SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicants:	RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE
	AND
First Respondent:	LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND
	AND
Second Respondent:	THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288
	AND
Third Respondent:	ROGER SHOTTON
	AND
Intervener:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

CERTIFICATE OF EXHIBIT

VOLUME 1 OF 4

Exhibits "DW-1" to "DW-7" to the Affidavit of DAVID WHYTE sworn at Brisbane this 2nd day of May 2014

Deponent

Solicitor/A Justice of the Peace

Alexander Philip Nase
Solicitor

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the Applicant, Mr David Whyte

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'DW-1'

SUPREME COURT OF QUEENSLAND

CITATION:	*RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192
PARTIES:	RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE (Applicants) v LM INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND (First Respondent) and THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (Second Respondent) and ROGER SHOTTON (Third Respondent) and AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION (Intervener)
FILE NO/S:	BS 3383 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	15, 16, 17 and 30 July 2013
JUDGE:	Dalton J
ORDER:	1. Application filed 15 April 2013 dismissed 2. Order that the first respondent wind up the LM First Mortgage Income Fund. 3. Order that Mr David Whyte, liquidator, is appointed to take responsibility for the winding-up of the LM First Mortgage Income Fund.

4. **Order that Mr David Whyte, liquidator, be appointed receiver of the property of the LM First Mortgage Income Fund.**

5. **Consequential Orders and directions.**

CATCHWORDS:

Corporations Act 2001 (Cth)
Corporations Regulations 2001 (Cth)

ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor [2002] NSWSC 310
ASIC v Wellington Investment Management Limited & Anor [2008] QSC 243
Capelli v Shephard (2010) 77 ACSR 35
Everest Capital Limited v Trust Company Ltd [2010] NSWSC 231
Handberg v Cant [2006] FCA 17
In Re Gordon [2005] FCA 950
Re Giant Resources Limited [1991] 1 Qd R 106, 117
Re Orchard Aginvest Ltd [2008] QSC 2
Re Stacks Managed Investments Ltd [2005] NSWSC 753
Re Stewden Nominees No 4 Pty Ltd [1975] 1 ACLR 185, 187
Shanahan v Scott (1957) 96 CLR 245, 250
Shephard v Downey [2009] VSC 33

CORPORATIONS – MANAGED INVESTMENT SCHEME – RESPONSIBLE ENTITY – where the applicants applied to have a temporary responsible entity appointed pursuant to ss 601FN and 601FP or reg 5C.2.02 – whether the application ought to be granted

CORPORATIONS – MANAGED INVESTMENT SCHEME – WINDING-UP – APPLICATIONS FOR WINDING-UP BY THE COURT – where a member of the fund and ASIC applied for orders pursuant to ss 601ND and 601NF – whether the first respondent should be directed to wind up the fund – whether it was necessary for an appointment pursuant to s 601FN(1) – appointment of receiver pursuant to s 601FN(2)

COUNSEL:

PH Morrison QC, with P Ahern, for the applicants
JC Sheahan QC, with S Cooper, for the first respondent
P Hastie for a member of the second respondent
DR Tucker (Solicitor) for the third respondent
RM Lilley QC, with SJ Forrest, for the intervener

SOLICITORS:

Piper Alderman for the applicants
Russells for the first respondent
Synkronos Legal for a member of the second respondent
Tucker & Cowen for the third respondent
Australian Securities and Investments Commission for the intervener

[1] This matter was commenced by originating application, adjourned twice, and came on in the civil list. By the time of the hearing two further applications had been made, one by ASIC, intervening, and one by a unit holder, Shotton. All applications were heard together over three days.

[2] The originating application was directed to the first respondent, a company in voluntary administration, which is the responsible entity of a managed investment scheme under the *Corporations Act* 2001 (Cth) (the Act), First Mortgage Income Fund, (FMIF or the fund). FMIF invested by lending on the security of mortgages to borrowers who developed real property. There are three associated feeder funds to FMIF, one is controlled by Trilogy Funds Management Limited (Trilogy) as responsible entity. Two are controlled by the first respondent as responsible entity, one of these is named Currency Protected Australian Income Fund (CPAIF). As well, there is a service company to the funds, LM Administration Pty Ltd (Administration). The same voluntary administrators were appointed to Administration as the first respondent. In a coda to the principal hearing the matter was mentioned again on 30 July 2013 and new material showed that at the second meeting of creditors of Administration, held on 26 July 2013, liquidators unconnected with the current administrators of the first respondent were appointed to Administration.

[3] The fund was established in 1999, it was successful in attracting investment – in February 2008 it was said to be worth over $700 million. It was adversely affected by the GFC. By June 2011 it had assets of $450 million; by June 2012 this had declined further to around $340 million, and again to $320 million by 31 December 2012. The only assets of the scheme are loans made to borrowers and all of those are in default. The net loss attributable to unit holders in 2011 was $77 million, and in 2012, $88 million.

[4] From 2009 the scheme had greatly reduced activities: in March it declined new applications to buy units; in October it suspended redemptions from the fund, the applicant concedes this was apparently on the basis that the fund was illiquid. Its unit value in November 2012 was said to be 59 cents; each unit had been worth one dollar on issue. In December 2012, before administrators were appointed, the responsible entity of the fund implemented a "go forward" strategy. The name was Orwellian in that this strategy involved an orderly sale of all remaining fund assets and a pro rata distribution of the proceeds (after repaying debt) to unit holders with the aim of returning investors' capital investment to them as quickly as commercially possible. In announcing this new strategy the responsible entity said that it had determined that the fund was not liquid for the purpose of the withdrawal provisions under the Act.

[5] Voluntary administrators were appointed to the first respondent, responsible entity of the fund, on 19 March 2013, on the basis of a board resolution that the company was insolvent or likely to become insolvent. I accept that the administrators are independent of the previous directors – Court Document 46, paragraphs 35-36.

[6] The administrators held a first meeting of creditors on 2 April 2013. No deed of company arrangement has been proposed and there is little likelihood of one being proposed. The second meeting has not yet been held. The likelihood appears that

the first respondent company will be put into liquidation within a month. It is expected that the current administrators will act as its liquidators.

[7] On 11 July 2013 Deutsche Bank AG appointed receivers over the assets and undertakings of the scheme. Deutsche Bank is owed around $30 million. There are sufficient assets in the scheme to found an expectation that Deutsche Bank will recover all amounts owing and depart, leaving significant assets still in the scheme. The current administrators of the first respondent have resolved to wind up FMIF, but are restrained from doing so until this proceeding is determined.

Trilogy Originating Application

[8] The originating application was filed on 15 April 2013. It sought, pursuant to ss 601FN and 601FP of the Act or alternatively reg 5C.2.02 of the *Corporations Regulations* 2001 (Cth), that Trilogy be appointed as temporary responsible entity of the FMIF.[1] It was common ground at the hearing of the application that Trilogy had indemnified the named applicants to this proceeding. The named applicants are small unit holders of the scheme (0.029 per cent of the issued units). Counsel appearing for the applicants expressly said that he was providing the view of Trilogy to the Court.[2] I will refer to the originating application as the Trilogy application.

Competence

[9] Section 601FN of the Act provides:

> "ASIC or a member of the registered scheme may apply to the Court for the appointment of a temporary responsible entity of the scheme under section 601FP if the scheme does not have a responsible entity that meets the requirements of section 601FA."

[10] Section 601FA of the Act provides:

> "The responsible entity of a registered scheme must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme."

[11] The applicant said the first respondent no longer held an Australian financial services licence which authorised it to operate a managed investment scheme. This was said to be due to ASIC's having issued a notice to the first respondent:

> "TAKE NOTICE that under s 915B(3)(b) of the Corporations Act 2001 (Act), the Australian Securities and Investments Commission (ASIC) hereby suspends Australian financial services licence number 220281 held by LM Investment Management Limited ... (Licensee) until 9 April 2015.
>
> Under s 915H of the Act, ASIC specifies that the licence continues in effect as though the suspension had not happened for the purposes of the provisions of the Act specified in schedule B regarding the matters specified in Schedule A.
>
> Schedule A

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1 The application sought alternative relief under the *Trusts Act* 1973 which was not pursued before me.

2 t 3-25.

> The provision by the Licensee of financial services which are reasonably necessary for, or incidental, to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of ... LM First Mortgage Income Fund ..."

[12] The word "operate" is not defined in the Act. It was considered by Davies AJ in *ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor.*[3] In that case ASIC brought proceedings against the defendant which had duped investors into paying large amounts of money purportedly as investments in something which was held to be a managed investment scheme within the meaning of s 9 of the Act. An issue in the case was whether or not the sole director of Pegasus had contravened the Act by operating the unregistered managed investment scheme. Davies AJ noted that the word "operate" should be given its ordinary English meaning; referred to the Oxford English Dictionary, and remarked that, "The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme."[4] The conclusion that the sole director and directing mind of Pegasus, the person who formulated and directed the scheme and the sole person involved in its day-to-day operations, was the person who operated it was unremarkable.

[13] The applicant relied upon the definition of "managed investment scheme" in s 9 of the Act; the constitution of the first respondent company, and various other provisions, including various of the s 601 provisions of the Act to show that a very wide range of matters could be comprehended by, or included in, the concept of operating a managed investment scheme. No doubt that is so. It does not follow that, because under the terms of ASIC's suspension of 9 April 2013, the first respondent was limited in the activities it could perform, that it did not operate the managed investment scheme after 9 April 2013. Its operation of the scheme after 9 April 2013 was limited, but continuing. The word "operate" is a word of wide import and it must take its meaning in any particular case from all the relevant circumstances, including the nature of the fund, and the financial position of the fund. From 2009 there had been significant limits on the operation of the fund as financial circumstances excluded more and more of the potential activities open to an operator of the fund. No doubt the ASIC notice of 9 April 2013 further limited what could be done by way of operation of the fund, but as a matter of ordinary English and practical reality that notice did not bring the first respondent's operation of the fund to an end. What it has done since then no doubt falls within the concept of operation of a managed investment scheme, and the first respondent no doubt continues to bear the obligations and duties associated with such operation. It follows that the applicant is not able to rely upon s 601FN to bring this application.

[14] The alternative basis relied upon by the applicant was reg 5C.2.02 of the *Corporations Regulations* which provides:

> "ASIC, or a member of a registered scheme, may apply to the Court for the appointment of a temporary responsible entity of the scheme if ASIC or member reasonably believes that the appointment is necessary to protect scheme property or the interests of members of the scheme."

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3 [2002] NSWSC 310.

4 Above, [55].

[15] The structure of the regulations is such that Part 5C.2, headed "The responsible entity" corresponds, on its face, with Part 5C.2, Division 2 of the Act headed "Changing the responsible entity", ss 601FJ-601FQ. The only provision of the Act allowing ASIC or a member to apply for the appointment of a temporary responsible entity is s 601FN, just discussed. It would seem therefore that reg 5C.2.02 goes beyond the Act in that it purports to give rights greater than, or inconsistent with, those provided for in s 601FN – see s 1364 of the Act, and *Shanahan v Scott*.[5] This point is reinforced by the fact that the regulation provides only that a member may apply to the Court, and s 601FP of the Act gives the Court power to appoint a temporary responsible entity only on application under s 601FL (not relevant to this part of the argument) or s 601FN.

[16] The position is somewhat complicated by the last section in Chapter 5C of the Act, s 601QB, which provides that:

> "The regulations may modify the operation of this Chapter or any other provisions of this Act relating to securities in relation to:
> (a) a managed investment scheme; or
> (b) all managed investment schemes of a specified class."

[17] Regulations 5C.1.03 and 5C.11.02 both expressly purport to modify the operation of Chapter 5C of the Act in accordance with s 601QB of the Act. However, there is no requirement in s 601QB that any regulation made pursuant to it expressly state that it is modifying the operation of the chapter pursuant to the section. Having regard to the plain terms of s 601QB, I do not think it is necessary that a regulation expressly do this before it can be valid.

[18] Nonetheless s 601QB is not a plenary power to modify, but only a power to modify provisions, "relating to securities". Securities is defined at s 92(1)(c) to include "interests in a managed investment scheme". Other securities, as defined by s 92 include debentures, stocks, bonds, shares or units. At s 9 a managed investment scheme is defined as having (inter alia) the feature that "people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme ...". While the word "interest" or "interests" is not strictly defined, this part of the definition of managed investment scheme, together with the other types of securities defined by s 92 of the Act, shed some light on how the word "interests" in s 92(1)(c) is to be understood. An interest in a managed investment scheme is something analogous to (if less defined than) a share in a company.

[19] Turning again to the terms of s 601QB, I cannot see that reg 5C.2.02 is a regulation which purports to modify a provision of the Act relating to securities. I do not think that s 601FN could be characterised as a provision of the Act relating to securities, notwithstanding it gives rights to members of managed schemes, who no doubt have interests in them, which would amount to securities within the meaning of s 92(1)(c) of the Act. Again by way of analogy, were the provisions dealing with companies, I would not characterise a provision along the lines of s 601FN as a provision relating to shares in a company merely because it gave a remedy to shareholders (along with ASIC). My view therefore is that reg 5C.2.02 does not authorise the application brought by the Bruces.[6] The applicant relied upon a short report, *In Re Gordon*.[7]

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5 (1957) 96 CLR 245, 250.

6 See the doubts expressed by Applegarth J in *Re Equititrust Ltd* [2011] QSC 353 [7], correctly in my view.

7 [2005] FCA 950.

The report does not contain any of the reasoning processes of the judge who made the order and does not reveal whether or not the validity of reg 5C.2.02 was in issue before him. For these reasons, I do not regard the report as helpful.

[20] Having regard to my conclusions in relation to s 601FN and reg 5C.2.02, the application brought by the Bruces ought to be dismissed as incompetent.

Discretion

[21] Even had I power to do so I would not appoint Trilogy as temporary responsible entity. Section 601FP(1) allows the Court to appoint a company as temporary responsible entity if the Court is satisfied that the appointment is in the interests of members. If reg 5C.2.02 were valid, it would additionally direct my attention to whether or not it was necessary to protect scheme property.

[22] Section 601FQ(1) provides that a temporary responsible entity is just that. It must call a members' meeting for the purpose of the members choosing a company to be a new responsible entity. This meeting must be held "as soon as practicable" and in any event within three months of it becoming the temporary responsible entity. This will inevitably involve cost for the fund. Section 601FQ(2) provides the opportunity for more than one meeting and for applications to be made to Court. Independently, s 601FQ(5) provides that if the temporary responsible entity forms the view that the scheme ought to be wound up, it must apply to Court for such an order. There is a likelihood that any person objectively looking at this scheme would need to make such an application. Further, having regard to the way this litigation has been conducted and the history of the 13 June 2013 meeting (see below for both topics), in my view there is a distinct possibility that there would be contention and indeed litigation about any meeting held to appoint a new responsible entity.

[23] Trilogy hoped that it would be appointed as a permanent responsible entity by the meeting required by s 601FQ(1). However, I cannot see it is in the interests of the members of the FMIF to become caught up in a process which provides an interim solution which will inevitably involve more expense by way of meeting (s 601FQ(1)), and may involve further expense by way of Court action, with the inevitable disclocation, uncertainty and expense which any interim solution must involve.

[24] There are other reasons why I do not regard the appointment of Trilogy as responsible entity as being in the interests of the members of this fund. One very practical one is that the current administrators swear that there is a considerable overlap between the staff of the first respondent and the company Administration which would make it difficult, and I infer, expensive, to hand over to a new responsible entity – Court Document 46, paragraph 63. It seems to me that prima facie those staff who have long knowledge of the business of the fund ought to be working for or with the responsible entity as much as possible in order to preserve corporate memory, competence and save cost.[8] Employees of the first respondent will have a good background knowledge of the loans which are its primary assets,

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[8] I note that this is a different argument conceptually from that advanced by the administrators of the first respondent to the effect that if this fund is to be wound up, they ought wind it up because otherwise the time they have spent as administrators since March will, in some part, be lost to the first respondent and this will involve waste of costs. I deal with that argument below at [128].

the properties which provide the first respondent its mortgage securities, and the history of the first respondent's dealing with the borrowers who are currently in default. Further, these employees will have knowledge of the documents and systems of the first respondent. From a practical point of view, it seems to me that this is all very valuable. I accept that uncertainty as to the longevity of this arrangement results from the decision to place Administration into liquidation, and thus to some extent diminishes the weight of this consideration.

[25] Trilogy puts itself forward as having an advantage over other persons proposed to take control of the fund by reason of the fact that it is not staffed by insolvency practitioners, but is a fund manager, with particular experience of distressed funds. I deal with these matters in detail at [37] below. In the end I do not see that there is any great advantage provided by the slightly different perspective which Trilogy's control would provide to the responsible entity. In fact, given that my view is that this fund ought to be wound up – [34]-[43] – it seems to me there is probably a disadvantage in Trilogy not having as much insolvency experience as the other contenders for control, particularly when it seems that there may be contention and litigation involved in the winding-up.

[26] In this case there is no evidence before me that the assets of the FMIF are in danger and need particular protection, except, indirectly, because of conflicts of interests which it is said will become evident if either the first respondent or Trilogy winds up FMIF.

[27] To the extent that the Trilogy application to be appointed temporary responsible entity is based on the idea that someone independent of the first respondent and its administrators ought to be appointed to control the FMIF, that will be achieved by the orders which I propose to make, although they differ from those which the applicant and Trilogy seek. In that regard, I have dealt with the applicant's arguments as to conflicts of interest and the need for independence at [97]ff below.

[28] To some extent, Trilogy will have potential conflicts of interest if it is in charge of the fund because it is the responsible entity of a feeder fund to FMIF. Further, Trilogy has a view that there ought to be litigation by members of the FMIF against the first respondent or its directors. It has engaged Piper Alderman to investigate such claims (as far back as November 2012) and has touted the idea publicly of a class action. There may be claims to be made, and it may be that it is rational to make them, depending on their prospects of success, likely cost and the likely prospect of recovering anything at the end of the day. At present, however, Trilogy has not investigated the matters to any extent[9] and I must say I find its advocacy of such claims prior to any proper assessment rather disconcerting. The first respondent says that Trilogy as a member has a right to claim against the first respondent and its directors if it wishes, but says that it seeks to become responsible entity of the fund so that it does not have to bear the cost of doing this, but can use the fund essentially to bear the expense of such actions. There is I think potential conflict of interest in this.

[29] The applicant advanced a general argument that it was undesirable for the responsible entity of the FMIF to be a company under external administration. There may be arguments to be made in cases where the fund itself will continue to

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9 For example, Court Document 91, paragraph 31.

trade as a going concern (for want of better terms). However, where the fund itself is to be brought to an end and its assets realised for the benefit of members (which should happen even in Trilogy's view), I cannot see that it is particularly undesirable for a responsible entity under external administration to have charge of this fund. It certainly does not outweigh the other factors which I consider bear upon my decision in this regard.

[30] Further, it was argued in a general way that ASIC might in the future act to further limit or wholly cancel the first respondent's financial services licence: there is the potential for breaches of the licence conditions due to the insolvency of the first respondent – see e.g., s 915B(3) of the Act. I do not think there is any realistic basis for present concern about that in circumstances where ASIC is an intervener in this litigation and is content for orders to be made which leave the first respondent as responsible entity, subject to another body being given responsibility for ensuring oversight of the winding-up of the fund.

[31] For all these reasons, I do not think it is in the interest of the members that Trilogy be appointed as temporary responsible entity. Nor, to deal with a submission made by counsel for Trilogy outside its application, do I think Trilogy ought to be appointed to wind up the FMIF, be receiver of the property of the FMIF, or to take responsibility for seeing that the FMIF is wound up.

ASIC Application and Shotton Application

[32] On 29 April 2013 Mr Shotton, a member of the FMIF, filed an application seeking an order pursuant to s 601ND of the Act that the first respondent be directed to wind up the FMIF and that an independent liquidator be appointed to take responsibility for ensuring that the FMIF was wound up in accordance with its constitution – s 601NF(1) of the Act.

[33] The ASIC application is similar. On 3 May 2013 ASIC filed an application seeking orders that the administrators of the first respondent be directed to wind up the fund pursuant to s 601ND(1)(a); that independent liquidators be appointed to take responsibility for ensuring that the fund was wound up in accordance with its constitution pursuant to s 601NF(1); that those liquidators be appointed as receivers of the property of the fund, either pursuant to s 1101B(1) or s 601NF(2) of the Act, and that they have wide powers to exercise as receivers. By the end of the hearing Mr Shotton joined with ASIC in proposing that receivers be appointed as proposed by ASIC.

Winding-up

[34] On 6 May 2013 the administrators of the first respondent resolved to wind up the fund on the basis that it cannot accomplish its purpose – s 601NC of the Act. They have been restrained from commencing the winding-up until this proceeding is resolved. Their position in relation to the first order sought by Shotton and ASIC is that it was unnecessary on the basis that the fund will in any event be wound up.

[35] All parties before the Court except the applicant agreed that the FMIF ought to be wound up. The current administrators depose at some length to the process undertaken by them in making the decision that the fund ought to be wound up. There was no real challenge to the substance of this evidence. Counsel for the

applicant asserted from the bar table that the fund was not insolvent.[10] I cannot determine that on the material before me, and no party advanced a case based on insolvency.

[36] Pursuant to s 601ND(1)(a) I have power to direct a responsible entity to wind up a scheme if it is just and equitable to do so. In this case it seems to me just and equitable to do so. The case law is to the effect that the principles concerning winding-up of companies on the just and equitable ground inform the Court's thinking in applications pursuant to s 601ND.[11] The financial position of the fund has already been outlined. From the end of 2012, if not before, those in charge of the company have been liquidating its assets with a view to returning capital to members. The fund was originally established to provide an investment which would provide regular income to unit holders and a return of capital at maturity – cll 11 and 12 of the constitution. This purpose has failed: there is no income and members can no longer exercise their rights to withdraw their investments in accordance with the constitution.[12]

[37] Trilogy does not advance the case that the fund should continue in a plenary way as a going concern. The point of difference between it and the other parties to this proceeding is that Trilogy puts itself forward as a more suitable person to take charge of the FMIF. It is a fund manager, unlike all the other persons proposed to take charge of the fund, who are insolvency practitioners. Trilogy has put material before the Court which shows that it has experience in dealing with distressed funds, including selling distressed assets to best advantage and dealing with claims against former fund managers. Against this background it is sworn – Court Document 29, paragraph 17 – that Trilogy would seek to: (a) consider selling the assets of the FIMF as appropriate and (b) obtain finance (either by external borrowing or on the sale of assets) to enable the development of some real properties, of which FIMF is mortgagee, to be completed. It is hoped that this second approach might provide higher sale prices than an insolvency practitioner might provide on a liquidation of the fund. In this regard Trilogy has a joint venture with a company named CYRE Trilogy Investment Management Pty Limited which specialises in marketing distressed property assets and assessing whether or not to complete incomplete development projects with a view to obtaining the best purchase price. Trilogy says that it would be advantageous if it were appointed as responsible entity for it would have an untrammelled financial services licence and full powers to pursue development of appropriate assets before sale, including borrowing for this purpose. It says that under its limited licence, the first respondent does not have sufficient power to act in this regard. For the same reason it says that I should not order the FMIF to be wound up.

[38] On behalf of the first respondent, a Mr Corbett swears that he has already performed a great deal of work, as leader of a team which has prepared a detailed analysis of the 27 groups of property over which the FMIF is mortgagee. He says that as part of that exercise he has considered development proposals for the properties. Neither he, nor Mr Wood, on behalf of Trilogy, identifies any particular property which should be developed prior to sale, or gives any detail as to even a class of properties which might be so developed.

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10 See *Capelli v Shephard* (2010) 77 ACSR 35 at [89]ff as to the colloquial concept of insolvency of a managed investment scheme.

11 *Equititrust* (above) at [29] and the cases cited there.

12 cf [13] *Equititrust*, above.

[39] It seems common ground before me that the winding-up of FMIF will take place over years. I do not think that the words of the limited financial services licence granted to the first respondent prohibit it developing property of which the fund is mortgagee in order to obtain a better price for that property in the course of winding-up. ASIC does not agitate such a limitation on this application, and in fact expressly does not prefer Trilogy or the first respondent as responsible entity. If there were to be doubt as to the first respondent's power to borrow or develop a particular property in the course of a winding-up, and there were a plainly sensible proposal in the interests of the fund, I cannot see that ASIC could not either clarify or modify the extent of powers under the limited financial services licence it has granted the first respondent.

[40] Nor am I convinced that making an order that the FMIF be wound up would remove from the person charged with winding-up the power to develop a particular property with a view to sale in the course of winding-up if it were in the interests of the fund. The fund was set up to invest in "mortgage investments" – cl 13.2 of its constitution – and cl 13.6 of the constitution makes it clear that in the ordinary course of its business it could exercise all the powers of a mortgagee. Indeed one would have thought that was a necessary and incidental part of running a business which invested in mortgage investments. The liquidator of a company would normally have the right to carry on the business of a company "so far as is necessary for the beneficial disposal or winding-up of that business" – see s 477(1)(a) of the Act. Here the constitution gives the responsible entity power to "manage the scheme" during the time of a winding-up until such time as all winding-up procedures have been completed and cl 16.7(e) gives such a responsible entity power to postpone the realisation of scheme property "for as long as it thinks fit". Again, if doubt arose about a particular proposal in the future s 601NF(2) allows the Court to make an appropriate direction. At the moment, there are no specific proposals, just some conceptual thinking.

[41] The second activity which Trilogy is keen to pursue is investigation of claims on behalf of the FMIF against the first respondent and/or the previous directors of the first respondent for conduct which is more fully detailed below, but which claims concern changes made to the first respondent's constitution being beyond power; related party transactions between the first respondent and Administration, and claims, perhaps in negligence, for the financial losses which were suffered by the FMIF during 2008 and 2009. These are the type of claims which are normally investigated, and if necessary, pursued by insolvency practitioners during the course of a company winding-up – cf s 477(2)(a) – and I cannot see that the limited financial services licence granted to the first respondent would prevent it from doing this. Nor is the potential existence of such claims a reason why I should not direct that the FMIF be wound up now. Clause 16.7(a) of the constitution obliges a responsible entity winding-up the fund to realise its assets. If there are claims to be made on behalf of the fund (and Trilogy has not investigated the position) then those choses in action would constitute property which the responsible entity, winding-up the scheme, would have power to pursue.

[42] In my view, it is desirable that the FMIF be wound up and its assets realised for unit holders. Further, I think it is desirable that I make an order that this occur. If I do not, the administrators will either need to call a meeting pursuant to cl 16.2(d) of the constitution or give members an opportunity to meet pursuant to cl 16.3(a) of the constitution; see also ss 601NB and 601NC which have very similar requirements.

At a general level, I should not be taken as opposing consulting the members as to the fate of the fund. However, for reasons which will appear from the discussion below, I anticipate at least the possibility that any meeting held pursuant to cl 16 of the constitution would be subject to contention between rival factions within the fund and litigation to test those rival contentions. Further, as my discussion of the 13 June 2013 meeting shows, there is a real possibility that the members will be showered with a great deal of information about rival contentions and that some of it may be misleading. Those circumstances must reduce the quality of the "democracy" invoked, and in my view make it desirable that I ought make an order.

[43] For all the above reasons I will make an order pursuant to s 601ND(1)(a) of the Act.

Appointments under s 601NF(1) and (2)

[44] The real issue joined between ASIC and Shotton on the one hand, and the first respondent on the other, was who ought to wind up the company, or take responsibility for the winding-up, as s 601FN(1) has it.[13]

[45] The first respondent submits that the provisions of Part 5C.9 of the Act make it clear that it is generally to be the responsible entity which winds up a managed investment scheme – ss 601NB, 601NC, 601ND and 601NE. I think this is right.

[46] Sections 601NE and 601NF(1) provide that the scheme is to be wound up "in accordance with its constitution and any orders" which the Court makes under s 601NF(2). There has been some consideration in the cases as to the width of the Court's power under s 601NF(2) to make directions (by order) about how a registered scheme is to be wound up, and I am grateful to Applegarth J for the review which is found in *Equitrust* (above) at [42]-[49], and his own views expressed at [50]ff in that case. While the scope of the power may not yet be fully explored, it is clear that there is not a wholesale importation of the scheme of company liquidation into the area of managed investment schemes. This is consistent, in my view, with the idea that it is generally the responsible entity which winds up the scheme in accordance with its constitution. Certainly this contrasts with e.g., the public aspects of a liquidation.

[47] Section 601NF(1) confers a jurisdiction in the Court to appoint a person other than the responsible entity to take responsibility for the winding-up of a scheme, "if the Court thinks it is necessary to do so". The first respondent submitted that the power of the Court to appoint was more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so. Again I think this correct, as a matter of plain English, against the background that the statute establishes a general regime where it is the responsible entity which will wind up a scheme in accordance with the constitution. It was the view taken by Fryberg J in *Re Orchard Aginvest Ltd.*[14] It was also the view of White J in *Re Stacks Managed Investments Ltd.*[15] Both these judges refused orders which might have been convenient or desirable, but were not necessary. Applegarth J took the

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13 In fact to a large extent this was also the point of the litigation for Trilogy whose primary position was that it would (eventually) have the task of realising the assets of the fund and who the applicant submitted ought be the person who was responsible for liquidating the fund if (contrary to its primary submission) an order to wind up the fund was made.

14 [2008] QSC 2, pp 8 and 9.

15 [2005] NSWSC 753 [50].

same view as to necessity in *Equititrust* at [51], and so did Judd J in *Shephard v Downey*.[16] The circumstances in which it is necessary to appoint will include a case where the responsible entity no longer exists or is not properly discharging its obligations in relation to a winding-up – s 601NF(1).

[48] Both ASIC and Shotton say that it is necessary to appoint someone to oversee the winding-up of FMIF pursuant to s 601MF because the first respondent cannot be relied upon to act in a balanced and impartial way in winding-up a fund where there are potential conflicts of interests and complex questions associated with them. ASIC in particular is concerned about the attitude of the first respondent demonstrated in relation to its calling a meeting of members of the FMIF; its dealings with ASIC, and its conduct in this proceeding. On behalf of Shotton various potential conflicts of interest between the interests of the FMIF, on the one hand, and the first respondent company; and the administrators themselves, on the other hand, were relied upon.[17] Trilogy also made criticism of the meeting and advanced submissions based on potential conflicts for the present administrators, and I deal with these in this part of the judgment. I now deal with each of these factual matters in turn.

Meeting 13 June 2013

[49] In response to receipt of Trilogy's application, the administrators of the first respondent caused a meeting of members of the fund to take place.

[50] Section 252B of the Act provides that the responsible entity of a registered scheme must hold a meeting of the scheme's members to vote on a proposed special or extraordinary resolution, if (inter alia) members with at least five per cent of the votes "that may be cast on the resolution" request it. It might be recalled that, in addition to being the responsible entity of FMIF, the first respondent is the responsible entity of two feeder funds which hold units in FMIF, and that one of the feeder funds is CPAIF. In fact the assets of CPAIF are held by a custodian trustee, the Trust Company. The administrators of the first respondent (as responsible entity of CPAIF) directed the Trust Company to request a meeting of members of FMIF pursuant to s 252B of the Act on the basis that it held 24 per cent of the issued units in FMIF. The Trust Company complied with that request without question, almost immediately, by sending the administrators (in their capacity as responsible entity for FMIF) a request in terms provided to the Trust Company by the administrators. The meeting request proposed two extraordinary, and interdependent, resolutions: (1) to remove the first respondent as the responsible entity of FMIF and (2) to appoint Trilogy in its stead. On this basis the administrators of the first respondent sent a notice convening a meeting.

[51] The administrators' purpose in calling the meeting was made plain in the notice of meeting. They wished to use the meeting as a strategy to defeat or damage Trilogy's prospects on its originating application. The introductory words of the covering letter to the notice of meeting are:

> "A Meeting is being called for the Fund by LM, the current manager.
> LM decided to call the Meeting because a unitholder has made an

16 [2009] VSC 33 [132]-[133].

17 After the hearing on 30 July 2013, dealing in part with the appointment of independent liquidators of Administration, the conflict points relating to Administration fell away.

application to the Supreme Court of Queensland for Trilogy to be appointed as the Manager of the Fund in place of LM.

LM does not believe that the power of the Court to appoint a temporary or replacement manager can or should be exercised in the circumstances relied upon by Trilogy in its Court application. However, LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy. This is considered preferable to a court determined outcome where over 99% of investors, by value, will have no say in the outcome."

[52] The introduction to the notice of meeting is similar:

"The Meeting is being called by LM Investment Management Limited (Administrators Appointed), the current Manager of the Fund (LM). LM decided to call the Meeting because, following receipt from two unitholders of an application to the Supreme Court of Queensland for Trilogy Funds Management Limited (Trilogy) to be appointed as the Manager of the Fund in replacement of LM, and immediate consultations with ASIC, LM wished to consult Members in the proper forum, with adequate notice.

LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy. LM also wishes to avoid the costs and delay of multiple Court appearances, perhaps appeals, and multiple meetings which are the practically inevitable result of Trilogy's Court application. For example, it is doubtful that the Court has, or will exercise the power to appoint a temporary manager. Appeals are possible. This Meeting is considered preferable to a court determined outcome where there is no meeting, no vote and where, at present, over 99% of members, by value, will have no say in the outcome unless they wish to participate in legal proceedings." (my underlining)

[53] Neither the administrators of the first respondent, the Trust Company nor CPAIF wanted the meeting to pass the two resolutions proposed. The first respondent argued strenuously against the resolutions in material which it distributed to the members of the scheme. For example:

(a) "LM expects that if it remains as manager investors will recover distributions faster and in a greater amount."

(b) "LM also notes that Trilogy (unlike LM) does not hold the correct Corporations Act licence in order to be able to manage your Fund" and "LM has taken legal advice on the adequacy of Trilogy's AFSL. LM is confident that Trilogy's AFSL does not authorise it to operate the Fund."[18]

(c) "Further, in a recent court action involving another Fund managed by LM where there was a proposal to change the Trustee, the court ordered that the full legal costs of each party to the court proceedings should be met from the

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18 Trilogy (at that stage) had no licence to manage foreign currencies which was necessary for management of the FMIF. Trilogy now has an appropriate licence.

assets of the underlying Fund (even though the lawyers had promised they would not charge their clients).

Thus by calling a meeting to vote on the appointment of Trilogy as a replacement Responsible Entity LM is also cognisant that such a move is likely to save significant legal costs for the Fund."

(d) Under the heading "Does LM have the licence to manage the fund?":

"As you may be aware, on 9 April 2013 the Australian Securities & Investments Commission temporarily suspended LM's AFSL for a period of 2 years. However ASIC allowed LM's AFSL to continue in effect as though the suspension had not happened for all relevant provisions of the Corporations Act 2001 (Cth) so to permit LM, under the control of FTI as Administrators, to remain as the responsible entity of all LM's registered managed investment schemes for certain purposes which include investigating and preserving the assets and affairs of, or winding-up, LM's registered management investment schemes.

ASIC's decision to suspend the AFSL but allow LM and FTI to continue in this way, ensures that FTI as administrators may perform their statutory and other duties.

LM has, of course, taken legal advice on its position. LM is confident that its AFSL adequately authorises LM through FTI to continue to control the Fund."

(e) "Deutsche Bank has provided the fund with a secured loan facility since 2010. LM's obligations under the Deutsche Bank facility are secured in favour of Deutsche Bank under an ASIC registered charge over all the assets and undertaking of the Fund. The facility has been progressively reduced by approximately $0.5m per month and now has a loan balance of approximately $26.5m.

If the resolutions are approved in this Notice of Meeting, that will be an Event of Default under the facility agreement with Deutsche Bank, entitling it, for example, to appoint receivers to the Fund. The consequences upon the existing financial arrangements with Deutsche Bank are unknown at this stage.

FTI has the ongoing operational support of Deutsche Bank following the appointment as Voluntary Administrators (even though the appointment of administrators was an Event of Default)."

(f) "There are only three possible outcomes of the administration of LM – a Deed of Company Arrangement, a creditors' voluntary winding-up or (unlikely) LM is returned to the control of the directors. If LM is wound up, its liquidators will have access to the claw-back provisions of the Act – for example, recovery of unreasonable director-related transactions etc. There is room for debate as to whether these provisions could be invoked for the benefit of the Fund; and the administrators have not yet completed the investigation as to any transactions which might be available for the benefit of Members. On 12 April, 2013, the Chief Justice extended the time for the administrators to convene a second meeting of creditors until 25 July, 2013.

> While those matters are not clear, what is clear is that if Trilogy replaces LM as the Responsible Entity of the Fund, it will have no access at all to those provisions for the benefit of Members."

[54] Other less controversial arguments were made, for example, that LM had more familiarity with the assets of the fund than Trilogy, and that changing responsible entities might be expected to slow the process of recovery of assets in the fund. The administrators, using existing LM staff, it was said, were more familiar with the affairs of the fund and less likely to be taken advantage of by those owing money to the fund.

[55] The notice of meeting stated that Trilogy had been invited to participate in the process leading up to the meeting and provide information about itself to members.

[56] The above statements all come from the initial notice of meeting and covering letter dated 26 April 2013. That contemplated a meeting being held on 30 May 2013. However, there intervened correspondence between the first respondent and ASIC, and correspondence between the first respondent and Trilogy, regarding the information given to members, and the validity of the meeting. ASIC and Trilogy rely upon this as further showing that the first respondent, by its administrators, is unsuitable to wind up the FMIF. I deal with that correspondence now. As to the calling of the meeting, it is sufficient to note that the process was technical and somewhat artificial, and that the administrators (in effect) called a meeting to consider two resolutions they opposed.

Dealings with ASIC

[57] The ASIC correspondence needs to be read against a particular background. On 19 April 2013 ASIC became aware of the Trilogy application and was concerned as to the impact that might have on the "efficient resolution of the future of the various funds" of which the first respondent was responsible entity. On 23 April 2013 ASIC met with one of the administrators and the administrators' solicitors. At that meeting the administrators' solicitors suggested that the administrators could call a meeting of members to consider the appointment of a new responsible entity. He said that given a choice between the first respondent and Trilogy, "the first respondent would win".

[58] ASIC too said it preferred a solution not involving litigation and suggested the use of an enforceable undertaking issued by ASIC which obliged the administrators to call a meeting to vote on "resolutions for the appointment of a new responsible entity or that the funds be wound up". There was discussion as to how quickly the administrators could call a meeting and make a final decision as to winding-up. ASIC was concerned that if the enforceable undertaking solution was to be of utility to members it would need to occur sooner rather than later in order to save costs in the litigation, and associated with the appointment of a temporary responsible entity. As part of its discussions with the first respondent on 23 April, ASIC had informed the first respondent that it planned to intervene in the Court proceeding and that if ASIC and the first respondent could agree on the terms of an enforceable undertaking, ASIC would take the position in the litigation that it was preferable for the first respondent to remain as responsible entity.

[59] The next day, 24 April 2013, ASIC forwarded a draft enforceable undertaking to the administrators' solicitors, "for discussion purposes". The draft involved the administrators' undertaking to call meetings of the members of FMIF and:

> "At the meetings referred to in subparagraphs (a) and (b) above, the resolutions put to the unitholders for determination will include resolutions for:
>
> (i) the appointment of a responsible entity over each of the funds; and
>
> (ii) whether the fund should be wound-up and, if so, by whom."

ASIC asked, "Please let me know your clients' comments and proposed amendments. It may be that we think of some additional amendments from our end as well as we consider it further over the public holiday [25 April]."

[60] On 26 April 2013 the first respondent issued the notice of meeting and covering letter discussed above. It informed ASIC of this briefly. It did not give ASIC the material sent to members. The meeting actually convened would not, as ASIC had wanted, deal with the question of winding-up, and it dealt with the question of who would be the responsible entity in a much more specific way than ASIC had proposed. Plainly enough it contradicted ASIC's expectation that the administrators would work with ASIC as to what would be put at the meeting. It also contradicted their solicitor saying to an ASIC solicitor earlier on 26 April that he would send a re-drafted version of the enforceable undertaking – affidavit Gubbins filed 15 July 2013, paragraph 6. As well, when ASIC received the notice of meeting it had concerns it was misleading.

[61] On 29 April 2013 the first respondent informed ASIC that it was not willing to enter into an enforceable undertaking and not willing to seek a resolution as to wind up the FMIF – affidavit Hayden filed 15 July 2013, paragraph 31(a). When asked to explain, the administrators said there would be negative connotations for them in entering into an enforceable undertaking and that they did not think it appropriate to seek a resolution from the meeting as to winding-up of the FMIF before a vote on who the FMIF desired as responsible entity. They said that if the meeting rejected Trilogy they would convene another meeting "promptly" to consider and approve any decision they might make to wind up the fund. These decisions were said to have been taken by the administrators after "two days of intensive consultation" with two firms of solicitors and with "other expert advisors".

[62] In an affidavit filed 2 May 2013 the administrator, Ms Muller, swears to a desire to "ensure that our conduct of the [first respondent] was to the extent possible, satisfactory to ASIC ..." – Court Document 46, paragraph 12. And further, "... Mr Park and I have been discussing with ASIC a proposal for undertakings to meet any concerns of ASIC and any 'bona fide' (concerns) of members in relation to the conduct of the fund", paragraph 16. I find it difficult to see this as consistent with the reality of the first respondent's interactions with ASIC. On 21 May 2013, solicitors for the administrators sent an amended draft enforceable undertaking to ASIC. The time for a co-operative solution had well since passed.

Correspondence Prior to 13 June Meeting

[63] To return to correspondence dealing with the proposed meeting, on 8 May 2013 ASIC wrote to the administrators' solicitors calling for an explanation as to various matters raised in the notice of meeting including, as to those matters I have summarised above, how it was that the first respondent thought calling a meeting would save legal costs in relation to the Trilogy application and how the ability of the first respondent to use Part 5.7B of the Act (clawback provisions) was a genuine point of differentiation between the first respondent and Trilogy so far as the FMIF was concerned. The letter also objected to the first set of underlined words at [52] above, which it said implied that ASIC had approved the first respondent's calling the meeting.

[64] As to the saving of costs point, no convincing explanation was provided by the first respondent. It pointed out that at the time of publishing the notice of meeting the Trilogy application had been made but the ASIC and Shotton applications had not. It was said against that background that:

> "It was our client's view that the court would adjourn the Original Proceedings until after the Meeting (at this time we understand that no party to the proceedings suggested that the proceedings were urgent). It was expected that the results of the vote at the Meeting would strongly inform the court proceedings. In addition, it was also thought possible that by convening the Meeting the two unitholders who had commenced the Original Proceedings might discontinue those proceedings and certainly would have if the meeting resolved to appoint Trilogy." – Norton Rose letter 10 May 2013, Court Document 73, p 35 exhibits.

[65] The only realistic way that legal costs would have been saved by calling a meeting was if the meeting voted to appoint Trilogy as temporary responsible entity. The notice distinctly does not say this. Indeed, this is the very result which the first respondent strongly urged members to reject. I think the notice was misleading about cost savings initially and became more so as events unfolded – see the following discussion.

[66] The letter of 10 May 2013 provided no convincing explanation in relation to the concern expressed by ASIC as to the clawback point and rejected ASIC's concern as to the notice implying that the first respondent had ASIC's sanction for its calling the meeting.

[67] ASIC was unconvinced and called upon the first respondent to issue an amended notice addressing its concerns. The first respondent proposed to put further information about the meeting on its website. It provided a draft of the further information it proposed to use to ASIC. By that stage concerns had been raised as to the legal basis on which a meeting seeking to change the responsible entity could be convened. Solicitors acting for the first respondent relied upon ss 601FL and 601FM of the Act.

[68] On 21 May 2013 ASIC called on solicitors acting for the first respondent to either adjourn their meeting until after the date (then) allocated to hear both the Trilogy application and the ASIC and Shotton applications, or alternatively cancel the meeting altogether. ASIC made its request on the basis that the vote of the meeting

would not impact on the majority of competing claims to be determined in the litigation so that the stated reason for convening the meeting – avoiding costs, delay and uncertainty – were inapplicable. It questioned whether s 601FL was applicable to the meeting.

[69] On 27 May lawyers for the first respondent rejected the idea that they would adjourn or cancel the meeting saying:

> "The Meeting will provide an opportunity for members to democratically vote on the direction and future of their fund. There is no logical reason why that opportunity should be taken away from members. Members only other chance to let their views be known to the Court is to appear at the Court hearing which would be a significant financial burden on members, as well as being totally impractical considering the number of members holding units in the FMIF." (my underlining)

Later in the same communication, "Our client's objective in calling the Meeting has been to allow investors to democratically determine who they wish to manage their fund. Our client is committed to this." (my underlining). It was said that if the resolutions were passed that would be the end of the Trilogy application, and if they were not passed, the results would inform the Court on the Trilogy application. The solicitors reiterated reliance on ss 601FL and 601FM of the Act as a basis for the proposed meeting. The solicitors said that the meeting would be adjourned to allow the further explanatory material they proposed to be considered by members and provided further drafts (amended) of that material to ASIC.

[70] From 6 May 2013 solicitors for Trilogy raised matters which went to the validity of the proposed meeting organised by the first respondent – see exhibits 4ff to Court Document 91. Their letters set out clearly, succinctly, and in my view correctly, the reasons why ss 601FL and 601FM of the Act do not allow the proposed meeting (see below). Solicitors for the first respondent made little attempt to meet the legal substance of the points advanced against them, but would not concede the point.

[71] From 6 May 2013 Trilogy actively encouraged members of the feeder fund of which it was responsible entity (around 20 per cent of membership of FMIF) not to participate in the proposed meeting. Further, on 23 May 2013 Trilogy adopted the position that it did not consent to being appointed by any meeting held as a consequence of the first respondent's notice, and called on the administrators to abandon the meeting which it said was not validly called, inutile and an attempted circumvention of Trilogy's court proceedings.

[72] Supplementary information was posted by the first respondent on the FMIF website in the form of a question and answer document dated 27 May 2013. As to the costs and utility of the proposed meeting, the additional information, at question one, rather seems to concede the point that there was little chance that the meeting would, at that stage, save costs or avoid litigation, but a further justification – informing the Court as to the wishes of the members – was raised. For the first time it was stated that the main cost saving would result if the meeting appointed Trilogy as responsible entity. It was still not plainly acknowledged that this was the only realistic scenario in which cost savings could ever have been made. Although Trilogy's lack of consent to being appointed at the meeting was raised, nothing

express was said as to any remaining utility in the meeting given Trilogy's attitude. Instead it was said:

> "It seems that Trilogy prefers to put both you (should you elect to put your views to the Court) and your fund to the significant costs associated with the Court proceedings rather than allow the matter to be determined in the more usual and democratic manner in a meeting of members. This is particularly so given the Court adjourned the proceedings till 15 July in part to allow the meeting to run its course." – Court Document 73, exhibit bundle 15. (my underlining)

[73] While submissions were apparently made on behalf of the first respondent at an interlocutory stage, that the proceeding ought to be adjourned to allow the proposed meeting to occur, I have not seen anything to show that the Court granted an adjournment of the proceeding for this purpose. In fact, counsel for the first respondent conceded it did not.[19]

[74] For the first time, at question six of the 27 May 2013 document, the first respondent clearly stated the limited nature of the licence granted to it by ASIC – i.e., to investigate and preserve, in train of either winding-up the scheme or transferring to a new responsible entity. Until then the information given to members was, in my view, misleading because it implied that the first respondent had a licence which enabled it to continue to manage the FMIF short of a winding-up – see [53(d)] above – and nowhere stated that unless the first respondent wound up FMIF it was obliged to appoint another responsible entity. These were very relevant matters for members to know prior to a vote on the appointment of a new responsible entity.[20]

[75] I assume, in response to ASIC's complaint that the notice of meeting implied ASIC had approved the course, material at question nine of this document stated that the first respondent was "solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting. Prior approval of such Notices by ASIC is not required." That may (or may not) have been apt to dispel the implication of which ASIC originally complained. By the time this statement was published ASIC disapproved in the plainest terms of the meeting and had called upon the first respondent to cancel it. The new statement did not reveal the true position regarding ASIC's attitude to the meeting.

[76] No reference was made to either Trilogy or ASIC's questioning the statutory basis for the meeting. Earlier in the document (at question two) it was stated, "The reason that Trilogy has provided for not consenting is that they believe that the matter should be determined by the Court". In fact Trilogy relied upon its assertions of invalidity as well.

[77] Some information was provided as to the clawback provisions and moderated the statements made in the notice of meeting which claimed that members would be advantaged if the first respondent remained as responsible entity. I note however that the information was not as frank as the view provided to ASIC about this on 1 May 2003, "It is at least hypothetically possible ...". Why the members were being given information about a legally novel, hypothetical advantage is not clear. I

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19 t 1-25.

20 Ms Muller conceded this – tt 1-52-53.

think the clawback information was initially, and remained, misleading in that it implied some real point of distinction between the first respondent and Trilogy.

[78] On 28 May 2013 ASIC again called upon the first respondent to cancel the proposed meeting. It called for more information in train of enquiries as to whether or not the meeting could validly have been called having regard to ss 252B, 601FL and 601FM of the Act.

[79] The meeting was held on 13 June 2013.

Validity of Meeting

[80] The first respondent relied upon two sections of the Act as allowing the meeting of 13 June 2013. Section 601FL(1) provides:

> "If the responsible entity of a registered scheme wants to retire, it must call a members' meeting to explain its reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new responsible entity. ..."

[81] Section 601FM provides:

> "If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity."

[82] Neither s 601FL or 601FM allowed the meeting which took place on 13 June 2013. The opening words of each of those sections describe a circumstance which did not exist. Section 601FL allows a meeting, "if the responsible entity of a registered scheme wants to retire". The first respondent did not want to retire as responsible entity, it wanted to test, or defeat, Trilogy's application to the Court to be appointed as new responsible entity. Section 601FM allows a meeting "if members of a registered scheme want to remove the responsible entity". Here no members of the registered scheme who wished to remove the responsible entity called the meeting. Insofar as there was any relevant state of mind of any member of this scheme, it was the state of mind of the administrators of the first respondent in their capacity as responsible entity of the CPIAL feeder fund, expressed on their behalf by the Trust Company. The desire of the administrators was to remain as responsible entity.

[83] Counsel for the first respondent argued that these introductory words in ss 601FL(1) and 601FM(1) could not possibly be read as a real requirement that there be a subjective intention in terms of the literal meaning of the words. He asked rhetorically how the subjective intention of numerous members who purported to act pursuant to s 601FM(1) might be determined, and what might occur if the intention of some members was different from the intention of others. In terms of s 601FL(1), I think it is quite clear that a subjective intention on the part of the responsible entity is required, for the responsible entity must explain to the members' meeting the reason for its wanting to retire.[21]. I do not see any reason for interpreting the introductory words at s 601FM(1) differently.

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21 See *ASIC v Wellington Investment Management Limited & Anor* [2008] QSC 243, per McMurdo J.

[84] In addition, as to s 601FM(1), ASIC says that the feeder fund CPIAL (whether through the Trust Company or otherwise) was not entitled to take action under Division 1 of Part 2G.4 for the calling of a members' meeting because, returning to the words of s 252B(1), above at [50], although CPIAL was a member with more than five per cent of the units in the scheme, it did not have "at least five per cent of the votes that may be cast on the resolution". ASIC says CPIAL was an "associate" of the first respondent within s 15(1)(a) of the Act: it was a person who was in concert with the first respondent in calling the meeting and voting at it. Thus CPIAL was precluded from voting because of the provisions of s 253E:

> "The responsible entity of a registered scheme and its associates are not entitled to vote their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter other than as a member. ..."

[85] It may be accepted that the first respondent had an interest as, and in remaining as, responsible entity of the scheme, which is an interest "other than as a member" for s 253E of the Act.[22] Sections 12, 15 and 16 of the Act, set up a horribly complex scheme for deciding who is an "associate" within the meaning of s 253E. However, it seems to me that the decision of White J in *Everest Capital Limited v Trust Company Ltd*[23] is determinative of the position here. In my view, Trust Company was not entitled to vote at the 13 June 2013 meeting because in voting its interest it was acting as agent of the first respondent. Further, in any event, having regard to the provisions of ss 12, 15 and 16 of the Act, it seems to me that s 15(1)(a) of the Act applies and that the first respondent and Trust Company were relevantly acting in concert, and that, in accordance with the decision in *Everest*,[24] s 16(1)(a) would not apply.

Conclusions as to Meeting and Related Conduct

[86] In my view it is plain that calling the meeting was a tactic by the first respondent which had the aim of seeing off its rival for control of FMIF.[25] Real concerns are raised in my mind by the misleading statements given in the information to members. It is difficult to see any explanation for these matters other than that the first respondent was pursuing its continuing control of the FMIF in a manner which was at odds with the interests of the members. In the absence of any other convincing explanation, I see the choice not to work with ASIC and not to hold a meeting at a time which allowed resolutions as to winding-up at the same time as resolutions as to the responsible entity, in the same light. The initial failure to properly disclose to members the true nature of the limited financial securities licence bears on this last point.

[87] I think it is very significant that when Trilogy's lawyers made a reasoned attack on the statutory basis for the meeting, and when ASIC attacked both the material given to members and the statutory validity of the meeting, the first respondent refused to

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22 This is conceded by Ms Muller – Court Document 79, paragraph 66.

23 [2010] NSWSC 231 [77]ff.

24 [89]ff above.

25 I should be careful in interpreting this (in isolation) as a marker of self-interest in the first respondent's administrators, rather than action in the interests of the members of the fund, because ASIC certainly had a similar strategy in the interests of the members of the fund. Perhaps it is a hindsight view to say that had an applications judge been persuaded to hear the point dealt with at [9] to [20] of this judgment, a much simpler and cheaper solution was available.

moderate its position, except inadequately in the question and answer document. The law as to the validity of the meeting is complex, and misinterpretation of it could readily be forgiven. However, the first respondent made little substantial response to the matters raised by Trilogy and ASIC. I cannot understand why a responsible entity acting solely in the interests of members would not attempt to accommodate or moderate its position in light of those arguments and the objective facts. Certainly by the time Trilogy had refused to consent to any appointment via the meeting,[26] there was no utility in the meeting except perhaps as a poll to inform the Court of what the members wanted. However, given the information which had been provided to members, including the misleading information; the information that Trilogy was not licensed to perform as responsible entity, and the information that Trilogy would not consent to perform as responsible entity if appointed by the meeting, any objective observer must have doubted the meeting's use even as a poll.

[88] From the underlined passages in the extracts at [52], [69] and [72] above, it can be seen that the administrators insisted on the meeting as some sort of democratic right in the members which the Trilogy application was designed to subvert. The evidence of Ms Muller in cross-examination as to the justification for, utility of, and likely outcome of the meeting was similar. She swore, as she had in her affidavit, that she thought there was "an appreciable chance" that Trilogy would be elected as responsible entity by the meeting. In cross-examination she said that was her view at all times up until the vote closed.[27] Unless Ms Muller was using the word "appreciable" to mean "very slight", I have difficulty accepting that was her genuine belief by the time members had been informed that Trilogy (a) did not have a licence to operate as responsible entity; and (b) did not consent to do so. That the first respondent insisted as it did on its position in relation to the meeting when objectively it had become quite untenable to my mind demonstrates that the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions.

Conduct of the Litigation

[89] ASIC made a separate but connected submission that the first respondent's conduct of this proceeding has been over-zealous. It pointed to the volume of material filed on behalf of the first respondent and the scope of issues sought to be agitated.[28] ASIC submitted that there was a disproportion evident when the interests of the unit holders were considered. It was said that a *Beddoe*[29] application ought to have been made. It is right that a responsible entity is a trustee under the Act. It is probably also right that this matter has more of an urgent and commercial flavour than the type of trust matter in which a *Beddoe* application is usually made. Nonetheless, in my view the conduct of the first respondent in this litigation was combative and partisan in a way which I see as reflective of the administrators acting in their own interests to keep control of the winding-up of the FMIF, rather than acting in the interests of the members.

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26 I accept there is no criticism of Trilogy to be made in relation to this stance, it was correct in saying that the meeting was invalidly called.

27 t 1-54.

28 The Court file in this matter to 12 July 2013 showed 102 documents filed. These included affidavits of expert accountants and affidavits of considerable (some unjustifiable) size. There were many more filed by leave at the hearing before me.

29 [1893] 1 Ch 547.

[90] The affidavit of Hellen (Court Document 40) was relied upon by ASIC as an illustration of the attitude it complains of. It was said that the affidavit was at no time likely to provide much assistance to the Court. Mr Hellen gives expert evidence as a forensic accounting specialist, with extensive experience as a liquidator. He was briefed to prepare a report regarding Trilogy's financial position. From Mr Hellen's recitation of his instructions, it appears that solicitors acting for the administrators of the first respondent were concerned about a contingent liability in the amount of $81 million in Trilogy's accounts, and were concerned otherwise to have Mr Hellen identify avenues of further investigation, either in relation to that matter or otherwise, as to whether Trilogy had a sound financial position. Mr Hellen was briefed "on the evening of 29 April 2013" and expresses reservation that he has had "very limited time" to undertake his assessment. His affidavit was filed on 2 May 2013. He heavily qualifies his report saying that it is based on interim and annual financial reports but he has seen few underlying documents.

[91] Mr Hellen comes to the unremarkable conclusion that if litigation against Trilogy, in which an amount of $81 million was claimed, were to go against Trilogy, Trilogy would be driven either to rely upon insurance or seek indemnity from a managed fund of which it was responsible entity. Mr Hellen could not assist with an opinion as to whether those sources would allow Trilogy to pay a judgment of $81 million. Nor could he give any further useful information about Trilogy's financial position: it had an excess of assets over liabilities and made a small operating profit.

[92] Before the conclusion of the hearing before me, judgment was given in Trilogy's favour in the litigation concerned and an appeal against that judgment was lodged and then withdrawn, so the substance of Trilogy's financial position did not concern me. Had it concerned me, Mr Hellen's report would not have been any more use to me than my own examination of the financial accounts with which he was briefed. Nor really could it have been expected to be. It seems an extravagant use of members' funds.

[93] An associated point is that in contrast to the highly qualified and inconclusive report by Mr Hellen, one of the administrators, Muller, swears at Court Document 46, paragraph 74, that Trilogy will not be able to pay the judgment debt if it loses the relevant litigation. It is hard to see this statement as anything other than unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions. It is significant that it is a statement squarely within Ms Muller's area of professional expertise as a liquidator. Not only that, it is in a part of her affidavit where she swears that material published by Trilogy and its solicitors contains "numerous statements" that are "either false or misleading" – Court Document 46, paragraph 68. There was no argument before me that Trilogy and its solicitors have published false or misleading statements. These are serious allegations, especially when made against professional people. More material of similar flavour is found in the same affidavit at paragraph 77.

[94] Solicitors acting for the first respondent filed an affidavit of over 800 pages – Court Documents 16, 17 and 18 – which was of such marginal relevance that it was not referred to in either written or oral submissions by any party. Further, Court Document 52, which itself has over 100 pages of exhibits, is a solicitor's affidavit which was read on the hearing before me but was little more than combative and querulous commentary on the litigation. Separately, the description in this affidavit of the enormous amount of affidavit material exchanged and the late hours and

weekend work by solicitors, reveals a worrying scenario as to litigation costs in circumstances where the first respondent ought firmly to be keeping in mind the interests of members of an illiquid, and perhaps insolvent, fund.

[95] Ms Muller's affidavit, which is Court Document 79, is characterised by the sort of sniping and argumentative passages which one would hope not to find in any affidavit, let alone an affidavit of someone who is an officer of the Court and a trustee acting on behalf of others – see for example paragraphs 11, 14(c), 22, 66, 75 and 81. It is evident from that affidavit that she is acting very much in the legal arena – she swears responses to written submissions on interlocutory applications and swears to circumstances where she and her solicitor participate in telephone conversations with other solicitors, the content of which conversations was contentious before me.

[96] I will not go on to multiply examples. However, there are many, both in the affidavits filed on behalf of the first respondent, and in the correspondence it and its solicitors undertook.

Conflicts and Potential Conflicts of Interest

[97] In *Re Stewden Nominees No 4 Pty Ltd*[30] Bowen CJ in Eq rejected the appointment of a liquidator who was a member of a firm which had audited the company's accounts in the past. He said that there was the potential for conflict if, for example, the liquidator had to take action which called into question the prior accounts of the company. He said, "It is important that a liquidator should be independent, and should be seen to be independent (*Re Allebart Pty Ltd* [1971] 1 NSWLR 24, at p 30)."

[98] Similarly in *Re Giant Resources Limited*[31] Ryan J said:

> "... a liquidator should not be put in a position where his independence might be open to challenge. It is of the greatest importance that there should be no possibility of criticism attaching to one of the Court's own officers on the ground of a conflict of interest. The liquidator needs to be seen to be independent in any matter which his duties as liquidator may require him to investigate."

[99] Lastly, in *Handberg v Cant*[32] Finkelstein J said:

> "If there are, or are likely to be, disputes between companies in liquidation that are under the control of one liquidator then as a general rule different persons should be appointed as liquidator to each company [authorities omitted]. This is not to say that it is inappropriate to appoint one person as a liquidator of a group of companies or companies that are closely connected [authorities omitted]. But once the likelihood of conflict becomes apparent it is necessary to take action."

[100] Both Shotton and Trilogy advance a number of factual scenarios as illustrating that if the current administrators of the first respondent were to wind up FMIF they would face actual and potential conflicts of interest.

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30 [1975] 1 ACLR 185, 187.
31 [1991] 1 Qd R 107, 117.
32 [2006] FCA 17, [14].

[101] Under the constitution of FMIF the responsible entity is entitled to a management fee of up to 5.5 per cent per annum of the value of the assets of the fund. The administrators swear that they will not pay the first respondent this management fee from FMIF. There would no doubt be difficulties and expense involved in valuing, and throughout the course of a winding-up, revaluing, the assets of FMIF in order to calculate the management fee, but it would not be impossible. In circumstances where both the first respondent and FMIF are being wound up and there is doubt as to the solvency of both, there is at least a potential conflict to be resolved between the desire of the creditors of the first respondent and the interests of the FMIF.

[102] The evidence as to what the administrators will do as to this fee is rather vague and not adequately documented.[33] While the administrators say they have "agreed" not to charge a management fee, I do not know who that agreement was with. I am not convinced that any arrangement they have made in relation to management fees would be sustainable if there were real pressure exerted by creditors of the first respondent.

[103] It has been mentioned that there are three feeder funds to FMIF, two controlled by the first respondent as responsible entity, and one by Trilogy as responsible entity. FMIF categorises its feeder fund members as a separate class of investors (class B investors), as it is entitled to do under its constitution. While the first respondent (before administration) suspended distributions to unit holders from 1 January 2011, there were distributions of nearly $17 million to class B unit holders in the year ending 30 June 2012. From the evidence given before me,[34] it appears this was an accounting exercise, undertaken because the feeder funds accounts did not balance without such a distribution. This rather illustrates that the first respondent (before administrators were appointed) was facing a conflict between its duties as responsible entity of FMIF and as responsible entity of the feeder funds.

[104] It is no criticism of the current administrators that they have not, in the short time available to them, formulated their position in relation to this distribution. The administrators concede that it may need to be investigated and that it may give rise to a claim on behalf of some unit holders of FMIF. "Undoing" the transaction would be difficult because almost $16 million of the distribution has been reinvested into the FMIF on behalf of class B unit holders, diluting the interests of other members. This was conceded by Mr Park in cross-examination, though he swore to the contrary in his affidavit.[35]

[105] I think this issue of distribution to B class shareholders illustrates the potential for conflict between the interests of the feeder funds and the FMIF if one responsible entity has charge of all of them. There is potential for this type of conflict to arise again, including in attempts to undo the 2012 transaction should it be found necessary. In this respect, Trilogy is the responsible entity of one of the feeder funds owning 20 per cent or so of units in the FMIF and the potential for conflict would apply as much if Trilogy were the responsible entity of FMIF, or the liquidator of FMIF.

[106] There are further issues which may arise as between FMIF and the first respondent. In both 2011 and 2012 the fund paid around $5 million to the first respondent as

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33 tt 2-14 – 2-16.

34 See Note 3 to the accounts at p 173 of the exhibit bundle to Court Document 2 and t 2-18.

35 t 2-19.

"loan management fees". There may be a question as to the legitimacy of these payments under the constitution of FMIF, as they seem to be in addition to management fees, and on their face do not seem to have been expenses. Once again the administrators have not yet formed a concluded position as to this, but acknowledge the potential for an overpayment, and acknowledge that the process of reversing the entries may prove to be complex,[36] though again Mr Park originally swore to the contrary.

[107] Trilogy relies upon an affidavit read by the first respondent sworn by Mr Corbett. He swears that the first respondent had not obtained valuations for most of the properties over which FMIF had mortgage security "for at least two years preceding the appointment" of the current administrators. It may thus be that management fees have been based on valuations which are too high. Any claim to recover such overpayments may involve a conflict between duties to the creditors of the first respondent and duties to the members of FMIF if the person liquidating both the first respondent and FMIF is the same person.

[108] Further Trilogy says that from 2002 there were changes made to the constitution of the FMIF without meetings of members, which increased the maximum loan to value ratio for lending by FMIF. It increased from 66 per cent in 2002 to 85 per cent in 2006. The power of the responsible entity to make changes to the constitution without a meeting of members was a limited one – it could only make changes which would not adversely affect unit holders' rights. Trilogy points to this as a potential basis for a claim on behalf of members of the fund against the first respondent, or its directors.

[109] With a broad brush, Trilogy identifies around $168 million of related party transactions which it says, in a very general way, might give rise to the possibility of conflicts between the fund and the first respondent.

[110] Trilogy also says that because of the spectacular collapse of the value of assets under management during 2008-2009 there may be legal claims, for example in negligence, which the FMIF has against the first respondent as responsible entity. On the material before me this seems quite speculative. No proper investigations have been undertaken by any party at this stage. Obviously there is the potential for conflict if such a claim were to be made because it appears that the current administrators will be the liquidators of the first respondent and will have to adjudicate on any proof of debt lodged by or on behalf of investors in FMIF. Were there to be litigation, they would be on both sides of the record. In that regard I note that the Trilogy interests have been active in lodging proofs in the administration but cannot give any idea as to the quantum of the amounts claimed, or the basis upon which they are said to be owing.

[111] On behalf of Shotton it was said that the responsible entity may have engaged in joint lending between FMIF and other funds controlled by the first respondent as responsible entity before administrators were appointed. On the material before me, this seemed a rather academic proposition.

[112] Counsel for the first respondent emphasises the fact that in all the cases discussed above the conflict of interest identified is potential only, and in some of the cases very little material can be put before the Court. That may be accepted, but I am not

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36 t 2-21.

of the view that the matters raised by Trilogy or Shotton are academic or theoretical only.

[113] The administrators say that if it became necessary, because of a conflict, various measures could be put in place to deal with any conflict which actually arose. If a conflict were identified by the administrators, they swear that they would seek legal advice. They swear that an option would be to approach the Court. They swear that a special purpose liquidator could be appointed to the first respondent company if that became necessary. Counsel for the first respondent said that if there were to be litigation between the feeder funds and the first respondent, Trilogy could be appointed as a representative defendant for the feeder funds so that the litigation could continue with an independent contradictor. In any given scenario the administrators postulate solutions involving their preferring to continue as liquidators of the FMIF and jettisoning any other role.

[114] The solicitor appearing for Mr Shotton points out this is consistent with the administrators' desire to retain control of the FMIF. The endeavours of the first respondent do have this flavour about them. At the conclusion of the hearing one of the alternative draft orders they proposed was that the ASIC and Shotton applications be dismissed on the administrators' undertaking to do all things necessary to secure independent liquidators to the first respondent company and to Administration. No notice of any such thing had been given at any prior time during the proceeding, and I was not convinced that there had been any consideration of the separate interests of the first respondent company or Administration,[37] and the effect that such a proposed order would have on those companies in terms, for example, of wasted costs to date. It may be that those companies have less assets than the fund, but I was told that the first respondent company had assets of around $7 million. I had no basis to assess how much of the administrators' planned charges related to the first respondent company and to Administration; what proportion of that would be wasted if new administrators or liquidators were appointed to those companies, and what proportion that waste of cost would bear to the overall picture of those companies' liquidations. It seemed to me that the administrators were acting without regard to the interests of those companies in order to propose a situation where there could be no possibility of potential conflicts clouding their continuing control of FMIF.

[115] Counsel for the first respondent made a submission that it is a fundamental part of any liquidator's task to deal with conflicts of interest which may arise from time to time, including on the adjudication of claims, and in that respect, a liquidator's role can involve adjudication. That is right no doubt as a general proposition. I note that in *Shephard v Downey*[38] Judd J preferred to appoint an independent liquidator rather than a liquidator with similar potential conflicts as raised here. He made the point that, even though it might be possible to manage potential conflicts through undertakings and directions in the future should they arise, his preference was to forestall such a process by having the appointment of someone independent from the start.[39]

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37 See argument as to this at tt 3-40ff.

38 [2009] VSC 33 [134].

39 Note: This discussion of Judd J occurred in circumstances where he had determined (and it was uncontroversial in the case before him) that an appointment ought to be made under s 601NF(1), viz it was necessary that someone be appointed to take responsibility for the liquidation other than the responsible entity because the responsible entity itself conceded it was not capable of undertaking the

[116] The first respondent submitted that the administrators would have a statutory duty as liquidators of the fund to properly investigate and pursue claims against the first respondent and that there was no basis for thinking they would not pursue this duty "independently, professionally and with due care".[40] In my view, the material discussed as to the conduct of the members meeting on 13 June 2013; interaction with ASIC, and the conduct of this litigation do give a basis for thinking otherwise. At paragraph 33 of Court Document 79 Ms Muller swears that she is aware of the need to, "remain astute to ensure that, as the administration continues, no conflicts arise, whether potential or actual. We intend to seek advice from solicitors ..." She names the two firms of solicitors who had charge of the correspondence relating to the 13 June 2013 meeting. At paragraph 34 of that affidavit Ms Muller says, "As I have explained in paragraphs 12-30 above, my and Mr Park's current understanding is there are no such conflicts exist or are likely to arise". I do not think it can be said on any objective view of the evidence that conflicts are not likely to arise. I do not have confidence that the administrators would adequately identify and deal fairly with conflicts if they were to arise.

[117] Were it just that there was a real potential for conflicts of interest to arise in the future, I like Judd J in *Shephard v Downey* – see [115] above – would prefer an independent liquidator for the fund. Like Fryberg J in *Re Orchard Aginvest Ltd* (above), I would see this as desirable. But I would accept, as he did in that case, that that would not be enough to give me power to make an order pursuant to s 601NF(1). It would not be necessary. In this case there is more. The administrators of the first respondent have, in my view, demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*. My view is that they have preferred their own commercial interests to the interests of the fund. This is demonstrated in the conduct I have outlined above in relation to the 13 June 2013 meeting; their dealings with ASIC, and their conduct with this litigation. It extends to the point where both administrators have sworn to matters which they either conceded were wrong in cross-examination – [104] and [106] above – or in my view are not consonant with reality – [62], [88], [93] and [116] above. In a winding-up where conflicts might well arise, and may involve questions of some complexity, I feel no assurance that the current administration would act properly in the interests of members of the fund in identifying those issues or in dealing with them. In my view, that makes it necessary that someone independent have charge of winding-up FMIF pursuant to s 601NF(1) of the Act.

[118] In a submission alternative to his main submission on the hearing, counsel for the first respondent advanced a draft order which would provide for an independent person to have some oversight of the first respondent during the time that the first respondent as responsible entity wound up the FMIF. The idea was that the first respondent would consult with, and report to, that independent person and that the first respondent would not, without the consent of that independent person, bring or defend legal proceedings or dispose of any secured property. The independent person was to be given, "on receipt" any written claim or demand against the fund and have full power to inspect the books and records of the fund. The first

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liquidation. Thus the discussion to which I refer by Judd J occurred in the context where he had found it was necessary to appoint someone, and in those circumstances preferred to appoint someone independent. He did not come to the conclusion that it was necessary to appoint somebody under s 601NF(1) because of potential conflicts of interest.

40 Written submissions, paragraph 60.

respondent offered to comply with any written directions of the independent person as to winding-up of the fund. The submission was that this was the minimum necessary direction to be given under s 601NF(2).

[119] The difficulty I have with the type of reporting envisaged by that order is that it depends, except in some few defined circumstances, on the administrators recognising that a matter is one worthy of report to the independent person, and making a full and fair report of the facts which the independent person would need to judge whether or not action should be taken on behalf of the fund, and whether or not there were conflicts arising which might necessitate action being taken. In addition, it is easier to compel the administrators in such a situation to report positive acts to the independent supervisor than to attempt to define circumstances in which they ought to discuss issues and concerns arising in the winding-up where they propose to take no action. For these reasons I am not convinced that such an order would allay the concerns which the administrators' conduct raises. I think that more is necessary to ensure that the winding-up of the first respondent proceeds regularly in accordance with the constitution of the fund and the law.

Who Ought to be Appointed

[120] There was some controversy as to who ought to be appointed. ASIC nominated liquidators who had the lowest schedule of rates of all those before me. That is certainly something in their favour. Although, when fees are charged on an hourly basis, efficiency and effectiveness in work practices will probably have more impact on the overall bill than rates alone. The costs of ASIC's nominee were not much less than the person put forward by Mr Shotton – David Whyte, liquidator. Trilogy, a major interested party, supported Mr Whyte in the event that it was not appointed, and I think that is of some significance. Mr Whyte, like all the proposed candidates, is well qualified for the job but I note that he has particular experience in a similar fund winding-up pursuant to s 601NF(1) – Equititrust. It was faintly suggested that he had a conflict which would prevent him acting but I do not accept that is so. In all the circumstances, I think he ought to be appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution pursuant to s 601NF(1).

[121] The provision at s 601ND(1) which allows a Court to direct that the responsible entity winds up a scheme, and the provision at s 601NF(1) which allows a Court to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution do not, to my mind, sit happily together. In particular they give the distinct potential for two separate sets of insolvency practitioners to charge a distressed fund. My view in this case is that Mr Whyte should in substance and effect conduct the winding-up of the fund. In *Equititrust* that was the view of Applegarth J. and he used a mechanism – constituting the person charged with winding the scheme up as receiver – to give that person the necessary powers. It was not contended by Shotton or Trilogy that I should make any different order in this case. Trilogy said I ought not appoint a receiver because to do so would damage the way the fund was perceived by creditors and by those who might potentially buy its assets. In circumstances where Deutsch Bank has already been appointed as receiver and where the responsible entity of the fund is itself in administration, and likely to be in liquidation, I am not deterred by this consideration. The fact of the matter is that the fund has reached a point where it

must be wound up. I will appoint Mr Whyte receiver of the property of the fund under s 601NF(2) of the Act.

[122] The first respondent argued that receivers ought not be appointed under s 1101B of the Act (on ASIC's application) because the breach which ASIC relied upon to give it power to ask for the appointment of receivers was one committed before administrators were appointed and one which itself did not justify this relief. For those reasons I do not rely upon s 1101B of the Act in appointing Mr Whyte as receiver.

[123] I now deal with two remaining matters raised in argument.

Wishes of the Members

[124] It is uncontroversial that the Court should have regard to the wishes of members of a scheme such as this when deciding its fate. In this regard the first respondent urged that I should interpret the results of the vote of the meeting of 13 June 2013 as indicating that the members did not want Trilogy as responsible entity. Only about 45 per cent of those eligible to vote at the meeting participated in it. Of that group 20 per cent abstained (almost entirely the feeder funds). Of the 25 per cent of members who voted, around 24 per cent voted against the motions. I find the result of the meeting of very limited assistance. Information given to the members by the first respondent before the meeting was misleading in several respects. As well, it was to the effect that Trilogy did not have the correct financial services licence required to run the fund. That was correct at the time but is no longer correct. The members voting at the meeting had been told that Trilogy did not consent to be appointed as responsible entity at the meeting. In those circumstances one wonders that any votes were cast in favour of Trilogy.

[125] Some members of the fund appeared on the hearing. The Bruces have an investment of around $144,000 in the fund. Mr Shotton also has a relatively small investment in the fund. Two additional members – Nunn and Byrne – have small investments in the fund. They supported the first respondent on the application. Mr Nunn apparently worked for the first respondent for eight or nine years.

[126] As responsible entity of the wholesale mortgage income fund Trilogy has around 20 per cent of the total units in the fund, equating to around $74 million worth of units. The balance of the fund (somewhat over 50 per cent) is held by individual investors with investments ranging between $1,000 and $8 million. Trilogy's views are therefore significant.[41]

[127] While I have been astute to recognise the interests of members of the fund, it must be acknowledged that my decision is grounded more on substantive matters than on attempting to implement the wishes of any particular member or group of members.

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41 Trilogy relies upon an affidavit of a solicitor which purposes to show that members support Trilogy as responsible entity. However, it is remarkable for what it does not say. There is no information as to how the members were prompted to express their views or what information they had about the issues in dispute before me. It is of little assistance.

Waste of Work

[128] On behalf of the first respondent it is said that to charge any person other than the current administrators with the winding-up of FMIF would be to waste the cost of the work which the administrators have performed to date. Quite clearly when the nature of the work performed to date is considered, not all of it would be wasted.[42] The current administrators say they would co-operate with anybody who is charged with responsibility of winding-up the fund, and indeed it would be absolutely extraordinary if they did not. The current administrators were appointed in March 2013. They have been restrained from commencing a winding-up pending the outcome of this proceeding. It appears that any winding-up will take some years,[43] so that while there may indeed be waste, the proportion is likely to be small in the overall cost of the winding-up. Fees to date have not been charged, but it is sworn that as at 27 June 2013 the administrators propose to charge the fund $960,756 and an unspecified part of $1,174,399 they have notionally charged to the first respondent company. There is nothing to show what has been achieved for those proposed charges. The administrators accept their charges must be approved by the company or the Court. I very much doubt that most of the costs of the 13 June 2013 meeting would be approved as necessary and appropriate and I have doubts as to some of the costs of this litigation.

[129] Bearing all these points in mind, I cannot see that the potential for some wasted fees would deter me from making an appointment under s 601NF(1).

[130] I will ask the parties to bring in minutes of order. I will hear submissions on costs.

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42 See cross-examination, tt 2-23ff.

43 Ms Muller swears an estimate of three years.

'DW-2'

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383/13

Applicants: PATRICIA BRUCE	RAYMOND EDWARD BRUCE AND VICKI
	AND
First Respondent: CAPACITY MORTGAGE	LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) ACN 077 208 461 IN ITS AS RESPONSIBLE ENTITY OF THE LM FIRST INCOME FUND
	AND
Second Respondent: MORTGAGE	THE MEMBERS OF THE LM FIRST INCOME FUND ARSN 089 343 288
	AND
Third Respondent:	ROGER SHOTTON
	AND
Intervener: COMMISSION	AUSTRALIAN SECURITIES & INVESTMENTS

ORDER

Before: Justice Dalton

Date: 21 August, 2013

Initiating document: Application filed 29 April, 2013 by Roger Shotton and Application filed 3 May 2013 by Australian Securities and Investments Commission ("Applications").

THE ORDER OF THE COURT IS THAT:

1. Pursuant to section 601ND(1)(a) of the Corporations Act 2001 (Cth) ("the Act") LM Investment Management Limited (Administrators

SUPREME COURT OF QUEENSLAND REGISTRY BRISBANE

Filed on behalf of the Third Respondent

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

Appointed) ACN 077 208 461 ("LMIM") in its capacity as Responsible Entity of the LM First Mortgage Income Fund is directed to wind up the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") subject to the orders below.

2. Pursuant to section 601NF(1) of the Act, David Whyte ("Mr Whyte"), Partner of BDO Australia Limited ("BDO"), is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution ("the Appointment").

3. Pursuant to section 601NF(2), that Mr Whyte:-

   (a) have access to the books and records of LMIM which concern the FMIF;

   (b) be indemnified out of the assets of the FMIF in respect of any proper expenses incurred in carrying out the Appointment;

   (c) be entitled to claim remuneration in respect of the time spent by him and by employees of BDO who perform work in carrying out the Appointment at rates and in the sums from time to time approved by the Court and indemnified out of the assets of the FMIF in respect of such remuneration.

4. Nothing in this Order prejudices the rights of:

   (a) Deutsche Bank AG pursuant to any securities it holds over LMIM or the FMIF; or

   (b) the receivers and managers appointed by Deutsche Bank AG, Joseph David Hayes and Anthony Norman Connelly.

5. Pursuant to sections 601NF (2) of the Act, Mr Whyte is appointed as the receiver of the property of the FMIF.

6. Pursuant to sections 601NF (2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to paragraph 5 above, the powers set out in section 420 of the Act.

7. Without derogating in any way from in any way from the Appointment or the Receiver's powers pursuant to these Orders, Mr Whyte is authorised to:

   (a) take all steps necessary to ensure the realisation of property of FMIF held by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF in relation to the property, including but not limited to:

(i) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate and/or finalise the sale of the property;

(ii) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;

(iii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property;

(iv) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and

(v) executing contracts, transfers, releases, or any such other documents as are required to carry out any of the above; and

(b) bring, defend or maintain any proceedings on behalf of FMIF in the name of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as is necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, including the execution of any documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions.

8. The First Respondent must, within 2 business days of the date of this Order:

(a) send an email to all known email addresses held by the First Respondent for Members of the FMIF notifying of Mr Whyte's appointment, and a copy of this Order; and

(b) make a copy of this order available, in PDF form, on:

(i) its website www.lmaustralia.com, together with a link to the www.bdo.com.au website;

(ii) its website www.lminvestmentadministration.com, together with a link to the www.bdo.com.au website.

9. The costs of the Third Respondent, Roger Shotton, of and incidental to the Applications, including reserved costs, shall be assessed on the indemnity basis, and shall be paid from the FMIF.

10. All other questions of costs of or incidental to the Applications and the Application filed 15 April 2013 by Raymond and Vicki Bruce are adjourned to a date to be fixed by the Court.

IT IS DIRECTED THAT:

11. Any party wishing to contend that the First Respondent is not entitled to indemnity from the ~~FMIF~~ Fund in relation to the Applications shall file an application to be heard and determined at the same time as the other issues as to costs.

12. Any application for the costs of complying with subpoenas issued in the proceedings are adjourned to a date to be fixed, and any time limitation imposed by rule 418 (5) of the UCPR is extended pursuant to rule 7 of the UCPR, to allow for the hearing of any such application at the date to be fixed.

Signed: nll

'DW-3'

ASIC & Business Names

ORGANISATIONAL SEARCH ON LM FIRST MORTGAGE INCOME FUND

Current Extract

This information was extracted from ASIC database on 14 March 2014 at 11:59AM

This extract contains information derived from the Australian Securities and Investment Commission's (ASIC) database under section 1274A of the Corporations Act 2001. Please advise ASIC of any error or omission which you may identify.

089 343 288	LM FIRST MORTGAGE INCOME FUND	DOCUMENT NO.
	089 343 288	
ABN	13 089 343 288	
Date Registered	28-Sep-1999	
Review Date	28-Sep-2014	

Current Organisation Details

Name	LM FIRST MORTGAGE INCOME FUND	026231974
Name Start	31-May-2007	
Status	WINDING UP - MANAGED INVESTMENT SCHEMES	
Type	MANAGED INVESTMENT SCHEME	
Disclosing Entity	NO	
Scheme category(s)	MTGE	

Current Responsible Entity

Officer Name	LM INVESTMENT MANAGEMENT LIMITED	7E5105009
ACN	077 208 461	
ABN	Not available	
Address	FTI CONSULTING, 'CORPORATE CENTRE ONE' LEVEL 9, 2 CORPORATE COURT, BUNDALL, QLD, 4217	
Appointment Date	28-Sep-1999	

Current Compliance Plan Auditor

Officer Name	MICHAEL JAMES REID	023038927
ABN	Not available	
Address	Address Unknown	
Appointment Date	24-Jul-2006	

Current Scheme Auditor

Officer Name	ERNST & YOUNG	020201836
Number	024870595	
ABN	Not available	

Address	LEVEL 5 WATERFRONT PLACE, 1 EAGLE STREET, BRISBANE, QLD, 4000
Appointment Date	04-Mar-2004

Appointment of secretary is optional. In the event no secretary is appointed the director(s) assume the responsibilities under the Law.

Document Details

Received	Form Type	Processed	No. Pages	Effective	
07-May-2013	5138	29-May-2013	2	06-May-2013	026231974
5138A	Notification of Commencement or Completion of Scheme Windingup - Commencement of Winding Up				
21-Dec-2012	7053	21-Dec-2012	5	16-Nov-2012	028183433
7053	Disclosure Notice				
29-Nov-2012	5111	07-Jan-2013	5	30-Jun-2012	028382967
5111	Audit Report on Compliance Plan				
19-Nov-2012	388	05-Dec-2012	53	30-Jun-2012	028335516
388B	Financial Report Financial Report - Registered Scheme				(FR 2012)
26-Oct-2012	5101	26-Oct-2012	5	26-Oct-2012	028183017
5101B	Constitution For Managed Investment Scheme Modification Of Constitution				
16-May-2012	5101	17-May-2012	21	16-May-2012	027850151
5101B	Constitution For Managed Investment Scheme Modification Of Constitution				
15-Mar-2012	7051	22-Mar-2012	32	31-Dec-2011	028008721
7051	Half Yearly Reports				
19-Sep-2011	388	04-Oct-2011	56	30-Jun-2011	020500688
388B	Financial Report Financial Report - Registered Scheme				(FR 2011)
19-Sep-2011	5111	04-Oct-2011	4	30-Jun-2011	027613174
5111	Audit Report on Compliance Plan				
28-Jun-2011	7051	29-Jun-2011	30	31-Dec-2010	027577581
7051	Half Yearly Reports				
22-Mar-2011	5102	23-Mar-2011	78	16-Mar-2011	020500652
5102C	Compliance Plan For Managed Investment Scheme Replacement Compliance Plan				
06-Oct-2010	5111	16-Nov-2010	5	30-Jun-2010	027106724
5111	Audit Report on Compliance Plan				
06-Oct-2010	388	15-Nov-2010	55	30-Jun-2010	027353931
388B	Financial Report Financial Report - Registered Scheme				(FR 2010)
10-Sep-2010	7053	10-Sep-2010	13	30-Jun-2010	026654419
7053	Disclosure Notice				
09-Jun-2010	7051	16-Jun-2010	26	31-Dec-2009	026593607

7051 Half Yearly Reports

11-Nov-2009 5120 12-Nov-2009 7 11-Nov-2009 020500491
5120 Notice of Exemption Re Managed Investment Scheme

11-Nov-2009 5120 18-Nov-2009 0 11-Nov-2009 020500486
5120 Notice of Exemption Re Managed Investment Scheme

26-Oct-2009 491 09-Dec-2009 3 29-Sep-2009 026041849
491 Change to Scheme Details

30-Sep-2009 5111 14-Oct-2009 5 30-Jun-2009 023417689
5111 Audit Report on Compliance Plan

01-Sep-2009 388 05-Oct-2009 52 30-Jun-2009 026048018
388B Financial Report Financial Report - Registered Scheme (FR 2009)

18-Jun-2009 7051 22-Jun-2009 25 31-Dec-2008 024949181
7051 Half Yearly Reports

15-May-2009 5111 29-May-2009 5 30-Jun-2008 025637392
5111 Audit Report on Compliance Plan

14-Apr-2009 5120 08-May-2009 5 14-Apr-2009 024672203
5120 Notice of Exemption Re Managed Investment Scheme

14-Apr-2009 5122 08-May-2009 5 14-Apr-2009 024672204
5122 Notice of Declaration Re Managed Investment Scheme

20-Mar-2009 5102 24-Mar-2009 2 13-Mar-2009 024506845
5102B Compliance Plan For Managed Investment Scheme Modification Of Compliance Plan

18-Mar-2009 388 31-Mar-2009 52 30-Jun-2008 025519022
388B Financial Report Financial Report - Registered Scheme (FR 2008)

01-Dec-2008 5102 02-Dec-2008 77 28-Nov-2008 024506463
5102C Compliance Plan For Managed Investment Scheme Replacement Compliance Plan

06-Nov-2008 491 08-Jan-2009 3 02-Oct-2008 025081742
491 Change to Scheme Details

11-Apr-2008 5101 11-Apr-2008 41 11-Apr-2008 020938294
5101C Constitution For Managed Investment Scheme Replacement Constitution

10-Apr-2008 5102 15-Apr-2008 76 10-Apr-2008 019981074
5102C Compliance Plan For Managed Investment Scheme Replacement Compliance Plan

14-Mar-2008 7051 29-Apr-2008 22 31-Dec-2007 024664207
7051 Half Yearly Reports

06-Dec-2007 491 17-Jan-2008 14 29-Sep-2007 024401787
491 Change to Scheme Details

28-Sep-2007 5111 11-Oct-2007 4 30-Jun-2007 024230093

5111 Audit Report on Compliance Plan

25-Sep-2007 388 04-Oct-2007 40 30-Jun-2007 024111855
388B Financial Report Financial Report - Registered Scheme (FR 2007)

01-Jun-2007 5102 01-Jun-2007 68 31-May-2007 020938161
5102C Compliance Plan For Managed Investment Scheme Replacement Compliance Plan

31-May-2007 5101 31-May-2007 40 31-May-2007 019979890
5101C Constitution For Managed Investment Scheme Replacement Constitution

31-May-2007 5140 31-May-2007 1 31-May-2007 019979888
5140 Notification of Proposed Change in Name of Scheme

16-Mar-2007 7051 23-Apr-2007 22 31-Dec-2006 023659004
7051 Half Yearly Reports

02-Oct-2006 5111 11-Oct-2006 3 30-Jun-2006 023164842
5111 Audit Report on Compliance Plan

11-Sep-2006 5114 13-Sep-2006 1 11-Sep-2006 023038927
5114 Notification of Request By Responsible Entity to Change Compliance Plan Auditor

28-Aug-2006 388 29-Aug-2006 42 30-Jun-2006 023134667
388B Financial Report Financial Report - Registered Scheme (FR 2006)

07-Jul-2006 5101 12-Jul-2006 37 07-Jul-2006 022819103
5101C Constitution For Managed Investment Scheme Replacement Constitution

04-Jul-2006 5102 05-Jul-2006 68 30-Jun-2006 020500396
5102C Compliance Plan For Managed Investment Scheme Replacement Compliance Plan

31-May-2006 5102 02-Jun-2006 7 22-May-2006 021674014
5102B Compliance Plan For Managed Investment Scheme Modification Of Compliance Plan

28-Apr-2006 5102 31-May-2006 6 21-Apr-2006 021677470
5102B Compliance Plan For Managed Investment Scheme Modification Of Compliance Plan

24-Apr-2006 5101 24-Apr-2006 4 24-Apr-2006 019979866
5101B Constitution For Managed Investment Scheme Modification Of Constitution

15-Mar-2006 7051 28-Mar-2006 21 31-Dec-2005 022837009
7051 Half Yearly Reports

24-Oct-2005 491 14-Nov-2005 6 29-Sep-2005 022372274
491 Change to Scheme Details

26-Sep-2005 5111 29-Sep-2005 3 30-Jun-2005 022236928
5111 Audit Report on Compliance Plan

14-Sep-2005	388	19-Sep-2005	35	30-Jun-2005	022294914
388B	Financial Report Financial Report - Registered Scheme				(FR 2005)
06-Jun-2005	5101	07-Jun-2005	37	06-Jun-2005	020945596
5101C	Constitution For Managed Investment Scheme Replacement Constitution				
06-Jun-2005	5102	20-Jun-2005	64	06-Jun-2005	020945597
5102C	Compliance Plan For Managed Investment Scheme Replacement Compliance Plan				
08-Mar-2005	7051	09-Mar-2005	15	31-Dec-2004	020886294
7051	Half Yearly Reports				
25-Oct-2004	491	29-Oct-2004	5	29-Sep-2004	019304539
491	Change to Scheme Details				
27-Sep-2004	388	01-Oct-2004	26	30-Jun-2004	020695850
388B	FINANCIAL REPORT FINANCIAL REPORT - REGISTERED SCHEME				(FR 2004)
27-Sep-2004	5111	01-Oct-2004	3	30-Jun-2004	020695842
5111	AUDIT REPORT ON COMPLIANCE PLAN				
12-Aug-2004	5102	16-Aug-2004	53	11-Aug-2004	017914997
5102C	COMPLIANCE PLAN FOR MANAGED INVESTMENT SCHEME REPLACEMENT COMPLIANCE PLAN				
23-Apr-2004	5114	14-May-2004	5	23-Apr-2004	020201988
5114	NOTIFICATION OF REQUEST BY RESPONSIBLE ENTITY TO CHANGE COMPLIANCE PLAN AUDITOR				
12-Mar-2004	7051	18-Mar-2004	14	31-Dec-2003	020078574
7051	HALF YEARLY REPORTS				
10-Mar-2004	5137	21-Apr-2004	3	04-Mar-2004	020201836
5137	NOTIFICATION OF APPOINTMENT OF SCHEME AUDITOR				
10-Mar-2004	5133	21-Apr-2004	1	10-Mar-2004	020201823
5133B	NOTIFICATION OF RESIGNATION, REMOVAL OR CESSATION OF SCHEME AUDITOR - REMOVAL OF SCHEME AUDITOR				
08-Mar-2004	5101	15-Mar-2004	36	08-Mar-2004	019199829
5101B	CONSTITUTION FOR MANAGED INVESTMENT SCHEME MODIFICATION OF CONSTITUTION				
08-Mar-2004	5102	31-Mar-2004	4	28-Feb-2004	017914799
5102B	COMPLIANCE PLAN FOR MANAGED INVESTMENT SCHEME MODIFICATION OF COMPLIANCE PLAN				
12-Feb-2004	5137	25-Feb-2004	2	29-Sep-1999	019860362
5137	NOTIFICATION OF APPOINTMENT OF SCHEME AUDITOR				
12-Jan-2004	491	17-Jan-2004	12	28-Sep-2003	017066693
491	CHANGE TO SCHEME DETAILS				

28-Oct-2003	5102	28-Jan-2004	52	28-Oct-2003	019682015
5102C	COMPLIANCE PLAN FOR MANAGED INVESTMENT SCHEME REPLACEMENT COMPLIANCE PLAN				
15-Sep-2003	388	19-Sep-2003	23	30-Jun-2003	019579759
388B	FINANCIAL REPORT FINANCIAL REPORT - REGISTERED SCHEME				(FR 2003)
15-Sep-2003	5111	19-Sep-2003	4	30-Jun-2003	019579752
5111	AUDIT REPORT ON COMPLIANCE PLAN				
15-Sep-2003	7160	16-Jan-2004	10	30-Jun-2003	019579729
7160A	ANNUAL RETURN - MANAGED INVESTMENT SCHEME ANNUAL RETURN - MIS - BALANCE DETAILS				(AR 2003)
14-Mar-2003	7051	18-Mar-2003	14	31-Dec-2002	019059904
7051	HALF YEARLY REPORTS				
23-Oct-2002	5102	14-Nov-2002	2	16-Oct-2002	017914180
5102B	COMPLIANCE PLAN FOR MANAGED INVESTMENT SCHEME MODIFICATION OF COMPLIANCE PLAN				
30-Sep-2002	7160	04-Dec-2002	7	30-Jun-2002	018380948
7160A	ANNUAL RETURN - MANAGED INVESTMENT SCHEME ANNUAL RETURN - MIS - BALANCE DETAILS				(AR 2002)
30-Sep-2002	5111	29-Oct-2002	4	30-Jun-2002	018380935
5111	AUDIT REPORT ON COMPLIANCE PLAN				
30-Sep-2002	7160	04-Dec-2002	5	30-Jun-2001	018380922
7160A	ANNUAL RETURN - MANAGED INVESTMENT SCHEME ANNUAL RETURN - MIS - BALANCE DETAILS				(AR 2001)
30-Sep-2002	7160	06-May-2003	5	30-Jun-2000	018380914
7160A	ANNUAL RETURN - MANAGED INVESTMENT SCHEME ANNUAL RETURN - MIS - BALANCE DETAILS				(AR 2000)
30-Sep-2002	388	28-Oct-2002	23	30-Jun-2002	016667196
388B	FINANCIAL REPORT FINANCIAL REPORT - REGISTERED SCHEME				(FR 2002)
23-Jul-2002	5101	23-Jul-2002	3	23-Jul-2002	017925494
5101B	CONSTITUTION FOR MANAGED INVESTMENT SCHEME MODIFICATION OF CONSTITUTION				
22-Jul-2002	766C	23-Jul-2002	1	22-Jul-2002	018187077
766C	SUPPLEMENTARY DISCLOSURE DOCUMENT FOR MANAGED INVESTMENT SCHEME Alters 017 448 360				
15-Mar-2002	7051	20-Mar-2002	11	31-Dec-2001	017993424
7051	HALF YEARLY REPORTS				
01-Nov-2001	388	07-Nov-2001	21	30-Jun-2001	017499136
388B	FINANCIAL REPORT FINANCIAL REPORT - REGISTERED SCHEME				(FR 2001)

31-Oct-2001 5111 04-Dec-2001 4 30-Jun-2001 016871199
5111 AUDIT REPORT ON COMPLIANCE PLAN

17-Sep-2001 766C 18-Sep-2001 5 17-Sep-2001 017448361
766C SUPPLEMENTARY DISCLOSURE DOCUMENT FOR MANAGED INVESTMENT
SCHEME
Alters 014 877 507

17-Sep-2001 764H 18-Sep-2001 29 25-Sep-2001 017448360
764H SHORT FORM PROSPECTUS FOR MANAGED INVESTMENT SCHEME
Altered by 018 187 077
Altered by 018 187 077
Altered by 018 187 077

17-Sep-2001 766C 18-Sep-2001 0 17-Sep-2001 016545925
766C SUPPLEMENTARY DISCLOSURE DOCUMENT FOR MANAGED INVESTMENT
SCHEME
Alters 014 877 507

17-Sep-2001 764H 18-Sep-2001 0 25-Sep-2001 016545926
764H SHORT FORM PROSPECTUS FOR MANAGED INVESTMENT SCHEME

13-Jun-2001 5102 19-Jun-2001 4 13-Jun-2001 016545724
5102B COMPLIANCE PLAN FOR MANAGED INVESTMENT SCHEME MODIFICATION
OF COMPLIANCE PLAN

13-Jun-2001 5101 18-Jun-2001 5 13-Jun-2001 016545725
5101B CONSTITUTION FOR MANAGED INVESTMENT SCHEME MODIFICATION OF
CONSTITUTION

14-Mar-2001 7051 23-Mar-2001 11 31-Dec-2000 017081531
7051 HALF YEARLY REPORTS

27-Oct-2000 388 15-Nov-2000 20 30-Jun-2000 011691382
388B FINANCIAL REPORT FINANCIAL REPORT - REGISTERED SCHEME (FR 2000)

11-Aug-2000 754C 11-Aug-2000 24 11-Aug-2000 014793868
754C REPLACEMENT PROSPECTUS FOR MANAGED INVESTMENT SCHEME
Alters 016 454 351

30-May-2000 764H 01-Jun-2000 27 07-Jun-2000 016454351
764H SHORT FORM PROSPECTUS FOR MANAGED INVESTMENT SCHEME
Altered by 014 793 868
Altered by 014 793 868
Altered by 014 793 868
Altered by 014 793 868
Altered by 016 545 723

17-Mar-2000 5101 21-Mar-2000 3 17-Mar-2000 016110608
5101B CONSTITUTION FOR MANAGED INVESTMENT SCHEME MODIFICATION OF
CONSTITUTION

29-Oct-1999 764 04-Nov-1999 20 29-Oct-1999 015883237
764C COPY OF PROSPECTUS FOR MANAGED INVESTMENT SCHEME(S)

01-Sep-1999 5100 28-Sep-1999 2 01-Sep-1999 014793385
5100A APPLICATION FOR REGISTRATION OF MANAGED INVESTMENT SCHEME - NEW SCHEME

01-Sep-1999 5101 28-Sep-1999 34 01-Sep-1999 014793387
5101A CONSTITUTION FOR MANAGED INVESTMENT SCHEME INITIAL SCHEME CONSTITUTION

01-Sep-1999 5102 28-Sep-1999 11 01-Sep-1999 014793388
5102A COMPLIANCE PLAN FOR MANAGED INVESTMENT SCHEME INITIAL SCHEME
COMPLIANCE PLAN

01-Sep-1999 5103 28-Sep-1999 1 01-Sep-1999 014793386
5103 DIRECTORS STATEMENT

Financial Reports

Balance Date	Report Due Date	AGM Due Date	Extended AGM Due Date	AGM Held Date	Outstanding	
30-Jun-2000	30-Sep-2000	Unknown	Unknown	Unknown	N	011691382
30-Jun-2001	30-Sep-2001	Unknown	Unknown	Unknown	N	017499136
30-Jun-2002	30-Sep-2002	Unknown	Unknown	Unknown	N	016667196
30-Jun-2003	30-Sep-2003	Unknown	Unknown	Unknown	N	019579759
30-Jun-2004	30-Sep-2004	Unknown	Unknown	Unknown	N	020695850
30-Jun-2005	30-Sep-2005	Unknown	Unknown	Unknown	N	022294914
30-Jun-2006	31-Oct-2006	Unknown	Unknown	Unknown	N	023134667
30-Jun-2007	30-Sep-2007	Unknown	Unknown	Unknown	N	024111855
30-Jun-2008	30-Sep-2008	Unknown	Unknown	Unknown	N	025519022
30-Jun-2009	30-Sep-2009	Unknown	Unknown	Unknown	N	026048018
30-Jun-2010	30-Sep-2010	Unknown	Unknown	Unknown	N	027353931
30-Jun-2011	30-Sep-2011	Unknown	Unknown	Unknown	N	020500688
30-Jun-2012	30-Sep-2012	Unknown	Unknown	Unknown	N	028335516

*** End of Extract ***

'DW-4'

LM INVESTMENT MANAGEMENT LIMITED

ABN 68 077 208 461

Australian Financial Services Licensee 220281

AND

THE MEMBERS AS THEY ARE CONSTITUTED

FROM TIME TO TIME OF THE

LM FIRST MORTGAGE INCOME FUND

ARSN 089 343 288

REPLACEMENT CONSTITUTION

DEED made this 10 day of April 2008

BETWEEN: LM INVESTMENT MANAGEMENT LIMITED ACN 077 208 461 a company duly incorporated in Queensland having its registered office at Level 4, RSL Centre, 9 Beach Road, Surfers Paradise in the State of Queensland (the Responsible Entity hereinafter referred to as the "RE")

AND: All those persons who from time to time apply for Units and are accepted as Unitholders of the Scheme ("the Members")

WHEREAS:

A. The RE holds a responsible entity's licence from the ASIC.

B. The RE established a pooled mortgage unit trust called the LM Mortgage Income Fund on 28 September 1999. From 31 May 2007 the LM Mortgage Income Fund will be known as the LM First Mortgage Income Fund.

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

D. Clause 26.1(b) and section 601GC(1)(b) of the Law allow the RE to modify or repeal and replace the Constitution where the RE reasonably considers the change will not adversely affect Members' rights. The RE is satisfied the amendments contemplated by this replacement Constitution will not adversely affect Members' rights.

E. Accordingly with effect from the date of this deed poll, the existing constitution of the Scheme is repealed and replaced with this Constitution.

F. This Constitution is made with the intent that the benefits and obligations hereof will enure not only to the RE but also to the extent provided herein to every person who is or becomes a Member.

IT IS AGREED:

1. DICTIONARY AND INTERPRETATION

1.1 Dictionary of Terms

In this Constitution:

"Accounting Standards" means the accounting standards and practices determined under clause 1.3;

"Adviser" means the financial adviser who has offered Unit/s in this Scheme to a Member;

"Applicant" anyone who submits an application for Unit/s in the Scheme in accordance with the PDS;

"Application" means a request from a Member to the RE to issue Units in a managed investment scheme pursuant to an Arrangement;

"Application Form" an application in writing for Unit/s in the Scheme attached to the PDS.

"Application Money" the amount received from an Applicant when lodging the

Application in respect of the Unit/s applied for in accordance with the PDS;

"Arrangement" means a written arrangement between the RE and a Member that sets out the circumstances in which Applications for Units in registered schemes operated by the RE, may be accepted;

"ASIC" the Australian Securities and Investments Commission;

"ASIC Instrument" means:

(a) an exemption or modification granted by ASIC in accordance with Part 5C.11 of the Law; or

(b) any other instrument issued by ASIC under a power conferred on ASIC which relates to the RE or the Scheme.

"Auditor" means the auditor of the Scheme appointed by the RE under clause 27.1 and shall be qualified to act as a registered scheme auditor pursuant to the Law;

"Authorised Investments" means

(a) monies deposited (whether secured or unsecured) with a Bank, or any corporation related to a Bank or other corporation or monies deposited with any trustee company, fund, bills of exchange, certificates of deposit and negotiable certificates of deposit issued by a Bank or similar instrument accepted and endorsed by a Bank;

(b) any investments the time being authorised by the laws of the Commonwealth of Australia or any State or Territory thereof for the investment of trust funds;

(c) monies deposited with an authorised short term money market dealer as such expression is used in section 65 of the Law;

(d) any investment in or acquisition of cash, stocks, bonds, notes or other securities or derivatives issued by the Government of Australia, any other country, any company, corporation, body corporate, association, firm, mutual fund or unit trust;

(e) any investment in or acquisition of options, entitlements or rights to any of the securities or derivatives referred to in clause (d) of this provision;

(f) real property or interests in real property whether by acquisition of units in unit trusts or otherwise;

(g) interests in any registered managed investment scheme (as defined in the Law) including but not limited to any scheme of which the RE acts as RE;

(h) making loans to any person or company with or without interest, whether secured or unsecured, and for any period whatsoever; and

(i) the acquisition of foreign currencies, hedging contracts, commodity contracts of any kind which are quoted on a financial market (as defined in the Law).

"Bank" has the meaning given to an ADI in section 5 of the Banking Act 1959 (Cth) and also includes an ADI constituted by or under a law of the State or Territory and a foreign ADI as that term is defined in section 5 of the Banking Act 1959 (Cth).

"Borrower" any person who applies to the Scheme to borrow Scheme Property and who is approved by the RE;

"Business Day" any day on which trading Banks are generally open for business on the Gold Coast, Queensland;

"Class" means a class of Units, being Units which have the same rights.

"Commencement Date" means the date of registration of the Scheme;

"Compliance Committee" the Compliance Committee of the RE.

"Compliance Plan" means the Compliance Plan for the Scheme lodged at the ASIC on Scheme registration;

"Constitution" this document including any Schedule, Annexure or Amendments to it and which also means the Unit Trust Deed;

"Custodian" Permanent Trustee Australia Limited ACN 008 412 913;

"Custody Agreement" an agreement dated the 4th day of February, 1999 and any further amendments entered into between the Custodian and the RE;

"Development Loan" a loan to fund the construction of a building on mortgaged property which is to be drawn down before completion of the building;

"Differential Fee Arrangement" means an arrangement pursuant to Class Order [CO 03/217] which provides an exemption from S601FC(1)(d) of the Law in relation to differential fee arrangements offered to investors investing in the Fund as a Wholesale Investor, within the meaning of Wholesale Client in Section 761G of the Corporations Act;

"Distributable Income" has the meaning given in clause 11.3;

"Distribution Period" is the relevant period referred to in clause 12.1;

"Dollars", "A$" and "$" mean the lawful currency of the Commonwealth of Australia;

"Extraordinary Resolution" means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by

at least 50% of the total votes that may be cast by Members entitled to vote on the resolution (including Members who are not present in person or by proxy);

"Financial Year" means the period of 12 months ending on the 30th day of June in each year during the continuance of this Constitution and includes the period commencing on the date the trust was established and expiring on the next succeeding 30th day of June and any period between the 30th day of June last occurring before the termination of the trust and the termination of the trust;

"FICS" means the Financial Industry Complaints Service Limited;

"GST" means a tax, impost or duty on goods, services or other things imposed by any fiscal, national, state, territory or local authority or entity and whether presently imposed or novel, together with interest or penalties either before or after the date of this Constitution;

"Income" means all amounts which are, or would be recognised as, income by the application of the Accounting Standards;

"Issue Price" means the price at which a Unit is issued calculated in accordance with clause 6.

"Investment Term" means the initial fixed investment term selected by the Member when they invest in the Scheme for a fixed term, and any subsequent fixed term for the investment where the investment is rolled over for that subsequent term, but does not include any fixed term under a Savings Plan Investment (and the initial fixed investment term and each subsequent fixed term will each be a separate Investment Term, and not a longer combined Investment Term);

"Law" means the Corporations Act 2001 and the Corporations Regulations.

"Lender" means the RE on behalf of the Members lending Scheme Property through the Scheme;

"Lending Rules" means the rules detailed in clauses 13.2 and 13.3;

"Liabilities" means at any time the aggregate of the following at that time as calculated by the RE in accordance with the Accounting Standards:

(a) Each liability, excluding Unit Holder Liability, of the RE in respect of the Scheme or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.

(b) Each other amount payable out of the Scheme, excluding Unit Holder Liability or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.

(c) Other appropriate provisions in accordance with the applicable Accounting Standards.

"Liquid Scheme" means a registered scheme that has liquid assets which

account for at least 80% of the value of scheme property.

"LMM" means Law Mortgage Management Pty Ltd ACN 055 691 426;

"LVR" means loan to valuation ratio and is the ratio of the amount of a loan to the valuation of the property offered as security for a loan in the Scheme;

"Member" in relation to a Unit, means the person registered as the holder of that Unit (including joint holders).

"Minimum Investment" means the minimum investment disclosed in the PDS from time to time unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment;

"Minimum Subscription" means any minimum amount of Application Money of a particular currency required by the RE to be received in respect of one or more Applicants, before the Application(s) will be accepted by the RE;

"Mortgagee" in all mortgages held by the Scheme the Mortgagee will be the Custodian as agent for the RE;

"Mortgage Lending Valuation Policy" means the RE's mortgage lending valuation policy as detailed in the Compliance Plan;

"Net Fund Value" at any time, means the value of the Scheme Property less the Liabilities at that time.

"Power" means any right, power, authority, discretion or remedy conferred on the RE by this Constitution or any applicable law;

"Promoter" for the purpose of the Law the promoter of this Scheme is the RE;

"PDS" means a Product Disclosure Statement or any Supplementary Product Disclosure Statement for the Scheme;

"Register" means the register of Members maintained by the RE under clause 22;

"Responsible Entity" or "RE" means the company named in the ASIC's records as the responsible entity of the Scheme and referred to in this document as the RE and who is also the Trustee of the Scheme;

"Savings Plan Investment" means an Australian dollar investment described as the "LM Savings Plan" in the PDS, with terms and conditions as disclosed in the PDS;

"Scheme" means a managed investment scheme to be known as the "LM First Mortgage Income Fund" that is to be registered under s601EB of the Law and also means the Trust;

"Scheme Property" means assets of the Scheme including but not limited to:

(a) contributions of money or money's worth to the Scheme; and

(b) money that forms part of the Scheme assets under the provisions of the Law; and

(c) money borrowed or raised by the RE for the purposes of the Scheme; and

(d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and

(e) the income and property derived, directly or indirectly from contributions, money or property referred to in paragraph (a), (b), (c) or (d);

"Scheme Valuation Policy" means the scheme valuation policy as detailed in the Compliance Plan;

"Security Property" means any property offered by a Borrower as security for a Mortgage in the Scheme;

"Special Resolution" means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by at least 75% of the votes cast by Members entitled to vote on the resolution;

"Subscription Account" an account opened and maintained by the RE into which is deposited all Application Moneys;

"Tax" includes, but is not limited to:

(a) stamp duty, excise and penalties relating to these amounts which are imposed on the RE in respect of any assets in the Scheme;

(b) taxes and duties and penalties relating to these items imposed as a result of any payment made to or by the RE under this Constitution;

(c) taxes imposed or assessed upon:

(i) any Application Money;

(ii) distributions of Income to Members, capital gains, profits or any other amounts in respect of the Scheme; or

(iii) the RE in respect of its capacity as responsible entity of the Scheme;

(d) imposts, financial institutions duties, debits tax, withholding tax, land tax or other property taxes charged by any proper authority in any jurisdiction in Australia in respect of any matter in relation to the Scheme, and every kind of tax, duty, rate, levy, deduction and charge including any GST;

"Tax Act" means the Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth);

"Trustee" means the RE;

"Uncontrolled Event" means an act of God, strike, lock out or other interference with work, war (declared or undeclared), blockage, disturbance, lightning, fire, drought, earthquake, storm, flood, explosion, government or quasi-government restraint, exploration, prohibition, intervention, direction,

embargo, unavailability or delay in availability of equipment or transport, inability or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licences, authorities or allocations, or any other cause whether of the kind specifically set out above or otherwise which is not reasonably within the control of the party relying on the Uncontrolled Event;

"Unit" means an undivided interest in the Scheme Property created and issued under this Constitution;

"Unit Holder Liability" means the liability of the Scheme to the Members for their undivided interest in the Scheme Property;

"Unit Holding" means the number of Units in the Scheme held by a Member as evidenced in the Register of Unit holders;

"Unit Holding Statement" means a statement issued by the RE to a Member pursuant to clause 5.9;

"Valuation Date" means the date which is the last day of each month or any date during each month at the RE's discretion or the date on which the RE determines there has been a material change in the value of the Scheme Property;

"Withdrawal Notice" means:

(a) for a Savings Plan Investment, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE, provided that only 4 such notices may be given within any 12 month period, and any notices in excess of this number will not be valid unless otherwise determined by the RE in its discretion;

(b) for any investment that is not a Savings Plan Investment nor for an Investment Term, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE;

(c) for all investments for an Investment Term, a notice in writing given by a Member and received by the RE before the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE,

and provided that if a notice in writing as referred to above is not received before 12 noon on a Business Day, the notice will be deemed to be received on

the next Business Day;

"Withdrawal Notice Period" means:

(a) for a Savings Plan Investment by a Member, the period commencing 1 Business Day after the first 12 month period of the Savings Plan Investment has expired, and continuing throughout the term of the Savings Plan Investment;

(b) for any investment that is not a Savings Plan Investment nor for an Investment Term, any period when the Member owns Units; or

(c) for all investments for an Investment Term, the period commencing 5 Business Days before the expiry of the relevant Investment Term (and where an Investment Term is created by the rollover of an existing Investment, means the period commencing 5 Business Days before the expiry of that subsequent Investment Term); or

(d) any other time period as determined by the RE.

"Withdrawal Price" means the price at which a Unit is redeemed calculated in accordance with Clause 8.

1.2 Interpretation

In this Constitution, unless the context otherwise requires:

(a) headings and underlining are for convenience only and do not affect the interpretation of this Constitution;

(b) words importing the singular include the plural and vice versa;

(c) words importing a gender include any gender;

(d) other parts of speech and grammatical forms of a word or phrase defined in this Constitution have a corresponding meaning;

(e) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Governmental Agency;

(f) a reference to any thing includes a part of that thing;

(g) a reference to a part, clause, party, annexure, exhibit or schedule is a reference to a part and clause of, and a party, annexure exhibit and schedule to, this Constitution;

(h) a reference to any statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;

(i) a reference to a document includes all amendments or supplements to,

or replacements or novations of, that document;

(j) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the preceding Business Day except that any amount payable on demand where the demand is made on a day which is not a Business Day must be paid on the next succeeding Business Day;

(k) a reference to an agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing;

(l) a reference to a document includes any agreement in writing, or any statement, notice, deed, instrument or other document of any kind;

(m) a reference to a body (including, without limitation, an institute, association or authority), whether statutory or not:

(i) which ceases to exist; or

(ii) whose powers or functions are transferred to another body;

is a reference to the body which replaces it or which substantially succeeds to its powers or functions;

(n) a reference to any date means any time up to 5.00 pm (Queensland time) on that date; and

(o) a reference to dealing with a Unit includes any subscription, withdrawal, sale, assignment, encumbrance, or other disposition whether by act or omission and whether affecting the legal or equitable interest in the Unit.

1.3 Accounting Standards

In respect of any accounting practice relevant to this Constitution, the following accounting standards apply as if the Scheme were a company in accordance with:

(a) the accounting standards required under the Law; and

(b) if no accounting standard applies under clause 1.3(a), the accounting practice determined by the RE.

2. ESTABLISHMENT OF TRUST

2.1 Trustee

The RE continues to act as trustee of the Scheme.

s601FC(2) 2.2 Role of Trustee

The RE recognises that it continues to hold the Scheme Property on trust for the Members.

s601FB(2) 2.3 Appointment of Custodian

(a) The RE has appointed the Custodian as agent to hold the Scheme Property on behalf of the RE.

(b) The Custodian holds the Scheme Property as agent of the RE for the term of the Scheme on terms and conditions as detailed in the Custody Agreement.

2.4 Name of Trust

The name of the trust and Scheme is the LM First Mortgage Income Fund or any other name that the RE may determine from time to time.

2.5 Initial Issue

The Scheme commenced at such time after the Commencement Date when LMM or its nominee paid $100.00 to the RE to establish the Scheme Property. The RE issued to LMM or its nominee 100 Units in return for that payment.

3. UNITS AND MEMBERS

3.1 Units

The beneficial interest in Scheme Property is divided into Units. Unless the terms of issue of a Unit or a Class otherwise provide, all Units will carry all rights, and be subject to all the obligations of Members under this Constitution.

3.2 Classes

Different Classes (and sub Classes) with such rights and obligations as determined by the RE from time to time may be created and issued by the RE at its complete discretion. 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.

3.3 Fractions

Fractions of a Unit may not be issued. When any calculations under this Constitution would result in the issue of a fraction of a Unit, the number of Units to be issued must be rounded down to the nearest whole Unit.

3.4 Equal value

At any time, all the Units in a Class are of equal value unless the units are issued under a Differential Fee Arrangement.

3.5 Interest

A Unit confers an interest in the Scheme Property as a whole. No Unit confers any interest in any particular asset of the Scheme Property.

3.6 Consolidation and re-division

(a) Subject to clause 3.6(b) the RE may at any time divide the Scheme Property into any number of Units other than the number into which the Scheme Property is for the time being divided.

(b) A division of a kind referred to in clause 3.6(a) must not change the ratio of Units in a Class registered in the name of any Member to the Units on issue in the Class.

3.7 Rights attaching to Units

(a) A Member holds a Unit subject to the rights and obligations attaching to that Unit and (if applicable) pursuant to any Differential Fee Arrangement.

(b) Each Member agrees not to:

(i) interfere with any rights or powers of the RE under this Constitution;

(ii) purport to exercise a right in respect of the Scheme Property or claim any interest in an asset of the Scheme Property (for example, by lodging a caveat affecting an asset of the Scheme Property); or

(iii) require an asset of the Scheme Property to be transferred to the Member.

3.8 Conditions

The RE may impose such conditions on the issue of Units as it determines including that the Member may not give effect to any mortgage, charge, lien, or other encumbrances other than as expressly permitted by the RE.

3.9 Rollover of Investments

If the Member has invested for an Investment Term, and fails to complete and return a Withdrawal Notice before the start of the relevant Withdrawal Notice period that applies to the Investment Term, the Member will be deemed to have elected to renew their investment in the Scheme as specified in the PDS. Units issued in respect of such reinvestment must be issued at an Issue Price equal to the Current Unit Value.

4. BINDING ON ALL PARTIES

s601GB 4.1 This Constitution is binding on the RE and on all Members of the Scheme as they are constituted from time to time.

4.2 By executing the Application Form attached to the PDS the Members as are constituted from time to time agree to be bound by the terms and conditions of this Constitution.

5. ISSUE OF UNITS

s601GA(a) 5.1 Offer and minimum investment

(a) The RE may at any time offer Units for subscription or sale.

(b) The Minimum Investment must be lodged with an Application for Units.

(c) The RE may invite persons to make offers to subscribe for or buy Units.

5.2 Minimum subscription

(a) The RE may set a Minimum Subscription for the pool of funds of any one currency for the Scheme at its discretion.

(b) The RE will hold Application Money in a Subscription Account until the Minimum Subscription for the pool of funds is received, subject to clause 5.3.

5.3 Insufficient Application Money received

The RE will return or cause to be returned all Application Money to the persons who paid such Application Money, less any taxes and bank charges payable if:

(a) insufficient Application Money to meet the Minimum Subscription stipulated in Clause 5.2 is received within a period reasonably determined by the RE, or

(b) the RE withdraws a PDS (which the RE is entitled to do) before sufficient Application Money is received, or

(c) the RE does not believe there will be sufficient funds available to achieve the aims of the Scheme contemplated in this Constitution or the PDS.

5.4 Form of Application

(a) Subject to clause 5.10, each Application for Units must be:

(i) made by Application Form attached to a PDS (or as otherwise permitted by the Law); and

(ii) be accompanied by Application Moneys as required by any relevant PDS.

(b) If the Application Form is signed pursuant to a power of attorney, then if requested by the RE, a certified copy of the relevant power of attorney and a declaration that the power of attorney has not been revoked as at the date the Application Form is signed must be provided.

5.5 Acceptance or rejection

The RE may, without giving any reason:

(a) accept an Application;

(b) reject an Application; or

(c) reject part of the Application.

5.6 Uncleared funds

Units issued against Application Money in the form of a cheque or other payment order (other than in cleared funds) are void if the cheque or payment order is not subsequently cleared.

5.7 Issue of Units

Units are taken to be issued when:

(a) the Application Money for the Issue Price is received by the RE; and

(b) the RE accepts the Application and the Units are entered in the Register, or at such other time as the RE determines.

5.8 Number of Units Issued

Subject to Minimum Investment, the number of Units issued at any time in respect of an Application for Units will be calculated as follows:

(a) by dividing the Application Moneys paid by the applicable Issue Price at that time;

(b) by rounding down to two decimal places.

5.9 Unit Holding Statement

The evidence of a Member's holding in the Scheme will be the latest extract from the Register as provided from time to time to a Member by the RE in a Unit Holding Statement.

5.10 Additional Applications

Additional Applications for investment in the Scheme by existing Members, not made on an Application Form may be accepted in an Australian dollar investment:

(a) from a Member;

(b) as a result of an Application;

(c) in accordance with an Arrangement for as long as and on condition that it complies with the requirements of the RE and the law or ASIC's policy including any relief granted to the RE from time to time; and

(d) are in multiples of $500 each unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment or agrees to accept an amount that is not a multiple of $500.

5.11 Holding Application Money

All Application Money must be held by the RE (or its agent, the Custodian) on trust for the relevant Applicant in the Subscription Account.

5.12 Interest on Application Money

The RE is not required to account to any Member for any interest earned on Application Money held in the Subscription Account.

5.13 Responsible Entity to return Application Money

Where the RE has rejected (in full or in part) an Application, the relevant Application Money (without interest) must be returned to the Applicant within 14 days.

5.14 Incomplete Application Form

The RE will, on receipt of any Application Money which is not accompanied by a completed Application Form, as soon as practicable return the Application Money to the relevant Applicant, or:

(a) attempt to obtain the Application Form from the Applicant; and

(b) bank the Application Money.

5.15 No Application Form received

(a) If the RE gives any Application Money to the Custodian pursuant to clause 5.11, then the Custodian will hold such Application Money in an account, as custodian for the Applicant in accordance with the Law until the Application Form is received.

(b) If the RE has not received the Application Form by the time the offer is closed, then the RE must use its best endeavours to return the Application Money, less any taxes and bank charges payable, to the Applicant as soon as practicable.

6. ISSUE PRICE

The issue price of a Unit shall be calculated as follows:

$$\left(\frac{\text{Net Fund Value}}{\text{number of Units on issue}}\right)$$

calculated on the last Valuation Date prior to the date of issue.

7. WITHDRAWAL OF UNITS - WHILE THE SCHEME IS LIQUID

7.1 Withdrawal request - while the Scheme is liquid

(a) While the Scheme is liquid as defined in S601KA (4) of the Law, any Member may request that some or all of their Units be redeemed by giving the RE a Withdrawal Notice by the start of or within the relevant Withdrawal Notice Period (as required by the relevant definition of Withdrawal Notice).

7.2 Withdrawal

(a) (i) Within 365 days after the end of the Member's Investment Term (where the Member's investment is held for an Investment Term and the Member has given a valid Withdrawal Notice in respect of the Units) or within 365 days after receiving a valid Withdrawal

Notice from the Member (if the Member's investment is not held for an Investment Term or is a Savings Plan Investment), the RE must redeem the relevant Units out of the Scheme Property for the Withdrawal Price.

(ii) However, the RE must redeem the Units within 180 days after the relevant date (instead of 365 days) where it determines that none of the circumstances referred to in Clause 7.2(b)(i) to (iv) below exist at the time of withdrawal. This Clause 7.2(a) does not limit the independent operation of Clause 7.2(b).

(iii) To the extent that the Law does not allow more than one period to be specified in this Constitution for satisfying withdrawal requests while the Scheme is liquid, that one period will be 365 days after the RE receives a valid Withdrawal Notice. Paragraph (ii) above will also apply to the extent permitted by the Law.

(iv) The RE may allow redemption of Units within a shorter period than the 365 (or 180) days referred to above, in its absolute discretion, subject to its obligations under the Law.

(b) The RE may suspend the withdrawal offer as detailed in clause 7.2(a) above for such periods as it determines where:

(i) the Scheme's cash reserves fall and remain below 5% for ten (10) consecutive Business Days; or

(ii) if in any period of (90) days, the RE receives valid net Withdrawal Notices equal to 10% or more of the Scheme's issued Units and, during the period of (10) consecutive days falling within the 90 day period, the Scheme's cash reserves are less than 10% of the total assets; or

(iii) it is not satisfied that sufficient cash reserves are available to pay the Withdrawal Price on the appropriate date and to pay all actual and contingent liabilities of the Scheme; or

(iv) any other event or circumstance arises which the RE considers in its absolute discretion may be detrimental to the interests of the Members of the Scheme.

(c) The RE is not required to process Withdrawal Notices where:

(i) the person seeking to redeem the Units cannot provide satisfactory evidence of the Member's title or authority to deal with the Units; or

(ii) the withdrawal would cause the Member's Unit Holding to fall below the Minimum Investment.

(d) If the RE allows a Member to withdraw an investment from the Scheme before the end of an Investment Term, the RE is also entitled to require the Member to pay an early withdrawal charge equal to the last three months interest distributions paid or payable on the amount being withdrawn (or if the investment has been for less than three months, the RE's estimate of what that amount would have been if the investment had been in place for the last three months), and where an Adviser has been paid an upfront commission in respect of the investment being withdrawn, the RE will also be entitled to require the Member to pay a further early withdrawal charge equal to the upfront commission paid, calculated on a pro-rata basis for the length of time remaining to the end of the Investment Term. The RE will also be entitled to require the Member to pay an amount equal to any other fees or charges arising from the early withdrawal (including fees and charges that may be payable to the financial institution which has organised the investment in the relevant currency). These early withdrawal charges will be deducted from the investment being withdrawn, and paid at the time of withdrawal. Such charges will become part of the Scheme Property.

(e) If the RE allows a Member to withdraw an investment, and that investment has been held for a period in respect of which no Distributable Income has been calculated in respect of that investment, the RE may pay to the Member the amount of Distributable Income that the RE estimates is payable to the member for that period, rather than delay payment to the member until the actual Distributable Income has been calculated.

7.3 Cancellation

(a) The RE must cancel the number of Units which have been redeemed under clause 7.2 and must not reissue them. Upon cancellation, the RE must immediately:

(i) remove the name of the Member from the Register in respect of the redeemed Units; and

(ii) provide the Member with a new Unit Holding Statement for any unredeemed Units.

(b) A Unit is cancelled when the Member holding the Unit is paid the Withdrawal Price by the RE.

8. WITHDRAWAL PRICE

The Withdrawal Price of each Unit pursuant to clause 7 shall be calculated as follows:

(Net Fund Value)

(number of Units issued)

calculated on the last Valuation Date prior to the date of withdrawal.

9. TRANSFER OF UNITS

9.1 Transferability of Units

(a) Subject to this Constitution, a Unit may be transferred by instrument in writing, in any form authorised by the Law or in any other form that the RE approves.

(b) A transferor of Units remains the holder of the Units transferred until the transfer is recorded on the Register.

9.2 Registration of Transfers

(a) The following documents must be lodged for registration on the Register at the registered office of the RE or the location of this Register:

(i) the instrument of transfer; and

(ii) any other information that the RE may require to establish the transferor's right to transfer the Units.

(b) On compliance with clause 9.2(a), the RE will, subject to the powers of the RE to refuse registration, record on the Register the transferee as a Member.

9.3 Where registration may be refused

Where permitted to do so by Law or this Constitution, the RE may refuse to register any transfer of Units.

9.4 Where registration must be refused

(a) Registration must be refused if:

(i) the RE has notice that the transferor of Units has entered into any borrowing or other form of financial accommodation to provide all or part of the funds to subscribe for or acquire a Unit and has not received confirmation from the financier that the financier consents to the transfer of those Units; or

(ii) the transferor has given a power of attorney in favour of the RE and the Custodian in the form set out in an application form accompanying a PDS and the transferee has not executed and provided to the RE a similar form of power of attorney (with such adaptations as are necessary) in favour of the RE and the Custodian;

(b) In the case of (i) or (ii) above, the RE must refuse to register same and must continue to treat the seller or transferor as the case may be

as the registered holder for all purposes and the purported sale, purchase, disposal or transfer shall be of no effect.

(c) If the transferee is not a Member the RE must not consent to the registration until the RE is satisfied that the transferee has agreed to be bound by the Constitution.

9.5 Notice of non-registration

If the RE declines to register any transfer of Units, the RE must within 5 Business Days after the transfer was lodged with the RE give to the person who lodged the transfer written notice of, and the reasons for, the decision to decline registration of the transfer.

9.6 Suspension of transfers

The registration of transfers of Units may be suspended at any time and for any period as the RE from time to time decide. However, the aggregate of those periods must not exceed 30 days in any calendar year.

10. TRANSMISSION OF UNITS

10.1 Entitlement to Units on death

(a) If a Member dies:

(i) the survivor or survivors, where the Member was a joint holder; and

(ii) the legal personal representatives of the deceased, where the Member was a sole holder,

will be the only persons recognised by the RE as having any title to the Member's interest in the Units.

(b) The RE may require evidence of a Member's death as it thinks fit.

(c) This clause does not release the estate of the deceased joint Member from any liability in respect of a Unit that had been jointly held by the Member with other persons.

10.2 Registration of persons entitled

(a) Subject to the Bankruptcy Act 1966 and to the production of any information that is properly required by the RE, a person becoming entitled to a Unit in consequence of the death or bankruptcy (or other legal disability) of a Member may elect to:

(i) be registered personally as a Member; or

(ii) have another person registered as the Member.

(b) All the limitations, restrictions and provisions of this Constitution relating to:

(i) the right to transfer; and

(ii) the registration of a transfer;

for Units apply to any relevant transfer as if the death or bankruptcy or legal disability of the Unit Member had not occurred and the notice or transfer were a transfer signed by that Member.

10.3 Distributions and other rights

(a) If a Member dies or suffers a legal disability, the Member's legal personal representative or the trustee of the Member's estate (as the case may be) is, on the production of all information as is properly required by the RE, entitled to the same distributions, entitlements and other advantages and to the same rights (whether in relation to meetings of the Scheme or to voting or otherwise) as the Member would have been entitled to if the Member had not died or suffered a legal disability.

(b) Where two or more persons are jointly entitled to any Unit as a result of the death of a Member, they will, for the purposes of this Constitution, be taken to be joint holders of the Unit.

11. DISTRIBUTABLE INCOME

11.1 Income of the Scheme

The Income of the Scheme for each Financial Year will be determined in accordance with applicable Accounting Standards.

11.2 Expenses and provisions of the Scheme

For each Financial Year:

(a) the expenses of the Scheme will be determined in accordance with the applicable Accounting Standards; and

(b) provisions or other transfers to or from reserves may be made in relation to such items as the RE considers appropriate in accordance with the applicable Accounting Standards including, but not limited to, provisions for income equalisation and capital losses.

11.3 Distributable Income

The Distributable Income of the Scheme for a month, a Financial Year or any other period will be such amount as the RE determines. Distributable Income is paid to Members after taking into account any Adviser fees or costs associated with individual Members' investments, to the extent those fees or costs have not otherwise been taken into account.

12. DISTRIBUTIONS

12.1 Distribution Period

(a) The Distribution Period is one calendar month for Australian dollar investments or as otherwise determined by the RE in its absolute

discretion.

(b) The Distribution Period is the Investment Term of the investment for non-Australian dollar investments or as otherwise determined by the RE in its absolute discretion.

12.2 Distributions

The RE must distribute the Distributable Income relating to each Distribution Period within 21 days of the end of each Distribution Period.

12.3 Present entitlement

Unless otherwise agreed by the RE and subject to the rights, restrictions and obligations attaching to any particular Unit or Class, the Members on the Register will be presently entitled to the Distributable Income of the Scheme on the last day of each Distribution Period.

12.4 Capital distributions

The RE may distribute capital of the Scheme to the Members. Subject to the rights, obligations and restrictions attaching to any particular Unit or Class, a Member is entitled to that proportion of the capital to be distributed as is equal to the number of Units held by that Member on a date determined by the RE divided by the number of Units on the Register on that date. A distribution may be in cash or by way of bonus Units.

12.5 Grossed up Tax amounts

Subject to any rights, obligations and restrictions attaching to any particular Unit or Class, the grossed up amount under the Tax Act in relation to Tax credits or franking rebates is taken to be distributed to Unit Members in proportion to the Distributable Income for a Distribution Period as the case may be, which is referable to a dividend or other income to which they are presently entitled.

12.6 Reinvestment of Distributable Income

(a) The RE may invite Members to reinvest any or all of their distributable income entitlement by way of application for additional Units in the Scheme.

(b) The terms of any such offer of reinvestment will be determined by the RE in its discretion and may be withdrawn or varied by the RE at any time.

(c) The RE may determine that unless the Member specifically directs otherwise they will be deemed to have accepted the reinvestment offer.

(d) The Units issued as a result of an offer to reinvest will be deemed to have been issued on the first day of the next Distribution Period immediately following the Distribution Period in respect of which the distributable income being reinvested was payable.

13. NATURE OF RE POWERS

s601GA(1)(b) 13.1 The RE has all the powers:

(a) of a natural person to invest and borrow on security of the Scheme Property;

(b) in respect of the Scheme and the Scheme Property that it is possible under the Law to confer on a RE and on a Trustee;

(c) as though it were the absolute owner of the Scheme Property and acting in its personal capacity; or

(d) necessary for fulfilling its obligations under this Constitution and under the Law.

s601GA(3) 13.2 The RE must only invest Members' funds in:

(a) subject to clause 13.3 and 13.3A, mortgage investments provided that:

(i) all mortgages are secured over property and the amount which may be advanced to a Borrower does not exceed an LVR of 75% of the value of the security property on initial settlement.

(ii) the type of real estate offered for security is acceptable to the RE;

(iii) the value of the property offered as security has been established in accordance with the Mortgage Lending Valuation Policy of the RE ;

(b) other mortgage backed schemes in accordance with this clause and the RE's compliance standards;

(c) a range of interest bearing investments backed by Australian Banks, building societies, State or Federal governments, or foreign banks as approved by the RE.

(d) Authorised Investments.

s601GA(3) 13.3 Notwithstanding the provisions of clause 13.2(a), after a loan has settled and where the RE considers it is in the best interests of the Members of the Scheme, the RE may approve an LVR not to exceed 85% of the value of the security property.

13.3A Notwithstanding any other provision of this Constitution, the LVR of a loan that is in default may exceed 85%

s601GA(3) 13.4 Whenever a loan of Scheme funds involves a Development Loan, the RE shall ensure it has included amongst its officers or employees persons with relevant project management experience who are competent to manage loans of this kind..

s601GA(3) 13.5 To the extent allowed by law:

(a) any restriction or prohibition imposed upon the RE in relation to the investment from time to time of the Scheme Property or any part thereof is hereby excluded from the obligations imposed.

(b) without derogating from the generality of the foregoing this exclusion specifically applies to any "Prudent Person Rule" or the like which may be implied by any future enactment of legislation.

s601GA(3) 13.6 To the extent allowed by law:

(a) the RE may borrow or raise money with or without security over the Scheme Property or any part of it on any terms, including any rate of interest and any fees and expenses as the RE thinks fit;

(b) the RE may deal with any property to exercise all the powers of a mortgagee pursuant to the mortgage terms and conditions.

s601GA(3) 13.7 The RE must direct the Custodian to deal with the Scheme Property in accordance with this Constitution.

14. COMPLAINTS PROCEDURES

s601GA(1)(c) 14.1 If a Member has a complaint they should generally first contact their Adviser. If the Adviser is unavailable, unwilling, or unable to assist, or if the Member wishes to directly contact the RE, and the complaint relates to the Fund or the RE, then the Member should contact the RE at the registered office of the RE. Complaints may be made in writing or by telephone.

14.2 The RE may (if applicable) contact the Adviser for further background information and attempt to mediate a satisfactory resolution of the complaint or escalate as necessary. The RE has 30 days to respond to the complaint once it is received. The RE must attempt to resolve the complaint within a satisfactory time period as determined by the nature of the complaint and the Member's response.

14.3 The Complaints Officer of the RE will take responsibility for formal complaints and record them in the Complaints Register. In acknowledging or resolving formal complaints, the RE must make or cause to be made, a written response including:-

(a) the name, title and contact details of the person actually handling the complaint;

(b) a summary of the RE's understanding of the complaint;

(c) details of the RE's offer for resolution of the complaint and relevant time frame;

(d) where the complaint is not fully dealt with in the letter an estimate of time required for the RE to resolve the complaint.

14.4 Full details of each formal complaint and resolution thereof must be recorded in

the Complaints Register including:-

(a) the person responsible for resolving the complaint;

(b) the name of the Member making the complaint;

(c) the nature of the complaint;

(d) the product service or department in respect of which the complaint was made;

(e) the actual time required to resolve the complaint;

(f) the actual resolution of the complaint;

(g) recommendations, if any, for changes to products disclosures systems or processes to ensure similar complaints do not arise in the future.

14.5 The Complaints Register should be reviewed by the Complaints Manager of the RE as part of an ongoing review process to determine whether recommendations for change arising from resolved complaints have been effectively incorporated in the compliance program.

14.6 Where the RE believes it has either resolved the complaint, or it has not resolved the complaint but believes it can do nothing more to satisfy the complainant, and the Member feels their complaint has still not been satisfactorily resolved, the complainant must be referred to the FICS for mediation. The FICS adopts a three stage approach in resolving complaints as follows:-

(a) stage 1: initial opportunity for Member to resolve complaints;

(b) stage 2: complaints review, investigation and conciliation;

(c) stage 3: independent determination of complaints by adjudicator.

The full terms of reference for the FICS are held by the RE.

14.7 If a complaint cannot be resolved to the satisfaction of the Member by the RE or the FICS then the complainant Member may:-

(a) refer the matter to arbitration or the courts; or

(b) take whatever other action is open to the complainant Member under the general law.

14.8 The RE must disclose the details of its complaints procedure to all investors.

15. TERM OF TRUST

The Scheme begins on the Commencement Date and is to be wound up on the earlier to occur of:

(a) the date which is eighty years from the Commencement Date; and

(b) any earlier date which the RE, in its absolute discretion may appoint as the Vesting Date.

16. WINDING UP THE SCHEME

s601GA(1)(d) 16.1 The Scheme shall only be wound up in accordance with the Law and this

Constitution.

16.2 The RE must wind up the Scheme in the following circumstances:-

s601NE(1)(a) (a) if the term of the Scheme as detailed in this Constitution has expired;

s601NE(1)(b) (b) the Members pass an extraordinary resolution directing the RE to wind up the Scheme;

s601NE(1)(c) (c) the Court makes an order directing the RE to wind up the Scheme pursuant to the Law and in particular pursuant to section 601FQ(5) and section 601ND;

s601NE(1)(d) (d) the Members pass an extraordinary resolution to remove the RE but do not at the same time pass an extraordinary resolution choosing a company to be the new RE that consents to becoming the Scheme's RE;

s601NC(1) 16. 3 (a) If the RE considers that the purpose of the Scheme:

(i) has been accomplished; or

(ii) cannot be accomplished,

it may take steps to wind up the Scheme.

(b) If the RE wishes to wind up the Scheme pursuant to clause 16.3(a), the RE must give to the Members of the Scheme and to the ASIC a notice in writing;

(i) explaining the proposal to wind up the Scheme, including explaining how the Scheme's purpose has been accomplished or why that purpose cannot be accomplished; and

(ii) informing the Members of their rights to take action under Division 1 of Part 2G.4 of the Law for the calling of a Members' meeting to consider the proposed winding up of the Scheme and to vote on a special resolution Members propose about the winding up of the Scheme; and

(iii) informing the Members that the RE is permitted to wind up the Scheme unless a meeting is called to consider the proposed winding up of the Scheme within 28 days of the RE giving the notice to the Members;

(c) if no meeting is called within that 28 days to consider the proposed winding up, the RE may wind up the Scheme.

s601NE(2) 16.4 (a) The RE may wind up the Scheme in accordance with this Constitution and any orders under S601NF(2) of the Law if the RE is permitted by S601NC(3) of the Law to wind up the Scheme.

s601NF (3) (b) An order to wind up the Scheme pursuant to s601ND (1) or s601NF (1) or (2) of the Law may be made on the application of:

(i) the RE; or

(ii) a director of the RE: or

(iii) a Member of the Scheme; or

(iv) the ASIC.

s601NE(3) 16.5 The RE shall not accept any further Applications for Units in the Scheme or make any further loans from the Scheme Property at a time after the RE has become obliged to ensure the Scheme is wound up or after the Scheme has started to be wound up.

16.6 The RE shall manage the Scheme until such time as all winding up procedures have been completed.

16.7 Subject to the provisions of this clause 16 upon winding up of 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 among 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 specified in clause 12.4.

(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 clause 16.7 anything retained under clause 16.7(f) which is subsequently not required.

s601NG 16.8 If on completion of the winding up of a registered Scheme, the RE or such other person who may be winding up the Scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the Scheme Property the RE or person winding up the Scheme must, as soon as practicable, pay the money or transfer the property to the

ASIC to be dealt with pursuant to Part 9.7 of the Law.

s601EE 16.9 If at any time the Scheme is operated while it is unregistered the following may apply to the Court to have the Scheme wound up:

(a) The ASIC

(b) The RE

(c) A Member of the Scheme

16.10 The RE shall arrange for an Auditor to audit the final accounts of the Scheme after the Scheme is wound up.

17. VALUE OF THE SCHEME FUND

17.1 Valuation of the Scheme Property

The RE may cause the Scheme Property to be valued at any time in accordance with the Scheme Valuation Policy of the RE.

17.2 Valuation if required

The RE must cause the Scheme Property or any asset of the Scheme Property to be valued if required by ASIC or under the Law and the valuation must be undertaken in accordance with those requirements.

17.3 Determination of Net Fund Value

The RE may determine the Net Fund Value at any time in its discretion, including more than once on each day.

18. FEES, TAXES, COSTS AND EXPENSES

s601GA(2) 18.1 Taxes:

The RE may use the Scheme Property to pay any Tax or other obligation, liability or expense required by any applicable law in relation to:

(a) this Constitution;

(b) any amount incurred or payable by the RE;

(c) a gift or settlement effected by this Constitution;

(d) the exercise by the RE of any Power; or

(e) money or investments held by or on behalf of the RE under this Constitution.

s601GA(2) 18.2 Payment of Debts:

The RE may set aside any money from the Scheme Property which, in the RE's opinion, is sufficient to meet any present or future obligation of the Scheme.

s601GA(2) 18.3 Fees:

The RE is entitled to receive out of the Scheme Property, a management fee of up to 5.5 % per annum (inclusive of GST) of the Net Fund Value in relation to the performance of its duties as detailed in this Constitution, the Compliance Plan and the Law. This fee is to be calculated monthly and paid at such times as the RE determines.

s601GA(2) 18.4 The RE shall be entitled to fees in relation to the following duties:

(a) the subscription and withdrawal of units;

(b) the transfer or transmission of Units;

(c) the establishment/loan application fees;

(d) the structuring or packaging of loan proposals;

(e) loan management;

(f) the rollover of a loan facility;

(g) due diligence enquiries generally;

(h) the sale of real estate or assets of the Scheme Property;

(i) the promotion and management of the Scheme;

(j) the appointment of the Custodian pursuant to the Custody Agreement;

(k) the winding-up of the Scheme;

(l) the performance of its duties and obligations pursuant to the Law and this Constitution.

s601GA(2) 18.5 Costs and Expenses

The RE shall be indemnified out of Scheme Property for liabilities or expenses incurred in relation to the performance of its duties; including:

(a) Auditor's fees;

(b) legal fees and outgoings in relation to settlement, rollover, default or recovery of loans

(c) barrister/QC - legal counsel fees;

(d) search fees including property searches, company, bankruptcy, CRAA searches and any other searches which may be necessary to enable location, identification and/or investigation of borrowers/guarantors/mortgagors;

(e) valuation fees;

(f) independent expert's or consultant's fees including but not limited to marketing agents, property specialists, surveyors, quantity surveyors, town planners, engineers;

(g) property report/property consultant fees;

(h) process servers' fees;

(i) private Investigator fees;

(j) fees in relation to the marketing and packaging of security properties for sale;

(k) real estate agent's sales commissions;

(l) costs of maintenance of mortgage securities;

(m) outstanding accounts relating to mortgage securities such as council rates;

(n) locksmith for changing locks of mortgage securities as appropriate;

(o) insurance (property and contents);

(p) removalists for removal of borrower's property as appropriate;

(q) security guards to attend mortgage securities as appropriate;

(r) building and/or property inspection report fees - i.e. building, town planning experts and the like;

(s) all ASIC charges;

(t) all costs of supplying Members with copies of this Constitution and any other documents required by the Law to be provided to Members;

(u) all costs and expenses incurred in producing PDS' and Supplementary PDS' or any other disclosure document required by the Law;

(v) reasonable costs incurred in protecting or preserving all assets offered as security;

s601FB(2) (w) all liability, loss, cost, expense or damage arising from the proper performance of its duties in connection with the Scheme performed by the RE or by any agent appointed pursuant to s601FB(2) of the Law;

(x) any liability, loss, cost, expense or damage arising from the lawful exercise by the RE and the Custodian of their rights under the Power of Attorney contained in clause 20;

(y) fees and expenses of any agent or delegate appointed by the RE;

(z) bank and government duties and charges on the operation of bank accounts;

(aa) costs, charges and expenses incurred in connection with borrowing money on behalf of the Scheme under the Constitution;

(bb) insurances directly or indirectly protecting the Scheme Property;

(cc) fees and charges of any regulatory or statutory authority;

(dd) taxes in respect of the Scheme but not Taxes of the RE [save and except any goods and services or similar tax ("GST")] which are payable by the RE on its own account;

(ee) costs of printing and postage of cheques, advices, reports, notices and other documents produced during the management of the Scheme;

(ff) expenses incurred in connection with maintaining accounting records and registers of the Scheme and of the Scheme Auditor;

(gg) costs and disbursements incurred in the preparation and lodgement of returns under the Law, Tax Act or any other laws for the Scheme;

(hh) costs of convening and holding meetings of Members;

(ii) costs and disbursements incurred by or on behalf of the RE in connection with its retirement and the appointment of a substitute;

(jj) costs and disbursements incurred by the RE in the initiation, conduct and settlement of any court proceedings;

(kk) costs of any insurance premiums insuring against the costs of legal proceedings (whether successful or not) including legal proceedings against Compliance Committee Members not arising out of a wilful breach of a duty referred to in S601JD of the Law;

(ll) costs of advertising the availability of funds for lending;

(mm) brokerage and underwriting fees;

(nn) if and when the RE becomes responsible to pay any GST in respect of any services provided to the Scheme or any payments in respect of GST to be made by the Members or the RE in respect of the Scheme or under the terms of this Constitution then the RE shall be entitled to be indemnified in respect of such GST from the Scheme Property;

(oo) If there is any change to the Law or ASIC policy whereby the RE is required to alter the structure of the Scheme or amend this Constitution, then the costs of the RE in complying with these changes will be recoverable out of the Scheme Property.

s601GA(2) 18.6 In the event that the RE has not performed its duties, the lack of entitlement to payment of fees pursuant to 18.3 is only in respect of that part of the payment which relates to the specific lack of proper performance on any given matter. Nothing in this clause shall be interpreted to mean that the RE is not entitled to be paid fees and expenses for work properly performed.

s601GA(2) 18.7 In the event of any dispute regarding the payment of fees and expenses, the RE shall be paid such fees and expenses until the dispute is fully determined. Any overpayment of the RE shall be repaid forthwith upon the identification of the overpayment.

18.8 The RE is entitled to recover fees and expenses from the Scheme provided they have been incurred in accordance with this Constitution.

18.9 The RE may waive the whole or any part of the remuneration to which it would otherwise be entitled under this clause.

18.10 Despite any other provision of this Constitution, the RE may pay a Member's Adviser a fee or fees as directed by the Adviser from time to time. These fees are to be paid out of Scheme Property, as an expense of the Scheme. Where income of the Scheme is not sufficient to pay in full an Adviser's fee and the relevant Member's expected income distribution, the RE may reduce the Adviser's fee and/or the expected income distribution on a pro rata basis, or on any other basis agreed with the Adviser.

19. INDEMNITY AND LIABILITY

s601GA(2) 19.1 The following clauses apply to the extent permitted by law:

(a) The RE is not liable for any loss or damage to any person (including any Member) arising out of any matter unless, in respect of that matter, it acted both:

(i) otherwise than in accordance with this Constitution and its duties; and

(ii) without a belief held in good faith that it was acting in accordance with this Constitution or its duties.

In any case the liability of the RE in relation to the Scheme is limited to the Scheme Property, from which the RE is entitled to be, and is in fact, indemnified.

(b) In particular, the RE is not liable for any loss or damage to any person arising out of any matter where, in respect of that matter:

(i) it relied in good faith on the services of, or information or advice from, or purporting to be from, any person appointed by the RE;

(ii) it acted as required by Law; or

(iii) it relied in good faith upon any signature, marking or documents.

(c) In addition to any indemnity under any Law, the RE has a right of indemnity out of the Scheme Property on a full indemnity basis, in respect of a matter unless, in respect of that matter, the RE has acted negligently, fraudulently or in breach of trust.

(d) The RE is not liable to account to any Member for any payments ma de by the RE in good faith to any duly authorised authority of the Commonwealth of Australia or any State or Territory of Australia for taxes or other statutory charges.

20. POWERS OF ATTORNEY

20.1 Each Member by execution of the Application Form or the transfer by which he/she/it acquires Units in the Scheme appoints the RE and the Custodian and any director officer attorney or substitute nominated by either the RE or the Custodian severally for this purpose as its attorney and agent with the right:

(a) at any time to:

(i) sign any document in relation to any subscription and withdrawal agreement;

(ii) sign any document in relation to the transfer or transmission of Units;

(iii) sign any variation of this Constitution;

(iv) sign any document required by ASIC to be executed by a Member in respect of the Scheme.

(b) at the request in writing of either the RE or the Custodian the Member must execute separate Powers of Attorney in a form reasonably required by the RE or the Custodian appointing the RE and/or the Custodian as its attorney for the purpose of this clause.

(c) any attorney may exercise its rights notwithstanding that the exercise of the right constitutes a conflict of interest or duty;

20.2 each Member indemnifies and shall keep indemnified any attorney against any liability, loss, cost, expense or damage arising from the lawful exercise of any right by the attorney under the Power of Attorney.

21. TITLE TO SCHEME FUND

21.1 Custodian to hold as agent of RE

The Scheme Property will be held in the name of the Custodian as agent for the RE on the terms and conditions as detailed in the Custody Agreement.

22. THE REGISTER

22.1 Keeping registers

The RE must establish and keep a register of Members, and if applicable, the other registers required by the Law.

22.2 Information in registers

To the extent applicable, the Register must be kept in accordance with, and contain the information required by the Law. Otherwise, the RE may decide what information is included in the Register. If the Law applies, the RE has the powers conferred under the Law in relation to the Register.

22.3 Changes

Every Member must promptly notify the RE of any change of name or address and the RE must alter the Register accordingly.

23. NOTICES

23.1 A notice or other communication connected with this Constitution has no legal effect unless it is in writing.

23.2 In addition to any other method of service provided by law, the notice must be:

(a) sent by post, postage prepaid, to the address for the Member in the RE's register of interests;

(b) sent by facsimile to the facsimile number of the Member; or

(c) otherwise delivered including via email, at the address of the addressee of the Member as is subsequently notified.

23.3 A notice must be treated as given and received:

(a) if sent by post, on the 2nd Business Day (at the address to which it is

posted) after posting;

(b) if sent by facsimile or electronically before 5.00 p.m. on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of delivery.

23.4 Despite clause 23.3(ii) a facsimile is not treated as given or received unless at the conclusion of the transmission the sender's facsimile machine issues a transmission report which indicates that the relevant number of pages comprised in the notice have been sent.

23.5 A notice sent or delivered in a manner provided by clause 23.2 must be treated as validly given to and received by the party to which it is addressed even if:

(a) the addressee has been liquidated or deregistered or is absent from the place at which the notice is delivered or to which it is sent; or

(b) the notice is returned unclaimed.

23.6 Any notice by a party may be given and may be signed by the solicitor for the party.

23.7 Any notice to a party may be given to the solicitor for the party by any of the means listed in clause 23.2 to the solicitor's business address or facsimile number as the case may be.

24. LIABILITY OF MEMBERS

(a) The liability of each Member, whether actual, contingent or prospective, is limited to the unpaid Issue Price of his/her/its Units except if the RE and the relevant Member agree otherwise in writing that the liability of a Member may be further limited or waived.

(b) A creditor or other person claiming against the RE as trustee of the Scheme has no recourse against a Member and no Member is personally liable to indemnify the RE, any creditor of the RE or any person claiming against the RE in respect of any actual, contingent, prospective or other liability of the RE in relation to the Scheme.

25. RETIREMENT AND APPOINTMENT OF RE

s601FL 25.1 The RE may retire as RE as permitted by s601FM of the Law.

s601FM 25.2 The RE must retire when required by s601FM of the Law.

s601FR 25.3 If the RE changes the former RE must comply with s601FR of the Law.

s601FS 25.4 The rights, obligations and liabilities of a former RE are as detailed in s601FS of the Law.

26. CHANGING THE CONSTITUTION

s601GC(1) 26.1 This Constitution may be modified or repealed or replaced with a new Constitution:

(a) by special resolution of the Members of the Scheme;

or

(b) by the RE if the RE reasonably considers the change will not adversely affect Members' rights.

26.2 In the event the RE wishes to change the Constitution the RE must:

s601GC(2) (a) lodge with the ASIC a copy of the modification or the new Constitution;

(b) the modification, or repeal and replacement, cannot take effect until the copy has been lodged;

s601GC(3) (c) the RE must lodge with the ASIC a consolidated copy of the Scheme's Constitution if the ASIC directs it to do so;

s601GC(4) 26.3 The RE must send a copy of the Scheme's Constitution to a Member of the Scheme within seven (7) days if the Member:

(a) asks the RE in writing for the copy; and

(b) pays any fee (up to the prescribed amount) required by the RE.

27. STATEMENTS, ACCOUNTS AND AUDIT

27.1 Appointment of auditors

(a) The RE must appoint an Auditor to regularly audit the accounts in relation to the Scheme and perform the other duties required of the Scheme's auditors under this Constitution and the Law.

(b) The RE must appoint an Auditor of the Compliance Plan (as defined in section 601HG of the Law).

27.2 Retirement of auditors

The Scheme Auditor and the Compliance Plan Auditor may each retire or be removed in accordance with the Law.

27.3 Remuneration of Auditor

The remuneration of the Scheme Auditor and Compliance Plan Auditor will each be fixed by the RE.

27.4 Accounts and reports

(a) The accounts of the Scheme must be kept and prepared by the RE in accordance with applicable Accounting Standards and the Law.

(b The RE must report to Members concerning the affairs of the Scheme and their holdings as required by the Law. Subject to the Law, the person preparing a report may determine the form, content and timing of it.

27.5 Audit

The RE will cause:

(a) the Scheme Auditor to audit and report on the Scheme's accounts;

(b) the Compliance Plan Auditor to audit and report on the Compliance Plan,

each in the manner required by the Law.

28. MEETINGS OF MEMBERS

28.1 Convening Meetings

The RE may at any time call and convene a meeting of Members and must call and convene a meeting of Members when required to do so by the Law.

28.2 Calling and holding meetings

s252G(4) (a) A notice of meeting sent by post is taken to be given the day after it is delivered.

s252R(2) (b) If, at any time, there is only 1 Member of the Scheme, the quorum for a meeting is 1 in all other cases the quorum for a meeting is 2.

s252R(3) (c) If an individual is attending a meeting as a Member and as a body corporate representative, the RE may in determining whether a quorum is present, count the individual more than once.

s252W(2) (d) A proxy is not entitled to vote on a show of hands.

s252W(3) (e) A proxy is entitled to speak and vote for a Member (to the extent allowed by the appointment) even if the Member is present (but only so long as the Member does not speak or vote, as the case may be).

s252Y(2) (f) An appointment of proxy:

(i) is valid even if it does not specify the Member's address; and

(ii) may be a standing one.

s252Z(5) (g) The RE may determine, in relation to a particular meeting or generally, that proxy documents may be received up to any shorter period before the meeting.

s253K(2) (h) A poll cannot be demanded on any resolution concerning:

(i) the election of the chair of a meeting; or

(ii) the adjournment of a meeting.

29. OTHER ACTIVITIES AND OBLIGATIONS OF THE RE

29.1 Subject to the Law, nothing in this Constitution restricts the RE (or its associates) from:

(a) dealing with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity);

(b) being interested in any contract or transaction with itself (as manager, trustee or responsible entity of another trust or managed investment scheme or in another capacity) or with any Member or retaining for its own benefit profits or benefits derived from any such contract or transaction; or

(c) acting in the same or similar capacity in relation to any other trust or managed investment scheme.

29.2 All obligations of the RE which might otherwise be implied by law are expressly excluded to the extent permitted by law.

30. GOVERNING LAW

This Deed is governed by the laws of the State of Queensland. The RE and the Members submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

31. ASIC INSTRUMENT

If relief from the provisions of the Law granted by an ASIC Instrument requires that this Constitution contain certain provisions, then those provisions are taken to be incorporated into this Constitution at all times at which they are required to be included and prevail over any other provisions of this Constitution to the extent of any inconsistency. However, if the relief is granted by Class Order (rather than specifically in relation to the Scheme) then the ASIC Instrument (and the provisions it requires) will only be taken to be incorporated if the RE declares in writing that this is the case.

32. UNCONTROLLED EVENTS

To the extent permitted by law, if the RE is prevented from performing its duties under this Constitution or the law due to the occurrence of an Uncontrolled Event then the RE is not liable to the Members and nor is the RE liable for any loss or decrease in value of the Scheme Property.

EXECUTED AS A DEED at the Gold Coast, Queensland:

GIVEN under the Common Seal of LM INVESTMENT MANAGEMENT LIMITED ACN 077 208 461 by authority of a resolution of the Board of Directors under the hands of two Directors who certify that they are the proper officers to affix this seal and in the presence of:

) .....
) Director
)
)
) .....
) Director

A Justice of the Peace/Solicitor

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Australian Securities &
Investments Commission

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
027850151

Form 5101
Corporations Act 2001
601GC

Notification of change to managed investment scheme's constitution

If there is insufficient space in any section of the form, print additional copies of the relevant page(s) and submit as part of this lodgement

Scheme details

Managed investment scheme name
LM FIRST MORTGAGE INCOME FUND

ARSN
089 343 288

Responsible entity name
LM INVESTMENT MANAGEMENT LTD

ACN
077 208 461

Lodgement details

Who should ASIC contact if there is a query about this form?

Firm/organisation
LM INVESTMENT MANAGEMENT LTD

Contact name/position description
BRUCE MACKENZIE - COMPLIANCE

ASIC registered agent number (if applicable)
220281 - L22583

Telephone number
07 5584 4500

Postal address or DX address
PO BOX 485
SURFERS PARADISE QLD 4217

Companies and Investments
10 MAY 2012

1 Details of change

		ASIC form code
☒ Modification of constitution authorised by special resolution of members	Date of resolution 16/05/12 (D D M M Y Y)	B
☐ Relacement of constitution authorised by special resolution of members	Date of resolution (D D M M Y Y)	C
☐ Modification of constitution authorised by responsible entity	Date authorised (D D M M Y Y)	B
☐ Replacement of constitution authorised by responsible entity	Date of replacement (D D M M Y Y)	C
☐ Consolidated constitution	Date of consolidation (D D M M Y Y)	D

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SUPPLEMENTAL DEED POLL

DATE 16 MAY 2012

PARTIES

LM Investment Management Limited ACN 077 208 461 of Level 4, RSL Centre, 9 Beach Road, Surfers Paradise, Queensland 4217 (**Responsible Entity**)

BACKGROUND

(A) The LM First Mortgage Income Fund ARSN 089 343 288 (**Trust**) was established under a constitution dated 24 August 1999 made by the Responsible Entity, as amended.

(B) The Responsible Entity is the responsible entity of the Trust.

(C) Clause 26 of the constitution of the Trust (**Constitution**) provides that the Responsible Entity may modify the Constitution by special resolution of the Members of the Trust, subject to law (including the *Corporations Act 2001* (Cth) (**Corporations Act**).

(D) On 16 May 2012 the Members of the Trust resolved by special resolution to modify the Constitution in accordance with the provisions of this deed.

(E) The Responsible Entity may give effect to the amendments by executing a supplemental deed. Pursuant to section 601GC(2) of the Corporations Act, the amendments to the Constitution do not take effect until a copy of this deed is lodged with ASIC.

OPERATIVE PROVISIONS

1. INTERPRETATION

A term defined in the Constitution has the same meaning in this deed unless it is defined differently in this deed.

2. AMENDMENTS TO THE CONSTITUTION

The Constitution is modified in the manner set out in Schedule 1 to this deed.

3. EFFECTIVE DATE

The amendments to the Constitution set out in Schedule 1 to this deed will take effect on the later of:

(a) the date that a copy of this deed is lodged with ASIC, and

(b) the date that the Members of the Trust resolve by special resolution to confirm the special resolution passed on 16 May 2012 to modify the Constitution in accordance with the provisions of this deed

(such date being the **Effective Date**).

4. BINDING PROVISIONS

The provisions of this deed are binding on the Responsible Entity, each Member and all persons claiming through them as if each were a party to this deed.

5. NO RESETTLEMENT

Other than as expressly amended by this document, the Constitution is unchanged and the amendments to the Constitution made under this deed do not constitute a resettlement of the trust which has been established under the Constitution.

6. GENERAL

6.1 Governing law and jurisdiction

(a) This deed is governed by the laws of New South Wales.

(b) Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New South Wales.

6.2 Further actions

The Responsible Entity must do all things and execute all further documents necessary to give full effect to this deed.

EXECUTED as a deed poll.

EXECUTED by LM Investment Management Limited ACN 077 208 461

In accordance with section 127(1) of the *Corporations Act 2001* (Cth):

Signature of director

SIMON TICKNER

Name

Signature of director/~~secretary~~

EGHARD VAN DER HOVEN

Name

SCHEDULE 1

Amendments to the Constitution

1. NEW CLAUSE 9A

With effect on and from the Effective Date, the Constitution is amended by inserting a new clause 9A (Transfer Facility) as follows:

"9A TRANSFER FACILITY

Definitions

9A.1 In this clause 9A, unless the context indicates otherwise:

Actual Unit Sale Price means, as at any Trigger Date for a Unit Sale Program, the price per Unit calculated in accordance with the following formula:

$$\frac{(NP \times BP) + NID - SD}{(BV}$$

where:

NP means the amount in the Net Proceeds Account as at that Trigger Date,
BV means the Book Value of the Sale Assets whose sale contributed to the Net Proceeds held in the Net Proceeds Account as at the Invitation Date of that Unit Sale Program,
BP means the Book Price of a Unit as at the Invitation Date of that Unit Sale Program,
NID means the Net Income Distributions as at that Trigger Date divided by the number of Sale Units (where that number is as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23),
SD means the duty (if any) payable to any Office of State Revenue on the transfer of a Unit under the Transfer Facility as at the Liquidity Date for that Trigger Date;

Asset Sale Program means the program for sales of Assets of the Scheme determined by the RE from time to time;

Assets of the Scheme means all assets of the Scheme including the properties over which the RE holds a mortgage or other security for the loans that are assets of the Scheme but (for the avoidance of doubt) excluding all Held Cash and all amounts held on trust for Buying Members under clause 9A.18(a);

Available Hold Income Reserve has the meaning given to that expression in clause 9A.14;

Available Sale Income Reserve has the meaning given to that expression in clause 9A.13;

Base Unit Sale Price means, for any Unit Sale Program, the price per Unit calculated in accordance with the following formula:

$$\frac{(NP \times BP)}{(BV}$$

where:

NP means the Expected Net Proceeds from the Sale Assets as at the Invitation Date of that Unit Sale Program,

BV means the Book Value of those Sale Assets as at the Invitation Date of that Unit Sale Program,
BP means the Book Price of a Unit as at the Invitation Date of that Unit Sale Program;

Book Price of a Unit means, as at any date ("Calculation Date"), the price calculated in accordance with the following formula as at the last Valuation Date prior to that Calculation Date:

$$\frac{NFV}{NOU}$$

where:

NFV means the Net Fund Value as at that Valuation Date,
NOU means the number of Units on Issue as at that Calculation Date;

Book Value means, for any Sale Assets as at any date ("Calculation Date"), the value of those Sale Assets as recorded in the books of the Scheme as at the date of the most recent audited accounts of the Scheme issued before that Calculation Date, taking into account any provision made in relation to those assets;

Buying Member has the meaning given to that expression in clause 9A.7;

Buying Member's Proportion of the Sale Units has the meaning, for any Buying Member, given to that expression in clause 9A.24;

Deutsche Bank Facility Agreement means the facility agreement dated 1 July 2010 made between LM Investment Management Limited in its capacity as responsible entity for the Scheme and Deutsche Bank AG, Sydney Branch;

Disposal Units has the meaning, for any Unit Sale Program, given to that expression in clause 9A.20;

Distributable Net Proceeds has the meaning, given to that expression in clause 9A.11;

Distribution Date means, for any Trigger Date in a Unit Sale Program, the Business Day immediately following the Liquidity Date for that Trigger Date;

Expected Net Proceeds means the net cash proceeds that the RE expects to receive from the sale of the Sale Assets under the Asset Sale Program, after deducting all costs of sale (including all brokerage, marketing expenses and transaction taxes);

Expected Sale Discount means, for any Investment Allocation Request, the fraction (expressed as a percentage) calculated in accordance with the following formula:

$$\frac{BV - NP}{BV}$$

where:

NP means the Expected Net Proceeds from the Sale Assets as at the Invitation Date of that Investment Allocation Request,
BV means the Book Value of those Sale Assets as at the Invitation Date of that Investment Allocation Request;

Facility Accounts means the Net Proceeds Account, Sale Asset Income Account and Hold Asset Income Account;

Final Completion Date means, in relation to any Unit Sale Program, the date on which the sale of all of the Sale Assets relating to that Unit Sale Program has been completed;

Held Cash has the meaning, as at any Trigger Date, given to that expression in clause 9A.26(d);

Hold Assets means all Assets of the Scheme that are not Sale Assets;

Hold Asset Income means, for any Unit Sale Program, the net income received by the RE from the Hold Assets after the Invitation Date for that Unit Sale Program;

Hold Asset Income Account means the account into which the Hold Asset Income is credited under clause 9A.10;

Invitation Date means, in relation to any Unit Sale Program and any Investment Allocation Request, the date of the Investment Allocation Request that initiated that Unit Sale Program;

Investment Allocation Request has the meaning given to that expression in clause 9A.2;

Liquidity Date means, for any Trigger Date in a Unit Sale Program, the 5th Business Day after that Trigger Date;

Member Election has the meaning given to that expression in clause 9A.3;

Net Income Distributions means, as at any date, the amount held as at that date in the Available Sale Income Reserve *plus* the amount held by the RE as at that date in accordance with the directions under clauses 9A.17 and 9A.18 in respect of distributions out of the Available Sale Income Reserve to Members;

Net Proceeds means the net cash proceeds received by the RE from the sale of the Sale Assets, after deducting all costs of sale (including all brokerage, marketing expenses and transaction taxes);

Net Proceeds Account means the account into which the Net Proceeds are credited under clause 9A.10;

Offer Closing Date has the meaning, in relation to any Investment Allocation Request, given to that expression in clause 9A.3;

Office of State Revenue means the Office of State Revenue of Queensland and any similar office in any other State or Territory of Australia;

Pro Rata Buyer Proportion has the meaning given to that expression in clause 9A.20;

Pro Rata Seller Proportion has the meaning given to that expression in clause 9A.20;

Release Date means the third anniversary of the date on which this clause 9A comes into effect or such earlier date (if any) as the RE determines;

Sale and Purchase Notice has the meaning given to that expression in clause 9A.20;

Sale Assets means, for any Unit Sale Program and any Investment Allocation Request, the assets identified in that Investment Allocation Request as the Assets of the Scheme that will be sold for the purposes of that Unit Sale Program under the Asset Sale Program (as adjusted under clause 9A.9);

Sale Asset Income means, for any Unit Sale Program, the net income received by the RE from the Sale Assets after the Invitation Date for that Unit Sale Program;

Sale Asset Income Account means the account into which the Sale Asset Income is credited under clause 9A.10;

Selling Member has the meaning given to that expression in clause 9A.6;

Selling Member's Disposal Units means, for any Selling Member and any Unit Sale Program, the Disposal Units for that Unit Sale Program that are held by that Selling Member;

Selling Member's Sale Units has the meaning, for any Selling Member and any Unit Sale Program, given to that expression in clause 9A.22;

Transfer Facility means the process for the sale and purchase of Units set out in this Clause 9A;

Trigger Date has the meaning, for any Units Sale Program, given to that expression in clause 9A.20;

Unit Sale Program means a program for the sale and purchase of Units under the Transfer Facility that is initiated by the Issue by the RE of an Investment Allocation Request under this clause 9A.

Member Election

9A.2 At any time the RE may give a notice to the Members (**Investment Allocation Request**) inviting each Member to notify the RE:

(a) whether it wishes to sell its Units under the Transfer Facility or to continue to hold them, and

(b) if it wishes to sell its Units, the percentage of its Unit Holding that it wishes to sell (which may be 100% or such lesser percentage as the Member notifies the RE).

9A.3 The RE must specify in the Investment Allocation Request:

(a) the date (**Offer Closing Date**) by which the Member's notice (**Member Election**) must be received, which must not be less than [20] Business Days after the Invitation Date;

(b) the Sale Assets;

(c) the Base Unit Sale Price; and

(d) the Expected Sale Discount.

9A.4 Notwithstanding any other provision of this clause 9A:

(a) a Member is not entitled to indicate in its Member Election that it wishes to sell less than 1,000 Units or an integral multiple of 1,000 Units, except that it may indicate that it wishes to sell all of its Unit Holding even where its total Unit Holding is less than 1,000 Units or is not an integral multiple of 1,000 Units; and

(b) the RE may at any time reject a Member Election in which the Member notifies the RE is wishes to sell all or some of its Units, and deem the Member Election to be a notice that the Member wishes to hold all of its Units and deem the Member to be a

Buying Member, if the Member cannot provide satisfactory evidence of the Member's title or authority to deal with the Units which it wishes to sell.

9A.5 If a Member does not give the RE a Member Election by the Offer Closing Date it will be deemed to wish to hold all of its Units for the purposes of the Transfer Facility.

9A.6 A Member which notifies the RE in its Member Election that it wishes to dispose of all or any of its Units is a **Selling Member** in respect of those of its Units which it has elected to dispose of (as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23).

9A.7 A Member which notifies the RE in its Member Election that it wishes to hold all or any of its Units (or which is otherwise deemed under this clause 9A to wish to hold its Units) is a **Buying Member** in respect of those of its Units:

(a) which it wishes to hold (or is deemed under clause 9A.4 to wish to hold), or

(b) which are otherwise not transferred under this clause 9A due to any adjustments under clauses 9A.21, 9A.22 and 9A.23.

9A.8 A Member Election:

(a) will be taken to be an offer by that Member to the other Members to sell the Units confirmed for sale in its Member Election on the terms and in accordance with the procedures (including adjustments) of this clause 9A,

(b) will be taken to have been accepted by the Buying Members on the terms and in accordance with the procedures (including adjustments) of this clause 9A (and in the case of each Buying Member in respect of the Sale Units which the RE determines under clause 9A.23 are to be transferred to it) when the RE issues a Sale and Purchase Notice in respect of that Member's Sale Units, and

(c) will be binding on that Member in relation to the number of its Units that it elects to sell in its Member Election (as adjusted under clauses 9A.4, 9A.21, 9A.22, 9A.23 and 9A.43).

9A.9 After the Offer Closing Date specified in an Investment Allocation Request the RE may exclude one or more assets from the Sale Assets identified in that Investment Allocation Request if the RE considers that the net sale proceeds from the remaining Sale Assets are likely to be sufficient to fund the payment in full of the Base Unit Sale Price for the Units that are confirmed for sale in the Member Elections (taking into account the adjustments noted in this clause 9A).

Net Proceeds and Income Accounts

9A.10 The RE will:

(a) establish a separate account in its books for each Unit Sale Program for each of (1) the Net Proceeds, (2) the Sale Asset Income, and (3) the Hold Asset Income relating to that Unit Sale Program;

(b) credit amounts received in respect of the Net Proceeds, the Sale Asset Income, and the Hold Asset Income for a Unit Sale Program to their respective accounts for that Unit Sale Program as and when those amounts are received; and

(c) apply the amounts held in those accounts consistently with the requirements of this clause 9A.

Allocation of Net Proceeds

9A.11 The RE may at any time and from time to time as it considers fit allocate the balance at that time in the Net Proceeds Account to the following reserves:

(a) all amounts then payable or repayable under the Deutsche Bank Facility Agreement in relation to the Sale Assets from which the Net Proceeds then held in the Net Proceeds Account have been derived,

(b) the amount required for redemption of Units permitted by ASIC on "hardship" grounds,

(c) the amount required to pay distributions to Members previously determined by the RE but not yet paid,

(d) the amount required for feeder fund payments for distributions and expenses allowed under the Deutsche Bank Facility Agreement,

(e) the amount that in the RE's opinion should be held in cash reserve for any Liabilities (including operational costs, provisions and contingencies) or other purposes, and

(f) the amount of the Net Proceeds that is available (after deducting the amounts referred to in paragraphs (a) to (e) above) for distribution to Members (**Distributable Net Proceeds**).

9A.12 The RE may at any time and from time to time as it considers fit apply out of the Net Proceeds Account any amount credited to a reserve referred to in paragraphs 9A.11(a) to (e) above towards the payments contemplated by that reserve.

Allocation of Income

9A.13 Subject to clause 9A.15, the RE may at any time and from time to time as it considers fit:

(a) allocate the balance at that time in the Sale Asset Income Account to any of the reserves noted in paragraphs (a) to (e) of clause 9A.11,

(b) apply any amount so credited to any of those reserves towards the payments contemplated by that reserve,

(c) allocate the balance after such allocations and applications to a reserve for distribution to Members (**Available Sale Income Reserve**), and

(d) distribute to Members out of the Available Sale Income Reserve in cash any amount that in the RE's opinion should be distributed to Members to assist them to pay Australian tax liabilities expected to be incurred on distributions in respect of the Sale Asset Income.

9A.14 Subject to clause 9A.15, the RE may at any time and from time to time as it considers fit:

(a) allocate the balance at that time in the Hold Asset Income Account to any of the reserves noted in paragraphs (a) to (e) of clause 9A.11,

(b) apply any amount so credited to any of those reserves towards the payments contemplated by that reserve,

(c) allocate the balance after such allocations and applications to a reserve for distribution to Members (**Available Hold Income Reserve**), and

(d) distribute to Members out of the Available Hold Income Reserve in cash any amount that in the RE's opinion should be distributed to Members to assist them to pay Australian tax liabilities expected to be incurred on distributions in respect of the Hold Asset Income.

9A.15 No amount credited to the Sale Asset Income Account or the Hold Asset Income Account or distributed under clauses 9A.13 and 9A.14 will constitute Distributable Income until it is determined to be Distributable Income under clause 11.3.

9A.16 Where an amount is distributed to Members under this clause 9A, the determination of whether that distribution is a distribution of capital or income will not be affected by the crediting of that amount to or distribution out of any of the accounts referred to in clause 9A.10 or any of the reserves referred to in clause 9A.11.

Distribution Directions

9A.17 Each Selling Member irrevocably directs the RE:

(a) to invest on its behalf all amounts distributed to it out of the Available Sale Income Reserve or the Available Hold Income Reserve (other than cash amounts distributed under clauses 9A.13 or 9A.14) into a separate account of the RE to be held (together with any interest earned on those amounts) on trust for that Selling Member; and

(b) to pay those amounts (together with any interest earned on those amounts) on its behalf upon completion of the transfer of its Sale Units in accordance with the directions in clause 9A.28.

9A.18 Each Buying Member irrevocably directs the RE:

(a) to invest on its behalf all amounts distributed to it out of the Available Sale Income Reserve (other than cash amounts distributed under clause 9A.13) into a separate account of the RE to be held (together with any interest earned on those amounts) on trust for that Buying Member;

(b) to pay those amounts (together with any interest earned on those amounts) on its behalf upon completion of the transfer of Sale Units to it in accordance with the directions in clause 9A.28;

(c) to reinvest all distributions made to it out of the Available Hold Income Reserve before the Release Date (other than cash amounts distributed under clause 9A.14) by way of application for additional Units in the Scheme under, and on the terms of, clause 12.6 on the basis that, for the purposes of that clause, the RE is deemed to have invited the Buying Member to make that reinvestment, and the Buying Member is deemed to have accepted that reinvestment offer; and

(d) to pay or apply all distributions made to it out of the Available Hold Income Reserve on or after the Release Date in accordance with clauses 11 and 12 as applying at that time.

9A.19 Each Member irrevocably directs the RE to distribute on each Distribution Date the Distributable Net Proceeds as at that date to the Members in accordance with this clause 9A pro rata to their Unit Holdings as at that Distribution Date.

Sale and Purchase of Units

9A.20 On the 5th Business Day after the Final Completion Date for a Unit Sale Program, and on such other earlier date or dates as the RE considers appropriate, (each a **Trigger Date**) the RE must give a notice (**Sale and Purchase Notice**) to Members setting out:

(a) the number of Units that have been confirmed for sale in Member Elections (as adjusted under clause 9A.43) that have not previously been transferred under the Transfer Facility or otherwise since the Invitation Date for that Unit Sale Program (and excluding Member Elections rejected under clause 9A.4) (**Disposal Units**),

(b) the amount of the Distributable Net Proceeds as at the Trigger Date,

(c) the number of Units to be sold and purchased (as whole Units) under this clause 9A in relation to those Member Elections as at that Trigger Date (**Sale Units**), where that number is calculated (subject to clauses 9A.4, 9A.21, 9A.22 and 9A.23) by dividing the amount of the Distributable Net Proceeds as at that Trigger Date by the Actual Unit Sale Price as at that Trigger Date, rounded down to the nearest whole Unit,

(d) the proportion of each Selling Member's Disposal Units as at that Trigger Date that will be sold under this clause 9A (subject to rounding down to whole Units under clause 9A.22), where that proportion (**Pro Rata Seller Proportion**) is the fraction calculated by dividing the number of Sale Units as at that Trigger Date (as adjusted under clauses 9A.4, 9A.21 and 9A.23 but before adjustment for rounding down under clause 9A.22) by the number of Disposal Units as at that Trigger Date, expressed as a percentage,

(e) the number of Sale Units to be bought by each Buying Member under this clause 9A as at that Trigger Date, expressed as a number per Unit held by a Buying Member (**Pro Rata Buyer Proportion**), where that number is calculated by dividing the number of Sale Units as at that Trigger Date (as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23) by the number of all Units held by Buying Members as at that Trigger Date, rounded down to two decimal points,

(d) the Liquidity Date for that Trigger Date, and

(e) the Distribution Date for that Trigger Date.

9A.21 If the number of Sale Units calculated under clause 9A.20(c) for a Trigger Date plus the aggregate number of Sale Units calculated under clause 9A.20(c) for each previous Trigger Date in the same Unit Sale Program is greater than or equal to the number of Disposal Units for that Unit Sale Program:

(a) the number of Sale Units as at that Trigger Date will be deemed to be the number equal to the balance of the Disposal Units for that Unit Sale Program then remaining unsold (whether under the Unit Sale Program or otherwise);

(b) the Pro Rata Seller Proportion will be deemed to be 100%; and

(c) the amount of the Distributable Net Proceeds that is attributable to the number of Sale Units that is greater than the number of Disposal Units will be reallocated to the cash reserve referred to in clause 9A.11(d).

9A.22 The number of a Selling Member's Disposal Units that will be sold under this clause 9A in relation to a Trigger Date (**Selling Member's Sale Units**) will be the number calculated by multiplying the number of that Selling Member's Disposal Units remaining unsold as at that Trigger Date (whether under the Unit Sale Program or otherwise) by the Pro Rata Seller Proportion, adjusted (where applicable) under clause 9A.23, and rounded down to the nearest whole Unit. The number of Sale Units calculated under clause 9A.20(c) will be reduced to reflect any such adjustment and rounding down so that the total number of Sale Units equals the sum of all of the Selling Members Sale Units.

9A.23 In addition to the adjustment under clauses 9A.21 and any rounding down under clause 9A.22, and without limiting clauses 9A.34 and 9A.37, the RE may reduce the number of a

Selling Member's Sale Units for a Trigger Date by any number (including to zero) if the RE considers that such reduction is necessary to ensure that the implementation of the Transfer Facility does not have a material adverse financial effect on the Scheme. In determining whether to make any such reduction and, if so, how to apply it to a Selling Member's Sale Units for a Trigger Date, the RE may take into account:

(a) the implications of the sale of the Selling Member's Sale Units for that Trigger Date under the Transfer Facility on the tax treatment of the Scheme (including in relation to the trading history of Units and the change in the members of the Scheme during relevant periods),

(b) the principle that priority should be given to Member Elections in terms of the chronological order in which they have been received by the RE, and

(c) such other factors as in the RE's opinion are relevant to the potential material adverse financial effect on the Scheme in relation to which such reduction is necessary.

9A.24 The number of the Sale Units (as adjusted under clauses 9A.4, 9A.21, 9A.22 and 9A.23) to be bought by a Buying Member under this clause 9A as at any Trigger Date (**Buying Member's Proportion of the Sale Units**) will be the number calculated by multiplying the number of Units held by the Buying Member as at the Trigger Date by the Pro Rata Buyer Proportion, rounded down to two decimal points .

9A.25 The amount of the Distributable Net Proceeds that is attributable through the calculations in clause 9A.20 to:

(a) any fraction of the Selling Member's Disposal Units that is excluded from the Selling Member's Sale Units by the rounding down in clause 9A.22,

(b) any fraction of a Unit that is excluded from the Sale Units by the rounding down in clause 9A.20(c), or

(c) any Unit that is excluded from the Sale Units by a reduction under clause 9A.23,

will be reallocated to the cash reserve referred to in clause 9A.11(e).

9A.26 On each Trigger Date in a Unit Sale Program a binding agreement will be deemed to have come into effect between the Members under which:

(a) each Selling Member agrees to sell its Selling Member's Sale Units as at that Trigger Date to the Buying Members for that Unit Sale Program, allocated between them in accordance with the Pro Rata Buyer Proportion for that Trigger Date, and

(b) each Buying Member agrees to buy from the Selling Members its Buying Member's Proportion of the Sale Units as at that Trigger Date,

in each case:

(c) at a price per Unit equal to the Actual Unit Sale Price as at that Trigger Date,

(d) on the basis that:

(i) at Completion all amounts held for Selling Members in accordance with their direction in clause 9A.17 in respect of the Sale Units as at that Trigger Date (**Held Cash**) will be applied in accordance with the directions in clause 9A.28, and

(ii) the transfer of any Sale Units includes all rights to distributions of capital and income in respect of the Sale Units paid on or after that Trigger Date (irrespective of when the distribution was determined by the RE),

(e) with completion of the transfer of the Sale Units to occur on the Liquidity Date for that Trigger Date but on the basis that payment of the price for the Units will be paid on the Distribution Date for that Trigger Date ,

(f) on the basis that each Member appoints the RE its attorney to complete the sale and purchase on its behalf with full authority to do so as more specifically described in clause 9A.30,

(g) on the basis that each Selling Member warrants to each Buying Member and to the RE that, at the time of completion of the transfer under this clause 9A:

(i) the Selling Member's Sale Units will be fully paid and free from all mortgages, charges, liens, encumbrances, pledges, security interests and other interests of third parties of any kind, whether legal or otherwise, and restrictions of any kind, and

(ii) it has full power and capacity to sell and transfer its Selling Member's Sale Units (together with any rights and entitlements attaching to those Units) to the Buying Members under the Transfer Facility, and

(h) otherwise on the terms and conditions of this clause 9A.

Completion of Sale and Purchase

9A.27 Each Member directs the RE to take all steps, including execute and deliver all documents (whether under seal or otherwise) and make all payments, in the name of and on behalf of the Member, that the RE considers necessary or desirable to confirm and complete any sale and purchase of Units that is referred to in clause 9A.26.

9A.28 Without limiting clause 9A.27:

(a) each Selling Member directs the RE to pay to the Buying Members (or as they direct) all of the Held Cash attributable to its Sale Units as at the relevant Trigger Date; and

(b) each Buying Member directs the RE to apply the Distributable Net Proceeds that are distributed to it on a Distribution Date under clause 9A.19 (including any amount distributed to it in respect of its Buying Member's Proportion of the Sale Units) and the amount held for it in relation to its Units in accordance with its directions in clause 9A.18 and all Held Cash distributed to it in accordance with the Selling Members' directions under clause 9A.28(a) towards:

(i) payment on that date of the price payable by it under clause 9A.26 for those Units until that price is paid in full, and

(ii) payment on that date to the relevant Office of State Revenue of any duty payable by it on the transfer of those Units,

and to reinvest any remaining surplus by way of application for additional Units in the Scheme under, and on the terms of, clause 12.6 on the basis that, for the purposes of that clause, the RE is deemed to have invited the Buying Member to make that reinvestment, and the Buying Member is deemed to have accepted that reinvestment offer.

These directions are irrevocable.

9A.29 The RE must register each transfer of Units completed in accordance with clause 9A.26 on the Liquidity Date for the relevant Trigger Date.

Appointment of RE as attorney

9A.30 Without limiting clause 20, each Member appoints the RE and any director, officer, attorney or substitute nominated by the RE severally for this purpose as its attorney and agent with the right and authority to take all steps, including execute and deliver all documents (whether under seal or otherwise) and make all payments, in the name of and on behalf of the Member to confirm and complete any sale and purchase of Units under this clause 9A, including (without limitation):

(a) to determine as it sees fit (consistently with the agreement set out in clause 9A.26) the particular Sale Units that are to be transferred on completion by a particular Selling Member to a particular Buying Member,

(b) to execute and deliver on the Liquidity Date on behalf of the both the relevant Selling Member and the relevant Buying Member all instruments of transfer of Units necessary or desirable to give effect to that determination;

(c) to pay to a Selling Member on the Distribution Date the price payable to that Selling Member under clause 9A.26 out of the distributions that it is directed by the Buying Members to apply towards that purpose under clause 9A.28;

(d) to pay to each relevant Office of State Revenue on behalf of the relevant Buying Member any duty payable by that Buying Member on the transfer of Units to it under the Transfer Facility; and

(e) to enforce on behalf of any Member at the cost of the Scheme any of its rights under the Transfer Facility (including in relation to any breach of the warranty set out in clause 9A.26(g)).

9A.31 At the request in writing of the RE a Member must execute separate powers of attorney in a form reasonably required by the RE appointing the RE as its attorney for the purposes of this clause.

9A.32 Any attorney may exercise its rights under clause 9A.30 or any power of attorney executed under clause 9A.31 notwithstanding that the exercise of the right constitutes a conflict of interest or duty.

9A.33 Each Member indemnifies and shall keep indemnified each attorney against any liability, loss, cost, expense or damage arising from the lawful exercise of any right by the attorney under clause 9A.30 or any power of attorney executed under clause 9A.31.

Termination of Unit Sale Program

9A.34 Notwithstanding the other provisions of this clause 9A, if at any time the RE considers that it is not in the best interests of Members to continue to implement the Transfer Facility in relation to a particular Investment Allocation Request issued under this clause, the RE may terminate the Unit Sale Program initiated by that Investment Allocation Request by a determination to that effect.

9A.35 Upon making any such determination under clause 9A.34:

(a) all notices, elections, agreements and other steps taken or deemed to have occurred under this clause 9A in relation to that Unit Sale Program will cease to have effect except for steps relating to transfers of Units which have been completed under this clause before the determination was made, and

(b) the RE must take all steps necessary (including in relation to allocations in, and distributions out of, the Facility Accounts) to put the Members back into the same position in relation to the Units they continue to hold that that they would have been in if the Unit Sale Program had not been initiated.

9A.36 A determination in relation to a Unit Sale Program under clause 9A.34 does not affect the implementation of any other Unit Sale Program. For the avoidance of doubt, any determination under clause 9A.34 does not affect any determinations made by the RE under clauses 11.3 or 12.1 in relation to the Distributable Income of the Scheme for a Distribution Period and does not affect Members present entitlement to that Distributable Income under clause 12.3.

Acknowledgements and authorities

9A.37 Without limiting any of its rights, powers, discretions, authorities and indemnities under this clause 9A, it is expressly acknowledged and the RE is expressly instructed that it is authorised to initiate and implement any Unit Sale Program, including the issue of Investment Allocation Requests and Sale and Purchase Notices, notwithstanding that doing so may or will result in a material adverse financial effect on the Scheme (whether in relation to the tax treatment of the Scheme or otherwise).

9A.38 The Buying Members authorise the RE to appoint itself or the Custodian or such other person as the RE determines as their nominee to hold the Sale Units transferred to the Buying Members under any Unit Sale Program on their behalf in the name of the nominee on such terms as the RE considers appropriate.

9A.39 The Buying Members acknowledge that all administrative options selected by a Buying Member in relation to its Units (including as to currency conversion, investment term and distribution reinvestment directions) will be deemed to apply also to all Units transferred to the Buying Member under this clause 9A, and that any costs incurred in providing and administering those options are expenses of the Scheme.

Further Unit Sale Programs

9A.40 The RE may from time to time issue a further Investment Allocation Request under clause 9A before the Final Completion Date for an earlier Investment Allocation Request provided that:

(a) the assets identified for sale in the further Investment Allocation Request do not include assets that comprise Sale Assets in any earlier Investment Allocation Request;

(b) a Member is not entitled to elect to dispose in its Member Election in response to a further Investment Allocation Request any Units that it has confirmed for disposal in its Member Election in response to an earlier Investment Allocation Request (other than Units that it continues to hold due to the rejection of its Member Election under clause 9A.4 or due to any adjustment under clauses 9A.21, 9A.22, 9A.23 or 9A.43);

(c) the sale and purchase of Units resulting from that further Investment Allocation Request (and all steps relating to it) will be taken to be a separate Unit Sale Program under this clause 9A;

(d) the RE must establish separate Facility Accounts for each Unit Sale Program; and

(e) each of the definitions in clause 9A.1 will apply separately in relation to each Unit Sale Program by reference to the Investment Allocation Request, Sale Assets,

Member Elections Trigger Dates and other elements of and steps in that Unit Sale Program.

Withdrawal Notices

9A.41 All Withdrawal Notices given by Members to the RE which remain unprocessed as the date on which this clause 9A comes into effect (other than Withdrawal Notices permitted by ASIC on hardship grounds) are deemed to be of no effect.

9A.42 Unless the RE determines otherwise and notifies the Members accordingly, a Member may not give a Withdrawal Notice in relation to any of its Units before the Release Date (other than a Withdrawal Notice permitted by ASIC on hardship grounds).

Adjustment of Member Elections

9A.43 A Member may at any time by notice to the RE ask the RE to adjust its Member Election for a Unit Sale Program by increasing or reducing (as set out in the Member's notice) the percentage of the Member's Unit Holding that it wishes to sell.

(a) The RE may accept (in whole or in part) or reject any such request in its absolute discretion.

(b) If the RE decides to accept the request (in whole or in part) it may only do so in accordance with and to the extent permitted by this clause 9A.43.

(c) The RE may not reduce the Member's Election in a way that would affect the sale of any Units that have already, as at the date of the RE's decision (**Adjustment Date**), been sold under that Unit Sale Program or that are included in the Sale Units for that Unit Sale Program notified in a Sale and Purchase Notice issued on or before the Adjustment Date.

(d) The RE may not increase the Member's Election in a way that would increase the number of Sale Units for that Unit Sale Program notified in a Sale and Purchase Notice issued on or before the Adjustment Date.

(e) Where a Member wishes to increase the percentage of its Unit Holding that it wishes to sell in a Unit Sale Program, and distributions have been made, between the Invitation Date for that Unit Sale Program and the Adjustment Date, out of the Available Sale Income Reserve or Available Hold Income Reserve on Units which would be included in that Member's Disposal Units if the RE accepted the Member's request (**Additional Sell Units**):

(i) the Actual Unit Sale Price for that Member's Sale Units in that Unit Sale Program must be reduced to the extent necessary to ensure that the RE is able to implement the Transfer Facility for other Members in accordance with the principles on Unit value and cash payments on Completion set out in the other clauses of this clause 9A as if the Additional Sell Units had been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE, and

(ii) the RE must take all other steps necessary to put the Members into the same position on and from the Adjustment Date that they would have been in if the Additional Sell Units had been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE.

(f) Where a Member wishes to reduce the percentage of its Unit Holding that it wishes to sell in a Unit Sale Program, and distributions have been made, between the

Invitation Date for that Unit Sale Program and the Adjustment Date, out of the Available Sale Income Reserve or Available Hold Income Reserve on Units which would cease to be included in that Member's Disposal Units if the RE accepted the Member's request (**Additional Hold Units**):

(i) the RE must deal (or adjust its dealings) with those distributions as necessary to ensure that they are held or reinvested as they would have been under this clause 9A (including the directions in clauses 9A.17 and 9A.18) if the Additional Hold Units had not been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE, and

(ii) the RE must take all other steps necessary to put the Members into the same position on and from the Adjustment Date that they would have been in if the Additional Hold Units had not been included in that Member's Election for that Unit Sale Program when it first gave that Member Election to the RE.

Facilitating Implementation

9A.44 Notwithstanding any other provision of this clause 9A, if the RE encounters any administrative difficulty when it implements the Transfer Facility (whether due to lack of express guidance in this clause 9A, or inconsistency between provisions or any other factor) the Members authorise the RE to take all steps the RE considers necessary or desirable (including making adjustments to the number or allocation of Disposal Units and Sale Units, or the calculations of the Actual Unit Sale Price, or to allocations in, and distributions out of, the Facility Accounts) to enable the RE to implement the Transfer Facility for Members in a way that in the RE's opinion is most consistent with the principles in this clause 9A."

2. NEW CLAUSE 3.3A

With effect on and from the Effective Date, the Constitution is amended by inserting a new clause 3.3A as follows:

"3.3A Notwithstanding clause 3.3, a fraction of a Unit up to two decimal places may be transferred under clauses 9 or 9A. Without limiting clause 9A, where a sale and purchase under clause 9A would result in the transfer of a fraction of a Unit, the number of Units to be transferred must be rounded down to the nearest two decimal points."

3. NEW CLAUSE 5.1A

With effect on and from the Effective Date, the Constitution is amended by inserting a new clause 5.1A as follows:

"5.1A Notwithstanding clause 5.1(a), the RE does not have power to, and must not, issue any Unit between the last Business Day of a Sale Period and the Distribution Date for that Sale Period."

4. MODIFY CLAUSE 9.1

With effect on and from the Effective Date, the Constitution is amended by modifying clause 9.1(a) to read as follows:

"9.1(a) Subject to this Constitution, a Unit (including a fraction of a Unit up to two decimal places) may be transferred by instrument in writing, in any form authorised by Law or in any other form that the RE approves. In this Constitution any reference to the transfer or transmission of a Unit will be taken to include a reference to a fraction of a Unit up to two

decimal places, and the interest of a Member will include any interest represented by any such fraction of a Unit that the Member holds."

Australian Securities & Investments Commission

Form 5101
Corporations Act 2001
601GC

Notification of change to managed investment scheme's constitution

If there is insufficient space in any section of the form, print additional copies of the relevant page(s) and submit as part of this lodgement

Scheme details

Managed investment scheme name
LM First Mortgage Income Fund

ARSN
089 343 288

Responsible entity name
LM Investment Management Limited

ACN
077 208 461

Lodgement details

Who should ASIC contact if there is a query about this form?

Firm/organisation
Norton Rose Australia

Contact name/position description
Peter Schmidt - Partner

ASIC registered agent number (if applicable)
27628 (Brisbane)

Telephone number
(07) 3414 2888

Postal address or DX address
GPO Box 407, Brisbane, QLD 4001

1 Details of change

		ASIC form code
☐	Modification of constitution authorised by special resolution of members — Date of resolution [D D] [M M] [Y Y]	B
☐	Replacement of constitution authorised by special resolution of members — Date of resolution [D D] [M M] [Y Y]	C
☒	Modification of constitution authorised by responsible entity — Date authorised 26/10/12 [D D] [M M] [Y Y]	B
☐	Replacement of constitution authorised by responsible entity — Date of replacement [D D] [M M] [Y Y]	C
☐	Consolidated constitution — Date of consolidation [D D] [M M] [Y Y]	D

2 Documents to be attached

- A copy of the modification or the new constitution.
  The modification, or repeal and replacement, cannot take effect until the copy has been lodged.

OR

- A consolidated copy of the scheme's constitution if directed to do so by ASIC.

Signature

This form must be signed by a director or secretary of the responsible entity

I certify that the information in this form is true and complete.

Name

Francene Mulder

Capacity

☒ Director of responsible entity

☐ Secretary of responsible entity

Signature

Date signed

2	6	/	1	0	/	1	2
D	D		M	M		Y	Y

Lodgement

Send completed and signed forms to:
Australian Securities and Investments Commission,
GPO Box 9827 in your capital city.

For more information

Web	www.asic.gov.au
Need help?	www.asic.gov.au/question
Telephone	1300 300 630

NORTON ROSE

Dated 26 OCTOBER 2012

Supplemental Deed

LM First Mortgage Income Fund
ARSN 089 343 288

LM Investment Management Limited
ACN 077 208 461

John Moutsopoulos
Norton Rose Australia
Level 18, Grosvenor Place, 225 George Street
Sydney NSW 2000
Telephone: +61 2 9330 8166
www.nortonrose.com
Our ref: 2789191

Supplemental Deed dated 26 OCTOBER 2012

Parties LM Investment Management Limited ACN 077 208 461
of Level 4, RSL Centre, 9 Beach Road, Surfers Paradise, Queensland 4217
(Responsible Entity)

Introduction

A By a replacement constitution lodged with the Australian Securities & Investments Commission dated 10 April 2008, as amended (Constitution), the scheme currently known as LM First Mortgage Income Fund ARSN 089 343 288 (Scheme) is registered as a managed investment scheme and the Responsible Entity is appointed as the responsible entity of the Scheme.

B Pursuant to clause 26.1(b) of the Constitution and section 601GC(1)(b) of the Law, the Constitution may be modified by the Responsible Entity if it reasonably considers the change will not adversely affect Members' rights.

C At the request of the responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875, the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868, the Constitution of the Scheme is to be amended to recognise and acknowledge the intent of See Through Voting provisions which have been inserted into their respective constitutions.

D The Responsible Entity reasonably considers that the modifications to the Constitution proposed to be made by this supplemental deed will not adversely affect Members' rights.

Operative provisions

1 Interpretation

Except to the extent that it is given a special meaning in this supplemental deed, any word or expression which has a particular meaning in the Constitution must, when used in this supplemental deed, be given the same meaning as it has in the Constitution.

2 Operation of this deed

This deed takes effect as a supplemental deed to the Constitution on the day it is lodged with ASIC pursuant to section 601GC(2) of the Law.

3 Amendments to the Constitution

3.1 Subject to clause 2, the Constitution is modified by including the following:

(a) Insert new definition into the Directory of Terms at clause 1.1:

"**Feeder Funds**" means the LM Currency Protected Australian Income Fund ARSN 110 247 875, the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (each a "**Feeder Fund**")."

(b) Insert new clause 33 into the Constitution:

"33. See Through Voting Covenants

The Scheme's RE recognises and acknowledges the intent and effect of the See Through Voting provisions contained within Schedule 1 of the respective Feeder Funds' constitution."

3.2 The provisions of the Constitution are not otherwise affected.

4 Binding provisions

The provisions of this supplemental deed are binding on the Responsible Entity, each Member and all persons claiming through them as if each were a party to this deed.

5 No resettlement

Nothing in this deed constitutes a resettlement or redeclaration of the Scheme.

6 Governing law

This deed is governed by and is to be construed according to the laws of Queensland.

Executed as a deed and delivered on the date shown on the first page

Executed by LM Investment Management Limited ACN 077 208 461 in accordance with section 127 of the *Corporations Act 2001*:

Director/company secretary	Director
Francene Maree Mulder	PETER CHARLES DRAKE
Name of director/company secretary (BLOCK LETTERS)	Name of director (BLOCK LETTERS)

'DW-5'

ASIC & Business Names

ORGANISATIONAL SEARCH ON LM INVESTMENT MANAGEMENT LIMITED

Current Extract

This information was extracted from ASIC database on 14 March 2014 at 12:04PM

This extract contains information derived from the Australian Securities and Investment Commission's (ASIC) database under section 1274A of the Corporations Act 2001. Please advise ASIC of any error or omission which you may identify.

077 208 461	LM INVESTMENT MANAGEMENT LIMITED	DOCUMENT NO.
	077 208 461	
ABN	68 077 208 461	
Registered in	QLD	
Date Registered	31-Jan-1997	
Review Date	31-Jan-2015	

Current Organisation Details

Name	LM INVESTMENT MANAGEMENT LIMITED	7E5097309
Name Start	06-Aug-1998	
Status	EXTERNALLY ADMINISTERED For information about this status refer to the documents listed under the heading "External Administration and/or Appointment of Controller", below.	
Type	AUSTRALIAN PUBLIC COMPANY	
Class	LIMITED BY SHARES	
Subclass	UNLISTED PUBLIC COMPANY	
Disclosing Entity	NO	

Current Registered Office

Address	FTI CONSULTING, 'CORPORATE CENTRE ONE' LEVEL 9, 2 CORPORATE COURT, BUNDALL, QLD, 4217	7E5105009
Start Date	29-Mar-2013	

Current Principal Place of Business

Address	LEVEL 4 RSL CENTRE, 9 BEACH ROAD, SURFERS PARADISE, QLD, 4217
Start Date	01-Jul-1998

Current Director

Officer Name	EGHARD VAN DER HOVEN	1F0109176
ABN	Not available	
Birth Details	21-Jan-1962 DURBAN SOUTH AFRICA	
Address	10 ROWES COURT, SORRENTO, QLD, 4217	

Appointment Date	22-Jun-2006	
Officer Name	PETER CHARLES DRAKE	1E2914414
ABN	Not available	
Birth Details	23-Aug-1955 WHANGARA NEW ZEALAND	
Address	13 ALBATROSS AVENUE, NOBBY BEACH, QLD, 4218	
Appointment Date	31-Jan-1997	
Officer Name	FRANCENE MAREE MULDER	1F0069214
ABN	Not available	
Birth Details	24-Apr-1961 SOUTHPORT QLD	
Address	109 STRAWBERRY ROAD, MUDGEERABA, QLD, 4213	
Appointment Date	30-Sep-2006	

Current Appointed Auditor

Officer Name	ERNST & YOUNG	020698531
Number	024870595	(FR 2004)
ABN	Not available	
Address	'WATERFRONT PLACE' LEVEL 1, 1 EAGLE STREET, BRISBANE, QLD, 4000	
Appointment Date	01-Oct-2003	

Current Receiver Manager

Officer Name	JOSEPH DAVID HAYES	7E5366580
ABN	Not available	
Address	MCGRATHNICOL, 'MCGRATHNICOL' LEVEL 31, 60 MARGARET STREET, SYDNEY, NSW, 2000	
Appointment Date	11-Jul-2013	
Officer Name	ANTHONY NORMAN CONNELLY	7E5366580
ABN	Not available	
Address	LEVEL 14, 145 EAGLE STREET, BRISBANE, QLD, 4000	
Appointment Date	11-Jul-2013	

Current Appointed Liquidator (Creditors Voluntary Winding up)

Officer Name	JOHN RICHARD PARK	7E5415398
ABN	Not available	
Address	FTI CONSULTING, 'CORPORATE CENTRE ONE' LEVEL 9, 2 CORPORATE COURT, BUNDALL, QLD, 4217	
Appointment Date	01-Aug-2013	
Officer Name	GINETTE DAWN MULLER	7E5415398
ABN	Not available	
Address	FTI CONSULTING, 'CORPORATE CENTRE ONE' LEVEL 9, 2 CORPORATE COURT, BUNDALL, QLD, 4217	
Appointment Date	01-Aug-2013	
Officer Name	GINETTE DAWN MULLER	7E5415403
ABN	Not available	

Address	FTI CONSULTING, 'CORPORATE CENTRE ONE' LEVEL 9, 2 CORPORATE COURT, BUNDALL, QLD, 4217	
Appointment Date	01-Aug-2013	
Officer Name	JOHN RICHARD PARK	7E5415403
ABN	Not available	
Address	FTI CONSULTING, 'CORPORATE CENTRE ONE' LEVEL 9, 2 CORPORATE COURT, BUNDALL, QLD, 4217	
Appointment Date	01-Aug-2013	

Appointment of secretary is optional. In the event no secretary is appointed the director(s) assume the responsibilities under the Law.

Current Issued Capital

Type	Current	7E2830546
Class	ORD ORDINARY	
Number of Shares/Interests issued	35	
Total amount paid/taken to be paid	$1032012.56	
Total amount due and payable	$0.00	

Note: For each class of shares issued by a proprietary company, ASIC records the details of the twenty members of the class (based on shareholdings). The details of any other members holding the same number of shares as the twentieth ranked member will also be recorded by ASIC on the database. Where available, historical records show that a member has ceased to be ranked amongst the twenty members. This may, but does not necessarily mean, that they have ceased to be a member of the company.

Documents Relating to External Administration and/or Appointment

This extract may not list all documents relating to this status. State and territory records should be searched.

Received	Form Type	Processed	No. Pages	Effective	
26-Feb-2014	524	26-Feb-2014	13	31-Jan-2014	7E5867779
524J	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF CREDITORS' VOLUNTARY WINDING UP				
10-Feb-2014	524	10-Feb-2014	12	10-Jan-2014	7E5824920
524N	PRESENTATION OF ACCOUNTS & STATEMENT ACCOUNTS OF RECEIVER & MANAGER				
30-Sep-2013	507	30-Sep-2013	62	26-Sep-2013	7E5546426
507F	REPORT AS TO AFFAIRS FROM CONTROLLER UNDER S.429(2)(C)				
06-Sep-2013	507	06-Sep-2013	21	11-Jul-2013	7E5494220
507G	REPORT AS TO AFFAIRS FROM MANAGING CONTROLLER WHO IS ALSO A RECEIVER/MANAGER				
02-Sep-2013	524	02-Sep-2013	14	31-Jul-2013	7E5481607
524Z	PRESENTATION OF ACCOUNTS & STATEMENT PRESENTATION OF FINAL ACCOUNTS OF ADMINISTRATOR				
23-Aug-2013	5011	23-Aug-2013	6	31-Jul-2013	7E5462841
5011A	COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS,				

111

CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A

13-Aug-2013 5011 13-Aug-2013 43 01-Aug-2013 7E5436451
5011B COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION UNDER S.436E OR S.439A

02-Aug-2013 505 02-Aug-2013 2 01-Aug-2013 7E5415403
505J NOTIFICATION OF APPOINTMENT OF LIQUIDATOR (CREDITORS' VOLUNTARY WINDING UP)

02-Aug-2013 509D 02-Aug-2013 2 01-Aug-2013 7E5415398
509DA NOTICE UNDER S.446A OF SPECIAL RESOLUTION TO WIND UP COMPANY
RESOLVED THAT COMPANY BE WOUND UP UNDER 439C(C)

12-Jul-2013 505 12-Jul-2013 2 11-Jul-2013 7E5366580
505B NOTIFICATION OF APPOINTMENT OF RECEIVER AND MANAGER

11-Jul-2013 504 25-Jul-2013 4 11-Jul-2013 028593214
504B NOTIFICATION OF APPOINTMENT OF A RECEIVER AND MANAGER

13-May-2013 5011 13-May-2013 4 26-Apr-2013 7E5211783
5011A COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION OTHER THAN UNDER S.436E OR S.439A

12-Apr-2013 5011 12-Apr-2013 45 02-Apr-2013 7E5149299
5011B COPY OF MINUTES OF MEETING OF MEMBERS, CREDITORS, CONTRIBUTORIES OR COMMITTEE OF INSPECTION UNDER S.436E OR S.439A
Altered by 028 521 226

19-Mar-2013 505 19-Mar-2013 2 19-Mar-2013 7E5097309
505U NOTIFICATION OF APPT OF ADMINISTRATOR UNDER S.436A, 436B, 436C, 436E(4), 449B, 449C(1), 449C(4) OR 449(6)

Document Details

Received	Form Type	Processed	No. Pages	Effective	
05-Aug-2013	484		0	05-Aug-2013	1F0478329
484E	Change to Company Details Appointment or Cessation of A Company Officeholder				
Document under requisition					
02-Aug-2013	484		0	02-Aug-2013	028687053
484E	Change to Company Details Appointment or Cessation of A Company Officeholder				
Document under requisition					
08-Jul-2013	484	29-Jul-2013	3	08-Jul-2013	1F0336384
484E	Change to Company Details Appointment or Cessation of A Company Officeholder				

20-Jun-2013	484	20-Jun-2013	2	20-Jun-2013	7E5304606
484E	Change to Company Details Appointment or Cessation of A Company Officeholder				
15-May-2013	FS90	15-May-2013	1	19-Mar-2013	7E5217844
FS90A	Notice That a Product in a Pds Has Ceased to Be Available - By Afs Licensee				
01-May-2013	902	05-Jun-2013	47	02-Apr-2013	028521226
902	Supplementary Document Alters 7E5 149 299				
10-Apr-2013	FS67	10-Apr-2013	1	10-Apr-2013	028227992
FS67	Order Suspending Afs Licence				
22-Mar-2013	484	22-Mar-2013	2	22-Mar-2013	7E5105009
484B	Change to Company Details Change of Registered Address				
28-Feb-2013	5122	01-Mar-2013	1	28-Feb-2013	020500750
5122	Notice of Declaration Re Managed Investment Scheme				
17-Jan-2013	FS90	17-Jan-2013	1	16-Jan-2013	7E4965053
FS90A	Notice That a Product in a Pds Has Ceased to Be Available - By Afs Licensee				
03-Dec-2012	FS90	03-Dec-2012	2	04-Oct-2012	7E4885393
FS90A	Notice That a Product in a Pds Has Ceased to Be Available - By Afs Licensee				
28-Nov-2012	878	28-Nov-2012	1	28-Nov-2012	027957724
878	Notice of Australian Offer Under Foreign Recognition Scheme				
07-Nov-2012	FS88	07-Nov-2012	3	07-Nov-2012	7E4833611
FS88A	Pds In-Use Notice - By Afs Licensee				
02-Nov-2012	878	02-Nov-2012	2	02-Nov-2012	7E4824597
878	Notice of Australian Offer Under Foreign Recognition Scheme				
02-Nov-2012	FS88	02-Nov-2012	3	02-Nov-2012	7E4824598
FS88A	Pds In-Use Notice - By Afs Licensee				
22-Oct-2012	484	22-Oct-2012	2	22-Oct-2012	7E4797015
484E	Change to Company Details Appointment or Cessation of A Company Officeholder				
05-Oct-2012	388	09-Nov-2012	44	30-Jun-2012	028208422 (FR 2012)
388A	Financial Report Financial Report - Public Company Or Disclosing Entity				
07-Sep-2012	484	07-Sep-2012	2	07-Sep-2012	7E4705266
484E	Change to Company Details Appointment or Cessation of A Company Officeholder				
07-Sep-2012	FS02	07-Sep-2012	26	07-Sep-2012	0L0310250
FS02	Copy of Afs Licence				

06-Sep-2012	FS90	06-Sep-2012	2	31-Aug-2012	7E4701411
FS90A	Notice That a Product in a Pds Has Ceased to Be Available - By Afs Licensee				
27-Aug-2012	FS90	27-Aug-2012	2	18-Jul-2012	7E4678949
FS90A	Notice That a Product in a Pds Has Ceased to Be Available - By Afs Licensee				
27-Aug-2012	FS90	27-Aug-2012	2	16-Aug-2012	7E4678937
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
27-Aug-2012	FS90	27-Aug-2012	2	21-Jun-2012	7E4678920
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
27-Aug-2012	FS90	27-Aug-2012	2	21-Jun-2012	7E4678906
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
27-Aug-2012	FS90	27-Aug-2012	2	18-Apr-2012	7E4678887
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
27-Aug-2012	FS90	27-Aug-2012	2	26-Apr-2012	7E4678876
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
27-Aug-2012	FS90	27-Aug-2012	2	15-Feb-2012	7E4678848
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
27-Aug-2012	FS90	27-Aug-2012	2	05-Dec-2011	7E4678833
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
27-Aug-2012	FS90	27-Aug-2012	2	04-Oct-2011	7E4677637
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
27-Aug-2012	FS88	27-Aug-2012	3	27-Aug-2012	7E4677593
FS88A	PDS IN-USE NOTICE - BY AFS LICENSEE				
09-Aug-2012	484	09-Aug-2012	2	09-Aug-2012	7E4644566
484E	CHANGE TO COMPANY DETAILS APPOINTMENT OR CESSATION OF A COMPANY OFFICEHOLDER				
13-Jul-2012	484	13-Jul-2012	2	13-Jul-2012	7E4588883
484E	CHANGE TO COMPANY DETAILS APPOINTMENT OR CESSATION OF A COMPANY OFFICEHOLDER				
05-Jul-2012	878	05-Jul-2012	1	05-Jul-2012	027956096
878	NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME				
29-Jun-2012	878	29-Jun-2012	2	29-Jun-2012	7E4554303

878 NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME

29-Jun-2012 FS88 29-Jun-2012 3 29-Jun-2012 7E4554304
FS88A PDS IN-USE NOTICE - BY AFS LICENSEE

15-Jun-2012 FS02 15-Jun-2012 26 15-Jun-2012 0L0310084
FS02 COPY OF AFS LICENCE

04-Jun-2012 878 04-Jun-2012 1 04-Jun-2012 027954654
878 NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME

04-Jun-2012 878 04-Jun-2012 1 04-Jun-2012 027954653
878 NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME

01-Jun-2012 878 01-Jun-2012 2 01-Jun-2012 7E4492353
878 NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME

01-Jun-2012 FS88 01-Jun-2012 3 01-Jun-2012 7E4492354
FS88A PDS IN-USE NOTICE - BY AFS LICENSEE

01-Jun-2012 878 01-Jun-2012 2 01-Jun-2012 7E4492327
878 NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME

01-Jun-2012 FS88 01-Jun-2012 3 01-Jun-2012 7E4492328
FS88A PDS IN-USE NOTICE - BY AFS LICENSEE

30-May-2012 878 30-May-2012 1 30-May-2012 027954594
878 NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME

28-May-2012 878 28-May-2012 2 28-May-2012 7E4479732
878 NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME

28-May-2012 FS88 28-May-2012 3 28-May-2012 7E4479733
FS88A PDS IN-USE NOTICE - BY AFS LICENSEE

30-Mar-2012 878 30-Mar-2012 2 30-Mar-2012 7E4369372
878 NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME

30-Mar-2012 FS88 30-Mar-2012 3 30-Mar-2012 7E4369373
FS88A PDS IN-USE NOTICE - BY AFS LICENSEE

30-Mar-2012 878 30-Mar-2012 2 30-Mar-2012 7E4369336
878 NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME

30-Mar-2012 FS88 30-Mar-2012 3 30-Mar-2012 7E4369337
FS88A PDS IN-USE NOTICE - BY AFS LICENSEE

29-Mar-2012 484 29-Mar-2012 2 29-Mar-2012 7E4367220
484E CHANGE TO COMPANY DETAILS APPOINTMENT OR CESSATION OF A
484E CHANGE TO COMPANY DETAILS APPOINTMENT OR CESSATION OF A COMPANY OFFICEHOLDER

27-Jan-2012	878	27-Jan-2012	2	27-Jan-2012	7E4240824
878	NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME				
27-Jan-2012	FS88	27-Jan-2012	3	27-Jan-2012	7E4240825
FS88A	PDS IN-USE NOTICE - BY AFS LICENSEE				
27-Jan-2012	878	27-Jan-2012	2	27-Jan-2012	7E4240743
878	NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME				
27-Jan-2012	FS88	27-Jan-2012	3	27-Jan-2012	7E4240744
FS88A	PDS IN-USE NOTICE - BY AFS LICENSEE				
17-Nov-2011	484	17-Nov-2011	2	17-Nov-2011	7E4097067
484A1	CHANGE TO COMPANY DETAILS CHANGE OFFICEHOLDER NAME OR ADDRESS				
15-Nov-2011	878	15-Nov-2011	2	15-Nov-2011	7E4091788
878	NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME				
15-Nov-2011	FS88	15-Nov-2011	3	15-Nov-2011	7E4091789
FS88A	PDS IN-USE NOTICE - BY AFS LICENSEE				
27-Oct-2011	484	27-Oct-2011	2	27-Oct-2011	7E4048590
484A1	CHANGE TO COMPANY DETAILS CHANGE OFFICEHOLDER NAME OR ADDRESS				
30-Sep-2011	388	13-Oct-2011	54	30-Jun-2011	026442958
388A	FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR DISCLOSING ENTITY				(FR 2011)
16-Sep-2011	878	16-Sep-2011	2	16-Sep-2011	7E3954068
878	NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME				
16-Sep-2011	FS88	16-Sep-2011	3	16-Sep-2011	7E3954069
FS88A	PDS IN-USE NOTICE - BY AFS LICENSEE				
01-Sep-2011	878	01-Sep-2011	2	01-Sep-2011	7E3920691
878	NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME				
01-Sep-2011	FS88	01-Sep-2011	3	01-Sep-2011	7E3920692
FS88A	PDS IN-USE NOTICE - BY AFS LICENSEE				
18-Jul-2011	878	18-Jul-2011	2	18-Jul-2011	7E3819934
878	NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME				
18-Jul-2011	FS88	18-Jul-2011	3	18-Jul-2011	7E3819935
FS88A	PDS IN-USE NOTICE - BY AFS LICENSEE				
20-May-2011	FS89	20-May-2011	1	20-May-2011	7E3682315
FS89A	NOTICE OF CHANGE TO FEES AND CHARGES IN A PDS - BY AFS LICENSEE				
30-Mar-2011	5122	31-Mar-2011	1	30-Mar-2011	020500654

5122 NOTICE OF DECLARATION RE MANAGED INVESTMENT SCHEME

30-Mar-2011 FS02 30-Mar-2011 26 30-Mar-2011 0L0309025
FS02 COPY OF AFS LICENCE

10-Nov-2010 309 11-Nov-2010 33 22-Oct-2010 027320265
309A NOTIFICATION OF DETAILS OF A CHARGE

10-Nov-2010 309 11-Nov-2010 33 22-Oct-2010 027320264
309A NOTIFICATION OF DETAILS OF A CHARGE

01-Oct-2010 388 08-Nov-2010 63 30-Jun-2010 027353763
388A FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR DISCLOSING ENTITY (FR 2010)

30-Jul-2010 350 03-Aug-2010 3 30-Jul-2010 026641595
350 CERTIFICATION OF COMPLIANCE WITH STAMP DUTIES LAW BY PROVISIONAL CHARGE
Alters 025 130 504

13-Jul-2010 309 13-Jul-2010 36 01-Jul-2010 025130504
309A NOTIFICATION OF DETAILS OF A CHARGE
Altered by 026 641 595

02-Jul-2010 312 05-Jul-2010 6 02-Jul-2010 026600340
312C NOTIFICATION OF RELEASE OF PROPERTY

02-Jul-2010 312 05-Jul-2010 6 02-Jul-2010 026600337
312C NOTIFICATION OF RELEASE OF PROPERTY

02-Jul-2010 312 05-Jul-2010 3 02-Jul-2010 026600336
312C NOTIFICATION OF RELEASE OF PROPERTY

15-Apr-2010 FS88 15-Apr-2010 3 15-Apr-2010 7E2831759
FS88A PDS IN-USE NOTICE - BY AFS LICENSEE

15-Apr-2010 484 15-Apr-2010 2 15-Apr-2010 7E2830546
484 CHANGE TO COMPANY DETAILS
484O CHANGES TO SHARE STRUCTURE
484G NOTIFICATION OF SHARE ISSUE

25-Mar-2010 484 26-Mar-2010 3 25-Mar-2010 1F0292823
484A1 CHANGE TO COMPANY DETAILS CHANGE OFFICEHOLDER NAME OR ADDRESS

23-Mar-2010 FS02 23-Mar-2010 25 23-Mar-2010 0L0307664
FS02 COPY OF AFS LICENCE

17-Mar-2010 2205 19-Mar-2010 7 30-Sep-2009 026421806
2205B NOTIFICATION OF RESOLUTION RELATING TO SHARES CONVERT SHARES
INTO LARGER OR SMALLER NUMBER

12-Mar-2010 FS90 12-Mar-2010 2 12-Mar-2010 7E2762221
FS90A NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE

11-Nov-2009	5120	12-Nov-2009	7	11-Nov-2009	020500491
5120	NOTICE OF EXEMPTION RE MANAGED INVESTMENT SCHEME				
11-Nov-2009	5120	18-Nov-2009	0	11-Nov-2009	020500486
5120	NOTICE OF EXEMPTION RE MANAGED INVESTMENT SCHEME				
28-Oct-2009	350	29-Oct-2009	2	28-Oct-2009	024981690
350	CERTIFICATION OF COMPLIANCE WITH STAMP DUTIES LAW BY PROVISIONAL CHARGE Alters 025 004 000				
30-Sep-2009	388	27-Oct-2009	59	30-Jun-2009	023417762
388A	FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR DISCLOSING ENTITY				(FR 2009)
10-Sep-2009	312	11-Sep-2009	3	10-Sep-2009	025003997
312C	NOTIFICATION OF RELEASE OF PROPERTY				
10-Sep-2009	311	11-Sep-2009	29	04-Sep-2009	025003998
311B	NOTIFICATION OF CHANGE TO DETAILS OF CHARGE				
10-Sep-2009	309	11-Sep-2009	43	07-Sep-2009	025004000
309A	NOTIFICATION OF DETAILS OF A CHARGE Altered by 024 981 690				
19-Aug-2009	878	07-Apr-2010	57	19-Aug-2009	026070205
878	NOTICE OF AUSTRALIAN OFFER UNDER FOREIGN RECOGNITION SCHEME				
12-Jun-2009	FS89	12-Jun-2009	1	12-Jun-2009	7E2239769
FS89A	NOTICE OF CHANGE TO FEES AND CHARGES IN A PDS - BY AFS LICENSEE				
27-May-2009	FS02	27-May-2009	26	27-May-2009	0L0501962
FS02	COPY OF AFS LICENCE				
07-May-2009	FS88	07-May-2009	3	06-May-2009	7E2173585
FS88A	PDS IN-USE NOTICE - BY AFS LICENSEE				
14-Apr-2009	5120	08-May-2009	5	14-Apr-2009	024672203
5120	NOTICE OF EXEMPTION RE MANAGED INVESTMENT SCHEME				
14-Apr-2009	5122	08-May-2009	5	14-Apr-2009	024672204
5122	NOTICE OF DECLARATION RE MANAGED INVESTMENT SCHEME				
26-Mar-2009	388	03-Apr-2009	56	30-Jun-2008	025509063
388A	FINANCIAL REPORT FINANCIAL REPORT - PUBLIC COMPANY OR DISCLOSING ENTITY				(FR 2008)
23-Mar-2009	309	24-Mar-2009	38	20-Mar-2009	025477874
309A	NOTIFICATION OF DETAILS OF A CHARGE				
05-Mar-2009	FS90	05-Mar-2009	1	03-Mar-2009	7E2068686
FS90A	NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE				
05-Mar-2009	FS90	05-Mar-2009	2	03-Mar-2009	7E2068666

FS90A NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE

05-Mar-2009 FS90 05-Mar-2009 2 03-Mar-2009 7E2068655
FS90A NOTICE THAT A PRODUCT IN A PDS HAS CEASED TO BE AVAILABLE - BY AFS LICENSEE

THERE ARE FURTHER DOCUMENTS LODGED BY THIS COMPANY. SELECT THE 'ORDER COMPANY DOCUMENTS' OPTION FROM THE ORGANISATIONAL SEARCH SUMMARY SCREEN TO OBTAIN A COMPLETE LIST OF COMPANY DOCUMENTS.

Financial Reports

Balance Date	Report Due Date	AGM Due Date	Extended AGM Due Date	AGM Held Date	Outstanding	
30-Jun-1999	31-Oct-1999	Unknown	Unknown	Unknown	N	016010134
30-Jun-2000	31-Oct-2000	Unknown	Unknown	Unknown	N	015964651
30-Jun-2001	31-Oct-2001	Unknown	Unknown	Unknown	N	017705919
30-Jun-2002	31-Oct-2002	Unknown	Unknown	Unknown	N	019168593
30-Jun-2003	31-Oct-2003	Unknown	Unknown	Unknown	N	019791166
30-Jun-2004	31-Oct-2004	Unknown	Unknown	Unknown	N	020698531
30-Jun-2005	30-Nov-2005	Unknown	Unknown	Unknown	N	022718227
30-Jun-2006	31-Oct-2006	Unknown	Unknown	Unknown	N	022755830
30-Jun-2007	31-Oct-2007	Unknown	Unknown	Unknown	N	024088738
30-Jun-2008	31-Oct-2008	Unknown	Unknown	Unknown	N	025509063
30-Jun-2009	31-Oct-2009	Unknown	Unknown	Unknown	N	023417762
30-Jun-2010	31-Oct-2010	Unknown	Unknown	Unknown	N	027353763
30-Jun-2011	31-Oct-2011	Unknown	Unknown	Unknown	N	026442958
30-Jun-2012	31-Oct-2012	Unknown	Unknown	Unknown	N	028208422

*** End of Extract ***

'DW-6'

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
028227992

Australian Securities and Investments Commission
Corporations Act 2001 section 915B

Notice of Suspension of Australian Financial Services Licence

To: LM Investment Management Limited ACN 077 208 461
FTI Consulting
Corporate Centre One
Level 9
2 Corporate Court
BUNDALL QLD 4217

TAKE NOTICE that under s915B(3)(b) of the Corporations Act 2001 (Act), the Australian Securities and Investments Commission (ASIC) hereby suspends Australian financial services licence number 220281 held by LM Investment Management Limited ACN 077 208 461 (Licensee) until 9 April 2015.

Under s915H of the Act, ASIC specifies that the licence continues in effect as though the suspension had not happened for the purposes of the provisions of the Act specified in Schedule B regarding the matters specified in Schedule A.

Schedule A

The provision by the Licensee of financial services which are reasonably necessary for, or incidental, to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of,:

1. LM Cash Performance Fund ARSN 087 304 032;
2. LM First Mortgage Income Fund ARSN 089 343 288;
3. LM Currency Protected Australian Income Fund ARSN 110 247 875;
4. LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868;
5. LM Australian Income Fund ARSN 133 497 917;
6. LM Australian Structured Products Fund ARSN 149 875 669;
7. The Australian Retirement Living Fund ARSN 162 406 162.

Schedule B

(a) The provisions of Chapter 5C;
(b) The provisions of Chapter 7, other than the provisions in Parts 7.2, 7.3, 7.4 and 7.5.

Dated this 9th day of April 2013

Signed .....
Graeme Darcy Plath, a delegate of the Australian Securities and Investments Commission

'DW-7'

BDO

Tel: +61 7 3237 5999
Fax: +61 7 3221 9227
www.bdo.com.au

Level 10, 12 Creek St
Brisbane QLD 4000
GPO Box 457 Brisbane QLD 4001
Australia

TO THE INVESTOR AS ADDRESSED

27 August 2013

LM FIRST MORTGAGE INCOME FUND
(RECEIVERS AND MANAGERS APPOINTED)(RECEIVER APPOINTED)
ARSN 089 343 288
('the Fund' or 'MIF')

1. Appointment

I write to confirm that I was appointed as the Receiver of the Fund's assets and as the person responsible to wind up the Fund in accordance with its constitution by Order of the Supreme Court of Queensland on 8 August 2013.

I attach a copy of the judgement dated 8 August 2013 and the Court Order dated 21 August 2013 setting out the terms of my appointment.

In summary, the constitution provides that, inter alia, the procedure for the winding up of the Fund is that all assets are converted to money, all properly incurred costs are deducted and the balance of money is distributed to each unit holder in proportion to the unit holder's interests in the Fund.

2. Interaction with other Appointees

As you would be aware, John Park and Ginette Muller were appointed Voluntary Administrators of the responsible entity of the Fund, LM Investment Management Ltd (In Liquidation) ('LMIM'), on 19 March 2013 and subsequently appointed as Liquidators on 1 August 2013. The responsible entity of the Fund remains in place, however whilst I undertake my role as the Court Appointed Receiver to wind up the Fund in accordance with its constitution, the role of the Liquidators will be very limited.

As you would also be aware, Joseph Hayes and Anthony Connelly of McGrathNicol were appointed Receivers and Managers of the responsible entity of the Fund by Deutsche Bank AG on 11 July 2013. The Receivers and Manager's role is to realise sufficient assets of the Fund to repay the debt due to Deutsche Bank AG pursuant to their facility agreement.

BDO and McGrathNicol are working together to ensure the objectives of their respective appointments are achieved as efficiently as possible.

BDO

3. MIF Feeder Funds

The Feeder Funds to the MIF include the LM Wholesale First Mortgage Income Fund ('WFMIF'), the LM Currency Protected Australian Income Fund ('CPAIF) and the LM Institutional Currency Protected Australian Income Fund ('ICPAIF').

Trilogy Funds Management remain the responsible entity for the WFMIF and LMIM remains the responsible entity for CPAIF and ICPAIF.

Since my appointment, several investors of the feeder funds have queried with me if they will be subject to the additional fees and expenses of the feeder funds when compared to investors who have invested directly with MIF.

Unfortunately, as I am not in control of these funds and as certain tasks are required to be undertaken by the relevant responsible entities in administering the funds and distributing funds to investors, there will be additional costs deducted from amounts paid to investors of the feeder funds.

4. Reporting to Investors

I intend to provide update reports to investors with respect to the status of the winding up of the Fund initially on a monthly basis. The update reports will include an estimated return to investors along with the anticipated timing of future distributions.

At this stage, several valuations of the underlying assets of the Fund are yet to be received.

I have had meetings with FTI in relation to the assets of the Fund and the estimated return to investors. They have prepared a detailed file for each asset and associated cash flows and including their estimated timing of sale of each asset. This file has not yet been made available to me to assist in determining an estimated return to investors. This will be commented on further in my next report when I will provide an estimated return to investors.

The update reports along with other information (including frequently asked questions) with respect to the winding up of the Fund will be posted to the following website:

www.lmfmif.com

The update reports will also be distributed to investors in accordance with the preferred method of correspondence recorded for each investor on the Fund's database. In order to assist in reducing distribution costs, it would be appreciated if as many investors as possible could provide an email address in this respect.

5. Queries

Should unit holders require further information, please contact either Investor Relations or BDO on the details provided below.

Investor Relations

Phone:+61 7 5584 4500

Toll Free: 1800 062 919

Fax: +61 7 5592 2505

Email: mail@lmaustralia.com

BDO

GPO Box 457

Brisbane QLD 4001

Phone: +61 7 3237 5999

Fax: +61 7 3221 9227

Email: enquiries@lmfmif.com

Yours faithfully

David Whyte
Receiver

SUPREME COURT OF QUEENSLAND

CITATION:	*RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192
PARTIES:	RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE (Applicants) v LM INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND (First Respondent) and THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (Second Respondent) and ROGER SHOTTON (Third Respondent) and AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION (Intervener)
FILE NO/S:	BS 3383 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	15, 16, 17 and 30 July 2013
JUDGE:	Dalton J
ORDER:	1. Application filed 15 April 2013 dismissed 2. Order that the first respondent wind up the LM First Mortgage Income Fund. 3. Order that Mr David Whyte, liquidator, is appointed to take responsibility for the winding-up of the LM First Mortgage Income Fund.

4. **Order that Mr David Whyte, liquidator, be appointed receiver of the property of the LM First Mortgage Income Fund.**

5. **Consequential Orders and directions.**

CATCHWORDS:

Corporations Act 2001 (Cth)
Corporations Regulations 2001 (Cth)

ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor [2002] NSWSC 310
ASIC v Wellington Investment Management Limited & Anor [2008] QSC 243
Capelli v Shephard (2010) 77 ACSR 35
Everest Capital Limited v Trust Company Ltd [2010] NSWSC 231
Handberg v Cant [2006] FCA 17
In Re Gordon [2005] FCA 950
Re Giant Resources Limited [1991] 1 Qd R 106, 117
Re Orchard Aginvest Ltd [2008] QSC 2
Re Stacks Managed Investments Ltd [2005] NSWSC 753
Re Stewden Nominees No 4 Pty Ltd [1975] 1 ACLR 185, 187
Shanahan v Scott (1957) 96 CLR 245, 250
Shephard v Downey [2009] VSC 33

CORPORATIONS – MANAGED INVESTMENT SCHEME – RESPONSIBLE ENTITY – where the applicants applied to have a temporary responsible entity appointed pursuant to ss 601FN and 601FP or reg 5C.2.02 – whether the application ought to be granted

CORPORATIONS – MANAGED INVESTMENT SCHEME – WINDING-UP – APPLICATIONS FOR WINDING-UP BY THE COURT – where a member of the fund and ASIC applied for orders pursuant to ss 601ND and 601NF – whether the first respondent should be directed to wind up the fund – whether it was necessary for an appointment pursuant to s 601FN(1) – appointment of receiver pursuant to s 601FN(2)

COUNSEL:

PH Morrison QC, with P Ahern, for the applicants
JC Sheahan QC, with S Cooper, for the first respondent
P Hastie for a member of the second respondent
DR Tucker (Solicitor) for the third respondent
RM Lilley QC, with SJ Forrest, for the intervener

SOLICITORS:

Piper Alderman for the applicants
Russells for the first respondent
Synkronos Legal for a member of the second respondent
Tucker & Cowen for the third respondent
Australian Securities and Investments Commission for the intervener

[1] This matter was commenced by originating application, adjourned twice, and came on in the civil list. By the time of the hearing two further applications had been made, one by ASIC, intervening, and one by a unit holder, Shotton. All applications were heard together over three days.

[2] The originating application was directed to the first respondent, a company in voluntary administration, which is the responsible entity of a managed investment scheme under the *Corporations Act* 2001 (Cth) (the Act), First Mortgage Income Fund, (FMIF or the fund). FMIF invested by lending on the security of mortgages to borrowers who developed real property. There are three associated feeder funds to FMIF, one is controlled by Trilogy Funds Management Limited (Trilogy) as responsible entity. Two are controlled by the first respondent as responsible entity, one of these is named Currency Protected Australian Income Fund (CPAIF). As well, there is a service company to the funds, LM Administration Pty Ltd (Administration). The same voluntary administrators were appointed to Administration as the first respondent. In a coda to the principal hearing the matter was mentioned again on 30 July 2013 and new material showed that at the second meeting of creditors of Administration, held on 26 July 2013, liquidators unconnected with the current administrators of the first respondent were appointed to Administration.

[3] The fund was established in 1999, it was successful in attracting investment – in February 2008 it was said to be worth over $700 million. It was adversely affected by the GFC. By June 2011 it had assets of $450 million; by June 2012 this had declined further to around $340 million, and again to $320 million by 31 December 2012. The only assets of the scheme are loans made to borrowers and all of those are in default. The net loss attributable to unit holders in 2011 was $77 million, and in 2012, $88 million.

[4] From 2009 the scheme had greatly reduced activities: in March it declined new applications to buy units; in October it suspended redemptions from the fund, the applicant concedes this was apparently on the basis that the fund was illiquid. Its unit value in November 2012 was said to be 59 cents; each unit had been worth one dollar on issue. In December 2012, before administrators were appointed, the responsible entity of the fund implemented a "go forward" strategy. The name was Orwellian in that this strategy involved an orderly sale of all remaining fund assets and a pro rata distribution of the proceeds (after repaying debt) to unit holders with the aim of returning investors' capital investment to them as quickly as commercially possible. In announcing this new strategy the responsible entity said that it had determined that the fund was not liquid for the purpose of the withdrawal provisions under the Act.

[5] Voluntary administrators were appointed to the first respondent, responsible entity of the fund, on 19 March 2013, on the basis of a board resolution that the company was insolvent or likely to become insolvent. I accept that the administrators are independent of the previous directors – Court Document 46, paragraphs 35-36.

[6] The administrators held a first meeting of creditors on 2 April 2013. No deed of company arrangement has been proposed and there is little likelihood of one being proposed. The second meeting has not yet been held. The likelihood appears that

the first respondent company will be put into liquidation within a month. It is expected that the current administrators will act as its liquidators.

[7] On 11 July 2013 Deutsche Bank AG appointed receivers over the assets and undertakings of the scheme. Deutsche Bank is owed around $30 million. There are sufficient assets in the scheme to found an expectation that Deutsche Bank will recover all amounts owing and depart, leaving significant assets still in the scheme. The current administrators of the first respondent have resolved to wind up FMIF, but are restrained from doing so until this proceeding is determined.

Trilogy Originating Application

[8] The originating application was filed on 15 April 2013. It sought, pursuant to ss 601FN and 601FP of the Act or alternatively reg 5C.2.02 of the *Corporations Regulations* 2001 (Cth), that Trilogy be appointed as temporary responsible entity of the FMIF.[1] It was common ground at the hearing of the application that Trilogy had indemnified the named applicants to this proceeding. The named applicants are small unit holders of the scheme (0.029 per cent of the issued units). Counsel appearing for the applicants expressly said that he was providing the view of Trilogy to the Court.[2] I will refer to the originating application as the Trilogy application.

Competence

[9] Section 601FN of the Act provides:

> "ASIC or a member of the registered scheme may apply to the Court for the appointment of a temporary responsible entity of the scheme under section 601FP if the scheme does not have a responsible entity that meets the requirements of section 601FA."

[10] Section 601FA of the Act provides:

> "The responsible entity of a registered scheme must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme."

[11] The applicant said the first respondent no longer held an Australian financial services licence which authorised it to operate a managed investment scheme. This was said to be due to ASIC's having issued a notice to the first respondent:

> "TAKE NOTICE that under s 915B(3)(b) of the Corporations Act 2001 (Act), the Australian Securities and Investments Commission (ASIC) hereby suspends Australian financial services licence number 220281 held by LM Investment Management Limited ... (Licensee) until 9 April 2015.
>
> Under s 915H of the Act, ASIC specifies that the licence continues in effect as though the suspension had not happened for the purposes of the provisions of the Act specified in schedule B regarding the matters specified in Schedule A.
>
> Schedule A

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1 The application sought alternative relief under the *Trusts Act* 1973 which was not pursued before me.

2 t 3-25.

> The provision by the Licensee of financial services which are reasonably necessary for, or incidental, to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of ... LM First Mortgage Income Fund ..."

[12] The word "operate" is not defined in the Act. It was considered by Davies AJ in *ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor*.[3] In that case ASIC brought proceedings against the defendant which had duped investors into paying large amounts of money purportedly as investments in something which was held to be a managed investment scheme within the meaning of s 9 of the Act. An issue in the case was whether or not the sole director of Pegasus had contravened the Act by operating the unregistered managed investment scheme. Davies AJ noted that the word "operate" should be given its ordinary English meaning; referred to the Oxford English Dictionary, and remarked that, "The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme."[4] The conclusion that the sole director and directing mind of Pegasus, the person who formulated and directed the scheme and the sole person involved in its day-to-day operations, was the person who operated it was unremarkable.

[13] The applicant relied upon the definition of "managed investment scheme" in s 9 of the Act; the constitution of the first respondent company, and various other provisions, including various of the s 601 provisions of the Act to show that a very wide range of matters could be comprehended by, or included in, the concept of operating a managed investment scheme. No doubt that is so. It does not follow that, because under the terms of ASIC's suspension of 9 April 2013, the first respondent was limited in the activities it could perform, that it did not operate the managed investment scheme after 9 April 2013. Its operation of the scheme after 9 April 2013 was limited, but continuing. The word "operate" is a word of wide import and it must take its meaning in any particular case from all the relevant circumstances, including the nature of the fund, and the financial position of the fund. From 2009 there had been significant limits on the operation of the fund as financial circumstances excluded more and more of the potential activities open to an operator of the fund. No doubt the ASIC notice of 9 April 2013 further limited what could be done by way of operation of the fund, but as a matter of ordinary English and practical reality that notice did not bring the first respondent's operation of the fund to an end. What it has done since then no doubt falls within the concept of operation of a managed investment scheme, and the first respondent no doubt continues to bear the obligations and duties associated with such operation. It follows that the applicant is not able to rely upon s 601FN to bring this application.

[14] The alternative basis relied upon by the applicant was reg 5C.2.02 of the *Corporations Regulations* which provides:

> "ASIC, or a member of a registered scheme, may apply to the Court for the appointment of a temporary responsible entity of the scheme if ASIC or member reasonably believes that the appointment is necessary to protect scheme property or the interests of members of the scheme."

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3 [2002] NSWSC 310.

4 Above, [55].

[15] The structure of the regulations is such that Part 5C.2, headed "The responsible entity" corresponds, on its face, with Part 5C.2, Division 2 of the Act headed "Changing the responsible entity", ss 601FJ-601FQ. The only provision of the Act allowing ASIC or a member to apply for the appointment of a temporary responsible entity is s 601FN, just discussed. It would seem therefore that reg 5C.2.02 goes beyond the Act in that it purports to give rights greater than, or inconsistent with, those provided for in s 601FN – see s 1364 of the Act, and *Shanahan v Scott*.[5] This point is reinforced by the fact that the regulation provides only that a member may apply to the Court, and s 601FP of the Act gives the Court power to appoint a temporary responsible entity only on application under s 601FL (not relevant to this part of the argument) or s 601FN.

[16] The position is somewhat complicated by the last section in Chapter 5C of the Act, s 601QB, which provides that:

> "The regulations may modify the operation of this Chapter or any other provisions of this Act relating to securities in relation to:
> (a) a managed investment scheme; or
> (b) all managed investment schemes of a specified class."

[17] Regulations 5C.1.03 and 5C.11.02 both expressly purport to modify the operation of Chapter 5C of the Act in accordance with s 601QB of the Act. However, there is no requirement in s 601QB that any regulation made pursuant to it expressly state that it is modifying the operation of the chapter pursuant to the section. Having regard to the plain terms of s 601QB, I do not think it is necessary that a regulation expressly do this before it can be valid.

[18] Nonetheless s 601QB is not a plenary power to modify, but only a power to modify provisions, "relating to securities". Securities is defined at s 92(1)(c) to include "interests in a managed investment scheme". Other securities, as defined by s 92 include debentures, stocks, bonds, shares or units. At s 9 a managed investment scheme is defined as having (inter alia) the feature that "people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme ...". While the word "interest" or "interests" is not strictly defined, this part of the definition of managed investment scheme, together with the other types of securities defined by s 92 of the Act, shed some light on how the word "interests" in s 92(1)(c) is to be understood. An interest in a managed investment scheme is something analogous to (if less defined than) a share in a company.

[19] Turning again to the terms of s 601QB, I cannot see that reg 5C.2.02 is a regulation which purports to modify a provision of the Act relating to securities. I do not think that s 601FN could be characterised as a provision of the Act relating to securities, notwithstanding it gives rights to members of managed schemes, who no doubt have interests in them, which would amount to securities within the meaning of s 92(1)(c) of the Act. Again by way of analogy, were the provisions dealing with companies, I would not characterise a provision along the lines of s 601FN as a provision relating to shares in a company merely because it gave a remedy to shareholders (along with ASIC). My view therefore is that reg 5C.2.02 does not authorise the application brought by the Bruces.[6] The applicant relied upon a short report, *In Re Gordon*.[7]

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5 (1957) 96 CLR 245, 250.

6 See the doubts expressed by Applegarth J in *Re Equitilrust Ltd* [2011] QSC 353 [7], correctly in my view.

7 [2005] FCA 950.

The report does not contain any of the reasoning processes of the judge who made the order and does not reveal whether or not the validity of reg 5C.2.02 was in issue before him. For these reasons, I do not regard the report as helpful.

[20] Having regard to my conclusions in relation to s 601FN and reg 5C.2.02, the application brought by the Bruces ought to be dismissed as incompetent.

Discretion

[21] Even had I power to do so I would not appoint Trilogy as temporary responsible entity. Section 601FP(1) allows the Court to appoint a company as temporary responsible entity if the Court is satisfied that the appointment is in the interests of members. If reg 5C.2.02 were valid, it would additionally direct my attention to whether or not it was necessary to protect scheme property.

[22] Section 601FQ(1) provides that a temporary responsible entity is just that. It must call a members' meeting for the purpose of the members choosing a company to be a new responsible entity. This meeting must be held "as soon as practicable" and in any event within three months of it becoming the temporary responsible entity. This will inevitably involve cost for the fund. Section 601FQ(2) provides the opportunity for more than one meeting and for applications to be made to Court. Independently, s 601FQ(5) provides that if the temporary responsible entity forms the view that the scheme ought to be wound up, it must apply to Court for such an order. There is a likelihood that any person objectively looking at this scheme would need to make such an application. Further, having regard to the way this litigation has been conducted and the history of the 13 June 2013 meeting (see below for both topics), in my view there is a distinct possibility that there would be contention and indeed litigation about any meeting held to appoint a new responsible entity.

[23] Trilogy hoped that it would be appointed as a permanent responsible entity by the meeting required by s 601FQ(1). However, I cannot see it is in the interests of the members of the FMIF to become caught up in a process which provides an interim solution which will inevitably involve more expense by way of meeting (s 601FQ(1)), and may involve further expense by way of Court action, with the inevitable disclocation, uncertainty and expense which any interim solution must involve.

[24] There are other reasons why I do not regard the appointment of Trilogy as responsible entity as being in the interests of the members of this fund. One very practical one is that the current administrators swear that there is a considerable overlap between the staff of the first respondent and the company Administration which would make it difficult, and I infer, expensive, to hand over to a new responsible entity – Court Document 46, paragraph 63. It seems to me that prima facie those staff who have long knowledge of the business of the fund ought to be working for or with the responsible entity as much as possible in order to preserve corporate memory, competence and save cost.[8] Employees of the first respondent will have a good background knowledge of the loans which are its primary assets,

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8 I note that this is a different argument conceptually from that advanced by the administrators of the first respondent to the effect that if this fund is to be wound up, they ought wind it up because otherwise the time they have spent as administrators since March will, in some part, be lost to the first respondent and this will involve waste of costs. I deal with that argument below at [128].

the properties which provide the first respondent its mortgage securities, and the history of the first respondent's dealing with the borrowers who are currently in default. Further, these employees will have knowledge of the documents and systems of the first respondent. From a practical point of view, it seems to me that this is all very valuable. I accept that uncertainty as to the longevity of this arrangement results from the decision to place Administration into liquidation, and thus to some extent diminishes the weight of this consideration.

[25] Trilogy puts itself forward as having an advantage over other persons proposed to take control of the fund by reason of the fact that it is not staffed by insolvency practitioners, but is a fund manager, with particular experience of distressed funds. I deal with these matters in detail at [37] below. In the end I do not see that there is any great advantage provided by the slightly different perspective which Trilogy's control would provide to the responsible entity. In fact, given that my view is that this fund ought to be wound up – [34]-[43] – it seems to me there is probably a disadvantage in Trilogy not having as much insolvency experience as the other contenders for control, particularly when it seems that there may be contention and litigation involved in the winding-up.

[26] In this case there is no evidence before me that the assets of the FMIF are in danger and need particular protection, except, indirectly, because of conflicts of interests which it is said will become evident if either the first respondent or Trilogy winds up FMIF.

[27] To the extent that the Trilogy application to be appointed temporary responsible entity is based on the idea that someone independent of the first respondent and its administrators ought to be appointed to control the FMIF, that will be achieved by the orders which I propose to make, although they differ from those which the applicant and Trilogy seek. In that regard, I have dealt with the applicant's arguments as to conflicts of interest and the need for independence at [97]ff below.

[28] To some extent, Trilogy will have potential conflicts of interest if it is in charge of the fund because it is the responsible entity of a feeder fund to FMIF. Further, Trilogy has a view that there ought to be litigation by members of the FMIF against the first respondent or its directors. It has engaged Piper Alderman to investigate such claims (as far back as November 2012) and has touted the idea publicly of a class action. There may be claims to be made, and it may be that it is rational to make them, depending on their prospects of success, likely cost and the likely prospect of recovering anything at the end of the day. At present, however, Trilogy has not investigated the matters to any extent[9] and I must say I find its advocacy of such claims prior to any proper assessment rather disconcerting. The first respondent says that Trilogy as a member has a right to claim against the first respondent and its directors if it wishes, but says that it seeks to become responsible entity of the fund so that it does not have to bear the cost of doing this, but can use the fund essentially to bear the expense of such actions. There is I think potential conflict of interest in this.

[29] The applicant advanced a general argument that it was undesirable for the responsible entity of the FMIF to be a company under external administration. There may be arguments to be made in cases where the fund itself will continue to

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9 For example, Court Document 91, paragraph 31.

trade as a going concern (for want of better terms). However, where the fund itself is to be brought to an end and its assets realised for the benefit of members (which should happen even in Trilogy's view), I cannot see that it is particularly undesirable for a responsible entity under external administration to have charge of this fund. It certainly does not outweigh the other factors which I consider bear upon my decision in this regard.

[30] Further, it was argued in a general way that ASIC might in the future act to further limit or wholly cancel the first respondent's financial services licence: there is the potential for breaches of the licence conditions due to the insolvency of the first respondent – see e.g., s 915B(3) of the Act. I do not think there is any realistic basis for present concern about that in circumstances where ASIC is an intervener in this litigation and is content for orders to be made which leave the first respondent as responsible entity, subject to another body being given responsibility for ensuring oversight of the winding-up of the fund.

[31] For all these reasons, I do not think it is in the interest of the members that Trilogy be appointed as temporary responsible entity. Nor, to deal with a submission made by counsel for Trilogy outside its application, do I think Trilogy ought to be appointed to wind up the FMIF, be receiver of the property of the FMIF, or to take responsibility for seeing that the FMIF is wound up.

ASIC Application and Shotton Application

[32] On 29 April 2013 Mr Shotton, a member of the FMIF, filed an application seeking an order pursuant to s 601ND of the Act that the first respondent be directed to wind up the FMIF and that an independent liquidator be appointed to take responsibility for ensuring that the FMIF was wound up in accordance with its constitution – s 601NF(1) of the Act.

[33] The ASIC application is similar. On 3 May 2013 ASIC filed an application seeking orders that the administrators of the first respondent be directed to wind up the fund pursuant to s 601ND(1)(a); that independent liquidators be appointed to take responsibility for ensuring that the fund was wound up in accordance with its constitution pursuant to s 601NF(1); that those liquidators be appointed as receivers of the property of the fund, either pursuant to s 1101B(1) or s 601NF(2) of the Act, and that they have wide powers to exercise as receivers. By the end of the hearing Mr Shotton joined with ASIC in proposing that receivers be appointed as proposed by ASIC.

Winding-up

[34] On 6 May 2013 the administrators of the first respondent resolved to wind up the fund on the basis that it cannot accomplish its purpose – s 601NC of the Act. They have been restrained from commencing the winding-up until this proceeding is resolved. Their position in relation to the first order sought by Shotton and ASIC is that it was unnecessary on the basis that the fund will in any event be wound up.

[35] All parties before the Court except the applicant agreed that the FMIF ought to be wound up. The current administrators depose at some length to the process undertaken by them in making the decision that the fund ought to be wound up. There was no real challenge to the substance of this evidence. Counsel for the

applicant asserted from the bar table that the fund was not insolvent.[10] I cannot determine that on the material before me, and no party advanced a case based on insolvency.

[36] Pursuant to s 601ND(1)(a) I have power to direct a responsible entity to wind up a scheme if it is just and equitable to do so. In this case it seems to me just and equitable to do so. The case law is to the effect that the principles concerning winding-up of companies on the just and equitable ground inform the Court's thinking in applications pursuant to s 601ND.[11] The financial position of the fund has already been outlined. From the end of 2012, if not before, those in charge of the company have been liquidating its assets with a view to returning capital to members. The fund was originally established to provide an investment which would provide regular income to unit holders and a return of capital at maturity – cll 11 and 12 of the constitution. This purpose has failed: there is no income and members can no longer exercise their rights to withdraw their investments in accordance with the constitution.[12]

[37] Trilogy does not advance the case that the fund should continue in a plenary way as a going concern. The point of difference between it and the other parties to this proceeding is that Trilogy puts itself forward as a more suitable person to take charge of the FMIF. It is a fund manager, unlike all the other persons proposed to take charge of the fund, who are insolvency practitioners. Trilogy has put material before the Court which shows that it has experience in dealing with distressed funds, including selling distressed assets to best advantage and dealing with claims against former fund managers. Against this background it is sworn – Court Document 29, paragraph 17 – that Trilogy would seek to: (a) consider selling the assets of the FIMF as appropriate and (b) obtain finance (either by external borrowing or on the sale of assets) to enable the development of some real properties, of which FIMF is mortgagee, to be completed. It is hoped that this second approach might provide higher sale prices than an insolvency practitioner might provide on a liquidation of the fund. In this regard Trilogy has a joint venture with a company named CYRE Trilogy Investment Management Pty Limited which specialises in marketing distressed property assets and assessing whether or not to complete incomplete development projects with a view to obtaining the best purchase price. Trilogy says that it would be advantageous if it were appointed as responsible entity for it would have an untrammelled financial services licence and full powers to pursue development of appropriate assets before sale, including borrowing for this purpose. It says that under its limited licence, the first respondent does not have sufficient power to act in this regard. For the same reason it says that I should not order the FMIF to be wound up.

[38] On behalf of the first respondent, a Mr Corbett swears that he has already performed a great deal of work, as leader of a team which has prepared a detailed analysis of the 27 groups of property over which the FMIF is mortgagee. He says that as part of that exercise he has considered development proposals for the properties. Neither he, nor Mr Wood, on behalf of Trilogy, identifies any particular property which should be developed prior to sale, or gives any detail as to even a class of properties which might be so developed.

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10 See *Capelli v Shephard* (2010) 77 ACSR 35 at [89]ff as to the colloquial concept of insolvency of a managed investment scheme.

11 *Equititrust* (above) at [29] and the cases cited there.

12 cf [13] *Equititrust*, above.

[39] It seems common ground before me that the winding-up of FMIF will take place over years. I do not think that the words of the limited financial services licence granted to the first respondent prohibit it developing property of which the fund is mortgagee in order to obtain a better price for that property in the course of winding-up. ASIC does not agitate such a limitation on this application, and in fact expressly does not prefer Trilogy or the first respondent as responsible entity. If there were to be doubt as to the first respondent's power to borrow or develop a particular property in the course of a winding-up, and there were a plainly sensible proposal in the interests of the fund, I cannot see that ASIC could not either clarify or modify the extent of powers under the limited financial services licence it has granted the first respondent.

[40] Nor am I convinced that making an order that the FMIF be wound up would remove from the person charged with winding-up the power to develop a particular property with a view to sale in the course of winding-up if it were in the interests of the fund. The fund was set up to invest in "mortgage investments" – cl 13.2 of its constitution – and cl 13.6 of the constitution makes it clear that in the ordinary course of its business it could exercise all the powers of a mortgagee. Indeed one would have thought that was a necessary and incidental part of running a business which invested in mortgage investments. The liquidator of a company would normally have the right to carry on the business of a company "so far as is necessary for the beneficial disposal or winding-up of that business" – see s 477(1)(a) of the Act. Here the constitution gives the responsible entity power to "manage the scheme" during the time of a winding-up until such time as all winding-up procedures have been completed and cl 16.7(e) gives such a responsible entity power to postpone the realisation of scheme property "for as long as it thinks fit". Again, if doubt arose about a particular proposal in the future s 601NF(2) allows the Court to make an appropriate direction. At the moment, there are no specific proposals, just some conceptual thinking.

[41] The second activity which Trilogy is keen to pursue is investigation of claims on behalf of the FMIF against the first respondent and/or the previous directors of the first respondent for conduct which is more fully detailed below, but which claims concern changes made to the first respondent's constitution being beyond power; related party transactions between the first respondent and Administration, and claims, perhaps in negligence, for the financial losses which were suffered by the FMIF during 2008 and 2009. These are the type of claims which are normally investigated, and if necessary, pursued by insolvency practitioners during the course of a company winding-up – cf s 477(2)(a) – and I cannot see that the limited financial services licence granted to the first respondent would prevent it from doing this. Nor is the potential existence of such claims a reason why I should not direct that the FMIF be wound up now. Clause 16.7(a) of the constitution obliges a responsible entity winding-up the fund to realise its assets. If there are claims to be made on behalf of the fund (and Trilogy has not investigated the position) then those choses in action would constitute property which the responsible entity, winding-up the scheme, would have power to pursue.

[42] In my view, it is desirable that the FMIF be wound up and its assets realised for unit holders. Further, I think it is desirable that I make an order that this occur. If I do not, the administrators will either need to call a meeting pursuant to cl 16.2(d) of the constitution or give members an opportunity to meet pursuant to cl 16.3(a) of the constitution; see also ss 601NB and 601NC which have very similar requirements.

At a general level, I should not be taken as opposing consulting the members as to the fate of the fund. However, for reasons which will appear from the discussion below, I anticipate at least the possibility that any meeting held pursuant to cl 16 of the constitution would be subject to contention between rival factions within the fund and litigation to test those rival contentions. Further, as my discussion of the 13 June 2013 meeting shows, there is a real possibility that the members will be showered with a great deal of information about rival contentions and that some of it may be misleading. Those circumstances must reduce the quality of the "democracy" invoked, and in my view make it desirable that I ought make an order.

[43] For all the above reasons I will make an order pursuant to s 601ND(1)(a) of the Act.

Appointments under s 601NF(1) and (2)

[44] The real issue joined between ASIC and Shotton on the one hand, and the first respondent on the other, was who ought to wind up the company, or take responsibility for the winding-up, as s 601FN(1) has it.[13]

[45] The first respondent submits that the provisions of Part 5C.9 of the Act make it clear that it is generally to be the responsible entity which winds up a managed investment scheme – ss 601NB, 601NC, 601ND and 601NE. I think this is right.

[46] Sections 601NE and 601NF(1) provide that the scheme is to be wound up "in accordance with its constitution and any orders" which the Court makes under s 601NF(2). There has been some consideration in the cases as to the width of the Court's power under s 601NF(2) to make directions (by order) about how a registered scheme is to be wound up, and I am grateful to Applegarth J for the review which is found in *Equitrust* (above) at [42]-[49], and his own views expressed at [50]ff in that case. While the scope of the power may not yet be fully explored, it is clear that there is not a wholesale importation of the scheme of company liquidation into the area of managed investment schemes. This is consistent, in my view, with the idea that it is generally the responsible entity which winds up the scheme in accordance with its constitution. Certainly this contrasts with e.g., the public aspects of a liquidation.

[47] Section 601NF(1) confers a jurisdiction in the Court to appoint a person other than the responsible entity to take responsibility for the winding-up of a scheme, "if the Court thinks it is necessary to do so". The first respondent submitted that the power of the Court to appoint was more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so. Again I think this correct, as a matter of plain English, against the background that the statute establishes a general regime where it is the responsible entity which will wind up a scheme in accordance with the constitution. It was the view taken by Fryberg J in *Re Orchard Aginvest Ltd.*[14] It was also the view of White J in *Re Stacks Managed Investments Ltd.*[15] Both these judges refused orders which might have been convenient or desirable, but were not necessary. Applegarth J took the

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13 In fact to a large extent this was also the point of the litigation for Trilogy whose primary position was that it would (eventually) have the task of realising the assets of the fund and who the applicant submitted ought be the person who was responsible for liquidating the fund if (contrary to its primary submission) an order to wind up the fund was made.

14 [2008] QSC 2, pp 8 and 9.

15 [2005] NSWSC 753 [50].

same view as to necessity in *Equititrust* at [51], and so did Judd J in *Shephard v Downey*.[16] The circumstances in which it is necessary to appoint will include a case where the responsible entity no longer exists or is not properly discharging its obligations in relation to a winding-up – s 601NF(1).

[48] Both ASIC and Shotton say that it is necessary to appoint someone to oversee the winding-up of FMIF pursuant to s 601MF because the first respondent cannot be relied upon to act in a balanced and impartial way in winding-up a fund where there are potential conflicts of interests and complex questions associated with them. ASIC in particular is concerned about the attitude of the first respondent demonstrated in relation to its calling a meeting of members of the FMIF; its dealings with ASIC, and its conduct in this proceeding. On behalf of Shotton various potential conflicts of interest between the interests of the FMIF, on the one hand, and the first respondent company; and the administrators themselves, on the other hand, were relied upon.[17] Trilogy also made criticism of the meeting and advanced submissions based on potential conflicts for the present administrators, and I deal with these in this part of the judgment. I now deal with each of these factual matters in turn.

Meeting 13 June 2013

[49] In response to receipt of Trilogy's application, the administrators of the first respondent caused a meeting of members of the fund to take place.

[50] Section 252B of the Act provides that the responsible entity of a registered scheme must hold a meeting of the scheme's members to vote on a proposed special or extraordinary resolution, if (inter alia) members with at least five per cent of the votes "that may be cast on the resolution" request it. It might be recalled that, in addition to being the responsible entity of FMIF, the first respondent is the responsible entity of two feeder funds which hold units in FMIF, and that one of the feeder funds is CPAIF. In fact the assets of CPAIF are held by a custodian trustee, the Trust Company. The administrators of the first respondent (as responsible entity of CPAIF) directed the Trust Company to request a meeting of members of FMIF pursuant to s 252B of the Act on the basis that it held 24 per cent of the issued units in FMIF. The Trust Company complied with that request without question, almost immediately, by sending the administrators (in their capacity as responsible entity for FMIF) a request in terms provided to the Trust Company by the administrators. The meeting request proposed two extraordinary, and interdependent, resolutions: (1) to remove the first respondent as the responsible entity of FMIF and (2) to appoint Trilogy in its stead. On this basis the administrators of the first respondent sent a notice convening a meeting.

[51] The administrators' purpose in calling the meeting was made plain in the notice of meeting. They wished to use the meeting as a strategy to defeat or damage Trilogy's prospects on its originating application. The introductory words of the covering letter to the notice of meeting are:

> "A Meeting is being called for the Fund by LM, the current manager.
> LM decided to call the Meeting because a unitholder has made an

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16 [2009] VSC 33 [132]-[133].

17 After the hearing on 30 July 2013, dealing in part with the appointment of independent liquidators of Administration, the conflict points relating to Administration fell away.

application to the Supreme Court of Queensland for Trilogy to be appointed as the Manager of the Fund in place of LM.

LM does not believe that the power of the Court to appoint a temporary or replacement manager can or should be exercised in the circumstances relied upon by Trilogy in its Court application. However, LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy. This is considered preferable to a court determined outcome where over 99% of investors, by value, will have no say in the outcome."

[52] The introduction to the notice of meeting is similar:

"The Meeting is being called by LM Investment Management Limited (Administrators Appointed), the current Manager of the Fund (LM). LM decided to call the Meeting because, following receipt from two unitholders of an application to the Supreme Court of Queensland for Trilogy Funds Management Limited (Trilogy) to be appointed as the Manager of the Fund in replacement of LM, and immediate consultations with ASIC, LM wished to consult Members in the proper forum, with adequate notice.

LM is strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy. LM also wishes to avoid the costs and delay of multiple Court appearances, perhaps appeals, and multiple meetings which are the practically inevitable result of Trilogy's Court application. For example, it is doubtful that the Court has, or will exercise the power to appoint a temporary manager. Appeals are possible. This Meeting is considered preferable to a court determined outcome where there is no meeting, no vote and where, at present, over 99% of members, by value, will have no say in the outcome unless they wish to participate in legal proceedings." (my underlining)

[53] Neither the administrators of the first respondent, the Trust Company nor CPAIF wanted the meeting to pass the two resolutions proposed. The first respondent argued strenuously against the resolutions in material which it distributed to the members of the scheme. For example:

(a) "LM expects that if it remains as manager investors will recover distributions faster and in a greater amount."

(b) "LM also notes that Trilogy (unlike LM) does not hold the correct Corporations Act licence in order to be able to manage your Fund" and "LM has taken legal advice on the adequacy of Trilogy's AFSL. LM is confident that Trilogy's AFSL does not authorise it to operate the Fund."[18]

(c) "Further, in a recent court action involving another Fund managed by LM where there was a proposal to change the Trustee, the court ordered that the full legal costs of each party to the court proceedings should be met from the

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18 Trilogy (at that stage) had no licence to manage foreign currencies which was necessary for management of the FMIF. Trilogy now has an appropriate licence.

assets of the underlying Fund (even though the lawyers had promised they would not charge their clients).

Thus by calling a meeting to vote on the appointment of Trilogy as a replacement Responsible Entity LM is also cognisant that such a move is likely to save significant legal costs for the Fund."

(d) Under the heading "Does LM have the licence to manage the fund?":

"As you may be aware, on 9 April 2013 the Australian Securities & Investments Commission temporarily suspended LM's AFSL for a period of 2 years. However ASIC allowed LM's AFSL to continue in effect as though the suspension had not happened for all relevant provisions of the Corporations Act 2001 (Cth) so to permit LM, under the control of FTI as Administrators, to remain as the responsible entity of all LM's registered managed investment schemes for certain purposes which include investigating and preserving the assets and affairs of, or winding-up, LM's registered management investment schemes.

ASIC's decision to suspend the AFSL but allow LM and FTI to continue in this way, ensures that FTI as administrators may perform their statutory and other duties.

LM has, of course, taken legal advice on its position. LM is confident that its AFSL adequately authorises LM through FTI to continue to control the Fund."

(e) "Deutsche Bank has provided the fund with a secured loan facility since 2010. LM's obligations under the Deutsche Bank facility are secured in favour of Deutsche Bank under an ASIC registered charge over all the assets and undertaking of the Fund. The facility has been progressively reduced by approximately $0.5m per month and now has a loan balance of approximately $26.5m.

If the resolutions are approved in this Notice of Meeting, that will be an Event of Default under the facility agreement with Deutsche Bank, entitling it, for example, to appoint receivers to the Fund. The consequences upon the existing financial arrangements with Deutsche Bank are unknown at this stage.

FTI has the ongoing operational support of Deutsche Bank following the appointment as Voluntary Administrators (even though the appointment of administrators was an Event of Default)."

(f) "There are only three possible outcomes of the administration of LM – a Deed of Company Arrangement, a creditors' voluntary winding-up or (unlikely) LM is returned to the control of the directors. If LM is wound up, its liquidators will have access to the claw-back provisions of the Act – for example, recovery of unreasonable director-related transactions etc. There is room for debate as to whether these provisions could be invoked for the benefit of the Fund; and the administrators have not yet completed the investigation as to any transactions which might be available for the benefit of Members. On 12 April, 2013, the Chief Justice extended the time for the administrators to convene a second meeting of creditors until 25 July, 2013.

> While those matters are not clear, what is clear is that if Trilogy replaces LM as the Responsible Entity of the Fund, it will have no access at all to those provisions for the benefit of Members."

[54] Other less controversial arguments were made, for example, that LM had more familiarity with the assets of the fund than Trilogy, and that changing responsible entities might be expected to slow the process of recovery of assets in the fund. The administrators, using existing LM staff, it was said, were more familiar with the affairs of the fund and less likely to be taken advantage of by those owing money to the fund.

[55] The notice of meeting stated that Trilogy had been invited to participate in the process leading up to the meeting and provide information about itself to members.

[56] The above statements all come from the initial notice of meeting and covering letter dated 26 April 2013. That contemplated a meeting being held on 30 May 2013. However, there intervened correspondence between the first respondent and ASIC, and correspondence between the first respondent and Trilogy, regarding the information given to members, and the validity of the meeting. ASIC and Trilogy rely upon this as further showing that the first respondent, by its administrators, is unsuitable to wind up the FMIF. I deal with that correspondence now. As to the calling of the meeting, it is sufficient to note that the process was technical and somewhat artificial, and that the administrators (in effect) called a meeting to consider two resolutions they opposed.

Dealings with ASIC

[57] The ASIC correspondence needs to be read against a particular background. On 19 April 2013 ASIC became aware of the Trilogy application and was concerned as to the impact that might have on the "efficient resolution of the future of the various funds" of which the first respondent was responsible entity. On 23 April 2013 ASIC met with one of the administrators and the administrators' solicitors. At that meeting the administrators' solicitors suggested that the administrators could call a meeting of members to consider the appointment of a new responsible entity. He said that given a choice between the first respondent and Trilogy, "the first respondent would win".

[58] ASIC too said it preferred a solution not involving litigation and suggested the use of an enforceable undertaking issued by ASIC which obliged the administrators to call a meeting to vote on "resolutions for the appointment of a new responsible entity or that the funds be wound up". There was discussion as to how quickly the administrators could call a meeting and make a final decision as to winding-up. ASIC was concerned that if the enforceable undertaking solution was to be of utility to members it would need to occur sooner rather than later in order to save costs in the litigation, and associated with the appointment of a temporary responsible entity. As part of its discussions with the first respondent on 23 April, ASIC had informed the first respondent that it planned to intervene in the Court proceeding and that if ASIC and the first respondent could agree on the terms of an enforceable undertaking, ASIC would take the position in the litigation that it was preferable for the first respondent to remain as responsible entity.

[59] The next day, 24 April 2013, ASIC forwarded a draft enforceable undertaking to the administrators' solicitors, "for discussion purposes". The draft involved the administrators' undertaking to call meetings of the members of FMIF and:

> "At the meetings referred to in subparagraphs (a) and (b) above, the resolutions put to the unitholders for determination will include resolutions for:
>
> (i) the appointment of a responsible entity over each of the funds; and
>
> (ii) whether the fund should be wound-up and, if so, by whom."

ASIC asked, "Please let me know your clients' comments and proposed amendments. It may be that we think of some additional amendments from our end as well as we consider it further over the public holiday [25 April]."

[60] On 26 April 2013 the first respondent issued the notice of meeting and covering letter discussed above. It informed ASIC of this briefly. It did not give ASIC the material sent to members. The meeting actually convened would not, as ASIC had wanted, deal with the question of winding-up, and it dealt with the question of who would be the responsible entity in a much more specific way than ASIC had proposed. Plainly enough it contradicted ASIC's expectation that the administrators would work with ASIC as to what would be put at the meeting. It also contradicted their solicitor saying to an ASIC solicitor earlier on 26 April that he would send a re-drafted version of the enforceable undertaking – affidavit Gubbins filed 15 July 2013, paragraph 6. As well, when ASIC received the notice of meeting it had concerns it was misleading.

[61] On 29 April 2013 the first respondent informed ASIC that it was not willing to enter into an enforceable undertaking and not willing to seek a resolution as to wind up the FMIF – affidavit Hayden filed 15 July 2013, paragraph 31(a). When asked to explain, the administrators said there would be negative connotations for them in entering into an enforceable undertaking and that they did not think it appropriate to seek a resolution from the meeting as to winding-up of the FMIF before a vote on who the FMIF desired as responsible entity. They said that if the meeting rejected Trilogy they would convene another meeting "promptly" to consider and approve any decision they might make to wind up the fund. These decisions were said to have been taken by the administrators after "two days of intensive consultation" with two firms of solicitors and with "other expert advisors".

[62] In an affidavit filed 2 May 2013 the administrator, Ms Muller, swears to a desire to "ensure that our conduct of the [first respondent] was to the extent possible, satisfactory to ASIC ..." – Court Document 46, paragraph 12. And further, "... Mr Park and I have been discussing with ASIC a proposal for undertakings to meet any concerns of ASIC and any 'bona fide' (concerns) of members in relation to the conduct of the fund", paragraph 16. I find it difficult to see this as consistent with the reality of the first respondent's interactions with ASIC. On 21 May 2013, solicitors for the administrators sent an amended draft enforceable undertaking to ASIC. The time for a co-operative solution had well since passed.

Correspondence Prior to 13 June Meeting

[63] To return to correspondence dealing with the proposed meeting, on 8 May 2013 ASIC wrote to the administrators' solicitors calling for an explanation as to various matters raised in the notice of meeting including, as to those matters I have summarised above, how it was that the first respondent thought calling a meeting would save legal costs in relation to the Trilogy application and how the ability of the first respondent to use Part 5.7B of the Act (clawback provisions) was a genuine point of differentiation between the first respondent and Trilogy so far as the FMIF was concerned. The letter also objected to the first set of underlined words at [52] above, which it said implied that ASIC had approved the first respondent's calling the meeting.

[64] As to the saving of costs point, no convincing explanation was provided by the first respondent. It pointed out that at the time of publishing the notice of meeting the Trilogy application had been made but the ASIC and Shotton applications had not. It was said against that background that:

> "It was our client's view that the court would adjourn the Original Proceedings until after the Meeting (at this time we understand that no party to the proceedings suggested that the proceedings were urgent). It was expected that the results of the vote at the Meeting would strongly inform the court proceedings. In addition, it was also thought possible that by convening the Meeting the two unitholders who had commenced the Original Proceedings might discontinue those proceedings and certainly would have if the meeting resolved to appoint Trilogy." – Norton Rose letter 10 May 2013, Court Document 73, p 35 exhibits.

[65] The only realistic way that legal costs would have been saved by calling a meeting was if the meeting voted to appoint Trilogy as temporary responsible entity. The notice distinctly does not say this. Indeed, this is the very result which the first respondent strongly urged members to reject. I think the notice was misleading about cost savings initially and became more so as events unfolded – see the following discussion.

[66] The letter of 10 May 2013 provided no convincing explanation in relation to the concern expressed by ASIC as to the clawback point and rejected ASIC's concern as to the notice implying that the first respondent had ASIC's sanction for its calling the meeting.

[67] ASIC was unconvinced and called upon the first respondent to issue an amended notice addressing its concerns. The first respondent proposed to put further information about the meeting on its website. It provided a draft of the further information it proposed to use to ASIC. By that stage concerns had been raised as to the legal basis on which a meeting seeking to change the responsible entity could be convened. Solicitors acting for the first respondent relied upon ss 601FL and 601FM of the Act.

[68] On 21 May 2013 ASIC called on solicitors acting for the first respondent to either adjourn their meeting until after the date (then) allocated to hear both the Trilogy application and the ASIC and Shotton applications, or alternatively cancel the meeting altogether. ASIC made its request on the basis that the vote of the meeting

would not impact on the majority of competing claims to be determined in the litigation so that the stated reason for convening the meeting – avoiding costs, delay and uncertainty – were inapplicable. It questioned whether s 601FL was applicable to the meeting.

[69] On 27 May lawyers for the first respondent rejected the idea that they would adjourn or cancel the meeting saying:

> "The Meeting will provide an opportunity for members to democratically vote on the direction and future of their fund. There is no logical reason why that opportunity should be taken away from members. Members only other chance to let their views be known to the Court is to appear at the Court hearing which would be a significant financial burden on members, as well as being totally impractical considering the number of members holding units in the FMIF." (my underlining)

Later in the same communication, "Our client's objective in calling the Meeting has been to allow investors to democratically determine who they wish to manage their fund. Our client is committed to this." (my underlining). It was said that if the resolutions were passed that would be the end of the Trilogy application, and if they were not passed, the results would inform the Court on the Trilogy application. The solicitors reiterated reliance on ss 601FL and 601FM of the Act as a basis for the proposed meeting. The solicitors said that the meeting would be adjourned to allow the further explanatory material they proposed to be considered by members and provided further drafts (amended) of that material to ASIC.

[70] From 6 May 2013 solicitors for Trilogy raised matters which went to the validity of the proposed meeting organised by the first respondent – see exhibits 4ff to Court Document 91. Their letters set out clearly, succinctly, and in my view correctly, the reasons why ss 601FL and 601FM of the Act do not allow the proposed meeting (see below). Solicitors for the first respondent made little attempt to meet the legal substance of the points advanced against them, but would not concede the point.

[71] From 6 May 2013 Trilogy actively encouraged members of the feeder fund of which it was responsible entity (around 20 per cent of membership of FMIF) not to participate in the proposed meeting. Further, on 23 May 2013 Trilogy adopted the position that it did not consent to being appointed by any meeting held as a consequence of the first respondent's notice, and called on the administrators to abandon the meeting which it said was not validly called, inutile and an attempted circumvention of Trilogy's court proceedings.

[72] Supplementary information was posted by the first respondent on the FMIF website in the form of a question and answer document dated 27 May 2013. As to the costs and utility of the proposed meeting, the additional information, at question one, rather seems to concede the point that there was little chance that the meeting would, at that stage, save costs or avoid litigation, but a further justification – informing the Court as to the wishes of the members – was raised. For the first time it was stated that the main cost saving would result if the meeting appointed Trilogy as responsible entity. It was still not plainly acknowledged that this was the only realistic scenario in which cost savings could ever have been made. Although Trilogy's lack of consent to being appointed at the meeting was raised, nothing

express was said as to any remaining utility in the meeting given Trilogy's attitude. Instead it was said:

> "It seems that Trilogy prefers to put both you (should you elect to put your views to the Court) and your fund to the significant costs associated with the Court proceedings rather than allow the matter to be determined in the more usual and democratic manner in a meeting of members. This is particularly so given the Court adjourned the proceedings till 15 July in part to allow the meeting to run its course." – Court Document 73, exhibit bundle 15. (my underlining)

[73] While submissions were apparently made on behalf of the first respondent at an interlocutory stage, that the proceeding ought to be adjourned to allow the proposed meeting to occur, I have not seen anything to show that the Court granted an adjournment of the proceeding for this purpose. In fact, counsel for the first respondent conceded it did not.[19]

[74] For the first time, at question six of the 27 May 2013 document, the first respondent clearly stated the limited nature of the licence granted to it by ASIC – i.e., to investigate and preserve, in train of either winding-up the scheme or transferring to a new responsible entity. Until then the information given to members was, in my view, misleading because it implied that the first respondent had a licence which enabled it to continue to manage the FMIF short of a winding-up – see [53(d)] above – and nowhere stated that unless the first respondent wound up FMIF it was obliged to appoint another responsible entity. These were very relevant matters for members to know prior to a vote on the appointment of a new responsible entity.[20]

[75] I assume, in response to ASIC's complaint that the notice of meeting implied ASIC had approved the course, material at question nine of this document stated that the first respondent was "solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting. Prior approval of such Notices by ASIC is not required." That may (or may not) have been apt to dispel the implication of which ASIC originally complained. By the time this statement was published ASIC disapproved in the plainest terms of the meeting and had called upon the first respondent to cancel it. The new statement did not reveal the true position regarding ASIC's attitude to the meeting.

[76] No reference was made to either Trilogy or ASIC's questioning the statutory basis for the meeting. Earlier in the document (at question two) it was stated, "The reason that Trilogy has provided for not consenting is that they believe that the matter should be determined by the Court". In fact Trilogy relied upon its assertions of invalidity as well.

[77] Some information was provided as to the clawback provisions and moderated the statements made in the notice of meeting which claimed that members would be advantaged if the first respondent remained as responsible entity. I note however that the information was not as frank as the view provided to ASIC about this on 1 May 2003, "It is at least hypothetically possible ...". Why the members were being given information about a legally novel, hypothetical advantage is not clear. I

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19 t 1-25.

20 Ms Muller conceded this – tt 1-52-53.

think the clawback information was initially, and remained, misleading in that it implied some real point of distinction between the first respondent and Trilogy.

[78] On 28 May 2013 ASIC again called upon the first respondent to cancel the proposed meeting. It called for more information in train of enquiries as to whether or not the meeting could validly have been called having regard to ss 252B, 601FL and 601FM of the Act.

[79] The meeting was held on 13 June 2013.

Validity of Meeting

[80] The first respondent relied upon two sections of the Act as allowing the meeting of 13 June 2013. Section 601FL(1) provides:

> "If the responsible entity of a registered scheme wants to retire, it must call a members' meeting to explain its reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new responsible entity. ..."

[81] Section 601FM provides:

> "If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity."

[82] Neither s 601FL or 601FM allowed the meeting which took place on 13 June 2013. The opening words of each of those sections describe a circumstance which did not exist. Section 601FL allows a meeting, "if the responsible entity of a registered scheme wants to retire". The first respondent did not want to retire as responsible entity, it wanted to test, or defeat, Trilogy's application to the Court to be appointed as new responsible entity. Section 601FM allows a meeting "if members of a registered scheme want to remove the responsible entity". Here no members of the registered scheme who wished to remove the responsible entity called the meeting. Insofar as there was any relevant state of mind of any member of this scheme, it was the state of mind of the administrators of the first respondent in their capacity as responsible entity of the CPIAL feeder fund, expressed on their behalf by the Trust Company. The desire of the administrators was to remain as responsible entity.

[83] Counsel for the first respondent argued that these introductory words in ss 601FL(1) and 601FM(1) could not possibly be read as a real requirement that there be a subjective intention in terms of the literal meaning of the words. He asked rhetorically how the subjective intention of numerous members who purported to act pursuant to s 601FM(1) might be determined, and what might occur if the intention of some members was different from the intention of others. In terms of s 601FL(1), I think it is quite clear that a subjective intention on the part of the responsible entity is required, for the responsible entity must explain to the members' meeting the reason for its wanting to retire.[21] I do not see any reason for interpreting the introductory words at s 601FM(1) differently.

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21 See *ASIC v Wellington Investment Management Limited & Anor* [2008] QSC 243, per McMurdo J.

[84] In addition, as to s 601FM(1), ASIC says that the feeder fund CPIAL (whether through the Trust Company or otherwise) was not entitled to take action under Division 1 of Part 2G.4 for the calling of a members' meeting because, returning to the words of s 252B(1), above at [50], although CPIAL was a member with more than five per cent of the units in the scheme, it did not have "at least five per cent of the votes that may be cast on the resolution". ASIC says CPIAL was an "associate" of the first respondent within s 15(1)(a) of the Act: it was a person who was in concert with the first respondent in calling the meeting and voting at it. Thus CPIAL was precluded from voting because of the provisions of s 253E:

> "The responsible entity of a registered scheme and its associates are not entitled to vote their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter other than as a member. ..."

[85] It may be accepted that the first respondent had an interest as, and in remaining as, responsible entity of the scheme, which is an interest "other than as a member" for s 253E of the Act.[22] Sections 12, 15 and 16 of the Act, set up a horribly complex scheme for deciding who is an "associate" within the meaning of s 253E. However, it seems to me that the decision of White J in *Everest Capital Limited v Trust Company Ltd*[23] is determinative of the position here. In my view, Trust Company was not entitled to vote at the 13 June 2013 meeting because in voting its interest it was acting as agent of the first respondent. Further, in any event, having regard to the provisions of ss 12, 15 and 16 of the Act, it seems to me that s 15(1)(a) of the Act applies and that the first respondent and Trust Company were relevantly acting in concert, and that, in accordance with the decision in *Everest*,[24] s 16(1)(a) would not apply.

Conclusions as to Meeting and Related Conduct

[86] In my view it is plain that calling the meeting was a tactic by the first respondent which had the aim of seeing off its rival for control of FMIF.[25] Real concerns are raised in my mind by the misleading statements given in the information to members. It is difficult to see any explanation for these matters other than that the first respondent was pursuing its continuing control of the FMIF in a manner which was at odds with the interests of the members. In the absence of any other convincing explanation, I see the choice not to work with ASIC and not to hold a meeting at a time which allowed resolutions as to winding-up at the same time as resolutions as to the responsible entity, in the same light. The initial failure to properly disclose to members the true nature of the limited financial securities licence bears on this last point.

[87] I think it is very significant that when Trilogy's lawyers made a reasoned attack on the statutory basis for the meeting, and when ASIC attacked both the material given to members and the statutory validity of the meeting, the first respondent refused to

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22 This is conceded by Ms Muller – Court Document 79, paragraph 66.

23 [2010] NSWSC 231 [77]ff.

24 [89]ff above.

25 I should be careful in interpreting this (in isolation) as a marker of self-interest in the first respondent's administrators, rather than action in the interests of the members of the fund, because ASIC certainly had a similar strategy in the interests of the members of the fund. Perhaps it is a hindsight view to say that had an applications judge been persuaded to hear the point dealt with at [9] to [20] of this judgment, a much simpler and cheaper solution was available.

moderate its position, except inadequately in the question and answer document. The law as to the validity of the meeting is complex, and misinterpretation of it could readily be forgiven. However, the first respondent made little substantial response to the matters raised by Trilogy and ASIC. I cannot understand why a responsible entity acting solely in the interests of members would not attempt to accommodate or moderate its position in light of those arguments and the objective facts. Certainly by the time Trilogy had refused to consent to any appointment via the meeting,[26] there was no utility in the meeting except perhaps as a poll to inform the Court of what the members wanted. However, given the information which had been provided to members, including the misleading information; the information that Trilogy was not licensed to perform as responsible entity, and the information that Trilogy would not consent to perform as responsible entity if appointed by the meeting, any objective observer must have doubted the meeting's use even as a poll.

[88] From the underlined passages in the extracts at [52], [69] and [72] above, it can be seen that the administrators insisted on the meeting as some sort of democratic right in the members which the Trilogy application was designed to subvert. The evidence of Ms Muller in cross-examination as to the justification for, utility of, and likely outcome of the meeting was similar. She swore, as she had in her affidavit, that she thought there was "an appreciable chance" that Trilogy would be elected as responsible entity by the meeting. In cross-examination she said that was her view at all times up until the vote closed.[27] Unless Ms Muller was using the word "appreciable" to mean "very slight", I have difficulty accepting that was her genuine belief by the time members had been informed that Trilogy (a) did not have a licence to operate as responsible entity; and (b) did not consent to do so. That the first respondent insisted as it did on its position in relation to the meeting when objectively it had become quite untenable to my mind demonstrates that the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions.

Conduct of the Litigation

[89] ASIC made a separate but connected submission that the first respondent's conduct of this proceeding has been over-zealous. It pointed to the volume of material filed on behalf of the first respondent and the scope of issues sought to be agitated.[28] ASIC submitted that there was a disproportion evident when the interests of the unit holders were considered. It was said that a *Beddoe*[29] application ought to have been made. It is right that a responsible entity is a trustee under the Act. It is probably also right that this matter has more of an urgent and commercial flavour than the type of trust matter in which a *Beddoe* application is usually made. Nonetheless, in my view the conduct of the first respondent in this litigation was combative and partisan in a way which I see as reflective of the administrators acting in their own interests to keep control of the winding-up of the FMIF, rather than acting in the interests of the members.

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26 I accept there is no criticism of Trilogy to be made in relation to this stance, it was correct in saying that the meeting was invalidly called.

27 t 1-54.

28 The Court file in this matter to 12 July 2013 showed 102 documents filed. These included affidavits of expert accountants and affidavits of considerable (some unjustifiable) size. There were many more filed by leave at the hearing before me.

29 [1893] 1 Ch 547.

[90] The affidavit of Hellen (Court Document 40) was relied upon by ASIC as an illustration of the attitude it complains of. It was said that the affidavit was at no time likely to provide much assistance to the Court. Mr Hellen gives expert evidence as a forensic accounting specialist, with extensive experience as a liquidator. He was briefed to prepare a report regarding Trilogy's financial position. From Mr Hellen's recitation of his instructions, it appears that solicitors acting for the administrators of the first respondent were concerned about a contingent liability in the amount of $81 million in Trilogy's accounts, and were concerned otherwise to have Mr Hellen identify avenues of further investigation, either in relation to that matter or otherwise, as to whether Trilogy had a sound financial position. Mr Hellen was briefed "on the evening of 29 April 2013" and expresses reservation that he has had "very limited time" to undertake his assessment. His affidavit was filed on 2 May 2013. He heavily qualifies his report, saying that it is based on interim and annual financial reports but he has seen few underlying documents.

[91] Mr Hellen comes to the unremarkable conclusion that if litigation against Trilogy, in which an amount of $81 million was claimed, were to go against Trilogy, Trilogy would be driven either to rely upon insurance or seek indemnity from a managed fund of which it was responsible entity. Mr Hellen could not assist with an opinion as to whether those sources would allow Trilogy to pay a judgment of $81 million. Nor could he give any further useful information about Trilogy's financial position: it had an excess of assets over liabilities and made a small operating profit.

[92] Before the conclusion of the hearing before me, judgment was given in Trilogy's favour in the litigation concerned and an appeal against that judgment was lodged and then withdrawn, so the substance of Trilogy's financial position did not concern me. Had it concerned me, Mr Hellen's report would not have been any more use to me than my own examination of the financial accounts with which he was briefed. Nor really could it have been expected to be. It seems an extravagant use of members' funds.

[93] An associated point is that in contrast to the highly qualified and inconclusive report by Mr Hellen, one of the administrators, Muller, swears at Court Document 46, paragraph 74, that Trilogy will not be able to pay the judgment debt if it loses the relevant litigation. It is hard to see this statement as anything other than unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions. It is significant that it is a statement squarely within Ms Muller's area of professional expertise as a liquidator. Not only that, it is in a part of her affidavit where she swears that material published by Trilogy and its solicitors contains "numerous statements" that are "either false or misleading" – Court Document 46, paragraph 68. There was no argument before me that Trilogy and its solicitors have published false or misleading statements. These are serious allegations, especially when made against professional people. More material of similar flavour is found in the same affidavit at paragraph 77.

[94] Solicitors acting for the first respondent filed an affidavit of over 800 pages – Court Documents 16, 17 and 18 – which was of such marginal relevance that it was not referred to in either written or oral submissions by any party. Further, Court Document 52, which itself has over 100 pages of exhibits, is a solicitor's affidavit which was read on the hearing before me but was little more than combative and querulous commentary on the litigation. Separately, the description in this affidavit of the enormous amount of affidavit material exchanged and the late hours and

weekend work by solicitors, reveals a worrying scenario as to litigation costs in circumstances where the first respondent ought firmly to be keeping in mind the interests of members of an illiquid, and perhaps insolvent, fund.

[95] Ms Muller's affidavit, which is Court Document 79, is characterised by the sort of sniping and argumentative passages which one would hope not to find in any affidavit, let alone an affidavit of someone who is an officer of the Court and a trustee acting on behalf of others – see for example paragraphs 11, 14(c), 22, 66, 75 and 81. It is evident from that affidavit that she is acting very much in the legal arena – she swears responses to written submissions on interlocutory applications and swears to circumstances where she and her solicitor participate in telephone conversations with other solicitors, the content of which conversations was contentious before me.

[96] I will not go on to multiply examples. However, there are many, both in the affidavits filed on behalf of the first respondent, and in the correspondence it and its solicitors undertook.

Conflicts and Potential Conflicts of Interest

[97] In *Re Stewden Nominees No 4 Pty Ltd*[30] Bowen CJ in Eq rejected the appointment of a liquidator who was a member of a firm which had audited the company's accounts in the past. He said that there was the potential for conflict if, for example, the liquidator had to take action which called into question the prior accounts of the company. He said, "It is important that a liquidator should be independent, and should be seen to be independent (*Re Allebart Pty Ltd* [1971] 1 NSWLR 24, at p 30)."

[98] Similarly in *Re Giant Resources Limited*[31] Ryan J said:

> "... a liquidator should not be put in a position where his independence might be open to challenge. It is of the greatest importance that there should be no possibility of criticism attaching to one of the Court's own officers on the ground of a conflict of interest. The liquidator needs to be seen to be independent in any matter which his duties as liquidator may require him to investigate."

[99] Lastly, in *Handberg v Cant*[32] Finkelstein J said:

> "If there are, or are likely to be, disputes between companies in liquidation that are under the control of one liquidator then as a general rule different persons should be appointed as liquidator to each company [authorities omitted]. This is not to say that it is inappropriate to appoint one person as a liquidator of a group of companies or companies that are closely connected [authorities omitted]. But once the likelihood of conflict becomes apparent it is necessary to take action."

[100] Both Shotton and Trilogy advance a number of factual scenarios as illustrating that if the current administrators of the first respondent were to wind up FMIF they would face actual and potential conflicts of interest.

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30 [1975] 1 ACLR 185, 187.
31 [1991] 1 Qd R 107, 117.
32 [2006] FCA 17, [14].

[101] Under the constitution of FMIF the responsible entity is entitled to a management fee of up to 5.5 per cent per annum of the value of the assets of the fund. The administrators swear that they will not pay the first respondent this management fee from FMIF. There would no doubt be difficulties and expense involved in valuing, and throughout the course of a winding-up, revaluing, the assets of FMIF in order to calculate the management fee, but it would not be impossible. In circumstances where both the first respondent and FMIF are being wound up and there is doubt as to the solvency of both, there is at least a potential conflict to be resolved between the desire of the creditors of the first respondent and the interests of the FMIF.

[102] The evidence as to what the administrators will do as to this fee is rather vague and not adequately documented.[33] While the administrators say they have "agreed" not to charge a management fee, I do not know who that agreement was with. I am not convinced that any arrangement they have made in relation to management fees would be sustainable if there were real pressure exerted by creditors of the first respondent.

[103] It has been mentioned that there are three feeder funds to FMIF, two controlled by the first respondent as responsible entity, and one by Trilogy as responsible entity. FMIF categorises its feeder fund members as a separate class of investors (class B investors), as it is entitled to do under its constitution. While the first respondent (before administration) suspended distributions to unit holders from 1 January 2011, there were distributions of nearly $17 million to class B unit holders in the year ending 30 June 2012. From the evidence given before me,[34] it appears this was an accounting exercise, undertaken because the feeder funds accounts did not balance without such a distribution. This rather illustrates that the first respondent (before administrators were appointed) was facing a conflict between its duties as responsible entity of FMIF and as responsible entity of the feeder funds.

[104] It is no criticism of the current administrators that they have not, in the short time available to them, formulated their position in relation to this distribution. The administrators concede that it may need to be investigated and that it may give rise to a claim on behalf of some unit holders of FMIF. "Undoing" the transaction would be difficult because almost $16 million of the distribution has been reinvested into the FMIF on behalf of class B unit holders, diluting the interests of other members. This was conceded by Mr Park in cross-examination, though he swore to the contrary in his affidavit.[35]

[105] I think this issue of distribution to B class shareholders illustrates the potential for conflict between the interests of the feeder funds and the FMIF if one responsible entity has charge of all of them. There is potential for this type of conflict to arise again, including in attempts to undo the 2012 transaction should it be found necessary. In this respect, Trilogy is the responsible entity of one of the feeder funds owning 20 per cent or so of units in the FMIF and the potential for conflict would apply as much if Trilogy were the responsible entity of FMIF, or the liquidator of FMIF.

[106] There are further issues which may arise as between FMIF and the first respondent. In both 2011 and 2012 the fund paid around $5 million to the first respondent as

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33 tt 2-14 – 2-16.

34 See Note 3 to the accounts at p 173 of the exhibit bundle to Court Document 2 and t 2-18.

35 t 2-19.

"loan management fees". There may be a question as to the legitimacy of these payments under the constitution of FMIF, as they seem to be in addition to management fees, and on their face do not seem to have been expenses. Once again the administrators have not yet formed a concluded position as to this, but acknowledge the potential for an overpayment, and acknowledge that the process of reversing the entries may prove to be complex,[36] though again Mr Park originally swore to the contrary.

[107] Trilogy relies upon an affidavit read by the first respondent sworn by Mr Corbett. He swears that the first respondent had not obtained valuations for most of the properties over which FMIF had mortgage security "for at least two years preceding the appointment" of the current administrators. It may thus be that management fees have been based on valuations which are too high. Any claim to recover such overpayments may involve a conflict between duties to the creditors of the first respondent and duties to the members of FMIF if the person liquidating both the first respondent and FMIF is the same person.

[108] Further Trilogy says that from 2002 there were changes made to the constitution of the FMIF without meetings of members, which increased the maximum loan to value ratio for lending by FMIF. It increased from 66 per cent in 2002 to 85 per cent in 2006. The power of the responsible entity to make changes to the constitution without a meeting of members was a limited one – it could only make changes which would not adversely affect unit holders' rights. Trilogy points to this as a potential basis for a claim on behalf of members of the fund against the first respondent, or its directors.

[109] With a broad brush, Trilogy identifies around $168 million of related party transactions which it says, in a very general way, might give rise to the possibility of conflicts between the fund and the first respondent.

[110] Trilogy also says that because of the spectacular collapse of the value of assets under management during 2008-2009 there may be legal claims, for example in negligence, which the FMIF has against the first respondent as responsible entity. On the material before me this seems quite speculative. No proper investigations have been undertaken by any party at this stage. Obviously there is the potential for conflict if such a claim were to be made because it appears that the current administrators will be the liquidators of the first respondent and will have to adjudicate on any proofs of debt lodged by or on behalf of investors in FMIF. Were there to be litigation, they would be on both sides of the record. In that regard I note that the Trilogy interests have been active in lodging proofs in the administration but cannot give any idea as to the quantum of the amounts claimed, or the basis upon which they are said to be owing.

[111] On behalf of Shotton it was said that the responsible entity may have engaged in joint lending between FMIF and other funds controlled by the first respondent as responsible entity before administrators were appointed. On the material before me, this seemed a rather academic proposition.

[112] Counsel for the first respondent emphasises the fact that in all the cases discussed above the conflict of interest identified is potential only, and in some of the cases very little material can be put before the Court. That may be accepted, but I am not

36 t 2-21.

of the view that the matters raised by Trilogy or Shotton are academic or theoretical only.

[113] The administrators say that if it became necessary, because of a conflict, various measures could be put in place to deal with any conflict which actually arose. If a conflict were identified by the administrators, they swear that they would seek legal advice. They swear that an option would be to approach the Court. They swear that a special purpose liquidator could be appointed to the first respondent company if that became necessary. Counsel for the first respondent said that if there were to be litigation between the feeder funds and the first respondent, Trilogy could be appointed as a representative defendant for the feeder funds so that the litigation could continue with an independent contradictor. In any given scenario the administrators postulate solutions involving their preferring to continue as liquidators of the FMIF and jettisoning any other role.

[114] The solicitor appearing for Mr Shotton points out this is consistent with the administrators' desire to retain control of the FMIF. The endeavours of the first respondent do have this flavour about them. At the conclusion of the hearing one of the alternative draft orders they proposed was that the ASIC and Shotton applications be dismissed on the administrators' undertaking to do all things necessary to secure independent liquidators to the first respondent company and to Administration. No notice of any such thing had been given at any prior time during the proceeding, and I was not convinced that there had been any consideration of the separate interests of the first respondent company or Administration,[37] and the effect that such a proposed order would have on those companies in terms, for example, of wasted costs to date. It may be that those companies have less assets than the fund, but I was told that the first respondent company had assets of around $7 million. I had no basis to assess how much of the administrators' planned charges related to the first respondent company and to Administration; what proportion of that would be wasted if new administrators or liquidators were appointed to those companies, and what proportion that waste of cost would bear to the overall picture of those companies' liquidations. It seemed to me that the administrators were acting without regard to the interests of those companies in order to propose a situation where there could be no possibility of potential conflicts clouding their continuing control of FMIF.

[115] Counsel for the first respondent made a submission that it is a fundamental part of any liquidator's task to deal with conflicts of interest which may arise from time to time, including on the adjudication of claims, and in that respect, a liquidator's role can involve adjudication. That is right no doubt as a general proposition. I note that in *Shephard v Downey*[38] Judd J preferred to appoint an independent liquidator rather than a liquidator with similar potential conflicts as raised here. He made the point that, even though it might be possible to manage potential conflicts through undertakings and directions in the future should they arise, his preference was to forestall such a process by having the appointment of someone independent from the start.[39]

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37 See argument as to this at tt 3-40ff.

38 [2009] VSC 33 [134].

39 Note: This discussion of Judd J occurred in circumstances where he had determined (and it was uncontroversial in the case before him) that an appointment ought to be made under s 601NF(1), viz it was necessary that someone be appointed to take responsibility for the liquidation other than the responsible entity because the responsible entity itself conceded it was not capable of undertaking the

[116] The first respondent submitted that the administrators would have a statutory duty as liquidators of the fund to properly investigate and pursue claims against the first respondent and that there was no basis for thinking they would not pursue this duty "independently, professionally and with due care".[40] In my view, the material discussed as to the conduct of the members meeting on 13 June 2013; interaction with ASIC, and the conduct of this litigation do give a basis for thinking otherwise. At paragraph 33 of Court Document 79 Ms Muller swears that she is aware of the need to, "remain astute to ensure that, as the administration continues, no conflicts arise, whether potential or actual. We intend to seek advice from solicitors ..." She names the two firms of solicitors who had charge of the correspondence relating to the 13 June 2013 meeting. At paragraph 34 of that affidavit Ms Muller says, "As I have explained in paragraphs 12-30 above, my and Mr Park's current understanding is there are no such conflicts exist or are likely to arise". I do not think it can be said on any objective view of the evidence that conflicts are not likely to arise. I do not have confidence that the administrators would adequately identify and deal fairly with conflicts if they were to arise.

[117] Were it just that there was a real potential for conflicts of interest to arise in the future, I like Judd J in *Shephard v Downey* – see [115] above – would prefer an independent liquidator for the fund. Like Fryberg J in *Re Orchard Aginvest Ltd* (above), I would see this as desirable. But I would accept, as he did in that case, that that would not be enough to give me power to make an order pursuant to s 601NF(1). It would not be necessary. In this case there is more. The administrators of the first respondent have, in my view, demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*. My view is that they have preferred their own commercial interests to the interests of the fund. This is demonstrated in the conduct I have outlined above in relation to the 13 June 2013 meeting; their dealings with ASIC, and their conduct with this litigation. It extends to the point where both administrators have sworn to matters which they either conceded were wrong in cross-examination – [104] and [106] above – or in my view are not consonant with reality – [62], [88], [93] and [116] above. In a winding-up where conflicts might well arise, and may involve questions of some complexity, I feel no assurance that the current administration would act properly in the interests of members of the fund in identifying those issues or in dealing with them. In my view, that makes it necessary that someone independent have charge of winding-up FMIF pursuant to s 601NF(1) of the Act.

[118] In a submission alternative to his main submission on the hearing, counsel for the first respondent advanced a draft order which would provide for an independent person to have some oversight of the first respondent during the time that the first respondent as responsible entity wound up the FMIF. The idea was that the first respondent would consult with, and report to, that independent person and that the first respondent would not, without the consent of that independent person, bring or defend legal proceedings or dispose of any secured property. The independent person was to be given, "on receipt" any written claim or demand against the fund and have full power to inspect the books and records of the fund. The first

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liquidation. Thus the discussion to which I refer by Judd J occurred in the context where he had found it was necessary to appoint someone, and in those circumstances preferred to appoint someone independent. He did not come to the conclusion that it was necessary to appoint somebody under s 601NF(1) because of potential conflicts of interest.

40 Written submissions, paragraph 60.

respondent offered to comply with any written directions of the independent person as to winding-up of the fund. The submission was that this was the minimum necessary direction to be given under s 601NF(2).

[119] The difficulty I have with the type of reporting envisaged by that order is that it depends, except in some few defined circumstances, on the administrators recognising that a matter is one worthy of report to the independent person, and making a full and fair report of the facts which the independent person would need to judge whether or not action should be taken on behalf of the fund, and whether or not there were conflicts arising which might necessitate action being taken. In addition, it is easier to compel the administrators in such a situation to report positive acts to the independent supervisor than to attempt to define circumstances in which they ought to discuss issues and concerns arising in the winding-up where they propose to take no action. For these reasons I am not convinced that such an order would allay the concerns which the administrators' conduct raises. I think that more is necessary to ensure that the winding-up of the first respondent proceeds regularly in accordance with the constitution of the fund and the law.

Who Ought to be Appointed

[120] There was some controversy as to who ought to be appointed. ASIC nominated liquidators who had the lowest schedule of rates of all those before me. That is certainly something in their favour. Although, when fees are charged on an hourly basis, efficiency and effectiveness in work practices will probably have more impact on the overall bill than rates alone. The costs of ASIC's nominee were not much less than the person put forward by Mr Shotton – David Whyte, liquidator. Trilogy, a major interested party, supported Mr Whyte in the event that it was not appointed, and I think that is of some significance. Mr Whyte, like all the proposed candidates, is well qualified for the job but I note that he has particular experience in a similar fund winding-up pursuant to s 601NF(1) – Equititrust. It was faintly suggested that he had a conflict which would prevent him acting but I do not accept that is so. In all the circumstances, I think he ought to be appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution pursuant to s 601NF(1).

[121] The provision at s 601ND(1) which allows a Court to direct that the responsible entity winds up a scheme, and the provision at s 601NF(1) which allows a Court to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution do not, to my mind, sit happily together. In particular they give the distinct potential for two separate sets of insolvency practitioners to charge a distressed fund. My view in this case is that Mr Whyte should in substance and effect conduct the winding-up of the fund. In *Equititrust* that was the view of Applegarth J and he used a mechanism – constituting the person charged with winding the scheme up as receiver – to give that person the necessary powers. It was not contended by Shotton or Trilogy that I should make any different order in this case. Trilogy said I ought not appoint a receiver because to do so would damage the way the fund was perceived by creditors and by those who might potentially buy its assets. In circumstances where Deutsch Bank has already been appointed as receiver and where the responsible entity of the fund is itself in administration, and likely to be in liquidation, I am not deterred by this consideration. The fact of the matter is that the fund has reached a point where it

must be wound up. I will appoint Mr Whyte receiver of the property of the fund under s 601NF(2) of the Act.

[122] The first respondent argued that receivers ought not be appointed under s 1101B of the Act (on ASIC's application) because the breach which ASIC relied upon to give it power to ask for the appointment of receivers was one committed before administrators were appointed and one which itself did not justify this relief. For those reasons I do not rely upon s 1101B of the Act in appointing Mr Whyte as receiver.

[123] I now deal with two remaining matters raised in argument.

Wishes of the Members

[124] It is uncontroversial that the Court should have regard to the wishes of members of a scheme such as this when deciding its fate. In this regard the first respondent urged that I should interpret the results of the vote of the meeting of 13 June 2013 as indicating that the members did not want Trilogy as responsible entity. Only about 45 per cent of those eligible to vote at the meeting participated in it. Of that group 20 per cent abstained (almost entirely the feeder funds). Of the 25 per cent of members who voted, around 24 per cent voted against the motions. I find the result of the meeting of very limited assistance. Information given to the members by the first respondent before the meeting was misleading in several respects. As well, it was to the effect that Trilogy did not have the correct financial services licence required to run the fund. That was correct at the time but is no longer correct. The members voting at the meeting had been told that Trilogy did not consent to be appointed as responsible entity at the meeting. In those circumstances one wonders that any votes were cast in favour of Trilogy.

[125] Some members of the fund appeared on the hearing. The Bruces have an investment of around $144,000 in the fund. Mr Shotton also has a relatively small investment in the fund. Two additional members – Nunn and Byrne – have small investments in the fund. They supported the first respondent on the application. Mr Nunn apparently worked for the first respondent for eight or nine years.

[126] As responsible entity of the wholesale mortgage income fund Trilogy has around 20 per cent of the total units in the fund, equating to around $74 million worth of units. The balance of the fund (somewhat over 50 per cent) is held by individual investors with investments ranging between $1,000 and $8 million. Trilogy's views are therefore significant.[41]

[127] While I have been astute to recognise the interests of members of the fund, it must be acknowledged that my decision is grounded more on substantive matters than on attempting to implement the wishes of any particular member or group of members.

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41 Trilogy relies upon an affidavit of a solicitor which purposes to show that members support Trilogy as responsible entity. However, it is remarkable for what it does not say. There is no information as to how the members were prompted to express their views or what information they had about the issues in dispute before me. It is of little assistance.

Waste of Work

[128] On behalf of the first respondent it is said that to charge any person other than the current administrators with the winding-up of FMIF would be to waste the cost of the work which the administrators have performed to date. Quite clearly when the nature of the work performed to date is considered, not all of it would be wasted.[42] The current administrators say they would co-operate with anybody who is charged with responsibility of winding-up the fund, and indeed it would be absolutely extraordinary if they did not. The current administrators were appointed in March 2013. They have been restrained from commencing a winding-up pending the outcome of this proceeding. It appears that any winding-up will take some years,[43] so that while there may indeed be waste, the proportion is likely to be small in the overall cost of the winding-up. Fees to date have not been charged, but it is sworn that as at 27 June 2013 the administrators propose to charge the fund $960,756 and an unspecified part of $1,174,399 they have notionally charged to the first respondent company. There is nothing to show what has been achieved for those proposed charges. The administrators accept their charges must be approved by the company or the Court. I very much doubt that most of the costs of the 13 June 2013 meeting would be approved as necessary and appropriate and I have doubts as to some of the costs of this litigation.

[129] Bearing all these points in mind, I cannot see that the potential for some wasted fees would deter me from making an appointment under s 601NF(1).

[130] I will ask the parties to bring in minutes of order. I will hear submissions on costs.

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42 See cross-examination, tt 2-23ff.

43 Ms Muller swears an estimate of three years.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicants:	RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE
	AND
First Respondent:	LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND
	AND
Second Respondent:	THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288
	AND
Third Respondent:	ROGER SHOTTON
	AND
Intervener:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

ORDER

Before:	Justice Dalton
Date:	21 August, 2013
Initiating document:	Application filed 29 April, 2013 by Roger Shotton and Application filed 3 May 2013 by Australian Securities and Investments Commission ("Applications").

THE ORDER OF THE COURT IS THAT:

1. Pursuant to section 601ND(1)(a) of the Corporations Act 2001 (Cth) ("the Act") LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 ("LMIM") in its capacity as Responsible Entity of the LM First Mortgage Income Fund is directed to wind up the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") subject to the orders below.

2. Pursuant to section 601NF(1) of the Act, David Whyte ("Mr Whyte"), Partner of BDO Australia Limited ("BDO"), is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution ("the Appointment").

3. Pursuant to section 601NF(2), that Mr Whyte:-

   (a) have access to the books and records of LMIM which concern the FMIF;

   (b) be indemnified out of the assets of the FMIF in respect of any proper expenses incurred in carrying out the Appointment;

   (c) be entitled to claim remuneration in respect of the time spent by him and by employees of BDO who perform work in carrying out the Appointment at rates and in the sums from time to time approved by the Court and indemnified out of the assets of the FMIF in respect of such remuneration.

4. Nothing in this Order prejudices the rights of:

   (a) Deutsche Bank AG pursuant to any securities it holds over LMIM or the FMIF; or

   (b) the receivers and managers appointed by Deutsche Bank AG, Joseph David Hayes and Anthony Norman Connelly.

5. Pursuant to sections 601NF (2) of the Act, Mr Whyte is appointed as the receiver of the property of the FMIF.

6. Pursuant to sections 601NF (2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to paragraph 5 above, the powers set out in section 420 of the Act.

7. Without derogating in any way from in any way from the Appointment or the Receiver's powers pursuant to these Orders, Mr Whyte is authorised to:

   (a) take all steps necessary to ensure the realisation of property of FMIF held by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF in relation to the property, including but not limited to:

      (i) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate and/or finalise the sale of the property;

      (ii) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;

      (iii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property;

      (iv) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and

(v) executing contracts, transfers, releases, or any such other documents as are required to carry out any of the above; and

(b) bring, defend or maintain any proceedings on behalf of FMIF in the name of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as is necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, including the execution of any documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions.

8. The First Respondent must, within 2 business days of the date of this Order:

(a) send an email to all known email addresses held by the First Respondent for Members of the FMIF notifying of Mr Whyte's appointment, and a copy of this Order; and

(b) make a copy of this order available, in PDF form, on:

(i) its website www.lmaustralia.com, together with a link to the www.bdo.com.au website;

(ii) its website www.lminvestmentadministration.com, together with a link to the www.bdo.com.au website.

9. The costs of the Third Respondent, Roger Shotton, of and incidental to the Applications, including reserved costs, shall be assessed on the indemnity basis, and shall be paid from the FMIF.

10. All other questions of costs of or incidental to the Applications and the Application filed 15 April 2013 by Raymond and Vicki Bruce are adjourned to a date to be fixed by the Court.

IT IS DIRECTED THAT:

11. ~~If any order such as that sought in paragraph 12 of the draft order annexed to the outline of submissions filed by the Third Respondent at the hearing on 21 August 2013, shall be brought by an application to be heard and determined at the same time as the other issues as to costs.~~ Any party wishing to contend that the first respondent is not entitled to indemnity from the funds in relation to the Applications shall file

12. Any application for the costs of complying with subpoenas issued in the proceedings are adjourned to a date to be fixed, and any time limitation imposed by rule 418 (5) of the UCPR is extended pursuant to rule 7 of the UCPR, to allow for the hearing of any such application at the date to be fixed.

Signed:

BDO

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Australia

TO THE INVESTOR AS ADDRESSED

15 October 2013

LM FIRST MORTGAGE INCOME FUND
(RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)
ARSN 089 343 288
('the Fund' or 'MIF')

I refer to my report dated 27 August 2013 and now provide my second update to investors in relation to the winding of up of the Fund, as follows.

1. Refinance of Secured Creditor

Since my last report, I have been trying to secure a refinancing of the secured creditor in order to reduce the ongoing interest costs and avoid any duplication of fees between McGrathNicol and BDO.

I have received an offer from BOQ for a facility of up to $25M in this regard which would result in the interest rate and other costs of the facility reducing from 21% to 12% per annum.

This would result in the retirement of the Receivers and Managers appointed by the secured creditor which will save on any duplication of costs. That said, the Receivers and Managers from McGrathNicol and BDO have been working well together to ensure there was little overlap in this regard.

Based on the cashflows prepared by McGrathNicol from their knowledge of the assets and current status of disposal, and where the funding is forecast to be repaid in full by 31 January 2014, I have estimated that there will be a saving of approximately $300,000 plus any saving in duplication of Receivers costs.

It should be noted however that this is after having to pay a negotiated reduced settlement amount to the secured creditor in respect of a make whole interest payment that had been agreed to by the then Administrators of the responsible entity, John Park and Ginette Muller of FTI on 2 April 2014.

The refinancing however is conditional on KordaMentha, who are trustees of the LM Managed Performance Fund, acknowledging that they will not seek to impugn the BOQ securities and bearing in mind they have put me on notice of a potential claim for breach of duties. KordaMentha have so far refused to provide the requested letter (although are reconsidering their position) and therefore the refinance may not now be able to proceed. I will confirm the position in my next report to investors.

2. Realisation of Assets

In order to avoid duplication of costs and to ensure strategies could be developed for all assets, including those where realisations were unlikely to be achieved during McGrathNicol's appointment, it was agreed between us that BDO would concentrate on seven "longer term" assets in the retirement village and aged care sectors and which represent in excess of 50% of the value of the Fund.

BDO has particular expertise in this sector and I have been assisted by our in house professionals in this respect. To date this has included site visits to the facilities in Victoria, Tasmania, South East Qld and Northern NSW as well as meetings with the management teams at the sites.

Valuations are in course for some of the assets and a review of the historical financial information and forecasts is being undertaken.

McGrathNicol has been progressing with the realisation of the other assets and I have discussed their strategies in relation to each asset so that the management of these matters can be transitioned smoothly.

3. Estimated Return to Investors

Several valuations are awaited on some of the assets in order to better determine the likely return to investors.

Prior to my appointment on 8 August 2013, and as advised in my first report to investors dated 27 August 2013, FTI had prepared a detailed analysis of the estimated cashflows from each asset and the estimated return to investors.

The full file in this respect has not been made available to me however I have received a summary that shows total net cashflows of approximately $185M from the realisation of the assets.

After costs, FTI has estimated a return to investors of approximately 27 cents in the $.

As further valuations are received and assets sold, I will update the estimated return and advise investors as the position changes.

As outlined above, I have not reviewed all of the assumptions used as I have not been in control of the Fund, and the estimate may materially change once I have updated the position.

4. Funds Held in Trust

There is approximately $8M presently held in a solicitors trust account in relation to amounts paid by residents of the retirement villages/aged care facilities to enter into loan/lease arrangements at the centres.

These funds have not been able to be released because the Administrators and Receivers and Managers have been concerned about the ongoing potential personal liability to repay the loans when the resident leaves the centre.

With the agreement of McGrathNicol, I have therefore instructed my solicitors to take the appropriate steps so that I can execute the agreements without incurring personal liability and to allow the funds to be released.

I am hopeful that this may be able to occur within the next month.

5. Audited Accounts

I have been in discussions with FTI and ASIC in relation to whether or not there is a need to undertake an annual audit of the Fund during the course of the winding up.

FTI's initial view was that an audit was required.

There is case law however to support the proposition that an audit is only required upon completion of the winding up.

The cost of the audit for the 2012 financial year was approximately $500,000 and therefore I am keen to ensure unnecessary costs are not incurred to the detriment of investors especially when it could take three or four years to complete the winding up. The saving for investors therefore could be well in excess of $1M.

I am currently awaiting confirmation from the ASIC that they will take no action in relation to the non provision of the audited accounts.

During the course of the winding up I will report all receipts and payments to investors and regularly update the valuations of the assets and estimated return to investors.

6. Appeal Lodged by FTI

I attach correspondence received from Russells solicitors, acting on behalf of the Liquidators of LM Investment Management Ltd (In Liquidation) together with associated correspondence in respect of the Liquidators decision to appeal the court's decision that led to my appointment as Receiver of the fund's assets and person responsible to ensure it is wound up pursuant to its constitution. This also includes correspondence relating to the "make whole" provision agreed to by the Liquidators that was referred to in Russell's correspondence.

The Liquidators have sought for the appeal to be expedited and a hearing date of 28 November 2013 has been set down in this respect.

Investors will note that the notice of appeal at page 9, paragraph 7, has reference to me having a conflict in my duties as I was a liquidator of a debtor company at the time of my appointment.

Although I did not have a conflict of interest under the Corporations Act 2001, to remove any perception of a potential conflict I arranged, at BDO's cost, for a replacement liquidator to be appointed to two borrower entities in this respect.

The judge at paragraph 120 of her judgement dated 8 August 2013 (a copy is on the website www.lmfmif.com) noted that "It was faintly suggested that he had a conflict which would prevent him acting but I do not accept this is so".

BDO

7. Reporting to Investors

Reports will be distributed to investors, initially monthly, in accordance with the preferred method of correspondence recorded for each investor on the Fund's database. In order to assist in reducing distribution costs, it would be appreciated if as many investors as possible could provide an email address in this respect. Please use the details below to advise us in this regard.

8. Receiver's Remuneration and Expenses

I attach a summary of my current remuneration and outlays for the period from my appointment to 4 October 2013. My remuneration incurred during this period totals $151,764.25 plus outlays of $24,753.43 plus GST.

The fees have been incurred in respect of general matters pertaining to our appointment and key areas of the Fund, these being the retirement villages and the refinance of the secured creditor. The work undertaken to date includes;

- Attending the retirement villages/aged care facilities to view the facilities and meet with onsite management;
- Undertake a financial review of the retirement villages to assist in determining the strategy for achieving the optimum return for investors;
- Meetings and correspondence with McGrathNicol and LM staff in relation to the strategies for the realisation of the loan book and in respect of legal actions on foot;
- Negotiations with the secured creditor in relation to the refinancing of the facility;
- Review of facility and security documentation and negotiations and meetings with BOQ, our solicitors and Korda Mentha and their advisors in respect of the refinancing;
- Liaising with the secured creditor to obtain a reduction in their "make whole" provision.

Approval of my fees will be the subject of an application to court in due course. A copy of my application in this respect will be posted to the website www.lmfmif.com and investors will be notified when the application has been lodged.

BDO

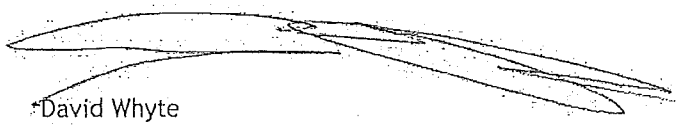
9. Queries

Should unit holders require further information, please contact either Investor Relations or BDO on the details provided below.

Investor Relations
Phone: +61 7 5584 4500
Fax: +61 7 5592 2505
Email: mail@lmaustralia.com

BDO
GPO Box 457
Brisbane QLD 4001
Phone: +61 7 3237 5999
Fax: +61 7 3221 9227
Email: enquiries@lmfmif.com

Yours faithfully



David Whyte
Receiver

REMUNERATION REPORT
LM First Mortgage Income Fund (Receiver Appointed)
8 August 2013 to 4 October 2013

Employee	Position	Rate	Total Units	Total $	Administration		Assets		Creditors		Investigation		Trade On	
					Units	$	Units	$	Units	$	Units	$	Units	$
Fielding, Andrew	Partner	560.00	0.80	448.00	0.60	336.00	0.00	0.00	0.20	112.00	0.00	0.00	0.00	0.00
Whyte, David	Partner	560.00	122.30	68,488.00	13.80	7,728.00	62.70	35,112.00	1.00	560.00	0.10	56.00	44.70	25,032.00
Beauchamp, Margaux	Executive Director	460.00	85.20	39,192.00	2.30	1,058.00	79.90	36,754.00	0.00	0.00	3.00	1,380.00	0.00	0.00
Somerville, John	Senior Manager	425.00	14.00	5,950.00	8.00	3,400.00	3.70	1,572.50	2.30	977.50	0.00	0.00	0.00	0.00
Kedney, Joanne	Manager	390.00	49.30	19,227.00	3.20	1,248.00	41.50	16,185.00	4.10	1,599.00	0.00	0.00	0.50	195.00
Wilson, James	Manager	390.00	1.40	546.00	0.30	117.00	0.20	78.00	0.90	351.00	0.00	0.00	0.00	0.00
Dharmaratne, Michael	Senior Accountant I	310.00	10.60	3,286.00	4.20	1,302.00	2.00	620.00	4.40	1,364.00	0.00	0.00	0.00	0.00
Tipman, Daniel	Senior Accountant I	310.00	0.40	124.00	0.00	0.00	0.00	0.00	0.40	124.00	0.00	0.00	0.00	0.00
Kennedy, Nicola	Accountant II	190.00	3.60	684.00	3.60	684.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Hattingh, Moira	Administration Assistant	75.00	0.30	22.50	0.30	22.50	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	TOTAL		287.90	137,967.50	36.30	15,895.50	190.00	90,321.50	13.30	5,087.50	3.10	1,436.00	45.20	25,227.00
	GST			13,796.75		1,589.55		9,032.15		508.75		143.60		2,522.70
	TOTAL INC GST			151,764.25		17,485.05		99,353.65		5,596.25		1,579.60		27,749.70
	AVERAGE HOURLY RATE			479.22		437.89		475.38		382.52		463.23		558.12

REMUNERATION REPORT
LM First Mortgage Income Fund (Receiver Appointed)
8 August 2013 to 4 October 2013
Outlays

Accommodation	339.56
Postage	6,077.68
Printing/Copying (includes printing charges for first report)	10,185.02
Mileage	113.40
Parking	132.11
Taxi Fares	15.64
Searches	2,616.71
Airfares	1,301.99
LM Website	1,567.27
General	153.73
SUB TOTAL	22,503.11
GST	2,250.32
TOTAL	$ 24,753.43
TOTAL INVOICE	$ 176,517.68

David Whyte

From: David Whyte
Sent: 14 October 2013 12:35 PM
To: 'Park, John'; Muller, Ginette
Cc: Joanne Kedney
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

John

I had delayed responding to you as I had wanted to confirm the refinancing had taken place. BOQ has approved the facility and the facility and security documentation was executed with settlement set for 4 October 2013. Unfortunately this has been delayed awaiting a requested letter from the trustees of the second mortgage fund, KordaMentha and we are awaiting confirmation as to whether or not this will be executed to allow the refinancing to proceed.

I (and my solicitors) disagree with your interpretation of the facility agreement and override deed which were disclosed in the proceedings leading to my appointment. I note however that the letter signed by you was not disclosed in the proceedings whereas it is this letter that gives rise to the additional $3M obligation to the make whole interest provision in the event of a refinancing, not the facility letter or override deed. That is the reason I asked why you considered it was in the best interests of investors to sign the letter.

Regards

David

From: Park, John [mailto:John.Park@fticonsulting.com]
Sent: 25 September 2013 1:50 PM
To: David Whyte; Muller, Ginette
Cc: Joanne Kedney
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

Dear David

Thank you for your email.

I am surprised by what you have written, given the very clear terms of the Deutsche Bank facility, and the circumstances in which it was entered into. I would have expected, given your deep interest in the proceedings pursuant to which you secured your appointment, and your retainer of the solicitor who acted for Mr Shotton (in whose name your solicitor sought your appointment), that you would be intimately familiar with the terms of the facility.

To summarise:-

1. The administrators did not sign the facility letter by which the facility was put in place. The relevant document – the Override Deed - is exhibited to Ms Muller's affidavit sworn 27 June, 2013, marked GDM-15, at page 139 and following. I would have expected your solicitor to have provided this to you or you would have obtained a copy and reviewed this pivotal document following your appointment.

2. The Override Deed is dated and, I understand, was executed on 21 December, 2012. I refer you to the provisions of the Override Deed.

3. We were appointed on 19 March, 2013. We did not execute the Override Deed, or any of the underlying facility agreements.

4. We took legal advice on the terms of the facility and the override deed – no doubt you will take your own advice on the meaning and effect of this deed.

5. We concluded that LMIM is, regrettably, bound by the terms of the facility.

6. The letter you have attached to your email merely acknowledged the terms of the existing facility. It created no new obligations; and it altered no existing obligations. It did limit the recourse of the financier, as per the handwritten note. I expect that you will have had experience of financiers seeking such assurances from external administrators newly appointed to their borrowers. I believe the letter avoided the appointment of receivers and the associated additional costs and asset impairment, which would have ensued had the letter not been signed given our appointment created an event of default. (This was the unfortunate effect of the proceedings in any event.) We note that the facilities deal with receiver realisations and it is a matter for you to structure any proposed refinancing in the interests of investors.

7. The terms of this Deed were the subject of submissions by your solicitor, when he first came into the matter. These submissions were erroneous. I refer you to paragraphs 161 to 163 of LMIM's written submissions at the trial in the proceedings pursuant to which you secured your appointment. I am surprised that your solicitor has not informed you of these matters.

8. We also thoroughly investigated the possibility of refinancing this facility. We were unsuccessful. We would not have expected that you would have been able to do any better, but we would have been pleased for the investors if our expectation had been misplaced.

9. Finally, and while neither defending nor impugning the board's decision to take this facility in the first place, it was plainly open to the board to make the business judgment in the interests of the investors to avoid an external administration, with the possibility of consequent diminution in asset values.

LMIM is the Responsible Entity of the LM First Mortgage Income Fund. It holds the scheme property on trust for the members. We are its liquidators. The above pre-existing issues with the DB facility have been fully ventilated in the court, are readily discernible through enquiry and we trust you have not incurred additional costs for the fund in pursuing the refinancing.

Regards - John

John Park
Leader Australia
Corporate Finance / Restructuring

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+61.7.3225.4999 fax
John.Park@fticonsulting.com

22 Market Street
Brisbane QLD
4000
Australia
www.fticonsulting-asia.com

From: David Whyte [mailto:David.Whyte@bdo.com.au]
Sent: Wednesday, 25 September 2013 7:32 AM
To: Park, John; Muller, Ginette
Cc: Joanne Kedney
Subject: FW: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

John/Ginette

I refer to the below correspondence from Clayton Utz in relation to my request for a payout figure for the Deutsche Bank ("DB") facility and where I have received an offer of finance from BOQ to refinance the facility (at a significantly less interest rate than being paid to DB).

You will see from the payout figure that DB is seeking to impose a "make-whole interest" payment of approximately $3M and is looking to rely on the attached letter executed by the Administrators in order to impose this amount under the facility terms. This is obviously giving us cause for concern and it would not be in the best interests of investors for me to payout the facility if this amount is indeed payable.

Could you please advise of the circumstances leading up to the signing of this letter and why you considered it in the best interests of investors to execute the letter? I am trying to negotiate a different arrangement with DB and therefore would appreciate your early comments in this respect. We are aiming to complete the refinancing on Monday, 30 September.

Regards

David

DAVID WHYTE
Partner
Direct: +61 7 3237 5887
Mobile: +61 413 491 490
David.Whyte@bdo.com.au

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AUSTRALIA
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Fax: +61 7 3221 9227
www.bdo.com.au

From: Bowden, Peter [mailto:PBowden@claytonutz.com]
Sent: 19 September 2013 12:56 PM
To: David Whyte
Cc: 'dtucker@tuckercowen.com.au'; Anthony Connelly (AConnelly@mcgrathnicol.com); jhayes@mcgrathnicol.com; Paul Sweeney (psweeney@mcgrathnicol.com); Ian Niccol (iniccol@mcgrathnicol.com); Poole, Nicholas; LM 1 (FMIF) Activity Report (lm.1@list.db.com); Martin Thomas; Matthew Fruin (matthew.fruin@db.com); Bowden, Peter; Poole, Nicholas
Subject: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

Dear Sir

As you know, we act for Anthony Connelly and Joseph Hayes (the **Receivers**) in their capacity as receivers and managers of the property of LM Investment Management Limited ABN 68 077 208 461 (In Liquidation) (Receivers and Managers Appointed) (**LMIM**) in its capacity as responsibility entity of the LM First Mortgage Income Fund (**Fund**).

The Receivers were appointed by Deutsche Bank AG, Sydney Branch (**DB**).

We understand that you are seeking a payout figure from the Receivers so that DB's debt can be refinanced in full. On that basis, we have been instructed to provide you with a payout figure on the assumption that DB's debt is to be refinanced in full on 30 September 2013.

Accordingly, the relevant payout figure as at 30 September 2013 is **$26,786,835.00** (the **Total Payout Figure**).

The Total Payout Figure comprises the following amounts:

1. DB's debt of $26,096,493.15 (see below) (the **DB Amount**);

2. The Receivers costs of $523,028.00; and
3. Clayton Utz's costs of $167,313.85.

The DB Amount has been calculated as follows:

Start	30-Sep-13
End	30-Jun-14
Days	273
OPB	23,000,000.00
Interest rate	18%
Interest convention	365
make-whole interest	3,096,493.15
Total due to DB	$26,096,493.15

For the avoidance of doubt, we confirm that the DB Amount is inclusive of the 'make-whole'. Pursuant to the finance documents between, amongst others, DB and LMIM in its capacity as responsibility entity of the Fund, DB is entitled to the make-whole. In this respect, we refer to the letter dated 28 March 2013 between DB and the administrators of LMIM (as they then were) (the **Letter** - see the **attached**) where it was confirmed that the make-whole was to apply in circumstances where there was an Event of Default / Potential Event of Default provided that the repayment wasn't from a cash sweep undertaken by DB or from proceeds from realisations of security by a receiver appointed by DB.

Any refinancing of DB's debt does not fall into either of the categories referred to above and would therefore attract the make-whole as per the Letter.

Please let us know if you have any questions in relation to the above. Otherwise, please feel free to pass on our details to the incoming financier (who we understand to be Bank of Queensland) in order to facilitate the refinance.

Kind regards

Peter

Peter Bowden, Senior Associate
Clayton Utz
333 Collins Street, Melbourne VIC 3000 Australia | D +61 3 9286 6506 | F +61 3 9629 8488 | M +61 423 822 480
pbowden@claytonutz.com

www.claytonutz.com

Deutsche Bank

Deutsche Bank AG
Australia & New Zealand
ABN 13 064 165 162
Deutsche Bank Place
Level 16
Cnr of Hunter & Phillip Streets
Sydney NSW 2000 Australia
GPO Box 7033 Sydney NSW 2001
Tel +61 2 8258 1234

Confidential

John Park and Ginette Muller
Joint and several administrators
LM Investment Management Limited
(Administrations Appointed)
C/- Level 4
RSL Centre
9 Beach Road
SURFERS PARADISE QLD 7000

28 March 2013

Dear Sir / Madam

LM Investment Management Limited ABN 68 077 208 461 (Administrators Appointed) (the Company)

We refer to the facility agreement dated 1 July 2010 between LM Investment Management Limited in its capacity as responsible entity of the LM First Mortgage Income Fund (**LM**) (as "Borrower") and Deutsche Bank AG, Sydney Branch (**DB**) (as "Financier") as varied, amended and supplemented from time to time including by the override deed dated 21 December 2012 (**Override Deed**) between LM and DB (as amended, the **Facility Agreement**).

We also refer to our previous correspondence and your conversation with representatives of DB today in relation to the administration of the Company in general.

As discussed during today's telephone conference (between DB, the administrators of the Company and representatives from LM), please confirm that the intention and agreement of the parties in respect of clause 4.2(i) of the Override Deed was that other than in respect of any repayments from proceeds of cash sweeps undertaken by DB pursuant to clause 4.2(g) and any proceeds from the realisation of secured assets by a receiver appointed by DB over the assets of the Company, the 'make-whole' obligation continues to apply despite the fact that an Event of Default or Potential Event of Default has occurred and is subsisting.

The 'make-whole' obligation requires LM to pay interest on the outstanding balance of any or all of the Facility (as that term is defined in the Facility Agreement) that is repaid prior to 30 June 2014 or, if the Option Term (as that term is defined in the Override Deed) is exercised, 30 June 2015, on the basis that the Facility (or that component of the Facility that is repaid) was drawn and outstanding for the full term of the Facility (that is, until 30 June 2014 or 30 June 2015, as applicable).

As you are aware, interest is currently accruing on the Facility at the default interest rate of 18% per annum.

Please acknowledge the above by signing and returning to us the attached copy of this letter. By doing so, you agree to signing such further documents as may be deemed necessary to reflect the above agreed position.

As previously noted, we continue to expressly reserve all of our rights arising under, in relation to or in connection with the Facility Agreement and each Finance Document.

Yours faithfully

DEUTSCHE BANK AG, SYDNEY BRANCH

Attorney

Name: KEVIN KOSOVICH

Attorney

Name: David Maynard

We, John Richard Park and Ginette Muller, in our capacity as joint and several administrators of LM Investment Management Limited (Administrations Appointed) in its capacity as responsible entity of the LM First Mortgage Income Fund, acknowledge and agree to the above:

" on the basis that any liability is limited to the assets of the fund and no action will be taken against the administrators or LMIM in their personal capacities.

John Richard Park
Joint and several administrator
LM Investment Management Limited ABN 68 077 208 461 (Administrators Appointed)

Date: 2/4/13

David Whyte

From: David Whyte
Sent: 27 September 2013 1:58 PM
To: 'Stephen Russell'
Cc: Ilenna Copley
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

Steve

I note your comments.

Please note that the alleged conflict you refer to has been dealt with as Andrew Fielding and I have resigned as liquidators of two entities which had been all but wound up and a replacement liquidator appointed. There is nothing in the Act that says it was a conflict however to ensure no perceived conflict we have resigned with all costs associated with this being borne by BDO.

Regards

David

From: Stephen Russell [mailto:srussell@russellslaw.com.au]
Sent: 27 September 2013 1:44 PM
To: David Whyte
Cc: Ilenna Copley
Subject: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)
Importance: High

Dear David

Please see attached letter.

Sincerely

RUSSELLS

Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

Postal—GPO Box 1402, Brisbane QLD 4001 / *Street*—Level 21, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: David Whyte [mailto:David.Whyte@bdo.com.au]
Sent: Wednesday, 25 September 2013 7:32 AM
To: Park, John; Muller, Ginette

Cc: Joanne Kedney
Subject: FW: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

John/Ginette

I refer to the below correspondence from Clayton Utz in relation to my request for a payout figure for the Deutsche Bank ("DB") facility and where I have received an offer of finance from BOQ to refinance the facility (at a significantly less interest rate than being paid to DB).

You will see from the payout figure that DB is seeking to impose a "make-whole interest" payment of approximately $3M and is looking to rely on the attached letter executed by the Administrators in order to impose this amount under the facility terms. This is obviously giving us cause for concern and it would not be in the best interests of investors for me to payout the facility if this amount is indeed payable.

Could you please advise of the circumstances leading up to the signing of this letter and why you considered it in the best interests of investors to execute the letter? I am trying to negotiate a different arrangement with DB and therefore would appreciate your early comments in this respect. We are aiming to complete the refinancing on Monday, 30 September.

Regards

David

DAVID WHYTE
Partner
Direct: +61 7 3237 5887
Mobile: +61 413 491 490
David.Whyte@bdo.com.au

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Brisbane QLD 4000
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Fax: +61 7 3221 9227
www.bdo.com.au

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RUSSELLS

27 September, 2013

Our Ref: Mr Russell
Your Ref: Mr Whyte

EMAIL TRANSMISSION

Mr David Whyte
BDO (Qld)
BRISBANE

email: David.Whyte@bdo.com.au

Dear Mr Whyte

LM Investment Management Limited (in liquidation) (receivers and managers appointed) ("LMIM") as responsible entity of the LM First Mortgage Income Fund ("the Fund")

We act, as you know, for LMIM.

We hereby give you formal notice that on 23 September, 2013, our client instituted an appeal against the Orders pursuant to which you were appointed. A copy of the Notice of Appeal accompanies this letter.

We refer, in that context, to your email to the liquidators dated 25 September, 2013 (which also accompanies this letter).

In the event that you proceed with any re-financing of the Deutsche Bank facility, in the light of the subsistence of the appeal, LMIM suggests that you should do so only in its name.

Whilst you have power under paragraph 420(2)(d) of the Act (imported by paragraph 6 of the Orders made on 26 August, 2013), to borrow money and, therefore, to re-finance with you personally as the borrower, doing so would create practical difficulties (quite apart from the subsistence of the appeal).

No doubt any new financier will require first registered mortgage security over the properties currently held subject to Deutsche Bank's security. That will entail LMIM executing a guarantee and/or granting mortgages by way of guarantee (in the latter case, by a direction to the custodian in whose name the securities over the underlying assets are currently held).

Accordingly, if you can achieve a re-financing, the simplest way would be for LMIM to be the borrower and to grant direct to the new financier, first registered mortgage security, by direction to the custodian, as necessary.

The second reason why, in our respectful submission, any re-financing should not be in your name personally is that if the appeal succeeds, there may be practical problems in unwinding the transaction, should you be un-seated. One can readily imagine that such problems may be substantial, particularly since securities will be registered, and you will cease to have any interest.

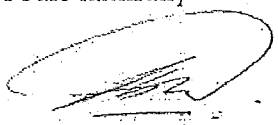
Thirdly, you will, as an officer of the court, naturally be anxious not to do anything to embarrass any proceedings in the court (i.e. the appeal) by, for example, seeking to entrench yourself in office, in the face of the appeal.

We are, for these reasons, instructed to ask you to confirm that any re-financing will not be undertaken by you personally and that it will be done in the name of LMIM, as direct borrower, obligor and mortgagor.

Of course, LMIM and the liquidators will co-operate in executing all and any documents in relation to any such re-financing as may be necessary.

We have sent this letter directly to you, because we have not received any notice that you have retained any solicitors. If you have retained solicitors, you might let us know who you have retained.

Yours faithfully



Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

CA NUMBER: 8895 of 2013

APPELLANT:	LM INVESTMENTS MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND (FIRST RESPONDENT)
	AND
FIRST RESPONDENTS	RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE (APPLICANTS)
	AND
SECOND RESPONDENT	ROGER SHOTTON (THIRD RESPONDENT)
	AND
THIRD RESPONDENTS	DAVID NUNN AND ANITA JEAN BYRNES (FOURTH RESPONDENTS)
	AND
FOURTH RESPONDENT	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION (INTERVENER)

NOTICE OF APPEAL

TO: The Respondents

AND TO: The Registrar, Supreme Court of Queensland

TAKE NOTICE that the Appellant appeals to the Court of Appeal against the whole of the Order of the Supreme Court of Queensland

Russells
Level 21
300 Queen Street
BRISBANE 4000
Phone: 07 3004 8888
Fax: 07 3004 8899

1. THE DETAILS OF THE JUDGMENT APPEALED AGAINST ARE:-

Date of Judgment:	26 August, 2013
Description of Proceedings:	BS3383 of 2013
Description of parties involved in the proceedings:	Raymond Edward Bruce and Vicki Patricia Bruce (as Applicants) and LM Investments Management Limited (In Liquidation) (Receivers and Managers appointed) ACN 077 208 461, as responsible entity of the LM First Mortgage Income Fund (as First Respondent) and The Members Of The LM First Mortgage Income Fund ARSN 089 343 288 (as Second Respondents) and Roger Shotton (as Third Respondent) and David Nunn and Anita Jean Byrnes (as Fourth Respondents) and Australian Securities and Investments Commission (as Intervener)
Name of Primary Court Judge:	Dalton J
Location of Primary Court:	Brisbane

2. GROUNDS

1. The learned trial judge erred in finding at paragraph 117 of the judgment that:

(a) the administrators of the appellant had demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the Corporations Act;

(b) the administrators had preferred their own commercial interests to the interests of the LM First Mortgage Income Fund;

(c) the court could not be assured that the administrators would act properly in the interests of members of the LM First Mortgage Income Fund in identifying conflicts during the course of the winding up or in dealing with those conflicts; and

(d) the conduct of the administrators of the appellant made it necessary that the court appoint someone independent to have charge of the winding up of the LM First Mortgage Income Fund pursuant to s.601NF(1) of the Act,

(together, *the paragraph 117 findings*) because:

(e) The findings of misconduct in (a) and (b) were not put to either of the administrators in cross-examination;

(f) the paragraph 117 findings did not take account of:

(i) uncontradicted evidence that the administrators believed that it was in the best interests of the members of the LM First Mortgage Income Fund that the appellant remain the responsible entity;

(ii) uncontradicted evidence that the administrators believed that the appointment of Trilogy as responsible entity of the LM First Mortgage Income Fund was not in the best interests of members (a finding which was made by the learned trial judge in her judgment);

(iii) the existence of a reasonable basis for the beliefs in (i) and (ii) in that:

A. the trial judge found that it was not in the interests of the members of the Fund that Trilogy be appointed as temporary responsible entity (Paragraph [31]);

B. there was uncontradicted evidence of the time and costs incurred by staff of the appellant and the administrators in becoming familiar with the assets of the LM First Mortgage Income Fund and in developing strategies designed to sell those assets in the way which achieved the greatest return for members, over the shortest period of time, with periodic returns of capital;

C. there was uncontradicted evidence of a sound working relationship between the administrators and the secured creditor of the LM First Mortgage Income Fund, Deutsche Bank AG ("Deutsche"); and

D. re was uncontradicted evidence of a substantial risk that the proceedings would prompt Deutsche to appoint receivers, which it did shortly prior to the trial (Paragraph [7]);

(g) the paragraph 117 findings were not the proper inferences to be drawn from the evidence.

2. The learned trial judge erred in making the paragraph 117 findings on the basis of the "conduct ... in relation to the 13 June 2013 meeting" because:

(a) the learned trial judge's findings in relation to the 13 June 2013 meeting proceeded upon a basis, namely, as set out in paragraphs 51 and 86 of the judgment, that the administrators' purpose in calling a meeting of members of the LM First Mortgage Income Fund was to use the meeting as a strategy to defeat or damage Trilogy's prospects on its originating application, which was not the proper inference to be drawn from all of the evidence;

(b) the learned trial judge's finding at paragraph 86 of the judgment that the appellant was pursuing its continuing control of the LM First Mortgage Income Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witness in

cross-examination and was not the proper inference to be drawn from all of the evidence;

(c) the learned trial judge's finding at paragraph 86 of the judgment that the appellant's choice not to work with ASIC and not to hold a meeting at a time which allowed resolutions as to winding-up at the same time as resolutions as to the responsible entity meant that the appellant was pursuing its continuing control of the LM First Mortgage Income Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witness in cross-examination and was not the proper inference to be drawn from all of the evidence;

(d) the learned trial judge's finding at paragraph 88 of the judgment that evidence of Ms Muller, one of the administrators of the appellant, as to there being "an appreciable chance" that Trilogy might be elected responsible entity at the 13 June 2013 meeting did not reflect Ms Muller's genuine belief was not the proper inference to be drawn from all of the evidence in circumstances where:

(i) Ms Muller was not cross-examined on the facts about which she gave evidence as the basis for her belief; and

(ii) There was no evidence controverting those facts, which were not inherently unlikely;

(e) the learned trial judge's finding in paragraph 88 of the judgment that the appellant's position in relation to the meeting of members demonstrated that the interests of members were not at the forefront of the thinking of those making the decisions (the administrators of the appellant) was not put to either of the administrators in cross-examination and was not the proper inference to be drawn from all of the evidence;

(f) the learned trial judge's findings in relation to the 13 June 2013 meeting failed to have sufficient regard to the desirability of ascertaining the views

of the members of that LM First Mortgage Income Fund as to which entity they wished to act as responsible entity;

(g) the learned trial judge erred in failing to have regard to the consideration that once a meeting was called the responsible entity had no power to cancel a meeting of members;

(h) the learned trial judge failed to have regard to the active role of two firms of experienced solicitors in relation to issues concerning the 13 June meeting (compare paragraph [116]).

3. The learned trial judge erred in making the paragraph 117 findings on the basis of the appellant's (and its administrators') "dealings with ASIC" because:

(a) the learned trial judge's finding at paragraph 61 of the judgment that on 29 April 2013, the appellant informed ASIC that it was not willing to enter into an enforceable undertaking was contrary to the evidence;

(b) the learned trial judge's finding at paragraph 62 of the judgment that a statement in an affidavit of Ms Muller was not consonant with the reality of the appellant's interactions with ASIC was not put to Ms Muller in cross-examination, was not the proper inference to be drawn from of the evidence and was vitiated by the erroneous finding in paragraph [61];

(c) the learned trial judge's findings in relation to the appellant's dealings with ASIC were dependent upon the findings in relation to the 13 June 2013 meeting which were affected by the errors identified in paragraph 1 above.

4. The learned trial judge erred in making the paragraph 117 findings on the basis of the appellant's "conduct of the litigation" because:

(a) the learned trial judge's finding at paragraph 89 of the judgment that the appellant's conduct of the litigation was combative and partisan in a way which was reflective of the administrators acting in their own interests to keep control of the winding up of the LM First Mortgage Income Fund rather than acting in the interests of members was not put to either of the

administrators or any other witness in cross-examination, did not have regard to the matters in 1(h) above, and was not the proper inference to be drawn from the evidence;

(b) the learned trial judge's finding at paragraph 93 of the judgment that there had been no argument that Trilogy had published false and misleading statements was incorrect in circumstances where:

(i) the appellant adduced evidence of such statements;

(ii) the appellant had made such submissions at trial;

(c) the learned trial judge's finding at paragraph 93 of the judgment that part of an affidavit of Ms Muller was unprofessionally robust and partisan was not put to Ms Muller in cross-examination and was not the proper characterisation of Ms Muller's evidence;

(d) the learned trial judge's finding at paragraph 94 of the judgment that an affidavit sworn by the solicitor for the appellant consisted of little more than combative and querulous commentary on the litigation was not put to the solicitor in cross-examination and was not the proper characterisation of the affidavit evidence in the light of the application in support of which it was sworn;

(e) the learned trial judge's finding at paragraph 95 of the judgment that an affidavit sworn by Ms Muller contained sniping and argumentative passages was not put to Ms Muller in cross-examination, was not the proper characterisation of Ms Muller's evidence and was in any event irrelevant;

(f) the learned trial judge's finding at paragraph 114 of the judgment that the appellant gave no notice of a proposal that the administrators would do all things necessary to secure the appointment of independent liquidators to the appellant and to LM Administration Pty Ltd was contrary to the

evidence and, in any event, the conclusion does not follow from the premise.

5. The learned trial judge erred in making the paragraph 117 findings on the basis that the administrators had sworn to matters which they conceded were wrong in cross-examination because:

(a) the learned trial judge's finding at paragraph 104 of the judgment concerning an apparent concession by Mr Park, one of the administrators of the appellant, was incorrect because the matter on which Mr Park was cross-examined did not properly reflect the content of his affidavit evidence, and it was not put to him that he had contradicted his affidavit evidence;

(b) the learned trial judge's finding at paragraph 106 of the judgment concerning an apparent concession by Mr Park was not the proper inference to be drawn from the evidence and the trial judge did not take into account his evidence in re-examination and the otherwise uncontradicted documentary evidence to which it referred.

6. The learned trial judge erred in making the paragraph 117 findings on the basis that the administrators had sworn to matters which they conceded were not consonant with reality because:

(a) the learned trial judge's finding at paragraph 62 of the judgment was affected by the errors identified in paragraph 3(a) above;

(b) the learned trial judge's finding at paragraph 88 of the judgment was affected by the errors identified in paragraph 2(c) and 2(d)(ii) above;

(c) the learned trial judge's finding at paragraph 93 of the judgment was affected by the errors identified in paragraph 4(a) and 4(b)(ii) above;

(d) the learned trial judge's finding at paragraph 116 of the judgment that a statement in an affidavit of Ms Muller about her current understanding as to the likelihood that conflicts existed or were likely to arise could not be

objectively held was not put to Ms Muller in cross-examination and ignored the balance of Ms Muller's evidence as to how the administrators intended to monitor the potential for conflicts (which they acknowledged) and to deal with conflicts in the event they arose;

(e) the learned trial judge's finding at paragraph 116 of the judgment that the conduct of the 13 June 2013 meeting, the appellant's interactions with ASIC and the appellant's conduct of the litigation gave a basis for thinking that the administrators of the appellant would pursue their duties otherwise than independently, professionally and with due care was not put to either of the administrators in cross-examination, was not the proper inference to be drawn from all of the evidence and, in any event, the conclusion does not follow from the premise;

(f) the learned trial judge's finding at paragraph 116 of the judgment that the court could not have confidence that the administrators would adequately identify and deal fairly with conflicts if they were to arise was not put to either of the administrators in cross-examination, was not the proper inference to be drawn from all of the evidence and, in any event, the conclusion does not follow from the premise.

7. The learned trial judge erred in appointing Mr Whyte to take control of the winding up of the LM First Mortgage Income Fund because the evidence established that Mr Whyte was a liquidator of a company which was a debtor of the Fund so that his appointment placed him immediately in a position where his duties were in conflict.

3. ORDERS SOUGHT

(a) That the appeal be allowed;

(b) That the orders made on 26 August, 2013 be set aside save for order 1, but deleting the words "subject to the orders below";

(c) That the Respondents pay the Appellant's costs of and incidental to this appeal and to the proceedings below.

4. RECORD PREPARATION

We undertake to cause a record to be prepared and lodged, and to include all material required to be included in the record under the rules and Practice Directions and any Order or Direction in the proceedings.

PARTICULARS OF THE APPELLANT

Name:	LM Investments Management Limited (In Liquidation) (Receivers and Managers appointed) ACN 077 208 461, as responsible entity of the LM First Mortgage Income Fund
Appellant's Address:	C/- FTI Consulting (Australia) Pty Ltd, 22 Market Street, Brisbane, Queensland,
Solicitor's Name	Stephen Charles Russell
and firm name:	Russells
Solicitor's business address:	GPO Box 1402, Brisbane, Queensland, 4001
Address for service:	Level 21, 300 Queen Street, Brisbane, Queensland, 4000
Telephone:	07 3004 8888
Fax:	07 3004 8899
Email:	srussell@russellslaw.com.au

PARTICULARS OF THE FIRST RESPONDENTS

Name:	Raymond Edward Bruce and Vicki Patricia Bruce as First Respondents
Residential Address	167 Foreshore Road RDI, Kaitaia New Zealand
Solicitor's name	Amanda Banton
and firm name:	Piper Alderman

Solicitor's business address:	Level 36 123 Eagle Street Brisbane, Queensland
Address for service:	Level 36 123 Eagle Street Brisbane, Queensland
Telephone:	07 3220 7777
Fax:	-
Email:	abanton@piperalderman.com.au

PARTICULARS OF THE SECOND RESPONDENT

Name:	Roger Shotton
Residential Address	Phirom Gardens – Flat 9A 11, Sukhumvit Road Wattana Bangkok 10110 Thailand
Solicitor's name and firm name:	David Robert Walter Tucker Tucker Cowen
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PARTICULARS OF THE THIRD RESPONDENTS

Name:	David Nunn and Anita Jean Byrnes
Residential Address	David Nunn: ~~29 Ocean Street~~ c/- his solicitors Synkronos Legal ~~Kogarah~~ 8 Masters Street ~~Sydney~~ Newstead ~~New South Wales~~ Brisbane, Queensland
Residential or Business Address	Anita Jean Byrnes c/- her solicitors Synkronos Legal 8 Masters Street Newstead Brisbane, Queensland

Solicitor's name	Gregory John Litster
and firm name:	Synkronos Legal
Solicitor's business address:	8 Masters Street Newstead Brisbane, Queensland
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PARTICULARS OF THE FOURTH RESPONDENT

Name:	Australian Securities & Investments Commission as Fourth Respondent.
Business Address	Level 20, 240 Queen Street, Brisbane. Queensland
Solicitor's name	Hugh Copley
and firm name:	Australian Securities & Investments Commission
Solicitor's business address:	Level 20, 240 Queen Street, Brisbane, Queensland
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Fax:	07 3867 4790
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Signed: Russells

Description: Solicitors for the Appellant

Dated: 23 September, 2013

This Notice of Appeal is to be served on:-

The First Respondents,

Raymond Edward Bruce and Vicki Patricia Bruce

c/- Their Solicitors, Piper Alderman

And on:

The Second Respondent,

Roger Shotton

c/- his Solicitors, Tucker Cowen

And on:

The Third Respondents,

David Nunn and Anita Jean Byrnes

c/- their solicitors Synkronos Legal

And on:

The Fourth Respondent,

Australian Securities & Investments Commission

BDO

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AUSTRALIA

TO THE INVESTOR AS ADDRESSED

4 December 2013

LM FIRST MORTGAGE INCOME FUND
(RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)
ARSN 089 343 288
('the Fund' or 'FMIF')

I refer to my report dated 15 October 2013 and now provide my third update to investors in relation to the winding of up of the Fund, as follows.

1. Refinance of Secured Creditor

As advised in my second report to investors, the refinancing of the Deutsche Bank facility by BOQ was conditional on KordaMentha, who are trustees of the LM Managed Performance Fund ("MPF"), acknowledging that they would not seek to impugn the BOQ securities should it be found they have a constructive trust claim against the secured creditor.

KordaMentha have advised that they are not in a position to sign the requested letter of comfort and therefore the refinance has not been able to proceed.

2. Potential claim by KordaMentha, the trustee of the MPF

As previously advised, KordaMentha, acting as trustee of the MPF has put me on notice of a potential claim against LM Investment Management Limited (Receivers and Managers Appointed) (in Liquidation) ("LMIM") and/or the Fund in relation to potential breaches of trust. This has not been fully articulated by them and limited details specifying the transactions that may result in a claim have been provided.

3. Tax Statements

It is not our intention to issue taxation statements for the year ended 30 June 2013 to investors at this time. Please be advised that a nil income was declared for the 2012/2013 financial year. The distributions to investors in February and June of this year relate to payments of capital. In addition to these distributions, a further amount was paid in January this year to those investors who had elected to receive monthly income; this distribution related to July - October 2010 interest payments and was included in investors tax statements for the 2011 financial year.

Should investors wish to receive a transaction statement please contact the Investor Relations team on +61 7 55844500 or mail@lmaustralia.com.

BDO

4. Funds Held in Trust

As advised in my report dated 15 October 2013, there is approximately $8M held in a solicitors trust account in relation to amounts paid by residents of the retirement villages/aged care facilities to enter into loan/lease arrangements at the centres.

These funds had not been able to be released because the Administrators and Receivers and Managers were concerned about the ongoing potential personal liability to repay the loans when the resident leaves the centre.

As LM Investment Management Ltd (Receivers and Managers Appointed) (In Liquidation) ("LMIM") is now in liquidation and is presently acting as the agent for the mortgagee in possession, then the liquidators are able to execute the agreements without personal liability with a view to securing the release of the funds from trust and reducing the secured creditors debt. The relevant agreements have been forwarded to FTI for execution in this respect.

Since my last report the Deutche Bank facility has been reduced to $13m. Assuming the trust funds are released to pay down the debt then it is currently expected that the secured creditor will be paid in full by Christmas.

5. Appeal Lodged by FTI

As previously advised, the Liquidators of LMIM have appealed the court's decision that led to my appointment as Receiver of the Fund's assets and person responsible to ensure it is wound up pursuant to its constitution.

The appeal hearing was heard on 28 November 2013 with the decision being reserved. I don't know what the timing for the delivery of the judgement will be however it is not unusual for it to take two to three months to be handed down.

A copy of the court order setting out the decision will be placed on the website www.lmfmif.com when released.

6. Valuation of the Fund

Following their appointment as Administrators to the responsible entity of the Fund on 19 March 2013, FTI arranged for professional valuations of the properties held as security for the Fund. The Receivers and Managers of the Fund, McGrathNicol, have continued with this process with the final valuation for one of the aged care facilities expected to be received later this week.

Prior to the appointment of the Administrators and as previously advised in their report to investors dated 7 June 2013, the Responsible Entity had not instructed professional valuations for a number of properties for some time and had relied on their in-house assessment of the property values and feasibility studies to determine the valuation of the fund.

The last valuation of the fund reported to investors in December 2012 was $288,980,628 with a unit value of 59 cents based upon the June 2012 audited accounts. Since that time there have been asset disposals totalling $28,176,878.

Taking into account the most recent professional valuations and offers received for each of the properties provides a total value of the assets of between $80,663,805 and $109,308,582. The lower

range includes a valuation of the underlying asset in one line, at a discount to the valuation amount or offers received with the higher range allowing for disposal of the individual parts of the properties at valuation or based on the offers received.

I have used these professional valuations and offers received to assist in determining the current estimated return to investors as outlined and further commented on at Section 9 below.

7. Realisation of assets

Details of the assets to be realised are summarised in the table below and which includes details of those subject to contract, offers received and current strategy for disposal. The valuations of the individual assets are not included so as to not prejudice any negotiations in relation to the sale of the properties.

Location	Description of asset/Strategy	Status
ACT	Mixed use development site (7,056m2) with DA approval for 278 residential units and a child care centre. Under contract. Due to settle on 6 December 2013.	Under contract
QLD	90 strata titled hotel rooms. Sell down of units ongoing with 32 sold to date, 40 under contract and 18 remaining to be sold.	Under contract/ Offers received/ On the market
QLD	The development comprises of 5 separate multi-storey buildings with a total of 119 residential units. Sell down of units ongoing. Of the 119 units, 109 have been sold to date, 4 under contract, 1 under offer and 5 remaining to be sold.	Under contract/ Offers received/ On the market
WA	12 luxury residential units, 11 sold to date with 1 remaining to be sold.	On the market
NSW	The security comprised of 4 units within a larger purpose built commercial building. Two adjoining units are occupied by a dance and yoga studio with the other two units unoccupied. A sale of the occupied units was completed in June this year. The remaining vacant units are currently being marketed.	On the market
NSW	The development comprises of 83 strata titled office lots with 63 of these units charged to the Fund. Of the 63 units, 59 units remain for sale/lease. A sale/lease marketing campaign is ongoing.	On the market
WA	The development has been subdivided into three super lots. The first lot consists of a residential subdivision with 9 created lots and	On the market

	an englobo parcel of land (7.7851 ha). The second lot comprises of an englobo parcel of land (1.6128ha) currently zoned as mixed use. A DA had previously been granted for 86 grouped dwellings. The third lot is currently zoned as mixed business (1.6291ha). In addition to the above security there is also a charge over the guarantor's home.	
NSW	Industrial development site with partly constructed (40-50%) strata titled development of warehouse/retail/office precinct. DA approval for a mixed use industrial estate of 56 units, comprising of 30 industrial units, 13 high tech units, 12 retail units and a child care facility.	Preparing to market
QLD	The development is an eight stage project to provide 116, 3 or 4 bedroom townhouses. There is 1 remaining lot from Stage 6, 14 completed lots from stage 7 with 12 lots from Stage 8 due for completion in December 2013.	Preparing to market
VIC	61 strata titled units within a larger purpose built self-storage facility.	Preparing to market
QLD	A supported living community, comprising of 64 independent living units with the proposed development of a further 76 units. Of the current 64 units, 22 are vacant.	Preparing to market
NSW	A supported living community, with 83 completed independent living units. 22 units are currently vacant.	Preparing to market
QLD	A supported living community, with 37 completed independent living units plus balance land for further development. There are also a further 7 completed detached dwellings and a partly constructed subdivision of c.100 townhouse/small dwelling lots under community title plus residual land.	Strategy being finalised
QLD	72 strata titled unit resort complex with management rights. 15 units have been sold to date with 57 units remaining.	Strategy being finalised
QLD	Two supported living communities. One currently has 62 completed units (14 vacant) with a further 106 proposed. The other has 110 completed units, with 26 currently vacant.	Strategy being finalised
QLD	Residential land subdivision. 3 constructed detached dwellings, 16 completed residential land lots, 80 lots with operational works	Current lots on the market with a strategy

	approval and additional land (approx. 57ha) with or pending development approval.	being finalised for the balance land.
VIC	A supported living community, with 60 completed independent living units (5 vacant) with a further 132 units proposed.	Strategy being finalised
TAS	A supported living community, with 25 completed independent living units (4 vacant) and a further 18 proposed.	Strategy being finalised

8. Other Potential Recoveries/Legal Actions

In addition to the realisation of the property assets of the Fund, there are legal proceedings on foot or currently being contemplated/investigated, as follows;

8.1 Bellpac Proceedings

8.1.1 Settlement of previous proceedings

In November 2010, proceedings against Gujarat NRE Minerals Limited were settled for a total amount of approximately $45.6M.

Both FMIF and MPF made loans to Bellpac Pty Ltd (In Liquidation) with approximately $48.8M and $24.0M outstanding to the FMIF and MPF at the time of settlement.

FMIF held a first mortgage over the property and MPF a second mortgage over the property that was the subject of the proceedings.

Notwithstanding the FMIF priority position, the settlement proceeds were split between the funds on the basis of a 65%/35% split with FMIF receiving $32.9M and MPF $12.7M.

LMIM was the Responsible Entity of the FMIF and the trustee of the MPF at the time this decision was made.

LMIM appears to have arrived at this decision after taking legal and accounting advice and after determining it was appropriate to split the proceeds based on the MPF funding the majority of the costs of the litigation and what terms a litigation funder would likely offer in relation to funding such an action.

No written agreement had been entered into between the funds and it appears that the majority of the funding had been provided by the MPF because the financier of the FMIF at the time had restricted access to funds.

LMIM appears to have preferred the interests of the MPF over the FMIF in splitting the proceeds of sale of the property/settlement of the litigation and therefore there may be a claim against the Responsible Entity and/or the MPF in relation to this transaction.

I am currently making further enquiries in this respect to determine if legal action should be commenced against any of the above parties.

BDO

8.1.2 Other Litigation

There are currently three other proceedings on foot in relation to Bellpac, as follows;

- Judgement has been awarded in favour of Bellpac in relation to $2M of bonds held in Gujaret NRE Coking Coal Ltd ("Gujaret"). The bonds are convertible into shares of Gujaret which are currently traded on the Australian Stock Exchange;
- There is a claim against several parties in relation to a further $8M of bonds in Gujaret where it is alleged these remain the property of Bellpac; and
- The second mortgagee of Bellpac has commenced proceedings against LMIM and the Receivers and Managers of Bellpac in relation to the alleged sale of the property at an undervalue and where this was part of the settled proceedings outlined at Section 8.1.1 above.

8.2 Other Potential Claims Against the Responsible Entity and Related Parties

8.2.1 Management Services Agreements with LM Administration Pty Ltd (in Liquidation) ("LMA")

The audited accounts for the FMIF for the year ended 30 June 2012 show that approximately $10.2M was paid to a related entity, LMA for "loan management fees paid to the responsible entity for loan management and receivership services provided by the responsible entity on behalf of the scheme in replacement of appointing external receivers".

I understand further amounts totalling approximately $2M were paid to LMA for the period from the 1 July 2012 to 19 March 2013 although I am awaiting further details to confirm the position in this respect.

Legal and accounting advice was received by the responsible entity in relation to the charging of these fees.

I am currently undertaking investigations in relation to this matter, and as to whether there has been any breach of the Corporations Act.

8.2.2 Distribution to Class B Unit Holders

During the financial year ended 30 June 2012 distributions of approximately $16.9M were made to Class B unit holders at a time when class A and C unit holders did not receive any distributions.

Class B unit holders, relate to the three feeder funds of FMIF. These feeder funds, together with their respective Responsible Entities, are summarised below:

Feeder Fund	Responsible Entity
LM Currency Protected Australian Income Fund	LMIM
LM Insitutional Currency Protected Australian Income Fund	LMIM
LM Wholesale First Mortgage Income Fund	Trilogy Funds Management Limited

BDO

Clause 3.1 of the constitution states that *"unless the terms of issue of a Unit or a Class otherwise provide, all units will carry all rights and be subject to all the obligations of Members under this Constitution"*.

Section 601FC(1)(d) of *the Corporations Act 2001* places a duty on the Responsible Entity to *"treat the members who hold interests in the same class equally and members who hold interests in different classes fairly"*.

I am unaware of any rights of Class B unit holders which would entitle them to a priority distribution over other classes of unit holders in the Fund.

Both the fund's financial statements and compliance plan were audited by Ernst & Young.

The auditor's report for the financial year ended 30 June 2012 noted a matter of material uncertainty surrounding the distribution, which states:

"During the period, the Scheme declared distributions of $16,904,211 to Class B unitholders (the Feeder Funds), as described in Note 3. These distributions have been fully reinvested back into the Scheme by the Feeder Funds during the period. Compliance with the Trust Deed and the Corporations Act in relation to these distributions is a matter of legal interpretation and the Responsible Entity believes it has an arguable position to support the declaration of these distributions as being fair and reasonable to all classes of unitholders. This is an area of significant judgement and accordingly, we bring it to your attention."

The auditor's report of the compliance plan for the financial year ended 30 June 2012 recorded an 'Emphasis of Matter' regarding the material uncertainty of the declared distributions, which states:

"During the period, the LM First Mortgage Income Fund ("the Scheme") declared distributions of $16,904,211 to Class B unit holders, of which $11,787,910 relates to the LM Currency Protected Australia Income Fund and the LM Institutional Currency Protected Australian Income Fund (schemes referred to as the "Feeder Funds"). These distributions were declared to enable the Feeder Funds to recognise distribution income to match expenses incurred. All Feeder Funds distributions have been reinvested into the Scheme during the period. Compliance with the Trust Deed and Corporations Act in relation to these distributions is a matter for legal interpretation and the Responsible Entity believes it has an arguable position to support the declaration of these distributions as being fair and reasonable to all classes of unit holders. This is an area of significant judgement and accordingly, I bring it to your attention."

Copies of the audit reports are available on the website www.lmfmif.com, which has been set up to assist with investor communication.

A breakdown of the Fund's different classes of unit holders together with the effect the distribution had on the unit holders are summarised below:

Description	Class A	Class B	Class C	Total
Opening Balance of Units (1 July 2011)	254,832,731	210,391,005	9,635,388	474,859,124
% units start of year	53.67%	44.30%	2.03%	100%
Units issued during the year	0	3,004,385	0	3,004,385
Units redeemed during the year	(2,072,000)	(4,497,306)	(47,739)	(6,617,045)
Total excluding any distribution/reinvestment	252,760,731	208,898,084	9,587,649	471,246,464
% Units excluding any distribution/reinvestment	53.64%	44.33%	2.03%	100.00%
Units reinvested following distribution	0	15,964,355	0	15,964,355
Closing balance of units (30 June 2012)	252,760,731	224,862,439	9,675,527	487,298,697
% units end of year	51.87%	46.14%	1.99%	100%

As shown above the effect of the distribution/reinvestment is that Class B unit holders have increased their units in the fund from 44.33% to 46.14% at the expense of the Class A & C unit holders.

This will result in the Class B unit holders receiving a greater amount in the winding up of the Fund as they will receive 46.14% of the assets available for distribution to investors rather than 44.3% of the total.

The above table also highlights the following discrepancy in the amount distributed to Class B Unit Holders and the amount reinvested in the fund:

Description	Amount ($)
Distribution to Class B Unit Holders	16,904,211
Reinvestment after distribution	(15,964,355)
Variance in reimbursement	939,856

This analysis is in conflict with the auditor's comments which note that "*distributions have been fully reinvested back into the Scheme*". Further investigation into the discrepancy of $939,856 will be undertaken and the results of my findings reported to investors in due course.

My solicitors are currently considering whether or not it is possible to reverse these transactions and if there are potential legal claims in respect of same.

8.2.3 Changes in Constitution

The fund's constitution was amended several times since its initial execution on 24 August 1999. The terms of the constitution stipulate that it may be modified or repealed or replaced with a new constitution, by:

a) Special resolution of the members of the scheme; or
b) The Responsible Entity, if the Responsible Entity reasonably considers the change will not affect Members' rights.

I am not currently aware of any special resolutions passed by members resolving to amend the terms of the constitution.

From my review of the constitution amendments, I am aware of several changes to the permitted loan to valuation ratio ('LVR') of the fund. LVR is defined in the Fund's constitution as "*the ratio of the amount of a loan to the valuation of the Borrower's property offered as security for a loan in the Scheme*". These changes were as follows:

- The original constitution dated 24 August 1999 provided for a LVR of no more than 66.66%;
- On 19 July 2002 the permitted LVR for the security property was amended to 75.00%;
- On 6 June 2005 the constitution was amended (Clause 13.3) so that the Responsible Entity may approve a LVR greater than clause 13.2(a) (i.e. 75%) after a loan has settled and where the Responsible Entity considers it is in the best interests of the members of the scheme; and
- On 21 April 2006 Clause 13.3 was amended to "after a loan has settled and where the RE considers it is in the best interests of the members, the RE may approve an LVR not to exceed 85% of the value of the security property".

Further investigation is required to determine the effect of these amendments and whether or not there may be potential legal claims arising from that.

8.2.4 Fund Valuation Policy

A review of the fund's compliance plan dated 16 March 2011 details the following regarding the fund's valuation policy:

- Valuations may only be carried out by panel valuers; and
- An updated valuation will generally be required for commercial loans at 24 month intervals and construction loans at 12 month intervals.

From my preliminary enquiries, it appears that the Responsible Entity did not generally obtain updated professional valuations after the initial advance was made. Instead, in the majority of cases, they relied upon discounted cash flows prepared by management on the feasibility of a project.

Further enquiries will be undertaken to determine if this was a breach of the policy and if there is a potential legal claim.

8.2.5 Potential Claim against the Auditor

One of BDO's auditors is currently reviewing the audits of the financial statements and the compliance plans for the last six years with a view to determining if there is a potential claim for damages against the auditors of the Fund.

9. Estimated Return to Investors

Based on the professional valuations and offers received for the properties charged to the Fund, I provide below an estimated return to Investors of between 13 and 19 cents in the dollar as at 30 November 2013 as follows:

	Low $000's	High $000's
Cash at Bank	5,720	5,720
Funds held in trust	8,936	8,936
Estimated selling prices	80,664	109,309
Less:		
Deutsche Bank facility	(13,000)	(13,000)
Selling costs (3.5% of sale price)	(2,823)	(3,826)
Land tax & rates	(563)	(563)
Other unsecured creditors	(10,127)	(9,830)
Estimated FTI Fees & legal costs (subject to approval)	(3,069)	(3,069)
Receivers and Managers' Fees (McGrath Nicol)	(647)	(647)
Receiver's fees & outlays (BDO)	(394)	(394)
Estimated net amount available to investors as at 30 November 2013	64,696	92,635
Total investor units	488,787,330	488,787,330
Estimated return in the dollar	0.13	0.19

The above table does not take into account future operating costs, future interest on the Deutsche Bank facility, future Receivers fees and future rates and land tax. It also excludes any legal recoveries against borrowers, valuers or other third parties.

Please note that the distribution to Investors will take place after paying secured creditors, land tax, rates, Receivers fees and the unsecured creditors who rank ahead of Investors' interests.

10. Updated Unit Price

I have received numerous requests to provide an updated unit price. In this regard, I provide below an updated unit price as at 30 November 2013 of 17 cents, which is based on the mid-point of the high and low estimated selling prices of the secured assets as at 30 November 2013.

	$000's
Total Value of Fund Assets as at 30 November 2013 (net of land tax and rates)	94,986
Less Deutsche Bank facility	(13,000)
Less Creditors and Other Payables	(17,413)
Total Net Value of Fund Assets	80,674
Total Number of Units as at 30 November 2013	488,787
Unit Price	0.17

I *attach* a copy of a letter that may be forwarded to Centrelink confirming the unit price as at 30 November 2013, and which may be used by investors to assist with the review of their pensions.

11. Distributions to Investors

Distributions to investors will recommence as soon as possible and after Deutsche Bank has been paid out in full.

Deutsche Bank is expected to be paid out in December 2013 or January 2014, subject to receipt of the trust monies of approximately $8m referred to at Section 4 of this report.

As mentioned earlier in my report, I am on notice from KordaMentha that the MPF potentially have a constructive trust or breach of trust claim against the secured creditor and/or the Fund.

The realisation of the Fund's assets is expected to take up to two or three years dependent on the time taken to improve or develop certain assets and proceed to sell the properties.

The Receivers and Managers who were appointed to Bellpac have put me on notice not to distribute funds until the proceedings mentioned at Section 8.1.2 are resolved.

I will be required to retain certain funds to meet the liabilities of the Fund, including contingent claims that may arise from the Bellpac litigation, the funds received for the loan/lease agreements of the aged care facilities and potentially in relation to the KordaMentha claims.

I may have to seek the directions of the court before proceeding with the next distribution.

I will update investors as to the expected timing of a distribution as these matters become clearer.

12. Audited Accounts

As previously advised, I have been in discussions with FTI and ASIC in relation to whether or not there is a need to undertake an annual audit of the Fund during the course of the winding up.

I am presently awaiting confirmation from the Australian Securities and Investments Commission that they will take no action in relation to the non-provision of the audited accounts.

BDO

13. Reporting to Investors

Reports will be distributed to investors in accordance with the preferred method of correspondence recorded for each investor on the Fund's database. In order to assist in reducing distribution costs, it would be appreciated if as many investors as possible could provide an email address in this respect. Please use the details below to advise us in this regard.

Due to the upcoming Christmas break and bearing in mind there will be reduced activity in the realisation of the assets in the holiday period, I will provide my next report to investors at the end of January 2014.

14. Receiver's Remuneration and Expenses

I attach a summary of my remuneration and outlays for the period from my appointment on 8 August 2013 to 30 November 2013.

My remuneration incurred during this period totals $352,144 plus outlays of $41,628 plus GST.

Approval of my fees will be the subject of an application to court in due course. A copy of my application in this respect will be posted to the website www.lmfmif.com and investors will be notified when the application has been lodged.

15. Queries

Should unit holders require further information, please contact either Investor Relations or BDO on the details provided below.

Investor Relations
Phone: +61 7 5584 4500
Fax: +61 7 5592 2505
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Yours faithfully

David Whyte
Receiver

REMUNERATION REPORT

LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed)

8 August 2013 to 30 November 2013

Employee	Position	Rate	Total Units	Total $	Administration Units	Administration $	Assets Units	Assets $	Creditors Units	Creditors $	Investigation Units	Investigation $	Trade On Units	Trade On $	Research/Data Collection Units	Research/Data Collection $	Analysis Units	Analysis $
Whyte, David	Partner	560.00	235.70	131,992.00	34.00	19,040.00	134.80	75,488.00	1.20	672.00	4.30	2,408.00	61.40	34,384.00	0.00	0.00	0.00	0.00
Fielding, Andrew	Partner	560.00	1.20	672.00	1.00	560.00	0.00	0.00	0.20	112.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Beauchamp, Margaux	Executive Director	460.00	190.10	87,446.00	2.30	1,058.00	184.80	85,008.00	0.00	0.00	3.00	1,380.00	0.00	0.00	0.00	0.00	0.00	0.00
Somerville, John	Senior Manager	425.00	14.00	5,950.00	8.00	3,400.00	3.70	1,572.50	2.30	977.50	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Haines, Charles	Senior Manager	425.00	81.30	34,552.50	0.10	42.50	22.20	9,435.00	2.90	1,232.50	56.10	23,842.50	0.00	0.00	0.00	0.00	0.00	0.00
Garcia, Joanne	Manager	390.00	171.90	67,041.00	8.50	3,315.00	86.70	33,813.00	26.70	10,413.00	0.00	0.00	0.50	195.00	6.40	2,496.00	43.10	16,809.00
Wilson, James	Manager	390.00	1.40	546.00	0.30	117.00	0.20	78.00	0.90	351.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Dharmaratne, Michael	Senior Accountant I	310.00	16.10	4,991.00	6.10	1,891.00	2.30	713.00	7.70	2,387.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Tipman, Daniel	Senior Accountant I	310.00	0.60	186.00	0.10	31.00	0.00	0.00	0.50	155.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Kennedy, Nicola	Accountant II	190.00	8.30	1,577.00	5.00	950.00	3.30	627.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Toniran, Rycko	Accountant II	175.00	85.50	14,962.50	0.00	0.00	85.50	14,962.50	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Jackson, Nicole	Practice Assistant	150.00	5.10	765.00	5.10	765.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Richardson, Ashley	Administration Assistant	75.00	6.40	480.00	6.40	480.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Hattingh, Moira	Administration Assistant	75.00	13.00	982.50	0.50	37.50	0.00	0.00	12.60	945.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
	TOTAL		830.60	352,143.50	77.40	31,687.00	523.50	221,697.00	55.00	17,245.00	63.40	27,630.50	61.90	34,579.00	6.40	2,496.00	30.80	16,809.00
	GST			35,214.35		3,168.70		22,169.70		1,724.50		2,763.05		3,457.90		249.60		1,680.90
	TOTAL INC GST			387,357.85		34,855.70		243,866.70		18,969.50		30,393.55		38,036.90		2,745.60		18,489.90
	AVERAGE HOURLY RATE			423.96		409.39		423.49		313.55		435.81		558.63		390.00		545.75

REMUNERATION REPORT

LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed)

8 August 2013 to 30 November 2013

Outlays

General	17,130.88
Postage	10,507.99
Printing/Copying	8,470.50
Searches	3,191.64
Airfares	1,301.99
Accommodation	339.56
Parking	217.56
Car Hire	297.96
Mileage	113.40
Taxi Fares	56.36
SUB TOTAL	41,627.84
GST	4,162.78
TOTAL	45,790.62
TOTAL INVOICE	433,148.47

BDO

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Australia

TO WHOM IT MAY CONCERN

4 December 2013

LM FIRST MORTGAGE INCOME FUND
(RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)
ARSN 089 343 288
('the Fund' or 'FMIF')

I refer to my appointment as the Receiver of the Fund's assets and as the person responsible to wind up the Fund in accordance with its constitution by Order of the Supreme Court of Queensland on 8 August 2013.

I provide an update on the estimated unit price of the fund as at 30 November 2013, calculated as follows:

	$000's
Total Value of Fund Assets as at 30 November 2013 (net of land tax and rates)	94,986
Less Deutsche Bank facility	(13,000)
	81,986
Less Creditors and Other Payables	(17,413)
Total Net Value of Fund Assets	80,674
Total Number of Units as at 30 November 2013	488,787
Unit Price	0.17

Should you have any queries in respect of the above, please contact Michael Dharmaratne of my office on (07) 3237 5768.

Yours faithfully

David Whyte
Receiver

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TO THE INVESTOR AS ADDRESSED

19 February 2014

LM FIRST MORTGAGE INCOME FUND
(RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)
ARSN 089 343 288
('the Fund' or 'FMIF')

I refer to my report dated 4 December 2013 and now provide my fourth update to investors in relation to the winding of up of the Fund, as follows.

1. Repayment of indebtedness to the Secured Creditor

At the time of my previous report to investors dated 4 December 2013, the secured creditor was owed $13m. Following the release of trust monies totalling approximately $8m (referred to in my previous report) and other property realisations the secured creditor has been repaid in full.

Nothwithstanding this, the Receivers and Managers appointed by the secured creditor have advised that they are not yet in a position to retire until the potential claim by KordaMentha as the new trustee of the LM Managed Performance Fund is resolved.

2. Potential claim by KordaMentha, the trustee of the MPF

As previously advised, KordaMentha, acting as trustee of the MPF has put me (and the Receivers and Managers appointed by the secured creditor) on notice of a potential claim against LM Investment Management Limited (Receivers and Managers Appointed) (in Liquidation) ("LMIM") and/or the Fund in relation to potential breaches of trust.

This correspondence did not include any notice of a potential claim against the secured creditor. The claims are vague and unparticularised.

In late November 2013, KordaMentha brought an application to court against the previous trustee, LMIM to obtain access to certain books and records of the Managed Performance Fund and a court order was granted governing the process that would be adopted to allow access to same.

KordaMentha have advised me that they have completed a substantial amount of their investigations however they still require further time before deciding whether or not a claim will be brought against the previous trustee and/or the Fund.

Until this position becomes clearer, the secured creditor releases its security and the Receivers and Managers retire, I will not be in a position to recommence distributions to investors.

3. Appeal Lodged by FTI

As previously advised, the Liquidators of LMIM have appealed the court's decision that led to my appointment as Receiver of the Fund's assets and person responsible to ensure it is wound up pursuant to its constitution.

The appeal hearing was heard on 28 November 2013 however the decision has been reserved and is still awaited.

A copy of the court order setting out the decision will be placed on the website www.lmfmif.com when released.

4. Valuation of the Fund

Following my last report, a number of investors have queried why there has been such a significant downturn in the valuation of the fund and bearing in mind that the GFC occurred more than five years ago (and when the investors units were still valued at 100 cents in the dollar).

There are a number of factors that have contributed to the loss in value, including the following:

- the methodology used in the valuation of the Fund;
- interest on loans granted to borrowers not being paid and being capitalised into the loan amount resulting in an increase in the loan to value ratio;
- substantial fees being paid to the Responsible Entity of the Fund;
- the Fund borrowing money from banks to increase funding available to borrowers;
- borrowers not paying interest and defaulting on loans with interest still having to be paid to the external financier; and
- the Fund having to meet costs not paid by the defaulting borrowers in respect of operating costs of the assets and statutory obligations including rates and land tax. Some of these costs have been substantial. For example three operating businesses have had trading shortfalls of up to approximately $5m per annum funded so that these businesses can be sold as going concerns.

Some of these issues are commented on in more detail below:

BDO

Method of valuation

As advised in my report dated 4 December 2013, the Responsible Entity has not obtained independent professional valuations of the charged properties for several years (which is a breach of the Constitution and Compliance Plan of the Fund) and instead has relied on internally produced feasibility studies of the properties.

The feasibility studies take into account the forecast development costs and sales for each property with the net cashflows derived being discounted back to a net present value.

A number of the feasibility studies are not viable with the properties having to be disposed of on an "as is" basis.

As previously advised, professional valuations were instructed by FTI and McGrathNicol after the Responsible Entity was placed into administration and it is these independent values on an "as is" basis or offers received that have been used to value the Fund.

This resulted in a downward revision in value of an unit from 59 cents as at 31 December 2012 to 17 cents as at 30 November 2013.

By way of example, one asset has reduced from approximately $50m as at 31 December 2012 to $13.5m as at 30 November 2013. This is because the existing planning permission is not viable for in excess of 450 units to be built on the site. Further the Fund should not be taking the risk of developing out the 400+ units to be built.

Development applications are being prepared to amend the existing approvals with a view to making the position viable and developing part of the site only with the balance of land to be sold.

A further example is where the Responsible Entity valued a property at approximately $26m as at 31 December 2012 that only has a current market value of $4.9m.

Again, the Responsible Entity's valuation was based on a feasibility study that is not workable because of the risks associated with developing out the product with it being far from certain that it would produce a better outcome taking into account the current rate of sale for the product and the number of units available before any further construction could be contemplated.

Defaulting loans

A summary of the balances of defaulting loans recorded in the Fund's audited accounts for the 2008 to 2012 financial years is provided in the table below:

	2008 $	2009 $	2010 $	2011 $	2012 $
Gross default loans opening balance	83,826,384	101,159,653	331,473,714	332,894,902	481,037,628
New and increase default loans	59,907,804	268,567,327	39,849,820	170,613,998	67,271,669
Balances written off	-754,152	-15,307	-1,333,416	-13,248,250	-29,304,112
Returned to performing or repaid	-41,820,383	-38,237,959	-37,095,216	-60,827,696	-61,394,886
Total default loans	*101,159,653*	*331,473,714*	*332,894,902*	*429,432,954*	*457,610,299*

It can clearly be seen from the above summary, the significant increases that have taken place over this period with almost all loans in default by 2012.

The balances of a number of these loans include the capitalisation of interest.

Fees paid to the Responsible Entity

There have been fees totalling in excess of $77m paid to the Responsible Entity from 1 July 2007 to 30 June 2013, as summarised in the table below:

	2008 $	2009 $	2010 $	2011 $	2012 $	2013 (unaudited) $	Total $
Management fees	5,801,477	15,410,762	9,131,818	10,997,188	9,103,864	4,519,156*	54,964,265
Custodian fees	157,876	123,356	88,163	112,324	29,983	49,107	560,809
Loan management/ recovery fees	nil	nil	nil	5,381,516	4,817,414	nil	10,198,930
Loan origination fees	9,410,607	2,194,460	nil	nil	nil	nil	11,605,067
Total	*15,369,960*	*17,618,578*	*9,219,981*	*16,491,028*	*13,951,261*	*4,568,263*	*77,329,071*

* LMIM ceased to charge management fees in June 2013.

Interest and facility fees paid to external financiers

The Fund has borrowed up to $150m from external financiers since 2008 with the latest facility now repaid in full.

The total interest and facility fees paid to external financiers of $64.3m for the 2008 to 2013 financial years is detailed in the table below:

	2008 $	2009 $	2010 $	2011 $	2012 $	2013 (unaudited) $	Total $
Interest paid	10,021,448	12,218,376	9,965,991	13,519,294	8,143,798	4,719,566	58,588,473
Facility fees	358,949	1,863,982	2,286,887	553,495	450,000	294,095	5,807,408
Total	*10,380,397*	*14,082,356*	*12,252,878*	*14,072,789*	*8,593,798*	*5,013,660*	*64,395,878*

It is clear from our review of the assets remaining to be sold that it would have been in investors interests for the Responsible Entity to have realised some of these assets much earlier so that management fees (which are based on a % of funds under management), bank interest (of up to 20% per annum) and holding costs would have been much reduced.

5. Other Potential Recoveries/Legal Actions

My report of 4 December 2013 identified various matters which required additional investigation to determine whether there were any potential legal actions for dealings which occurred prior to my appointment as Receiver.

These investigations are continuing and I am in the process of obtaining further documentation and legal advices in relation to several potential claims.

Once proceedings are commenced or my investigations are complete in relation to each of the matters, I will update investors accordingly.

6. Estimated Return to Investors

Based on the professional valuations and offers received for the properties charged to the Fund, I provide an estimated return to Investors of between 13 and 18 cents in the dollar as at 31 January 2014, calculated as follows:

	Low $000's	High $000's
Cash at Bank	11,204	11,204
Funds held in trust	1,198	1,198
Estimated selling prices of properties to be sold	65,644	92,625
Less:		
Selling costs (3.5% of sale price)	(2,298)	(3,242)
Land tax & rates	(695)	(695)
Other unsecured creditors	(7,936)	(8,076)
Estimated FTI Fees & legal costs (subject to approval)	(3,069)	(3,069)
Receivers and Managers' Fees (McGrathNicol)	(129)	(129)
Receiver's fees & outlays (BDO)	(595)	(595)
Estimated net amount available to investors as at 31 January 2014	**63,324**	**89,221**
Total investor units	488,787,330	488,787,330
Estimated return in the dollar	**0.13**	**0.18**

The above table does not take into account future operating costs, future Receivers fees and future rates and land tax. It also excludes any legal recoveries against borrowers, valuers or other third parties.

Please note that the distribution to Investors will take place after paying secured creditors, land tax, rates, Receivers fees and the unsecured creditors who rank ahead of Investors' interests.

7. Distributions to Investors

As mentioned earlier in my report, I am on notice from KordaMentha that the MPF potentially have a breach of trust claim against the Fund. In addition, the Receivers and Managers who were appointed to Bellpac have put me on notice not to distribute funds until the proceedings mentioned in my last report dated 4 December 2013 are resolved and also due to the MPF position, the secured creditor has not yet released its charge or retired its Receivers.

Once the Receivers and Managers have retired and funds released to me, I will be required to retain certain funds to meet the liabilities of the Fund, including contingent claims that may arise from the Bellpac litigation, the funds received for the loan/lease agreements of the aged care facilities and potentially in relation to the KordaMentha claims.

I may have to seek the directions of the court before proceeding with the next distribution.

I will update investors as to the expected timing of a distribution as these matters become clearer.

BDO

8. Audited Accounts

As previously advised, I have been in discussions with FTI and ASIC in relation to whether or not there is a need to undertake an annual audit of the Fund during the course of the winding up.

I am presently awaiting confirmation from the Australian Securities and Investments Commission that they will take no action in relation to the non-provision of the audited accounts.

In the meantime, I have met with representatives of the responsible entities of the feeder funds and confirmed to them that I will provide them with unaudited management accounts for the year ended 30 June 2013 prepared in accordance with the relevant accounting standards to assist them in their valuation of the feeder funds at that date. I will post these accounts on the website www.lmfmif.com as soon as they are finalised.

9. Ongoing Reporting to Investors

Reports will be distributed to investors in accordance with the preferred method of correspondence recorded for each investor on the Fund's database. In order to assist in reducing distribution costs, it would be appreciated if as many investors as possible could provide an email address in this respect. Please use the details in section 11 below to advise us in this regard.

My next report to investors will be issued by 30 April 2014.

10. Receiver's Remuneration and Expenses

I attach a summary of my remuneration and outlays for the period from my appointment on 8 August 2013 to 7 February 2014.

My remuneration incurred during this period totals $487,936 plus outlays of $52,544 plus GST.

Approval of my fees will be subject to court approval from time to time. An application to court will be prepared for the period ending 28 February 2014 and a copy of my application in this respect will be posted on the website www.lmfmif.com and investors will be notified when the application has been lodged.

11. Queries

Should unit holders require further information, please contact either Investor Relations or BDO on the details provided below.

Investor Relations

Phone:	+61 7 5584 4500
Fax:	+61 7 5592 2505
Email:	mail@lmaustralia.com

BDO
GPO Box 457
Brisbane QLD 4001
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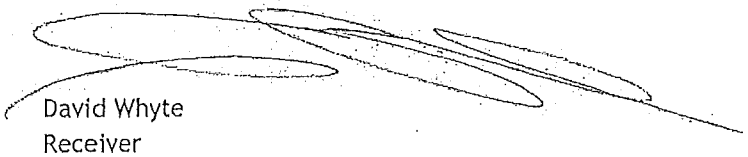
Fax: +61 7 3221 9227
Email: enquiries@lmfmif.com

Yours faithfully



David Whyte
Receiver

REMUNERATION REPORT

LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed)

8 August 2013 to 7 February 2014

					Administration		Assets		Creditors		Investigation		Trade On		Research/Data Collection		Analysis	
Employee	Position	Rate	Total Units	Total $	Units	$	Units	$	Units	$	Units	$	Units	$	Units	$	Units	$
Whyte, David	Partner	560.00	302.70	169,512.00	43.00	24,080.00	171.50	96,040.00	2.30	1,288.00	5.50	3,080.00	80.40	45,024.00	0.00	0.00	0.00	0.00
Fielding, Andrew	Partner	560.00	1.20	672.00	1.00	560.00	0.00	0.00	0.20	112.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Beauchamp, Margaux	Executive Director	460.00	218.60	100,556.00	2.30	1,058.00	213.30	98,118.00	0.00	0.00	3.00	1,380.00	0.00	0.00	0.00	0.00	0.00	0.00
Somerville, John	Senior Manager	425.00	15.40	6,545.00	8.80	3,740.00	3.80	1,615.00	2.30	977.50	0.00	0.00	0.50	212.50	0.00	0.00	0.00	0.00
Haines, Charles	Senior Manager	425.00	154.80	65,790.00	3.20	1,360.00	27.20	11,560.00	2.90	1,232.50	118.00	50,150.00	3.50	1,487.50	0.00	0.00	0.00	0.00
Garcia, Joanne	Manager	390.00	275.10	107,289.00	25.20	9,828.00	114.00	44,460.00	55.80	21,762.00	0.30	117.00	24.30	9,477.00	7.00	2,730.00	48.50	18,915.00
Wilson, James	Manager	390.00	1.80	702.00	0.60	234.00	0.20	78.00	1.00	390.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Dharmaratne, Michael	Senior Accountant I	310.00	22.70	7,037.00	8.10	2,511.00	2.90	899.00	11.70	3,627.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Tipman, Daniel	Senior Accountant I	310.00	0.70	217.00	0.20	62.00	0.00	0.00	0.50	155.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Kennedy, Nicola	Accountant II	190.00	10.90	2,071.00	7.60	1,444.00	3.30	627.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Taniran, Rycko	Accountant II	175.00	144.20	25,235.00	0.00	0.00	85.50	14,962.50	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	58.70	10,272.50
Jackson, Nicole	Practice Assistant	150.00	5.10	765.00	5.10	765.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Richardson, Ashley	Administration Assistant	75.00	7.40	555.00	7.40	555.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Hattingh, Moira	Administration Assistant	75.00	13.20	990.00	0.60	45.00	0.00	0.00	12.60	945.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
		TOTAL	1173.80	487,936.00	113.10	46,242.00	621.70	268,359.50	89.30	30,489.00	126.80	54,727.00	108.70	56,201.00	7.00	2,730.00	107.20	29,187.50
		GST		48,793.60		4,624.20		26,835.95		3,048.90		5,472.70		5,620.10		273.00		2,918.75
		TOTAL INC GST		536,729.60		50,866.20		295,195.45		33,537.90		60,199.70		61,821.10		3,003.00		32,106.25
		AVERAGE HOURLY RATE		415.69		408.86		431.65		341.42		431.60		517.03		390.00		272.27

REMUNERATION REPORT

LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed)

8 August 2013 to 7 February 2014

Outlays

Accommodation	339.56
Airfares	2,152.90
Car Hire	305.69
General	22,011.62
Mileage	113.40
Parking	422.11
Photocopy	7,371.90
Postage	14,954.59
Printing	1,470.30
Search Fee	3,337.44
Taxi fares	64.84
SUB TOTAL	52,544.35
GST	5,254.44
TOTAL	57,798.79
TOTAL INVOICE	$ 594,528.39

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicants:	RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE
	AND
First Respondent:	LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND
	AND
Second Respondent:	THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288
	AND
Third Respondent:	ROGER SHOTTON
	AND
Intervener:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

CERTIFICATE OF EXHIBIT

VOLUME 2 OF 4

Exhibit "DW-8" to the Affidavit of DAVID WHYTE sworn at Brisbane 2nd day of May 2014

Deponent

Solicitor/A Justice of the Peace

Alexander Philip Nase
Solicitor

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the Applicant, Mr David Whyte

TUCKER & COWEN
Solicitors
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