

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS3508/15

First Applicant:

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

AND

Second Applicant:

LM INVESTMENT MANAGEMENT  
LIMITED (IN LIQUIDATION) (RECEIVERS  
AND MANAGERS 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

AFFIDAVIT


I, JOHN RICHARD PARK of care of Level 20, Central Plaza One 345 Queen Street, Brisbane in  
the State of Queensland, Chartered Accountant, state on oath:

INTRODUCTION

1. I am a Liquidator and Chartered Accountant. I have been practising in the business of restructuring, corporate recovery and insolvency for approximately 26 years.

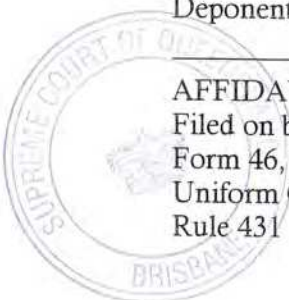
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Deponent 

Taken by 

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

Russells  
Level 18, 300 Queen Street  
Brisbane QLD 4000  
Tel: 07 3004 8888  
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Ref: JTW:20180543



2. I am a Senior Managing Director of the firm FTI Consulting (Australia) Pty Ltd (“FTI Consulting”) and the Leader of Corporate Finance and Restructuring, Australia.
3. I have sworn previous affidavits in this proceeding, the affidavits relevant to this application being:
  - (a) an affidavit filed on 28 January 2017, being court file index (“CFI”) documents numbered 37-40;
  - (b) an affidavit sworn and filed on 7 August 2018, being CFI 144-145; and
  - (c) an affidavit sworn on 10 August 2018 and filed on 13 August 2018, being CFI 144.
4. In this affidavit capitalised terms have the same meanings as in those previous affidavits.
5. I supervise Ms Kelly-Anne Lavinia Trenfield and other FTI Consulting staff members in respect of the liquidation of LMIM and the Funds. Ms Trenfield has the day to day conduct of the liquidation of LMIM under my supervision.
6. The basis of my belief in the truth of the matters to which I deposed to in paragraphs 8 to 84 arises from:
  - (a) the accumulation of my knowledge as a result of my investigations into the affairs of LMIM as its voluntary administrator and liquidator as deposed to in paragraphs 3 and 4 of my 13 August 2018 affidavit;
  - (b) where documents have informed that view, those documents which are exhibited to this affidavit; and
  - (c) specific matters to which I refer to in this affidavit.
7. Now produced and shown to me and marked “JRP-10” is an indexed and paginated bundle of documents to which I shall refer to in this affidavit. References to [ ] are references to page numbers of JRP-10.

#### THIS APPLICATION

8. I have caused this application to be brought to consider the most efficient way forward in respect of the winding up of LMIM, the Funds and all other trusts and managed investment schemes in respect of LMIM (“the LM Estate”) so that a return can be made to unit holders of the Funds as efficiently and as quickly as possible.



9. This Application has been brought against the background of correspondence exchanged by my solicitors, Russells, and the solicitors for the Respondent, Tucker & Cowen. The relevant correspondence between Russells and Tucker & Cowen, including a 3 October 2018 letter from Russells ("3 October 2018 Letter") in respect of this Application are at [1] to [6]. The 3 October 2018 Letter sets out the issues that I consider currently exist arising from the fact of there being multiple insolvency practitioners appointed in respect of the LM estate.
10. There are, in essence and as set out in the 3 October 2018 letter, four issues in respect of the LM Estate that currently exist being:
- (a) Delay in winding up the Funds and the return of funds to members;
  - (b) Lack of funds for the general administration of the LM Estate, including delay and non-recovery of remuneration and expenses, notwithstanding availability of funds in the various Funds;
  - (c) Lack of a funded contradictor to resolve key disputes, including the Clear Accounts Proceeding and the Feeder Fund Proceeding, leading to unfairness and delay; and
  - (d) Lack of transparency regarding overall costs and benefits of various proceedings being undertaken by the Respondent.
11. The 3 October 2018 letter sets out the facts giving rise to the issues I have identified about the overall administration of the LM Estate. The Application sets out orders that will provide for what I consider to be the most efficient way forward to effect the finalisation of the LM Estate.
12. The orders are, in effect:
- (a) I be directed to act as contradictor in respect of the Supreme Court of Queensland Proceeding number 11560 of 2016 ("Clear Accounts Proceeding") and the Supreme Court of Queensland Proceeding number 13534 of 2016 ("the Feeder Funds Proceeding");
  - (b) The Receiver and I file affidavits setting out our respective budgets in respect of remuneration and expenses (including legal costs) ("Budgets") up to and including when there is no impediment to the paying a final distribution/return to members of all of the Funds ("the Conclusion");



- (c) That the Receiver's appointment continues only in respect of the conduct on behalf of the FMIF of the Clear Accounts Proceeding, the Feeder Fund Proceedings and Supreme Court of Queensland Proceeding number BS2166/2015 ("the EY Proceeding");
  - (d) That I be appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution, together with such necessary orders as may be appropriate;
  - (e) If I am appointed to wind up the FMIF, or alternatively if the Receiver continues in the role, an interim distribution is to be made by either the Receiver or me within three months or an affidavit filed as to why there is an impediment in making that distribution;
  - (f) The Court approving the Budgets;
  - (g) Fixing or determining the remuneration of myself and the Receiver up to the Conclusion in the amount of 50% of the Budgets;
  - (h) Payment to the Receiver and me of 50% of our expenses as stated in the Budget on a monthly basis; and
  - (i) Reserving the right for an order for payment as to the other 50% of the remuneration and expenses of myself and the Receiver at the final remuneration and expenses determination. Or alternatively, the monthly payment being on account of an amount to be paid at the final remuneration and expenses determination.
13. I address in this affidavit the specific issues, in addition to and to clarify, the matters set out in the 3 October 2018 Letter, under the following headings:
- (a) Steps to wind up the LM Estate, including delay;
  - (b) Impediments to finalisation;
  - (c) Remuneration and expenses; and
  - (d) Finalisation strategy.



## STEPS TO WIND UP THE LM ESTATE, INCLUDING DELAY

### Steps to wind up LMIM itself

14. Details of the current stage in respect of the winding up of LMIM are set out in my 23 August 2018 Liquidator's Report at [7] to [12].
15. The Liquidation of LMIM is now at a stage where proofs of debt have been called for and received. On 3 September 2018 I caused a notice to be sent to creditors of LMIM and investors in the Funds inviting them to prove their debts or claim. ("the Proof of Debt Notice"). The Proof of Debt Notice is at [13] to [17].
16. 150 proofs of debt have been received since the date of my appointment. Of those, approximately 133 are in respect of LMIM as opposed to a particular fund.
17. At [18] to [50] is a check list that is used by me and FTI Consulting staff when completing a winding up of a company on a creditors voluntary basis. The checklist sets out 139 tasks. The check list is at [19].to [27] Those tasks are also set out in separate sub checklists which are colour coded in accordance with the checklist at [28] to [50].
18. In respect of tasks set out in the checklist and LMIM in its own right:
  - (a) All relevant tasks set out in the checklist have been completed including:
    - (i) the lodging of annual reports in accordance with the *Corporations Act 2001* ("the Act");
    - (ii) liquidation of its assets; and
    - (iii) the payment of expenses with the exception of those noted in (b) and (c) below.
  - (b) The tasks within CVL 3.24 and CVL3.32, being in respect of ongoing BAS lodgements and Annual Administration Returns lodged from 2019 onwards, are ongoing and need to be completed on a periodic basis; and
  - (c) The tasks in items CVL 3.33 to CVL 3.45 are finalisation tasks, being tasks that still need to be completed in order for the winding up of LMIM in its own right to be concluded and the company deregistered (excluding those tasks that are specific to LMIM's role as trustee).



19. I will estimate the costs of completing the winding up of LMIM as part of the Budget. As stated in my report to creditors at [12], I do not anticipate that there will be any return to unsecured creditors of LMIM in its own right.
20. Some of the proofs of debts include amounts that may be claimed by way of indemnity from the assets of particular funds. The process of handling such claims against the FMIF is set out in the Order of Jackson J dated 17 December 2015.
21. I am currently without funds to conduct the work to assess those claims and, although there is a prospect of recovering costs in respect of the claims against the FMIF, I do not have funds to pay for that work as and when the work is done. For the reasons set out in paragraphs 57 to 60 below, I am concerned that if I incur costs and expenses in undertaking the work, there will be delay in recovering amounts and I may not recover all of the expenses, leaving me personally exposed to any shortfall.
22. Accordingly, the major impediment to progressing the winding up of LMIM is a lack of funds. I have prepared a summary of the net asset position of LMIM and its receipts and payments (as at 30 September 2018) which is at [51]. The assets of LMIM are cash at bank of \$126,983 as at 30 September 2018 and a claim for re-imburement from the Funds of some of the costs and expenses subject to court approval. The liabilities are outstanding legal expenses and work in progress for legal expenses in respect of the firm Russells, those amounts being greater than those assets. I am informed by my solicitor Mr Ashley Tiplady, a partner of the law firm Russells, that:
- (a) the legal expenses invoiced by his firm but not yet paid total \$1,198,733.87; and
  - (b) the work in progress of his firm is in excess of \$400,000 of which approximately \$300,000 is recoverable.

#### Winding up of the funds generally

23. As set out above, the Proof of Debt Notice was sent to members of the Funds as well as all creditors of LMIM. A number of the 150 proofs of debts received are proofs from investors in the Funds for the value of the units held by them as members of the respective Fund. Those proofs are not admissible as debts in respect of the liquidation of LMIM, however they will be treated by me as claims for the purposes of the distribution of the net assets from each of the Funds if a distribution is to be made in respect of a particular Fund.



24. I have not yet classified those proofs to identify which are claims by creditors in respect of one of the particular Funds and the Funds generally. I intend to carry out that classification when I adjudicate in respect of the proofs received in respect of the FMIF creditors.
25. I now turn to the current position in respect of the winding up of each of the Funds.

#### Winding up of AIF

26. The indicative net asset position of AIF as at 30 June 2018 is \$9,053,509.00. All of the assets of AIF have been liquidated to cash. I refer to my 19 September 2018 circular to AIF members at [52] to [54] in respect of the indicative net asset value and the timing for finalisation and distributions.
27. I have caused to be prepared a concise checklist of the steps to be carried out in respect of the winding up of a solvent managed investment scheme and also an insolvent managed investment scheme ("MIS Checklist"). At [55] is a copy of that checklist. The winding up of AIF is in effect in respect of a solvent managed investment scheme as a distribution will be paid to members of that fund. The steps that are to be completed in respect of the winding up of AIF are tasks 1 to 8 in respect of the winding up of a solvent managed investment scheme.
28. I estimate that the costs of completing those tasks to be in the vicinity of \$105,000.00: my remuneration is estimated to be in the vicinity of \$100,000.00 with expenses estimated to be in the vicinity of \$5,000.00. External costs such as legal and audit expenses are in addition to these amounts although I do not currently foresee these expenses exceeding an amount of \$10,000.00 to \$15,000.00 at most. I intend to make a distribution to AIF members after that remuneration and those expenses have been paid.

#### Winding up of ASPF

29. As at 30 June 2018 the net asset position of ASPF was \$1,693,945.25, the assets held in cash. At [56] to [58] is my 19 September 2018 circular to ASPF investors setting out, *inter alia*, the net asset position.
30. The solvent MIS checklist applies in respect of ASPF as I intend to make a distribution to investors. Tasks 1 to 8 of that checklist remain to be undertaken.
31. I estimate that the costs of completing those tasks to be in the vicinity of \$70,000.00: my remuneration is estimated to be in the vicinity of \$65,000.00 with expenses estimated to be in the vicinity of \$5,000.00. External costs such as legal and audit expenses are in addition



to these amounts, although I do not currently foresee these expenses exceeding an amount of \$5,000.00 at most. I intend to make a final distribution to the ASPF members after that remuneration and those expenses have been paid.

#### Winding up of the Feeder Funds

32. The indicative net asset position of CPAIF as at 30 June 2018 is \$20,532.00 plus 120,702,630 of the units in the FMIF. The only assets of the ICPAIF are 9,350,802 of the units in the FMIF. At [59] to [63] are copies of my 19 September 2018 circulars to investors of the Feeder Funds.
33. The distribution of any funds to the unitholders of the Feeder Funds is subject to the outcome of Supreme Court of Queensland proceeding 13534 of 2016 ("the Feeder Fund Proceeding"). Given the possibility of a distribution to the Feeder Fund, I cannot wind up the Feeder Funds until the Feeder Fund Proceeding is resolved.
34. I refer to the MIS Checklist. Pending resolution of the Feeder Fund Proceeding I cannot yet determine whether the winding up of the Feeder Funds will proceed in respect of a solvent or insolvent MIS.
35. Once the outcome of the Feeder Fund Proceeding is known, I will continue with the winding up of the Feeder Funds, either on a solvent or insolvent basis. If I wind up the Feeder Funds on an insolvent basis then I will complete tasks 1 to 5 in the MIS Checklist under the heading "*Insolvent MIS*". If I wind up the Feeder Funds on a solvent basis then I will complete steps 1 to 8 of that checklist under the heading "*Solvent MIS*."
36. I estimate that my remuneration:
  - (a) for attending to tasks 1 to 8 in respect of a solvent MIS winding up of the Feeder Funds to be in the vicinity of \$50,000 for each of the Feeder Fund; and
  - (b) to be in the vicinity of \$10,000.00 in respect of the completing of tasks 1 to 5 in respect of an insolvent MIS for each of the Feeder Funds.

#### Winding up of CPF

37. As stated at paragraph 35 of my 7 August 2018 affidavit, the indicative net asset position of CPF is -\$10,797.00.
38. CPF is being wound up as an insolvent MIS. Tasks 1 to 5 in the MIS Checklist in respect of an insolvent MIS remain to be completed.





39. I estimate that my remuneration and expenses for completing the winding up of CPF will be in the vicinity of \$2,000.00 and \$500.00 respectively. I intend to finalise the winding up of CPF within the next three to five weeks.

**Winding up of the FMIF**

40. The winding up of the FMIF is currently in the hands of the Receiver. According to the Receiver's report of 28 September 2018 the FMIF has net assets of \$66,884,414.00 as at 30 June 2018. At [64] to [89] is a copy of that report.
41. The work done in respect of the winding up of the FMIF appears in the periodic reports issued by the Receiver to the investors of the FMIF. At [90] to [373] are copies of those reports, issued approximately every 3 months since April 2016. The reports include summaries of the work done and the remuneration charged, but not details of all expenses.
42. In the most recent report, dated 28 September 2018, the Receiver indicates that the winding-up of the FMIF will be finalised in approximately 18 to 24 months. A similar time estimate has been provided since September 2016.
43. The total remuneration approved for the Receiver in respect of his receivership appointment is \$11,495,077.55 and the total approved in respect of his controllership appointments is \$753,940.00. Those amounts have been calculated as follows:

<i>Remuneration Period</i>	<i>Remuneration Order</i>	<i>Amount of Receiver Remuneration Approved</i>	<i>Amount of Controller Remuneration Approved</i>
<i>8.8.13 to 31.3.14</i>	<i>McMurdo J on 28.8.14</i>	<i>\$702,480.35</i>	
<i>1.4.14 to 30.9.14</i>	<i>Mullins J on 27.11.14</i>	<i>1,005,948.35</i>	<i>\$7,000.95</i>
<i>1.10.14 to 30.4.15</i>	<i>Jackson J on 23.6.15</i>	<i>\$1,761,911.25</i>	<i>\$442,214.30</i>
<i>1.5.15 to 31.10.15</i>	<i>Martin J on 11.12.15</i>	<i>\$2,279,205.50</i>	<i>\$194,052.10</i>
<i>1.11.15 to 30.4.16</i>	<i>Douglas J on 26.6.16</i>	<i>\$1,405,155.40</i>	<i>\$36,510.65</i>
<i>1.5.16 to 31.10.16</i>	<i>Daubney J on 2.12.16</i>	<i>\$1,119,991.40</i>	<i>\$13,385.35</i>




1.11.16 to 30.4.17	Mullins J on 30.6.17	\$897,580.20	\$12,314.50
1.5.17 to 31.10.17	Applegarth J on 30.11.17	\$1,280,897.20	\$26,155.25
1.11.17 to 30.04.18	Boddice J on 21.06.18	\$1,041,907.90	\$22,306.90
		<b>\$11,495,077.55</b>	<b>\$753,940.00</b>

**Deutsche Bank Receivers**

44. The quarterly reports provided by the Receiver record that, since at least April 2016, the only matter precluding the retirement of the Deutsche Bank Receivers is the provision to them of a release by the Trustee of the MPF. It is unclear to me why the Deutsche Bank Receivers have not retired.
45. On 20 September 2018 Mr Henry from McGrath Nicol emailed me in respect of the DB Receivership. He states that in that email that he expected to retire from LMIM in the next seven days. That email is at [374] to [375].
46. As at the date of this affidavit, that DB Receivers have not retired, nor have I received any further emails or otherwise been contacted in respect of his retirement.

**KordaMentha as trustee of MPF**

47. On 2 October 2018 KordaMentha as trustee for MPF lodged proof of debts in respect of the liquidation of LMIM:

Claim	Amount (\$)
LM Managed Performance Fund (Kingopen)	19,948,253.18
LM Managed Performance Fund (Greystanes)	10,706,853.84
LM Managed Performance Fund (Bellpac)	4,153,731.32

LM Managed Performance Fund (AIIS)	16,820,356.30
LM Managed Performance Fund (Lot 111)	2,320,118.62
LM Managed Performance Fund (Lifestyle)	18,982,171.51
LM Managed Performance Fund (Barley Wood)	5,128,071.34

48. At [376] to [389] are copies of those proofs of debt.
49. I am yet to adjudicate on those proofs of debt, with one impediment being the lack of funds to enable me to do so. As indicated below, to the extent that I will be required to obtain legal advice to assist me in the adjudication process, I am concerned that delay in payment to me of any expenses out of the FMIF will further expose me to costs and expenses for which I will be personally liable and which I will not be able to recover from any Fund.

#### IMPEDIMENTS TO FINALISATION

50. At paragraph 10 of this affidavit I depose to the four issues which currently exist impeding the finalisation of the LM Estate. I will deal with each issue in more detail below.

#### Delay in winding up LMIM and the Funds

##### FMIF distribution to the Feeder Funds

51. I will only be in a position to determine whether distribution will be paid to members of the Feeder Funds after the Feeder Funds have been paid the amounts they are entitled to receive as unit holders in the FMIF. The Feeder Funds hold approximately 48% of the units in the FMIF. If the Receiver makes a distribution to unitholders in the FMIF, and subject to the resolution of the Feeder Fund Proceeding and the Clear Accounts Proceeding, the Feeder Funds will receive a distribution from FMIF.




52. I can only take steps to finalise the winding up of the Feeder Funds when I know whether the Receiver will be making such a distribution.
53. I acknowledge that the Receiver's position, as set out in his 28 September 2018 report to investors, is that if he is successful in the Feeder Fund Proceeding, the effect will be that the CPAIF and ICPAIF will not receive any distribution from FMIF. Accordingly, pending resolution of the Feeder Fund Proceedings, I am unable to take steps to wind up these funds.

Clear Accounts Proceeding

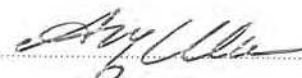
54. At paragraph 143 of *Park & Muller (Liquidators of LM Investment Management Ltd) v Whyte No 3* [2017] QSC 230 ("the Indemnity Decision") the Honourable Justice Jackson held that the clear accounts rule operates to "suspend" LMIM's claimed right for payment from the assets of the FMIF until the resolution of that claim and that to the extent such claims are otherwise maintainable, they should not be finally resolved until the claim in the Clear Accounts Proceeding is resolved.
55. Accordingly, it will be difficult for me to finalise the liquidation of LMIM in respect of the FMIF until the Clear Accounts Proceeding is resolved.

Audited Accounts

56. I have caused audited accounts for 2013 and 2014 financial years to be prepared. Those accounts were not completed until the end of 2017. The delay in finalising the 2013 and 2014 end of financial year account has in part delayed the winding up of AIF and ASPF. The requirement to lodge further audited accounts including final audits will further delay the winding up of AIF and ASPF.
57. I estimate that the remaining audited accounts for AIF and ASPF up to and including 2018 end of financial year will take approximately 9 months.

Lack of funds for general administration of the winding up of LMIM and the Funds

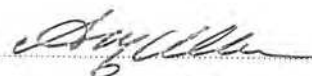
58. As a result of the Indemnity Decision I have been unable to pay expenses in respect of the liquidation of LMIM from the assets of the FMIF unless I apply to the court for an order for direct payment. I have also held off on paying some expenses from the AIF and ASPF given the effect of the Indemnity Decision on how those expenses are likely to be apportioned between the FMIF, AIF and ASPF (which depends on a direct payment order being made in respect of the FMIF).



59. For the same reason, I have also been unable to pay:
- (a) the expenses which I have classified as being in respect of all of the funds generally; and
  - (b) the expenses relevant to the general corporate work carried out in respect of the liquidation of LMIM.
60. At paragraph 247 to 258 of the Remuneration Decision the basis of apportionment in respect of Category 2 remuneration and expense has been determined to be 'Method 2' being an equal split between AIF, ASPF, FMIF, CPF and MPF until 12 April 2013 and an equal split between AIF, ASPF, FMIF and CPF from 13 April 2013 onwards. I have held off seeking payment of my expenses relevant to all LM Funds and corporate work given the cost associated with reconciling all expenses paid since my appointment as voluntary administrator of LMIM. Following legal advice, such expenses prior to the handing down of the Remuneration Decision were calculated and paid on a calculation undertaken based on the funds under management in respect of each Fund. In light of the Remuneration Decision, I have formed the view that those past payments may need to be recalculated and adjusting payments/entries made with future payments of such expenses to be calculated adopting the 'Method 2' formula. This adjustment covers a period in excess of five years and involves an extensive reconciliation of all expenses paid to date will be required if I apply that method of apportionment from the date of my appointment. I am currently discussing this situation with my lawyers and seeking advice regarding whether or not I should undertake this recalculation exercise. I am particularly conscious of the time and costs involved in such a task.

**Lack of a funded contradictor in respect of the Clear Accounts Proceeding and the Feeder Fund Proceeding**

61. On 20 July 2018 my solicitors Russells sent a letter to Tucker & Cowen in respect of the Clear Accounts Proceeding and an application in respect of that proceeding returnable on 25 July 2018. At [390] of JRP-10 is a copy of that letter.
62. At paragraph 76 of this affidavit I depose to correspondence sent by Russells to Tucker & Cowen in respect of the Feeder Fund Proceeding. As stated in that correspondence I did not oppose the Feeder Fund Proceeding or appear in respect of it as LMIM is in its own right is without funds.



63. If orders are made in accordance with 1(a), 2(i) and 2(j) of this Application, I will be able to act as contradictor in respect of each proceeding. I intend to act as a contradictor in respect of the Clear Accounts Proceeding (if those orders are made), given the effect that proceeding has on LMIM's indemnity claims; those indemnity claims cannot be finally resolved until the Clear Accounts Proceeding is determined. If those orders are made I intend to consider and if so advised, oppose the Clear Accounts Proceeding so that LMIM has a right of indemnity in respect of the scheme assets of the FMIF.
64. If orders are made in accordance with paragraphs 1, 2(i) and 2 (j) of this Application, I will act as a contradictor in respect of the Feeder Fund Proceeding. If the Feeder Funds Proceeding is not resolved following the 5 and 6 November 2018 mediation, I intend to appear on any further court appearances to represent the interests of the Class B unit holders in the Feeder Funds.

#### REMUNERATION AND EXPENSES

65. Since April 2013, when LMIM was first placed into voluntary administration, there have been numerous insolvency practitioners appointed over various entities within the LM Estate, including:
- (a) myself and Ms Muller as voluntary administrators and subsequently liquidators of LMIM;
  - (b) Mr Whyte who on 21 August 2013 was appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution;
  - (c) Mr Whyte's separate appointments as a controller in respect of the FMIF;
  - (d) Mr Whyte who on 21 August 2013 was appointed as the receiver of property of the FMIF;
  - (e) Mr Anthony Connelly and Mr Joseph Hayes who on 11 July 2013 were appointed by Deutsche Bank, under a charge given to it, as receivers and managers of LMIM in its capacity as responsible entity of the FMIF;
  - (f) Mr David Clout who on 26 July 2013 was appointed the liquidator of LM Administration Pty Ltd;
  - (g) Mr Said Jahani who on 16 November 2015 was appointed by Custom House Currency Exchange (Australia) Pty Ltd, under charges given to it, as receiver and

manager of LMIM as responsible entity for the two Feeder Funds being the CPAIF and the ICPAIF;

- (h) KordaMentha Pty LTd as trustee of MPF; and
- (i) Trilogy Funds Management Limited as responsible entity of the LM Wholesale First Mortgage Income Fund.

66. The remuneration, fees and expenses of the various practitioners has been assessed and determined according to the nature of each appointment. As liquidator and given that payment is made out of trust funds, my remuneration and expenses have to be approved by the Court. The approval process has been complex, particularly in light of the identification of what work was done in relation to what funds and the apportionment of common work between various funds. Further, given that the CPF is without funds, I have necessarily not been able to recover a percentage of my remuneration, costs and expenses.
67. For various reasons, there have significant difficulties and delays in the process of my obtaining payment of my remuneration and recovering expenses for work carried out in relation to the LM Estate. The process has been one of, if not the, most complex in my experience of many hundred insolvency administrations handled by me over my 26 years as an insolvency practitioner. The factors that have caused or contributed to this complexity include the structure of the LM companies, managed investment schemes and trusts, the inter-related nature of the businesses and investments themselves, the interplay between the multiple entities, including companies and trusts, the various litigation challenges during the voluntary administration and liquidation and ultimately the appointment of multiple insolvency practitioners over similar parts of the business without clear delineation of powers and responsibilities.
68. Whilst every effort has been made by me and my staff to provide open and transparent reporting of the work that has been carried out, it has been very difficult and time-consuming to identify and apportion work across the various entities with absolute precision. Whilst I am confident that every charge has been properly incurred, the apportionment and allocation task, including the use of categories as identified in previous affidavits and the published reasons for judgment, is one that has caused significant cost. Without criticism of the Receiver, the extreme level of scrutiny and attention that the Receiver has given to every aspect of my remuneration and expenses including generalised concerns being raised rather than specific issues being taken, has caused significant further expense on my part in order to explain every charge in the way that the Receiver has requested to address his various concerns.



69. Whilst I am not aware of the quantum of the Receiver's fees and remuneration in seeking the details of and challenging my various applications for remuneration and expenses, given the amount of time spent by my staff and my legal expenses, I would estimate that the Receiver's own remuneration and expenses in challenging my remuneration and expenses, together with my remuneration and expenses of the processes, may well outweigh any benefit to the FMIF of such reductions or re-apportionment that might have been achieved.
70. For example, in relation to the Indemnity Application resolved by the decision in *Park & Muller (liquidators of LM Investment Ltd) v Whyte (No. 3)* [2017] QSC 230 on 17 October 2017, the gross saving to the FMIF of the application was an amount of \$283,494.75. However, the FMIF was required to pay, 90% of my legal costs, assessed on an indemnity basis. Those legal costs were approximately \$570,005.00 (including Counsel's fees referred to in paragraph 72 below). I instructed junior counsel throughout for that process. The Receiver's legal team in respect of the court hearing included Senior and Junior Counsel, which in my experience would have involved significantly more cost than I incurred. Accordingly, the overall net cost to the FMIF of the process was significantly more than the benefit to the FMIF of objecting to the costs and expenses in the first place.
71. Another difficulty has been the recovery and payment of legal costs and GST from the Receiver. Without descending into detail, whilst the Receiver has not required me to have my legal fees formally assessed, the negotiation process between the solicitors for me and the Receiver has resulted inevitably in a global reduction of approximately 10-20% of the costs claimed on each occasion when I have obtained the benefit of a costs order against the FMIF. On no occasion has the Respondent paid the entire amount of a claim. Whilst I understand that the Respondent could justify all such reductions as being in the best interest of the FMIF, which no doubt they are, the fact is that I do not have funds, nor do I consider it in the best interests of the FMIF or myself, to have protracted negotiations over relatively minor proportions of costs, and I have instructed my solicitors to take a commercial approach at all times to agree to reductions to avoid further delay and expense. This has resulted in the global reductions referred to above and has meant that I am personally liable for the inevitable shortfall on such costs as a result of the reduced payment received from the Receiver.
72. A further, specific example, of this is the issue of fees of Mr Peden of Counsel, whose fee note for the hearing of the Indemnity Application hearing on 19 and 20 June 2017, including preparation, was, as a result of mistaken communication from Mr Peden's Chambers, not included in the amount sought from the Respondent after the hearing. The issue was raised with the Respondent in early July 2018. The Respondent has agreed in





principle that some of these fees ought to be paid from the FMIF. Despite the passage of 4 months since this issue was raised, there is still no resolution. I have instructed my solicitors to agree to any reasonable percentage reduction to achieve a speedy resolution, but the extensive deed sought by the respondent to document the payment of the amount has not been able to be finalised. Again, my firm will have to bear the difference.

73. There has also be delay from when orders are made by the Court and when payment of my remuneration and my legal costs are made. On 22 November 2017 the Court made orders in this proceeding for the payment of my remuneration and legal costs. The orders were made in respect of the Indemnity Judgment. My remuneration was not paid until 21 December 2017, and even then, without GST, and my legal costs were not paid until July 2018.

#### Lack of transparency in respect of the litigation being conducted by the Receiver

74. On 31 March 2017, 30 June 2017, 29 September 2017, 21 December 2017, 29 March 2018, 29 June 2018 and 28 September 2018 the Receiver provided reports to investors in respect of the Feeder Fund Proceeding, the Clear Accounts Proceeding and the EY Proceeding. At [64] to [373] are copies of those updates to investors.
75. I have reviewed those reports and they do not disclose the costs and overall benefit of the Feeder Fund Proceeding, Clear Accounts Proceeding and the EY Proceeding. It is not stated in those reports, nor is there elsewhere any ongoing costs disclosure made by the Receiver.
76. My solicitors Russells have requested information about the existence of budgets from the Receiver. At [391] to [392] is Russells' 21 September 2018 letter to Tucker & Cowen in which detailed information was requested in respect of, inter alia, whether the Receiver had a budget for remuneration and legal expenses for each discrete legal proceeding and whether there is an accounting done in respect of those budgets. The Respondent has declined to provide any such estimates, if they exist. At [393] to [399] is Tucker & Cowen's response dated 27 September 2018.

#### FINALISATION STRATEGY

77. The 3 October 2018 Letter sets out my strategy to wind up LMIM and each of the Funds ("the Finalisation Strategy"). The Finalisation Strategy addresses the issues identified in that letter and as stated in this affidavit.

The Receiver continue only in respect of the remaining litigation

78. In paragraphs 2(a) and 2(b) of this Application, I apply for an order that the Receiver continue only in respect of the conduct on behalf of FMIF of the Clear Accounts Proceeding, the Feeder Fund Proceeding and the EY Proceeding and that I take responsibility for ensuring that FMIF is wound up in accordance with its Constitution. If orders are made to that effect I will attend to the winding up of FMIF as promptly and as cost efficiently as possible. I have already received proofs of debt in respect of FMIF and I will adjudicate on those proofs of debt. I also intend to make the distribution to FMIF creditors and subsequently members if those orders are made.
79. I am willing to undertake the above work at the capped fee for remuneration and commit to promptly paying an interim distribution to FMIF members if that is at all possible. In respect of the payment of an interim distribution, the MPF Proofs of Debt may affect that adjudication process given the amounts of those claims. If the MPF proofs of debt are admitted or if any decision to reject those proofs of debts is appealed and the appeal is successful, then an interim distribution to the FMIF creditors and/or members will not be possible.

**Remuneration and expenses**

80. The Finalisation Strategy includes:
- (a) that the fixing of all of the Receiver's and my future remuneration and expenses be deferred to the conclusion of the winding up of LMIM and the Funds;
  - (b) with all such remuneration and expenses being approved at one comprehensive hearing; and
  - (c) that pending that hearing payments be made on account to the Receiver and me to meet 50% of anticipated remuneration and expenses. Paragraphs 2(e) to 2(j) of this Application provide for the fixing and payment of remuneration and expenses in accordance with the Finalisation Strategy.
81. The orders sought mean that 50% of my remuneration and expenses will be paid on a monthly basis. As a result of this I will be able to carry out work in respect of the Clear Accounts Proceeding and other matters as set out in the Budget. In respect of my remuneration this will allow me to draw that remuneration in accordance with a prospective fixing or determination by the court in accordance with the Act and will allow me to pay expenses (on a monthly basis) in accordance with those orders. If the orders are



not made, I will not be able to pay 50% of my remuneration and expenses (in respect of general corporate work, in respect of the FMIF and in respect of all of the Funds generally) on a monthly basis and will therefore be restricted with respect to the extent of work than can be completed for the winding up of LMIM and the LM Funds.

**Contradictor in respect of the Feeder Fund Proceeding**

82. As stated in paragraph 33 of this affidavit, the winding up of the Feeder Funds cannot be finalised until the Feeder Fund proceeding is resolved.
83. If the orders sought in paragraph 1(a) and paragraphs 2(i) and 2(j) of this Application are made, pending the outcome of the mediation currently underway, I will be acting as a contradictor in respect of the Feeder Fund Proceeding. I intend to instruct my solicitors to attend the hearings in respect of that proceeding, whether in respect of an application in the proceeding or at a hearing and to represent the interests of the Class B unit holders in the FMIF. I intend to also seek to resolve the Feeder Fund Proceeding expeditiously and at minimum costs as this will allow the winding up of LMIM and the Funds to be completed.
84. If the orders sought in paragraphs 1, 2(i) and 2(j) of this Application are made, I will act as a contradictor in respect of the Clear Accounts Proceeding. I intend to seek to resolve Clear Accounts Proceeding expeditiously and at minimum cost as this will allow the winding up of LMIM and the Funds to be completed.
85. All the facts and circumstances herein 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 in this my affidavit.

Sworn by the Deponent on 12 November 2018 at Brisbane in the presence of:



JOHN RICHARD PARK  
Deponent



Name: Ashleigh Ubank  
~~Lawyer / Commissioner for Declarations / JP~~



SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS3508/15

First Applicant:

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

AND

Second Applicant:

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

AND

Respondent:

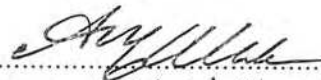
DAVID WHYTE AS THE PERSON  
APPOINTED TO SUPERVISE THE  
WINDING UP OF THE LM FIRST  
MORTGAGE INCOME FUND ARSN 089 343  
288 PURSUANT TO SECTION 601NF OF  
THE CORPORATIONS ACT 2001

CERTIFICATE OF EXHIBIT

Exhibit "JRP-10" to the affidavit of JOHN RICHARD PARK sworn on 12 November 2018



.....  
JOHN RICHARD PARK  
Deponent



.....  
Name: Ashleigh Ubank  
~~Lawyer/Commissioner for Declarations/JP~~



CERTIFICATE OF EXHIBIT  
Filed on behalf of the Applicants

Russells  
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Tel: (07) 3004 8888  
Fax: (07) 3004 8899  
Ref: JTW:20180543

**SUPREME COURT OF QUEENSLAND**

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Filed on behalf of the Applicants

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Level 18, 300 Queen Street  
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Part 1 of 2 (pages 1 -179) of the exhibit "JRP-10" to the Affidavit of **JOHN RICHARD PARK** sworn 12 November 2018.