

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

AFFIDAVIT OF DAVID WHYTE

I, DAVID WHYTE of Level 6, 10 Eagle Street, Brisbane in the State of Queensland, Official Liquidator, state on oath:-

1. I am an Official Liquidator and a Partner of the firm BDO. I am an affiliate member of the Institute of Chartered Accountants of Australia and an associate member of the Australian

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Signed:

Witnessed by:

AFFIDAVIT:  
Form 46, R.431

TUCKER & COWEN  
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Filed on behalf of the Applicant, Mr David Whyte

Restructuring, Insolvency and Turnaround Association (ARITA) (formerly known as the Insolvency Practitioners Association of Australia).

2. By Order of this Honourable Court made on 8 August 2013, I was appointed:
  - (a) pursuant to section 601NF(1) of the *Corporations Act 2001* (Cth) (the Act) to take responsibility for ensuring that the LM First Mortgage Income Fund ARSN 089 343 288 (the FMIF) is wound up in accordance with its constitution; and
  - (b) pursuant to sections 601NF(2) of the Act, as the receiver of the property of the FMIF.
3. Now produced and shown to me and marked "DW-1" is a copy of the reasons for judgement of the Honourable Justice Dalton delivered in this proceeding on 8 August 2013. Justice Dalton directed the parties to bring in minutes of order to reflect the reasons for judgement. Now produced and shown to me and marked "DW-2" is a copy of the Orders made by Justice Dalton dated 21 August 2013 (the Orders)
4. I now make an application for the approval of my remuneration for acting as person responsible for ensuring that the FMIF is wound up in accordance with its constitution for the period 8 August 2013 to 31 March 2014 (the relevant period).
5. I set out in this affidavit the background to my appointment; details of the tasks which I and my staff have undertaken in the course of the winding up of the FMIF; and an explanation as to why these tasks were necessary.
6. Throughout this affidavit, where I refer to "my role", I am referring to my role as the person appointed under section 601NF(1) of the Act as person responsible for ensuring the FMIF is wound up in accordance with its constitution.

#### Background –Summary of the FMIF, and Insolvency Appointments

7. In the performance of my duties as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution, I have had and continue to have access to books and records

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of the FMIF. The statements made by me concerning the FMIF in this affidavit concern matters known to me on the basis of my inspection and knowledge of those books and records.

8. The FMIF was registered as a managed investment scheme on 28 September 1999. Now produced and shown to me and marked "DW-3" is a search of the records of the Australian Securities and Investments Commission (ASIC) for the FMIF. Now produced and shown to me and marked "DW-4" is a copy of the constitution of the FMIF as lodged with ASIC on 11 April 2008, together with recent amendments made to the FMIF's constitution.
9. LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461 (LMIM) is the responsible entity of the FMIF, and has been since its inception. Now produced and shown to me and marked "DW-5" is a search of the records of ASIC for LMIM.
10. LMIM is also the responsible entity of a number of other managed investment schemes to which I have not been appointed, including the LM Australian Income Fund, the LM Structured Products Fund, the LM Cash Performance Fund, the LM Currency Protected Australian Income Fund, the LM Institutional Currency Protected Australian Income Fund, LMIM is the trustee of the LM Australian Income Currency Protected Fund, and the former trustee of the LM Managed Performance Fund.
11. The LM Currency Protected Australian Income Fund, the LM Institutional Currency Protected Australian Income Fund and the LM Wholesale First Mortgage Income Fund are feeder funds that invested in the FMIF. Trilogy Funds Management Limited is the responsible entity of the LM Wholesale First Mortgage Income Fund.
12. The FMIF has over 4,500 members.
13. The members of the FMIF subscribed capital for investment purposes. FMIF's investment activities consisted of advancing funds to borrowers under loan agreements on the security of first registered mortgages. The assets of the FMIF consist of its rights against borrowers under these loan agreements and mortgages.


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14. According to the Financial Statements of the FMIF, LMIM, as responsible entity of the FMIF, was paid fees in excess of \$77 million from 1 July 2007 to 30 June 2013, including management fees, custodian fees, loan management/recovery fees, and loan origination fees.
15. In about 2003, LMIM entered into a General Services Agreement with LM Administration Pty Ltd (In Liquidation) (LMA) with respect to the FMIF. According to the audited accounts of the FMIF for the financial years ended 30 June 2011 and 30 June 2012, LMIM paid LMA \$11 million and \$9.1 million respectively for management services and \$5.4 million and \$4.8 million respectively for loan management and controllership services provided by the responsible entity on behalf of the scheme.
16. I am aware from my inspection of certain books and records of the FMIF that:
  - (a) the FMIF was closed for new investments in about March 2009; and
  - (b) redemption of units in the FMIF was suspended in October 2009, other than redemptions allowed under hardship provisions and certain payments to feeder funds.
17. On 19 March 2013, John Park and Ginette Muller were appointed voluntary administrators of LMIM.
18. LMIM held an Australian Financial Services Licence (AFSL). On or about 9 April 2013, ASIC suspended LMIM's AFSL. Now produced and shown to me and marked "DW-6" is a copy of the notice of suspension. The notice of suspension specifies, pursuant to section 915H of the Act, that the AFSL continues in effect for the purposes of the provisions of Chapter 5C and Chapter 7 other than the provisions of Parts 7.2, 7.3, 7.4 and 7.5 of the Act, regarding the provision by LMIM 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, various funds including the FMIF.

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19. On 11 July 2013, Deutsche Bank AG (DB), a secured creditor of the FMIF, appointed Joseph Hayes and Anthony Connelly of McGrathNicol (the DB receivers) as receivers and managers of the assets and undertakings of the FMIF.
20. On 1 August 2013, Mr Park and Ms Muller were appointed liquidators of LMIM.
21. On 8 August 2013, I was appointed, pursuant to the Orders, as the person responsible for ensuring that it is wound up in accordance with its constitution.

#### Reports to members

22. Since my appointment, I have provided regular updates to the members of the FMIF as to the winding up of the FMIF. Now produced and shown to me and marked "DW-7" is a copy of my reports to members dated 27 August 2013, 15 October 2013, 4 December 2013, and 19 February 2014. In my reports to members dated 15 October 2013, 4 December 2013, and 19 February 2014, I provided an update to members as to the amount of my remuneration and outlays incurred to date.
23. In my report to members dated 4 December 2013, I provided an updated value of the FMIF of \$80,674,000, and a revised unit value for the FMIF of 17 cents in the dollar as at 30 November 2013 not taking into account future operating costs, future interest on the DB facility, future Receivers fees, future rates and land tax, and any legal recoveries against borrowers (other than the proceeds of sale of the securities held by the FMIF), valuers or other third parties.
24. In my report to members dated 19 February 2014, I provided an estimated return to investors of between 13 and 18 cents in the dollar as at 31 January 2014, not taking into account future operating costs, future receivers' fees, future rates and land tax, and any legal recoveries against borrowers (other than the proceeds of sale of the securities held by the FMIF), valuers or other third parties. That remains my current estimate of the return to investors.

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Assets to be realised

25. A summary of the location of, and the assets of the FMIF to be realised, and the status of those assets is as follows:

Location	Description of asset/Strategy	Status
QLD	90 strata titled hotel rooms. Sell down of units ongoing with 74 sold to date, 1 under contract, 13 with offers received and 2 remaining to be sold.	Under contract/ Offers received/ On the market
NSW	The security is 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 last 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, 57 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 an englobo parcel of land (7.7851 ha), this was sold in January 2014. The second lot comprises of an englobo parcel of land (1.6128 ha) currently zoned as mixed use. A DA had previously been granted for 86 grouped dwellings, this is subject to a conditional offer. The third lot is currently zoned as mixed business (1.6291 ha). In addition to the above security there is also a charge over the guarantor's home.	On the market/ Offer received
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.	On the 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 which is under contract, 10 of the 14 completed lots from stage 7 are under contract with 12 lots from Stage 8 due for completion in April 2014.	On the market/ Under contract
VIC	61 strata titled units within a larger purpose built self-storage facility.	Under contract
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, 20 are vacant.	Preparing to market
NSW	A supported living community, with 83 completed independent living units. 28 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.	Preparing to market
QLD	72 strata titled unit resort complex with management rights. 15 units have been sold to date with 57 units remaining.	Legal action in course
QLD	Two supported living communities. One currently has 62 completed units (20 vacant) with a further 106 proposed. The other has 110 completed units, with 21 units currently vacant.	Borrower in control of asset

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Location	Description of asset/Strategy	Status
QLD	Residential land subdivision. 3 constructed detached dwellings (1 sold, 1 under offer), 16 completed residential land lots (9 under offer), 80 lots with operational works approval and additional land (approx. 57ha) with or pending development approval.	Completed lots on the market with a strategy being finalised for the balance land.
VIC	A supported living community, with 60 completed independent living units (4 vacant, of which 3 are under contract with settlement scheduled for early April 2014) with a further 132 units proposed.	Individual units for sale/preparing to market
TAS	A supported living community, with 26 completed independent living units (3 vacant) and a further 18 proposed.	Preparing to market

I estimate that the sale of the above properties will realise between \$63.8 million and \$90.6 million.

#### Work done in the Winding up of the FMIF

26. In my role during the relevant period my staff and I have undertaken tasks which broadly fall within the following five categories:

- (a) Assets;
- (b) Administration;
- (c) Creditors;
- (d) Investigation; and
- (e) Trade On.

27. While my staff and I used the above categories to record time, certain items of work could have fallen within more than one of the categories, so that, for example, communicating with members of the FMIF could be recorded under either Administration or Creditors. However, each task is only recorded once, and the time for carrying out each task is only recorded once.

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28. In addition to the work undertaken by the Business Recovery & Insolvency (BRI) area within BDO, I have also requested assistance from my corporate finance, tax and audit areas within BDO to assist me with specialised matters.
29. The work done by the persons in each of these departments, described below, was in my assessment necessary for the winding up of the FMIF in accordance with its constitution. The work undertaken by these persons is of a specialist nature and was necessary to assist with developing the strategy for the realisation of the retirement village assets, my investigations into the tax position of the FMIF and whether or not there may be a potential legal action against the auditors of the FMIF.
30. With the exception of one member of staff, the charge out rates charged by our corporate finance, tax and audit staff is lower than BRI rates. These lower rates have been used in calculating the fees to be charged with the one member of staff at a higher rate being reduced to the BRI rate applicable to that level.

#### Corporate Finance

31. The corporate finance area have provided assistance with determining the strategy for the disposal of the retirement villages. The corporate finance staff have specialised knowledge in this sector and have assisted me with analysing the financial performance of the retirement villages and in determining the options available to further develop and/or sell the villages. Further details of the work undertaken in this respect is included in paragraphs 48 to 50.

#### Tax

32. Our tax area has acted as a tax agent for the fund to obtain the relevant documents from the ATO portal to assist in the analysis of the tax position.

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Audit

33. Our audit area have reviewed the audited financial statements and compliance plan audit of the Fund since 2006 and provided me with a report to assist with my initial investigations into potential claims against the responsible entity, its directors and/or the auditors of the fund.
34. Now produced and shown to me and marked "DW-8" is a schedule of work performed by staff of the Brisbane office of BDO during the period 8 August 2013 to 31 March 2014 (the Schedule).
35. The Schedule shows a description of each task undertaken, the name and position of the person who performed the task, the date the task was undertaken, the length of time it took and the amount charged. A summary of the tasks undertaken, time taken and amount charged is detailed below:

Category/area	Total hours	Amount (net of GST) \$
Assets	800.80	332,920.50
Administration	205.10	87,041.00
Creditors	127.10	49,448.50
Investigations	229.80	97,659.00
Trade on	142.50	71,549.50
Total	1,505.30	638,618.50
GST		63,861.85
Total claim		702,480.35

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36. The Schedule reflects the fact that I delegated to members of my staff the performance of a number of tasks and activities in the winding up in accordance with my usual practices. I delegated work so that the person responsible for particular work reflected the nature of the work. For example, throughout the winding up I have endeavoured to ensure that the least complex of the required work is done by junior members of my staff at lower charge-out rates than senior members of my staff and me.
37. From my knowledge of the work carried out in relation to the winding up and my supervision of the tasks undertaken, I am satisfied that the time recorded for each of the tasks is commensurate with what was required to be undertaken and that the records are accurate.
38. My staff and I record time on a daily basis. We enter our time in six minute units, and we enter the details of the time spent and the description of the tasks undertaken in an electronic system. My staff and I review these time entries on a periodic basis and when necessary, entries will be written off. It should be noted that, in general, our corporate finance members of staff have recorded their time in multiples of half hours rather than to the nearest six minute unit. I have discussed this with the two members of staff who have confirmed to me that this has been rounded down on each occasion and therefore there has been a marginal under-recording of time spent on the tasks. Following a detailed review of the time recorded, and for the purposes of this application a sum of \$8,642.50 plus GST has been written off. The entries reflect BDO's scale of insolvency hourly charge out rates and the consent to act. Now produced and shown to me and marked "DW-9" is a copy of the consent to act filed in this proceeding (which was provided in the form of an Affidavit that I swore on 29 April 2013) (consent to act) and "DW-10" is a copy of BDO's scale of insolvency hourly charge out rates current from 1 July 2013 (which materially reflects the content of the consent to act). The partners of BDO Business Recovery and Insolvency (Qld) are members of ARITA and follow the ARITA Statement of Best Practice – Remuneration.
39. In order to further assist the Court, I set out below an explanation as to why the tasks detailed in the Schedule were undertaken, and why these tasks were necessary for the proper administration of the winding up of the FMIF. Where I have considered it appropriate, I have also detailed a



background to the complexities and difficulties which have arisen since my appointment under section 601NF(1) of the Act. All of the tasks detailed in the Schedule were carried out pursuant to my appointment under s 601NF(1) of the Act to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution. No additional work has been performed by reason of my appointment as Receiver of the property of the FMIF.

40. Some of the overarching main factors which have added to the complexity of the winding up include:
- (a) the fact that there are over 4,500 members of the FMIF and a need to communicate with and respond to questions from members;
  - (b) the need to obtain and review updated valuations of the securities held by the FMIF, as LMIM had been relying upon discounted cash flows prepared by management on the feasibility of a project rather than obtaining valuations from a registered valuer;
  - (c) the number of and the complexity of the properties held as security for the various loans made by the FMIF, and the need to put in place and carry out realisation strategies for each of those properties;
  - (d) the legal and practical complexities associated with realising the security held by the FMIF over a significant number of retirement villages in multiple jurisdictions in Australia, the risk of personal liability being incurred under agreements proposed to be entered into with residents of the retirement villages, and the need to work with management of the various retirement villages in relation to the ongoing operation of the retirement villages;
  - (e) the number and complexity of issues requiring investigation for the purposes of identifying potential claims that may be available to the FMIF, including but not limited to potential claims against the auditors of the FMIF, LMIM, the directors of LMIM, and LMA;

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- (f) the complex inter-relationship between LMIM's affairs in its own right and LMIM's affairs as responsible entity of the FMIF, and LMA;
- (g) the complex inter-relationship between the FMIF and other funds of which LMIM is responsible entity, including a claim against the FMIF foreshadowed by KordaMentha as trustee of the LM Managed Performance Fund (the MPF);
- (h) issues as between the holders of different classes of units in the FMIF;
- (i) the need to co-operate with a number of other appointees, including the DB Receivers, the liquidators of LMIM and the liquidator of LMA;
- (j) Initial issues regarding delegation of work and access to books and records; and
- (k) Ongoing issues regarding the services agreement between the liquidator of LMA, the receivers and managers of LMIM and the liquidator of LMIM.

Assets

41. In the relevant period, my staff and I have undertaken various tasks and activities that can be described as falling within the category "assets". I canvass these tasks and activities below.

*Asset realisation strategy*

42. Prior to my appointment, the secured creditor, DB appointed the DB Receivers.
43. In order to avoid duplication of work and ultimately costs to investors, it was decided by the DB Receivers and me that the DB Receivers would concentrate on those assets already on the market or about to be placed on the market to enable DB to be paid out in full as early as possible and avoid ongoing interest charges.
44. Given that it was expected that DB would be paid out within six months of my appointment, it was decided by the DB Receivers and me that I would then concentrate on the retirement villages and

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other assets with longer sell-down periods as these would require a more thorough review and strategies to be put in place before they could be taken to the market.

45. Unfortunately, despite DB being paid out in full in early January 2014, I am informed and believe that DB does not consider it is in a position to release its charge and retire the DB Receivers. I am informed and believe that this is due to the FMIF being put on notice by the trustee of the MPF of a potential breach of trust claim.
46. The overall strategy remains unchanged with the DB Receivers controlling the sell down of those assets either being marketed or ready to be marketed and me controlling the retirement village assets and other longer term assets.
47. As part of this process, the DB Receivers and I (and our respective staff) have had and continue to have regular discussions regarding the asset realisation strategy. My dealings with the DB Receivers concerning these matters were in my view necessary for the winding up of the FMIF in accordance with its constitution.

*Aged care facilities*

48. The FMIF advanced funds to the operators of seven retirement villages, located in various states across Australia including Queensland, New South Wales, Victoria and Tasmania. It was agreed between the DB Receivers and me that I would have carriage of the assessment of the options available and the realisation process for these retirement villages.
49. In the relevant period, my staff and I have undertaken the following tasks:
- (a) Attending each of the retirement villages/aged care facilities to view the facilities and meeting with onsite management;
  - (b) Reviewing and preparing a summary of the loan documentation for each of the seven retirement villages, including third party guarantees and security priority deed;
  - (c) Reviewing correspondence regarding demands made against the guarantors;

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- (d) Reviewing and preparing a summary of the management and marketing agreements;
- (e) Meeting with the operators of the seven retirement villages to discuss ongoing marketing and management of the sites;
- (f) Liaising with LMA staff regarding ongoing marketing requirements for the lease of individual units;
- (g) Meetings with my solicitors to discuss various matters pertaining to the ongoing operations and management of the seven retirement villages. Consider the options available for the legal structure of management of the villages and obtain legal advice on the options available;
- (h) Meetings with the DB Receivers and LMA staff to discuss various matters, including disclosure statements to residents, audits and release of monies held in trust;
- (i) Liaising with LMA staff regarding ongoing building works at some of the villages;
- (j) Preparing announcements to the village residents and complete documents for annual general meetings;
- (k) Liaising with LMA staff and the operators of the various retirement villages to collate information for the review of the villages;
- (l) Undertake a detailed financial review and analysis of the retirement villages to assist in determining the strategy for achieving the optimum return for members, including:
  - (i) Reviewing initial information provided by LM, including, but not limited to management agreements, financial reports, resident profile information, management forecasts and building contracts;
  - (ii) Liaising with LM staff and the village operators;

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- (iii) Obtaining and collating the relevant information for the preparation of the financial model. This step includes an external research on valuation assumptions specific to retirement villages in Australia (for example, the discount rate, CPI, life tables, X-factor, tax rates, etc). Research facilities include Australian Bureau of Statistics, Reserve Bank of Australia, Capital IQ, and other published empirical papers;
- (iv) Development of the cash flow profile within the financial model. The cash inflows and outflows are modelled by way of a discounted cash flow analysis;
- (v) Development of the deferred management fee profile having regard to the information set out in the resident profile matrix;
- (vi) Structuring the financial model to incorporate the sources of inflows with the sources of outflows relevant to a discounted cash flow analysis;
- (vii) Incorporate additional scenarios into the financial model for testing;
- (viii) Liaising with LM and the village operators with regards to the plausibility of the assumptions adopted in the financial model;
- (m) Preparing an options report providing a detailed analysis of each retirement village to determine the optimum realisation strategy, including:
  - (i) Reviewing each valuation and meeting with the valuer to discuss the valuation and current market trends;
  - (ii) Preparing an analysis of market research including current trends;
  - (iii) Reviewing the resident agreements and current disclosure statements to determine whether they meet current statutory requirements;
  - (iv) Meetings with solicitors to discuss the resident agreements;

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- (v) Reviewing the village operator management agreements for the multiple sites to determine if operators are meeting their requirements under the agreements;
- (vi) Reviewing the village operator marketing and sales agreements for the multiple sites to determine if operators are meeting their requirements under the agreements;
- (vii) Reviewing the marketing budgets prepared by the village operators to assess reasonableness;
- (viii) Reviewing LM and village operator data and prepare General Service Charge accounts and scheme operator accounts for the financial years ending 30 June 2012, 30 June 2013, and the year to date for the financial year ending 30 June 2014;
- (ix) Analysing the financials including key items of income and expenditure;
- (x) Analysing the various options available for example, sell as is or develop and sell including determining the level of funding required to continue to fund the villages during the sell down process;
- (n) Meeting with the DB Receivers and their staff and LMA staff to discuss the winding-up application against one of the retirement villages;
- (o) Preparing documents for the proposed appointment of an administrator;
- (p) Reviewing and preparing a summary of an ATO decision regarding GST implications for the retirement villages; and
- (q) Preparing correspondence requesting marketing submissions for the sale of five of the retirement villages.

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50. All of this work was necessary for the winding up of the FMIF in accordance with its constitution. The work undertaken was necessary, given the complexity of the retirement village assets, to assist with determining the optimum strategies for realising each of the retirement village assets.
51. Work undertaken in respect of the retirement village assets may be recorded in other categories. However, the work undertaken is only recorded once.

*Other assets (excluding retirement village assets)*

52. It was agreed between the DB Receivers and me that I would also have carriage of the realisation strategy for the following assets held as security for loans made by the FMIF:

Location	Description of asset
QLD	7 completed detached dwellings and a partly constructed subdivision of c.100 townhouse/small dwelling lots under community title plus residual land.
QLD	72 strata titled unit resort complex with management rights. 15 units have been sold to date with 57 units remaining.
QLD	Residential land subdivision. 3 constructed detached dwellings, 16 completed residential land lots, 80 lots with operational works approval and additional land (approx. 57ha) with or pending development approval.

53. In the relevant period, my staff and I have undertaken the following tasks:
- (a) Attending each of the sites to view the facilities and meet with onsite management where applicable;
  - (b) Meetings with LM staff to discuss ongoing strategies for sell down and site specific issues, such as, potential claims against the builder and development issues;
  - (c) Meetings with a planning consultant to determine the optimum strategy for lot reconfiguration and development approvals in respect of one of the other assets;
  - (d) Meeting with the planning consultant and council in relation to a proposal to progress development applications in respect of a complex site with multiple uses;

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- (e) Collating information for parties interested in making an offer to purchase the assets and
- (f) Liaising with the DB Receivers and their staff regarding interested parties and potential offers.

54. All of this work was in my view necessary for the winding up of the FMIF in accordance with its constitution. By undertaking this work I am ensuring that realisation of the Fund's assets are optimised for the benefit of members.

55. Work undertaken in respect of the other assets may be recorded in other categories. However, the work undertaken is only recorded once.

*Refinance of DB facility by the Bank of Queensland Limited ("BOQ")*

56. Shortly after my appointment, I entered into discussions with financiers with a view to refinancing the DB facility which at that time was subject to an interest rate of 18%.

57. After a number of discussions, I secured an offer of refinance from BOQ with interest of 12% per annum.

58. Unfortunately, this refinance (which would have saved several hundred thousand dollars in interest and other costs) did not ultimately proceed as the trustees of the MPF, KordaMentha advised that they were not in a position to sign a requested letter of comfort that they would not seek to impugn the BOQ securities.

59. In respect of the refinance, my staff and I undertook the following tasks:

- (a) Meetings and correspondence with our solicitors regarding various refinance matters including facility and security documentation;
- (b) Negotiations with the secured creditor in relation to the refinancing of the facility including liaising with the secured creditor and their legal advisers;

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- (c) Negotiations and meetings with BOQ, their advisers and our solicitors and KordaMentha and their advisors in respect of the refinancing;
  - (d) Liaising with multiple legal firms and LM staff to locate original solicitor certificates for the loans to assist with due diligence on the loans;
  - (e) Review of facility and security documentation, liaising with BOQ's legal advisers and LM staff regarding multiple queries arising from the security review;
  - (f) Issue correspondence to and hold meetings with KordaMentha to discuss the potential breach of trust claim and the implications for the refinance procedure including details of NSW assets not included in the security package for the refinance.
60. This work was in my consideration reasonably necessary for the winding up of the FMIF in accordance with its constitution. The refinancing of the DB facility at that time would have resulted in savings in respect of interest and fees of the DB Receivers for the benefit of members.
61. Work undertaken in respect of the refinance may be recorded in Administration and Trade on categories. However, the work undertaken is only recorded once.

#### Administration

62. In my role, my staff and I have undertaken various tasks that can be described as falling within the category "administration".
63. In essence, the remuneration claimed under this category for the relevant period includes work my staff and I undertook that was necessary for the proper and efficient administration of the winding up, and to ensure proper accounts and records were maintained.
64. The main tasks my staff and I undertook in the relevant period are set out further below.

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Witnessed by:



*Maintaining and updating records relevant to the winding up*

65. A master spreadsheet was created containing a summary of the loans and the security held and other relevant details regarding the valuations of the assets and the realisation strategy. During the relevant period my staff have continued to maintain and update the master spreadsheet to monitor the realisation of security.

*Applications for approval of remuneration*

66. For the purposes of this present application, in the relevant period, my staff and I were required to review and amend the time narrations to ensure confidentiality of certain persons (including individual investors and prospective purchasers of assets) and to maintain legal professional privilege in respect of the work undertaken by my staff and I in the relevant period. I was also required to liaise with and provide instructions to my solicitors in respect of this application

*Job management*

67. In the relevant period, my staff and I have conducted internal meetings and discussions in order to discuss:

- (a) the progression of the job;
- (b) efficient job administration and management;
- (c) the strategy for moving forward;
- (d) options available regarding the retirement villages;
- (e) loan strategies; and
- (f) other general day to day management.

68. I consider that such tasks are necessary for the proper administration of the winding up and to ensure the winding up is conducted in an efficient manner.

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Witnessed by:



*Insurance*

69. During the course of the winding up, my staff and I have liaised with the insurance providers used by the DB Receivers and the liquidators of LMIM to ensure that my interest is recorded on the policies.

*Investor relations and communications*

70. I refer to the section below entitled 'creditors'.
71. As stated therein, during the course of the winding up and in the relevant period my staff and I have attended to answering member enquiries both by telephone and in person, and issuing member communications to keep members updated as to the winding up including the process of asset realisation and the expected return to members. Enquiries from members regarding changes to their details arise regularly however the more in-depth queries from members mainly arise after a report to members has been issued.
72. For the purposes of the member communications, including my reports and letters to the members, my staff and I have been required to collate all relevant material for these reports including documents concerning the status of the realisation of the assets; potential legal actions; updating the estimated valuation of the fund; and "work in progress" and remuneration reports. The reports have been compiled and issued to each member of the FMIF. I consider that these tasks are necessary to keep members of the FMIF properly informed as to the progress of the winding up of the FMIF.
73. Work undertaken in relation to communications with members may be recorded in more than one category, that is, under Creditors and/or Administration. However, time for carrying out each task is only recorded once.

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Witnessed by:



*General*

74. In addition to the above specific matters, my staff and I also conducted the following ongoing tasks and activities in the relevant period:

- (a) travel to the offices of LMIM to meet with staff;
- (b) travel to the retirements villages and the location of other assets to view the properties and meet with management;
- (c) liaising with the other appointees;
- (d) liaising with Cyberthread, a company that BDO retained to set up and maintain a website for the FMIF, [www.lmfimif.com](http://www.lmfimif.com) (the FMIF website) following my appointment regarding website issues, including the publishing of reports to members;
- (e) reviewing and attending to correspondence as required;
- (f) maintaining an appropriate filing system and filing correspondence; and
- (g) reviewing and considering GST obligations.

75. I consider that each of these tasks was necessary for the proper administration of the winding up and to keep members informed of the progress being made and assets realised for the benefit of members.

76. Work undertaken in respect of administration may be recorded in other categories. However, the work undertaken is only recorded once.

Creditors

77. Between the date of my appointment and 31 March 2014, I published on the FMIF website four reports to members of the FMIF updating them as to the ongoing winding up of the FMIF.

78. In the reports, I provided members of the FMIF with a summary of:

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Witnessed by:



- (a) asset realisations and the repayment of the DB facility;
- (b) interactions with the other appointees;
- (c) the status of the legal proceedings including matters pertaining to the MPF;
- (d) an updated estimate of the return to investors and the timing thereof; and
- (e) my remuneration.

79. During the relevant period my staff and I were required to undertake tasks for the purposes of reporting to members of the FMIF, including:

- (a) drafting and reviewing reports to members of the FMIF;
- (b) preparing and updating the asset realisation summary, this work included reviewing the valuations for each of the sites, summarising the assets available at the date of the valuation, liaising with LMA staff to determine what assets have been sold as at 30 November 2013 and 31 January 2014 and adjusting the summaries and valuations accordingly;
- (c) calculate the estimated return to members, this work included liaising with LMA staff and McGrathNicol to determine the bank account balances and reviewing the balance sheet entries as at 30 November 2013 and 31 January 2014; and
- (d) preparing a table summarising my remuneration for inclusion in each report.

80. In addition to the reports to members set out above, my staff and I have also been contacted by email and telephone by members of the FMIF regarding:

- (a) the status of the winding up of the FMIF;
- (b) queries arising from the reports to members regarding the winding up; and
- (c) queries regarding updating member details.



81. Work undertaken in relation to communications with members may be recorded in more than one category. However, time for carrying out the task is only recorded once.
82. I consider that it is necessary for the proper administration of the winding up to keep the investors properly informed as to the progress of the winding up of the FMIF, and to try to minimise the number of direct inquiries from members of the FMIF requesting the same information.

### Investigations

83. During the course of the winding up, my staff and I have undertaken various tasks that can be described as falling within the category "investigations". The investigations to date fall into two categories, those concerning Bellpac Pty Ltd (in Liquidation) (Bellpac) and other potential claims against the Responsible Entity and related parties. Bellpac is a debtor of both the FMIF and the MPF. Four relevant proceedings concerning Bellpac have necessitated ongoing investigations. Other potential claims against the Responsible Entity and other parties have been the subject of investigation by my staff and me. These potential claims are subject to ongoing consideration.
84. In essence, the remuneration claimed in this application under this category for the relevant period includes the following work:
- (a) Reviewing documents available on the LMIM website;
  - (b) Reviewing historical financial reports for certain transactions and disclosures;
  - (c) Reviewing internally prepared documentation including amendments to the FMIF's Constitution, the various versions of the compliance plan, Product Disclosure Statements and Supplementary Product Disclosure Statements;
  - (d) Meetings with the solicitor who acted for LMIM prior to the appointment of administrators to discuss the proceedings involving Bellpac;

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- (e) Attending LMIM offices to review documentation and meet with staff in respect of proceedings involving Bellpac, loans between the MPF and the FMIF and the distribution to Class B unit holders;
- (f) Meetings with BDO audit; and
- (g) Meetings with my solicitors to discuss potential actions and review initial advice.

85. All of this work was in my view necessary for the winding up of the FMIF in accordance with its constitution. By carrying out these investigations I am ensuring I am in a position to reach an informed opinion as to whether or not it is in the best interests of members of the FMIF for any legal action to be taken with a view to recovering funds for the benefit of members.

86. Work undertaken in respect of the investigations may be recorded in other categories. However, the work undertaken is only recorded once.

Trade on

87. Generally, "trade-on" work relates to work for the relevant period which is incidental to the winding up and the specific matters discussed above and includes:

- (a) Reviewing and approving payment of expenses;
- (b) Reviewing the DB Receivers' cashflow forecasts;
- (c) Meetings with BDO tax regarding the tax status of the FMIF and GST issues;
- (d) Meetings and follow up discussions with the DB Receivers and their staff, the liquidators of LMIM and the liquidator of LMA regarding the court order under which I was appointed, controllerships, claim from the MPF in relation to potential breaches of trust, books and records and operational matters including ongoing arrangements for the employment of staff and sharing of costs;

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Witnessed by:



- (e) Meetings with the DB Receivers and their staff regarding the retirement of the DB Receivers and operational matters;
- (f) Liaising with my solicitors regarding the termination of the DB Receivers' appointment;
- (g) Reviewing legal advice and correspondence to the DB Receivers and DB regarding the retirement of the DB Receivers.

88. Following feedback from the responsible entity and members, and in order to try to avoid incurring the cost of preparing audited accounts for the financial year ended 30 June 2013 (the cost of preparing audited accounts for the financial year ending 30 June 2012 was in excess of \$500,000), I will be providing members with unaudited management accounts as at 30 June 2013 and six monthly thereafter.

89. During the relevant period, my staff and I have undertaken the following tasks in respect of preparing the management accounts:

- (a) Attending meetings with LM staff and consultant to review the accounts drafted by them and consider the further information to be collated to assist in finalising same;
- (b) Reviewing the working papers to verify the accuracy of the management accounts;
- (c) Preparing summaries for the valuation of each of the assets which are expected to sell within the next twelve months and those expected to take longer than twelve months to sell;
- (d) Calculate the selling, statutory and holding costs for each asset and adjust the asset value to take into account these costs; and
- (e) Calculate the net present value of those assets which are expected to take longer than twelve months to sell.

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Witnessed by:



90. This work was in my opinion necessary for the winding up of the FMIF in accordance with its constitution. By undertaking this work I will be able to provide ongoing financial accounts to members and avoid incurring ongoing audit fees during the winding up.
91. Work undertaken in relation to trade-on may be recorded in more than one category. However, the work undertaken is only recorded once.

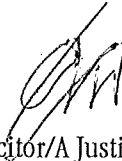
#### Remuneration

92. Given the nature and volume of the work involved in this winding up as canvassed above, I believe that the sum of \$702,480.35, inclusive of GST, represents a fair and reasonable amount for remuneration for the relevant period and that the work undertaken to which the remuneration relates was necessary for the proper conduct of the winding up of the FMIF pursuant to the Orders.
93. I respectfully request this Honourable Court to make orders that my remuneration for the relevant period be fixed in the amount of \$702,480.35 inclusive of GST.
94. As the winding up of the FMIF is ongoing, there will be a need for further applications for approval of remuneration. These will be made on a regular basis.
95. All the facts and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit.

Sworn by DAVID WHYTE on the 2<sup>nd</sup> day of May 2014 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

Alexander Philip Nase  
Solicitor