

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

Page 1

Signed: 

Witnessed by: 

AFFIDAVIT:  
Form 46, R.431

TUCKER & COWEN  
Solicitors  
Level 15, 15 Adelaide Street  
Brisbane, Qld, 4000.  
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Filed on behalf of the First Respondent

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

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. Now produced and shown to me and marked "**DW-130**" is an indexed paginated bundle of the documents referred to in this Affidavit ("**the Bundle**").

### **Appointments**

#### *Receivership*

3. By Order of Justice Dalton made in proceeding 3383/13 on 8 August 2013 and later embodied in an Order dated 21 August 2013, I was appointed:
  - (a) pursuant to section 601NF(1) of the *Corporations Act* 2001 (Cth) ("**the Act**") to take responsibility for ensuring that the LM First Mortgage Income Fund ARSN 089 343 288 ("**the FMIF**") is wound up in accordance with its constitution; and
  - (b) pursuant to section 601NF(2) of the Act, as the receiver of the property of the FMIF.
4. By Order of this Honourable Court made on 17 December 2015 in this proceeding (herein referred to as the "**December 2015 Orders**"), I was:-
  - (a) empowered subject to the balance of orders therein, to determine the extent LM Investment Management Ltd (receivers and managers appointed) (in liquidation) ("**LMIM**") is entitled to be indemnified from the property of the FMIF, in respect of any expense or liability, or claim against, LMIM, in acting as Responsible Entity ("**RE**") of the FMIF;

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Page 2

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- (b) authorised, and empowered, to exercise the powers of, and am responsible for, the functions of the RE of the FMIF as set out in Clauses 9,10 and 22 of the Constitution of the FMIF, in respect of:-
- (i) the transfer, registration and suspension of units in the FMIF (Clause 9);
  - (ii) transmission of units (Clause 10); and
  - (iii) maintaining the Register of Members of the FMIF (Clause 22).
- (c) directed not to make any distribution to the members of the FMIF, without the authority of a further order of the Court.

5. On 18 July 2018, certain variations were made, by consent, to the December 2015 Orders.
6. At pages 1 to 13 of the Bundle is a copy of the orders referred to in paragraphs 3 to 5 above.

#### **The Application**

7. I swear this Affidavit in support of an application by me for authority to make an interim distribution to FMIF members of up to \$40 million and for directions in relation to the foreign exchange spot rate at which to convert the units of foreign investors into Australian dollars to ensure that they are paid their correct entitlements ("**the Application**").

#### **FMIF background**

8. The FMIF was registered as a managed investment scheme on 28 September 1999.
9. The FMIF is governed by a Constitution, which has been amended at various times since the registration of the FMIF as a managed investment scheme. The current Constitution of the FMIF is the "Replacement Constitution" dated 11 April 2008, as amended by supplemental deeds dated 16 May 2012 and 26 October 2012 ("**the Constitution**"). At pages 14 to 77 of the Bundle is a copy of the Constitution of the FMIF, together with those amendments.

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10. The members of the FMIF subscribed capital for investment purposes. The FMIF's investment activities consisted of advancing funds to borrowers under loan agreements on the security of (mainly) first registered mortgages. The assets of the FMIF primarily consisted of its rights against borrowers under these loan agreements and mortgages.
11. A number of product disclosure statements were issued over time to solicit investment in the FMIF. At pages 78 to 160 of the Bundle is a copy of the most recent Product Disclosure Statement of the FMIF dated 10 April 2008, together with supplementary Product Disclosure Statements issued on 28 November 2008, 3 March 2009 and 30 October 2009, ("the PDS").
12. LM Investment Management Limited (In Liquidation) (Receivers and Manager Appointed) ("LMIM") is the responsible entity ("RE") of the FMIF, and has been since the FMIF's inception.
13. The property of the FMIF is held by a custodian, The Trust Company (PTAL) Limited ("PTAL") (formerly known as Permanent Trustee Australia Limited), pursuant to a Custody Agreement dated 4 February 1999, as amended from time to time. At pages 161 to 206 of the Bundle is a copy of that Custody Agreement, together with amendments to the Custody Agreement, dated 14 June 1999 and 1 September 2004 respectively.
14. The Custody Agreement has also been amended at other times by including or removing additional Schemes (on 20 May 1999, 24 May 2000, 18 March 2002, 19 November 2002 and 27 September 2006), and PTAL resigned as custodian of certain Schemes (not including the FMIF) on 9 April 2008, but I have not exhibited those amendments because they do not concern the custody arrangements for the FMIF.
15. LMIM was also the responsible entity or trustee of a number of other funds.
16. Those included three 'Feeder Funds', whose assets were predominately units in the FMIF. They are the funds known as the LM Currency Protected Australian Income Fund ("CPAIF"), the LM Institutional Currency Protected Australian Income Fund ("ICPAIF"), and the LM Wholesale First Mortgage Income Fund ("WFMIF").

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Page 4

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17. In addition, LMIM was trustee of the LM Managed Performance Fund (“**MPF**”) and responsible entity of the LM Australian Income Fund (“**AIF**”), the Australian Structured Products Fund (“**ASPF**”) and the LM Currency Protected Fund (“**CPF**”).
18. The FMIF started to face difficulties around the time of the Global Financial Crisis, which eventually led to the FMIF being closed for new investments in March 2009, and the suspension of redemptions shortly thereafter in May 2009.
19. On or about 16 November 2012, Trilogy Funds Management Limited (“**Trilogy**”) replaced LMIM as the responsible entity of the WMIF.
20. On 19 March 2013, John Park and Ginette Muller were appointed voluntary administrators of each of LMIM and LM Administration Pty Ltd (“**LMA**”), a service company providing services for LMIM’s funds management operations under a series of services agreements.
21. On 12 April 2013, de Jersey CJ ordered in proceeding 2869/13 that LMIM be replaced as the trustee of the MPF by KordaMentha Pty Ltd and Calibre Capital Ltd. Calibre Capital Ltd has since resigned as a trustee of the MPF, and KordaMentha Pty Ltd is now the sole trustee of the MPF (“**MPF Trustee**”).
22. On 11 July 2013, Deutsche Bank AG (“**DB**”), a secured creditor of the FMIF, appointed Joseph Hayes and Anthony Connelly of McGrathNicol (“**the DB Receivers**”) as receivers and managers of the assets and undertaking of the FMIF.
23. On 1 August 2013, Mr Park and Ms Muller were appointed liquidators of LMIM (“**the Liquidators**”). Mr Park has remained a liquidator of LMIM, although I note that Ms Muller retired from the role on 17 May 2017.

#### **High Level Summary of Key Events in Winding up to date**

24. At the time of my appointment, the FMIF had cash at bank of about \$9 million. It owed approximately \$25 million to DB, a secured creditor of the FMIF.

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Page 5

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25. All of the real property security assets of the FMIF have now been realised, by me or in some cases, the DB Receivers. I had carriage of the more complex realisations of retirement village assets, and the DB Receivers had carriage of the less complex realisations having been identified as those that could be realised the fastest in order to pay out their appointor.
26. As a result of realisations of real property assets, DB was paid out in early January 2014. The DB Receivers informed me to the effect that, and I believe that, DB did not terminate their appointment upon DB being paid out, because of claims against the FMIF by the MPF Trustee.
27. Relevantly, the MPF Trustee had commenced the following proceedings seeking relief against FMIF assets:-
- (a) Supreme Court of Queensland Proceedings 8032/14 and 8034/14 (“**KPG and Lifestyle Proceedings**”) – In these proceedings, the total amount claimed against assets of the FMIF was approximately \$24 million plus interest and costs; and
  - (b) Supreme Court of Queensland Proceeding 12716/15 (“**AIIS Proceeding**”). In this proceeding, the total amount claimed against assets of the FMIF was approximately \$3.9 million plus interest and costs.
28. The DB Receivers continued to have carriage of the sale of some real property assets of the FMIF until December 2017.
29. The KPG and Lifestyle Proceedings were discontinued by the MPF Trustee on 7 June 2018, and the AIIS Proceeding was discontinued on 10 August 2018.
30. On 10 December 2018, the DB Receivers retired. Following the retirement of the DB Receivers, control of the FMIF bank account (which remain in the name of the FMIF’s Custodian, PTAL) was transferred to me.

**A. APPLICATION FOR AUTHORITY TO MAKE AN INTERIM DISTRIBUTION**

31. The FMIF has cash at bank of approximately \$65million as at 14 February 2019 and existing liabilities of approximately \$3million.

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Page 6



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Witnessed by:

32. In addition to the existing liabilities of the FMIF, the FMIF also has a number of contingent liabilities for which it is necessary to retain funds.
33. The FMIF's contingent liabilities fall into two categories:
- (a) *Firstly*, liabilities that are contingent on events that are not entirely within my control (“**uncontrolled contingent liabilities**”); and
  - (b) *Secondly*, liabilities that are contingent on matters that are entirely within my control, namely decisions in the winding up of the FMIF (“**controlled contingent liabilities**”).
34. For example, I have caused substantial claims to be commenced to recover funds for the benefit of FMIF investors that, if successful, may increase the funds available to return to FMIF investors significantly. The contingent liabilities relating to those claims are across both of the categories of contingent liability, as follows:
- (a) the FMIF's exposure to adverse costs orders relating to the prosecution of a proceeding to date is an uncontrolled contingent liability. That is because, if I were to cause LMIM as RE of the FMIF to discontinue those proceedings immediately, the Fund would automatically be liable for the costs of the other parties;
  - (b) the FMIF's exposure going forward for my costs of prosecuting the proceeding, and any adverse costs orders made in the event the proceeding is successfully defended, are controlled contingent liabilities. That is because it is within my power to discontinue the proceeding effective immediately, and decision whether to continue to prosecute the proceeding is mine alone.
35. My evidence below is limited to the uncontrolled contingent liabilities.
36. On the basis of that evidence, I seek the Court's authority to make a distribution of “up to” \$40million.

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Page 7



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37. I will then take advice and, if and to the extent I consider it to be necessary and appropriate, I will seek judicial advice from a judge who is not a potential trial judge on the question of how much of the authorised amount I am justified distributing to investors, taking into account the status of the various proceedings that I have caused to be commenced to recover funds for the benefit of FMIF investors.
38. In doing so, I will be in a position to take into account the expected proceeds of settlements of two claims that presently remain subject to conditions precedent, but which I am not in a position to disclose to the Court on this Application.
39. At pages 207 to 232 of the Bundle is a copy of the most recent financials for the FMIF prepared by BDO for the financial year ended 30 June 2018.
40. I set out below in some more detail the existing and uncontrolled contingent liabilities that I am aware of and for which I consider funds ought to be retained. In summary, they are estimated as follows:

| Description  | \$ Amount       |
|--|-----------------|
| Actual liabilities   | \$ 2,213,000.00 |
| <u>Uncontrolled Contingent Liabilities:</u>                                    |                 |
| Creditor Indemnity Claims  | \$ 774,497.72   |
| Exit entitlements relating to former retirement village assets (approximately) | \$ 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   | \$ 2,100,000.00 |
| The Auditor's Proceeding   | \$ 2,450,000.00 |
| Drake Proceeding   | \$ 8,200,000.00 |



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|                                     |                 |
|-------------------------------------|-----------------|
| The recovery in the Lamb bankruptcy | \$ 230,000.00   |
| <b>Total:</b>                       | \$24,811,387.61 |

41. For the avoidance of doubt, these amounts are not my estimate of the extent of the liabilities that are more likely than not to arise in the winding up of the FMIF, but are my assessment of a realistic worst-case scenario. They assume that any liability that might realistically eventuate will do so.
42. Taking into account these actual and uncontrolled contingent liabilities, it is in my view possible to distribute a sum of up to \$40 million to FMIF investors, subject to an assessment of the appropriateness of controlled contingent liabilities relating to the existing claims I have caused to be commenced to recover funds for the benefit of FMIF investors.

**Existing Liabilities**

43. The FMIF has a number of existing liabilities against which it is necessary for me to retain funds. They are as follows.
44. **First**, BDO's work in progress for November and December 2018 and January 2019 is approximately \$800,000.
45. **Second**, the accounts of the FMIF include a liability of about \$1.372million for unpaid income distributions, that were declared before 1 January 2011 but never paid.
46. I am seeking advice regarding these liabilities, however for the time being I consider that their full amount should be retained.
47. **Third**, the accounts of the FMIF include a liability of \$41,000 for unpaid redemptions, reflecting situations where a redemption request made by an investor was approved but, for some reason, was not paid.

**Contingent Liabilities**

48. As I indicated above, the FMIF has a number of contingent liabilities, for which it is presently necessary for me to retain funds.



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49. The categories of contingent liabilities are as follows:
- (a) The potential claims by residents of retirement villages against LMIM as RE of the FMIF, to recover their incoming contributions, if the purchasers to whom the retirement villages' assets were sold are unable to pay;
  - (b) Creditor Indemnity Claims under the December 2015 Orders;
  - (c) Existing (but unresolved) and future remuneration and indemnity claims by the liquidator of LMIM;
  - (d) Liabilities arising in relation to the claims that are being prosecuted for the benefit of FMIF members;
  - (e) My remuneration and expenses to complete the winding up of the FMIF.
50. I address each of these categories of contingent liabilities below, in turn.

**Creditor Indemnity Claims**

51. Under the December 2015 Orders:-
- (a) the Liquidator was directed to ascertain the debts payable by and the claims against, LMIM, and to identify any debts or claims in respect of which LMIM has a claim for indemnity from the FMIF ("**Creditor Indemnity Claims**"), and to notify me of the same within 14 days;
  - (b) within 14 days of notification of any such Creditor Indemnity Claims, I may request from the Liquidator any further information I reasonably consider necessary to assess the claim;
  - (c) within 30 days of notification of any Creditor's Indemnity Claim or receipt of the further information requested, I am required to accept the claim, reject the claim, accept part of it and reject part of the claim, and to give the Liquidator written notice of my decision;

  
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- (d) I am required to give the Liquidator a written reason for rejecting any part of the claim within seven days after giving notice of my decision to the liquidator; and
- (e) within 28 days of receiving a notice of rejection, the liquidator may apply to Court for directions in relation to whether the claim is one for which LMIM has a right to be indemnified out of scheme property of the FMIF, and must notify the Creditor for any rejected claim of, *inter alia*, my decision, any reasons for that decision and whether the Liquidator intends to apply to Court for directions in respect of my decision.
52. Mr Park called for lodgement of Proofs of Debt in early September 2018, with a due date of 2 October 2018.
53. On 17 October 2018, Minter Ellison, the solicitors for the MPF Trustee, sent a letter to Clayton Utz, the solicitors for the DB Receivers, which was copied to my solicitors, informing them that the MPF trustee had lodged Proofs of Debt in the liquidation of the LMIM in the total sum of about \$346 million, but that the proofs do not assert any claim against LMIM as trustee of the FMIF. At page 233 of the Bundle is a copy of that letter.
54. On 7 December 2018, I was informed by my solicitors that they received correspondence from Russells informing them that Mr Park anticipated being in a position to notify me of any Creditor Indemnity Claims by 25 January 2018. A copy of that correspondence is at pages 234 to 235 of the Bundle.
55. On 19 December 2018, I instructed my solicitors to send correspondence to Russells confirming that I am proceeding on that basis that no claims for indemnity from the FMIF will be made, either by the MPF Trustee or LMIM, with respect to the debts or claims the subject of the proofs of debt lodged by the MPF Trustee and asking that they let us know as soon as possible if LMIM intends to leave open the possibility of making any Creditor Indemnity Claims in connection with any of the debts or claims the subject of the proofs of debt lodged by the MPF Trustee. A copy of that correspondence is at pages 236 to 237 of the Bundle.
56. I am informed by my solicitors and believe that they have not yet received a response to that letter.



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57. On 20 December 2018, I received a letter from Mr Park informing me that “*claims against FMIF have been received and admitted*”, with respect to proofs of debt lodged by Ernst & Young (“**EY**”) in the amount of \$158,896.51, and Norton Rose Fulbright Australia (“**Norton Rose**”) in the sum of \$315,601.21 (“**Norton Rose Proof**”). A copy of that correspondence is at pages 238 to 313 of the Bundle.
58. On 2 January 2019, I sought further information in relation to those claims. At pages 314 to 319 of the Bundle is a copy of that correspondence.
59. On 16 January 2019, I received a letter from Mr Park in response to my request for information in relation to the Norton Rose proof of debt, and providing a copy of a reviewed proof of debt lodged by EY in the amount of \$158,896.51 “plus interest and legal costs” from 19 March 2013. The amount of interest and costs was not particularised. At pages 320 to 331 of the Bundle is a copy of that correspondence, and the revised EY proof of debt (“**EY Proof**”).
60. On 24 January 2019, Ms Renee Lobb of FTI Consulting confirmed to me that the Liquidator has made a determination and is making a Creditor Indemnity Claim against assets of the FMIF with respect to the EY Proof and the Norton Rose Proof. At pages 332 to 341 of the Bundle is a copy of that correspondence.
61. On 25 January 2019, I received a letter from Mr Park attaching a further proof of debt lodged by EY (“**Further EY Proof**”) for the sum of approximately \$180 million. That proof asserts that, to the extent that the claim made in Supreme Court of Queensland Proceeding 2166 of 2015 (“**the Auditor’s Action**”) is successful, EY will recover loss or damage which is recoverable from LMIM and noting that the Liquidator has requested further information from EY in relation to this proof of debt to enable him to adjudicate upon this claim. At pages 342 to 345 of the Bundle is a copy of that letter and the further proof of debt lodged by EY (excluding the copy of the documents annexed to the Further EY Proof).
62. On 31 January 2019, I sent a letter to Mr Park regarding the Further EY Proof. At pages 346 to 348 of the Bundle is a copy of that letter.

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Page 12



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63. I am informed by my solicitors and believe that on 4 February 2019, they received a letter from Russells informing them that they consider that this Application may be premature “pending the outcome of the EY court proceeding” because of the Further EY Proof. At pages 349 to 350 of the Bundle is a copy of that letter.
64. On 4 February 2019, I instructed my solicitors to send correspondence to Russells informing them that I consider that the Further EY Proof is not a barrier to an interim distribution because it is “merely reflective of and is contingent upon” LMIM as RE of the FMIF obtaining a judgment or orders against EY in the Auditor’s Action. At pages 351 of the Bundle is a copy of that letter.
65. On 6 February 2019, I instructed my solicitors to send a letter to King & Wood Mallesons, the solicitors for EY in the Auditor’s Action, seeking confirmation that the amount claimed by the Further EY Proof is limited to the amount of any judgment or orders against EY in the Auditor’s Action. At pages 352 to 361 of the Bundle is a copy of that letter.
66. On 7 February 2019, I received a response to my letter of 31 January 2019 from Mr Park. At pages 362 to 366 of the Bundle is a copy of that letter.
67. The letter referred to in paragraph 66 was attached to an email from Ms Renee Lobb of FTI Consulting, which email also advised, among other things, that no further information had been received from EY in relation to the EY Proof at that time. At pages 367 to 374 of the Bundle is a copy of that letter.
68. On 14 February 2019, I wrote to Mr Park regarding the EY Proof. At pages 375 to 377 of the Bundle is a copy of that letter.
69. On 14 February 2019, I wrote to Mr Park rejecting the Creditor Indemnity Claim made in respect of the claim notified by the Norton Rose Proof. At pages 378 to 383 of the Bundle is a copy of that letter.
70. On 14 February 2019, I also instructed my solicitors to write to Russells regarding both the EY Proof and the Further EY Proof. At pages 384 to 385 of the Bundle is a copy of that letter.



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71. On the basis of the above, in my opinion the following amounts ought to be retained on account of contingent liabilities in relation to the Creditor Indemnity Claims:-

| Description  | \$ Amount     |
|--|---------------|
| Amount of Creditor Indemnity Claims  | \$ 474,497.72 |
| Estimated interest at the statutory rate of 8% under section 563B of the Act from the date of the commencement of the administration of LMIM to 31/12/2020 | \$ 300,000    |
| <b>Total:</b>  | \$ 774,497.72 |

72. The above amount is based on the following assumptions:

- (a) That the only Creditor Indemnity Claims made are those made by LMIM in respect of the EY Proof and Norton Rose Proof;
- (b) That there will be no liability to pay any amount from the FMIF with respect to the Further EY Proof because that proof will only apply if my claim against EY is successful, in which case the amount of the Further EY Proof will be limited to and set off against the judgment;
- (c) That no claims for indemnity from the FMIF will be made with respect to the proof of debt lodged by the MPF Trustee.
- (d) That interest might be payable on any Creditor Indemnity Claims that are accepted.


73. It is in my view possible but unlikely that a third party might make a further claim against LMIM for which LMIM will have a right of indemnity against the FMIF.

74. It is not possible for me to provide any meaningful guidance to the Court of what the amount of any such claims might be.

75. I note, however, that any such claims may now have limitation issues, where the winding up of the FMIF commenced in August 2013. For that reason, I do not propose that any amount be retained on account of such liabilities.



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**Claims against PTAL with respect to retirement villages assets**

76. The FMIF held a number of securities over retirement village assets, provided by the following borrowers from the FMIF:-
- (a) Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed) ACN 098 955 296 ("**Cameo**");
  - (b) Bridgewater Lake Estate Pty Limited (In Liquidation) (Controllers Appointed) ACN 086 203 786 ("**Bridgewater**");
  - (c) OVST Pty Ltd (Controllers Appointed) (In Liquidation) ACN 103 216 771 ("**Ovst**");
  - (d) Redland Bay Leisure Life Pty Ltd (In Liquidation) (Controllers Appointed) ACN 109 932 916 ("**RBL**");
  - (e) Redland Bay Leisure Life Development Pty Ltd (In Liquidation) (Controllers Appointed) ACN 112 002 383 ("**RBLD**");
  - (f) Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed) ACN 116 192 780 ("**Pinevale**").
77. After the winding up of the FMIF had commenced, LMIM or PTAL (as mortgagee in possession) executed a number of resident contracts under which "incoming contributions" were received by PTAL from residents, and under which PTAL committed to payment of an "exit entitlement" when the resident ceases to reside or sells the right to reside in the village.
78. Under the retirement village legislation in the relevant state jurisdictions in which the retirement village assets are located, it is my understanding that the liability to repay these exit entitlements may be enforceable against any of:
- (a) the party to the contract;
  - (b) LMIM or PTAL as the operator of the village at the time the contract was entered into; or

  
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- (c) the current operator or owner of the village who may be liable to repay these incoming contributions, if it is held to have been the operator of a retirement village.
79. In the event that LMIM or PTAL is called upon to pay any such "exit entitlement", they are likely to be entitled to an indemnity from the assets of the FMIF.
80. On 25 September 2014, Andrew Fielding (a Partner at BDO) and I were appointed as agents of PTAL as mortgagee in possession in respect of securities held by PTAL (as custodian for the FMIF) that had been provided by the borrowers from the FMIF identified in paragraph 76:-
81. Pursuant to those appointments, Mr Fielding and I effected the sale of the securities over which we were appointed, all of which were retirement village assets. Four of those retirement villages were sold on 23 April 2015 and a fifth retirement village was sold on 31 July 2015.
82. On or about 14 August 2018, PTAL issued notices revoking the appointments of Mr Fielding and I as controllers of Bridgewater, RBL, RBLD, OVST, and Cameo on and from 15 August 2018, and on or about 21 September 2018, PTAL issued a notice revoking our appointment as controllers of Pinevale on and from 22 September 2018.
83. Pursuant to each of the agreements for sale, the incoming owner and operator of the retirement village provided an indemnity for the potential obligation to pay an "exit entitlement".
84. On the basis of my work with Mr Fielding as agents of the mortgagee in possession, PTAL, I understand that the maximum amount of the contingent liability is about \$11 million, being the quantum of incoming contributions paid under contracts entered before the villages were sold. There is, in my view, a high likelihood that this contingent liability has dissipated or will not in the event be called upon, because:
- (a) I understand from my experience operating the retirement village assets before they were sold that the average length of stay of a resident is four years;
  - (b) The incoming contributions are reduced by the costs of the resident staying in the village;
  - (c) no claims from residents for exit entitlements have been received to date; and

  
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(d) the retirement villages were sold to operators who I believed then and still believe are financially sound.

85. Nonetheless, I cannot presently say with certainty that that is the case, nor that no claims will be made.

86. I intend to write to the current operators of each of the retirement villages in question to ascertain the current exposure of the FMIF to these potential liabilities, and I will update the Court on the position prior to the hearing of this Application.

87. At this stage, and in the circumstances outlined above, it would in my opinion be excessive to retain the full amount of the \$11million, but in my opinion on a rough assessment of a realistic worst case scenario, the following amount ought to be retained in connection with the retirement villages:-

| Description   | \$ Amount  |
|---|------------|
| Provision for contingent liability of PTAL or LMIM to repay exit entitlements | \$5million |

88. This is based on the following assumptions:

- (a) Claims might be made for about 50 % of the exit entitlements;
- (b) None of those claims are disputed.


#### **Remuneration and Expenses claims of Liquidator**

##### ***Second FTI Remuneration Application***

89. By application filed 17 July 2018 (“**the Second FTI Remuneration Application**”), Mr Park, applied to the Supreme Court for orders that further amounts for his remuneration for acting as the administrator of LMIM be paid from the assets of the FMIF, for approval of further remuneration for his acting as liquidator of LMIM, and for orders that some of that amount be paid from the assets of the FMIF.



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90. The total amount Mr Park seeks in the Second FTI Remuneration Application to be paid from the property of the FMIF is \$743,889.89 (including GST) (**Document 234**).
91. The Second FTI Remuneration Application was heard on 6 September 2018 and 3 October 2018 before Justice Jackson, and judgment is currently reserved. However, I propose that the full amount of Mr Park's claims for payment from the FMIF be retained pending judgment.
92. I also anticipate that Mr Park will seek to recover his remuneration and expenses of the Second FTI Remuneration Application from the FMIF. I propose that an amount be retained for this potential liability.

***Further FTI Remuneration and expenses***

93. I anticipate that there will be further applications by the liquidator for payment of remuneration and expenses from the property of the FMIF.
94. ***First***, the liquidator has foreshadowed re-allocating approximately \$1.6 million in unpaid 'corporate' expenses (principally unpaid legal costs and outlays) to the various funds that LMIM is RE of, and making a claim for indemnity from the FMIF for a portion of those expenses.
95. At pages 386 to 387 of the Bundle is a copy of paragraphs 12 to 16 of an Affidavit of John Park sworn 5 September 2018 in respect of the Second FTI Remuneration Application, filed in this proceeding, which deposes to his intention to bring an application for approval of these expenses, including orders for the expenses to be paid from trust assets.
96. In my view, 25% of this amount should be retained, on the assumption (although I do not presently know if it be correct) that the amount claimed will be reflect at most an equal apportionment between the various funds still managed by LMIM as responsible entity.
97. ***Second***, on 10 October 2018 Mr Park filed an application seeking directions in relation to arrangements for the future conduct of the winding up of the FMIF ("**the Directions Application**"),

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Page 18

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Witnessed by: 

that was heard on 10 December 2018. Mr Park sought directions including to the general effect that:-

- (a) my appointment continue in relation to certain specified legal proceedings, and that Mr Park otherwise take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution;
  - (b) the Liquidator is directed to act as contradictor in Supreme Court proceedings 11560 of 2016 (“**the Clear Accounts Proceeding**”), in which I have caused LMIM as RE of the FMIF to seek declaratory relief to the effect that I am justified applying LMIM’s liability to the FMIF to make good breaches of trust in satisfaction of LMIM’s right of indemnity for creditor claims, such that no further amount need be paid from the FMIF.
98. The Directions Application was heard before Justice Jackson on 10 December 2018. Judgment is reserved.
99. I anticipate that Mr Park will seek to recover his remuneration and expenses of the Directions Application from the FMIF. I propose that an amount be retained for this potential liability, in the event the Court considers that it is appropriate that his costs be paid from the FMIF.
100. I do not propose that any amount be withheld for Mr Park’s costs of prosecuting the Clear Accounts Proceeding. Those proceedings are presently stayed and whether any costs will be incurred in the future will depend on whether I decide to prosecute the Clear Accounts Proceeding, or seek to discontinue it.
101. **Third**, as to FTI’s further remuneration and expenses of the winding up, I understand that Mr Park retains the following responsibilities in the winding up of the FMIF:
- (a) Completing the process under the December 2015 Orders as to Creditor Indemnity Claims against the property of the FMIF;
  - (b) Maintaining LMIM’s AFSL;

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- (c) Causing a final audit of the FMIF to be conducted, unless responsibility for that task (once it falls due) is transferred to me;
- (d) Making a further application or applications for recovery of remuneration and expenses from the FMIF.

102. I propose that amounts be retained for such further remuneration and expenses (if approved by the Court), including for the remuneration and expenses of any application or applications to recover them.

103. I have, for the purpose of identifying the amounts to be retained, assumed that the existing arrangements for the winding up of the FMIF are not altered. However, in the event that the orders sought in the Directions Application are made, I assume that FTI's remuneration and expenses will be roughly similar to my own for the same work, which I have estimated below.

***Summary of Liquidator claims***

104. In light of the above, on the basis of my experience with the conduct of the winding up of the FMIF to date, and as a receiver and liquidator with many years' experience, in my opinion the following amounts ought to be retained on account of contingent liabilities in relation to future claims for remuneration and expenses by the Liquidator:-

| Description   | \$ Amount     |
|---|---------------|
| Liquidator's remuneration claimed from the FMIF in the Second FTI Remuneration Application                                  | \$ 743,889.89 |
| Liquidator's further legal expenses notified in the Second FTI Remuneration Application but not (yet) claimed from the FMIF | \$ 400,000    |
| Liquidator's other remuneration and expenses recoverable from the FMIF to the conclusion of the winding up of the FMIF      | \$ 200,000    |
| Liquidator's legal costs and remuneration of the Second FTI Remuneration Application  | \$ 200,000    |

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|---|-----------------|
| Liquidator's legal costs and remuneration of the Directions Application   | \$ 200,000      |
| Liquidator's legal costs and remuneration of further applications for recovery of expenses and remuneration from the FMIF | \$ 300,000      |
| <b>Total:</b>   | \$ 2,043,889.89 |

105. The above amounts are provided based on the following assumptions:
- (a) there is only one further application by the Liquidator for approval of expenses; and
  - (b) there is only one further application by the Liquidator for approval of remuneration;
  - (c) the complexity of and the extent of any further disputes relating to the Liquidators remuneration or expenses is less than was the case in the applications heard to date due to the considerable guidance provided by the judgments handed down by Justice Jackson.

**My Remuneration and expenses to finalise winding up**

106. I anticipate the following tasks remain to be done by me in order to conclude the conduct of my appointments in relation to the FMIF:
- (a) progressing litigation which I have caused to be brought in the name of LMIM as responsible entity of the FMIF, or have otherwise caused to be funded for the benefit of the FMIF;
  - (b) completing the proof of debt and indemnity claim process, pursuant to the December 2015 Orders;
  - (c) complying with financial reporting obligations, and seeking the extension of the current ASIC exemptions obtained on my application, should the current exemptions expire before the winding up is at the stage where the final audit should be undertaken. At pages 388 to 389 of the Bundle is a copy of the most recent instrument of relief issued by ASIC to the FMIF on my application;



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- (d) maintaining the Register of members of the FMIF;
  - (e) reporting quarterly to members;
  - (f) application/s by me for approval of remuneration;
  - (g) dealing with any claims by Mr Park for remuneration, costs or expenses to be paid from the FMIF;
  - (h) distributing funds to the members of the FMIF, including seeking the authority of the Court to do so;
  - (i) taking such further steps as are necessary to bring my appointments to an end.
107. The most substantial tasks that remain to be performed in the winding up are the prosecution of the various legal proceedings which remain on foot in order to recover substantial funds for the benefit of FMIF members.
108. I note that if the orders sought by the Liquidator in the Directions Application are made, that would have the effect of limiting my appointment to the conduct of certain legal proceedings. If so, responsibility for all or some of these administrative tasks may be transferred to the Liquidator. I have assumed, however, that the Liquidator's costs of those tasks would be no more than my own.
109. I address below the amounts to be retained on account of the administrative aspects of the winding up, before addressing the litigation.

**Administrative aspects of winding up**

110. The costs of these administrative tasks is a relatively small proportion of the costs of the winding up given that the most substantial tasks that remain relate to the prosecution of legal proceedings to recover funds for the benefit of FMIF members.
111. However, the costs of the administrative tasks will be heavily influenced by how long the winding up continues for.

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112. In my opinion, and based on my experience of my conduct of the winding up of the FMIF to date, the following amounts ought to be retained on account of contingent liabilities in relation to my future claims for remuneration and expenses:-

| Description   | \$ Amount           |
|---|---------------------|
| Ongoing administrative tasks (for 5 years)  | \$ 1 million        |
| Completing the Proof of Debt Process, including resolving any disputes  | \$ 50,000           |
| Responding to further claims by the Liquidator for recovery of remuneration and expenses from the FMIF          | \$ 100,000          |
| Applying for authority to make a final distribution to the members of the FMIF                                  | \$ 50,000           |
| Legal costs and remuneration of further applications for approval of remuneration (10 x 6 monthly applications) | \$ 500,000          |
| Finalising my appointment   | \$ 100,000          |
| <b>Total:</b>   | <b>\$ 1,800,000</b> |

**Legal Proceedings**

113. I address below the significant proceedings that remain on foot in respect of which there is the possibility of significant liabilities going forward.
114. The costs related to any other legal proceedings which may be recoverable from the assets of the FMIF are encompassed by the further contingency that I have allowed, to which I refer above.

Feeder Fund Proceedings

115. I caused Supreme Court proceedings 13534/16 (the **Feeder Fund Proceedings**) to be commenced to seek declarations that the Feeder Funds were disentitled from receiving further distributions in the winding up of the FMIF, to the extent of the benefits previously provided to them from the FMIF in breach of trust (subject to any necessary adjustments), and that a number of income distributions and deemed re-investments were void.



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116. The key defendants to the Feeder Fund Proceedings are:
- (a) LMIM in its capacity as responsible entity of the CPAIF;
  - (b) Trilogy in its capacity as responsible entity of the WFMIF;
  - (c) LMIM in its capacity as RE of the ICPAIF; and
  - (d) LMIM in its own right.
117. On 13 June 2018, his Honour Justice Jackson directed pursuant to section 59 of the *Trusts Act 1973* (Qld) that:
- (a) Mr Said Jahani of Grant Thornton, the privately appointed receiver to the assets of the CPAIF and the ICPAIF, represent the interests of LMIM in its capacity as responsible entity of the CPAIF and the ICPAIF;
  - (b) Mr Park represent the interests of LMIM in its own right.
118. At pages 390 to 422 of the Bundle is a copy of the Second Further Amended Statement of Claim filed on 21 June 2018. This is the most recent pleading. No defence has yet been filed.
119. A confidential settlement was agreed in principle at mediation in November 2018 attended by LMIM in its capacity as responsible entity of the CPAIF and ICPAIF, and Trilogy as responsible entity of the WFMIF, and a Deed of Settlement and Release executed in December 2018.
120. The Deed of Settlement is subject to a number of conditions precedent, including that:-
- (a) myself, Mr Jahani, Trilogy and the custodian of the WFMIF, The Trust Company Limited obtain judicial advice to the effect that they are justified in entering into and performing the Deed (clauses 3.1(b),(d) and (f)). We are each obliged to apply for such judicial advice by 1 February 2019 and to use best endeavours to have the application heard by 15 March 2019;

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Page 24

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- (b) orders are made by the Supreme Court of Queensland giving authority for an interim distribution to be made to FMIF members in the amount of at least \$30 million (clause 3.1(g)). I am obliged by the Deed to make this application by 1 February 2019 and use my best endeavours to have the application heard by 15 March 2019; and
- (c) the interim distribution is made. The time for satisfaction, non-fulfillment or waiver of this condition precedent, which is for the benefit of all parties, is three weeks after the Court delivers judgment with respect to the application for authority to make the interim distribution.
121. At pages 423 to 427 of the Bundle is a copy of pages 1, 2 and 10-12 of the Deed of Settlement showing the names of the parties, clause 3.1 (Conditions Precedent) and 3.2 (Time for fulfilment of Conditions Precedent).
122. I have filed an application to Court seeking directions to the effect that I am justified entering into and performing the terms of the Deed of Settlement. An application for substituted service orders in respect of this application is listed before Justin Mullins on 22 February 2019.
123. For the purpose of this Application, however, I assume that the Deed of Settlement does not proceed, and propose to retain funds to cover any liability for an adverse costs order for costs incurred by the defendants to date.
124. In that event, the Application also seeks orders that amounts be withheld from the Feeder Funds in the proposed interim distribution, pending a determination in the Feeder Fund Proceeding of their entitlement to receive a distribution.
125. In my opinion, having consulted with my solicitors retained in the matter (Gadens), and based on my experience conducting litigation such as the Feeder Fund Proceedings and dealing with Mr Jahani and Trilogy in the Feeder Fund Proceedings itself, the following amounts ought to be

  
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retained on account of uncontrolled contingent liabilities in relation to the Feeder Fund Proceeding:-

| Description   | \$ Amount    |
|---|--------------|
| Legal costs and remuneration of the application to Court for judicial advice                      | \$ 100,000   |
| Liability under adverse costs orders for costs of Mr Jahani and Trilogy of the litigation to date | \$ 1 million |
| <b>Total:</b>   | \$ 1,100,000 |

**Auditor's Action**

- 126. I caused Supreme Court proceedings 2166/15 (**Auditors' Claim**) to be brought by LMIM as RE of the FMIF against EY, the auditors of the FMIF, in relation to their conduct of the half year review and end of year audits of the Financial Statements of the FMIF, and of the annual compliance plan audits, for the period from 1 July 2007 through to and including 30 June 2012.
- 127. This claim is on the commercial list before Justice Jackson. An order has been made for a mediation to be held by 15 March 2019. The mediation has been scheduled for 4 and 5 March 2019.
- 128. If this proceeding does not settle at mediation, I intend to bring an application to Court for directions as to whether I am justified in proceeding with this claim, with or without litigation funding.
- 129. In my opinion, however, and on the assumption the following amounts ought to be retained on account of the uncontrolled contingent liabilities in relation to the Auditor's Claim:-

| Description  | \$ Amount  |
|--|------------|
| Legal expenses and remuneration up to and including mediation                  | \$ 350,000 |
| Legal expenses and remuneration of an application to Court for judicial advice | \$ 100,000 |



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|   |              |
|---|--------------|
| Liability under adverse costs order for costs of EY of the litigation to date | \$ 2 million |
| <b>Total:</b>   | \$ 2,450,000 |

**Drake Proceeding**

130. I caused Supreme Court proceeding 12317/14 (“**Drake Proceeding**”) to be commenced by LMIM as RE of the FMIF by claim filed on 19 December 2014, against LMIM in its own right, the MPF Trustee and various directors of LMIM.
131. It is alleged that LMIM as RE of the FMIF acted in breach of trust and duty by executing a settlement deed, to settle a dispute with a purchaser of a security property over which the FMIF had a first registered mortgage and the MPF had a subsequent registered mortgage, which provided for the settlement proceeds to be split between the FMIF and the MPF.
132. The sum of \$15,546,147.85 was received by LMIM as trustee of the MPF from the settlement proceeds, and that amount plus interest is the amount of the claim.
133. The MPF Proceeding is ongoing and is being managed on the Commercial List by Justice Jackson. The proceeding has been listed for a 10 day trial commencing 1 April 2019.
134. A sum of \$1 million is held in the trust account of Gadens Lawyers as security for costs in the Drake Proceeding, having been paid into that trust account from the property of the FMIF.
135. In light of the proximity of the trial of this matter, I propose to account for the controlled contingent liabilities of running the trial as well as the uncontrolled contingent liabilities for the purpose of this Application.



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136. In my opinion, the following amounts ought to be retained on account of controlled and uncontrolled contingent liabilities in relation to the Drake Proceeding (in addition to the security held by Gadens):-

| Description   | \$ Amount      |
|---|----------------|
| Legal costs and remuneration up to and including trial                | \$ 700,000     |
| Further liability under adverse costs order, if claim is unsuccessful | \$ 7.5 million |
| <b>Total:</b>   | \$ 8,200,000   |

137. The above amounts are based on the following assumptions:-
- (a) That the trial proceeds in April 2019;
  - (b) That the length of the trial is 10 days.

**Clear Accounts Proceeding**

138. I caused Supreme Court proceedings 11560/16 (**the Clear Accounts Proceeding**) to be commenced in the name of LMIM as responsible entity of the FMIF against LMIM in its own right, to preserve claims for damages or equitable compensation suffered by the FMIF as a result of breaches of trust or duty by LMIM.
139. My purpose in commencing the Clear Accounts Proceeding was and remains to preserve a clear accounts rule defence to the indemnity that would otherwise be available to LMIM as trustee.
140. Mr Park was appointed as the person to represent the interests of LMIM in its own right in the Clear Accounts Proceeding, pursuant to section 59 of the *Trusts Act 1973* (Qld), by the orders of the Honourable Justice Jackson made on 25 July 2018.
141. As part of the same orders, the Clear Accounts Proceeding was stayed pending completion of the proof of debt process, and the identification of the creditors who will stand to benefit from any indemnity claims who might be called upon to fund a defence of the Clear Accounts Proceedings.



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142. The extent to which it is necessary to proceed with the claims made in this proceeding will not be known until after completion of the proof of debt process.
143. As such, the decision whether to proceed with the Clear Accounts Proceeding is entirely within my control.
144. Furthermore, in circumstances where the proceedings were stayed immediately upon the making of orders as to representation, I do not expect that there will be any uncontrolled contingent liabilities, such as potential adverse costs orders for costs incurred to date.
145. As such, in my opinion, there is no need to retain any amount on account of uncontrolled contingent liabilities in relation to the Clear Accounts Proceeding.

**Bankrupt estate of Ross Lamb**

146. PTAL as custodian of the FMIF obtained a default judgment against Mr Lamb in the Supreme Court of New South Wales for approximately \$3 million, plus interest and costs.
147. Mr Lamb then filed a debtor's petition and was declared bankrupt.
148. Mr Lamb and his wife had been parties to a Development Agreement. The proceeds of sale of 11 lots owned by Mr Lamb and his wife (in some cases, with another party) that were developed and sold are held in a solicitor's trust account.
149. There is presently in excess of \$12 million in the solicitor's trust account, being essentially the profits of the development, protected on an interim basis by certain undertakings given by the solicitors holding the funds.
150. Mr Lamb's former trustee in bankruptcy had been liaising with other parties involved in the development and investigating whether the bankrupt may have an entitlement in respect of a portion of the funds held in the solicitor's trust account.
151. It is alleged by the other parties to the dispute that Mr Lamb is not entitled to a share of the profits. Instead, they allege that associated entities to Mr Lamb and his wife (including their daughter, to

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whom Mr Lamb transferred shares in the entity that undertook the development for no consideration) and the joint venture partner with whom Mr Lamb and his wife undertook the development are the parties entitled to be paid the profits.

152. PTAL as custodian of the FMIF has, on my instructions, entered into a Deed of Indemnity to fund a public examination under the *Bankruptcy Act 1966* to further investigate the claims available to the trustees and any agreed recovery proceedings.
153. Under the terms of the Deed, PTAL is obliged to indemnify the bankruptcy trustee for their remuneration and expenses of and incidental to the proposed public examination and any agreed legal proceeding and for any liability under adverse costs orders in relation to such proceedings.
154. In my opinion, the following amounts ought to be retained to cover potential uncontrolled contingent liabilities with respect to Mr Lamb's bankruptcy:-

| Description  | \$ Amount  |
|--|------------|
| Trustee's legal costs and remuneration in relation to public examination | \$ 200,000 |
| My expenses and remuneration   | \$ 30,000  |
| <b>Total:</b>  | \$ 230,000 |

155. The above amounts are based on the following assumptions:
- (a) That there are six to ten summonses issued; and
  - (b) That the public examination lasts for about four days, with no adjournments.

**B. THE RIGHTS OF FOREIGN INVESTORS IN THE FMIF**

156. The FMIF presently has 171 members who invested in the FMIF by paying for the units that they acquired with a currency other than Australian dollars ("**Foreign Currency Members**").
157. From the dates of the investments of the Foreign Currency Members, I understand and believe that all of them invested in the FMIF under the PDS dated 10 April 2008.

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158. The PDS was updated by the Supplementary Product Disclosure Statement dated 28 November 2018, after some but not all of the Foreign Currency Members had already invested.
159. The currencies used by the Foreign Currency Members to invest in the FMIF were the Euro, the British Pound, Hong Kong Dollars, New Zealand Dollars, Singapore Dollars, Thai Baht, the Turkish Lira, and United States Dollars.
160. The Foreign Currency Members are referred to in the financials of the FMIF as C class unit holders. At the time each of the Foreign Currency Members invested, the price of a unit in the FMIF was AUD\$1.
161. Based on the membership records of the FMIF as they presently stand, Foreign Currency members hold about 2.6 percent of the units in the FMIF.

#### **Migration of Membership Records of FMIF**

162. Up until about 2011, a software system known as Composer was used to store, maintain and update records of members of the FMIF ("**Composer database**").
163. In about 2011, the records of members of the FMIF in the Composer database were migrated, or transferred to, a software system known as AX.
164. Thereafter, the AX software system was used to store, maintain and update records of members of the FMIF ("**AX database**").
165. The member records of the FMIF are stored on the AX database. It is the register of members.
166. Based on my review of the membership records of the FMIF, it appears that:
  - (a) the number of units acquired by Foreign Currency Members was initially recorded in the Composer database by converting the investments made in foreign currencies to their Australian dollar equivalent at the prevailing foreign exchange rate at the date of the investment, and units were then issued to them at the applicable unit price of AUD \$1 per unit based on the Australian dollar value of their investment;

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Page 31

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- (b) when LMIM transferred the FMIF investor database from the Composer database to the AX database, the number of units held by each Foreign Currency Member was recorded in the "Unit Balance" column based on the foreign currency amount invested. That is, one unit was recorded for each unit of foreign currency invested, irrespective of the value of the currency in AUD;
- (c) for each investor, the AX database also recorded in the "Investment Currency" column the currency in which that investor had invested;
- (d) since the transfer of the membership records to the AX database, transactions in the following categories have occurred involving Foreign Currency Members:
  - (i) distributions have been paid to Foreign Currency Members;
  - (ii) hardship payments have been made to Foreign Currency Members;
  - (iii) Foreign Currency Members have reinvested distributions; and
  - (iv) Foreign Currency Members have transferred or sold units.

167. At the pages 428 to 434 of the Bundle is an extract of the Investor Master Register as at the "Effective Date" of 29 November 2012 (with member names and addresses redacted). For each member:

- (a) the "Unit Balance" records the number of units of foreign currency invested, i.e. 1 unit for US\$1 invested;
- (b) the "Investment Currency" records the currency in which the member invested into the FMIF;
- (c) the "Effective Unit Price" records the unit price (in AUD) as at the Effective Date;
- (d) the "Balance in Currency" is Unit Balance Multiplied by the Effective Unit Price; and
- (e) the "Balance in AUD" is the amount required in AUD to pay the investor the "Balance in Currency" at the then applicable foreign exchange spot rate.

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168. At page 435 of the Bundle is an example of a statement issued to a foreign investor, with member details redacted. The currency is recorded as EUR (the Euro), and the investor is allocated one unit for each Euro invested. The expiry of each investment, and the amount re-invested and reheded, from time to time, in foreign currency.
169. When reporting the number of units in the Fund, for example in the Financial Statements, the RE would convert the "Unit Balance" into an Australian dollar equivalent amount as at the foreign currency exchange spot rate between the "Investment Currency" and the Australian Dollar prevailing at the time.
170. When making capital distributions in both March 2013 and in June 2013, LMIM (by itself in March and by its administrators in June 2013) calculated the amount to be paid to Class C investors by **reference** to the foreign exchange spot rate as at the date of the distribution.

**Forward Foreign Exchange Contracts**

171. Prior to my appointment, LMIM as RE of the FMIF entered into Forward Foreign Exchange Contracts ("FFEC"), hedging the investments made by Foreign Currency Members.
172. On notification that LMIM had been placed into voluntary administration, all the FFECs entered into by the FMIF were closed out at market rates.
173. Mr Park and Ms Muller, as the administrators of LMIM, partially reheded the investments made by Foreign Currency Members for a period of time, but I am not aware that this hedging has been continued.
174. I have not entered into any FFECs in my capacity as receiver, or purported to do so on behalf of LMIM as RE of the FMIF.
175. At page 436 of the Bundle is a summary of the amounts invested in each foreign currency, the exchange rate as at 8 August 2013 (the commencement of the winding up) and the AUD value of the investments as at that date (assuming a value of AUD\$1 per unit).

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Page 33



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176. At page 437 of the Bundle is summary of the amounts invested in each foreign currency, the exchange rate as at 29 January 2019, and the AUD value of the investments as at that date (assuming a value of AUD\$1 per unit).

**Documentation of rights attaching to C class units**

177. BDO have undertaken a number of searches or inquiries to identify any documents (other than the PDS and SPDS) recording a determination by the RE of the rights attaching to the C class units.
178. *Firstly*, I instructed BDO staff under my supervision to review the minutes of the meetings of LMIM's executive committee in the 30 June 2008 financial year for any determination of the rights attached to C class units.
179. I also instructed them to search the books and records of the FMIF, including the computer servers containing the books and records of the FMIF, for copies of the minutes of the board meetings of LMIM held in the 30 June 2008 financial year, and the board papers tabled at those meetings.
180. They have informed me, and I believe, that they were able to locate and review the board papers tabled at each of those meetings, as well as the minutes of the meetings held on 12 September 2007, and on 2 May 2008. They were not able to locate the minutes of the meetings held on 27 November 2007.
181. They have informed me, and I believe, that they were not able to locate any record of a determination of the rights attaching to the C class units.
182. *Secondly*, I instructed BDO staff under my supervision to perform keyword searches of the Outlook (email) inboxes of various key LMIM personnel, including Lisa Darcy (former Executive Director of LMIM), Peter Drake (former Chairman and CEO of LMIM), Carolyn Hodge (former Secretary of LMIM and member of Compliance and Fund Management Committees), Sharon Duffy (former Department Head of Investment Services, Foreign Currency Withdrawals, and, Donna Alexander (a former employee in LMIM's Treasury Services Department), David Monaghan (a former

  
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commercial manager and legal advisor of LMIM), Grant Fischer (former CFO of LMIM), Eghard van der Hoven (former Director of LMIM).

183. They have informed me, and I believe, that they were not able to locate any documentation of the rights attached to C class units, other than the PDS.
184. However, they have identified and provided me with a copy of an email from Carolyn Hodge sent 12 February 2013 which states that “*our disclosure document covers off how we determine classes*” and then gives an example from a clause in the AIF disclosure document. At pages 438 to 442 of the Bundle is a copy of a chain of emails which includes that email. Ms Hodge’s email appears to have been sent to answer a query in an email from Edhard van der Hoven as to the mechanism used to allow for different treatment between different classes.
185. **Thirdly**, they have also informed me, and I believe, that they have identified an LMIM document entitled “PDS and SPDS Checklist” for the PDS issued 10 April 2008, signing off on the issue of the PDS. At pages 443 to 449 of the Bundle is a copy of that document.
186. **Fourthly**, at pages 450 to 517 of the Bundle is a copy of the FMIF’s compliance plan dated effective 31 May 2007, in force when the PDS was being prepared.
187. I refer to section 14 of the 31 May 2007 PDS and the reference to a register for PDS approvals and supporting documents, and the requirement that all statements in the PDS must be verifiable and supported by written documentation if possible.
188. I instructed BDO staff to review LMIM’s records for such a register or supporting documents. I am informed by them and believe that they were unable to find any register of the PDS approvals, or of supporting documentation.
189. At pages 518 to 593 of the Bundle is a copy of the FMIF’s amended compliance plan effective 10 April 2008, upon the issue of the PDS to address compliance matters regarding the Foreign Currency Investors.

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Page 35

  
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190. *Fifthly*, I instructed BDO staff under my supervision to undertake keyword searches of the transcripts of the public examinations which were held in relation to the examinable affairs of the FMIF. The keywords “class” constitution”, “investor”, “foreign”, “pds” and “product” were used. Based on these searches, it appears that no questions were asked at the public examination in relation to whether there is any documentation setting out the rights attaching to the C class units.
191. Lisa Darcy, a former director of LMIM, gave evidence at the public examination that she did not recall whether there was any documentation setting out the rights attaching to the units held by the B class unit holders (the Feeder Funds). At pages 594 to 595 of the Bundle is a copy of the relevant pages from the transcript of Ms Darcy’s evidence.
192. *Sixthly*, I have caused direct inquiries to be made of a number of former directors or employees of LMIM.
193. BDO staff under my supervision have also informed me that the PDS was prepared with the assistance of Mr John Beckinsale, partner of Allens. As a result on 31 January 2019, I emailed David Monaghan, of Allens, a former commercial manager and legal advisor of LMIM who is now at Allens, in relation to preparation of the PDS in April of 2008 inquiring as to whether he or John Beckinsale, a partner of Allens, recalls LM asking them to document the rights and obligations attaching to the classes of units. Mr Monaghan sent an email to me in response advising that neither he, nor John Beckinsale recalls the matter or being asked by LMIM to document the establishment of the classes. At page 596 to 599 of the Bundle is a copy of my email to Mr Monaghan and his response.
194. On or about 31 January 2019, I attempted to contact Donna Alexander of LMIM, who was involved in the preparation of the PDS, however she has not responded to my call or to the text message which I then sent to her.
195. On 5 February 2019, I spoke to Simon Tickner, a former director of LMIM. Mr Tickner informs me, and I believe, to the effect that he was not involved in that part of the business, does not recall any documentation setting out the class rights and is unable to help.



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Witnessed by:

196. I am informed by Arthur Taylor, a Senior Manager of BDO, and believe that he made an inquiry of Carolyn Hodge (former secretary of LMIM and member of Compliance and Fund Management Committees) who was unable to recall or refer him to any documents setting out the rights attaching to the C class units other than the Constitution, the PDS and the compliance plan.
197. *Finally*, in light of the above, I am confident that, if there were any further documents setting out the rights attaching to the C class units, the searches and inquiries undertaken by BDO on my instructions, to which I refer above, would have identified them.
198. 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 18<sup>th</sup> day of February 2019 at Noosa in the presence of:



**Deponent**



**Solicitor/A Justice of the Peace**

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

CERTIFICATE OF EXHIBIT

Exhibit "DW-130" to the Affidavit of DAVID WHYTE sworn this 18<sup>th</sup> day of February 2019



Deponent



Solicitor/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  
Brisbane, Qld, 4000  
Tel: (07) 300 300 00  
Fax: (07) 300 300 33

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INDEX OF EXHIBITS

Volume

| No.             | Index to "DW-130"  | Date                                     | Page No. |
|-----------------|--|--|----------|
| <b>VOLUME 1</b> |  |  |          |
| 1.              | Orders of Dalton J dated 21 August<br>Orders of Jackson J made on 17 December 2015 and 18 July 2018<br>in proceeding 3508/15 | Various                                  | 1 - 13   |
| 2.              | Replacement Constitution of LM First Mortgage Income Fund<br>and variations thereto  | 10.04.2008;<br>16.05.2012;<br>26.10.2012 | 14 - 77  |

|                 |  |   |           |
|-----------------|--|---|-----------|
| 3.              | Product Disclosure Statement of FMIF and supplementary Product Disclosure Statements   | 10.04.2008;<br>30.10.2009;<br>3.3.2009;<br>28.11.2008 | 78 - 160  |
| 4.              | Custody Agreement between LMIM and PTAL, together with the following relevant amendments:  | 4.02.1999   | 161 – 197 |
|                 | (a) Amendment to agreement by letter   | 14.06.1999  | 198 – 200 |
|                 | (b) Amending Deed  | 1.09.2004   | 201 – 206 |
| <b>VOLUME 2</b> |  |   |           |
| 5.              | FMIF financials for the year ending 30 June 2018   | 27.09.2018  | 207 – 232 |
| 6.              | Letter from Minter Ellison to Clayton Utz  | 17.10.2018  | 233       |
| 7.              | Letter from Russells to Tucker & Cowen   | 07.12.2018  | 234 – 235 |
| 8.              | Letter from Tucker & Cowen to Russells   | 19.12.2018  | 236 – 237 |
| 9.              | Letter from Mr Park to Mr Whyte  | 20.12.2018  | 238 – 313 |
| 10.             | Email from David Whyte to Kelly Trenfield and others   | 2.1.2019  | 314 – 319 |
| 11.             | Letter from John Park to David Whyte   | 16.1.2019   | 320 – 331 |
| 12.             | Email from Renee Lobb to David Whyte   | 24.1.2019   | 332 – 341 |
| 13.             | Letter from John Park to David Whyte attaching proof of debt lodged by EY for the sum of approximately \$180 million (excluding annexures) | 25.1.2019   | 342 – 345 |
| 14.             | Letter from David Whyte to John Park   | 31.1.2019   | 346 – 348 |
| 15.             | Letter from Russells to Tucker & Cowen   | 4.2.2019  | 349 – 350 |
| 16.             | Letter from Tucker & Cowen to Russells   | 4.2.2019  | 351       |
| 17.             | Letter from Tucker & Cowen to King & Wood Mallesons  | 6.2.2019  | 352 – 361 |
| 18.             | Letter from John Park to David Whyte   | 7.2.2019  | 362 – 366 |
| 19.             | Email from Renee Lobb to David Whyte   | 7.2.2019  | 367 – 374 |
| 20.             | Letter from David Whyte to John Park regarding EY Proof  | 14.2.2019   | 375 – 377 |
| 21.             | Letter from David Whyte to John Park rejecting Norton Rose Proof   | 14.2.2019   | 378 – 383 |
| 22.             | Letter from Tucker & Cowen to Russells   | 14.2.2019   | 384 – 385 |
| 23.             | Pages containing paragraphs 12 to 16 of Affidavit of John Park filed in proceeding 3508/15   | 5.9.2018  | 386 – 387 |
| 24.             | ASIC Instrument 16-0959  | 15.03.2018  | 388 – 389 |
| 25.             | Second Further Amended Statement of Claim filed in Feeder Fund Proceeding  | 21.6.2018   | 390 – 422 |



|                 |   |            |           |
|-----------------|---|------------|-----------|
| 26.             | Pages 1, 2 and 10-12 of the Deed of Settlement in Feeder Fund Proceeding  | 7.12.2018  | 423 - 427 |
| <b>VOLUME 3</b> |   |            |           |
| 27.             | Extract of Investor Master Register   | 29.11.2012 | 428 - 434 |
| 28.             | Example of statement for Foreign Investor (with investor names redacted)  |            | 435       |
| 29.             | Summary of amounts invested in each foreign currency and AUD value (exchange rate 8 August 2013) (calculation prepared 30 January 2019)                         |            | 436       |
| 30.             | Summary of amounts invested in each foreign currency and AUD value (exchange rate 29 January 2019) as at 30 January 2019 (calculation prepared 30 January 2019) |            | 437       |
| 31.             | Email from Carolyn Hodge  | 12.2.2013  | 438 – 442 |
| 32.             | PDS and SPDS Checklist  | 10.04.2008 | 443 – 449 |
| 33.             | Replacement Compliance Plan   | 31.5.2007  | 450 – 517 |
| 34.             | Replacement Compliance Plan   | 10.04.2008 | 518 – 593 |
| 35.             | Transcript of Lisa Darcy evidence at public examination   | 20.10.2015 | 594 – 595 |
| 36.             | Emails between David Whyte and David Monaghan   | 31.1.2019  | 596 – 599 |