SUPREME COURT OF QUEENSLAND

Registry: Brisbane

Number: BS3508/2015

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) CAN 077 208 461 AS THE RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 AND THE LM INSTITITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868**

SUBMISSIONS ON BEHALF OF THE RECEIVER

TABLE OF CONTENTS

I. SYNOPSIS

1. This application is brought by the First Respondent (the **Receiver**).

2. The primary purpose of this application is to facilitate a substantial interim distribution to members, in the winding up of the LM First Mortgage Income Fund (the **FMIF**).

3. A second purpose of this application is to give effect to a confidential settlement of Supreme Court proceedings 13534 of 2015 (the **Feeder Fund Proceedings**), which is dependent upon an interim distribution of at least $30 million being made.[1]

Procedural Issues

4. In bringing this application, the Receiver has sought to deal appropriately with a number of procedural complications.

5. Some of these issues are explained in more detail below, but they may be briefly outlined as follows.

6. ***First***, there is a complication arising from the Liquidator's application to narrow the scope of the Receiver's functions (the **Liquidator's Application**), which has been heard but not yet determined.[2]

7. In these circumstances, the Receiver's choice was either:

   (a) to defer this application until the Liquidator's Application was resolved; or

   (b) to bring the present application to deal with this discrete issue, on the basis that either:

      (i) it would not affect the broader issues to be resolved on the Liquidator's Application; or that

      (ii) it would be determined at the same time as the Liquidator's Application.

8. The Receiver considered that option (b) was the appropriate course, as the interim distribution issue seems to be a discrete issue which is suitable for immediate consideration – separately from broader questions about the winding up.

9. ***Secondly,*** there is a complication arising from the Receiver's need to also seek judicial advice as to the appropriateness of the settlement reached in the Feeder Fund Proceedings, including the associated question of whether it is appropriate to make the specific interim distribution that is a condition precedent of the settlement agreement (of at least $30 million).

10. Similar applications for judicial advice are required for each other party to the settlement, who are each responsible entities of the three Feeder Funds.[3]

11. As these applications for judicial advice require the Court to consider materials which cannot properly be placed before a potential trial Judge (such as Justice Jackson), they are required

[1] Paragraphs 120(b) and (c) of the affidavit of David Whyte sworn 19 February 2019 (**Mr Whyte's Affidavit**).
[2] Paragraphs 97 and 98 of Mr Whyte's Affidavit.
[3] Paragraph 120(a) of Mr Whyte's Affidavit. The 'Feeder Funds' are described at paragraphs 15 and 16 of Mr Whyte's Affidavit.

to be heard by Justice Mullins. Arrangements have been made for all of these applications to be heard on 2 May 2019.

12. In dealing with this complication, the Receiver's choice was either to:

    (a) bring all relevant applications before Justice Mullins (including the present application); or

    (b) bring the present application for authorisation (on open material) before Justice Jackson, and an application for judicial advice (on confidential material) before Justice Mullins.

13. The Receiver considered that the second option was the appropriate course.

14. That is because the issue of the proper allocation of responsibilities between the Liquidator and the Receiver is a matter which is in the course of determination by Justice Jackson – and it would not seem to be appropriate for the Receiver to refer any aspect of this issue to another Judge.

15. The Receiver also considered that the present application (which does not seek approval to make any specific quantum of distribution) could properly be determined by the present Court on open material, leaving any necessary judicial advice as to the quantum of distribution to be sought from Justice Mullins in due course.

16. The Receiver is conscious, however, that the parties representing one of the Feeder Funds (the WFMIF[4]) has expressed a preference to having all of the applications, including this application, heard by the one Judge (Justice Mullins).[5]

17. Accordingly, if the Court determines that this application (in whole or in part) should be heard by Justice Mullins, then the Receiver has no objection to this occurring.

18. ***Thirdly***, there is a complication arising from the timing of these two applications.

19. That is because the confidential settlement arrangements for the Feeder Fund Proceedings include a number of inter-related conditions precedent the satisfaction of which turn on the hearing and determination of these two applications, and the making of an interim distribution, within particular time frames. A copy of the provisions of the Deed of Settlement containing the conditions precedent and the time for their satisfaction is at pages 423 to 427 of Mr Whyte's Affidavit.

20. It would greatly simplify matters if the orders made on all relevant applications were made at the same time. There is scope for undesirable complications to arise if this does not occur.

21. That might be said to be a factor favouring the applications being heard by Justice Mullins – and the Receiver would see the practical merit in this approach.

22. However, there is an obvious alternative. Given the interdependence of the applications before Justices Jackson and Mullins, the appropriate course would seem to be to co-ordinate the delivery of formal judgments so that the matters are resolved at the same time.

[4] Namely, the Wholesale First Mortgage Income Fund.
[5] Letter from Squire Patton Boggs dated 12 March 2019.

23. ***Fourthly***, there is an issue of standing. The source of the Court's power to make the orders presently sought is s 601NF(2) of the *Corporations Act* 2001 (Cth) (the **Act**). It is true that the Receiver is not specifically named in s 601NF(3) as a party who has standing to apply for such an order. In the present circumstances, however, that is not considered to be a source of difficulty. That is because the Court's powers under s 601NF(2) have already been enlivened in these proceedings, and the present application only concerns a further working out of the directions which the Court has made. This was contemplated by the liberty to apply which was granted to the parties to the present proceedings in the orders made on 17 December 2015 (the **2015 Orders**).

24. ***Fifthly***, if there is to be an interim distribution, there is some uncertainty as to the entitlements of the unit-holders whose investments were made in foreign currencies (the **Class C Unitholders**).

25. To deal with this issue, the Receiver is seeking appropriate declaratory relief as part of the present application.

Need for Authorisation

26. Aside from these procedural complications, the legal framework of this application may be shortly stated.

27. The FMIF is a managed investment scheme that was registered on 28 September 1999, and was ordered by Justice Dalton to be wound up on 21 August 2013.[6]

28. The Receiver is the person appointed by Justice Dalton to supervise the winding up of the FMIF. He was also appointed the receiver of the property of the FMIF, with various powers including to commence proceedings in the name of LM Investment Management Limited (in liq) (**LMIM**) as responsible entity of the FMIF.[7]

29. The practical consequences of those orders were found by Justice Jackson in ***Park v Whyte (No 1)*** [2015] QSC 283 at [100] to [106] to include that:

    (a) LMIM's obligation under clause 16.7(c) of the Constitution to make distributions in the winding up of the FMIF was suspended, because the orders appointing the Receiver meant that it was not in possession of the scheme property;

    (b) the Receiver was under no obligation to return the property of the FMIF to the liquidator of LMIM once he had completed collecting and realising the assets of the FMIF, without an order of the Court; and

    (c) the orders appointing the Receiver did not authorise him to make distributions to the members in the responsible entity's place.

30. Those findings were encapsulated in the 2015 Orders made by Justice Jackson, which included directions that:[8]

    (a) (para 11) "LMIM shall not be responsible for, and is not required to discharge, the functions, duties and responsibilities set out in clauses 16.7(c) …"; and

[6] Paragraphs 3 and 8 and pages 1-4 of Exhibit DW-130 to Mr Whyte's Affidavit
[7] Paragraphs 3 and 4 of Mr Whyte's Affidavit.
[8] Pages 5 to 11 of Exhibit DW-130 to Mr Whyte's Affidavit.

(b) (para 12) "Mr Whyte is directed not to make any distribution to the members of the FMIF, without the authority of a further Order of the Court".

31. The 2015 Orders also provided in paragraph 12 that the Receiver was authorised and empowered to carry out the functions of LMIM pursuant to clauses 9, 10 and 22 of the constitution of the FMIF, namely its functions in relation to the maintenance of the register of members of the FMIF (the **Register**).

32. Following the retirement of receivers appointed by Deutsche Bank AG (**DB**) on 10 December 2018 and the resolution of certain legal proceedings earlier in 2018, the Receiver is now in control of a substantial cash fund held by the FMIF's custodian.[9]

33. Although the winding up of the FMIF has not concluded, it seems appropriate for substantial funds to be returned to the members of the FMIF by way of an interim distribution.

Amount of the Distribution

34. The funds held by the custodian of the FMIF exceed the money required to satisfy the actual as well as the 'uncontrolled' contingent liabilities of the FMIF, namely those liabilities that are at least partly outside the control of the Receiver.

35. Against cash at bank of approximately $65 million, the evidence suggests that FMIF's actual liabilities are in the amount of around $2,213,000, and its 'uncontrolled' contingent liabilities are estimated (on a realistic worst-case scenario) in the amount of $21,773,387.61.[10]

36. There is a further claim to be mentioned. The auditors of the FMIF, Ernst & Young (**EY**), have submitted a substantial proof of debt in the liquidation of LMIM dated 20 December 2018 (the **EY Proof**),[11] and have filed a Third Party Notice (the **Third Party Notice**) in Supreme Court proceedings 2166 of 2015 (the **Auditor's Action**) asserting various claims against LMIM[12], in both cases asserting rights of indemnity against the property of the FMIF. However, EY's claims are not free-standing. They arise in the event that it is established that EY have a liability to LMIM or if they become entitled to a costs order. For reasons explained further below, these possibilities are allowed for in the approach which is proposed.

37. In these circumstances, it is proposed that the Receiver be given the authority to make a distribution to the members of the FMIF of up to $40 million, being the balance after the actual and uncontrolled liabilities.

38. The precise amount which the Receiver may be justified in distributing depends upon matters which are confidential and cannot appropriately be placed before a potential trial Judge.

39. These matters include the terms of settlement of the Feeder Fund litigation, as well as the potential costs of continuing other litigation for the benefit of the members.

---

[9] Paragraphs 27 to 31 of Mr Whyte's Affidavit.
[10] Paragraphs 31 to 42 of Mr Whyte's Affidavit.
[11] Pages 342 to 345 of Exhibit DW-130 to Mr Whyte's Affidavit.
[12] Pages 8 to 100 of Exhibit DW-131 to the affidavit of David Whyte sworn 5 March 2019 (**Mr Whyte's Second Affidavit**).

40. These are matters to be dealt with in the application before Justice Mullins.

41. If the Court considers it to be necessary or desirable for such evidence to be before the Court which is determining the present application, then the appropriate course would seem to be to adjourn this application to be heard by Justice Mullins on 2 May 2019.

Class C Unitholders

42. The difficulty with Class C Unitholders is of two kinds.

43. ***First***, the rights of Class C Unitholders are not defined in the Constitution and do not appear to have been defined in any deed or similar document executed by LMIM as the responsibility entity of the FMIF. The only relevant document appears to be the Product Disclosure Statement dated 10 April 2008.[13]

44. ***Secondly***, this Product Disclosure Statement outlines the rights of Class C Unitholders in a descriptive way, which gives rise to a number of possible constructions.

45. It does seem clear, however, that the purpose of the Class C units was to protect unitholders from foreign exchange fluctuations, such that they would remain entitled to a distribution calculated on the basis of their original investment converted into Australian dollars at the foreign exchange spot rate as at the date of the distribution.

46. The Receiver seeks declaratory relief confirming that to be the nature of their entitlement in the interim distribution that he now proposes to make.

47. Finally, annexed to these submissions are the Receiver's list of materials (as "Annexure A") and his proposed draft orders (as "Annexure B").

II. INTERIM DISTRIBUTION

48. The winding up of a managed investment scheme is governed by the constitution of the scheme, and any directions made by the Court under section 601NF of the Act.[14]

49. The relevant provision of the Constitution is clause 16.7[15], which provides as follows:

> "Subject to the provisions of this clause 16 upon winding up the Scheme the RE must:
>
> (a) realise the assets of the Scheme Property;
>
> (b) pay all liabilities of the RE in its capacity as Trustee of the Scheme including, but not limited to, liabilities owed to any Member who is a creditor of the Scheme except where such liability is a Unit Holder Liability;
>
> (c) subject to any special rights or restrictions attached to any Unit, distribute the net proceeds of realisation amoung the Members in the same proportion specified in Clause 12.4;
>
> (d) The Members must pay the costs and expenses of a distribution of assets under clause 16.7(c) in the same proportion;

[13] Pages 78 to 160 of Exhibit DW-130 to Mr Whyte's Affidavit.
[14] ***Re Stacks Managed Investments Ltd*** (2005) 54 ACSR 466 at [45]-[46] (White J).
[15] A copy of the FMIF's constitution is at pages 14 to 77 of Exhibit DW-130 to Mr Whyte's Affidavit.

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

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

(g) The RE must distribute among the Members in accordance with clause16.7 anything retained under clause 16.7(f) which is subsequently not required."

50. In the ordinary course, therefore, the responsible entity is required to distribute the net proceeds of the realisation of the FMIF's property, subject to a right under clause 16.7(f) to withhold amounts on account of actual or contingent liabilities.

Amount of Potential Distribution

51. The winding up of the FMIF now being in its sixth year, it is desirable that a substantial interim distribution be made to the members of the FMIF.

52. That is now possible because all of the real property security assets of the FMIF have been realised,[16] there is cash at bank of approximately $65 million under the control of the Receiver,[17] and significant litigation seeking indemnities against the property of the Fund has been resolved.[18]

53. As against the cash position, the FMIF's actual liabilities are estimated in the amount of $2,213,000, and its 'uncontrolled' contingent liabilities are in the amount of $21,773,387.61.

54. The 'uncontrolled' contingent liabilities are as follows:

Creditor Indemnity Claims

55. By the 2015 Orders, the liquidator of LMIM 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 (the **Creditor Indemnity Claims**).[19]

56. The liquidator of LMIM has recently notified the Receiver of Creditor Indemnity Claims in an aggregate amount of $774,497.72, including interest under section 563B of the Act.[20]

57. That amount includes one of the two proofs of debt lodged by EY, and a proof of debt lodged by Norton Rose. The excluded EY Proof is considered further below. The included proof lodged by EY is a claim for unpaid audit fees in an amount of $158,896.51 plus interest. The other proof was lodged by Norton Rose for unpaid legal fees in an amount of $315,601.21 plus interest.

58. These claims are resisted by the Receiver relying on the 'clear accounts' rule.[21]

[16] Paragraph 25 of Mr Whyte's Affidavit.
[17] Paragraph 31 of Mr Whyte's Affidavit.
[18] Paragraphs 27 and 29 of Mr Whyte's Affidavit.
[19] See the 2015 Orders, as well as paragraph 51(a) of Mr Whyte's Affidavit.
[20] Paragraphs 51 to 75 of Mr Whyte's Affidavit.
[21] Pages 375-383 of DW-130 to Mr Whyte's Affidavit. See also paragraphs 138 to 142 of Mr Whyte's Affidavit regarding Supreme Court proceedings 11560/16 (the **Clear Accounts Proceedings**).

59. The Receiver nevertheless considers that it is appropriate to make provision for them in the event that the clear accounts rule does not prove to be effective in responding to these claims such that, in the result, there is a balance in favour of LMIM in respect of its indemnity claims.

60. However, there is a complication with this process.

61. The liquidator of LMIM advised in correspondence dated 7 February 2019 that "[a]s the proof of debt process is not being conducted by the Liquidator for the purpose of declaring a dividend, creditors are able to lodge a proof of debt at any point in time."[22]

62. This would seem to be correct.

63. The liquidator's position is consistent with the call for proofs not having been conducted under regulation 5.6.65 of the *Corporations Regulations* 2001 (Cth) in advance of the company declaring a dividend among the creditors of LMIM, but under regulation 5.6.48,[23] which relevantly provides as follows:

> (1) A liquidator may from time to time fix a day, not less than 14 days after the day on which notice is given in accordance with subregulation (2), on or before which creditors of the company whose debts or claims have not been admitted are formally to prove their debts or claims.
>
> …
>
> (4) A creditor of the company who fails to comply with a requirement of a liquidator under subregulation (1) is excluded:
>
> (a) from the benefit of a distribution made before his or her debt or claim is admitted; and
>
> (b) from objecting to that distribution.

64. This provision, however, would not seem to assist in the present case. That is because it is not apparent that the proposed interim distribution from the FMIF is a 'distribution' within the meaning of regulation 5.6.48(4). To the contrary, in context, it would apply to distributions of the property of the company, but that does not include trust property.

65. In the circumstances, the Receiver's solicitors have written to the liquidator of LMIM's solicitors on 20 February 2019 and requested that he confirm "the maximum reasonably possible extent" of LMIM's equitable lien over the property of the FMIF by reason of its right of indemnity.[24]

66. The solicitors for the liquidator wrote on 6 March 2019, in which they promised a relevant summary "in the next 48 hours", and added that "*we agree that our client's role in respect of that application is likely to be limited (if anything) to ensuring that sufficient funds are retained within FMIF to preserve LMIM's right of indemnity (and direct payment claims) until the conclusion of the winding up of FMIF and LMIM itself.*"

67. To date, however, no substantive response has been received to the Receiver's solicitors' correspondence dated 20 February 2019.

---

[22] See pages 362-3 of DW-130 to Mr Whyte's Affidavit.
[23] See also ***Derwinto Pty Ltd (in liq) v Lewis*** (2002) 42 ACSR 645 at [62].
[24] See pages 103-4 of DW-131 to Mr Whyte's Second Affidavit.

68. In practical terms, therefore, there is no material on the basis of which the Receiver can provide further guidance to the Court as to the quantum and risk of any future claims.[25]

69. In the circumstances, however, this risk would seem to be more theoretical than real:

    (a) the liquidator has formally called for proofs under the 2015 Orders, and the aggregate quantum of proofs received to date is less than $1million;

    (b) the winding up of the FMIF is in its sixth year. Although time for the purpose of the application of the statute of limitations is assessed as at the 'relevant date' of 19 March 2013,[26] nonetheless the fact that a significant amount of time has passed and only a handful of claims have been identified is a matter the Court may take into account;

    (c) in the event that there is a further proof lodged in the winding up, the authority sought by the Receiver presently leaves an excess of about $1million of assets over liabilities;

    (d) there is in any event a real possibility that some of the uncontrolled contingent liabilities will never arise (particularly the exit entitlements, addressed below).

70. It is the Receiver's view that there should be an interim distribution, notwithstanding the technical uncertainty as to whether further proofs of debt will be lodged.

Exit entitlements

71. It is necessary to allow a provision for potential liabilities to indemnify the payment of exit entitlements relating to former retirement village assets of $5,000,000.[27]

72. The basis for this contingent liability is retirement village legislation that permits a resident in a retirement village to recover their 'exit entitlements' when ceasing to reside or selling their right to reside in a residence not only from the current owner or operator of the retirement village, but also from the operator of the retirement village at the time they entered into their residency contract.

73. The Receiver has sought information about the potential extent of this contingent liability for the five villages in question, and has received information from one of them to the effect that there remain exit entitlements for which the FMIF could be liable, calculated to be in an aggregate amount of approximately $2.9million.

74. He believes that the village in question is likely to have the most remaining exit entitlements, as it is the only one which admits residents from 50 years of age; the average length of stay of the other villages is only four (4) years.[28]

Other claims

75. There are a number of other uncontrolled contingent liabilities that for which provision should be allowed, as follows.

---

[25] Paragraph 74 of Mr Whyte's Affidavit.
[26] See ***Motor Terms Co Pty Ltd v Liberty Insurance Ltd (in liq)*** (1967) 116 CLR 177. The date of 13 March 2013 is the date on which administrators were appointed to LMIM: see Paragraph 20 of Mr Whyte's Affidavit.
[27] Paragraphs 76 to 88 of Mr Whyte's Affidavit.
[28] Paragraphs 8 to 15 of Mr Whyte's Second Affidavit.

76. ***First***, there are existing (but unresolved) and potential future claims by the liquidator of LMIM for indemnity from the FMIF in the amount of $2,043,889.89.[29]

77. ***Second***, there are the non -litigation expenses and remuneration of the Receiver over five years, in the amount of $1,800,000.[30]

78. ***Third***, there are the litigation expenses and potential liabilities of the Feeder Fund Proceedings, but on the (worst case) assumption that it does not settle but is not pursed, in the amount of $1.1million.[31]

79. ***Fourth***, there are the litigation expenses and potential liabilities of the Auditor's Action, on the (worst case) assumption that it does not settle but is not pursued, in the amount of $2.45million.[32]

80. ***Fifth***, there are the litigation expenses and potential liabilities of Supreme Court proceedings 12317 of 2014 (the **Drake Proceeding**), on the (worst case) assumption that it does not settle against any defendant, and is unsuccessfully pursued against all defendants, in the amount of $8.2million.[33]

81. ***Sixth***, there is the expense and associated remuneration of public examinations to be conducted in Mr Ross Lamb's bankruptcy, which the Receiver has agreed to indemnity, in the amount of $230,000.[34]

The amount of the authorisation

82. The relevance of the evidence outlined above is to establish an amount which could *potentially* be distributed at the present time ($40 million).

83. Assuming that the Receiver is conferred with the necessary authority, it will then be necessary for the Receiver to make a further decision as to the quantum of the actual distribution to be made to members – based not only on the actual and uncontrolled contingent liabilities, but also on factors including the expected benefits of confidential settlements, and the extent to which he intends to pursue various legal proceedings he has commenced for the benefit of the FMIF.

84. This is a matter which will be referred to Justice Mullins for consideration, as it is a condition precedent of the settlement of the Feeder Fund Proceedings that a distribution of at least $30 million be made.

85. In seeking judicial advice as to the appropriateness of this settlement, it will be necessary for the Court to consider whether the Receiver is justified in making a distribution of this amount. This determination will be made on the basis of information about the potential benefits of the various settlements, and the costs of prosecuting the existing litigation.

[29] Paragraphs 89 to 105 of Mr Whyte's Affidavit.
[30] Paragraphs 106 to 112 of Mr Whyte's Affidavit.
[31] Paragraphs 115 to 125 of Mr Whyte's Affidavit.
[32] Paragraphs 126 to 129 of Mr Whyte's Affidavit.
[33] Paragraphs 130 to 137 of Mr Whyte's Affidavit.
[34] Paragraphs 146 to 155 of Mr Whyte's Affidavit.

Position of EY

86. It is necessary to mention that substantial claims have been made by EY against the property of the FMIF by the EY Proof lodged in the liquidation of LMIM, and the Third Party Notice filed in the Auditor's Action.

87. The face value of EY's claims substantially exceed the current value of the FMIF.[35]

88. For that reason, both EY and the liquidator of LMIM have asserted in correspondence from their respective solicitors that they consider that no interim distribution should be made until the Auditor's Action is resolved.[36]

89. However, neither the EY Proof nor the Third Party Notice identify any claim that goes beyond what EY might be ordered to pay to LMIM as responsible entity of the FMIF if EY loses the Auditor's Action, plus its costs of the Auditors' Action, plus a further claim of $158,896.51 for unpaid audit fees.

90. The claim for unpaid audit fees has already been factored into the Creditor Indemnity Claims for which the Receiver already proposes to make provision.

91. As to the EY Proof, it makes various claims "[t]o the extent the contraventions contained in the Sixth Further Amended Statement of Claim are proven (which is denied)".

92. As to the Third Party Notice, although the notice itself does not seek damages in any particular amount, the attached Statement of Claim articulates EY's allegations of loss and damage in paragraphs 21(a), 26, 29, 36, 37, 40, 45, 47, 52, 59(a), 64, 69, 70 and 81 variously in the following ways:

    (a) "in the form of legal costs and any adverse judgment in the proceedings";

    (b) "to the extent of its liability to the plaintiff";

    (c) "the legal costs incurred in connection with these proceedings" (para 70(b)(i));

    (d) "in an amount commensurate with any adverse judgment in the proceedings" (para 70(b)(ii)).

93. The claim for unpaid audit fees is articulated in paragraphs 113 to 119 in an amount of $158,896.51 (plus interest and costs).

94. All of those formulations limit the EY's claim to a purely reflective claim plus costs and its unpaid audit fees, despite the continued insistence of EY's solicitors to the contrary.[37]

95. For this reason, provided that EY's likely costs are accounted for by the Receiver in determining the amount of the interim distribution, it is not otherwise necessary to take into account the EY claims in calculating the amount of the distribution which may now be made to members.

---

[35] The EY Proof is for $181,005,000 plus interest and legal costs.

[36] The relevant correspondence with King & Wood Mallesons for EY and Russells for LMIM is at pages 346-361 of Exhibit DW-130 to Mr Whyte's Affidavit, page 8 of Exhibit DW-131 to Mr Whyte's Second Affidavit and the further letter to King & Wood Mallesons dated 11 March 2019 in the affidavit of David Schwarz sworn 12 March 2019.

[37] Email from Phillip Pan of KWM to Tucker & Cowen dated 12 March 2019, in the affidavit of David Heiner Schwarz to be sworn 12 March 2019.

96. These estimated costs (to date) are already accounted for in determining the sum of $40 million. A further allowance for future costs will be required in determining the appropriate amount of the interim dividend.

What if the Settlement is Not Approved?

97. In the event that the settlement of the Feeder Fund Proceedings is not approved, the Receiver considers that it would still be appropriate to make a distribution to the other members of the FMIF.

98. However, the relief sought in the Feeder Fund Proceedings includes declaratory relief that LMIM as responsible entity of the FMIF is entitled to withhold distributions or payments from the Feeder Funds to the extent of LMIM's pleaded liability to make good the breaches of trust alleged in those proceedings.[38]

99. That relief is sought on the basis of three equitable rules, namely the rule known as the clear accounts rule,[39] the rule in *Cherry v Boultbee*,[40] and the equitable recoupment rule.[41]

100. The purpose of the order sought in paragraph 1(b) of the orders sought by this application is to remove any doubt as to the interim arrangements applicable to any such distributions – with the Receiver not being obliged to actually pay distributions until the resolution of the Feeder Fund Proceedings, or earlier order.

101. The legal basis for withholding payment is explained in the reasons for judgment of Justice Jackson in ***Park v Whyte (No 3)*** [2018] 2 Qd R 475 at [135] to [144]. His Honour held that for so long as there is an unresolved question about the application of the clear accounts rule, the entitlement of the person beneficially entitled (in that case, the trustee) is suspended as a matter of law until the claim is resolved.

102. The Court also has power under section 601NF(2) of the Corporations Act 2001 (Cth) to give directions as to settling the entitlements of members: see ***Re Stacks Managed Investments Ltd*** (2005) 54 ACSR 466 at [52] (White J).

103. As a practical matter, the Receiver proposes to hold the funds which would otherwise be paid to the Feeder Funds separately to the other property of the FMIF, pending resolution of the Feeder Fund Proceedings, or until further order of the Court.

104. In the event that such a regime might cease to be appropriate, it is proposed that the Receiver's authorisation to withhold payment is subject to the further order of the Court, such that will always be scope for the Feeder Funds to revisit the issue in the future.

---

[38] See, generally, the Second Further Amended Statement of Claim dated 21 June 2018, a copy of which is at pages 390 to 422 of Mr Whyte's Affidavit. The factual basis for such relief was established in the Feeder Fund Proceedings, for the purpose of obtaining leave to proceed against a company in liquidation. That material can be read in support of this application, if necessary.
[39] See *In Re Dacre* [1916] 1 Ch 344 at 347 and *RWG Management Ltd v Commissioner for Corporate Affairs (Vic)* (1984) 9 ACLR 739 at 750-752 (Brooking J).
[40] (1839) 4 My & Cr 442. See also *Jeffs v Wood* (1723) 2 P Wms 128; 24 ER 668.
[41] See generally Jacobs' Law of Trusts in Australia (8th ed) at [17-37] and [17-38].

Who Should Make the Interim Dividend?

105. The Receiver proposes that authority to make the interim distribution and to determine its timing and amount be given to him instead of, for example, the responsible entity or its liquidator.

106. The broader question of the Receiver's ongoing role in the winding up of the FMIF is the subject of the Liquidator's Application, which has been heard but not determined.

107. The discrete questions concerning the proposed interim dividend would not seem to impact upon these broader questions – but just require a practical resolution.

108. At present, the Receiver would seem to be in the better practical position to make any interim distributions called for by the circumstances.

109. That is because:

(a) the quantum and timing of the proposed distribution are largely dictated by considerations relating to the litigation being conducted on behalf of the FMIF;

(b) on any view of the Liquidator's Application, it seems to be contemplated that the Receiver will continue to be responsible for this litigation;

(c) the relevant funds, and the Register, are presently within the Receiver's control.

III. PROCEDURAL ISSUES

110. The procedural issues arising from the present application have already been mentioned.

111. The first two issues – the complications arising from the Liquidator's Application and from the need to obtain judicial advice from another Judge – have been dealt with above.

Timing of Orders

112. The third problem arises from potential differences in the timing of any orders made.

113. The conditions precedents to the Deed of Settlement executed to resolve the Feeder Fund Proceedings have been disclosed, and relevantly include:[42]

(a) (clauses 3.1(b), (d) and (f)) that each of the parties to the settlement obtain judicial advice to the effect that they are justified in entering into and performing the Deed;

(b) (clause 3.1(g)) that the Receiver obtain the authority to make an interim distribution to the members of the FMIF in an amount of at least $30 million; and

(c) (clause 3.1(h)) that the interim distribution (in an amount of at least $30 million) be made.

114. The parties agreed in clause 3.2(d) to utilise their best endeavours to ensure that the various applications be heard by 15 March 2019.

[42] See clause 3.1 of the Deed of Settlement, a copy of which is at pages 423-427 of Exhibit DW-130 to Mr Whyte's Affidavit.

115. Clause 3.1(f) of the Deed of Settlement then required the interim distribution to be made 3 weeks after the date upon which the Court delivered judgment granting the Receiver the authority to make it, but notably without reference to the resolution of the other applications for judicial advice.

116. As such, the terms of the settlement did not comprehensively address the various procedural possibilities, including the possibility that multiple judges would be involved in hearing the various applications, and that they may reserve their decisions for different periods of time.

117. However, the apparent object of these provisions is for each of the parties to apply for and obtain the necessary advices and authorities, following which the interim distribution would be made.

118. The potential for complexity arises, however, if these various applications are not heard and determined at or about the same time. As the Receiver understands the position, no party wishes this to occur.

119. However, this possibility is a real concern, because the application before Justice Mullins is not to be heard until 2 May 2019 – and either of the two Judges may wish to consider the matter further before determining it.

120. In these circumstances, it would seem appropriate for the court to consider adopting a practical solution to this problem – by co-ordinating the delivery of any relevant orders on all applications.

Standing

121. It is proposed that the order for authority be made under section 601NF of the Act.

122. Section 601NF(1) empowers the Court to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders made under s 601NF(2).

123. Section 601NF(2) empowers the Court to give directions about how a registered scheme is to be wound up.

124. Section 601NF(3) provides that orders under s 601NF(1) or 601NF(2) "may" be made on the application of the responsible entity, a director of the responsible entity, ASIC or a member. It does not provide that such orders may "only" be made on the application of such a person.

125. In the present case, LMIM as responsible entity originally applied to the Court for orders under section 601NF(2) by its Amended Originating Application filed 20 July 2015, which resulted in the December 2015 Orders.

126. As part of the December 2015 Orders, however, Justice Jackson directed that "[a]ny person affected by these Orders has liberty to apply".

127. Accordingly, the Receiver primarily applies for authority to make the interim distribution pursuant to the liberty to apply granted in the December 2015 Orders, as a person affected by those orders.

128. Alternatively, it is submitted that the Court's power to make orders under section 601NF(2) extends to making orders on the application of a person who has been appointed under section 601NF(1).

IV. CLASS C UNITHOLDERS

129. Since 2008, a total of 171 members invested in the FMIF (representing about 2.6% of the units issued) by paying in a foreign currency (the **Foreign Currency Investors**).[43] At all relevant times, each unit in the FMIF was valued at AUD$1.[44]

130. The Financial Statements of the FMIF identify such investors as holding "C Class" units.[45]

131. Until 2011, the Register was maintained using a software system known as "Composer", in which the number of units issued to the Foreign Currency Investors was calculated by converting the amount invested into Australian Dollars at the foreign exchange rate as at the date of their investment.[46]

132. In about 2011, the Register was migrated to a new software system known as AX, in which the holdings of Foreign Currency Investors were recorded in the foreign currency. For example, an investor investing USD$1 was recorded as holding 1 unit, not the Australian dollar equivalent, but the AX database also retained the details of the investment currency.[47]

133. An extract from the 'Investor Master Register' as at 29 November 2012 is at pages 428 to 434 of the Exhibit to Mr Whyte's Affidavit. For each member:[48]

    (a) the "Unit Balance" records the number of units of foreign currency invested, for e.g. 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.

134. The effect of this documentation of the investments of the Foreign Currency Investors in the Register is that their unit-holdings, when converted into AUD from time to time, appear to fluctuate over time due to ongoing fluctuations in various foreign exchange rates.

135. Prior to the Receiver's appointment, LMIM as responsible entity of the FMIF entered into a series of forward foreign exchange contracts (**FFECs**), hedging the investments made by the Foreign Currency Investors. The FFECs have not been maintained in the winding up.[49]

---

[43] Paragraph 156 to 161 of Mr Whyte's Affidavit. The Foreign Currency Investors invested in a number of different currencies, namely the Euro, the British Pound, Hong Kong Dollars, New Zealand Dollars, Singapore Dollars, Thai Baht, the Turkish Lira and United States Dollars
[44] Paragraph 160 of Mr Whyte's Affidavit.
[45] Paragraph 160 of Mr Whyte's Affidavit.
[46] Paragraph 163 and 166(a) of Mr Whyte's Affidavit.
[47] Paragraph 166 of Mr Whyte's Affidavit.
[48] Paragraph 167 of Mr Whyte's Affidavit.
[49] Paragraphs 171 to 174 of Mr Whyte's Affidavit.

136. The position of the Foreign Currency Investors if their entitlements are assessed at the foreign exchange rates applicable on 8 August 2013 (when the winding up of the FMIF commenced) and on 29 January 2019 are compared on pages 436 and 437 of Exhibit DW-130 to Mr Whyte's Affidavit.

137. Relevantly, if valued as at 29 January 2019, the Foreign Currency Investors would be treated as holding 12,786,500.15 units in aggregate, but if valued as at 8 August 2013 they would be treated as holding 11,190,073.30 units in aggregate.

138. As such, it is important that the precise nature of the rights of the Foreign Currency Investors be clarified.

Documentation of the rights of the C Class Units

139. The Constitution of the FMIF in clause 3.2 provides for the creation of different classes of units, as follows:

> 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 in its complete discretion. Such rights and obligations may, but need not be, referred to in the PDS. If the RE determines in relation to particular Units, the terms of issue of those Units may eliminate, reduce or enhance any of the rights or obligations which would otherwise be carried by such Units. Without limitation, the RE may distribute the Distributable Income for any period between different Classes on a basis other than proportionately, provided that the RE treats the different Classes fairly. [emphasis added]

140. Other than the Product Disclosure Statement (**PDS**) of the FMIF, the Receiver and staff under his supervision have not found any other documentation recording any such "determination".

141. As to the PDS, however, section 1013D(1) of the Act provides that the content of a PDS must include information that a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire a financial product, including not only information about significant benefits and risks, but also "information about any other characteristics or features of the product or of the rights, terms, conditions and obligations attaching to the product".[50]

142. The significance of the PDS as a constitutive document of the FMIF is then further highlighted in the recitals to the Constitution, which provides as follows:

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

143. Finally, the terms of the PDS were signed off on and consented to by all of the directors of LMIM, including a Finance Reviewer.[51]

144. The rights and obligations of the Foreign Currency Investors may therefore properly be identified from the terms of the PDS, albeit care is needed in interpreting the document where it serves a number of different purposes.

[50] See section 1013D(1)(f) of the Act.
[51] Pages 443 to 445 of Exhibit DW-130 to Mr Whyte's Affidavit.

Terms of the Product Disclosure Statement

145. The terms of the PDS suggest that:

(a) Class C Units were to be recorded in Australian dollars;

(b) Class C Units were to be held for fixed terms (which were extendable); and

(c) the rights of the Foreign Currency Investors were intended to be protected from any foreign exchange fluctuations from the date of their investment.

146. The PDS issued 10 April 2008 (PDS) offered "Non-Australian Dollar Currency Hedged Fixed Term Investment Options" for investment in the FMIF. The PDS relevant stated:

(a) (Page 8) "The Fund currency hedges a non-Australian dollar investment through the use of Foreign Forward Exchange Contracts ("FFEC")."

(b) (Page 8) "On acceptance of investment funds and the completed Application Form, the relevant currency is converted at the prevailing spot market rate into Australian dollars and units in the Fund issued. The Fund simultaneously enters into a FFEC. The FFEC requires the Fund to deliver an amount of Australian dollars in exchange for an amount of the relevant foreign currency at a specific time in the future (the specific time is equivalent to the investment term) at a predetermined exchange rate (forward rate). At the end of the investment period the Fund converts the earnings of the investor into the relevant foreign currency at the forward foreign exchange rate."

(c) (Page 8) "Non-AUD investment terms for all currencies commence on the day the Manager settles the FFEC".

(d) (Page 9) "At the end of the relevant investment term, the investor's original investment amount and interest distribution (unless the investor elects to have the interest distribution paid direct to the account nominated on the Application Form), are automatically reinvested and re-hedged in the originally nominated currency for further 1 month investment terms until the investor provides the Manager with longer investment term instructions or a written withdrawal notice"

(e) (page 17) In the event of a delay in payment of a redemption or the suspension of redemptions: "For all non-Australian dollar investments, the Manager will continue to hedge (on a 1 monthly basis) the currency exposure of these investments." [emphasis added]

147. Further, as to the relevant risks, the PDS states on page 26 as follows:

> "Investors should however, be aware that any delay or shortfall in income or capital payments from the Fund may result in a loss for the Fund due to breaking a FFEC. In such an event, the investment will not be currency hedged and income and/or capital may be impacted."

148. The Supplementary PDS issued on 28 November 2008 (**SPDS**) further stated:

> "Non-Australian dollar currency hedged fixed term investors may elect to have their distributions electronically credited to the investor's nominated financial institution account on a monthly basis. If the distribution is electronically credited monthly to an investor's financial institution account the distribution is not hedged. … The distribution does not form part of the FFEC as it does for a non-AUD investment where the interest is paid at maturity."

149. The above disclosures in the PDS are all consistent with the Foreign Currency Investors being afforded a right to be protected from foreign exchange fluctuations, as follows:

(a) *First*, they were technically to be issued units based on the AUD value of their foreign currency investment, at the applicable exchange rates as at the beginning of the Investment Term.

(b) *Second*, however, at the end of the Investment Term they would receive (in effect) the benefit of the FFEC purchased by the RE at the outset of the term. Their entitlement would be equivalent to the capital value of their units calculated according to clause 8 of the Constitution (i.e. the Withdrawal Price), however that would be adjusted to reflect any changes in the relevant exchange rate. As such, if the AUD has increased in relative value, their entitlement in AUD would be reduced, but if the AUD had decreased in relative value, their entitlement would be increased in AUD.

(c) *Third*, unless they had opted to redeem their investment at the end of the Investment Term (either on the Application Form, or by lodging a Redemption Request), their return would be automatically reinvested for a further Investment Term (either 1-month by default, or otherwise as elected on the Application Form).

However, the number of units re-invested would differ from their previous investment, assuming that the relative exchange rate had changed (as one might expect). That is because the return on their investment would buy a different number of units in AUD than did their initial investment on the earlier exchange rate.

150. The effect of this is best explained through a worked example. Assume that each unit in the Fund was worth AUD$1 throughout the relevant periods, that AUD and USD were at parity at the beginning of an Investment Term, then moved such that AUD$1 = USD$0.5 at the end of a first Investment Term (i.e. AUD decreased in relative value), and then returned to parity at the end of a second Investment Term (i.e. AUD increased again in relative value). On those assumptions, for a USD$100 initial investment:

(a) The Unitholder would initially be issued 100 units, at the beginning of the first Investment Term.

(b) At the end of the first Investment Term, their usual entitlement to a return of AUD$100 (on 100 units) would be increased to AUD$200 by reason of their special rights as a Class C Unitholder (i.e. to offset the AUD's decrease in relative value).

(c) Assuming they had not opted to redeem their investment, their return would then be automatically re-invested in the Fund in exchange for 200 units, for a second Investment Term.

(d) At the end of the second Investment Term, their usual entitlement to a return of AUD$200 (on 200 units) would be decreased to AUD$100 by reason of their special rights as a Class C Unitholder (i.e. to offset the AUD's increase in relative value).

(e) Assuming they had not opted to redeem their investment, their return would then be automatically re-invested in the Fund in exchange for 100 units, for a further Investment Term.

151. In summary, the holdings of each Foreign Currency Investor in the Fund would vary at the end of each Investment Term in line with exchange rate fluctuations.

152. However, this is not obvious on the face of the Register (in the AX software system). That is because the Register recorded and then maintained the record of each member's investment in the foreign currency. This can be seen in the sample statement of a Foreign Currency Investor at page 435 of Exhibit DW-130 to Mr Whyte's Affidavit.

153. As such, the form of the Register is not strictly accurate in the sense that it does not accurately identify the number of units actually held by the Foreign Currency Investors from time to time (in AUD).

154. Nonetheless, if the above analysis of the rights of Foreign Currency Investors is correct, the form of the Register is useful. That is because on the basis of the information in the Register it is relatively simple to calculate the amount to be paid to each Foreign Currency Investor in a distribution or at the conclusion of the winding up of the Fund, taking into account their special rights under clause 3.2.

155. However, if the above analysis is not correct, and Foreign Currency Investors are not protected from some or all foreign exchange rate changes, then it is more difficult to calculate their entitlements based on the information in the Register. That is because the actual unitholding of each Foreign Currency Investor (in Australian dollar terms) would have to be worked out by adjusting the number of units recorded in the Register in the foreign currency by converting it using the exchange rate applicable at the beginning of the most recent Investment Term, and that date is likely to be different for each investor.

Winding up of the FMIF

156. The winding up of the Fund in August 2013 potentially adds an additional layer of complexity, particularly in circumstances where the FFECs have not been maintained.[52]

157. That is because, strictly, the re-investment of the interests of the Foreign Currency Investors came to an end at that time, such that the number of units held by each Class C Unitholder ceased to adjust periodically (at the end of each Investment Term) to changes in foreign currency exchange rates.

158. There would seem to be three possibilities:

    (a) The Foreign Currency Investors are entitled to be paid distributions by reference to the exchange rate as at the date of the beginning of the final Investment Term, i.e. simply by reference to the number of units they hold in the Fund, in the same way as ordinary unitholders.

    (b) They are entitled to be paid distributions by reference to the exchange rate as at the date of the end of the final Investment Term, notwithstanding non-payment promptly after that date.

    (c) They are entitled to be paid distributions by reference to the exchange rate as at the date of the (delayed) payment.

[52] Paragraphs 172 to 174 of Mr Whyte's Affidavit.

159. The Receiver considers the third to be the better interpretation of the disclosures in the PDS, for the following reasons:

(a) The PDS expressly provides, in the event of a suspension of redemptions, for the rights of Foreign Currency Investors to be protected from foreign exchange rate fluctuations is to be protected.

(b) There are no disclosures in the PDS to the effect that foreign exchange fluctuations are a relevant investment risk for the Foreign Currency Investors, even in the event of a winding up of the FMIF, or in the event that the RE for whatever reason ceases to maintain the FFECs. The disclosure of risks relating to the FFECs on page 26 of the PDS are identified as risks to the Fund, and not to individual investors.

(c) The benefit or detriment of the FFECs is not described in the PDS as being held on trust or for the direct benefit of the Foreign Currency Investors. To the contrary, they are described as contracts entered into by the Fund.

160. As such, the Class C Unitholders would be entitled to be paid distributions by reference to the exchange rate as at the date of the (delayed) payment of a distribution.

161. It is significant that this is how the two capital distributions made in March 2013 (by LMIM) and June 2013 (by the administrators of LMIM) were calculated.[53]

The Value of Units and clause 3.4 of the Constitution

162. The terms of the Constitution and the PDS are all consistent with each unit in the FMIF being worth the same amount. Relevantly:

(a) Clause 3.4 of the Constitution provides that "At any time, all the Units in a Class are of equal value unless the units are issued under a Differential Fee Arrangement"

(b) The disclosures in the PDS regarding "Unit Pricing" on page 2 provide, across both Australian Dollar and Non-Australian Dollar Investments that "the price of units in the Fund is currently $1.00 and has been so since the commencement of the Fund in October 1999 …".

163. This position is not, however, inconsistent with the nature of the rights disclosed by the PDS, considered above.

164. If it is understood in its full context, clause 3.4 cannot have been intended as addressing the commercial or 'market' value of investments in the FMIF, or to the collective value of the rights of each of the various classes of unitholders, but to the initial "base" value of a unit before taking into account the effect of any special rights or obligations created under clause 3.2. Relevantly:

(a) Clause 3.4 itself is phrased in the imperative, i.e. "all the Units in a Class are of equal value unless the units are issued under a Differential Fee Arrangement". It does not in terms prohibit special rights or obligations determined according to clause 3.2 that might affect the actual commercial value of the Unit.

(b) Clause 3.2 expressly provides that "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." Any elimination,

[53] Paragraph 170 of Mr Whyte's Affidavit.

reduction or enhancement of the rights of particular Units would necessarily alter their value.

(c) Clause 12.4 "Capital distributions" expressly provides that a Member's entitlement to "that proportion of the capital to be distributed as is equal to the number of Units held by that Member" is "[s]ubject to the rights, obligations and restrictions attaching to any particular Unit or Class". Any such caveat limiting a Member's entitlement to a capital distribution must necessarily affect the value of their Units.

165. In contrast, the Withdrawal Price referred to in clause 8 (to be paid upon the redemption of a Unit) does not expressly allow for any such caveat. However, that clause may also be read down in the context of clause 3.2 of the PDS.

Declarations Sought

166. The Receiver seeks declaratory relief to confirm the rights of the Class C Unitholders of the FMIF.

167. As far as the Receiver is currently aware, none of the Class C Unitholders have taken an active position on this application.

168. However, it is not an impediment to the Court's power to award declaratory relief that a party who has an interest to oppose the declaratory relief sought nonetheless decides not to oppose it: see ***Australian Competition and Consumer Commission v MSY*** (2012) 201 FCR 378 at [30]-[33] (Greenwood, Logan and Yates JJ).

169. In this case, significantly, the Receiver deposes to having made significant searches or inquiries to identify any documents recording a determination by the RE of the rights attaching to the Class C units: see paragraphs 177 to 197 of Mr Whyte's Affidavit. Those included keyword-based searches of the books and records of the FMIF, and inquiries made of certain former solicitors, directors and employees of LMIM.

170. Relevantly, the Receiver has concluded in light of those searches and inquiries that he is 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 his instructions (referred to in Mr Whyte's Affidavit) would have identified them.[54]

171. Further, there is utility in granting the declaratory relief sought so as to give certainty on the question of the true rights of the C Class Unitholders in the winding up of the FMIF, both for the benefit of the unitholders themselves, but also for the benefit of the Receiver to give him confidence that he is correctly distributing the property of the FMIF to the investors.

172. Finally, all of the Class C Unitholders have been served with this application, pursuant to the substituted service orders made on 7 February 2019.[55]

[54] Paragraph 197 of Mr Whyte's Affidavit.
[55] See also the affidavit of Ryan Whyte sworn 11 March 2019.

173. In the circumstances, it is appropriate that the Court exercise its discretion to grant the declaratory relief that is sought in this application.

These submissions are settled by Mr J D McKenna of Queen's Counsel and Mr D J Ananian-Cooper of Counsel

"ANNEXURE A"

SUPREME COURT OF QUEENSLAND

Registry: Brisbane

Number: BS3508/2015

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) CAN 077 208 461 AS THE RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 AND THE LM INSTITITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868**

LIST OF MATERIALS

1. Outline of submissions filed 12 March 2019.
2. Application filed 1 February 2019 (court index 206).
3. Orders made on 7 February 2019 (court index 218).
4. Affidavit of David Whyte sworn 18 February 2019 and Exhibit DW-130 (court index 214 to 217).
5. Affidavit of David Whyte sworn 5 March 2019 and Exhibit DW-131 (court index 220).
6. Affidavit of Ryan Whyte affirmed and filed 11 March 2019 (court index 221).

7. Affidavit of David Heiner Schwarz sworn 12 March 2019.

8. Affidavit of Jayleigh Tyler Sargent affirmed 12 March 2019.

Other material

9. Judgment delivered on 15 October 2015 (court index 27).

10. Orders made on 17 December 2015 (court index 36).

11. Application filed 10 October 2018 (court index 173).

"ANNEXURE B"

SUPREME COURT OF QUEENSLAND

Registry: Brisbane

Number: BS3508/2015

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) CAN 077 208 461 AS THE RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 AND THE LM INSTITITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868**

DRAFT ORDER

Before:	Jackson J
Date:	13 March 2019
Initiating document:	Application filed 1 February 2019

THE ORDER OF THE COURT IS THAT:

1. Pursuant to section 601NF(2) of the *Corporations Act* 2001 (Cth) ("**the Act**"), that:

    (a) the First Respondent is authorised and empowered to exercise the powers of, and is responsible for the functions of, the Second Applicant as the responsible entity of the LM First Mortgage Income Fund ("**FMIF**") as set out in clause 16.7(c) of the constitution

of the FMIF, to make an interim distribution from the property of the FMIF of up to $40 million among the members of the FMIF;

(b) in the event that any of the conditions precedent to the Deed of Settlement and Release resolving Supreme Court proceedings 13534/15 (the **Feeder Fund Proceedings**) have not been satisfied or will not be satisfied by the making of the interim distribution, the First Respondent is authorised to withhold payment of the interim distribution to each of:

(i) LM Investment Management Limited (In Liquidation) ACN 077 208 461 (**LMIM**) as responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875;

(ii) LMIM as responsible entity of the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868; and

(iii) The Trust Company Limited ACN 004 027 749 as custodian of the property of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511

to the extent and for so long as the claim against them in the Feeder Fund Proceedings remains unresolved.

(c) the First Respondent is to ensure that any amount withheld pursuant to sub-paragraph (b) above is to be held separately to the other property of the FMIF to the account of the Feeder Fund otherwise entitled to the interim distribution, until and subject to the resolution of the Feeder Fund Proceedings or the further order of the Court.

2. A declaration that each member holding “Class C” Units in the FMIF (having invested in one of the “Non-Australian Dollar Currency Hedged Fixed Term Investment Options”) is entitled to be paid in the winding up of the FMIF amounts calculated by reference to that member’s “Unit Balance” recorded in the “Investor Master Register”, as adjusted for the foreign exchange spot rate between the “Investment Currency” recorded in the “Investor Master Register” and the Australian Dollar prevailing as at the time of each distribution in the winding up.

3. The First Respondent’s costs of and incidental to this application be costs in the winding up of the FMIF, to be paid out of the assets of the FMIF.