

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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

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

AND

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

AND

First 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

AND

Second Respondent: SAID JAHANI IN HIS CAPACITY AS RECEIVER AND MANAGER OF THE ASSETS, UNDERTAKINGS, RIGHTS AND INTERESTS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS THE RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 AND THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868

AFFIDAVIT OF DAVID WHYTE

I, DAVID WHYTE of Level 10, 12 Creek Street, Brisbane in the State of Queensland, Registered Liquidator, state on oath:-

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Signed:

Witnessed by:

AFFIDAVIT:
Form 46, R.431

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

Filed on behalf of the First Respondent,
Mr David Whyte

1. I am a Registered Liquidator and a Partner of the firm BDO. I am an affiliate member of the Chartered Accountants Australia and New Zealand (formerly the Institute of Chartered Accountants of Australia) and a professional member of the Australian Restructuring, Insolvency and Turnaround Association (formerly known as the Insolvency Practitioners Association of Australia) ("ARITA").
2. I refer to my previous affidavit sworn on 18 February 2019 and filed on 19 February 2019 in support of my application filed 1 February 2019 ("my previous Affidavit"). I swear this further affidavit to update my evidence in support of that application. Unless the context otherwise requires, terms defined in my previous Affidavit have the same meaning in this Affidavit.
3. Now produced and shown to me and marked "DW-131" is an indexed paginated bundle of the documents referred to in this Affidavit ("the Bundle").

Norton Rose Proof

4. I refer to paragraphs 57 to 60 and 69 of my previous Affidavit regarding the Norton Rose Proof.
5. At pages 1 to 7 of the Bundle is a copy of a letter from FTI Consulting to Norton Rose dated 22 February 2019, a copy of which was sent to me by FTI Consulting on 25 February 2019. That letter gave notice to Norton Rose of and attached a copy of my reasons for rejecting the Norton Rose Proof, and informed them that it is not Mr Park's intention to make an application to Court for directions in respect of my rejection of that Creditor Indemnity Claim.

Further EY Proof

6. I refer to paragraph 65 of my Affidavit regarding my letter to King & Wood Mallesons ("KWM") regarding the Further EY Proof.
7. I am informed by my solicitors, Tucker & Cowen and believe that on 1 March 2019, they received a response from KWM, in which they advise that they do not agree that EY's claims are merely reflective or limited to any judgment made against EY in the Auditor's Proceeding, and enclosing a Third Party Notice filed in the Auditor's Proceeding that purportedly further articulate those

Page 2

Signed:

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Witnessed by:

claims. At pages 8 to 100 of the Bundle is a copy of that letter and the Third Party Notice and Statement of Claim.

Exit entitlements

8. I refer to paragraphs 77 to 86 of my Affidavit regarding the potential liability of the FMIF to indemnify exit entitlements relating to certain retirement village assets over which security was previously held by the FMIF.
9. Of the five retirement villages, four of them were sold by the FMIF to Freedom Aged Care ("Freedom"). Freedom was then in turn subsequently acquired by the Aveo Group ("Aveo") in 2016.
10. At page 101 of the Bundle is a copy of letter from me to Aveo sent by email on 28 February 2019 enquiring as to the details of any outstanding exit entitlements relating to residents of those retirement villages in respect of whom contracts were entered into during the course of the winding up of the FMIF. I have not exhibited the schedules enclosed with that letter, which I requested Aveo to complete with the details of any remaining contingent liabilities for exit entitlements, because they contain the personal details of the relevant residents.
11. I have not to date received any response to my letter to Aveo.
12. The other retirement village was sold to Bridgewater Lake Village Pty Ltd in its capacity as trustee for the Bridgewater Lake Asset Trust ("BLV"). At page 102 of the Bundle is a copy a letter sent from me to O'Loughlins Lawyers, the solicitors of BLV by email on 28 February 2019 requesting details, pursuant to clause 15.9 of the contract of sale, of the status of certain residents of the village in relation to exit entitlements. I have not exhibited the enclosures to that letter, which were a copy of the Contract of Sale, and a schedule containing details relating to the relevant residents that I requested BLV to complete by inserting details of the exit entitlements.
13. I received a response from BLV on 1 March 2019, which attached a report entitled 'Bridgewater Sellers Residents – BDO report.xls' (the "Report"); I have not exhibited the Report as it contains

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Signed:

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Witnessed by:

personal details of residents. According to the Report, there remains a potential exposure for the FMIF to indemnify exit entitlements in an amount of approximately \$2.9 million.

14. I refer to paragraph 84(a) of my Affidavit, where I say that in my experience the average length of stay of a resident of a retirement village is four years. That was my experience in relation to the four retirement village assets now owned by Aveo. However, the retirement village now owned by BLV admits residents from 50 years of age. As a result, the average length of stay of residents is longer for that village. That is the reason for the substantial remaining exposure for the FMIF to indemnify liabilities to pay exit entitlements in relation to that retirement village.
15. I remain of the opinion that on a rough assessment of a realistic worst-case scenario the amount of \$5 million ought to be retained for the FMIF's exposure to indemnify liabilities to pay exit entitlements in relation to the five retirement villages that were once held by the FMIF.

Updated table of contingent liabilities

16. I refer to the table at paragraph 40 of my Affidavit. I update that table as follows:

Description	\$ Amount
Actual liabilities	\$ 2,213,000.00
<u>Uncontrolled Contingent Liabilities:</u>	
Creditor Indemnity Claims	\$ 949,497.72
Exit entitlements relating to former retirement village assets	\$ 5,000,000.00
Potential claims by the Liquidator of LMIM	\$ 2,043,889.89
Non-litigation expenses and remuneration of Mr Whyte	\$ 1,800,000.00
The Feeder Fund Proceeding	\$ 1,100,000.00
The Auditor's Proceeding	\$ 2,450,000.00
Drake Proceeding	\$ 8,200,000.00

The recovery in the Lamb bankruptcy	\$ 230,000.00
Total:	\$23,986,387.61

17. I note that the estimate of uncontrolled contingent liabilities in relation to the Feeder Fund Proceedings has been changed in the above table from \$2.1million to \$1.1million. That change corrects an error in the table in my Affidavit, which did not reflect my evidence at paragraph 125 of my Affidavit.


LMIM's right of indemnity

18. On 20 February 2019, I instructed my solicitors to send correspondence to Russells, the solicitors acting for Mr Park and LMIM, inviting them to notify me of their clients' positions as to the amounts referred to in my Affidavit and their rights of indemnity against the FMIF and, if they consider it appropriate, to appear at the hearing on 13 March 2019. At page 108 of the Bundle is a copy of that letter.
19. I am informed by my solicitors and believe that they have not to date received any response to that correspondence.
20. All the facts and circumstances above 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 DAVID WHYTE on the 5th day of March 2019 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
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AND

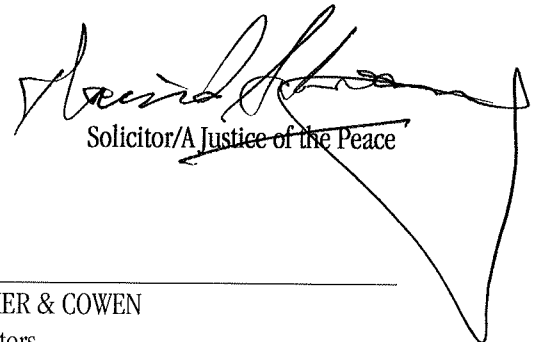
Second Respondent: SAID JAHANI IN HIS CAPACITY AS RECEIVER AND MANAGER OF THE ASSETS, UNDERTAKINGS, RIGHTS AND INTERESTS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS THE RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 AND THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868

CERTIFICATE OF EXHIBIT

Exhibit "DW-131" to the Affidavit of DAVID WHYTE sworn this 5th day of March 2019



Deponent



Solicitor/A Justice of the Peace

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the First Respondent

TUCKER & COWEN
Solicitors
Level 15, 15 Adelaide Street
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"DW-131"



22 February 2019

Our Ref: RCL_897414_NRF

Peter Schmidt, Partner
Norton Rose Fulbright
Level 21, 111 Eagle Street
BRISBANE QLD 4000

By email: peter.schmidt@nortonrosefulbright.com

Dear Sir

**RE: The Creditors of LM Investment Management Limited (in Liquidation) (Receivers Appointed) ("the Company") and the Funds
Formal proof of debt or claim**

I refer to previous correspondence relating to the Company and your proof of debt or claim for \$315,601.21 dated 28 September 2018.

Please be advised, David Whyte as Receiver of the LM First Mortgage Income Fund has provided the ***attached** notification rejecting the proof of debt previously forwarded to him by me. The reasons for the rejection are contained in the correspondence.

In accordance with the Orders of Jackson J dated 17 November 2015, the Liquidators may make an application for directions as to whether or not the Eligible Claim is or is not one for which the Company has a right of indemnity out of the scheme property of the FMIF. It is not my intention to make an application for directions in respect of the rejected claim.

Should you have any queries, please do not hesitate to contact my office.

Yours faithfully
FTI Consulting

A handwritten signature in black ink, appearing to read 'John Park'.

John Park
Liquidator

FTI Consulting (Australia) Pty Limited
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Via email: john.park@fticonsulting.com

John Park
FTI Consulting
Level 20, CP1
345 Queen Street
BRISBANE QLD 4001

14 February 2019

Dear Mr Park

LM FIRST MORTGAGE INCOME FUND ("FMIF")- PROOF OF DEBT LODGED BY NORTON ROSE, DATED 28 SEPTEMBER 2018; CREDITOR INDEMNITY CLAIM CONFIRMED BY EMAIL DATED 24 JANUARY 2019; NOTIFICATION OF DECISION ON CREDITOR INDEMNITY CLAIM AND REASONS FOR DECISION

Notification of Decision

I refer to:

1. The Orders dated 17 December 2015 in proceeding 3508/15 ("the Orders"). Unless the context otherwise requires, terms defined in the Orders have the same meaning in this letter;
2. Your letter dated 20 December 2018, enclosing a Proof of Debt lodged by Norton Rose Fulbright Australia ("Norton Rose") in the sum of \$315,601.21 ("Norton Rose Proof");
3. My request for further information in relation to this Proof dated 2 January 2019;
4. Your response dated 16 January 2019; and
5. Ms Lobb's email dated 24 January 2019 confirming that you have identified a Creditor Indemnity Claim with respect to the Norton Rose Proof.

Under paragraph 8(b) of the Orders, within 30 days of receipt of an Eligible Claim, or of any information requested in accordance with paragraph 8(a) of the Orders, I am required to accept the Eligible Claim as one for which LMIM has a right to be indemnified from property of the FMIF, reject the Eligible Claim, or accept part of it and reject part of it.

I hereby give you notice, pursuant to paragraph 8(b) of the Orders, that I reject the Creditors Indemnity Claim made against the FMIF in respect of the Norton Rose Proof. Specifically, my view is that:

1. I consider that, but for the clear accounts rule, LMIM would have been entitled to indemnity from the FMIF in relation to the claim notified by the Norton Rose Proof in the sum of \$274,209.75;

2. The effect of the clear accounts rule is that LMIM's claimed right of payment from the FMIF with respect to the claim notified by the Norton Rose Proof is suspended until the claims made against LM Investment Management Ltd (Receiver Appointed) (In Liquidation) ("LMIM") in the Drake Proceeding, the Feeder Fund Proceeding, and the Clear Accounts Proceeding (as defined below) are resolved, and LMIM has no present right to be indemnified from the FMIF with respect to the Creditors Indemnity Claim made in relation to the claim notified by the Norton Rose Proof;
3. No amount will be due to be paid to LMIM with respect to the Norton Rose Proof if the amount of LMIM's liabilities to the FMIF exceeds the amount in respect of which LMIM is entitled to indemnity from the FMIF.

Detailed Reasons for Decision

Under paragraph 8(c) of the Orders, if I reject an Eligible Claim, whether in whole or in part, I must provide you with written reasons for my decision when or within seven days after, giving notice of my determination.

I now provide reasons for my decision pursuant to paragraph 8(c) of the Orders.

I have reviewed the Norton Rose Proof, and the supporting documents provided, including the letter from Norton Rose dated 30 September 2014, the schedule of invoices, copies of the invoices, and the client agreement provided by Norton Rose.

I note that a total of \$253,514.02 of the amount claimed by Norton Rose relates to the "ASIC Investigation" matter, file number 2787923, and a total of \$62,087.19 relates to the "Trilogy Funds Management Limited - change of responsible entity" matter, file number 2789191.

ASIC Investigation Matter

By letter dated 24 September 2012, Norton Rose offered to enter into a costs agreement, with LMIM in its own right and as responsible entity ("RE") of the FMIF. The retainer is described as assisting with the ASIC investigations inquiry including advising on any notices issued by ASIC and the appropriate response, undertaking any investigations required to respond to ASIC and advising on an appropriate strategy to sell down or manage redemption of the Fund in consultation with ASIC. The costs agreement does not appear to be signed by or on behalf of LMIM but I do not think anything turns upon that if it was sent and LMIM continued to instruct Norton Rose to perform the work.

The letter from Norton Rose dated 30 September 2014 describes the work undertaken in respect of the ASIC investigation file, as follows:

1. *"The majority of discussions and negotiations with ASIC was in respect of the "forward looking" management of the LMFIF. This involved negotiations and meetings with ASIC and substantial reports, and provision of information to ASIC as to the current status of the fund and the steps which LM intended to take as RE to move to an orderly sale of the assets of that fund;*
2. *Advise on constitutional amendments, procedure regarding redemption. Settling RG45 Report and investor communications;*

3. *The work also involved an application, following ASIC's invitation at ... one of the meetings held, by LM as RE of the LMFMIF to make an application for relief from the provisions of section 253E of the Corporations Law which would allow LM as RE of the Feeder Funds to vote on behalf of those feeder funds if, as was expected would occur at that time, Trilogy Funds Management Limited called a meeting of the members of the LMFMIF in order to seek orders to have LM replaced as RE of that fund. The reasons why that was in the interests of members is discussed below; and*
4. *Provision of documentation, and responses on specific issues, following the receipt of notices issued by ASIC."*

I am satisfied that, on the basis of the information and explanations provided by Norton Rose, that all or most of the work undertaken on this file was undertaken in LMIM's capacity as RE of the FMIF.

Trilogy Funds Management File

By letter dated 24 September 2012, Norton Rose offered to enter into a costs agreement with LMIM in its own right and as responsible entity of, the FMIF, the LM Wholesale First Mortgage Income Fund and the LM Currency Protected Australian Income Fund. The retainer is described as to advise in respect to the attempt by Trilogy to replace LMIM "as responsible entity of the "funds". The costs agreement is signed by Francene Mulder on behalf of LMIM on 19 October 2012.

The letter from Norton Rose dated 30 September 2014 describes the work undertaken in respect of the Trilogy Funds Management file, as follows:

1. "As shown by the letter of engagement, the engagement in respect of this matter was on behalf of LM as responsible entity of the LMFMIF and its 2 feeder funds, LMWFMIF and LMCPAIF, because at the time, the view was taken that the interests of members was the same, at least for the work which we were being asked to undertake.
2. The work undertaken involved advice to LM on steps it could take to defeat the application of Trilogy, not only to be replaced as RE of the feeder funds, but also the expected upcoming application by Trilogy to call a meeting of members of the main fund to replace LM as RE.
3. As you are aware, in the end, Trilogy changed tack and tried to make an application under the Corporations Law to be appointed as temporary responsible entity, which sparked the subsequent court litigation.
4. As you are also aware, Dalton J. eventually found it was not in the interests of members of the LMFMIF for Trilogy to be appointed as responsible entity of the LMFMIF (refer paragraph [31] of the judgment delivered on 8 August 2013).
5. For the same reasons, it was reasonable for LM as RE of the LMFMIF to form the view that the appointment of Trilogy as RE of the fund was not in the interests of members and therefore defending attempts by Trilogy to be appointed was in the interests of members.
6. From my review of the accounts on this file, it appears that some of the work done on the application referred to in paragraph 2.2(2) above was also recorded on this file.

7. Some of the work the subject of the unpaid invoices on this file also related to assisting LM in its role as RE of the feeder funds to deal with the handover of the management of those funds to Trilogy. It may be that some of these accounts should be split between the 3 funds."

I am satisfied, based on the definition of the clients and the description of work to be performed in the costs agreement, the descriptions of the work performed provided by Norton Rose and my review of the invoices, that it is reasonable for the work relating to this file to be apportioned as between the FMIF and the two Feeder Funds.

I do not propose to undertake a line by line review of the invoices to determine which fund they relate to.

I am satisfied that, in the circumstances, it is reasonable to allocate one third of the total of the invoices outstanding for this file, to the FMIF.

Summary

The total amount of the claim by Norton Rose that, but for the clear accounts rule, I would have accepted against the FMIF is therefore \$274,209.75.

Clear Accounts Rule

However, as you are aware, the trustee's right of indemnification is subject to the Rule known as the clear accounts rule.

The existence of that rule was noted by Justice Applegarth in his Honour's judgment in the *KordaMentha Pty Ltd v LM Investment Management Ltd & Anor*: see [2016] QSC 183 at [21].

More recently, it was the subject of specific consideration and findings by Justice Jackson in your client's first application for Indemnity from the FMIF: see [2017] QSC 230 at [124] to [143]. In that case, LMIM had asserted a right of indemnity against the assets of the FMIF.

I refer in particular to paragraphs [137] to [143] of Justice Jackson's judgment, as follows (footnotes omitted):

[137] In some quarters, the clear accounts rule is seen as derived from the rule in *Cherry v Boulton*. A reasonable argument exists that it is either separable from or a sub-set of the principles for which *Cherry v Boulton* is often cited. The Court of Appeal in *Re Dacre*, *Whitaker v Dacre*, without considering *Cherry v Boulton*, acted on the footing that there was a long series of authorities that "a defaulting trustee cannot claim a share in the estate unless and until he has made good his default" and that the rule is based on the theory "that the [c]ourt treats the trustee as having received his share by anticipation", meaning that the trustee is treated as already having received its share to the extent of the default. Modern statements do not gainsay those propositions.

[138] In *RWG Management*, Brooking J considered and rejected an argument that a trustee was prevented from making a claim for indemnity for expenses against the estate until it has made good the loss to the estate from default, in the sense of payment of the amount of the default. Instead, he accepted that the counter-liabilities were to be applied (as if set off) against each other on the principle set out above, so that the trustee is entitled to any excess in its favour.

[139] To the extent that the reasons of Gordon J in *Australian Securities and Investments Commission v Lettern and ors (No 17)* suggest that the trustee's obligation to make good the default is a condition precedent to the right to an indemnity, in my view, they should not be taken as requiring anything more than the process of reducing the amount of the right by the amount of the counter-liabilities in accordance with the principle stated by Brooking J, as already mentioned.

[140] That may mean that the net amount of the right to an indemnity will not be capable of ascertainment until the amount of the loss caused by the breach of trust that is the basis of the counter-liability can be established. But that is a procedural matter, not an element of the right to indemnity or a matter of substantive defence. Hence, in my view, the statement of Young CJ in *Warne v GDK Financial Solutions Pty Ltd; Billingham v Parberry* that the trustee has a *prima facie* right to indemnity but an order for accounts will be made if there is doubt about a default that suspends the right of the trustee while the accounts are taken is correct. This reflects how matters would have proceeded in an administration action in equity involving an allegation of breach of trust.

[141] Gordon J in *Lettern* accepted that a breach of certain "core" duties will as a matter of course result in a loss of the right to indemnity for an associated expense. However, it is necessary to distinguish that statement from the operation of the clear accounts rule or the wider rule in *Cherry v Boulton*. That statement was not concerned with either principle, but a trustee's right to indemnity for an expense incurred in connection with the postulated breach of a core duty. There is no principle that the operation of the clear accounts rule is confined to a trustee's right to indemnity for an expense connected with a breach of trust.

[142] Following these steps, in the present case, reduction of the amount of the right of indemnity by the amount of the claim for the counter-liabilities in proceeding BS11560/16 would exceed the amounts claimed by LMIM for payment for indemnity for expenses, even if the claim for indemnity were otherwise accepted as one made for expenses properly incurred by LMIM as trustee or responsible entity.

[143] It follows that the clear accounts rule operates to "suspend" the claimed right to payment from the assets of the FMIF until the resolution of that claim and that LMIM's indemnity claims, to the extent that they are otherwise maintainable, should not be finally resolved until the claim in proceeding BS11560/16 is resolved.

Identification of Claims made against LMIM

LMIM as RE of the FMIF has made the following claims against LMIM in its personal capacity:

1. the claims made by LMIM as RE of the FMIF against LMIM in the Clear Accounts proceeding (Supreme Court of Queensland proceeding no. 11560/16). The Amended Claim and Statement of Claim filed in that proceeding has been served on your client. The quantum of the claim is yet to be finalised, but includes claims for the aggregate amounts of approximately \$13.7 million and \$12.9 million plus interest;

2. a claim for the sum of approximately \$15.5M plus interest and costs in the Drake Proceeding (Supreme Court of Queensland Proceeding 12317/2014). A copy of the Third Further Amended Statement of Claim filed in that proceeding has been served on LMIM. This proceeding is due to go to trial in April of 2019;
3. a claim for the sum of approximately \$56M plus interest and costs in the Feeder Fund Proceeding (Supreme Court of Queensland Proceeding 13534/16). A copy of the Second Further Amended Statement of Claim in that proceeding has been served on LMIM.

Relevantly, the effect of the clear accounts rule is that LMIM's Creditor Indemnity Claim (claim for indemnity) against the FMIF with respect to the claim notified by proof of debt lodged by Norton Rose:

1. is suspended until the Drake Proceeding, the Feeder Fund Proceeding and the Clear Accounts proceeding are resolved; and
2. may not be productive of a money order in LMIM's favour, in the event that LMIM is found to have counter-liabilities to the FMIF exceeding the amount which LMIM is entitled to an indemnity out of the FMIF for in respect of the Norton Rose Proof.

If you have any queries or wish to discuss, please do not hesitate to contact me.

Yours faithfully



David Whyte

Court Appointed Receiver of LM First Mortgage Income Fund

1 March 2019

To Alex Nase
Tucker & Cowen
Level 15
15 Adelaide Street
BRISBANE QLD 4000
anase@tuckercowen.com.au
By email

Dear Colleagues

LM Investment Management Limited (In Liquidation) in its capacity as responsible entity for the LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver and Manager Appointed) ARSN 089 343 288 ("FMIF") -v- EY (also known as Ernst & Young) (A Firm) & Ors Supreme Court of Queensland proceeding no. 2166/15 ("Auditor Proceeding")

We refer to your letter dated 6 February 2019, your email today and your client's application for authority to make an interim distribution from the assets of the FMIF ("Interim Dividend").

With respect, we do not agree that our clients' claims are merely "reflective" or limited to any judgment made against our clients in the Auditor Proceeding. We **enclose** a copy of our clients' third party notice and supporting statement of claim filed in the Auditor Proceeding today, which includes various indemnity and trust subrogation and other claims the subject of the proofs of debt.

For the reasons set out above, our clients' rights extend beyond the scope set out in your letter and materially affect the ability of your client to make the Interim Dividend. We expect that the other third parties may have similar indemnity and subrogation claims in respect of the trust assets of the FMIF.

Yours faithfully

King & Wood Mallesons

Contact

Philip Pan | Partner

King & Wood Mallesons

T +61 7 3244 8081 | M +61 418 976 365

philip.pan@au.kwm.com

Cameron Mew | Special Counsel

King & Wood Mallesons

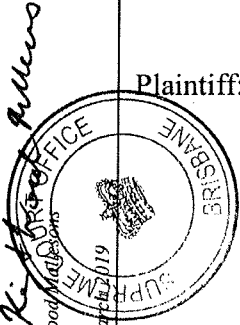
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cameron.mew@au.kwm.com

This communication and any attachments are confidential and may be privileged.

Signed:
King & Wood Malletson

Date: 1 March 2019



SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 2166/15

Plaintiff:

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

AND

First Defendant:

EY (ALSO KNOWN AS ERNST & YOUNG) (A FIRM)

AND

Second Defendant:

PAULA MCLUSKIE

AND

Third Defendant:

MICHAEL JAMES REID

AND

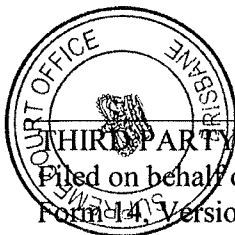
First Third Party:

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

AND

Second Third Party:

**LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461 IN ITS CAPACITY AS
RESPONSIBLE ENTITY FOR THE LM CURRENCY
PROTECTED AUSTRALIAN INCOME FUND
(RECEIVERS APPOINTED) ARSN 110 247 875**



THIRD PARTY NOTICE

Piled on behalf of the Defendants

Form 14, Version 1

**Pursuant to Orders of Jackson J dated
13 November 2018**

King & Wood Malletson

**Level 33, Waterfront Place, 1 Eagle Street,
Brisbane Qld 4000**

T +61 7 3244 8000

F +61 7 3244 8999

Ref: PYP/CRM:607-0022483

AND

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

AND

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

AND

Fifth Third Party: **LISA MAREE DARCY**

AND

Sixth Third Party: **EGHARD VAN DER HOVEN**

AND

Seventh Third Party: **FRANCENE MAREE MULDER**

AND

Eighth Third Party: **JOHN FRANCIS O'SULLIVAN**

AND

Ninth Third Party: **SIMON JEREMY TICKNER**

AND

Tenth Third Party: **GRANT PETER FISCHER**

AND

Eleventh Third Party: **ANGELO VENARDOS**

AND

Twelfth Third Party: **CAROLYN ANNE HODGE**

AND

Thirteenth Third Party: **MICHELLE JACKSON**

AND

Fourteenth Third Party: **BRUCE MACKENZIE**

AND

Fifteenth Third Party: **ALEXANDER DAVID MONAGHAN****THIRD PARTY NOTICE**

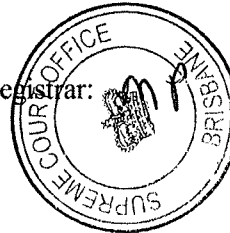
ISSUED WITH THE AUTHORITY OF THE SUPREME COURT:

And filed in the Brisbane Registry on

~~04 MAR 2019~~

01 MAR 2019

Registrar:

**TO THE THIRD PARTIES:**

TAKE NOTICE that the Plaintiff has brought a claim against the Defendants in the Court. In it the Plaintiff claims loss and damages against the Defendant (plus GST, costs and interest) as appears in the claim. A copy of the claim and attached third party statement of claim of the Defendants is served on you with this notice together with a copy of the order made on 13 November 2018.

The Defendants claim against the Third Parties the following:

1 Declarations that:

- (a) LM Investment Management Limited (In Liquidation) ACN 077 208 461 ("LMIM") is liable to the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") for loss and damage as referred to in paragraphs 79 and 80 of the attached third party statement of claim plus interest; and
- (b) the defendants are entitled to exercise or be subrogated to LMIM's rights to an indemnity from the assets of:

- (i) the LM Currency Protected Australian Income Fund ARSN 110 247 875 (Receivers Appointed) ("**CPAIF**");
- (ii) the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (Receivers Appointed) ("**ICPAIF**"); and
- (iii) the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 ("**WFMIF**").

(together, the "**Feeder Funds**") in satisfaction of that liability, in the following proportions respectively ("**Feeder Fund Indemnities**"):

- (iv) from the assets of the CPAIF, \$40,583,109.06 plus interest;
- (v) from the assets of the ICPAIF, \$5,044,118.30 plus interest; and
- (vi) from the assets of the WFMIF, \$9,432,090.76 plus interest.

2 Declarations that:

- (a) the Feeder Fund Indemnities are each an asset or right to which recourse may be had by the plaintiff in order to discharge the expenses to which it is liable in respect of the claims advanced by the defendants as referred to in paragraphs 21(c), 26, 59, 63(b), 63(c)(ii), 68(c)(ii) and 69 of the attached third party statement of claim; and
- (b) the defendants are entitled to exercise or be subrogated to the plaintiff's rights to the Feeder Fund Indemnities.

3 Declarations that:

- (a) LMIM is liable to the defendants for loss and damage as referred to in paragraphs 81 and 82 of the attached third party statement of claim; and
- (b) the defendants are entitled to exercise or be subrogated to LMIM's rights to an indemnity from the assets of the respective Feeder Funds in satisfaction of those liabilities.

- 4 A declaration that the plaintiff is entitled to withhold from distributions or payments otherwise payable in relation to the Class B units in the FMIF held for the CPAIF and for the ICPAIF in respect of the amount of the loss and damage referred to in paragraphs 79 and 80 of the attached third party statement of claim.
- 5 A declaration that the plaintiff is entitled to withhold from distributions or payments otherwise payable in relation to the Class B units in the FMIF held for the WFMIF in respect of the amount of the loss and damage referred to in paragraphs 79 and 80 of the attached third party statement of claim.
- 6 The sum of \$158,896.51.
- 7 Damages, including damages or compensation:
 - (a) pursuant to sections 197, 1041H, 1041I and 1325 of the *Corporations Act 2001* (Cth);
 - (b) pursuant to sections 12DA, 12GF and 12GM of the *Australian Securities and Investments Commission Act 2001* (Cth);
 - (c) pursuant to sections 52, 82 and 87 of the *Trade Practices Act 1974* (Cth) (as in force prior to 1 January 2011);
 - (d) pursuant to sections 38, 99 and 100 of the *Fair Trading Act 1989* (Qld) (as in force prior to 1 January 2011);
 - (e) pursuant to sections 18 and 236 of Schedule 1 of the *Competition and Consumer Act 2010* (Cth) by force of section 131 of the *Competition and Consumer Act 2010* (Cth) (as in force on and from 1 January 2011), or alternatively section 16 of the *Fair Trading Act 1989* (Qld) (as in force on and from 1 January 2011);
 - (f) for negligence;
 - (g) for breach of contract; and
 - (h) in equity.
- 8 Contribution, whether equitable or pursuant to the *Law Reform Act 1995* (Qld).

9 Interest.

10 Costs.

11 Such further or other relief that the Court considers appropriate.

The Defendants make the claim in reliance on the facts alleged in the attached statement of claim of the Defendants.

AND TAKE NOTICE if you intend to dispute the claim against you, you must within 28 days of service upon you of this notice file a Notice of Intention to Defend in this Registry. If you do not comply with this requirement judgment may be given against you for the relief claimed without further notice to you and you will be bound by any judgment or decision given in this proceeding. Further, by Rule 201, if the Plaintiff obtains default judgment against the Defendants and you have filed no notice of intention to defend or defence, you are taken to admit the Defendants' claims and will be bound by the default judgment so far as it is relevant to the claim and the Defendants may obtain a judgment for contribution or indemnity against you after satisfying the default judgment or with the Court's leave before satisfying it. The Notice of Intention to Defend should be in Form 6 to the Uniform Civil Procedure Rules. You must serve a copy of it at the Defendants' address for service shown in this notice as soon as possible.

Address of Registry: Law Courts Complex, George Street, Brisbane Qld 4000

PARTICULARS OF THE DEFENDANTS:

Name:	EY (ALSO KNOWN AS ERNST & YOUNG) (A FIRM) PAULA MCLUSKIE MICHAEL JAMES REID
Residential or business address:	Level 51, 111 Eagle Street Brisbane Qld 4000
Name of solicitor or agent (<i>if any</i>):	Philip Pan
and firm name:	King & Wood Mallesons
Solicitor's business address:	Level 33, Waterfront Place, 1 Eagle Street, Brisbane Qld 4000
Address for service:	Level 33, Waterfront Place, 1 Eagle Street, Brisbane Qld 4000
Telephone:	61 7 3244 8000
Fax:	61 7 3244 8999

Signed: *Kj + Neal Miller*

Description: Solicitor for the Defendants

Dated: 1 March 2019

This notice is to be served on:

LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461

To: c/- FTI Consulting
22 Market Street
Brisbane Qld 4000

And to: Russells
Level 18, 300 Queen Street
Brisbane Qld 4000

LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 in its capacity as Responsible Entity for the LM Currency Protected Australian Income Fund (Receivers Appointed) ARSN 110 247 875

To: c/- Grant Thornton
Level 17, 383 Kent Street
Sydney NSW 2000

And to: HWL Ebsworth Lawyers
Level 19, 480 Queen Street
Brisbane Qld 4000

LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 in its capacity as Responsible Entity for the LM Institutional Currency Protected Australian Income Fund (Receivers Appointed) ARSN 122 052 868

To: c/- Grant Thornton
Level 17, 383 Kent Street
Sydney NSW 2000

And to: HWL Ebsworth Lawyers
Level 19, 480 Queen Street
Brisbane Qld 4000

Trilogy Funds Management Limited ACN 080 383 679 in its capacity as Responsible Entity for the LM Wholesale First Mortgage Income Fund ARSN 099 857 511

To: Level 23, 10 Eagle Street
Brisbane Qld 4000

And to: Squire Patton Boggs
Level 17, Aurora Place
Sydney NSW 2000

Lisa Maree Darcy

To: Unit 25, 35-43 Dailey Street
Queenscliff NSW 2096

And to: Rodgers Barnes & Green
Level 10, 300 Adelaide Street
Brisbane Qld 4000

Eghard van der Hoven

To: 10 Rowes Court
Sorrento Qld 4217

And to: James Conomos Lawyers
Level 12, 179 Turbot Street
Brisbane Qld 4001

Francene Maree Mulder

To: 109 Strawberry Road
Mudgeeraba Qld 4213

And to: James Conomos Lawyers
Level 12, 179 Turbot Street
Brisbane Qld 4001

John Francis O'Sullivan

To: Apartment 1110 Al Halawi
18 The Shoreline Palm
Jumeriah Al Halawi
Dubai
United Arab Emirates

Simon Jeremy Tickner

To: U1304 Wyndham Apartments
3108 Surfers Paradise Blvd
Surfers Paradise Qld 4217

And to: HW Litigation Pty Ltd
PO Box 1221
Southport Qld 4215

Grant Peter Fischer

To: Unit 146, 1 Moores Crescent
Varsity Lakes Qld 4227

And to: HW Litigation Pty Ltd
PO Box 1221
Southport Qld 4215

Angelo Venardos

To: c/- Brisbane Club Tower
Level 8, 241 Adelaide Street
Brisbane Qld 4000

Carolyn Anne Hodge

To: 47 Pinnaroo Street
Hope Island Qld 4212

And to: Capital Lawyers
GPO Box 1683
Canberra ACT 2601

Michelle Jackson

To: 47 Pinnaroo Street
Hope Island Qld 4212

Bruce Mackenzie

To: c/- Level 2, 108 Wickham Street
Fortitude Valley Qld 4006

Alexander David Monaghan

To: c/- Level 26, 480 Queen Street
Brisbane Qld 4000

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 2166/15

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

AND

First Defendant: **EY (ALSO KNOWN AS ERNST & YOUNG) (A FIRM)**

AND

Second Defendant: **PAULA MCLUSKIE**

AND

Third Defendant: **MICHAEL JAMES REID**

AND

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

AND

Second Third Party: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461 IN ITS CAPACITY AS
RESPONSIBLE ENTITY FOR THE LM CURRENCY
PROTECTED AUSTRALIAN INCOME FUND
(RECEIVERS APPOINTED) ARSN 110 247 875**

STATEMENT OF CLAIM
Filed on behalf of the Defendants
Form 16, Version 2
Uniform Civil Procedure Rules 1999
Rules 146, 193

King & Wood Mallesons
Level 33, Waterfront Place, 1 Eagle Street,
Brisbane Qld 4000
T +61 7 3244 8000
F +61 7 3244 8999
Ref: 607-0019182

AND

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

AND

Fourth Third Party: **TRILOGY FUNDS MANAGEMENT LIMITED ACN 080
383 679 IN ITS CAPACITY AS RESPONSIBLE ENTITY
FOR THE LM WHOLESALE FIRST MORTGAGE
INCOME FUND ARSN 099 857 511**

AND

Fifth Third Party: **LISA MAREE DARCY**

AND

Sixth Third Party: **EGHARD VAN DER HOVEN**

AND

Seventh Third Party: **FRANCENE MAREE MULDER**

AND

Eighth Third Party: **JOHN FRANCIS O'SULLIVAN**

AND

Ninth Third Party: **SIMON JEREMY TICKNER**

AND

Tenth Third Party: **GRANT PETER FISCHER**

AND

Eleventh Third Party: **ANGELO VENARDOS**

AND

Twelfth Third Party: **CAROLYN ANNE HODGE**

AND

Thirteenth Third Party: **MICHELLE JACKSON**

AND

Fourteenth Third Party: **BRUCE MACKENZIE**

AND

Fifteenth Third Party: **ALEXANDER DAVID MONAGHAN**

Filed in the Brisbane Registry on

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THIRD PARTY STATEMENT OF CLAIM

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

I BACKGROUND

- 1 In the sixth further amended statement of claim (**Claim**), the plaintiff has made certain allegations against the defendants.
- 2 If (which is denied) the plaintiff can establish the matters pleaded in the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead against the third parties as follows.
- 3 For the purpose of this third party claim, the defendants repeat paragraphs 8 to 28, 55, 61, 64, 65 and 118 to 122 of the Claim.

II THIRD PARTIES

- 4 The first third party, LM Investment Management Limited (In Liquidation) ACN 077 208 461 ("**LMIM**") is and was at all material times:
 - (a) a company duly incorporated according to law which was placed into liquidation on 1 August 2013;
 - (b) able to sue and be sued in its corporate name and style;
 - (c) the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288 ("**FMIF**"), a registered managed investment scheme under the *Corporations Act 2001* (Cth) ("**Act**");
 - (d) the responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875 (Receivers Appointed) ("**CPAIF**"), a registered managed investment scheme under the Act;
 - (e) the responsible entity of the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (Receivers Appointed) ("**ICPAIF**"), a registered managed investment scheme under the Act; and

- (f) the responsible entity of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 (“**WFMIF**”) until replaced on 16 November 2012 by Trilogy Funds Management Limited ACN 080 383 679.

5 The fifth to tenth third parties (“**Directors**”):

- (a) were persons capable of being sued at all material times; and
- (b) were directors and officers of LMIM at the following material times:
 - (i) in the case of the fifth third party, during the period from 12 September 2003 to 21 June 2012;
 - (ii) in the case of the sixth third party, during the period from 22 June 2006 to present;
 - (iii) in the case of the seventh third party, during the period from 30 September 2006 to present;
 - (iv) in the case of the eighth third party, during the period from 27 November 2007 to 30 September 2012;
 - (v) in the case of the ninth third party, during the period from 18 September 2008 to 13 July 2012; and
 - (vi) in the case of the tenth third party, during the period from 13 March 2012 to 12 August 2012.

6 The eleventh to fourteenth third parties were members of the compliance committee in respect of the FMIF (“**Committee Members**”) at the following material times:

- (a) in the case of the eleventh third party, during the period from 29 May 2007 to 29 September 2013;
- (b) in the case of the twelfth third party, during the period from 29 May 2007 to 5 May 2011;
- (c) in the case of the thirteenth third party, during the period from 13 December 2008 to 29 September 2013; and

- (d) in the case of the fourteenth third party, during the period from 5 May 2011 to 26 June 2012.

- 7 At all material times, the tenth third party was LMIM's chief financial officer ("CFO") and officer of LMIM for the purpose of section 9 of the Act.
- 8 At all material times, the fifteenth third party was LMIM's in-house legal counsel ("**In-House Counsel**") and officer of LMIM for the purpose of section 9 of the Act.

III LMIM TRUSTEE DUTIES

Statutory duties

- 9 At all material times, LMIM was subject to various statutory obligations pursuant to Chapter 5C of the Act as the responsible entity of the FMIF ("**LMIM Statutory Duties**"), as follows:
- (a) pursuant to section 601EA of the Act, when registering the Fund, to lodge an application with the Australian Securities and Investments Commission ("**ASIC**") with the following documents:
- (i) a copy of the scheme's constitution;
 - (ii) a copy of the scheme's compliance plan; and
 - (iii) a statement signed by its directors that:
 - (A) the scheme's constitution complies with sections 601GA and 601GB of the Act; and
 - (B) the scheme's compliance plan complies with section 601HA of the Act; and
- (b) pursuant to section 601FC(1) of the Act, when exercising its powers and carrying out its duties as the responsible entity of the FMIF:
- (i) to act honestly;

- (ii) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position;
- (iii) to act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests;
- (iv) to treat the members who hold interests of the same class equally and members who hold interests of different classes fairly;
- (v) to ensure the scheme's constitution at all times meets the requirements of sections 601GA and 601GB of the Act;
- (vi) to ensure that the scheme's compliance plan at all times meets the requirements of section 601HA of the Act;
- (vii) to comply with the scheme's compliance plan;
- (viii) to ensure that the property of the scheme is valued at regular intervals appropriate to the nature of the property;
- (ix) to ensure that all payments made out of scheme property are made in accordance with the scheme's constitution and the Act;
- (x) to report to ASIC any breach of the Act that relates to the scheme or has had, or is likely to have, a materially adverse effect on the interests of members as soon as practicable after it became aware of the breach; and
- (xi) carry out or comply with any other duty, not inconsistent with the Act, that is conferred on the responsible entity by the scheme's constitution.

Equitable duties

- 10 Pursuant to section 601FC(2) of the Act, LMIM held the FMIF scheme property on trust for the members of the FMIF.
- 11 At all material times, LMIM was subject to duties in equity as trustee of the FMIF scheme property for the members of the FMIF ("**LMIM's Equitable Duties**");

- (a) to preserve the trust property;
- (b) to keep proper accounts;
- (c) to exercise the same care that an ordinary prudent person of business would exercise in managing similar affairs of his or her own;
- (d) to exercise its powers in good faith and in the best interests of the members of the Funds;
- (e) not to prefer its own interests where its interests may be in conflict with the interests of the members of the FMIF; and
- (f) to adhere to the terms of the trust, comprising the constitution.

IV LMIM OFFICER DUTIES

Duties and liabilities of officers

- 12 Pursuant to section 601EA(4) of the Act, on application for registration of the FMIF, the Directors were required to certify that:
- (a) the constitution of the FMIF complies with sections 601GA and 601GB of the Act; and
 - (b) the compliance plan complies with sections 601HA of the Act.
- 13 At all material times, the Directors, the CFO and the In-House Counsel were subject to the following duties (“**Officer Duties**”):
- (a) pursuant to section 601FD(1) of the Act:
 - (i) to act honestly;
 - (ii) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer’s position;
 - (iii) to act in the best interests of the members and, if there is a conflict of interest between the members’ interests and the interests of the responsible entity, give priority to the members’ interests;

- (iv) to not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
 - (v) to take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with the Act, any conditions imposed on the responsible entity's Australian financial services licence, the scheme's constitution and the scheme's compliance plan;
- (b) pursuant to section 180 of the Act and at general law, to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position occupied the office held by, and had the same responsibilities within the corporation as, the director or officer; and
 - (c) pursuant to section 181 of the Act and at general law, to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.

Duties of Committee Members

- 14 At all material times, pursuant to section 601JA(1) of the Act, LMIM was required to establish, and did in fact establish, a compliance committee in respect of the FMIF ("**Compliance Committee**").
- 15 Pursuant to section 601JC(1) of the Act, the function of the Compliance Committee was:
 - (a) to report to what extent the responsible entity complies with the scheme's compliance plan and to report on its findings to the responsible entity;
 - (b) to report to the responsible entity any breach of the Act involving the scheme or any breach of the provisions included in the scheme's constitution in accordance with section 601GA of the Act, of which the committee become aware of that it suspects;

- (c) to report to ASIC if the committee is of the view that the responsible entity has not taken, or does not propose to take, appropriate action to deal with a matter reported to the responsible entity; and
- (d) to assess at regular intervals whether the compliance plan is adequate, to report to the responsible entity on the assessment and to make recommendations to the responsible entity about any changes that is considers should be made to the plan.

16 At all material times, pursuant to section 601JD(1) of the Act and at general law, the Committee Members were subject to the following statutory and general law duties ("**Committee Member Duties**"):

- (a) to act honestly;
- (b) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the committee member's position;
- (c) to not make use of their position as a member of the committee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
- (d) to take reasonable steps to assist ASIC in carrying out a check.

Duties of CFO

17 At all material times, the CFO was subject to the following duties ("**CFO Duties**"):

- (a) under the FMIF's compliance plan, to monitor any unusual fee payments and the services agreements between LMIM and any related parties, including LM Administration Pty Ltd ("**LMA**"); and
- (b) under the FMIF's compliance plan, to perform annual reviews to verify that those agreements were commercial.

Duties of In-House Counsel

18 At all material times, the In-House Counsel owed LMIM and the respective Funds the following duties at general law ("**In-House Counsel Duties**"):

- (a) to act competently and diligently; and
- (b) to comply with the law and avoid conflict.

V BREACHES BY LMIM

19 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 64 and 65 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) LMIM contravened section 296 of the Act in failing to ensure that each annual financial report prepared by LMIM on behalf of the FMIF complied with applicable Australian Accounting Standards;
- (b) LMIM contravened section 304 of the Act in failing to ensure that each half-year financial report prepared by LMIM on behalf of the FMIF complied with applicable Australian Accounting Standards;
- (c) LMIM contravened section 297 of the Act in failing to ensure that each annual financial report prepared by LMIM on behalf of the FMIF gave a true and fair view of the financial position and financial performance of the FMIF; and
- (d) LMIM contravened section 305 of the Act in failing to ensure that each half-year financial report prepared by LMIM on behalf of the FMIF gave a true and fair view of the financial position and financial performance of the FMIF.

20 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 119 to 121 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) by reason of the matters referred to in paragraph 119 of the Claim, LMIM contravened section 601FC(1)(h) of the Act;
- (b) by reason of the matters referred to in paragraph 120 of the Claim, LMIM contravened section 601FC(1)(g) of the Act;
- (c) by reason of the matters referred to in paragraph 121(c) of the Claim, LMIM contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
- (d) by reason of the matters referred to in paragraph 121(d) of the Claim, LMIM contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
- (e) by reason of the matters referred to in paragraph 121(e) of the Claim, LMIM contravened sections 601FC(1)(b), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
- (f) by reason of the matters referred to in paragraph 121(f) of the Claim, LMIM contravened sections 601FC(1)(b), 601FC(1)(c), 601FC(1)(k) and/or 601FC(1)(m) of the Act; and
- (g) by reason of the matters referred to in paragraph 121(g) of the Claim, LMIM contravened sections 601FC(1)(b), 601FC(1)(c), 601FC(1)(k) and/or 601FC(1)(m) of the Act.

21 In consequence of the matters referred to in paragraphs 19 and 20 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then in consequence they have suffered, and are liable to suffer, loss or damage in the form of legal costs and any adverse judgment in the proceedings;
- (b) such loss is or will be suffered by reason of the conduct of LMIM in contravention of Chapter 5C of the Act; and
- (c) the defendants seek relief against LMIM under section 1325 of the Act in order to compensate them for the loss or damage or to prevent or to reduce the loss or damage.

- 22 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 79 to 83 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants allege that the making of the payments pleaded therein was a breach of LMIM's Equitable Duties.
- 23 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 84 to 97 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants that the making of the payments pleaded therein was a breach of LMIM's Equitable Duties.
- 24 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 98 to 105 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants allege that the making of the payments pleaded therein was a breach of LMIM's Equitable Duties.
- 25 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 106 to 113 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants allege that the making of the payments pleaded therein was a breach of LMIM's Equitable Duties.
- 26 In consequence of the matters referred to in paragraphs 22 to 25 above:
- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then they will be liable for the losses consequent upon LMIM's breach of LMIM's Equitable Duties as pleaded in paragraphs 22 to 25 above;
 - (b) LMIM is likewise liable for LMIM's breach of LMIM's Equitable Duties as pleaded in paragraphs 22 to 25 above;
 - (c) such losses are common and coordinate and the defendants are entitled to equitable compensation from LMIM in respect of any amounts which the defendants may be ordered to pay to the plaintiff; and

- (d) further, or in the alternative, LMIM and the defendants are tortfeasors liable to the plaintiff in respect of the same damage within the meaning of section 6(c) of the *Law Reform Act 1995* (Qld) (“**LRA**”) and the defendants are entitled to orders in the nature of indemnity or contribution from LMIM under section 6(c) of the LRA in respect of any amounts which the defendants may be ordered to pay to the plaintiff.

VI BREACHES BY DIRECTORS

27 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 64 and 65 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) ss 295(1)(c), (4) and (5), 296, 297, 303(1)(c), (4) and (5), 304 and 305 of the Act together required that each of the financial reports prepared by LMIM on behalf of the FMIF included a declaration by the then Directors as to whether, in the Directors’ opinion, the financial statements and notes to the financial statements:
- (i) complied with the Accounting Standards; and
 - (ii) gave a true and fair view of the financial position and performance of FMIF;
- (b) the Directors gave such declarations, as pleaded in paragraph 61 of the Claim (“**Directors’ Declarations**”);
- (c) the Directors lodged with ASIC each of the financial reports prepared by LMIM on behalf of the FMIF together with the Directors’ Declarations, as pleaded in paragraph 62 of the Claim;
- (d) the Directors made available to members each of the financial reports prepared by LMIM on behalf of the FMIF together with the Directors’ Declarations, as pleaded in paragraph 63 of the Claim;

- (e) by authorising the issuing of the financial reports with the Directors' Declarations the Directors represented to members of the FMIF and the defendants that:
 - (i) they held the view that the financial statements and notes to the financial statements:
 - (A) complied with the Accounting Standards; and
 - (B) gave a true and fair view of the financial position and performance of FMIF;
 - (ii) such opinion resulted from the application of the Australian Accounting Standards; and
 - (iii) such opinion was held on a reasonable basis and was the product of the application of reasonable care and skill by each relevant Director; and
- (f) if the plaintiff can establish the matters pleaded in paragraphs 64 and 65 of the Claim the Directors:
 - (i) failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position;
 - (ii) failed to take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with the Act, any conditions imposed on the responsible entity's Australian financial services licence, the scheme's constitution and the scheme's compliance plan; and
 - (iii) in the premises, contravened sections 180 and/or 601FD(1) of the Act and/or their Officer Duties.

28 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 119 to 121 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) by reason of the matters referred to in paragraph 119 of the Claim:
 - (i) LMIM contravened section 601FC(1)(h) of the Act;
 - (ii) the Directors contravened sections 601FD(1)(b) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, each of the Directors was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,

within the meaning of sections 79(a), (c) and (d) respectively of the Act; and
 - (iv) in the premises, the Directors contravened section 601FC(5) of the Act;
- (b) by reason of the matters referred to in paragraph 120 of the Claim:
 - (i) LMIM contravened section 601FC(1)(g) of the Act;
 - (ii) the Directors contravened sections 601FD(1)(b) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, in the circumstances of section 601EA(4) of the Act, each of the Directors was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,

within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and

- (iv) in the premises, the Directors contravened section 601FC(5) of the Act;
- (c) by reason of the matters referred to in paragraph 121(c) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the Directors contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, each of the Directors was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and
 - (iv) in the premises, the Directors contravened section 601FC(5) of the Act;
- (d) by reason of the matters referred to in paragraph 121(d) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the Directors contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, each of the Directors was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:

- (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
- within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and
- (iv) in the premises, the Directors contravened section 601FC(5) of the Act;
- (e) by reason of the matters referred to in paragraph 121(e) of the Claim:
- (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the Directors contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, each of the Directors was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,

within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and
 - (iv) in the premises, the Directors contravened section 601FC(5) of the Act;
- (f) by reason of the matters referred to in paragraph 121(f) of the Claim:
- (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(c), 601FC(1)(k) and/or 601FC(1)(m) of the Act;

- (ii) the Directors contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
- (iii) further or in the alternative, each of the Directors was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and
- (iv) in the premises, the Directors contravened section 601FC(5) of the Act; and
- (g) by reason of the matters referred to in paragraph 121(g) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(c), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the Directors contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, each of the Directors was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and

(iv) in the premises, the Directors contravened section 601FC(5) of the Act.

29 In consequence of the matters referred to in paragraphs 27 and 28 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then in consequence they have suffered, and are liable to suffer, loss or damage in the form of legal costs and any adverse judgment in the proceedings;
- (b) such loss is or will be suffered by reason of the conduct of the Directors in contravention of Chapter 5C of the Act; and
- (c) the defendants seek relief against the Directors under section 1325 of the Act in order to compensate them for the loss or damage or to prevent or to reduce the loss or damage.

30 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 79 to 83 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF; and
- (b) in the premises, comprised a contravention by the Directors of sections 180 and/or 181 of the Act and/or their Officer Duties.

31 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 84 to 97 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF; and

- (b) in the premises, comprised a contravention by the Directors of sections 180 and/or 181 of the Act and/or their Officer Duties.

32 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 98 to 105 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:

- (i) contrary to the constitution; and
- (ii) not in the best interests of FMIF; and

- (b) in the premises, comprised a contravention by the Directors of sections 180 and/or 181 of the Act and/or their Officer Duties.

33 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 106 to 113 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:

- (i) contrary to the constitution; and
- (ii) not in the best interests of FMIF; and

- (b) in the premises, comprised a contravention by the Directors of sections 180 and/or 181 of the Act and/or their Officer Duties.

34 In consequence of the matters referred to in paragraphs 27 to 33 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then they will be liable for the losses consequent upon the contraventions by the Directors as pleaded in paragraphs 27 to 33 above;

- (b) the Directors have a common and coordinate liability with the defendants in respect of the damage recoverable by the plaintiff from the defendants and the defendants are entitled to equitable contribution in respect of any amounts which the defendants may be ordered to pay to the plaintiff; and
- (c) further, or in the alternative, the Directors and the defendants are tortfeasors liable to the plaintiff in respect of the same damage within the meaning of section 6(c) of the LRA and the defendants are entitled to orders in the nature of indemnity or contribution from the third parties under section 6(c) of the LRA in respect of any amounts which the defendants may be ordered to pay to the plaintiff.

VII BREACHES BY COMMITTEE MEMBERS

35 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 119 to 121 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) by reason of the matters referred to in paragraph 119 of the Claim:
 - (i) LMIM contravened section 601FC(1)(h) of the Act;
 - (ii) the Committee Members contravened sections 601JD(1)(b) of the Act;
 - (iii) further or in the alternative, each of the Committee Members was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
- within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and

- (iv) in the premises, each of the Committee Members contravened section 601FC(5) of the Act;
- (b) by reason of the matters referred to in paragraph 120 of the Claim:
 - (i) LMIM contravened section 601FC(1)(g) of the Act;
 - (ii) the Committee Members contravened sections 601JD(1)(b) of the Act;
 - (iii) further or in the alternative, each of the Committee Members was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,

within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and
 - (iv) in the premises, each of the Committee Members contravened section 601FC(5) of the Act;
- (c) by reason of the matters referred to in paragraph 121(c) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the Committee Members contravened sections 601JD(1)(b) of the Act
 - (iii) further or in the alternative, each of the Committee Members was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or

- (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act;
 and
- (iv) in the premises, each of the Committee Members contravened section 601FC(5) of the Act;
- (d) by reason of the matters referred to in paragraph 121(d) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the Committee Members contravened sections 601JD(1)(b) of the Act;
 - (iii) further or in the alternative, each of the Committee Members was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act;
 and
 - (iv) in the premises, each of the Committee Members contravened section 601FC(5) of the Act;
- (e) by reason of the matters referred to in paragraph 121(c) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the Committee Members contravened sections 601JD(1)(b) of the Act;

- (iii) further or in the alternative, each of the Committee Members was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and
- (iv) in the premises, each of the Committee Members contravened section 601FC(5) of the Act;
- (f) by reason of the matters referred to in paragraph 121(f) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(c), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the Committee Members contravened sections 601JD(1)(b) of the Act;
 - (iii) further or in the alternative, each of the Committee Members was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and
 - (iv) in the premises, each of the Committee Members contravened section 601FC(5) of the Act;

- (g) by reason of the matters referred to in paragraph 121(g) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(c), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the Committee Members contravened sections 601JD(1)(b) of the Act;
 - (iii) further or in the alternative, each of the Committee Members was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and
 - (iv) in the premises, the Committee Members contravened section 601FC(5) of the Act.

36 In consequence of the matters referred to in paragraph 35 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then in consequence they have suffered, and are liable to suffer, loss or damage in the form of legal costs and any adverse judgment in the proceedings;
- (b) such loss is or will be suffered by reason of the conduct of the Committee Members in contravention of Chapter 5C of the Act; and
- (c) the defendants seek relief against the Committee Members under section 1325 of the Act in order to compensate them for the loss or damage or to prevent or to reduce the loss or damage.

37 In further consequence of the matters referred to in paragraph 35 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then they will be liable for the losses consequent upon the contraventions by the Committee Members as pleaded in paragraph 35 above;
- (b) the Committee Members have a common and coordinate liability with the defendants in respect of the damage recoverable by the plaintiff from the defendants and the defendants are entitled to equitable contribution in respect of any amounts which the defendants may be ordered to pay to the plaintiff; and
- (c) further, or in the alternative, the Committee Members and the defendants are tortfeasors liable to the plaintiff in respect of the same damage within the meaning of section 6(c) of the LRA and the defendants are entitled to orders in the nature of indemnity or contribution from the third parties under section 6(c) of the LRA in respect of any amounts which the defendants may be ordered to pay to the plaintiff.

VIII BREACHES BY CFO

38 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 64 and 65 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) ss 295(1)(c), (4) and (5), 296, 297, 303(1)(c), (4) and (5), 304 and 305 of the Act together required that each of the financial reports prepared by LMIM on behalf of the FMIF included a declaration by the then Directors as to whether, in the Directors' opinion, the financial statements and notes to the financial statements:
 - (i) complied with the Accounting Standards; and
 - (ii) gave a true and fair view of the financial position and performance of FMIF;
- (b) the Directors gave the Directors' Declarations;

- (c) the Directors lodged with ASIC each of the financial reports prepared by LMIM on behalf of the FMIF together with the Directors' Declarations, as pleaded in paragraph 62 of the Claim;
- (d) the Directors made available to members each of the financial reports prepared by LMIM on behalf of the FMIF together with the Directors' Declarations, as pleaded in paragraph 63 of the Claim;
- (e) the CFO as LMIM's chief financial officer knew and intended that the Directors would act in the manner referred to in sub-paragraphs (a) – (d);
- (f) by authorising the issuing of the financial reports with the Directors' Declarations the CFO as LMIM's chief financial officer represented to members of the FMIF and the defendants that:
 - (i) he held the view that the financial statements and notes to the financial statements:
 - (A) complied with the Accounting Standards; and
 - (B) gave a true and fair view of the financial position and performance of FMIF;
 - (ii) such opinion resulted from the application of the Australian Accounting Standards; and
 - (iii) such opinion was held on a reasonable basis and was the product of the application of reasonable care and skill by each relevant Director; and
- (g) if the plaintiff can establish the matters pleaded in paragraphs 64 and 65 of the Claim the CFO as LMIM's chief financial officer:
 - (i) failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the CFO's position;

- (ii) failed to take all steps that a reasonable person would take, if they were in the CFO's position, to ensure that the responsible entity complies with the Act, any conditions imposed on the responsible entity's Australian financial services licence, the scheme's constitution and the scheme's compliance plan; and
- (iii) in the premises, contravened sections 180 and/or 601FD(1) of the Act and/or his Officer Duties.

39 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 119 to 121 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) by reason of the matters referred to in paragraph 119 of the Claim:
 - (i) LMIM contravened section 601FC(1)(h) of the Act;
 - (ii) the CFO contravened sections 601FD(1)(b) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, the CFO was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and
 - (iv) in the premises, the CFO contravened section 601FC(5) of the Act;
- (b) by reason of the matters referred to in paragraph 120 of the Claim:
 - (i) LMIM contravened section 601FC(1)(g) of the Act;

- (ii) the CFO contravened sections 601FD(1)(b) and/or 601FD(1)(f) of the Act;
- (iii) further or in the alternative, in the circumstances of section 601EA(4) of the Act, the CFO was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,

within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and
- (iv) in the premises, the CFO contravened section 601FC(5) of the Act;
- (c) by reason of the matters referred to in paragraph 121(c) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the CFO contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, the CFO was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,

within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and
 - (iv) in the premises, the CFO contravened section 601FC(5) of the Act;

- (d) by reason of the matters referred to in paragraph 121(d) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the CFO contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, the CFO was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he or she:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and
 - (iv) in the premises, the CFO contravened section 601FC(5) of the Act;
- (e) by reason of the matters referred to in paragraph 121(e) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the CFO contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, the CFO was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,

within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and

- (iv) in the premises, the CFO contravened section 601FC(5) of the Act;
- (f) by reason of the matters referred to in paragraph 121(f) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(c), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the CFO contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, the CFO was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and
 - (iv) in the premises, the CFO contravened section 601FC(5) of the Act;
- (g) by reason of the matters referred to in paragraph 121(g) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(c), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the CFO contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, the CFO was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;

(B) was knowingly concerned in, or party to, the contraventions; or

(C) conspired with LMIM to effect the contraventions,

within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and

(iv) in the premises, the CFO contravened section 601FC(5) of the Act.

40 In consequence of the matters referred to in paragraphs 38 and 39 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then in consequence they have suffered, and are liable to suffer, loss or damage in the form of legal costs and any adverse judgment in the proceedings;
- (b) such loss is or will be suffered by reason of the conduct of the CFO in contravention of Chapter 5C of the Act;
- (c) the defendants seek relief against the CFO under section 1325 of the Act in order to compensate them for the loss or damage or to prevent or to reduce the loss or damage.

41 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 79 to 83 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF;
- (b) the CFO failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the CFO's position; and
- (c) in the premises, the CFO contravened his CFO Duties and/or Officer Duties.

42 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 84 to 97 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF;
- (b) the CFO failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the CFO's position; and
- (c) in the premises, the CFO contravened his CFO Duties and/or Officer Duties.

43 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 98 to 105 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF;
- (b) the CFO failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the CFO's position; and
- (c) in the premises, the CFO contravened his CFO Duties and/or Officer Duties.

44 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 106 to 113 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF;
- (b) the CFO failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the CFO's position; and
- (c) in the premises, the CFO contravened his CFO Duties and/or Officer Duties.

45 In consequence of the matters referred to in paragraphs 41 to 44 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then they will be liable for the losses consequent upon the contraventions by the CFO as pleaded in paragraphs 41 to 44 above;
- (b) the CFO has a common and coordinate liability with the defendants in respect of the damage recoverable by the plaintiff from the defendants and the defendants are entitled to equitable contribution in respect of any amounts which the defendants may be ordered to pay to the plaintiff; and
- (c) further, or in the alternative, the CFO and the defendants are tortfeasors liable to the plaintiff in respect of the same damage within the meaning of section 6(c) of the LRA and the defendants are entitled to orders in the nature of indemnity or contribution from the third parties under section 6(c) of the LRA in respect of any amounts which the defendants may be ordered to pay to the plaintiff.

IX BREACHES BY IN-HOUSE COUNSEL

46 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 119 to 121 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) by reason of the matters referred to in paragraph 119 of the Claim:
 - (i) LMIM contravened section 601FC(1)(h) of the Act;

- (ii) the In-House Counsel contravened sections 601FD(1)(b) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, the In-House Counsel was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and
 - (iv) in the premises, the In-House Counsel contravened section 601FC(5) of the Act;
- (b) by reason of the matters referred to in paragraph 120 of the Claim:
- (i) LMIM contravened section 601FC(1)(g) of the Act;
 - (ii) the In-House Counsel contravened sections 601FD(1)(b) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, in the circumstances of section 601EA(4) of the Act, the In-House Counsel was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and

- (iv) in the premises, the In-House Counsel contravened section 601FC(5) of the Act;
- (c) by reason of the matters referred to in paragraph 121(c) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the In-House Counsel contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, the In-House Counsel was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and
 - (iv) in the premises, the In-House Counsel contravened section 601FC(5) of the Act;
- (d) by reason of the matters referred to in paragraph 121(d) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the In-House Counsel contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, the In-House Counsel was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:

- (A) aided, abetted, counselled or procured the contraventions;
- (B) was knowingly concerned in, or party to, the contraventions; or
- (C) conspired with LMIM to effect the contraventions,

within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and

- (iv) in the premises, the In-House Counsel contravened section 601FC(5) of the Act;

(e) by reason of the matters referred to in paragraph 121(e) of the Claim:

- (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
- (ii) the In-House Counsel contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
- (iii) further or in the alternative, the In-House Counsel was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:

- (A) aided, abetted, counselled or procured the contraventions;
- (B) was knowingly concerned in, or party to, the contraventions; or
- (C) conspired with LMIM to effect the contraventions,

within the meaning of sections 79(a), (c) and (d) respectively of the Act;
and

- (iv) in the premises, the In-House Counsel contravened section 601FC(5) of the Act;

(f) by reason of the matters referred to in paragraph 121(f) of the Claim:

- (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(c), 601FC(1)(k) and/or 601FC(1)(m) of the Act;

- (ii) the In-House Counsel contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
- (iii) further or in the alternative, the In-House Counsel was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and
- (iv) in the premises, the In-House Counsel contravened section 601FC(5) of the Act;
- (g) by reason of the matters referred to in paragraph 121(g) of the Claim:
 - (i) LMIM contravened sections 601FC(1)(b), 601FC(1)(c), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) the In-House Counsel contravened sections 601FD(1)(c) and/or 601FD(1)(f) of the Act;
 - (iii) further or in the alternative, the In-House Counsel was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that he:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act; and

- (iv) in the premises, the In-House Counsel contravened section 601FC(5) of the Act.

47 In consequence of the matters referred to in paragraph 46 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then in consequence they have suffered, and are liable to suffer, loss or damage in the form of legal costs and any adverse judgment in the proceedings;
- (b) such loss is or will be suffered by reason of the conduct of the In-House Counsel in contravention of Chapter 5C of the Act; and
- (c) the defendants seek relief against the In-House Counsel under section 1325 of the Act in order to compensate them for the loss or damage or to prevent or to reduce the loss or damage.

48 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 79 to 83 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF;
- (b) the In-House Counsel:
 - (i) had a duty to inquire and to ascertain, and to understand and advise upon, all of those transactions;
 - (ii) advised uncritically on those transactions, or failed to ascertain the nature of those transactions and thereby failed to advise upon those transactions; and

- (iii) failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the In-House Counsel's position; and

- (c) in the premises, the In-House Counsel contravened his Officer Duties and/or In-House Counsel Duties.

49 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 84 to 97 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:

- (i) contrary to the constitution; and

- (ii) not in the best interests of FMIF;

- (b) the In-House Counsel:

- (i) had a duty to inquire and to ascertain, and to understand and advise upon, all of those transactions;

- (ii) advised uncritically on those transactions, or failed to ascertain the nature of those transactions and thereby failed to advise upon those transactions; and

- (iii) failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the In-House Counsel's position; and

- (c) in the premises, the In-House Counsel contravened his Officer Duties and/or In-House Counsel Duties.

50 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 98 to 105 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF;
- (b) the In-House Counsel:
 - (i) had a duty to inquire and to ascertain, and to understand and advise upon, all of those transactions;
 - (ii) advised uncritically on those transactions, or failed to ascertain the nature of those transactions and thereby failed to advise upon those transactions; and
 - (iii) failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the In-House Counsel's position; and
- (c) in the premises, the In-House Counsel contravened his Officer Duties and/or In-House Counsel Duties.

51 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 106 to 113 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF;
- (b) the In-House Counsel:
 - (i) had a duty to inquire and to ascertain, and to understand and advise upon, all of those transactions;

- (ii) advised uncritically on those transactions, or failed to ascertain the nature of those transactions and thereby failed to advise upon those transactions; and
- (iii) failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the In-House Counsel's position; and
- (c) in the premises, the In-House Counsel contravened his Officer Duties and/or In-House Counsel Duties.

52 In consequence of the matters referred to in paragraphs 46 to 51 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then they will be liable for the losses consequent upon the contraventions by the In-House Counsel as pleaded in paragraphs 46 to 51 above;
- (b) the In-House Counsel has a common and coordinate liability with the defendants in respect of the damage recoverable by the plaintiff from the defendants and the defendants are entitled to equitable contribution in respect of any amounts which the defendants may be ordered to pay to the plaintiff; and
- (c) further, or in the alternative, the In-House Counsel and the defendants are tortfeasors liable to the plaintiff in respect of the same damage within the meaning of section 6(c) of the LRA and the defendants are entitled to orders in the nature of indemnity or contribution from the third parties under section 6(c) of the LRA in respect of any amounts which the defendants may be ordered to pay to the plaintiff.

X BREACH OF LMIM RETAINERS

53 For the purpose of this third party claim, the defendants repeat paragraphs 29 to 33 of the Claim as to the terms of the engagement of the defendants ("**Retainers**") by LMIM in its capacity as responsible entity of the FMIF to audit ("**Audit**") and review ("**Review**") the FMIF.

54 There were terms of the Retainers that:

- (a) the defendants would make inquiries of management of LMIM about the representations contained in the financial reports;
- (b) the defendants would also obtain written representations from certain members of management of LMIM as to certain matters required by the Australian Auditing Standards;
- (c) the defendants would rely upon the responses from management to the defendants' inquiries and the written representations from certain members of management of LMIM in forming their opinions;
- (d) the responses from management to the defendants' inquiries and the written representations from certain members of management of LMIM would:
 - (i) be the product of reasonable inquiry;
 - (ii) be the product of due care and skill, commensurate with the skills and experience of the member of management of LMIM;
 - (iii) only be given if there was a reasonable basis for the making of the representation; and
 - (iv) be qualified insofar as the person making the representation was unable to give a reliable and unqualified representation; and
- (e) the responses from management to the defendants' inquiries and the written representations from certain members of management of LMIM comprised acts and omissions (as the case may be) of LMIM acting as the responsible entity, and trustee of the property of, FMIF.

Particulars

- (i) The terms referred to in paragraphs (a) to (c) are express terms at clause 10 of the annexure to the Retainers headed "Our responsibilities and your responsibilities".

- (ii) The term referred to in paragraph (d) is to be implied in fact as being clear, obvious (in light of the terms referred to at (a) to (c)), reasonable and equitable, necessary to give business efficacy to the Retainers, and not inconsistent with any express term of the Retainers.
- (iii) The term referred to in paragraph (e) is to be implied in law insofar as the actions of management of LMIM referred to therein are to be attributed to LMIM acting in its capacity as the responsible entity, and trustee of the property of, FMIF in the course of preparing financial statements for the FMIF.
- (iv) Alternatively, the term referred to in paragraph (e) is to be implied in fact as being clear, obvious (in light of the law of trusts), reasonable and equitable, necessary to give business efficacy to the Retainers, and not inconsistent with any express term of the Retainers.

55 Express written representations were made to the defendants by the third parties, which pertained to each of the Audits and Reviews, and for the express purpose of enabling the defendants to form their opinions ("**Representations**"):

- (a) as relates to each of the financial audits and reviews and the compliance audits for the years ended 30 June 2008, 30 June 2009 and 30 June 2010 and the half-years ended 31 December 2008, 31 December 2009 and 31 December 2010:
 - (i) the financial report gives a true and fair view of the financial position and financial performance of the FMIF in accordance with Accounting Standards and other mandatory financial reporting requirements in Australia and the Act and are free of material misstatements, including omissions;
 - (ii) the FMIF has a system of internal controls adequate to permit the preparation of accurate financial reports in accordance with Accounting Standards and other mandatory financial reporting requirements in Australia and the Act;

- (iii) all known actual or possible noncompliance with laws and regulations have been disclosed to the defendants whose effect should be considered when preparing the financial report;
 - (iv) all financial records and related data have been made available to the defendants;
 - (v) the requirements of AASB139 – Impairment of Assets have been considered when assessing the carrying values of non-current assets and in ensuring that no non-current assets are stated in excess of their recoverable amount;
 - (vi) the recoverability of mortgage loans advanced by the FMIF has been subject to assessment by management and the carrying value of these loans in the financial report is considered appropriate;
 - (vii) other than described in the financial report, there have been no events subsequent to period end which require adjustment of or disclosure in the financial report or notes thereto; and
 - (viii) all requirements of the FMIF's constitution have been complied with during the financial year;
- (b) as relates to each of the financial audits and reviews and the compliance audits for the years ended 30 June 2011 and 30 June 2012 and the half-year ended 31 December 2011:
- (i) the financial report gives a true and fair view of the financial position and financial performance of the FMIF in accordance with Accounting Standards and other mandatory financial reporting requirements in Australia and the Act and are free of material misstatements, including omissions;
 - (ii) the responsibilities, as set out in the terms of the audit engagement letter, have been fulfilled for the preparation of the financial report in accordance with Australian Accounting Standards and the Act;

- (iii) the FMIF has a system of internal controls adequate to permit the preparation of accurate financial reports in accordance with Accounting Standards and other mandatory financial reporting requirements in Australia and the Act;
- (iv) all known actual or possible noncompliance with laws and regulations have been disclosed to the defendants whose effect should be considered when preparing the financial report;
- (v) access to all information that is relevant to the preparation of the financial report such as records, documentation and other matters has been provided to the defendants;
- (vi) the requirements of AASB139 – Impairment of Assets have been considered when assessing the carrying values of non-current assets and in ensuring that no non-current assets are stated in excess of their recoverable amount;
- (vii) the recoverability of mortgage loans advanced by the FMIF has been subject to assessment by management and the carrying value of these loans in the financial report is considered appropriate;
- (viii) the recoverability of certain mortgages loans advances requires sourcing of additional funds to finalise the construction of these projects in order to realise / recover the outstanding loan balance, and management has assessed the accessibility of these funds and is satisfied that the monies required will be obtained to support the recoverability of these loans;
- (ix) other than described in the financial report, there have been no events subsequent to period end which require adjustment of or disclosure in the financial report or notes thereto; and
- (x) all requirements of the FMIF's constitution have been complied with during the financial year;

- (c) specific to the financial audit for the year ended 30 June 2008, the loan receivable from LM Managed Performance Fund (“MPF”) was assigned to the FMIF on 30 June 2008 and is under normal terms and conditions and is an arms length transaction;
- (d) specific to the financial audit for the year ended 30 June 2011:
 - (i) the recoverability of prepaid management fees from the FMIF to LMA has been subject to assessment by management and the carrying value of the prepayment in the financial report is considered appropriate;
 - (ii) during August 2008, 3 mortgage loans were assigned from the FMIF to the MPF, the repayment of which allowed the MPF to directly pay fund expenses and net settlements on foreign currency trades on behalf of the FMIF and its feeder funds; and
 - (iii) those payments have been reflected as a reduction of the loan receivable from the MPF and the payments made on behalf of the feeder funds by the MPF are repaid by the feeder funds through redemption of their investment in the FMIF;
- (e) specific to the compliance audits, that in the opinion of LMIM as responsible entity for the FMIF, to the best of its knowledge and belief:
 - (i) the compliance plans were in all respects complied with; and
 - (ii) the compliance plans continue to meet the requirements of the Act; and
- (f) specific to the compliance audit for the years ended 30 June 2011 and 30 June 2012, that in the opinion of LMIM as responsible entity for the FMIF, to the best of its knowledge and belief, other than certain identified breaches, there were no other reportable breaches that occurred during the period.

Particulars

- (i) In respect of paragraph (a), various representation letters set out in the table below addressed to the defendants on LMIM’s letterhead in respect of each Audit and Review.

Date	Signed by
9 March 2009	Fifth third party, as executive director, and tenth third party, as chief financial officer
16 June 2009	Sixth third party, as executive director, and tenth third party, as chief financial officer
7 June 2010	Fifth third party, as executive director, and tenth third party, as chief financial officer
6 October 2010	Fifth third party, as executive director, and tenth third party, as chief financial officer
27 June 2011	Fifth third party, as executive director, and tenth third party, as chief financial officer

- (ii) In respect of paragraph (b), various representation letters as set out in the table below addressed to the defendants on LMIM's letterhead in respect of each Audit and Review.

Date	Signed by
16 September 2011	Fifth third party, as executive director, and tenth third party, as chief financial officer
15 March 2012	Fifth third party, as executive director, and tenth third party, as chief financial officer
16 November 2012	Fifth third party, as executive director, and tenth third party, as chief financial officer

- (iii) In respect of paragraph (c), representation letter addressed to the defendants on LMIM's letterhead and signed by the fourth third party, as executive director, and the tenth third party, as chief financial officer, dated 9 March 2009.
- (iv) In respect of paragraph (d), representation letter addressed to the defendants on LMIM's letterhead and signed by the fourth third party, as executive director, and the tenth third party, as chief financial officer, dated 16 September 2011.
- (v) In respect of paragraph (e), various representation letters as set out in the table below addressed to the defendants on LMIM's letterhead in respect of each compliance audit.

Date	Signed by
11 May 2009	Twelfth third party, as compliance officer, and Peter Drake, as director
16 September 2011	Fifth third party, as executive director, twelfth third party, as business standard and compliance manager, and tenth third party, as business standard and compliance manager
26 November 2012	Twelfth third party, as business standards and compliance manager, and Peter Drake, as executive director

- (vi) In respect of paragraph (f):
 - (A) representation letter addressed to the defendants on LMIM's letterhead and signed by the fourth third party, as executive director, the twelfth third party, as business standard and compliance manager, and the fourteenth third party, as business standard and compliance manager, dated 16 September 2011; and

- (B) representation letter addressed to the defendants on LMIM's letterhead and signed by the twelfth third party, as business standards and compliance manager, and Peter Drake, as executive director, dated 26 November 2012.

- 56 The Representations were given to the defendants by LMIM acting as the responsible entity, and trustee of the property of, FMIF, in performance of the Retainers.
- 57 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 64, 65 and 119 to 121 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:
- (a) the defendants repeat paragraphs 27, 28, 30 to 33 and 35 above;
 - (b) by reason thereof, the Representations were given in breach of the term of the Retainers referred to at paragraph 54(d) above; and
 - (c) in the premises, any such breach of the Retainers was that of LMIM acting as the responsible entity, and trustee of the property of, FMIF.
- 58 The defendants relied upon the Representations in the course of the preparation of the Audits and the Reviews.
- 59 If (which is denied) the defendants are liable in the manner alleged in the Claim:
- (a) they will have suffered loss and damage in consequence of the breach of the Retainers referred to in paragraph 57 above to the extent of its liability to the plaintiff; and
 - (b) they claim damages from LMIM for breach of the Retainers.

XI DUTY OF CARE OWED TO THE DEFENDANTS

- 60 In the premises of paragraphs 53 to 55 above, each of LMIM and the persons making the Representations as referred to in the particulars sub-joined to paragraph 55 above owed a duty of care to the defendants to ensure that the Representations were:

- (a) the product of reasonable inquiry;
- (b) the product of due care and skill, commensurate with the skills and experience of the member of management of LMIM;
- (c) only given if there was a reasonable basis for the making of the representation; and
- (d) qualified insofar as the person making the representation was unable to give a reliable and unqualified representation.

61 It was foreseeable that, in the event that the Representations were given other than in the circumstances referred to in paragraphs 60(a) to (d) that the audit and review opinions may be wrongly given and that the defendants would suffer loss and damage.

62 The defendants relied upon, and it was reasonable for the defendants to rely upon the Representations as part of the evidence in the Audits and the Reviews and for the purpose of corroborating other evidence in respect of those Audits and Reviews.

63 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 64, 65 and 119 to 121 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the defendants repeat paragraphs 27, 28, 30 to 33 and 35 above;
- (b) by reason thereof, the Representations were given by LMIM:
 - (i) in breach of the duty of care referred to at paragraph 60 above; and
 - (ii) acting as the responsible entity, and trustee of the property of, FMIF; and
- (c) further and in the alternative to paragraph (b), the Representations were given by each of the third parties referred to in the particulars sub-joined to paragraph 55:
 - (i) in breach of the duty of care referred to at paragraph 60 above; and
 - (ii) in respect of which LMIM is vicariously liable for the torts committed by such other third parties.

- 64 If (which is denied) the defendants are liable in the manner alleged in the Claim, then they will have suffered loss and damage in consequence of the breaches of duty referred to in paragraph 63 above to the extent of its liability to the plaintiff.

XII MISLEADING AND DECEPTIVE CONDUCT

- 65 In making the Representations, LMIM was engaged in trade or commerce.

- 66 The making of the Representations conveyed in all of the circumstances that the Representations were:

- (a) the product of reasonable inquiry;
- (b) the product of due care and skill;
- (c) only given if there was a reasonable basis for the making of the representation; and
- (d) qualified insofar as the person making the representation was unable to give a reliable and unqualified representation.

- 67 The making of the Representations was in respect of a "financial service" for the purpose of section 766A(1)(d) of the Act insofar as they pertained to the operation of a registered scheme, namely FMIF.

- 68 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 64, 65 and 119 to 121 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the defendants repeat paragraphs 27, 28, 30 to 33 and 35 above;
- (b) by reason thereof, the Representations made by LMIM:
 - (i) comprised conduct in relation to a financial service that was misleading or deceptive, or that was likely to mislead or deceive, for the purpose of section 1041H of the Act and section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) ("ASIC Act"); and

- (ii) constituted conduct of LMIM acting as the responsible entity, and trustee of the property of, FMIF;
- (c) further and in the alternative to paragraph (b), the Representations made by each of the third parties referred to in the particulars sub-joined to paragraph 55:
 - (i) comprised conduct in relation to a financial service that was misleading or deceptive, or that was likely to mislead or deceive, for the purpose of section 1041H of the Act and section 12DA of the ASIC Act; and
 - (ii) comprised conduct in respect of which LMIM is vicariously liable for the torts committed by such other third parties, and
- (d) further or in the alternative to paragraphs (b) and (c), the making of the Representations comprised conduct in trade or commerce which was misleading or deceptive for the purpose of:
 - (i) section 52 of the *Trade Practices Act 1974* (Cth) (as in force prior to 1 January 2011);
 - (ii) section 38 of the *Fair Trading Act 1989* (Qld) (as in force prior to 1 January 2011); and/or
 - (iii) section 18 of Schedule 1 of the *Competition and Consumer Act 2010* (Cth) by force of section 131 of the *Competition and Consumer Act 2010* (Cth) (as in force on and from 1 January 2011), or alternatively section 16 of the *Fair Trading Act 1989* (Qld) (as in force on and from 1 January 2011).

69 In consequence of the matters referred to in paragraphs 68(b) and (c) above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then in consequence they have suffered, and are liable to suffer, loss or damage in the form of legal costs and any adverse judgment in the proceedings;
- (b) such loss is or will be suffered by reason of the conduct of LMIM and the third parties referred to in the particulars sub-joined to paragraph 55 in contravention of Chapter 5C of the Act; and

- (c) the defendants seek relief against LMIM and the third parties referred to in the particulars sub-joined to paragraph 55 under section 1325 of the Act in order to compensate them for the loss or damage or to prevent or to reduce the loss or damage.

70 In further consequence of the matters referred to in paragraph 68 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then in consequence they have suffered, and are liable to suffer, loss or damage in the form of legal costs and any adverse judgment in the proceedings; and
- (b) the defendants seek:
 - (i) damages in respect of loss and damage in the form of the legal costs incurred in connection with these proceedings; and
 - (ii) a declaration that LMIM and the third parties referred to in the particulars sub-joined to paragraph 55 are liable to compensate them, by way of damages, in an amount commensurate with any adverse judgment in the proceedings.

XIII RIGHT OF INDEMNITY AGAINST ASSETS OF FMIF

71 At all material times, and pursuant to section 601FB(1) of the Act, the FMIF was governed by the FMIF Replacement constitution dated 10 April 2008 ("**constitution**"), which relevantly provides as follows:

- (a) by clause 1.1:
 - (i) the "Custodian" means Permanent Trustee Australia Limited ACN 008 412 913, which company is now known as "The Trust Company (PTAL) Limited" ("**PTAL**");
 - (ii) 'Member' in relation to a Unit means the person registered as the holder of that Unit (including joint holders);
 - (iii) 'Register' means the register of Members maintained by the RE under clause 22;

- (iv) the "Responsible Entity", or "RE" means the company named in ASIC's records as the responsible entity of the Scheme and referred to in the constitution as the RE who is also the Trustee of the Scheme;
 - (v) the "Scheme" means the FMIF;
 - (vi) the "Scheme Property" means assets of the Scheme; and
 - (vii) "Unit" means an undivided interest in Scheme Property created and issued under the constitution;
- (b) by clauses 2.1 and 2.2, the RE is trustee of the Scheme and holds the property of the Scheme on trust for members of the Scheme;
 - (c) by clause 2.3, the RE has appointed the Custodian as agent to hold the Scheme Property on behalf of the RE, on the terms and conditions as detailed in the Custody Agreement;
 - (d) by clause 3.1, the beneficial interest in the Scheme Property is divided into Units and, unless the terms of issue of a Unit or a Class otherwise provide, all Units will carry all rights, and be subject to all the obligations of Members under the constitution;
 - (e) by clause 3.2, different Classes (and sub Classes) with such rights and obligations as determined by the RE from time to time may be created and issued by the RE at its complete discretion and, if the RE determines in relation to particular Units, the terms of issue of those Units may eliminate, reduce or enhance any of the rights or obligations which would otherwise be carried by such Units;
 - (f) by clause 9.1:
 - (i) subject to the constitution, a Unit may be transferred by instrument in writing, in any form authorised by the Law or in any other form that the RE approves; and
 - (ii) a transferor of Units remains the holder of the Units transferred until the transfer is recorded on the Register;

- (g) by clause 13.7, the RE must direct the Custodian to deal with the Scheme Property in accordance with the constitution;
- (h) by clause 16.7, subject to the provisions of clause 16, upon winding up of the Scheme the RE must:
 - (i) realise the assets of the Scheme Property;
 - (ii) pay all liabilities of the RE in its capacity as Trustee of the Scheme including, but not limited to, liabilities owed to any Member who is a creditor of the Scheme except where such liability is a Unit Holder Liability; and
 - (iii) subject to any special right or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in clause 12.4;
- (i) by clause 18.5, the RE shall be indemnified out of the Scheme Property for liabilities or expenses incurred in relation to the performance of its duties, including:
 - (i) (sub-clause a) auditor's fees;
 - (ii) (sub-clause v) reasonable costs incurred in protecting or preserving all assets offered as security;
 - (iii) (sub-clause w) all liability, loss, cost, expense or damage arising from the proper performance of its duties in connection with the Scheme performed by the RE or by an agent appointed pursuant to s601FB(2) of the [Act]; and
 - (iv) (sub-clause y) fees and expenses of any agent or delegate appointed by the RE;
- (j) by clause 19.1, the RE has a right of indemnity out of Scheme Property on a full indemnity basis in respect of a matter unless the RE has acted negligently, fraudulently or in breach of trust;

- (k) by clause 21.1, the Scheme Property will be held in the name of the Custodian as agent for the RE on the terms and conditions as detailed in the Custody Agreement; and
- (l) by clause 22.1, the RE must establish and keep a register of Members, and if applicable, the other registers required by the Law.

72 The Custody Agreement between LMIM and PTAL dated 4 February 1999 as amended from time to time (“**Custody Agreement**”) included at all material times material terms to the following effect:

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

where in all the circumstances this results in PTAL or the person holding the asset on PTAL’s behalf having effective control of the asset for the purpose of its safekeeping (whether or not PTAL or the person holding the asset on PTAL’s behalf, as the case may be, also performs other services in relation to the asset);

- (d) (Clause 1.1) 'Portfolio' means property of a Scheme Custodially Held from time to time by PTAL or a Sub-custodian pursuant to this agreement;
- (e) (Clause 1.1) 'Scheme' means those schemes listed in schedule 2 and any other scheme included by mutual agreement in writing between PTAL and LMIM, which relevantly included from time to time the CPAIF, ICPAIF and the WFMIF;
- (f) (Clause 4.1) LMIM is responsible for taking all decisions in relation to the Portfolio and properly communicating to PTAL Instructions in relation to the assets of the Portfolio. Subject to this agreement, PTAL must act on LMIM's Instructions in relation to any assets of the Portfolio. If PTAL does not have Instructions, PTAL is not required, subject to this agreement, to make any payment or take any other action in relation to any matter concerning any asset in a Portfolio;
- (g) (Clause 4.3) PTAL is not responsible for reviewing or advising LMIM on the Portfolio or any part of it nor for any action or omission pursuant to a decision taken or mistakenly not taken by LMIM; and
- (h) (Clause 4.8) PTAL is not obliged to see whether, in exercising any of its powers or performing any of its duties under this agreement in accordance with Instructions from an Authorised Person, the Authorised Person is acting in proper exercise or performance of his powers or duties.

73 PTAL was at all material times the custodian of the assets of the FMIF, pursuant to the terms of the Custody Agreement.

74 Pursuant to section 601FB of the Act, for the purpose of determining whether LMIM has properly performed its duties for the purposes of section 601GA(2) of the Act, LMIM is taken to have done (or failed to do) anything that LMA as trustee for the LM Administration Trust did or failed to do in the performance or purported performance of the Service Agreements as defined in paragraph 21 of the Claim even if LM Administration was acting fraudulently or outside of the scope of its authority or engagement.

- 75 Pursuant to clause 18.5(w) of the constitution LMIM has a right to be indemnified out of the property of the FMIF for all liability, loss, cost, expense or damage arising from the proper performance of its duties in connection with the FMIF performed by LMIM or by an agent appointed pursuant to section 601FB(2) of the Act.
- 76 Pursuant to section 72 of the *Trusts Act 1973* (Qld), which applies whether or not a contrary intention is expressed in the constitution, and at general law, a trustee may reimburse itself, or pay or discharge out of the trust property, all expenses incurred in or about execution of the trustee's trusts or powers.
- 77 The right of indemnity referred in paragraphs 75 and 76 is secured by a first lien or charge over the assets of FMIF which ranks in priority to the claims of the members of the FMIF.
- 78 In respect of the claims against LMIM in its capacity as the responsible entity of the FMIF as referred to in paragraphs 21(c), 26, 59, 63(b), 63(c)(ii), 68(c)(ii) and 69 above:
- (a) LMIM has a right of indemnity against, and lien over, the assets of the FMIF;
 - (b) in the context of the insolvency of LMIM, the defendants are subrogated to the beneficial interest enjoyed by LMIM over the assets of the FMIF.

XIV CLAIMS AGAINST FEEDER FUNDS

- 79 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 98 to 105 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:
- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF;

- (b) in the premises:
 - (i) comprised a contravention by the Directors of sections 180 and/or 181 of the Act and/or their Officer Duties; and
 - (ii) comprised a contravention by the Committee Members of their Committee Member Duties;
- (c) LMIM as responsible entity of CPAIF, ICPAIF and WFMIF (“**Feeder Funds**”) knew of the matters pleaded in paragraphs 98 to 105 of the Claim;
- (d) LMIM as responsible entity of the Feeder Funds:
 - (i) was involved in the contravention by the Directors of sections 180 and/or 181 of the Act and/or their Officer Duties; and
 - (ii) was involved in the contravention by the Committee Members of their Committee Member Duties; and
- (e) further and in the alternative:
 - (i) LMIM as responsible entity of the FMIF contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) LMIM as responsible entity of the Feeder Funds assisted in LMIM’s contraventions, in that, between 11 May 2009 and 31 January 2013:
 - (A) ICPAIF received \$5,044,118.30 in redemptions from the FMIF;
 - (B) CPAIF received \$40,583,109.06 in redemptions from the FMIF; and
 - (C) WFMIF received \$9,432,090.76 in redemptions from the FMIF;
 - (iii) LMIM as responsible entity of the Feeder Funds was a person involved in LMIM’s contraventions of section 601FC(1)(h) of the Act by reason that it:
 - (A) aided, abetted, counselled or procured the contraventions;

(B) was knowingly concerned in, or party to, the contraventions; or

(C) conspired with LMIM to effect the contraventions;

within the meaning of sections 79(a), (c) and (d) respectively of the Act:

- (iv) in the premises, LMIM as responsible entity of the Feeder Funds contravened section 601FC(5) of the Act.
- (v) LMIM is liable to compensate the FMIF to the extent of \$5,044,118.30 pursuant to section 1317H of the Act and in equity referable to the ICPAIF redemptions;
- (vi) LMIM is liable to compensate the FMIF to the extent of \$40,583,109.06 pursuant to section 1317H of the Act and in equity referable to the CPAIF redemptions; and
- (vii) LMIM is liable to compensate the FMIF to the extent of \$9,432,090.76 pursuant to section 1317H of the Act and in equity referable to the WFMIF redemptions.

80 If (which is denied) the plaintiff can establish the matters pleaded in paragraphs 106 to 113 of the Claim and (which is denied) the defendants are liable in the manner alleged in the Claim, then, solely for the purposes of this third party claim, the defendants plead as follows:

- (a) the making of the payments pleaded therein was:
 - (i) contrary to the constitution; and
 - (ii) not in the best interests of FMIF;
- (b) in the premises:
 - (i) comprised a contravention by the Directors of sections 180 and/or 181 of the Act and/or their Officer Duties; and
 - (ii) comprised a contravention by the Committee Members of their Committee Member Duties;

- (c) LMIM as responsible entity of the Feeder Funds knew of the matters pleaded in paragraphs 106 to 113 of the Claim;
- (d) LMIM as responsible entity of the Feeder Funds:
 - (i) was involved in the contravention by the Directors of sections 180 and/or 181 of the Act and/or their Officer Duties; and
 - (ii) was involved in the contravention by the Committee Members of their Committee Member Duties;
- (e) further and in the alternative:
 - (i) LMIM as responsible entity of the FMIF contravened sections 601FC(1)(c), 601FC(1)(d), 601FC(1)(k) and/or 601FC(1)(m) of the Act;
 - (ii) LMIM as responsible entity of the Feeder Funds assisted in LMIM's contraventions, in that, between 1 July 2011 and 31 October 2012:
 - (A) ICPAIF received \$1,131,173.50 in distributions from the FMIF;
 - (B) CPAIF received \$12,231,875.90 in distributions from the FMIF; and
 - (C) WFMIF received \$6,219,464.37 in distributions from the FMIF; and
 - (iii) LMIM as responsible entity of the Feeder Funds was a person involved in LMIM's contraventions of section 601FC(1)(h) of the Act by reason that it:
 - (A) aided, abetted, counselled or procured the contraventions;
 - (B) was knowingly concerned in, or party to, the contraventions; or
 - (C) conspired with LMIM to effect the contraventions,
 within the meaning of sections 79(a), (c) and (d) respectively of the Act;

- (f) in the premises, LMIM as responsible entity of the Feeder Funds contravened section 601FC(5) of the Act;
- (g) LMIM is liable to compensate the FMIF to the extent of \$1,131,173.50 pursuant to section 1317H of the Act and in equity referable to the ICPAIF distributions;
- (h) LMIM is liable to compensate the FMIF to the extent of \$12,231,875.90 pursuant to section 1317H of the Act and in equity referable to the CPAIF distributions; and
- (i) LMIM is liable to compensate the FMIF to the extent of \$12,231,875.90 pursuant to section 1317H of the Act and in equity referable to the WFMIF distributions.

81 In consequence of the matters referred to in paragraphs 79 and 80 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then in consequence they have suffered, and are liable to suffer, loss or damage in the form of legal costs and any adverse judgment in the proceedings;
- (b) such loss is or will be suffered by reason of the conduct of LMIM as responsible entity of the Feeder Funds in contravention of Chapter 5C of the Act; and
- (c) the defendants seek an order under section 1325 of the Act that LMIM as responsible entity of the Feeder Funds in order to compensate them for the loss or damage or to prevent or to reduce the loss or damage.

82 In further consequence of the matters referred to in paragraphs 79 and 80 above:

- (a) if (which is denied) the defendants are liable in the manner alleged in the Claim, then they will be liable for the losses consequent upon the contraventions by LMIM as responsible entity of the Feeder Funds as pleaded therein;
- (b) LMIM as responsible entity of the Feeder Funds has a common and coordinate liability with the defendants in respect of the damage recoverable by the plaintiff from the defendants and the defendants are entitled to equitable contribution in respect of any amounts which the defendants may be ordered to pay to the plaintiff; and

- (c) further, or in the alternative, LMIM as responsible entity of the Feeder Funds and the defendants are tortfeasors liable to the plaintiff in respect of the same damage within the meaning of section 6(c) of the LRA and the defendants are entitled to orders in the nature of indemnity or contribution from the third parties under section 6(c) of the LRA in respect of any amounts which the defendants may be ordered to pay to the plaintiff.

XV CLAIMS OF INDEMNITY AGAINST FEEDER FUNDS

- 83 Pursuant to section 601FC(2) LMIM held the scheme property of CPAIF, ICPAIF and the WFMIF ("**Feeder Funds**") on trust for their respective members.
- 84 On 16 November 2012, the responsible entity of the WFMIF changed from LMIM to Trilogy Funds Management Limited ("**Trilogy**"), and thereby and pursuant to section 601FS of the Act the rights, obligations and liabilities of LMIM in relation to the WFMIF become rights, obligations and liabilities of Trilogy, except for:
- (a) any right of LMIM to be paid fees for the performance of its functions before it ceased to be the responsible entity of the WFMIF;
 - (b) any right of LMIM to be indemnified for expenses it incurred before it ceased to be the responsible entity of the WFMIF;
 - (c) any right, obligation or liability that LMIM had as a member of the WFMIF; and
 - (d) any liability for which LMIM could not have been indemnified out of the property of the WFMIF if it had remained the responsible entity of the WFMIF.
- 85 At all material times from 16 November 2012, the responsible of the WFMIF was Trilogy.
- 86 On 18 October 2013, LMIM determined to wind up the CPAIF under s.601NC of the Act.
- 87 On 18 October 2013, LMIM determined to wind up the ICPAIF under s.601NC of the Act.

Custody arrangements – the Feeder Funds

88 Pursuant to section 601FC(2) of the Act:

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

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

- (a) (ESTABLISHMENT OF TRUST — Appointment of Custodian) The RE may, but is not obliged to, appoint a Custodian as agent to hold the Scheme Property on behalf of the RE, in accordance with the terms and conditions of a Custody Agreement.
- (b) (TITLE TO SCHEME PROPERTY — Custodian to hold as agent of RE) If a Custodian has been appointed, the Scheme Property will be held in the name of the Custodian as agent for the RE on the terms and conditions as detailed in the Custody Agreement. If not the Scheme Property will be held in the name of the RE.

Particulars

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

- (ii) The term pleaded in paragraph (b) is clause 21.1 of the Replacement constitution of the WFMIF, and clause 20.1 of the Replacement constitutions of the CPAIF and the ICPAIF.

90 There was a custodian appointed to hold the scheme property of the CPAIF, namely PTAL, in the following periods:

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

Particulars

- (i) PTAL was appointed custodian of the CPAIF under the Custody Agreement.
- (ii) PTAL was initially appointed as custodian of the CPAIF by an Amending Deed dated 1 September 2004.
- (iii) LMIM terminated PTAL's custody of the property of the CPAIF on about 9 April 2008, but re-appointed PTAL into that role by Amending Deed
- (iv) Mr John Park, in his capacity as a liquidator of LMIM, caused LMIM to terminate PTAL's custody of the property of the CPAIF by letter dated 19 February 2016, with effect from 31 March 2016.

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

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

Particulars

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

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

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

Particulars

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

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

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

(g) (Clause 7)

- (i) (sub-paragraph (a)) TCL must not effect any transactions or grant any securities involving the Assets of a Trust unless it has received Proper Instructions and must only give effect to those transactions in accordance with those Proper Instructions.
- (ii) (sub-paragraph (d)) Trilogy will only provide Proper Instructions for proper purposes and TCL is not under any obligation to verify the purposes or the propriety of any purpose for which any transaction is being effected.

Winding up of FMIF

94 Pursuant to orders of Dalton J dated 21 August 2013:

- (a) LMIM was directed to wind up the FMIF, subject to, inter alia, the appointment of Mr David Whyte as receiver of the property of the FMIF; and
- (b) Mr David Whyte:
 - (i) was appointed pursuant to section 601NF(1) of the Act to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution;
 - (ii) was appointed pursuant to section 601NF(2) of the Act as receiver of the property of the FMIF;
 - (iii) has, in relation to the property of the FMIF, the powers set out in section 420 of the Act;
 - (iv) is authorised to bring, defend or maintain any proceedings on behalf of the FMIF in the name of LMIM as is necessary for the winding up of the FMIF in accordance with clause 16 of the constitution; and
 - (v) is entitled to bring and brings these proceedings in the name of LMIM as responsible entity of the FMIF.

- 95 Pursuant to the orders of Jackson J dated 17 December 2015:
- (a) the liquidators of LMIM were directed not to carry out the functions of LMIM pursuant to clauses 9, 10 and 22 of the constitution;
 - (b) LMIM was relieved of the obligations imposed by clauses 9, 10 and 22 of the constitution; and
 - (c) Mr Whyte was authorised and empowered to exercise the powers of, and was made responsible for the functions of, the responsible entity as set out in clauses 9, 10 and 22 of the constitution.
- 96 By section 601NE of the Act, and in the premises of the orders of Dalton J dated 21 August 2013, LMIM as responsible entity of the FMIF is obliged to ensure that the FMIF is wound up in accordance with the constitution and the orders referred to in paragraphs 94 and 95 above.
- 97 At all material times, the constitution relevantly provided by clause 16.7 to the effect that, subject to the provisions of clause 16, "upon winding up of the FMIF the responsible entity must:
- (a) realise the assets of the Scheme Property;
 - (b) pay all liabilities of the responsible entity in its capacity as Trustee of the Scheme including, but not limited to, liabilities owed to any Member who is a creditor of the Scheme except where such liability is a Unit Holder Liability; and
 - (c) subject to any special right or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4; ..."
- 98 The constitution included the following terms expressly by reference, or by necessary implication:

- (a) that the administration of the FMIF, including its winding up, is to be carried out pursuant to the principles of the law of trusts, except where those principles are inconsistent with the provisions of the Act concerning the obligations of a responsible entity of a managed investment fund or the express terms of the constitution;
- (b) that LMIM or its agent or assignee, by reference to those principles, is to be treated as a matter of accounting as having received by anticipation that part of the assets of the FMIF to which it or its agent or assignee will in due course become beneficially entitled, directly or through another party, as a Class B unitholder by anticipation, to the extent of its LMIM's unsatisfied obligation as responsible entity and trustee of the FMIF to make good to the FMIF any breaches of trust or duty for which it is responsible;
- (c) that, by reference to those principles, and in relation to any person Unitholder who is liable to the FMIF:
 - (i) that Unitholder person or their agent or assignee cannot share in the FMIF, directly or through another party, without first contributing to the FMIF by satisfying any its liability to make a contribution in aid of the FMIF; and
 - (ii) that Unitholder's person's obligation to contribute to the FMIF is treated as being in satisfaction of their or their agent or assignee's its right to share, directly or through another party, in the income or assets of the FMIF to the extent of their the Unitholder's obligation or, in other words, that Unitholder's their or their agent or assignee's right to share in the income or assets of the FMIF is appropriated in payment of its their liability to contribute to the FMIF; and
- (d) that, by reference to those principles, where LMIM as responsible entity of the FMIF has made an overpayment or wrong payment to any Unitholder, LMIM is entitled to recoup any such overpayment or wrong payment from any capital or income remaining in, or coming into LMIM's hands, to which the overpaid or wrongly paid Unitholder or their agent or assignee would otherwise be entitled.

Particulars

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

99 Further and in the alternative the principles obligations and restrictions on LMIM referred to in sub-paragraphs (a) to (d) of paragraph 98 above were imposed on LMIM and its agents and assignees in equity.

100 As at 16 November 2012 when Trilogy became the RE of the WFMIF, the rights of Trilogy as RE of the WFMIF and of its agents and assignees and in that capacity as a Class B unitholder in the FMIF were thereafter qualified and limited by reference to the principles referred to in paragraphs 98 and 99 above, insofar as they those principles had applied to LMIM and its agents and assignees immediately before it LMIM ceased to be the responsible entity of the WFMIF.

FMIF subrogated to indemnity over Feeder Funds

101 The constitution of each Feeder Fund conferred on LMIM as responsible entity thereof a right to be indemnified from the assets of that fund on a full indemnity basis, in respect of a matter unless, in respect of that matter, it had acted negligently, fraudulently or in breach of trust, in that capacity.

Particulars

- (i) Clause 18.3 of the constitution of the CPAIF.
- (ii) Clause 18.3 of the constitution of the ICPAIF.
- (iii) Clause 19.1(c) of the constitution of the WFMIF.

- 102 Pursuant to section 72 of the *Trusts Act 1973* (Qld), which applies whether or not a contrary intention is expressed in the constitution, and at general law, the trustee of each Feeder Fund may reimburse itself, or pay or discharge out of the trust property, all expenses incurred in or about execution of the trustee's trusts or powers.
- 103 The right of indemnity referred in paragraphs 101 and 102 is secured by a first lien or charge over the assets of each Feeder Fund which ranks in priority to the claims of the members of the Feeder Fund.
- 104 In respect of each request for withdrawal of Class B units from the FMIF, LMIM:
- (a) was acting both as the responsible entity of the FMIF and as the responsible entity of a Feeder Fund;
 - (b) conferred a financial benefit on the Feeder Fund in question;
 - (c) acted in the proper performance of its duties to the Feeder Fund in question;
 - (d) became entitled to an indemnity out of the assets of the Feeder Fund in question in respect of its liability:
 - (i) for the loss to the FMIF pleaded in paragraphs 79 and 80 above, insofar as that loss relates to each such request; and
 - (ii) for the loss to the defendants pleaded in paragraphs 81 and 82 above, insofar as that loss relates to each such request; and
 - (e) became entitled to a lien or charge over the assets of the Feeder Fund in question to secure and to the extent of that indemnity.
- 105 In the premises of paragraphs 79, 80 and 104 above:
- (a) FMIF has claims against the Feeder Funds as set out in paragraphs 79 and 80;
 - (b) the Feeder Funds are liable to FMIF as set out in paragraphs 79 and 80;
 - (c) the responsible entity of each of the Feeder Funds is entitled to the indemnity referred to in paragraph 104(d) above, and to enforce the lien or charge referred to in paragraph 104(e) above; and

- (d) FMIF is entitled to exercise or be subrogated to the indemnity, and to enforce the lien or charge, as referred to in paragraph 105(c) above.

Defendants (indirectly) subrogated to FMIF's subrogated right of indemnity over Feeder Funds

106 The defendants repeat paragraph 78 above.

107 The right of LMIM, as responsible entity of the FMIF, to exercise or be subrogated to the right to the indemnity referred to in paragraph 104(d) above, or to enforce the lien or charge referred to in paragraph 104(c) above, as pleaded in paragraph 105(d) above:

- (a) is an asset or right to which recourse may be had by LMIM in its capacity as the responsible entity of the FMIF in order to discharge the expenses to which it is liable in respect of the claims advanced by the defendants as referred to in paragraphs 21(c), 26, 59, 63(b), 63(c)(ii), 68(c)(ii) and 69 above; and
- (b) is an asset or right to which, in the context of the insolvency of LMIM, the defendants are subrogated to the beneficial interest enjoyed by LMIM.

Defendants (directly) subrogated to rights of indemnity over Feeder Funds

108 In the premises of paragraphs 81, 82 and 104 above:

- (a) the defendants have claims against the Feeder Funds as set out in paragraphs 81 and 82;
- (b) the Feeder Funds are liable to the defendants as set out in paragraphs 81 and 82;
- (c) the responsible entity of each of the Feeder Funds is entitled to the indemnity referred to in paragraph 104(d) above, and to enforce the lien or charge referred to in paragraph 104(e) above, in order to satisfy the defendants' claims in paragraphs 81 and 82; and
- (d) the defendants are entitled to exercise or be subrogated to the indemnity, and to enforce the lien or charge, as referred to in paragraph 108(c) above.

Recoupment of payments to Feeder Funds

- 109 In the premises of paragraphs 79 and 80 above, LMIM is liable to compensate the FMIF in respect of the losses referred to therein.
- 110 In the premises, LMIM's rights in relation to the CPAIF Units in the FMIF are subject to the principles referred to in paragraphs 98(a) to (d) and 99 above to the extent of LMIM's liabilities referred to in paragraphs 79 and 80 above, alternatively so far as they concern the CPAIF.
- 111 In the premises, Trilogy's and, further and in the alternative, TCL's rights in relation to the WFMIF Units are subject to the principles referred to in paragraphs 98(a) to (d) and 99 above to the extent of LMIM's liabilities referred to in paragraphs 79 and 80 above, alternatively so far as they concern the WFMIF.
- 112 In the premises, LMIM's rights in relation to the ICAPIF Units are subject to the principles referred to in paragraphs 98(a) to (d) and 99 above to the extent of LMIM's liabilities referred to in paragraphs 79 and 80 above, alternatively so far as they concern the ICAPIF.

XVI UNPAID AUDIT FEES

- 113 On or about July 2012, the defendants were engaged as auditors of the half-year financial statements of LMIM as responsible entity of the FMIF for the period 1 July 2012 to 31 December 2012.
- 114 It was a term of the defendants' engagement that LMIM shall pay the defendants for all work in progress, services already performed and expenses incurred by the defendants up to and including the effective date of termination of the Retainers, with payment due 14 days following receipt of the defendants' invoice for those amounts.

Particulars

- (a) The term is an express term at clause 23 of the document titled "Attachment General Terms and Conditions (Statutory Audit)", which sets out the terms of the defendants' engagement.

115 On or around January to March 2013, the defendants performed the audit in accordance with their engagement.

116 On or about 18 March 2013, the defendants issued the following invoices (“**Invoices**”) for work performed in accordance with their engagement:

(a) tax invoice no. AU00100324826 dated 15 March 2013 in the sum of S116,836.50; and

(b) tax invoice no. AU00100327917 dated 8 April 2013 in the sum of \$42,060.01; pursuant to clauses 19 and 23 of the document titled “Attachment General Terms and Conditions (Statutory Audit)”, which sets out the terms of the defendants’ engagement.

117 The plaintiff has refused and/or failed to make payment in accordance with the Invoices.

118 In the premises of the above, the total of the Invoices, being \$158,896.51 plus interest and legal costs remains due and owing to the defendants.

119 In respect of the claims against LMIM in its capacity as the responsible entity of the FMIF as referred to in paragraph 118 above:

(a) LMIM has a right of indemnity against, and lien over, the assets of the FMIF; and

(b) in the context of the insolvency of LMIM, the defendants are subrogated to the beneficial interest enjoyed by LMIM over the assets of the FMIF.

XVII SET-OFF

120 In respect of the claims against LMIM in its capacity as the responsible entity of the FMIF as referred to in paragraphs 21(c), 26, 59, 63(b), 63(c)(ii), 68(c)(ii), 69 and 119 above, the defendants claim a right of set-off at law or in equity in respect of any liability that they may have to the plaintiff (which is denied).

XVIII SECTION 197 OF THE ACT

121 In respect of the claims against LMIM in its capacity as the responsible entity of the FMIF as referred to in paragraphs 21(c), 26, 59, 63(b), 63(c)(ii), 68(c)(ii), 69 and 119 above, in the event LMIM is not entitled to be fully indemnified against liability out of the assets of any of the Funds in question (which is denied), then the Directors are liable to discharge that liability pursuant to section 197 of the Act.

XIX RELIEF

The defendants claim the following relief against the third parties:

1 Declarations that:

- (a) LMIM is liable to the FMIF for loss and damage as referred to in paragraphs 79 and 80 plus interest; and
- (b) the defendants are entitled to exercise or be subrogated to LMIM's rights to an indemnity from the assets of the Feeder Funds in satisfaction of that liability, in the following proportions respectively ("**Feeder Fund Indemnities**"):
 - (i) from the assets of the CPAIF, \$40,583,109.06 plus interest;
 - (ii) from the assets of the ICPAIF, \$5,044,118.30 plus interest; and
 - (iii) from the assets of the WFMIF, \$9,432,090.76 plus interest.

2 Declarations that:

- (a) the Feeder Fund Indemnities are each an asset or right to which recourse may be had by the plaintiff in order to discharge the expenses to which it is liable in respect of the claims advanced by the defendants as referred to in paragraphs 21(c), 26, 59, 63(b), 63(c)(ii), 68(c)(ii) and 69 above; and
- (b) the defendants are entitled to exercise or be subrogated to the plaintiff's rights to the Feeder Fund Indemnities.

3 Declarations that:

- (a) LMIM is liable to the defendants for loss and damage as referred to in paragraphs 81 and 82; and
- (b) the defendants are entitled to exercise or be subrogated to LMIM's rights to an indemnity from the assets of the respective Feeder Funds in satisfaction of those liabilities.

4 A declaration that the plaintiff is entitled to withhold from distributions or payments otherwise payable in relation to the Class B units in the FMIF held for the CPAIF and for the ICPAIF in respect of the amount of the loss and damage referred to in paragraphs 79 and 80 above.

5 A declaration that the plaintiff is entitled to withhold from distributions or payments otherwise payable in relation to the Class B units in the FMIF held for the WFMIF in respect of the amount of the loss and damage referred to in paragraphs 79 and 80 above.

6 The sum of \$158,896.51.

7 Damages, including damages or compensation:

- (a) pursuant to sections 197, 1041H, 1041I and 1325 of the *Corporations Act 2001* (Cth);
- (b) pursuant to sections 12DA, 12GF and 12GM of the *Australian Securities and Investments Commission Act 2001* (Cth);
- (c) pursuant to sections 52, 82 and 87 of the *Trade Practices Act 1974* (Cth) (as in force prior to 1 January 2011);
- (d) pursuant to sections 38, 99 and 100 of the *Fair Trading Act 1989* (Qld) (as in force prior to 1 January 2011);
- (e) pursuant to sections 18 and 236 of Schedule 1 of the *Competition and Consumer Act 2010* (Cth) by force of section 131 of the *Competition and Consumer Act 2010* (Cth) (as in force on and from 1 January 2011), or alternatively section 16 of the *Fair Trading Act 1989* (Qld) (as in force on and from 1 January 2011);

- (f) for negligence;
- (g) for breach of contract; and
- (h) in equity.

8 Contribution, whether equitable or pursuant to the *Law Reform Act 1995* (Qld).

9 Interest.

10 Costs.

11 Such further or other relief that the Court considers appropriate.

Signed: *Rij + Wood McBeans*

Description: Solicitor for the Defendants

This pleading was settled by Mr Brendon Roberts SC

NOTICE AS TO DEFENCE

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

Via email: david.hunt@aveo.com.au

David Hunt
Aveo
Chief Financial Officer
5/99 Macquarie Street
SYDNEY NSW 2000

28 February 2019

Dear Sir

**FREEDOM AGED CARE - PURCHASE OF FOUR RETIREMENT VILLAGES FROM LM FIRST MORTGAGE
INCOME FUND (RECEIVER APPOINTED) (LMFMIF)**

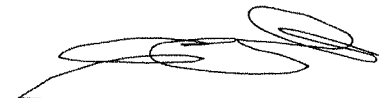
I am the court appointed Receiver of the assets of the LMFMIF and person responsible for ensuring it is wound up pursuant to the terms of its constitution. In April 2015, I sold four retirement villages to Freedom Aged Care at Redland Bay, Banora Point, Morayfield and Launceston. I understand that Freedom Aged Care was acquired by the Aveo Group in 2016.

Pursuant to the terms of the contracts of sale I am able to request details of any outstanding exit entitlements relating to residents where contracts were entered into during the course of the winding up of the fund. I attach spreadsheets that provide details of each resident that applied to at the time of the sale. I have applied to court to make an interim distribution to investors of the LMFMIF and there is a court hearing on 13 March 2018 relating to that application.

I would like to inform the court of any outstanding exit entitlements and would appreciate your assistance in completing the relevant details on the attached spreadsheets.

Should you have any queries in this respect, please contact me on (07) 3237 5887 or by email at david.whyte@bdo.com.au.

Yours faithfully



David Whyte
Receiver

Enc.

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ADELAIDE SA 5000

28 February 2019

Dear Sir/Madam

**YOUR CLIENT: BRIDGEWATER LAKE VILLAGE PTY LTD ACN 604 901 617
IN ITS CAPACITY AS TRUSTEE FOR THE BRIDGEWATER LAKE ASSET UNIT TRUST**

I refer to the attached contract of sale and in particular to clause 15.9 of the contract whereby from time to time, I am able to request details of the status of certain residents of the village.

I attach a schedule of the affected residents in that respect and shall be obliged if your client will complete and return the requested details as soon as they are able to as I require the details for an upcoming court hearing on 13 March 2019 relating to the LM First Mortgage Income Fund (Receiver Appointed).

Should you have any queries in the above respect, please contact me on (07) 3237 5887 or by email at david.whyte@bdo.com.au

Yours faithfully

David Whyte
Receiver

Enc.

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Tucker & Cowen Solicitors.

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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

20 February 2019

Your reference: Mr Tiplady / Mr Walsh

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.
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Paul Armit.

Mr Ashley Tiplady
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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 filed by Mr Whyte on 1 February 2019 for authority to make interim distribution ("the Application")

We refer to the Application filed by our client on 1 February 2019 for, *inter alia*, authority to make an interim distribution to FMIF investors, that has been listed for hearing on 13 March 2019.

Our client appreciates that LMIM has an equitable lien over the property of the FMIF to the extent of any right of indemnity for expenses properly incurred in its capacity as responsible entity and trustee of the FMIF.

As you will see from our client's Affidavit, our client has made an assessment of the maximum possible extent of various "uncontrolled" contingent liabilities that may have to be met from the property of the FMIF, including claims that have been made or are likely to be made by Mr Park as the liquidator of LMIM for remuneration or expenses, and by LMIM for indemnity in respect of Creditor Indemnity Claims.

Our client's position at the hearing on 13 March 2019 will be that his assessment reflects the maximum reasonably possible extent of LMIM's equitable lien over the property of the FMIF.

However, in the event that your clients do not agree with our client's assessment, we invite your clients to notify us of their position for our client's consideration and, if they consider it appropriate, to appear at the hearing on 13 March 2019 to make such submissions as they consider to be necessary to preserve LMIM's right of indemnity.

Yours faithfully



Alex Nase
Tucker & Cowen

Direct Email: anase@tuckercowen.com.au
Direct Line: (07) 3210 3503

Individual liability limited by a scheme approved under Professional Standards Legislation.