them are well out of date and be lost, but the point is we're trying to give notice across the spread, not bring everybody in as a party to a proceeding.

MR O'SULLIVAN: I don't know how your Honour's [indistinct] Does your Honour have in mind an advertisement in a newspaper which sets it out as well, or simply trying to email individuals?

HIS HONOUR: Previously, these notices have been put up on the website, I think, from – and people have been given emails and directed to the website or a copy of it's been attached.

MR O'SULLIVAN: Yes.

HIS HONOUR: As I say, there've been a number of these things that have been dealt with in the notice forms that have been given to the members of the FMIF.

MR O'SULLIVAN: Yes.

HIS HONOUR: And I think we could adapt them, but I do have in mind that I don't want to put the FMIF through Mr White to the expense of a very expensive notice process. So - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: - - - I would like some common sense about that in rather than making - - -

MR O'SULLIVAN: I understand.

HIS HONOUR: - - - it as extensive as one could possibly do.

MR O'SULLIVAN: Is what your Honour have in mind is looking at the register, trying to work out the addressees and then some communication that way rather than some public notification? Is that what your Honour has - - -

HIS HONOUR: Yes.

MR O'SULLIVAN: Yes.

HIS HONOUR: Yes, because ordinarily the addressees have – ordinarily, as I understand it, those who are on the register have got addresses for communication, the way that one usually does with securities.

MR O'SULLIVAN: Yes, yes. And - - -

HIS HONOUR: Although this security has not traded, it operated in a fairly commercial way.

MR O'SULLIVAN: And Mr Turner reminds me that insofar as the liquidator has got that information, I assume your Honour has in mind that Mr White's representatives will contact the liquidator and obtain - - -

HIS HONOUR: I had in mind that making an order that the liquidator make available to Mr White the - - -

MR O'SULLIVAN: I understand.

HIS HONOUR: The registers to enable him to be able to do that. And also make that register available to your clients so there's an area where - - -

MR O'SULLIVAN: That's what I see - - -

HIS HONOUR: Where, although your - - -

MR O'SULLIVAN: That's order 4 - - -

HIS HONOUR: - - - client is not going to be responsible for the carriage of the information, you'll have the information as to contact, because - - -

MR O'SULLIVAN: Yes.

HIS HONOUR: - - - in a sense, each of the – because of the point you were raising about the possibility of section 113, each of the beneficiaries sits in a possible relationship with you.

MR O'SULLIVAN: Yes. And so order 4 is an order in relation to the liquidator. The liquidator shall X, Y and Z. I follow your Honour.

HIS HONOUR: Ms Ahern.

MS AHERN: Very briefly, your Honour. In relation to the question that your Honour raised about the register insofar as it relates to the Wholesale First Mortgage Income Fund, I made that inquiry yesterday. My solicitor understands the Trilogy jug does have it, as one would expect as a responsible entity. So I think the issues that have just been canvassed don't arise in respect of the wholesale ethnic, if I can call the trust that.

HIS HONOUR: I agree. It seems to me that, logically, if Trilogy is, unlike LMIM, not dead in the water, and is able to carry on its proper role as RE, it can represent the interests of those who are the members of the LIM Wholesale First Mortgage Income Fund.

MS AHERN: Yes. And I had already asked for those members' interests to be canvassed by Trilogy.

HIS HONOUR: Right. So – but your client should therefore be a party to the process for the mediation for exchange of positions in the same way as Mr O'Sullivan's client would be.

MS AHERN: I'd say certainly, your Honour. I would agree that a position exchange is the thing that's required rather than a pleading, certainly given the possible reformulation of the plaintiff's case.

HIS HONOUR: And one of the reasons why - - -

MS AHERN: Or pleading I should say.

HIS HONOUR: One of the reasons why I'm not anxious about making people put in formal pleadings is if my rant, as I call it, does generate the possibility of breaking some parts of this case up, it may be that it won't proceed on a pleading to a trial in the way that the claim foreshadows. The claim and the statement on the claim set out the essential facts from which it may be we can pick out what needs to be decided. So hence my lack of anxiety for an exchanged pleading as opposed to exchanged positions for the purpose of the mediation. Where does the fifth defendant sit in this, though? I notice – I know that there's been a change in a sense that the trust company is, as I understand it, the custodian of the LM Wholesale First Mortgage Income Fund and therefore the holder of its assets, and therefore I assume is the, as I've understood it, the registered holder of the units relating to the fund.

MS AHERN: I think that is correct, your Honour. I should say I've only recently been briefed so I'm still trying to get across it, but I think that is what – that is, that position is correct pursuant to the terms of the custody agreement.

HIS HONOUR: Under the usual custodial agreements the custodian is – I don't put too fine a point in saying this – is the agent of the RE and required to follow its directions, so whether it should have any real role to play in this as opposed to being a party simply so that if any order's made it might be bound, seems to me to a bit questionable.

MS AHERN: And, as I understand it, those types of clauses are present here, so it may well be that in the – that - - -

HIS HONOUR: Right.

MS AHERN: - - - in many ways the fifth defendant just abides the result and the real defence is conducted by the second defendant.

HIS HONOUR: All right. So for present purposes, then, we don't need to distinguish between defendant 5 and the second defendant. So is there anything else you want, then, in terms of the orders - - -

MS AHERN: The only other - - -

HIS HONOUR: - - - that I've foreshadowed?

MS AHERN: The only other point, and it is a minor matter, your Honour, was that my client wanted – would like the orders to include debts for the mediation, just to give some certainty around that process. But that's - - -

HIS HONOUR: So you want the 8th and the 29th of June respectively.

MS AHERN: Yes, and I understand that that is probably too early for the first and third defendants given the investigations that they have said that they need to make, so, obviously, I would not be dogmatic about those dates, but my client just wants some certainty around the mediation process.

HIS HONOUR: I'm happy for the party to agree dates. It seems to me the process that I've suggested is going to involve, without wishing to foist it on anyone, is going to involve weeks of delay in the notice and responsive periods. I think you should be able to talk to one another about that. But I'm happy to provide for a date, but I'm also happy to provide for, and intended, there would ought be attached to these orders liberties to apply so anything that needs to be adjusted can be.

MS AHERN: Thank you, your Honour.

HIS HONOUR: And I would intend to do that as informality as possible. There must become a point where we don't again inflict on people when we need, in a case like this, what I would describe as relatively informal adjustment of directions for full and lengthy hearings by way of directions hearings. So I'm amenable to doing this potentially, for example, by telephone conference, in a case like this, if that would assist in trying to bring these – this predinterest into a relatively simplified management structure.

MS AHERN: I think that would also assist my side for another reason, your Honour, because my solicitors are in Sydney, so it would certainly assist in a practical sense there – a telephone conference I mean.

HIS HONOUR: Once we get into full adversarial positions and decision then that can't be - - -

MS AHERN: Yes.

HIS HONOUR: Be appropriate, but I – and without using the dreaded language of case management conference that applies elsewhere, I do think that for some of these sorts of directions we're talking about now may be that, as the practicalities emerge, people might want some simple adjustments. Often that's done by sending to my Associate agreed variations of existing orders and I accede to that. But it might be, on some occasions, it would require a telephone conference, and I'm perfectly amenable to that idea as well.

MS AHERN: Thank you, your Honour.

MR O'SULLIVAN: Sorry to rise. One other thing's been brought to my attention which is that would your Honour be minded to extend paragraph 4 which refers to the disclosure of the register of members to also require the provision of any information the liquidator has about the amount and timing of any redemptions to those unit holders in the feeder funds, because my instructions are we don't have that information, and my instructions are, indeed, Mr White doesn't have that

information. And so we're looking, insofar as the liquidator has that information, for him to provide that to us, the amount and timing of redemptions.

HIS HONOUR: I'm disposed to make that order, but I think because of its particular nature, it's one that should be done on notice.

MR O'SULLIVAN: Yes.

HIS HONOUR: Rather than me providing for it now.

MR O'SULLIVAN: I understand, your Honour.

HIS HONOUR: I could provide for it now and have in the order liberty to them to apply to vary it if they want. I'd be prepared to make it in that provisional form.

MR O'SULLIVAN: Yes.

HIS HONOUR: Making it explicit that I'm – if they see some difficulty - - -

MR O'SULLIVAN: Well, you could - - -

HIS HONOUR: - - - that they can apply to change it.

MR O'SULLIVAN: You could say – yes. We can – I'm just thinking out loud. It could be in effective unless they make an application or it could just simply be any orders made subject to them bringing - - -

HIS HONOUR: Yes.

MR O'SULLIVAN: Exercising their right - - -

HIS HONOUR: That's what I had in mind.

MR O'SULLIVAN: - - - of liberty to apply within X days.

HIS HONOUR: I'm happy to make it in that provisional form, but I don't want to just make an absolute direction - - -

MR O'SULLIVAN: I understand.

HIS HONOUR: - - - as though I've dealt with - - -

MR O'SULLIVAN: When it's served on the liquidators, we'll draw their attention to that provision.

HIS HONOUR: Right. Yes, I'm content with that idea as well. Mr McKenna, is there anything else that's emerged out of this that you want to add?

MR McKENNA: So, your Honour, we should adopt the draft with those additional orders?

HIS HONOUR: Yes.

MR McKENNA: And then – I must say, I suspect Mr White would be more comfortable filling the liquidator immediately with what's proposed so if there are any issues from the liquidator's point of view we can deal with them, rather than having your Honour make orders and [indistinct]

HIS HONOUR: Yes. And there'll be a general liberty to apply - - -

MR McKENNA: Yes.

HIS HONOUR: - - - attached to them so that anybody who's affected by them can make applications as needs be. And in those circumstances, I am comfortable and more comfortable, particularly with the idea of the two leaves that are involved in your application. I'm content to make those - - -

MR McKENNA: Thank you.

HIS HONOUR: Those orders on that basis.

MR McKENNA: Thank you.

HIS HONOUR: Is there anything else that is outstanding that I need to deal with in terms of the substance?

MR O'SULLIVAN: No.

HIS HONOUR: All right. Well, then I'll await the provision of the draft. Thanks, ladies and gentlemen.

ADJOURNED **[11.24 am]**

Tucker&CowenSolicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15. 15 Adelaide St. Brisbane. Qld. 4000 / GPO Box 345. Brisbane. Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady / Mr Walsh

31 July 2018

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

Email: atiplady@russellslaw.com.au
jwalsh@russellslaw.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*"); Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte Supreme Court of Queensland Proceeding No. 3508/2015; Indemnity Application by Park & Muller as Liquidators of LMIM filed 20 May 2017 - Orders of Jackson J, 22 November 2017

We refer to your letter of 11 July 2018, which was received with your email of 11 July 2018 and which enclosed a number of other documents, including a fee note to your firm from Mr John Peden dated 21 June 2017.

Relevantly, you have said that, due to an oversight, the invoice from Mr Peden had not been received by your firm when the amount of the costs to which your clients were entitled pursuant to the Orders of Jackson J made on 22 November 2017, in respect of the "Indemnity Application", was being negotiated. As a consequence, the amount of those costs was fixed by agreement (and by Consent Order) and subsequently paid without that fee note having been taken into account.

We note that the failure appears to have been due, at least in part, to an issue on the part of Counsel's invoicing system, and you have provided to us a copy of an email from Mr Peden to you dated 5 July 2018, providing an explanation of the circumstances.

We, and our client, have given consideration to your clients' request that both the Terms of Agreement, as well as the Consent Order made on 27 June 2017, be varied to incorporate a further amount in respect of the invoice to you from Mr Peden.

Your letter has requested payment of a further amount of $55,257 in respect of Mr Peden's invoice. However, it appears that the calculation of that amount has not taken account of the following:-

1. The agreement between the respective parties was that the amount of costs would be calculated and paid on a GST-exclusive basis, in keeping with the 'indemnity principle', given that your clients have been able to claim the input tax credits on the amounts of your tax invoices (that agreement having been reflected in the amounts the subject of the Terms of Agreement); and

2. The costs Order in the Indemnity Application provides for payment to your clients of 90% (rather than 100%) of your clients' costs, to be paid out of the FMIF.

Having regard to those matters, and the exclusion of the first four items in Mr Peden's invoice (which your letter acknowledges relate to another proceeding), we calculate the relevant amount of Mr Peden's invoice to be $45,225.

We understand that your clients do not seek any additional payment in respect of the costs of the Remuneration Application; if they do, please tell us as soon as possible.

We are instructed that our client is prepared to agree to a variation to the Terms of Agreement, as well as to the Consent Order made on 27 June 2018 in the Indemnity Proceeding, to allow for payment of an additional amount of $45,225 to your clients, on the basis that:-

1. Your clients do not later claim further costs from the FMIF in respect of the correspondence concerning Mr Peden's invoice and attending to those variations (we say this for the sake of completeness, but we expect that it goes without saying); and

2. Naturally, no interest would run on that varied Order; having already procured prompt payment to you of the amount fixed by the Order of 27 June 2018 (and by the Terms of Agreement), our client will again use his best endeavours to procure prompt payment of the additional amount once both the Terms of Agreement and the Consent Order have been varied, but we reiterate that the FMIF bank accounts are not under his exclusive control.

Naturally, formal documentation (to attend to both the variation to the Terms of Agreement, and the variation to the Consent Order) will be required; we are instructed that there should be no binding agreement until such time as at least the formal documentation recording the variation to the Terms of Agreement has been signed by all parties to those Terms of Agreement.

You might kindly let us know by return correspondence whether your clients are agreeable to the above proposal.

Yours faithfully

David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

RUSSELLS

20 August 2018

Our Ref: AJT:JTW:20131259

Your Ref: Mr Schwarz

Mr David Schwarz
Tucker & Cowen
GPO Box 345
BRISBANE 4001

By Email: dschwarz@tuckercowen.com.au

Dear Colleagues

LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation)
Cost Order made in Supreme Court of Queensland Proceeding number 3508 of 2015

We refer to your letter of 31 July 2018 in response to our letter of 11 July 2018.

Our client is prepared to agree to a variation of the Terms of Agreement and a variation of the Consent Order made on 27 June 2018 in respect of the Indemnity Application to allow for payment of an additional amount of $45,225.00.

Attached is a Deed of Variation in respect of the Terms of Agreement and a draft Consent Order amending the 27 June 2018 costs order.

Please provide us with your comments in respect of the Deed of Variation and the draft Consent Order as soon as possible.

Yours faithfully

Julian Walsh
Special Counsel

Direct (07) 3004 8836
Mobile 0449 922 233
JWalsh@RussellsLaw.com.au
20131259/2505640

RUSSELLS

DEED OF VARIATION OF TERMS OF AGREEMENT

DAVID WHYTE IN HIS CAPACITY AS RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND (ARSN 089 343 288) AND AS THE PERSON RESPONSIBLE FOR ENSURING THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND IN ACCORDANCE WITH ITS CONSTITUTION

and

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

and

JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461

Russells Contact: Julian Walsh
Telephone: 07 3004 8836
Email: JWalsh@RussellsLaw.com.au
Reference: 20131259

DEED OF VARIATION OF TERMS OF AGREEMENT

Dated

BETWEEN **DAVID WHYTE IN HIS CAPACITY AS RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND (ARSN 089 343 288) AND AS THE PERSON RESPONSIBLE FOR ENSURING THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND IN ACCORDANCE WITH ITS CONSTITUTION**

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

AND **JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461**

RECITALS

A. The Parties entered into a Terms of Agreement on 18 June 2018 (**the Terms of Agreement**).

B. The Parties wish to vary the Terms of Agreement on the terms set out in this Deed.

1. VARIATIONS TO THE TERMS OF AGREEMENT

1.1 Definitions

Clause 1.1 be varied by inserting as follows:

*"**Deed of Variation** means the Deed of Variation varying this agreement"*

1.2 Costs Orders – Indemnity Application

The Parties agree to vary clause 3.3 so that:

(a) the amount of *"$220,859.31"* is changed to *"$266,084.31"*; and

(b) the words *"to procure that an order is made"* are changed to *"to procure that orders are made."*

1.3 Costs Orders – Indemnity Application

Clause 3.4 be varied so that it states as follows:

"Consent orders fixing the Liquidator's costs in accordance with clauses 3.2 and 3.4 are filed:

3.4.1 seven days after execution of this agreement fixing the amount of $230,889.50 and $220,859.31 respectively with payment of the Liquidator's costs be made no later than seven days after those orders are made; and

3.4.2 seven days after the execution of the Deed of Variation varying the consent order in respect of the amount of $220,859.31 to $266,084.31 with payment of the additional amount of $45,225.00 to be made no later than seven days after that order is made.

EXECUTED as a deed

SIGNED SEALED AND DELIVERED by **JOHN RICHARD PARK** in the presence of:

Witness Signature

Print Name

Signature

Print Name

SIGNED SEALED AND DELIVERED by **GINETTE DAWN MULLER** in the presence of:

Witness Signature

Print Name

Signature

Print Name

EXECUTED by **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461** pursuant to section 127 of the *Corporations Act 2001* (Cth) by:

Witness

Print Name

SIGNED SEALED AND DELIVERED by **DAVID WHYTE** in the presence of:

Witness Signature

Print Name

Signature

Print Name

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS3508/2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)

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 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**

CONSENT ORDER

Before: Registrar

Date: August 2018

Initiating document: Consent to Order of Registrar filed

THE ORDER OF THE COURT BY CONSENT IS THAT:

1 The amount of $220,859.31 stated in paragraph 1 of the Consent Order made on 27 June 2018 (Court Doc No 124) be changed to the amount of $266,084.31.

Signed:

ORDER
Filed on behalf of the Applicants
Form 59, Version 1
Uniform Civil Procedure Rules 1999
Rule 661

Russells
Level 18, 300 Queen Street
Brisbane QLD 4000
Tel: (07) 3004 8888
Fax: (07) 3004 8899
Ref: JTW:20131259

Olivia Briers

From:	Julian Walsh
Sent:	Tuesday, 21 August 2018 9:12 AM
To:	'David Schwarz'
Cc:	Ashley Tiplady; Alex Nase
Subject:	RE: LMIM Cost Order made in Supreme Court of Queensland proceeding number 3508 of 2015- Matter: 20131259
Attachments:	2505688 Deed of Variation.docx

David

Attached is the deed of variation in word format.

Yours faithfully

RUSSELLS

Julian Walsh
Special Counsel

Direct 07 3004 8836
Mobile 0449 922 233
JWalsh@RussellsLaw.com.au

Brisbane / Sydney
Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: David Schwarz <dschwarz@tuckercowen.com.au>
Sent: Monday, 20 August 2018 4:07 PM
To: Julian Walsh <JWalsh@russellslaw.com.au>
Cc: Ashley Tiplady <atiplady@russellslaw.com.au>; Alex Nase <anase@tuckercowen.com.au>
Subject: RE: LMIM Cost Order made in Supreme Court of Queensland proceeding number 3508 of 2015- Matter: 20131259

Dear Julian,

Thank you for your email. Could you please send us the draft deed of variation in Word format?

Regards

David

David Schwarz
[illegible]

E dschwarz@tuckercowen.com.au
D [illegible] M 0488 400 348 T [illegible] F [illegible]
Level 15, 15 Adelaide Street, Brisbane GPO Box 1049, Brisbane Qld 4001
TCS Solicitors Pty Ltd ACN 610 201 509

Tucker&CowenSolicitors.

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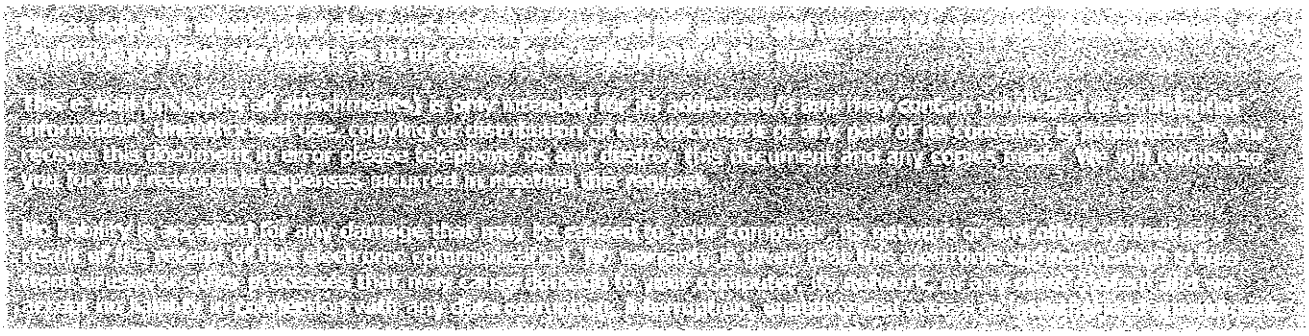

From: Olivia Briers [mailto:OBriers@russellslaw.com.au] **On Behalf Of** Julian Walsh
Sent: Monday, 20 August 2018 3:51 PM
To: David Schwarz
Cc: Julian Walsh; Ashley Tiplady; Alex Nase
Subject: LMIM Cost Order made in Supreme Court of Queensland proceeding number 3508 of 2015- Matter: 20131259

Dear Colleagues

Please refer to our attached correspondence dated 20 August 2018.

Yours faithfully

RUSSELLS

Julian Walsh
Special Counsel

Direct 07 3004 8836
Mobile 0449 922 233
JWalsh@RussellsLaw.com.au

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Russells Contact: Julian Walsh
Telephone: 07 3004 8836
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Reference: 20131259

DEED OF VARIATION OF TERMS OF AGREEMENT

Dated

BETWEEN **DAVID WHYTE IN HIS CAPACITY AS RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND (ARSN 089 343 288) AND AS THE PERSON RESPONSIBLE FOR ENSURING THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND IN ACCORDANCE WITH ITS CONSTITUTION**

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

AND **JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461**

RECITALS

A. The Parties entered into a Terms of Agreement on 18 June 2018 (**the Terms of Agreement**).

B. The Parties wish to vary the Terms of Agreement on the terms set out in this Deed.

1. VARIATIONS TO THE TERMS OF AGREEMENT

1.1 Definitions

Clause 1.1 be varied by inserting as follows:

*"**Deed of Variation*** *means the Deed of Variation varying this agreement"*

1.2 Costs Orders – Indemnity Application

The Parties agree to vary clause 3.3 so that:

(a) the amount of *"$220,859.31"* is changed to *"$266,084.31"*; and

(b) the words *"to procure that an order is made"* are changed to *"to procure that orders are made."*

1.3 Costs Orders – Indemnity Application

Clause 3.4 be varied so that it states as follows:

"Consent orders fixing the Liquidator's costs in accordance with clauses 3.2 and 3.4 are filed:

3.4.1 seven days after execution of this agreement fixing the amount of $230,889.50 and $220,859.31 respectively with payment of the Liquidator's costs be made no later than seven days after those orders are made; and

3.4.2 *seven days after the execution of the Deed of Variation varying the consent order in respect of the amount of $220,859.31 to $266,084.31 with payment of the additional amount of $45,225.00 to be made no later than seven days after that order is made.*

EXECUTED as a deed

SIGNED SEALED AND DELIVERED by **JOHN RICHARD PARK** in the presence of:

Witness Signature	**Signature**
Print Name	**Print Name**

SIGNED SEALED AND DELIVERED by **GINETTE DAWN MULLER** in the presence of:

Witness Signature	**Signature**
Print Name	**Print Name**

EXECUTED by **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461** pursuant to section 127 of the *Corporations Act 2001* (Cth) by:

Witness	
Print Name	

SIGNED SEALED AND DELIVERED by **DAVID WHYTE** in the presence of:

Witness Signature	**Signature**
Print Name	**Print Name**

Olivia Briers

From: Julian Walsh
Sent: Tuesday, 28 August 2018 2:27 PM
To: 'David Schwarz'
Cc: Ashley Tiplady; 'Alex Nase'
Subject: RE: LMIM Cost Order made in Supreme Court of Queensland proceeding number 3508 of 2015- Matter: 20131259

David

Please respond to our 20 August 2018 letter as soon as possible.

You have had the letter and the word version of the Deed of Variation for a week.

The Deed of Variation is straightforward and we can see no reason for you objecting to the Terms of Agreement being varied on that basis.

Yours faithfully

RUSSELLS

Julian Walsh
Special Counsel

Direct 07 3004 8836
Mobile 0449 922 233
JWalsh@RussellsLaw.com.au

Brisbane / Sydney
Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 732 534
RussellsLaw.com.au

From: Julian Walsh
Sent: Tuesday, 21 August 2018 9:12 AM
To: David Schwarz <dschwarz@tuckercowen.com.au>
Cc: Ashley Tiplady <atiplady@russellslaw.com.au>; Alex Nase <anase@tuckercowen.com.au>
Subject: RE: LMIM Cost Order made in Supreme Court of Queensland proceeding number 3508 of 2015- Matter: 20131259

David

Attached is the deed of variation in word format.

Yours faithfully

RUSSELLS

Julian Walsh
Special Counsel

Direct 07 3004 8836
Mobile 0449 922 233
JWalsh@RussellsLaw.com.au

2018

PROFESSIONAL SERVICES nab Awards 2017 FINALIST

Brisbane / Sydney
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Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: David Schwarz <dschwarz@tuckercowen.com.au>
Sent: Monday, 20 August 2018 4:07 PM
To: Julian Walsh <JWalsh@russellslaw.com.au>
Cc: Ashley Tiplady <atiplady@russellslaw.com.au>; Alex Nase <anase@tuckercowen.com.au>
Subject: RE: LMIM Cost Order made in Supreme Court of Queensland proceeding number 3508 of 2015- Matter: 20131259

Dear Julian,

Thank you for your email. Could you please send us the draft deed of variation in Word format?

Regards

David

David Schwarz
Principal

E: dschwarz@tuckercowen.com.au
D: 07 3833 9515 M: 0488 400 349 | T: 07 3833 3000 F: 07 3833 3033
Level 15, 15 Adelaide Street Brisbane | GPO Box 345 Brisbane Qld 4001
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Tucker&CowenSolicitors.

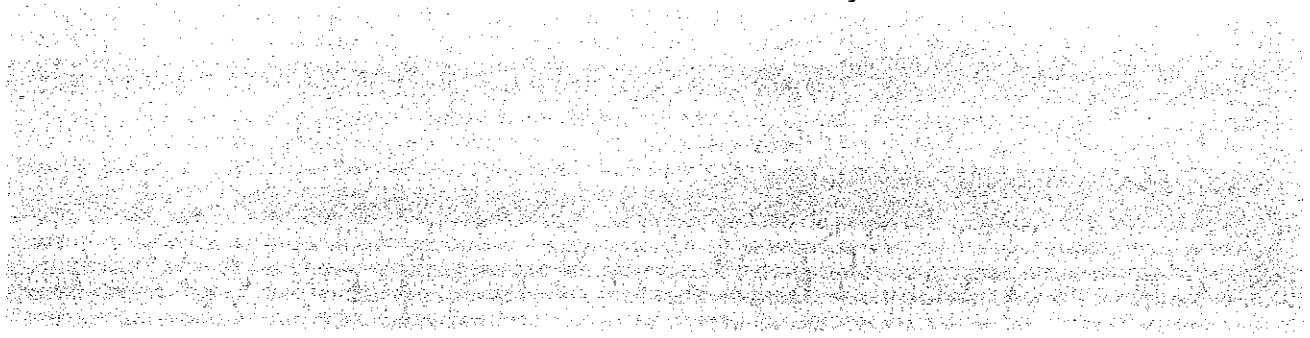
Leading Litigation & Dispute Resolution and Insolvency & Reconstruction Lawyers 2012 to 2017, First Tier for Insolvency 2017 - Doyle's Guide

Best Lawyers | International 2013 - 2019 Justin Marschke for Litigation and Regulatory 2019

msi Global Alliance

Independent legal & accounting firms

Individual liability limited by a scheme approved under Professional Standards Legislation



From: Olivia Briers [mailto:OBriers@russellslaw.com.au] **On Behalf Of** Julian Walsh
Sent: Monday, 20 August 2018 3:51 PM
To: David Schwarz
Cc: Julian Walsh; Ashley Tiplady; Alex Nase
Subject: LMIM Cost Order made in Supreme Court of Queensland proceeding number 3508 of 2015- Matter: 20131259

Dear Colleagues

Please refer to our attached correspondence dated 20 August 2018.

Yours faithfully

RUSSELLS

Julian Walsh
Special Counsel

Direct 07 3004 8836
Mobile 0449 922 233
JWalsh@RussellsLaw.com.au

2018 WINNER

nab PROFESSIONAL SERVICES Awards 2017 FINALIST

RUSSELLS

21 September 2018

Our Ref: AJT:JTW:20180543
Your Ref: Mr Schwarz

Mr David Schwarz
Tucker & Cowen
GPO Box 345
BRISBANE 4001

By Email: dschwarz@tuckercowen.com.au
anase@tuckercowen.com.au

Dear Colleagues

LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation)

Thank you for your letter dated 18 September 2018.

We note your observations about the powers of the Court to make orders and will bear your observations in mind when our client brings his application.

As for the resumed hearing date on 3 October 2018, the primary purpose of that hearing is to finalise the remuneration application. In that regard, we are waiting to hear from you with your client's response to the schedule that we provided to you on Tuesday, 18 September 2018 setting out the proper analysis of the available headroom within the existing remuneration approvals. Might we enquire when you will respond to us so that we know whether your client presses his objection, in which case we will need, at least, three or four days prior to the hearing on 3 October to prepare affidavit material. If the matter is going to be controversial, then your earliest response would be appreciated, so that there is time for our affidavit material to be served well before the 3rd, and your client having an opportunity to respond say, 2 days prior to the hearing.

As foreshadowed on 6 September 2018, we also intend to raise with His Honour some options about the future conduct of the dual appointments, with a view to presenting possible solutions to the problems currently being experienced. In that regard, we envisage providing to you, in the next few days, an application for directions and draft Order that sets out one or more of the options. It is not envisaged that an Order will be sought in those terms on 3 October 2018, but rather that the options be presented to His Honour and the application then be adjourned to a date to be fixed in order to allow for service on all parties who might appropriately be respondents to the application for directions.

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We note your client's views, as expressed in your letter, about any departure from the status quo and what will be in the best interests of the members of the FMIF.

We enquire if your client's position is that he considers that the current regime is working optimally, so far as he is concerned, such that there ought to be no change to the status quo?

In this regard, we ask for your client's specific response to the following questions, on the basis that we intend to tender this letter, and your response, at the hearing on 3 October 2018.

First, does your client and your firm maintain separate cost centres for discrete litigated proceedings; i.e., such that you are able to provide, without significant cost, a schedule of the amount of money claimed for remuneration and legal costs expended in relation to a claim?

Second, is there, in relation to each discrete legal proceeding, a budget for remuneration and legal expenses anticipated for that proceeding?

Third, if there is such a budget, is there any accounting done, either as the matter proceeds, or at the conclusion, of the actual remuneration and expenditure compared to the budget?

Fourth, in relation to the GST issue, if we can call it that, that has been ventilated between the parties since you raised in in November 2017, is there any way of identifying the remuneration and costs and expenses attributable to that issue?

Fifth, in relation to Mr Peden QC's outstanding invoice of 22 June 2017 (copy attached), being for the costs of the indemnity hearing in June 2017 (other than the four items totaling $1,200 relating to the remuneration claim), is there any reason why that invoice (less the $1,200) cannot now be paid from the FMIF, in full, notwithstanding that it was mistakenly left off the list of costs provided to you in February 2018?

We look forward to hearing from you.

Yours faithfully

Ashley Tiplady
Partner

Direct (07) 3004 8833
Mobile 0419 727 626
ATiplady@RussellsLaw.com.au
20180543/2526035

JOHN PEDEN
Barrister

Level 30, Santos Place
32 Turbot Street
Brisbane QLD 4000

TAX INVOICE

ABN 45 629 241 162

Russells Lawyers
Level 18
300 Queen Street
Brisbane QLD 4000

Attention: Mr Ashley Tiplady

LM Investment Management Ltd (in liqu.) – Liquidator's remuneration, fees and expenses

30-03-16	Confer with Mr McQuade QC about form of final Order for provision to the Court (1 hr) (Remuneration claim)	$600.00
22-02-17	Review further decision of *re Primespace* and telephone call with Mr de Jersey (15 mins) (Remuneration claim)	$150.00
23-02-17	Further consider *re Primespace*; telephone call with Mr Tiplady; emails (30 mins) (Remuneration claim)	$300.00
10-03-17	Review decision in *Sanderson v Sakr*; call with Mr Tiplady about communication to Court; email with Mr de Jersey (15 mins) (Remuneration claim)	$150.00
17-05-17	Consider Tucker & Cowen response; draft response; emails with Mr Tiplady (2 hrs) (liqu. costs and expenses claim)	$1,200.00
22-05-17	Review emails and T&C letter; response re further letter from T&C (30 mins) (liqu. costs and expenses claim)	$300.00
24-05-17	Review T&C letter; telephone call with Mr Tiplady about response (15 mins) (liqu. costs and expenses claim)	$150.00
29-05-17	Commence reading extensive affidavits of Mr Whyte and Mr Leeuwendal, including printing and collating (1 hr 30 mins) (liqu. costs and expenses claim)	$900.00
30-05-17	Review affidavits of Mr Schwarz, further consider affidavits of Mr Whyte and Mr Leeuwendal; draft email re costs; note of hearing; telephone call with Mr Tiplady (3 hrs) (liqu. costs and expenses claim)	$1,800.00
31-05-17	Review BDO letter and consider response (10 mins) (liqu. costs and expenses claim)	$100.00

Phone 07 3229 0555
Fax 07 3221 6571
jpeden@qldbar.asn.au
www.northquarterlanechambers.com.au

02-06-17	Review T&C letter for documents and call with Ms Fitzpatrick; considering draft letter and settling (including locating ledger listing) (2 hrs) (liqu. costs and expenses claim)	$1,200.00
05-06-17	Emails back and forth about evidence collection in response to the clear account claim, including printing and considering email correspondence from 2011 (AAR file), advice about evidence and considering points of claim (4 hrs) (liqu. costs and expenses claim)	$2,400.00
06-06-17	Review emails from Ms Lobb; telephone conference with MS Fitzpatrick and Ms Lobb about evidence to collect, including contact with Mr Monaghan and Ms Darcy; need for emails about McGrath Nicol fees cf LMA fees (2 hrs) (liqu. costs and expenses claim)	$1,200.00
08-06-17	Review further affidavits by receiver; emails about further steps and evidence; (4 hrs) (liqu. costs and expenses claim)	$2,400.00
09-06-17	Review Thomsons email and consider; email to Renee re evidence (30 mins) (liqu. costs and expenses claim)	$300.00
12-06-17	Prepare for hearing, including attending emails; telephone calls with Ms Fitzpatrick; drafting outline of submissions (4 hrs) (liqu. costs and expenses claim)	$2,400.00
13-06-17	Trial preparation, including drafting outline, considering new affidavits; telephone call with AJT and SCR (1 day) (liqu. costs and expenses claim) (liqu. costs and expenses claim)	$5,000.00
14-06-17	Attend offices of FTI to prepare affidavit of Mr Park, including arrangements and documents and associated emails (1 day) (liqu. costs and expenses claim)	$5,000.00
15-06-17	Prepare for application for approval of liquidator's costs and expenses, including further preparation of outline of submissions; review draft affidavit of Mr Park and associated 2 volumes of proposed annexures; emails about affidavit of Mr Park (4 hours total); attend at offices of Russells to settle affidavit of Mr Park/Ms Trenfield (4.5 hours) (say, 1 day) (1 day) (liqu. costs and expenses claim)	$5,000.00
16-06-17	Attend settling affidavit of Ms Chesmond and associated emails (15mins); Email and telephone call with Ms Fitzpatrick about summary of Mr Monaghan (15mins); review and attend emails about allegations of impropriety regarding the appeal costs; telephone call with Mr Stephen Russell regarding need for and nature of affidavit material in response (1 hour) (1 hr 30 mins) (liqu. costs and expenses claim)	$900.00
17-06-17	Preparation for application, including further work on outline of submissions (1 day) (liqu. costs and expenses claim)	$5,000.00
18-06-17	Prepare for application, including drafting outline of submissions, telephone calls with Mr Tiplady and attending emails about preparation (1 day) (liqu. costs and expenses claim)	$5,000.00
19-06-17	Appear on application for payment of costs and expenses out of the FMIF - Day 1 (1 day)	$5,000.00

20-06-17	Appear on application for liquidator's costs and expenses out of the FMIF - Day 2 (1 day)	$5,000.00

Total Fees *(GST Exclusive)*	$51,450.00
Total GST	$5,145.00
Total Payable	**$56,595.00**

Due date for payment: 14 July 2017

With Compliments

J W PEDEN

21 June, 2017

NORTH QUARTER LANE CHAMBERS

Payment options

- ☐ Cheque
- ☐ Direct credit (please reference matter name) A/c Name: J W Peden Bank: Commonwealth Bank
  BSB: 064 183 A/c no.: 1008 9985
- ☐ Credit card (Visa/Mastercard only)
  Cardholder name: _____ Card number: _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _
  Signature: _____ Expiry date: _ _/_ _

Tucker&CowenSolicitors.

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Level 15. 15 Adelaide St. Brisbane. Qld. 4000 / GPO Box 345. Brisbane. Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady / Mr Walsh

3 October 2018

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

Email: atiplady@russellslaw.com.au
jwalsh@russellslaw.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*"); Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte Supreme Court of Queensland Proceeding No. 3508/2015; Indemnity Application by Park & Muller as Liquidators of LMIM filed 20 May 2017 ("*Indemnity Application*") - Orders of Jackson J, 22 November 2017

We refer to your letter of 21 September 2018, insofar as your letter inquires as to Mr Peden QC's invoice of 22 June 2017.

The balance of your letter has been addressed separately, by our correspondence last week, particularly our letter of 27 September 2018.

The matter of Mr Peden's invoice for work done in connection with the Indemnity Application was first raised by your Mr Tiplady in a telephone conversation with our Mr Schwarz on 6 July 2018, after your firm confirmed on 5 July 2018 that payment had been received from the FMIF of the amount fixed by the Consent Order dated 27 June 2018 in respect of the costs of the Indemnity Application.

Your letter of 11 July 2018 requested payment of the amount of $55,257 (additional to the amount of $220,859.31 already fixed and paid in respect of your client's costs of the Indemnity Application) on account of Mr Peden's invoice, and requested Mr Whyte's agreement to vary both the Terms of Agreement and Consent Order to incorporate that additional amount.

We responded to that request by our letter of 31 July 2018. We noted, among other things, that the Orders made on 22 November 2017 in respect of your client's costs of the Indemnity Application provided for payment to your clients of 90% (rather than 100%) of their costs from the FMIF, and that as your clients are entitled to claim the amount of the GST stated in the invoice as an input tax credit, the amount of costs to be paid under the Order would (as would usually be the case) be the GST-exclusive amount so calculated, in accordance with the 'indemnity principle'. We calculated the relevant amount of Mr Peden's invoice to be $45,225.

Our letter of 31 July 2018 then proposed the basis upon which our client would be prepared to agree to payment to your clients of that additional amount from the property of the FMIF, and to variations to the Terms of Agreement and Consent Order to allow that to occur.

Your letter of 21 September 2018 asked, "*is there any reason why that invoice (less the $1,200) cannot now be paid from the FMIF, in full, notwithstanding that it was mistakenly left off the list of costs provided to you in February 2018?*" As to that, we refer you again to what was said in our letter of 31 July 2018, and which we have reiterated above.

Our client remains prepared to negotiate suitable variations to the Terms of Agreement and to the Consent Order to enable payment to your clients from the property of the FMIF of the additional amount of $45,225, in respect of the recently produced invoice of Mr Peden.

We look forward to hearing from you.

Yours faithfully

David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

Olivia Briers

From: Julian Walsh
Sent: Wednesday, 24 October 2018 2:10 PM
To: 'dschwarz@tuckercowen.com.au'
Cc: 'Alex Nase'; Ashley Tiplady
Subject: FW: LMIM Park & Muller and LMIM as RE of the LM FMIF v David Whyte Supreme Court of Queensland Proceeding Number 3508/2015-Matter: 20131259
Attachments: 2537039 L - to Tucker Cowen - John Peden's fees.pdf

Dear Colleagues

We refer to our 12 October 2018 letter in respect of the variation of the Terms of Agreement and Mr Peden QC's outstanding invoice.

In that letter we requested, inter alia, that a suitably worded version of clause 1.3(d) of the proposed deed be provided as quickly as possible. We are still to receive a further draft of the proposed deed.

The payment of that outstanding invoice was first raised on 11 July 2018. We are concerned that it has taken over three months to resolve what is a straight forward issue.

We request that you respond to our 12 October 2018 letter within the next 48 hours. If we do not receive a response within the next 48 hours we will be seeking instructions to file an application to, inter alia, vary the 27 June 2017 Consent Order to be heard on 19 November 2018.

Yours faithfully

RUSSELLS

Julian Walsh
Special Counsel

Direct 07 3004 8836
Mobile 0449 922 233
JWalsh@RussellsLaw.com.au

From: Olivia Briers **On Behalf Of** Julian Walsh
Sent: Friday, 12 October 2018 12:19 PM
To: 'dschwarz@tuckercowen.com.au' <dschwarz@tuckercowen.com.au>; 'anase@tuckercowen.com.au'

<anase@tuckercowen.com.au>
Cc: Julian Walsh <JWalsh@russellslaw.com.au>; Ashley Tiplady <atiplady@russellslaw.com.au>
Subject: LMIM Park & Muller and LMIM as RE of the LM FMIF v David Whyte Supreme Court of Queensland Proceeding Number 3508/2015-Matter: 20131259

Dear Colleagues

Please refer to our attached correspondence dated 12 October 2018.

Yours faithfully

RUSSELLS

Julian Walsh
Special Counsel

Direct 07 3004 8836
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JWalsh@RussellsLaw.com.au

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RUSSELLS

12 October 2018

Our Ref: AJT:JTW:20131259

Mr David Schwarz and Mr Alex Nase
Tucker & Cowen
Level 15, 15 Adelaide Street
BRISBANE CITY QLD 4000

By Email: dschwarz@tuckercowen.com.au
anase@tuckercowen.com.au

Dear Colleagues

LM Investment Management Limited (receivers and managers appointed) (in liquidation) ("LMIM")
Park & Muller and LMIM as RE of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding Number 3508/2015

Thank you for your correspondence of 3 October 2018 in respect of the fees which are payable to Mr Peden QC for work for the period 30 March 2016 to 20 June 2017 (including 19 and 20 June 2017 hearings).

Whilst we note that you indicate that your client "remains prepared to negotiate suitable variations" to the Terms and Agreement and Consent Order, we are unclear what your client considers to be "suitable".

As we presently understand the position, you seek for his fees to be reduced generally by:

1. a reduction of $1,200 for non-related work (the remuneration application) included in the fee note (which we agree with);

2. 10%, to reflect a commercial negotiated reduction which you say is in the best interests of the FMIF; and

3. a reduction of 10% for GST.

Assuming we accept that the commercial reduction of 10% is made, and we have discussed this with Mr Peden and he accepts that reduction purely as a commercial matter in order to achieve a swift resolution without further expense to the members of the FMIF, that just leaves the question of GST.

Would you please confirm, in light of how matters fell at the hearing before Justice Jackson on Wednesday, 3 October 2018, whether your client wishes to continue to press that a net amount should be paid (i.e. net of any GST)?

Whilst we don't consider that a further amending deed is necessary or that a further Court Order is necessary (Mr Whyte can simply make the payment out of the FMIF – we have assured you that Mr Peden's fees will not be further claimed out of the FMIF), we acknowledge that you have sought such documents.

Clause 1.3(d) of the proposed deed of variation says:

> *"The Liquidators and LMIM agree not to claim or seek from the FMIF any indemnity or payment in respect of any remuneration, costs or expenses (including legal fees or outlays) whatsoever of or incidental to this Deed, the negotiations proceeding the Parties entry into this Deed, or carrying out of the steps required by this Deed."*

In our view, the proposed wording of this deed of variation might be construed to cover claims beyond Mr Peden's fees. Is that what is intended as a "suitable variation"?

We raise this specifically, because there are further costs that have been incurred arising out of the Orders of 22 November 2017; specifically, in relation to the GST payment dispute that is referred to in the affidavit of Ms Trenfield on 28 September 2018, in which she estimated the quantum of those costs and expenses in an amount of approximately $29,749.75 (excluding counsel's fees since 20 April 2018).

We do intend to claim those amounts in due course as they reflect time and expense having been incurred by the liquidator in dealing with that point as a direct result of it being raised by Mr Whyte. They are attributable solely to the FMIF.

If your instructions are, in the process of negotiating for a variation of the deed and Orders to seek a "suitable variation" to prevent our client from seeking those GST related expenses, could you please advise us and we will consider our client's position.

Otherwise, we look forward to hearing from you with a suitably worded revision of clause 1.3(d) and hope that this matter can be resolved as quickly as possible.

As we have indicated in our letter dated 3 October 2018, our client seeks more transparency as to the incurring of costs and expenses, and their payment out of the FMIF. Accordingly, we request again that you provide the information sought in our letter dated 21 September 2018. We also ask that you identify for us the amount of costs and expenses incurred in relation to this issue of Mr Peden QC's fees being paid out of the FMIF.

We indicate that our client will rely on this letter and your response in the forthcoming directions application.

Yours faithfully

Julian Walsh
Special Counsel

Direct 07 3004 8836
Mobile 0449 922 233
JWalsh@RussellsLaw.com.au
20180543/2532426

Olivia Briers

From: Jessica Roberts <JRoberts@tuckercowen.com.au> on behalf of David Schwarz <dschwarz@tuckercowen.com.au>
Sent: Friday, 26 October 2018 2:47 PM
To: Ashley Tiplady; Julian Walsh
Cc: David Schwarz; Alex Nase
Subject: Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM"); Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte Supreme Court of Queensland Proceeding No. 3508/2015;
Attachments: Letter to Russells Lawyers (TCS01592004).pdf; 2486436 Letter from Russells to Tucker & Cowen regarding John Peden QC Invoices (TCS01545788).pdf; Letter to Russells Lawyers 31.07.2018 (TCS01554000).pdf; Draft Supplementary Deed (TCS01572403).pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Colleagues

Please find **attached** correspondence and enclosures for your attention.

Yours faithfully,

Sent on behalf of **David Schwarz**, Principal
E: dschwarz@tuckercowen.com.au | D: 07 3210 3506 | M: 0438 400 348

by:

Jessica Roberts
Personal Assistant

E: jroberts@tuckercowen.com.au
D: 07 3210 3517 | T: 07 3000 3000 | F: 07 3000 3033
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001
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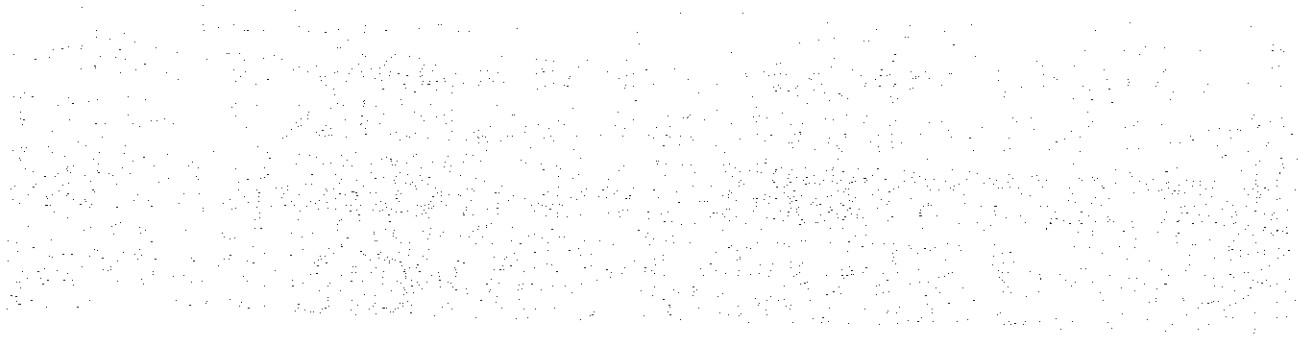
Tucker&CowenSolicitors.



Tucker&CowenSolicitors.

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Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Principals.
Richard Cowen.
David Schwarz.
Justin Marschke.
Daniel Davey.

Consultant.
David Tucker.

Special Counsel.
Geoff Hancock.
Alex Nase.
Brent Weston.
Marcelle Webster.

Associates.
Emily Anderson.
James Morgan.
Scott Hornsey.
Robert Tooth.
Paul Armit.
Wesley Hill.

Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady / Mr Walsh

26 October 2018

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

Email: atiplady@russellslaw.com.au
jwalsh@russellslaw.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015;
Application by Park & Muller as Liquidators of LMIM filed 20 May 2017 and Amended Application filed 13 June 2017 (together, "*Indemnity Application*")

We refer to your letter dated 12 October 2018 and to your email of 24 October 2018.

Your letter of 12 October 2018 referred to an issue of an invoice to your firm from Mr Peden QC for work performed in a period to 20 June 2017 in connection with the Indemnity Application, which was heard on 19 and 20 June 2017, and which was determined by His Honour's Judgment delivered on 17 October 2017 and Orders made on 22 November 2017 ("**Indemnity Orders**").

In your letter of 12 October 2018, you say that you will raise the issue of Mr Peden QC's invoice at the directions hearing on 19 November 2018. We fail to see the relevance of Mr Peden's invoice to the directions hearing, which does not concern the Indemnity Application or the Indemnity Orders.

It is relevant to briefly recite the relevant background to this issue:-

1. The Indemnity Orders were made on 22 November 2017; paragraph 2 of those Orders provided for your clients (the First Applicants, Mr Park and Ms Muller) to be paid 90% of their costs of the Indemnity Application out of the FMIF on an indemnity basis;

2. Our respective clients negotiated an agreement as to the quantum of those costs, following an exchange in which your client provided details of the costs claimed; our respective clients also negotiated agreement as to a number of other matters, which agreement was then recorded in the Terms of Agreement 18 June 2018 between David Whyte, LMIM, and Mr Park and Ms Muller as liquidators of LMIM ("**Terms of Agreement**");

3. Pursuant to the Terms of Agreement our client, and your clients, agreed to consent to orders fixing the quantum of costs payable to your client out of property of the FMIF under paragraph 2 of the Indemnity Orders in the sum of $220,859.31;

4. On 27 June 2018, consent Orders were made by the Deputy Registrar in those terms (fixing the quantum of your client's costs in the sum of $220,859.31);

5. On 5 July 2018 you confirmed that payment had been received by you from the FMIF of the amount fixed by the consent order of 27 June 2018;

6. On 6 July 2018, the matter of Mr Peden's invoice for work done in connection with the Indemnity Application was first raised by you in a telephone call;

7. On 11 July 2018, you wrote to us attaching an invoice from Mr Peden QC for the Indemnity Application in the sum of $56,595 including GST, informed us that due to an oversight on your part Mr Peden's invoice had not been included in the costs claimed by your client with respect to the Indemnity Application and asked that we bring this to Mr Whyte's attention with a view to both the Terms of Agreement and the Consent Order made on 27 June 2018 being varied to incorporate a further amount of $55,270 for Mr Peden QC's invoice (after reduction for certain entries which related to the Remuneration Application). A copy of that letter is enclosed;

8. On 31 July 2018, we wrote to you to inform you, in effect, that:-

   (a) given that the Indemnity Orders provided for 90% of your clients' indemnity costs to be paid from the FMIF, and that your clients (being entitled to themselves claim the input tax credits in respect of the GST component of the invoice) would be entitled only to the GST-exclusive amount, we calculated the relevant amount of Mr Peden QC's invoice to be $45,225, and

   (b) our client was prepared to agree to a variation to the Terms of Agreement as well as to the Consent Order made on 27 June 2018 to allow for payment of an additional amount of $45,225 to your client on the basis that your clients do not later claim further costs from the FMIF concerning Mr Peden's invoice and attending to those variations (because those additional costs arose as a result of an oversight on your part).

   A copy of that letter is enclosed.

9. In other words, despite the Terms of Agreement having been entered into between our respective clients, consent orders having been made to fix your clients' costs of the Indemnity Application, and payment of that fixed amount having been promptly made to your clients, our client has been prepared to agree to pay the entirety of the proper additional amount claimed by your client in respect of Mr Peden's invoice.

10. Various drafts of a supplementary deed have been exchanged between us.

11. We had not, until very recently, understood there to be any controversy at all following our letter of 31 July 2018 as to the quantum to be paid from the FMIF in respect of the additional amount claimed.

On 21 September 2018, you wrote to us to ask "*is there any reason why that invoice [Mr Peden QC's invoice] cannot now be paid from the FMIF, in full, notwithstanding that it was mistakenly left off the list of costs provided to you in February 2018?*".

We responded to that query, again, on 3 October 2018.

In your letter of 12 October 2018, you say that it remains unclear what our client considers to be a "suitable" variation to the Terms of Agreement.

The variations that our client considers suitable, are those set out in the enclosed draft Supplementary Deed (which you have previously seen).

To be clear, we address again some of the points sought to be made in your letter:-

1. **Reduction for non-related work**

   The reduction for non-related work, reflected in the amount stated in our letter of 31 July 2018 and in the draft Supplementary Deed, is the same reduction your firm proposed in your letter of 11 July 2018.

2. **"Commercial negotiated reduction" of 10%**

   The Indemnity Orders provide for payment to your clients of 90% of their costs of the Indemnity Application out of the FMIF on an indemnity basis.

   It is the Indemnity Orders of 22 November 2017, not any "commercial negotiation", that mandates a 10% reduction in the amount to be paid from the FMIF. Your clients have already been paid, in full, the amount fixed by Order of the Court for their costs under the Indemnity Orders.

3. **GST-exclusive amount**

   Your clients are entitled to input tax credits in respect of the GST component of invoices for legal services supplied to them. The supply of those legal services was plainly to your clients, not to our client or to the FMIF. That is not controversial.

   Therefore, in accordance with GSTR 2001/4 and other authority[1], your clients are entitled to be indemnified only for the GST-exclusive amount of their costs, in accordance with the 'indemnity principle'. Again, this should not be controversial.

   This is, of course, a very different scenario to the claim for remuneration to be paid directly from the FMIF, which was the subject of submissions before His Honour on the hearing of your clients' application, on 6 September and 3 October 2018.

   The GST issue in respect of which submissions were made to His Honour on 3 October 2018 was a different issue; this is confirmed by the exchange between His Honour and Mr Ananian-Cooper at page 54 of the transcript, at line 30, to page 54 line 12. That issue was resolved, in so far as your client's second remuneration application is concerned at least, in a pragmatic way by our client agreeing to accept an undertaking belatedly offered by your client to provide a tax invoice addressed to the FMIF to enable the FMIF to claim a reduced input tax credit, without the need for His Honour to decide the issue.

[1] such as *Hennessey Glass and Aluminium Pty Ltd v Watpac Australia Pty Ltd* [2007] QDC 057 per McGill DCJ at *[127]*, *The Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina Ltd and Ors* [2009] QSC 84 at [114] per Martin J

4. **Necessity of Variation to Terms of Agreement and Consent Order**

You say in your letter that an amendment to the Terms of Agreement and the Consent Order is not necessary. That is a marked change of position from that expressed in your letter of 11 July 2018, in which you proposed variations to both the Terms of Agreement and the Consent Order.

Our client considers that variations to both the Terms of Agreement and Consent Order are necessary in order for our client to be in a position to properly pay to your clients an additional amount now sought by your clients. Indeed, were our client to now cause additional amounts to be paid to your clients from the property of the FMIF in respect of their costs of the Indemnity Application, without a variation to the Consent Order having been made, it is possible that our client would be regarded as acting beyond his authority. Plainly, that is unacceptable.

5. **Clause 1.3(d) of proposed Deed of Variation**

You then express the view that clause 1.3(d) of the proposed Deed of Variation might be construed to cover claims beyond Mr Peden's fees. The reference to "this Deed" in the draft clause 1.3(d) is clearly a reference to the Supplementary Deed, not a reference to the Terms of Agreement. That is reflective of what was said in our letter of 31 July 2018.

That said, our client would have no issue with the term "this Deed of Variation" being used in clause 1.3(d), instead of "this Deed", but there is no real doubt about the intended meaning of the clause.

As to the point of principle, our client considers it fair and reasonable, given the need for your client to seek the variations to the Terms of Agreement has been occasioned by an oversight on the part of you or your client, that the FMIF members ought not bear the costs of any further claim by your client for indemnity from the FMIF with respect to the costs associated with the Supplementary Deed.

6. **Costs of GST Payment dispute**

You say that your clients do intend to claim the amounts totaling some $29,749 (excluding counsel's fees) in relation to the GST payment dispute.

This dispute was the subject of the "Payment Application" filed by your clients on 19 December 2017.

We point out that your clients have agreed by clause 2.7 of the Terms of Agreement that your clients have agreed to bear their own costs of the Payment Application and not to seek any indemnity from the property of the FMIF.

7. **Mr Whyte's costs in addressing issue of Mr Peden's invoice / variation to Terms of Agreement**

We note that you and your client do not provide a running commentary as to your client's costs relating to various issues and our client does not propose to incur the cost of doing so either.

8. **Threatened application**

Your email of 24 October 2018 threatens to bring an application. We are unaware of what the basis of such an application would be, and note that such an application would be wholly unnecessary and serve only to increase costs for FMIF members.

In any event, as pointed out above, our client, without being under any obligation to do so, has offered to enter into a Supplementary Deed which would allow for payment of a further amount to your client from the FMIF for Mr Peden's invoice, over and above the agreed quantum of costs provided in the Terms of Agreement and the Consent Order.

We look forward to receiving your response to the **enclosed** draft Supplementary Deed.

Yours faithfully

David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

RUSSELLS

11 July 2018

Our Ref: AJT:JTW:20131259

Your Ref: Mr Schwarz

Mr David Schwarz
Tucker & Cowen
GPO Box 345
BRISBANE 4001

By Email: dschwarz@tuckercowen.com.au

Dear Colleagues

LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation)
Cost Order made in Supreme Court of Queensland Proceeding number 3508 of 2015

Further to your Mr Schwarz's telephone conversation with our Mr Tiplady of last Friday, 6 July 2018, attached is an invoice dated 21 June 2017 from Mr Peden in respect of his costs of preparing for and appearing at the hearing before Justice Jackson on 19 and 20 June 2017 (being the FMIF indemnity and expenses application).

As discussed, this invoice had not been delivered to Russells prior to our reconciliation of the payments to be made from the funds received last week from the LM First Mortgage Income Fund. As such, it was not billed to LM Investment Management Limited (Receivers and Managers Appointed) (in Liquidation) as part of what should have been our invoice number B29948 dated 28 July 2017 (copy enclosed). Accordingly, this invoice was not part of the amount claimed and which was included in clause 3.3 of the Heads of Agreement dated 18 June 2018.

This was plainly due to an oversight. To this end, we enclose a copy of Mr Peden's email to the writer of Thursday, 5 July 2018 which details the situation. In these circumstances we wish to raise this issue with you and ask that you bring it to Mr Whyte's attention with a view to both the Heads of Agreement as well as the Consent Order made on 27 June 2017 being varied to incorporate a further amount of $55,257.00 (i.e. the amount of the enclosed tax invoice minus the first four time entries, which relate to the remuneration application).

We apologise for this situation and any inconvenience which may be caused but it is plain that the invoice from Mr Peden ought to have been included in the amount sought and paid pursuant to the costs order made by His Honour Justice Jackson on 22 November 2017.

Brisbane / Sydney
Postal GPO Box 1412, Brisbane QLD 4001 / Street Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3914 8888 / Facsimile (07) 3914 8889
RussellsLaw.com.au

The work was plainly undertaken and the amount charged by Mr Peden is, in our view, reasonable.

Naturally, we will prepare all necessary documentation to affect the variations to the Heads of Agreement and the Consent Order should Mr Whyte be so agreeable.

We look forward to hearing from you and thank you (and your client) for your understanding in the circumstances at hand.

Yours faithfully

Ashley Tiplady
Partner

Direct 07 3004 8833
Mobile 0419 727 626
ATiplady@RussellsLaw.com.au

20131259/2486436

Tucker&CowenSolicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15. 15 Adelaide St. Brisbane. Qld. 4000 / GPO Box 345. Brisbane. Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady / Mr Walsh

31 July 2018

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

Email: atiplady@russellslaw.com.au
jwalsh@russellslaw.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*"); Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte Supreme Court of Queensland Proceeding No. 3508/2015; Indemnity Application by Park & Muller as Liquidators of LMIM filed 20 May 2017 - Orders of Jackson J, 22 November 2017

We refer to your letter of 11 July 2018, which was received with your email of 11 July 2018 and which enclosed a number of other documents, including a fee note to your firm from Mr John Peden dated 21 June 2017.

Relevantly, you have said that, due to an oversight, the invoice from Mr Peden had not been received by your firm when the amount of the costs to which your clients were entitled pursuant to the Orders of Jackson J made on 22 November 2017, in respect of the "Indemnity Application", was being negotiated. As a consequence, the amount of those costs was fixed by agreement (and by Consent Order) and subsequently paid without that fee note having been taken into account.

We note that the failure appears to have been due, at least in part, to an issue on the part of Counsel's invoicing system, and you have provided to us a copy of an email from Mr Peden to you dated 5 July 2018, providing an explanation of the circumstances.

We, and our client, have given consideration to your clients' request that both the Terms of Agreement, as well as the Consent Order made on 27 June 2017, be varied to incorporate a further amount in respect of the invoice to you from Mr Peden.

Your letter has requested payment of a further amount of $55,257 in respect of Mr Peden's invoice. However, it appears that the calculation of that amount has not taken account of the following:-

1. The agreement between the respective parties was that the amount of costs would be calculated and paid on a GST-exclusive basis, in keeping with the 'indemnity principle', given that your clients have been able to claim the input tax credits on the amounts of your tax invoices (that agreement having been reflected in the amounts the subject of the Terms of Agreement); and

2. The costs Order in the Indemnity Application provides for payment to your clients of 90% (rather than 100%) of your clients' costs, to be paid out of the FMIF.

Having regard to those matters, and the exclusion of the first four items in Mr Peden's invoice (which your letter acknowledges relate to another proceeding), we calculate the relevant amount of Mr Peden's invoice to be $45,225.

We understand that your clients do not seek any additional payment in respect of the costs of the Remuneration Application; if they do, please tell us as soon as possible.

We are instructed that our client is prepared to agree to a variation to the Terms of Agreement, as well as to the Consent Order made on 27 June 2018 in the Indemnity Proceeding, to allow for payment of an additional amount of $45,225 to your clients, on the basis that:-

1. Your clients do not later claim further costs from the FMIF in respect of the correspondence concerning Mr Peden's invoice and attending to those variations (we say this for the sake of completeness, but we expect that it goes without saying); and

2. Naturally, no interest would run on that varied Order; having already procured prompt payment to you of the amount fixed by the Order of 27 June 2018 (and by the Terms of Agreement), our client will again use his best endeavours to procure prompt payment of the additional amount once both the Terms of Agreement and the Consent Order have been varied, but we reiterate that the FMIF bank accounts are not under his exclusive control.

Naturally, formal documentation (to attend to both the variation to the Terms of Agreement, and the variation to the Consent Order) will be required; we are instructed that there should be no binding agreement until such time as at least the formal documentation recording the variation to the Terms of Agreement has been signed by all parties to those Terms of Agreement.

You might kindly let us know by return correspondence whether your clients are agreeable to the above proposal.

Yours faithfully

David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

RUSSELLS

SUPPLEMENTARY DEED TO TERMS OF AGREEMENT

DAVID WHYTE IN HIS CAPACITY AS RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND (ARSN 089 343 288) AND AS THE PERSON RESPONSIBLE FOR ENSURING THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND IN ACCORDANCE WITH ITS CONSTITUTION

and

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

and

JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461

Russells Contact: Julian Walsh
Telephone: 07 3004 8836
Email: JWalsh@RussellsLaw.com.au
Reference: 20131259

SUPPLEMENTARY DEED TO TERMS OF AGREEMENT

Dated

BETWEEN DAVID WHYTE IN HIS CAPACITY AS RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND (ARSN 089 343 288) AND AS THE PERSON RESPONSIBLE FOR ENSURING THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND IN ACCORDANCE WITH ITS CONSTITUTION

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

AND JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461

RECITALS

A. The Parties entered into a Terms of Agreement on 18 June 2018 (**the Terms of Agreement**).

B. On 27 June 2018, the Deputy Registrar made an Order ("**the Costs Order**") fixing the costs payable to the Liquidators under paragraph 2 of the Indemnity Order in the sum of $220,859.31, pursuant to clause 3.3 of the Terms of Agreement.

C. On or about 3 July 2018, the sum of $220,859.31 was paid to the Liquidators in payment of the costs payable under the Costs Order.

D. The Parties wish to vary the Terms of Agreement on the terms set out in this Deed.

1. VARIATIONS TO THE TERMS OF AGREEMENT

1.1 Definitions

(a) Terms defined in the Terms of Agreement have the same meaning in this Deed.

(b) The terms "**Varied Costs Order**" and "**Additional Amount**" have the meanings set out in, respectively, clauses 1.2(a) and 1.2(b)(ii) of this Deed.

(c) Clause 1.1 be varied by inserting as follows:

*"**Deed of Variation*** *means the Deed of Variation varying this agreement"*

1.2 Costs Orders – Indemnity Application

(a) The Parties hereby agree to seek by consent, a variation to the Costs Order, to increase the amount stated in the Costs Order from $220,859.31 to $266,084.31 ("**Varied Costs Order**").

(b) The Parties agree to use their best endeavours to procure that:-

(i) Consent Orders varying the Costs Order in accordance with clause (a) are filed within 7 days after the date of this Deed and are made as soon as reasonably practicable thereafter;

(ii) payment is made to the Liquidators of the additional amount of $45,225 ("**the Additional Amount**") as soon as reasonably practicable after the Varied Costs Order is made, in full and final payment of the costs payable under the Varied Costs Order.

1.3 Further conditions

(a) The variations to the Terms of Agreement contained herein take effect once this Deed is executed by all Parties and exchanged.

(b) The Liquidators and LMIM acknowledge and agree that, other than the Additional Amount, neither the Liquidators nor LMIM are entitled to be paid any further or additional amounts , whether for GST or otherwise, from the property of the FMIF under or pursuant to paragraph 2 of the Indemnity Order or the Varied Costs Order.

(c) Except as otherwise expressly provided in this document, each party will bear and pay its own fees and expenses of and incidental to the negotiation, preparation and execution of this Deed.

(d) The Liquidators and LMIM agree not to claim or seek from the FMIF any indemnity or payment in respect of any remuneration, costs or expenses (including legal fees or outlays) whatsoever of or incidental to this Deed, the negotiations preceding the Parties entry into this Deed, or the carrying out of the steps required by this Deed.

(e) No interest is payable on the Varied Costs Order.

(f) The parties hereby acknowledge and affirm all of the terms and conditions contained in the Terms of Agreement (as varied by this Deed).

(g) This Deed may be executed in two or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

EXECUTED as a deed

SIGNED SEALED AND DELIVERED by **JOHN RICHARD PARK** in the presence of:

Witness Signature	**Signature**
Print Name	**Print Name**

SIGNED SEALED AND DELIVERED by **GINETTE DAWN MULLER** in the presence of:

Witness Signature	**Signature**
Print Name	**Print Name**

EXECUTED by **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461** by its duly appointed liquidator **John Richard Park**:

Witness	**Signature of John Richard Park**
Print Name	

SIGNED SEALED AND DELIVERED by **DAVID WHYTE** in the presence of:

Witness Signature	**Signature**
Print Name	**Print Name**