

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

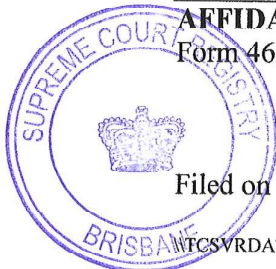
- 1. I am a Registered Liquidator and a Partner of the firm BDO. I am an affiliate member of the Chartered Accountants Australia and New Zealand and a**

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Signed: 

Witnessed by: 



**AFFIDAVIT:  
Form 46, R.431**

Filed on behalf of the Applicant

**TUCKER & COWEN  
Solicitors  
Level 15  
15 Adelaide Street  
Brisbane, Qld, 4000.  
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professional member of the Australian Restructuring, Insolvency and Turnaround Association (“**ARITA**”).

2. Now produced and shown to me and marked “**DW-120**” is an indexed paginated bundle of the documents referred to in this Affidavit (“**the Bundle**”).


### **Appointments**


#### *Receivership*

3. By Order of this Honourable Court made on 8 August 2013 and later embodied in an Order dated 21 August 2013, I was appointed:
  - (a) pursuant to section 601NF(1) of the Corporations Act 2001 (Cth) (“**the Act**”) to take responsibility for ensuring that the LM First Mortgage Income Fund ARSN 089 343 288 (“**the FMIF**”) is wound up in accordance with its constitution; and
  - (b) pursuant to section 601NF(2) of the Act, as the receiver of the property of the FMIF.
4. I refer to my affidavit sworn and filed on 7 November 2014 (“**November 2014 Affidavit**”). The background to my appointment is relevantly explained by me at paragraphs 12 to 37 of my November 2014 Affidavit.
5. By Order of this Honourable Court made on 17 December 2015 in proceeding 3508/15 (“**Residual Powers Orders**”), I was:-
  - (a) Empowered subject to the balance of orders therein, to determine the extent LM Investment Management Ltd (receivers and managers appointed) (in liquidation) (“**LMIM**”) is entitled to be indemnified from the property of the FMIF, in respect of any expense or liability, or claim against, LMIM, in acting as Responsible Entity (“**RE**”) of the FMIF;
  - (b) Authorised, and empowered, to exercise the powers of, and am responsible for, the functions of the RE of the FMIF as set out in Clauses 9, 10 and 22 of the Constitution of the FMIF, in respect of:-

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- (i) The transfer, registration and suspension of units in the FMIF (Clause 9);
  - (ii) Transmission of units (Clause 10); and
  - (iii) Maintaining the Register of Members of the FMIF (Clause 22).
- (c) Directed to apply to the Australian Securities and Investments Commission (“ASIC”) to obtain relief from financial reporting and audit obligations of the FMIF under Part 2M.3 of the Act, herein referred to as the “Residual Powers Orders”.
6. By order of this Honourable Court made on 18 July 2018 in proceeding 3508/15, it was directed that the Liquidators are entitled to claim their further reasonable costs and expenses of carrying out the work they or LMIM are required to do by and under the Residual Powers Orders in connection with the FMIF, not being the subject of a claim already made under the Residual Powers Orders, and to be paid therefore out of the assets of the FMIF, in such amounts as are approved by the Court from time to time.
7. By order of this Honourable Court made on 2 October 2019 in proceeding 3508/15, I was authorised and empowered to make an interim distribution from the property of the FMIF, to members of the FMIF, of up to \$40 million.

*Controllership*

8. On 25 September 2014, Andrew Fielding and I were appointed as agents of The Trust Company (PTAL) Ltd (“PTAL”), in lieu of LMIM, in respect of the securities it holds from the following companies:-
- (a) Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed) ACN 098 955 296 (“Cameo”);
  - (b) Bridgewater Lake Estate Pty Limited (In Liquidation) (Controllers Appointed) ACN 086 203 786 (“Bridgewater”);

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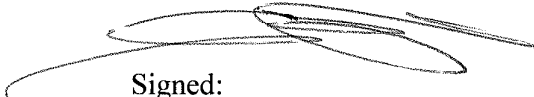
Witnessed by: 


- (c) OVST Pty Ltd (Controllers Appointed) (In Liquidation) ACN 103 216 771 (“**OVST**”);
- (d) Redland Bay Leisure Life Pty Ltd (In Liquidation) (Controllers Appointed) ACN 109 932 916 (“**RBL**”);
- (e) Redland Bay Leisure Life Development Pty Ltd (In Liquidation) (Controllers Appointed) ACN 112 002 383 (“**RBLD**”);
- (f) Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed) ACN 116 192 780 (“**Pinevale**”),

together, referred to in this affidavit as the “**Controllership Companies**”. In August 2018, PTAL issued notices revoking the appointments of Mr Fielding and I as controllers of Cameo, Bridgewater, OVST, RBL, RBLD, and in September of 2018, PTAL issued notices revoking the appointment of Mr Fielding and I as controllers of Pinevale.


*References*

- 9. Throughout this affidavit, where I refer to:-
  - (a) “BDO”, I am referring in a ‘short-hand’ way to staff at BDO under my supervision
  - (b) “my appointment”, 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;
  - (c) “BRI” or “BR” I am referring to BDO Business Recovery & Insolvency (Qld) Pty Ltd. On 16 August 2016, BDO Business Recovery and Insolvency (Qld) Pty Ltd changed its name to BDO Business Restructuring Pty Ltd.
- 10. For ease of reference, I use the following terms which are defined throughout this affidavit:-

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<b>Defined Term</b>	<b>Definition</b>	<b>Paragraph No.</b>
the Act	the <i>Corporations Act 2001</i> (Cth)	3(a)
AIIS	Supreme Court of Queensland Proceeding No. 12716/15 commenced by KordaMentha against LMIM, in relation to a loan made by LMIM as trustee for the MPF to AIIS, for equitable compensation against LMIM, and for a constructive trust and other proprietary relief against assets of the FMIF, which is now discontinued.	201
ARITA	the Australian Restructuring, Insolvency and Turnaround Association	1
ASIC	Australian Securities and Investments Commission	5(c)
Auditors Claim	Supreme Court of Queensland proceeding number 2166 of 2015 against the former auditors of the FMIF	62
Bellpac	Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation)	87
BR	BDO Business Restructuring Pty Ltd	9(c)
Claim against the MPF	Supreme Court of Queensland proceeding number 12317 of 2014 against LMIM, certain former directors of LMIM and the trustees of the MPF	21(c)
DB	Deutsche Bank AG	26
DB Receivers	Joseph Hayes and Anthony Connelly	27
EY	EY also known as Ernst and Young	167(a)
Feeder Funds	the LM Currency Protected Australian Income Fund, the LM Institutional Currency Protected Australian Income Fund and the LM Wholesale First Mortgage Income Fund	96
Feeder Fund Claim	Supreme Court proceeding 13534 of 2016 against LMIM and the Feeder Funds.	21(b)

  
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<b>Defined Term</b>	<b>Definition</b>	<b>Paragraph No.</b>
FMIF	the LM First Mortgage Income Fund ARSN 089 343 288	3(a)
FMIF assets	Assets over which the FMIF has held security for loans advanced by the FMIF	23
FTI Remuneration Proceeding	Further Amended Originating Application filed in Supreme Court of Queensland proceeding 3508 of 2015	138
FTI	FTI Consulting	138
Fund	the LM First Mortgage Income Fund ARSN 089 343 288	3(a)
June 2016 Affidavit	Affidavit of David Whyte filed 8 June 2016 in this proceeding	Various
June 2017 Affidavit	Affidavit of David Whyte filed 14 June 2017 in this proceeding	Various
June 2018 Affidavit	Affidavit of David Whyte filed 1 June 2018 in this proceeding	Various
June 2019 Affidavit	Affidavit of David Whyte filed 6 June 2019 in this proceeding	Various
KordaMentha	Trustees of the MPF	36(g), 193
LMA	LM Administration Pty Ltd (in liquidation)	36(f)
LMIM	LM Investment Management Ltd (receivers and managers appointed)(in liquidation)	5(a)
LMIM claim	Supreme Court of Queensland proceeding no.11560/16	109, 158
MPF	LM Managed Performance Fund	21(c)
MPF Proceedings	Supreme Court of Queensland Proceedings 8032/14 and 8034/14 commenced by KordaMentha which sought equitable compensation against LMIM and relief over assets of the FMIF by way of subrogation to LMIM's alleged right of indemnity out of	193



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<b>Defined Term</b>	<b>Definition</b>	<b>Paragraph No.</b>
	assets of the FMIF, but are now discontinued	
November 2015 Affidavit	Affidavit of David Whyte filed 24 November 2015 in this proceeding	Various
November 2016 Affidavit	Affidavit of David Whyte filed 18 November 2016 in this proceeding	Various
November 2017 Affidavit	Affidavit of David Whyte filed 10 November 2017 in this proceeding	Various
November 2018 Affidavit	Affidavit of David Whyte filed 14 November 2018 in this proceeding	Various
PEs	Public Examinations	62
PTAL	The Trust Company (PTAL) Ltd	8
RE	Responsible Entity	5(a)
Relevant Period	from 1 May 2019 to 31 October 2019	12
Residual Powers Orders	Orders made by Jackson J on 17 December 2015, as varied or supplemented by orders made by Jackson J on 18 July 2018 and 2 October 2019	5 - 75(c)
Second FTI Remuneration Application	The application filed by Mr Park on 17 July 2018, in Supreme Court of Queensland Proceeding 3508/15 seeking remuneration as liquidator and administrator of the Responsible Entity LMIM	146
the Schedule	a schedule of work performed by staff of the Brisbane office of BDO during the Relevant Period in relation to my appointment (in connection with the winding up of the FMIF).	49
WCL	Wollongong Coal Ltd	21(f)
\$2M proceeding	Supreme Court of New South Wales proceeding no.2014/332566	86



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Defined Term	Definition	Paragraph No.
\$8M proceeding	Federal Court of Australia at New South Wales proceeding No. 2016/00120239	90

*Previous Remuneration*

11. I have made eleven previous applications for approval of my remuneration:-

Remuneration Period	Remuneration Order	Amount of remuneration approved (incl. of GST)	Approximate remuneration per month
8 August 2013 to 31 March 2014	McMurdo J on 28 August 2014	\$702,480.35	\$88,000
1 April 2014 to 30 September 2014	Mullins J on 27 November 2014	\$1,005,948.35 (receivership) \$7,000.95 (controllership)	\$169,000
1 October 2014 to 30 April 2015	Jackson J on 23 June 2015	\$1,761,911.25 (receivership) \$442,214.30 (controllership)	\$315,000
1 May 2015 to 31 October 2015	Martin J on 11 December 2015	\$2,279,205.50 (receivership) \$194,052.10 (controllership)	\$412,000
1 November 2015 to 30 April 2016	Douglas J on 26 June 2016	\$1,405,155.40 (receivership) \$36,510.65 (controllership)	\$240,000
1 May 2016 to 31 October 2016	Daubney J on 2 December 2016	\$1,119,991.40 (receivership) \$13,385.35 (controllership)	\$189,000

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<b>Remuneration Period</b>	<b>Remuneration Order</b>	<b>Amount of remuneration approved (incl. of GST)</b>	<b>Approximate remuneration per month</b>
1 November 2016 to 30 April 2017	Mullins J on 30 June 2017	\$897,580.20 (receivership) \$12,314.50 (controllership)	\$152,000
1 May 2017 to 31 October 2017	Applegarth J on 30 November 2017	\$1,280,897.20 (receivership) \$26,155.25 (controllership)	\$218,000
1 November 2017 to 30 April 2018	Boddice J on 21 June 2018	\$1,041,907.90 (receivership) \$22,306.90 (controllership)	\$177,000
1 May 2018 to 31 October 2018	Mullins J on 29 November 2018	\$1,946,635.35 (receivership) \$20,902.75 (controllership)	\$328,000
1 November 2019 to 30 April 2019	Mullins J on 2 July 2019	\$1,248,853.10 (receivership)	\$208,000

12. I now make an application for approval of my remuneration for work performed in the period from 1 May 2019 to 31 October 2019 (“**Relevant Period**”) for acting as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution in the amount of \$652,328.05 (inclusive of GST).

**Executive Summary**

*Winding up and asset realisation progress*

13. Cash at bank as at 30 June 2019 was \$63,940,278.

  
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14. The remuneration sought in this application for the Relevant Period of about \$109,000 per month is significantly lower than the amount sought in my most recent remuneration application.
15. On or about 30 September 2019, I informed members, in a report to members, of an estimated unit price of 12.6 cents as at 30 June 2019. This estimate does not take into account or include any allowance for future recoveries from legal proceedings, any allowance for claims against the assets of the Fund and the costs to finalise the winding up of the FMIF. Depending on the results of those claims, the cents in the dollar returnable to members is likely to improve.
16. Between 16 and 23 October 2019, an interim distribution of 6.5 cents per unit in the FMIF (approximately \$32 million in total, before taking into account amounts withheld from distributions to the Feeder Funds), was paid to members of the FMIF.
17. Following the making of the interim distribution, the FMIF's cash at bank was \$38,906,794.92 as at 31 October 2019.

*Summary of Benefits to FMIF*

18. The benefits obtained, or received by the FMIF to date as a result of work undertaken by BDO include (but are not limited to) the following:-

<b>Description of benefit</b>	<b>Approximate or estimated quantum of benefit, gross of fees or expenses of my receivership (funds received by FMIF, estimated costs savings, or face value of claim discontinued or dismissed)</b>	<b>Paragraph No.</b>
Net Proceeds of sale of retirement village assets held by FMIF as security for loans to borrowers, which were sold by BDO	Approximately \$40 million – see note 1 below.	Paragraphs 58 to 61 of June 2019 Affidavit

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<b>Description of benefit</b>	<b>Approximate or estimated quantum of benefit, gross of fees or expenses of my receivership (funds received by FMIF, estimated costs savings, or face value of claim discontinued or dismissed)</b>	<b>Paragraph No.</b>
Discontinuance of MPF proceedings in which I was joined as Second Defendant to defend claims made against FMIF assets	Amount claimed by plaintiff against FMIF assets approximately \$24 million plus interest and costs	193 to 196
Discontinuance of AIIS proceeding	Amount claimed by plaintiff against FMIF assets approximately \$3.9 million plus interest and costs	201 to 204
Amount of remuneration sought from FMIF but not approved on First remuneration application by the Liquidators, which was opposed by Mr Whyte	Approximately \$1.3 million (excluding any GST) – See Note 2 below	138 to 145
Recovery of funds from a borrower to whom the FMIF had advanced funds, as a result of negotiations undertaken by BDO	\$7.5 million	N/A
Recovery received by FMIF from proceedings against quantity surveyor, conducted by BDO alleging professional negligence in respect of certifying works on a completed commercial development	\$3 million	N/A
Amount of expenses sought but not approved on FTI Indemnity Application which was opposed by Mr Whyte	\$366,536 – See Note 3 below.	148 to 165



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Witnessed by:



Description of benefit	Approximate or estimated quantum of benefit, gross of fees or expenses of my receivership (funds received by FMIF, estimated costs savings, or face value of claim discontinued or dismissed)	Paragraph No.
Estimated costs savings to the FMIF to date as a result of successful applications by Mr Whyte to ASIC for financial reporting and audit relief	Costs savings in auditor's fees alone estimate to be about \$140,000 - \$343,000 plus FTI's remuneration and expenses had they been involved in the process - See Note 4 below	133 to 137
Amount paid to FMIF by AIF and ASPF following entry into Terms of Agreement between Mr Whyte and FTI	\$212,700.83	145
Amount of remuneration sought from FMIF but not approved on Second FTI Remuneration application by the Liquidator, which was opposed by Mr Whyte in part	\$348,692.87 – see Note 5 below	146 to 147
Recoveries to date in relation to the proceedings against the Feeder Funds	\$4,131,535.74 withheld from the interim distribution to the Feeder Funds of 6.5 cents per unit – see Note 6 below.	98 to 111
Distribution received from the Bellpac Liquidator from the proceeds of the \$2M proceeding	\$1 million	89

Note 1 – The amount received from the sale of the retirement village assets was about \$10 million above the value of the retirement village assets, as assessed in professional valuations obtained by BDO prior to the sales.

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Note 2 – this figure does not take into account additional remuneration or legal costs incurred by me as a result of opposing the application, nor any future costs savings on future remuneration applications by the Liquidator that may result from His Honour approving the apportionment of work referable to all of the funds (category 2 remuneration), as between the various funds that LMIM is or was responsible entity or trustee of, in a manner more favourable to the FMIF than was proposed by the Liquidators. The Liquidator’s costs fixed in the sum of \$230,889.50 were ordered to be paid out of the FMIF.


Note 3 – this figure does not take into account additional remuneration or legal costs incurred by me as a result of opposing the application. The Liquidator’s costs fixed in the sum of \$266,084.31 were ordered to be paid out of the FMIF. Further, it was held that, by reason of the clear accounts rule, LMIM’s entitlement to indemnity for some of the amounts claimed cannot be determined until after the LMIM Claim is heard and determined. See paragraph 157 below for further details.

Note 4 - this figure does not take into account costs savings in relation to the additional Liquidators or Receivers remuneration that would be associated with complying with the relevant financial reporting and audit obligations

Note 5 - this figure does not take into account additional remuneration or legal costs incurred by me, or any additional costs incurred by the Liquidator and paid out of the FMIF, as a result of my opposing part of the Application, nor any future costs savings to FMIF members as a result of His Honour ruling that corporate remuneration is not recoverable from the FMIF. See paragraphs 146 to 148 below for further details.

Note 6 – the settlement of the Feeder Fund Proceeding is expected to affect the return to the Feeder Funds (negatively) and other members of the FMIF (positively).

19. The total of my remuneration approved to date is \$15,465,408.75 (inclusive of controllership remuneration and GST), and the expenses (primarily legal expenses) incurred by me in carrying out the terms of my appointment, are

  
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included in the receipts and payments accounts and financial statements referred to in paragraphs 230 to 235 herein.

*All Court Proceedings*

20. A summary of all court proceedings (including those substantial matters mentioned above) in which the FMIF has had an interest during the Relevant Period, or in respect of which work was performed during the Relevant Period (either to advance the proceeding or matters arising as a consequence of the proceeding), is set out in the table below:-


<b>Title, Court &amp; No.</b>	<b>Description of proceeding</b>	<b>Remuneration category in the Relevant Period</b>
Bruce v LM Investment Management Ltd (in liq.) in its capacity as responsible entity of the LM First Mortgage Income Fund & Ors.  Supreme Court of Queensland Proceeding No. 3383/13	This is the proceeding in which I was appointed and winding up orders made.  Various interlocutory applications have been made in the proceeding including applications for approval of remuneration, and applications for judicial advice.	Trade On and Administration
LM Investment Management Ltd (in liq.) in its capacity as responsible entity for the LM First Mortgage Income Fund (Receivers & Managers Appointed) (Receiver Appointed) v EY (formerly known as Ernst & Young) (a firm) & Ors., (“ <b>Auditors Claim</b> ”)	Claim by LMIM as RE of the FMIF against the auditors (EY) and two partners of EY for misleading and deceptive conduct and professional negligence	Assets

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Witnessed by: 


Title, Court & No.	Description of proceeding	Remuneration category in the Relevant Period
Supreme Court of Queensland Proceeding No. 2166/15		
KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund v LM Investment Management Ltd (Receivers & Managers Appointed) (in liq.) & Anor.  Supreme Court of Queensland Proceedings Nos. 8032/14 and 8034/14  ("MPF Proceedings")	Claim by MPF Trustee against LMIM, arising out of the assignment of KPG and Lifestyle loans from LMIM as RE of the FMIF to LMIM as trustee of the MPF, for, inter alia, equitable compensation for breach of duties owed to members of the MPF, and for declarations that LMIM is entitled to indemnity out of the FMIF with respect to any such liability, and that the MPF trustee is entitled to be subrogated to the rights of LMIM in respect of FMIF assets.  In my position as receiver of the FMIF, I was joined as a Defendant.  These proceedings were discontinued by the plaintiff on 7 June 2018.	Creditors
John Richard Park and Ginette Dawn Muller as liquidators of LM Investment Management Ltd (in liq.) (Receivers and Managers Appointed) the responsible entity of the LM	Application by Mr Park, Ms Muller, and LMIM for directions as to how the FMIF is to be wound up and as to the extent of their powers, functions, and duties.	Trade On and Investigations

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Witnessed by: 

Title, Court & No.	Description of proceeding	Remuneration category in the Relevant Period
<p>First Mortgage Income Fund &amp; Anor. v David Whyte as the person appointed to supervise the winding up of the LM First Mortgage Income Fund</p> <p>Supreme Court of Queensland Proceeding No. 3508/2015</p> <p><b>(“FTI Remuneration Proceeding”)</b></p>	<p>By Further Amended Originating Application filed on 16 December 2015, Mr Park and Ms Muller sought remuneration and expenses as the liquidators (and as administrators) of the Responsible Entity LMIM.</p> <p>By further Application filed 20 May 2016 pursuant to the Orders of Jackson J made 12 December 2015, Mr Park and Ms Muller sought an indemnity from the FMIF for expenses incurred by the Responsible Entity (Indemnity Proceedings).</p> <p>By application filed 19 December 2017, Mr Park and Ms Muller sought further orders against me for payment of the amounts ordered on 22 November 2017.</p> <p>By application filed on 17 July 2018, Mr Park sought approval of remuneration as liquidator and as administrator, of the Responsible Entity LMIM</p> <p>By application filed on 10 October 2018, Mr Park sought</p>	


  
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Title, Court & No.	Description of proceeding	Remuneration category in the Relevant Period
	<p>directions in relation to the dual appointments of Mr Park and I in relation to the winding up of the FMIF ("<b>Dual Appointment Application</b>").</p> <p>By application filed on 1 February 2019, I sought orders authorising me to make an interim distribution to FMIF members of up to \$40 million and declarations as to the proper entitlements of members holding "Class C" units in the FMIF ("<b>Authority Application</b>")</p>	
<p>LM Investment Management Ltd v Drake &amp; Ors.</p> <p>Supreme Court of Queensland Proceeding No. 12317/2014</p> <p>("Claim against the MPF")</p>	<p>Claim against the MPF Trustee, LMIM and certain former directors in respect of a loss suffered by the FMIF as a result of an amount paid to the MPF in the Bellpac litigation matter.</p>	<p>Assets</p>
<p>Supreme Court of New South Wales Proceeding No. 2014/332566</p> <p>("\$2m proceeding")</p>	<p>Claim with respect to \$2 million of bonds issued by Wollongong Coal Ltd to Bellpac, where the FMIF holds a first ranking security over the assets of Bellpac.</p>	<p>Assets</p>

  
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Title, Court & No.	Description of proceeding	Remuneration category in the Relevant Period
Federal Court of Australia at New South Wales Proceeding No. 2016/00120239  (“\$8m proceeding”)	Claim against Wollongong Coal by Bellpac Pty Ltd Liquidator with respect to non-conversion of \$8 million of bonds to shares, where the FMIF holds a first ranking security over the assets of Bellpac.	Assets
PTAL and LM Investment Management Ltd v Coulter Developments Pty Ltd & Ors  Supreme Court of Western Australia Proceeding No. 2403/2014	Claim against Borrowers and Guarantors for \$13.8 million plus interest and costs	Assets
The Trust Company (PTAL) Ltd v Ross Lamb  Federal Circuit Court SYG2097/2016	Creditors Petition against Guarantor. The Guarantor has been made bankrupt. PTAL as custodian of the FMIF is funding the bankruptcy Trustees to undertake a public examination and any agreed recovery proceedings.	Assets
LM Investment Management Ltd (Receivers and Managers appointed) (in Liquidation) as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) v LM Investment Management Ltd (Receivers and Managers appointed)(in Liquidation) as responsible entity for the	Seeking a declaration against LMIM as responsible entity of the Feeder Funds to withhold from distributions or payments otherwise payable to the Feeder Funds in the amount of \$55,059,318.12 or certain alternative remedies as set out in the claim. This proceeding has settled.	Assets

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Witnessed by:



Title, Court & No.	Description of proceeding	Remuneration category in the Relevant Period
LM Currency Protected Australian Income Fund (Receiver Appointed) & Ors  Supreme Court of Queensland Proceeding No. 13534/16  ("Feeder Fund claim")		
LM Investment Management Ltd (Receivers and Managers appointed) (in Liquidation) as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) v LM Investment Management Ltd (Receivers and Managers appointed)(in Liquidation)  Supreme Court of Queensland Proceeding No.11560/16  ("LMIM claim")	Claim against LMIM in relation to payments LMIM caused to be made from the property of the FMIF which were not authorised by the constitution or the Act and material losses suffered by the FMIF by reason of breaches of duty by LMIM.	Assets

*Summary of work in the Relevant Period*

21. By way of short summary, I have undertaken the following work in the Relevant Period, that I considered necessary for the winding up of the FMIF

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- (a) In relation to Supreme Court of Queensland proceeding numbered 2166/15 against the former auditors of the FMIF, the significant work included, the following:
- (i) providing instructions and assisting my solicitors and Counsel in respect of further work to finalise 3 volumes of further and better particulars of the sixth further amended statement of claim;
  - (ii) providing instructions and assisting my solicitors and Counsel in respect of a review of the Auditor's Claim held by the Commercial List Judge Justice Jackson on 13 June 2019;
  - (iii) reviewing the defendants applications for leave to proceed against LMIM as filed on 21 June 2019 ("**Leave Application**") and for relief concerning privilege against self-incrimination and penalty privilege as filed 10 June 2019 ("**Relief Application**") as detailed in paragraphs 66 and 67 below;
  - (iv) liaising, providing instructions and assisting my solicitors in relation to an application filed by me on 21 June 2019 ("**Representation Application**") to join me as a third party to the Third Party Proceedings in order to defend claims against LMIM the First Third Party, as RE of the FMIF, of up to approximately \$180 million;
  - (v) providing instructions and assisting my solicitors and Counsel in respect of preparing my affidavits in respect of both the representation application and the Relief Application;
  - (vi) providing instructions and assisting my solicitors and Counsel in respect of preparing two affidavits in respect of the Leave Application;
  - (vii) providing instructions and assisting my solicitors and Counsel in respect of a hearing in the Auditor's Claim held by the

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Commercial List Judge Justice Jackson on 26 July 2019 in relation to the three separate applications detailed in paragraphs 66 to 68 of this affidavit and referred to as the Representation Application, the Leave Application and the Relief Application;

- (viii) reviewing and providing instructions in relation to the submissions of all parties concerning the three separate applications as heard on 26 July 2019;
- (ix) attending several conferences with my solicitors and Counsel to discuss the approach to each of the Applications and to provide instructions regarding same;
- (x) reviewing correspondence and advices received from my solicitors;
- (xi) reviewing correspondence received from the solicitors for the defendants' and the third parties; and
- (xii) reviewing the judgments delivered on 4 October 2019 (with respect to the Leave Application) and 17 October 2019 (with respect to costs of the applications);

The quantum of the claim is for in excess of \$200 million ("**Auditors Claim**").

- (b) In relation to Supreme Court of Queensland proceeding numbered 13534/16 against LMIM and the Feeder Funds, the significant work included the following:
  - (i) providing instructions and assisting my solicitors and Counsel in respect of preparing my two further affidavits in support of my application to Court for judicial advice that I was justified in entering into the Deed of Settlement;
  - (ii) attending the hearing in respect of my application to Court before Justice Mullins on 2 and 3 May 2019 and providing instructions to my solicitors and Counsel;

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- (iii) several conferences and discussions with my legal representatives in relation to the settlement of the proceeding and the outcome of the application for judicial advice;
- (iv) remodelling the potential distributions to members of the FMIF based on the court order determining the foreign currency investors entitlement, total number of units held and first distribution of 6.5 cents per unit; and
- (v) satisfying the remaining conditions precedent of the Deed of Settlement and liaising with my legal representatives in respect of same;

The claim was for in excess of \$55 million with the relief sought being to withhold distributions or other monies payable to the Feeder Funds from the winding up of the Fund up to specific amounts claimed against each of them or certain alternative remedies as set out in the claim ("**Feeder Fund Claim**");

- (c) In relation to Supreme Court of Queensland proceeding numbered 12317/14 against the trustees of the LM Managed Performance Fund ("**MPF**") and others, the claim is for approximately \$15.5 million plus interest ("**Claim against the MPF**"). No significant work was required in relation to the proceeding during the period as the proceeding was and still is awaiting judgment which is to be handed down on 22 November 2019;
- (d) In relation to Supreme Court of Queensland Proceeding BS3508/15, the significant work has included:
  - (i) Reviewing and considering the judgments delivered by the Court on 2 October 2019 with respect to the Second FTI Remuneration Application, the Authority Application and the Dual Appointment Application;
  - (ii) Conferring with my solicitors in relation to and reviewing advices in relation to, the judgments of the Court; and

  
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- (iii) Liaising with and providing instructions to my solicitors as to matters arising out of the judgments, including liaising with other parties as to the costs orders to be sought, the making of submissions as to the form of orders, and appropriate costs orders and reviewing the judgment of the Court in relation to costs;
  - (e) Liaising with the Bellpac liquidator in relation to the Fund's entitlement to the bond proceeds;
  - (f) Liaising with the Bellpac liquidator in relation to the status of the Heads of Agreement with Wollongong Coal Ltd ("WCL") and to the sunset date sought by WCL for obtaining shareholder approval in the \$8M proceeding;
  - (g) Complying with the obligations pursuant to the relief from ASIC from financial reporting and audit requirements;
  - (h) Paying an interim distribution of 6.5 cents per unit to FMIF' members, including calculating the amount of the distribution;
  - (i) Preparation of unit price calculation as at 30 June 2019;
  - (j) Preparation of management accounts for the year ending 30 June 2019;
  - (k) Preparation of reports to members issued in July 2019 and September 2019; and
  - (l) Work undertaking the investor management function for over 4,500 members, including answering queries on the winding up of the FMIF and maintaining the investor database, including any change in details or transfer of units.
22. The above, very brief, summary of work undertaken by my staff and me is detailed further in my affidavit below.

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*Status of the FMIF assets*

23. All real property assets have now been sold.
24. There remain various legal proceedings on foot that must be determined or resolved, before the winding up can be completed.
25. I am working towards resolving the main issues in the winding up, as soon as is reasonably possible.

*Status of the DB Receivers*

26. I refer to paragraphs 21 and 22 of my June 2018 Affidavit for background in relation to this issue.
27. On 10 December 2018, Joseph Hayes and Anthony Connelly, (the “**DB Receivers**”) retired.

*Distribution*

28. Following the retirement of the DB Receivers, on 1 February 2019, I applied to Court for authority to make an interim distribution to FMIF members of up to \$40 million (“**Authority Application**”), and in a separate application, for judicial advice that I am justified entering into and performing, the deed of settlement entered into with respect to the Feeder Fund Proceeding (“**Judicial Advice Application**”).
29. On 22 May 2019, the Court directed that I am justified in making an interim distribution of 6.5 cents per unit in the FMIF, if I am authorised to do so in on the Authority Application.
30. On 2 October 2018, the Court authorised me to make an interim distribution of up to \$40 million.
31. As noted above, between 16 October 2019 and 23 October 2019, an interim distribution of 6.5 cents per unit in the FMIF, was paid to members.

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**Reduction in costs**

- 32. As part of the winding up process, I have reduced the costs of managing the FMIF.
- 33. Prior to the appointment of Mr Park and Ms Muller as administrators in March 2013, the management fees charged by LMIM as RE of the FMIF averaged \$14 million per annum, for the five years ended 30 June 2012.
- 34. The current and ongoing costs of managing the FMIF are the remuneration and expenses of myself and my staff, and amounts to be paid to the liquidator of LMIM for remuneration or expenses.
- 35. The amount of remuneration sought for this Relevant Period is significantly lower than the amount sought in the previous application and the lowest amount since my first application. I anticipate that my remuneration will show a general downward trend going forward, because:
  - (a) all hard property assets have been realised;
  - (b) a number of the litigation matters have settled, or are awaiting delivery of judgment, or have otherwise been finalised; and
  - (c) in relation to the Auditor's Claim, the detailed accounting and other investigations in relation to the quantum of the claims are largely finalised.

**Complexities**

- 36. Some of the overarching factors which have contributed to the complexity of the winding up of the FMIF include:-
  - (a) the fact that there are over 4,600 members of the FMIF, both in Australia and internationally, and the responsibility to communicate with each of those members as to the progress of the winding up;
  - (b) the number and type of properties held as security for the various loans made by the FMIF;

  
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- (c) the complexity of litigation, including claims made to recover funds for the benefit of members of the FMIF and claims made against assets of the FMIF;
  - (d) risk of personal liability being incurred under agreements entered into with residents of the retirement villages;
  - (e) the number and complexity of issues in the period from 2008 to 2013 requiring my various investigations;
  - (f) the complex inter-relationship between LMIM, LMIM as RE of the FMIF, and LM Administration Pty Ltd (in liquidation) (“LMA”);
  - (g) the complex inter-relationship between the FMIF and other funds of which LMIM is RE, including claims against the FMIF by KordaMentha (which were discontinued in 2018); and
  - (h) the need to liaise with a number of other appointees, including the DB Receivers, the liquidators of LMIM, the liquidator of LMA, the Receivers of the LM Currency Protected Australian Income Fund and the LM Institutional Currency Protected Australian Income Fund and the RE of the LM Wholesale First Mortgage Income Fund.
37. In addition to the overall complexities, certain other issues have arisen or continued to require attention, in the Relevant Period which have added to the complexity of the winding up, and contributed to the time taken, and remuneration sought, including:-
- (a) The extensive, detailed and complex work required in this relevant period in relation to the Auditors Claim and the Feeder Fund Claim as detailed in paragraph 21 above;
  - (b) Work relating to making the interim distribution to over 4,600 investors and 5,200 investment accounts, which included:
    - (i) Calculating the distribution for each investment;

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- (ii) Calculating the distribution amount to be paid to Australian Dollar unit holders;
- (iii) calculating the amounts to be distributed to members who invested in foreign currency using the foreign exchange spot rate at the commencement of the winding up on 8 August 2013 in accordance with the court order dated 2 October 2019;
- (iv) Calculating the amount to be withheld from distributions to the Feeder Funds in accordance with the Deed of Settlement and release as varied by a Deed of Variation for the Supreme Court of Queensland Proceedings 13534 of 2016;
- (v) Processing and recording the distribution within the Fund's database;
- (vi) Providing instructions and information to PTAL to effect the distribution;
- (vii) Creating payment files to pay the distribution to the member's nominated bank account recorded on the Fund's database;
- (viii) Preparing cheques and international bank drafts for members that did not have a bank account recorded on the Fund's database, and
- (ix) Preparing a notice to members confirming a distribution has been paid and arranging for the issue of that notice.

38. Given the complexity of many of the litigation matters, and particularly the technical expertise required for prosecuting the Auditors Claim, it has been necessary to maintain the engagement of staff at a senior level with higher charge out rates. Two audit partners, Mr Clark Jarrold and Mr Craig Jenkins

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together with other senior personnel (Ms Julie Pagcu and Mr Arthur Taylor) have been involved in the litigation matters.

**Time recording**

- 39. My staff and I record our 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 are written off.
- 40. The partners of BDO Business Restructuring Pty Ltd (“BR”) are members of ARITA, and follow the ARITA Statement of Best Practice – Remuneration.
- 41. Each task and the time for carrying out each task, is only recorded once.

**Teams assisting**

- 42. Staff from across several practice areas of BDO, in addition to members of the BR practice area, assist me in my receivership role. These staff are sourced from the Audit and Corporate Finance practice groups. I set out generally below, the function of each practice group and their assistance to me in the Relevant Period.
- 43. Given the complexities and nuances of this particular winding up, I considered that it was necessary to involve the assistance of these persons, given the specialist knowledge they possess with regard to particular areas. For example, I sought specialist knowledge regarding the audit and accounting issues arising in preparation of the Auditors Claim. The assistance of these teams was necessary for the purposes of the winding up.

At pages 1 to 3 of the Bundle are copies of the hourly charge out rate schedules of the BDO practice groups that applied during the Relevant Period.

*Audit*

- 44. During the Relevant Period, the Audit team at BDO has assisted me by:-

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- (a) responding to queries from my solicitors and Counsel regarding the auditor's duties to comply with applicable legislation in financial and compliance plan audits to assist with the prosecution of the Auditors Claim;
  - (b) attending and preparing for conferences with the auditing experts being considered or already appointed to prepare expert evidence in relation to financial audits and audits of compliance plans and loss and damage to assist with the prosecution of the Auditors Claim;
  - (c) attending conferences with solicitors and counsel in relation to the appointment of experts in the Auditors Claim proceeding;
  - (d) providing assistance in relation to loss calculations and documents recovered from EY to be considered by experts in the Auditors Claim proceeding;
  - (e) providing assistance in preparation for the Auditor Claim hearing on 26 July 2019 in relation to practical applications of auditing standards and issues relating to allegations in the Third Party Statement of Claim with respect to management representations;
  - (f) Assisting with the review and completion of the management accounts for the year ended 30 June 2019.
45. Given the expertise required to perform this work, I believe it was necessary for the Audit team to assist me with the above matters.


**Categories of work**

46. During the Relevant Period, my staff and I have undertaken tasks which broadly fall within the following five categories:-

- (a) Assets;

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Witnessed by:



- (b) Trade on;
- (c) Creditors;
- (d) Dividend; and
- (e) Administration.

47. 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.
48. At pages 4 to 5 of the Bundle is a breakdown of time charged by BDO employees pursuant to my appointment (in connection with the winding up of the FMIF) and a table in respect of "Disbursements" charged against my appointment. These disbursements are office expenses that BDO has incurred. I do not seek approval in this application for these expenses.
49. At pages 6 to 168 of the Bundle is a schedule of work performed by staff of BDO during the Relevant Period ("the **Schedule**") in relation to my appointment (in connection with the winding up of the FMIF). The charges in the Schedule exclude GST.
50. 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:-

<b>Category/area</b>	<b>Total hours</b>	<b>Amount (\$)</b>
Assets	534	254,413.00
Trade on	80.3	42,427.00

  
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<b>Category/area</b>	<b>Total hours</b>	<b>Amount (\$)</b>
Creditors	762.9	193,601.50
Dividend	135.6	38,491.50
Administration	213	64,092.50
Total (exclusive of GST)	1,725.8	593,025.50
GST		59,302.55
<b>Total claim (inclusive of GST)</b>		<b>652,328.05</b>

51. 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. This is in accordance with my usual practices. I delegated work so that the level of experience of the person responsible for particular work reflected, and was appropriate to, 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.
52. The entries in the Schedule reflect BDO's scale of insolvency and other hourly charge out rates.
53. 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.
54. In order to further assist the Court, I set out below explanations 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.

  
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Witnessed by:



55. The tasks detailed in the Schedule were carried out in furtherance of 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.

*Assets*

56. In the Relevant Period, my staff and I have undertaken various tasks and activities that can be described as falling within the category “*Assets*”.

57. Generally, work attributed to this category includes tasks in respect of:-

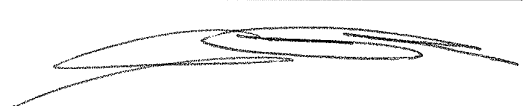
- (a) Advancing claims against guarantors; and
- (b) Court proceedings, including:-
  - (i) Pursuing the Claim against the MPF;
  - (ii) Pursuing the Auditors Claim;
  - (iii) The litigation associated with the realisation of bonds held in WCL by Bellpac;
  - (iv) Pursuing the claim against the Feeder Funds.

58. In total, \$254,413.00 (exclusive of GST) of remuneration is sought for approval in the Relevant Period in respect of the “*Assets*” category.

59. I set out below the extent of work undertaken in respect of “*Assets*”.

*Court Proceedings*

60. Generally, work in respect of court proceedings that have been initiated by me is now attributed to the “*Assets*” category, having formerly been charged to the “*Investigations*” category of work. The reason for this move is to reflect that the investigation aspect of the work has for the most part come to an end and that the court proceedings filed are treated as what is considered to be an asset of the FMIF.

  
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Witnessed by:






61. In this Affidavit, where estimated timeframes for the resolution or determination of legal proceedings are given, it is important to note that the actual timeframes may vary depending upon a range of factors usual for litigation matters, some of which are not within my control, for example, the conduct of the other parties to the litigation.

*Auditors Claim - Supreme Court of Queensland Proceeding 2166/15*

62. Paragraphs 158 to 168 of my November 2015 Affidavit, set out the background to the Public Examinations (“**PEs**”), and paragraphs 104 to 111 of my June 2016 Affidavit, paragraph 74 of my November 2016 affidavit, paragraph 70 of my June 2017 affidavit, paragraph 68 of my November 2017 affidavit, paragraphs 66 and 68 of my June 2018 affidavit, paragraphs 67 to 70 of my November 2018 Affidavit, and paragraphs 67 to 72 of my June 2019 Affidavit, set out the steps in the proceeding to the period ending 30 April 2019.
63. The quantum of the loss claimed in the Auditors Claim is at its highest in excess of \$200 million.
64. This matter is on the commercial list before Justice Jackson.
65. On or about 1 March 2019, the Defendants filed and served Third Party Notices on the Feeder Funds, as well as certain directors, former directors, former officers and the former in-house Counsel of LMIM.
66. On 10 June 2019, the defendants applied to be excused from certain pleading requirements under the Court rules in relation to their defence, on the basis of a claim of privilege (“**Relief Application**”).
67. On 21 June 2019, the defendants applied for leave to proceed against LMIM under section 500 of the Corporations Act 2001 (Cth) (“**Leave Application**”).
68. On 21 June 2019, I applied to be joined to the proceedings constituted by the Third Party Notice filed by the Defendants (“**Representation Application**”).
69. Each of these applications was listed for hearing on 26 July 2019.

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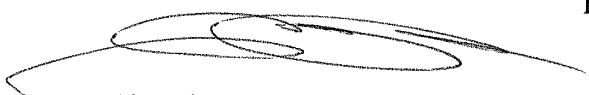
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70. In respect of the Relief Application, an amended application was filed by the defendants and orders were made by the Court timetabling the delivery of the defendants' defence, and the challenge to any claim for privilege which is made by the defendants in that Defence.
71. In respect of the Leave Application, the application was heard and judgment reserved.
72. The Representation Application was adjourned to a date to be fixed.
73. On 25 September 2019, a Defence was filed.
74. On 4 October 2019, judgment with respect to the Leave Application was delivered by Jackson J and orders were made that:
- (a) The defendants application for leave to proceed against LMIM be dismissed;
  - (b) The third party notice be struck out against the first, second, third and fourth parties (namely, LMIM and the Feeder Funds);
  - (c) The third party statement of claim be struck out;
  - (d) The first, second, third and fourth third parties be removed as parties to the proceeding;
  - (e) Leave be granted to the defendants to re-plead the third party statement of claim against the remaining third parties.
75. On 17 October 2019 judgment was delivered by Jackson J in relation to costs of the applications decided on 4 October 2019 and an order was made that:
- (a) the defendants pay my costs in relation to the leave application; and
  - (b) I pay the costs of LMIM in respect of the representation application, such costs to be indemnified from the FMIF with both LMIM's costs together with my own costs to be costs in the proceeding, as between the plaintiff and the defendants.

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Witnessed by:

76. The next review hearing of the Auditors Claim is listed for 21 November 2019.
77. I am informed by Mr Scott Couper of Gadens, my solicitor in the matter, and believe that he estimates that the matter is likely to take between 18 months and two years for the proceeding to be determined or resolved. I am informed by Mr Couper that he believes this estimate to be reasonable, given:
- (a) the nature of the proceedings and the complexity of the claim, including that it alleges breaches over a 5-year audit/review period; and
  - (b) that third party notices were issued by the Defendants to 15 third parties and whilst 4 of those parties have now been removed as parties to the proceedings as result of the judgment of Jackson J on 4 October 2019, 11 third parties remain in the proceedings. Although it is not yet clear the extent to which each of these parties will participate in the proceedings, in his view, this will add additional time to the resolution of the proceedings, particularly if the third-party proceedings are determined to be heard at the same time as the primary proceedings.
78. During the Relevant Period, the work of my staff and I included the following:-
- (a) The work with respect to the Auditors Claim detailed in paragraph 21(a) of this Affidavit;
  - (b) The provision of relevant information for briefing audit experts, which due to the EY laptop malfunctioning, required my staff to undertake extensive sorting, collating and categorisation of the voluminous, uncategorised EY hard copy records, provided prior to the PEs in 2015, into the nine audit periods the subject of the proceedings;
  - (c) Liaising, providing instructions and assisting my solicitors in briefing experts in the Auditor's Claim proceeding;
  - (d) Liaising with experts briefed and providing instructions and material as produced by the audit team;

  
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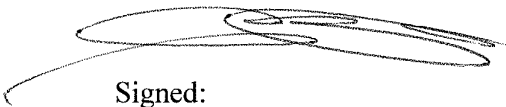


- (e) Reviewing the defence filed in the proceeding and liaising and providing instructions in relation to objections to same regarding privilege;
- (f) Reviewing submissions in relation to seeking my costs of responding to the defendants leave to proceed application and bringing my application for representation in the Third Party Proceedings;
- (g) Reviewing all parties submissions in relation to costs of the leave to proceed and representation applications.

*Claim against the MPF – Queensland Supreme Court proceeding 12317 of 2014*

- 79. A proportion of the “Assets” work has been in respect of the claim I have filed in Supreme Court of Queensland proceeding numbered 12317 of 2014.
- 80. The Claim against LMIM, various former directors of LMIM and the MPF, as filed, seeks \$15,546,147.85, plus interest (calculated from 2011). Whilst the claim has been brought in the name of LMIM, pursuant to the orders of Justice Jackson on 21 July 2015, the interests of LMIM as the responsible entity of the FMIF are being represented by me.
- 81. The background to the Claim against the MPF is set out in my November 2015 Affidavit at paragraphs 102 to 105, and details of steps taken in the proceeding appear at paragraphs 106 to 119 therein, paragraph 80 of my June 2016 Affidavit, paragraph 81 of my November 2016 affidavit, paragraph 77 of my June 2017 affidavit, paragraph 75 of my November 2017 affidavit, paragraph 73 of my June 2018 affidavit paragraph 74 of my November 2018 Affidavit and paragraphs 80 to 81 of my June 2019 Affidavit.
- 82. Only BDO staff in the BR practice group have worked (on my instruction) on the Claim against the MPF.
- 83. This matter is on the commercial list before Jackson J.

Signed:



Witnessed by:



84. The trial of the claim was heard by Jackson J from 1 April 2019 to 9 April 2019 (with the matter not sitting on 4 or 5 April 2019). Judgment is to be handed down by Jackson J on Friday 22 November 2019.
85. During the Relevant Period, the work of my staff and I included instructing my solicitors in respect of the continuation of the online trial documents and settling invoices.

*\$2 million of WCL convertible bonds - Federal Court of Australia at New South Wales proceeding 2014/332566*

86. Paragraphs 126 to 133 of my November 2015 Affidavit set out the background in Federal Court of Australia at New South Wales proceeding 2014/332566 (“**\$2M proceeding**”). Reference to this proceeding is also made at paragraph 88 of my June 2016 Affidavit, paragraph 87 of my November 2016 Affidavit, paragraph 83 of my June 2017 Affidavit, paragraph 81 of my November 2017 affidavit, paragraphs 76 to 79 of my June 2018 affidavit and paragraphs 83 to 86 of my June 2019 Affidavit.
87. The claim was successfully prosecuted by the liquidator of Bellpac for whom judgment was given. I consider that the FMIF is entitled as first ranking secured creditor to the funds ultimately recovered by the Bellpac liquidator from these actions (after costs). Following the settlement between the FMIF and the MPF Trustee, the MPF Trustee withdrew its claim to about \$678,336 of these funds.
88. The net proceeds of the \$2 million bonds settlement were received by the Bellpac liquidator, and part of these funds have been utilised to fund the recovery of the \$8 million of WCL convertible bonds.
89. During the Relevant Period, the work of my staff and I has included ongoing liaising with the Liquidator regarding a distribution of \$1 million to the Fund and requests for payment of the Liquidator’s fees and legal fees from the bond proceeds. The distribution of \$1 million was received from the Bellpac liquidator in November of 2019.

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Witnessed by:



*\$8 million of WCL convertible bonds - Federal Court of Australia at New South Wales proceeding no. NSD1488/2015*

90. Paragraph 135 of my November 2015 Affidavit sets out the background to the Federal Court of Australia at New South Wales Proceeding No. NSD1488/2015 (“**\$8M proceeding**”). Reference to this proceeding is also made at paragraph 90 of my June 2016 Affidavit, paragraphs 90 and 91 of my November 2016 Affidavit paragraph 85 of my June 2017 Affidavit, paragraph 86 of my November 2017 affidavit and paragraphs 80 to 84 of my June 2018 affidavit.
91. In summary, judgment in these proceedings was given in favour of the Liquidator of Bellpac and the defendant’s appeal and application to the High Court for special leave were not successful.

*Federal Court of New South New Wales Proceeding 2016/00120239*

92. This proceeding concerns a claim brought by the Liquidator against WCL seeking orders requiring WCL to convert the bonds to shares. I consider that the FMIF, as first ranking creditor, will be entitled to the funds received from this proceeding (after costs).
93. The Liquidator entered into a Heads of Agreement (“**HOA**”) with WCL to settle this proceeding. The remaining condition precedent to be satisfied is WCL obtaining shareholder approval of the settlement. The sunset date to complete the conditions precedent in the HOA has been extended on a number of occasions and the Liquidator was successful in negotiating, as part of the agreement to extend the Sunset Date, that WCL will pay interest at 3% per annum from 2 October 2017, until settlement. The Liquidator last entered into a further agreement with WCL, extending the sunset date to satisfy the conditions precedent to 31 March 2019, and to date WCL has paid approximately \$2.5 million towards the settlement into their solicitors trust account, which is to be released upon receiving shareholder approval of the settlement. Discussions are ongoing between the Liquidator and WCL in relation to a proposed further extension of the Sunset Date and the terms to apply to same.

  
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Witnessed by:



94. During the Relevant Period, the work of my staff and I has included:-
- (a) Liaising with the Liquidator on an ongoing basis in relation to WCL's progression towards satisfying the conditions precedent, including obtaining expert reports and shareholder approval;
  - (b) Liaising with the Liquidator in relation to WCL not meeting the extended sunset date in the HOA; and.
  - (c) Reviewing correspondence between the Liquidator and WCL in relation to WCL's requests to extend the Sunset Date.

*Feeder Fund Claim - Redemptions and distribution to Class B Unit Holders - Supreme Court of Queensland proceeding no. 13534/16*

95. The background to the Feeder Fund Claim is set out in my November 2015 Affidavit at paragraphs 184 to 187. Reference to this proceeding is also made at paragraphs 117 to 119 of my June 2016 affidavit, paragraph 104 of my November 2016 affidavit, paragraph 99 of my June 2017 affidavit, paragraph 90 of my November 2017 affidavit, paragraphs 85 to 89 of my June 2018 affidavit, paragraphs 87 to 93 of my November 2018 Affidavit and paragraphs 92 to 103 of my June 2019 Affidavit.
96. These proceedings were filed on 23 December 2016 claiming against LMIM and the Feeder Funds about \$55 million in respect of redemptions made to the Feeder Funds and seeking orders which include declarations to withhold from payments or distributions otherwise payable to the Feeder Funds the aggregate sum of about \$55 million plus interest.
97. This proceeding is on the commercial list before Jackson J.
98. The key defendants to the Feeder Fund Proceeding are:
- (a) LMIM in its capacity as responsible entity of the CPAIF;
  - (b) Trilogy in its capacity as responsible entity of the WFMIF ("**Trilogy**");
  - (c) LMIM in its capacity as RE of the ICPAIF; and

Signed:



Witnessed by:



- (d) LMIM in its own right.
99. On 13 June 2018, His Honour Jackson J directed pursuant to s 59 of the *Trusts Act 1973* (Qld) that:
- (a) Mr Said Jahani of Grant Thornton, the privately appointed receiver to the assets of the CPAIF and the ICPAIF, represent the interests of LMIM in its capacity as responsible entity of the CPAIF and the ICPAIF; and
- (b) Mr Park represent the interests of LMIM in its own right.
100. Following the mediation that took place on 5, 6 and 20 November 2018, a Deed of Settlement and Release was executed in December 2018.
101. The settlement is subject to various conditions precedent, including that:
- (a) myself, Mr Jahani, Trilogy, and the Trust Company Limited, the custodian of the WFMIF, obtain judicial advice to the effect that they are justified in entering into and performing the Deed of Settlement and Release.;
- (b) Orders are made by the Supreme Court of Queensland giving authority to make an interim distribution to FMIF members of at least \$30 million.; and
- (c) The interim distribution is made within three weeks of the Court delivering judgment in relation to the Authority Application.
102. On 1 February 2019, I filed an application in proceeding 3508/15 seeking orders that I am authorised to make an interim distribution to FMIF members of up to \$40million (“**Authority Application**”).
103. On 1 February 2019, I filed an application in this proceeding seeking directions to the effect that I am justified in entering into and performing the terms of the Deed of Settlement and Release (“**Judicial Advice Application**”).
104. On 22 May 2019 Her Honour Justice Mullins directed that I am justified in:

Signed:

Witnessed by:



- (a) Entering into and performing the terms of the Deed of Settlement and Release, and
- (b) Making an interim distribution to the members of the FMIF of 6.5 cents per unit in the FMIF (approximately \$32 million), if I am conferred with the authority to do so on my application dated 1 February 2019 filed in the Supreme Court proceeding 3508 of 2015.

See *Bruce v LM Investment Management Limited (in liq) & Ors* [2019] QSC 126.

- 105. On 2 October 2019, the Authority Application was granted.
- 106. The conditions precedent to the settlement of the Feeder Fund Proceeding, have now been satisfied and an interim distribution was made to the members of the FMIF over the course of several days up to 23 October 2019.
- 107. The proceeding is to be discontinued pursuant to the Deed of Settlement and Release.
- 108. During the Relevant Period, the work of my staff and I has included:
  - (a) The work with respect to the Feeder Fund Claim detailed in paragraph 21 of this Affidavit;
  - (b) Liaising, instructing and providing assistance to my solicitors with respect to the Judicial Advice Application, which was heard by Justice Mullins on 2 and 3 May 2019, including providing detailed instructions to my solicitors and Counsel regarding a confidential affidavit containing a detailed advice on prospects of the proceedings (which advice I do not waive privilege in) and in respect of an open affidavit detailing the existing and contingent liabilities in the winding up of the FMIF;

Signed:



Witnessed by:



- (c) Instructions and assistance by my staff to my solicitors regarding a detailed affidavit of service in respect of information requiring service on the members of the FMIF;
- (d) Liaising, instructing and providing assistance to my solicitors with respect to correspondence to the Feeder Funds, to the solicitors for the Auditors and to the liquidator of LMIM regarding the Judicial Advice Application and the material filed by me in support of same;
- (e) Remodelling potential distributions in light of the terms of the Deed of Settlement; and
- (f) Liaising, instructing and providing assistance to my solicitors in relation to the proposed distribution amounts in accordance with the Deed of Settlement.

*LMIM Claim Supreme Court of Queensland proceeding no.11560/16*


109. The background in relation to investigations in regard to the claim is relevantly set out in the Investigation sections at paragraphs 96 and 97 of my June 2017 affidavit, paragraphs 152 to 156 of my November 2017 affidavit and paragraphs 90 to 95 of my June 2018 affidavit.
110. The LMIM Claim was commenced by Claim filed on 9 November 2016. It makes allegations of breach of trust and duty against LMIM by:
- (a) causing to be paid, at its direction, management fees from the assets of the FMIF in advance of performing its duties to the FMIF, and did not pay interest to the FMIF in respect of the management fees which were prepaid;
  - (b) causing to be paid, at its direction, loan management fees out of property of the FMIF which were not authorised by the Constitution of the FMIF;

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- (c) causing to be paid, at its direction, management fees from the assets of the FMIF in amounts which exceeded its entitlement, given the true net fund value for the periods referable to those management fees; and
  - (d) directing payments from the MPF to the FMIF to be paid to the Feeder Funds, in the absence of any liability due and payable or any other basis.
111. An Amended Claim and Statement of Claim and Consolidated Particulars have been filed and served.
112. The quantum of each of the above claims have not yet been finally determined, although:
- (a) in relation to the claims pertaining to the loan management fees (including in respect of periods prior to the administration of LMIM) the amount claimed is presently up to \$13,720,167 plus interest; and
  - (b) in relation to the claims pertaining to the payments to the Feeder Funds the claim has been quantified in the amount of \$12,931,836 plus interest.
113. Subject to any directions that may be made by the Court, if the claims made in this proceeding are successful they may be able to be relied upon as a set-off against claims made by LMIM for indemnity out of assets of the FMIF, including those claims identified through the proof of debt process or claims made by other parties, seeking to subrogate to LMIM's alleged rights of indemnity.
114. I applied to the Court for directions under section 59 of the Trusts Act (1973) (QLD) in relation to how the differing interests of the parties (LMIM as RE of the FMIF, and LMIM in its personal capacity) are to be represented in the proceeding, for leave to proceed under Section 500 of the Act and a stay of the proceeding until further order.
115. A stay was sought because, following the discontinuance of the claims brought by the MPF Trustee, the creditors of the FMIF had not been identified by the

  
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Liquidator as the Liquidator had not called for proofs, there was no one identified as willing and able to fund a defence of the Claim and it was unclear whether there would be a practical need for the claims made in the proceeding to be fully litigated.

116. I do not want to incur the costs of proceeding with parts of this claim that it may not ultimately be necessary or beneficial to the FMIF Members to pursue, in order to establish claims of sufficient quantum to set-off (by operation of the clear accounts rule) against claims made against the Fund by LMIM, or by creditors seeking to subrogate to LMIM's alleged rights of indemnity.
  117. On 25 July 2018, the Court directed that I represent the interests of LMIM as RE of the FMIF, Mr Park represent the interests of LMIM in its own capacity, granted leave to proceed with this claim and ordered that the claim be stayed until further order.
  118. I am informed by Alex Nase, of Tucker and Cowen, my solicitors in this proceeding, and believe that, he estimates that, from when any order is made lifting the stay, if only the claims made in relation to pre-paid management fees and loan management fees were proceeded with, and if the claim is defended, it is likely to take about 18 months for this proceeding to be resolved or determined, assuming it is not consolidated or heard together with, the Auditor's Claims.
  119. On 19 September 2019, my solicitors wrote to the solicitors for LMIM to seek further information to assist me to consider how this proceeding ought to be dealt with.
  120. During the Relevant Period, the work of my staff and I has included reviewing correspondence from my solicitors and providing instructions to my solicitors in relation to correspondence to the solicitors for LMIM.
- The Trust Company (PTAL) Ltd v Ross Lamb*
121. PTAL obtained a default judgment against Mr Lamb in the Supreme Court of New South Wales for approximately \$3 million, plus interest and costs. Prior

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to the hearing of the creditors petition, Mr Lamb filed a debtor's petition and was declared bankrupt.

122. The bankrupt and his wife were parties to a Development Agreement. The proceeds of sale of 11 lots owned by the bankrupt and his wife (in some cases, with another party) that were developed and sold are held in a solicitor's trust account. There is presently approximately \$12 million in the solicitor's trust account. The former trustee had been liaising with other parties involved in the development and investigating whether the bankrupt may have an entitlement in respect of the funds held in the solicitor's trust account.
123. The former trustee in bankruptcy issued a request to PTAL for funding of recovery action for the benefit of creditors of the bankrupt estate of which PTAL as custodian of the FMIF is a major creditor. The former trustee was replaced with new trustees on 14 May 2018, who are continuing investigations and requested funding from PTAL as custodian of the FMIF.
124. On my instructions, in December of 2018, PTAL as custodian of the FMIF entered into a Deed of Indemnity to fund a public examination under the Bankruptcy Act 1966 (Cth) to further investigate the claims available to the Trustee and any relevant recovery proceedings.
125. The Trustees of the bankrupt estate are Mr David Clout and Ms Patrica Talty, of David Clout and Associates. I am informed by Mr David Clout, of David Clout and Associates, and believe that:
  - (a) The Court has issued Summonses for a public examination;
  - (b) The examinations were initially scheduled to take place in September 2019, but were adjourned due to the failure of various examinees to produce documents sought by the Summonses by the required dates;
  - (c) The examinees have all purported to complete production of documents pursuant to the Summonses;
  - (d) The examinations were held in the Federal Court on 7, 12, 13, 18 and 19 November 2019;

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- (e) It is estimated that any agreed recovery proceeding will take approximately 12 to 18 months to resolve or prosecute to a determination, from when any such proceedings are initiated.

126. During the Relevant Period, the work of my staff and I in relation to this matter has included:

- (a) Liaising with my solicitors, and PTAL in relation to a variation to the Deed of Indemnity;
- (b) Reviewing correspondence, and including monthly reports from the Trustees in bankruptcy;
- (c) Reviewing and assessing monthly claims made by the Trustees under the Deed of Indemnity and issuing instructions to PTAL with respect to such claims;
- (d) liaising with the Trustees to request further information; and
- (e) Responding to requests for documents relevant to the proposed recovery action from the trustees.

*Trade on*

127. Generally, work is considered to be "*Trade-on*" if the work is considered to be incidental to the winding up.

128. Work undertaken in relation to trade-on may be recorded in more than one category, however, the work undertaken is only recorded once.

129. During the Relevant Period, work attributed to this category included:-

- (a) Preparation of unaudited management accounts for the financial year ended 30 June 2019;
- (b) Reviewing and processing payments of expenses;

  
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- (c) Maintenance of the Microsoft AX investor database. This involved accounting for receipts and payments, reconciling bank accounts and processing month end cash and year end adjustments;
- (d) Maintenance of the Microsoft AX loan management database, including accounting for payments, reconciling statements and processing month end and year end adjustments;
- (e) Conducting internal meetings to discuss job management issues including:-
  - (i) Maintenance of accounts and preparation of the management accounts for the financial year ended 30 June 2019;
  - (ii) Status of litigation matters and work to be done to progress same; and
  - (iii) Investor issues including content for my regular reports to members, status of investigations, creditor claims and my application for approval of remuneration.
- (f) Meeting with members of the BDO Audit practice group regarding the preparation of the management accounts for the financial year ended 30 June 2019;

130. In total, \$42,427.00 (exclusive of GST) of remuneration is sought for approval in respect of the "Trade on" category.

*Management Accounts*

131. During the Relevant Period, my staff and I have undertaken the following tasks in respect of completing the management accounts for the financial year ended 30 June 2019:-
- (a) Reviewing work papers to verify the accuracy of the management accounts;
  - (b) ascertaining amounts that are outstanding at 30 June 2019;

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- (c) Preparing a summary of loan reductions to calculate the movement in loans in default;
- (d) Calculating the net assets attributable to unitholders, movement in default loans, receivables and related party transactions;
- (e) Preparing a summary of payable invoices:-
  - (i) either paid after the year end; or
  - (ii) remaining to be paid, which relate to work incurred during the financial year ending 30 June 2019.
- (f) to determine the accrued expenses;
- (g) Calculating provisions for the remaining loan accounts or receivable balances and updating the loan spreadsheet;
- (h) Preparing a trial balance, and processing the:-
  - (i) Accrued expense journals;
  - (ii) Impairments journals;
  - (iii) Bank transaction journals;
  - (iv) Write off journals; and
  - (v) Relevant expenses and income journals.
- (i) Preparing work papers to support the notes to the accounts, including, but not limited to, the movement in impairments as between the periods 30 June 2018 and 30 June 2019;
- (j) Preparing the management accounts for distribution to members, which includes:-
  - (i) A statement of comprehensive income;
  - (ii) A statement of financial position;

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- (iii) A statement of changes in net assets attributable to unitholders;  
and
- (iv) Notes to the accounts.
  
- (k) Liaising with the BDO Audit practice group regarding movements in asset values, provisions and default loans between 30 June 2018 and 30 June 2019;
- (l) Reviewing and amending the trial balance in respect to changes required by the BDO Audit practice group;
- (m) Reviewing and amending financial statements in respect to changes required by the BDO Audit practice group;
- (n) Reviewing and considering disclosure requirements with reference to Australian Accounting Standards; and
- (o) Reviewing and amending the management accounts and notes in accordance with Australian Accounting Standards and recommendations by my solicitors.

132. This work was, in my opinion, necessary for the winding up of the FMIF in accordance with its constitution. By undertaking this work, I am able to provide ongoing financial accounts to members and avoid incurring ongoing audit fees during the winding up.

*Application to ASIC for financial reporting and audit relief*

133. Under the Residual Powers Orders, I was directed to apply on behalf of the FMIF to ASIC for relief from compliance with financial reporting and audit obligations in Part 2M.3 and s 601HG of the Corporations Act.

134. I made such an application, and on 29 September 2016, ASIC issued ASIC Instrument 16-0959, granting the FMIF a deferral of its obligations to comply with the relevant financial reporting and audit obligations until 16 May 2018, subject to compliance with certain conditions of the relief.

  
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135. On 8 December 2017, I applied to further extend this relief, and on 15 March 2018, ASIC issued ASIC Instrument 18-0166, extending the deferral of the FMIF's financial reporting and audit obligations to 16 March 2020. At pages 169 to 170 of the Bundle is a copy of this Instrument of Relief.
136. The last audit of the FMIF, which was for the 2012 financial year, cost in excess of \$500,000.
137. I am informed by Mr Craig Jenkins, a BDO audit partner, who audits several managed investment schemes, and believe, that the auditor's fees for an audit would be between \$20,000 and \$50,000 for each financial year, up to about December 2015. The auditor's fees for each half yearly audit review required by section 302 of the Act is estimated to be between 50% and 70% of the cost of an annual audit, up to about December 2015. The BDO audit partner estimates that, from about December 2015, an auditor's fees would be about \$12,500 to \$20,000 for each yearly audit, and between 50% and 70% of that for each half yearly audit. However, the auditor's fees for undertaking only one audit at the completion of the winding up (which would cover the entire period of the winding up) as required under the FMIF's constitution would be about \$60,000. These figures do not include insolvency practitioner's fees to instruct auditors and provide documents or explanations to auditors, or the costs of complying with other aspects of the financial reporting and audit obligations. There are therefore significant costs savings, in auditor's fees alone, if only one audit is undertaken at the completion of the winding up.

*Supreme Court of Queensland proceeding 3508 of 2015*

138. On 16 December 2015, the liquidators of LMIM, Mr Park and Ms Muller, filed a Further Amended Originating Application in Supreme Court Proceeding No. 3508 of 2015 ("**FTI Remuneration Proceeding**").
139. The Further Amended Originating Application sought approval of their remuneration as both the administrators in the period from 19 March 2013 to 31 July 2013, and as liquidators from 1 August 2013 to 30 September 2015.
140. In total, \$3,098,251.83 (excluding GST) was sought to be approved for payment from the FMIF in the FTI Remuneration Proceeding. Of that amount,

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Witnessed by:



a total of \$1,827,205.23 was approved to be paid from property of the FMIF (including remuneration and a small amount of out-of-pocket expenses).

141. On 17 October 2017, judgment with respect to the FTI Remuneration Proceeding was delivered: *Park & Muller (liquidators of LM Investment Management Ltd v Whyte No 2* [2017] QSC 229. Orders reflecting His Honour's reasons for judgment were made on 22 November 2017.
142. A dispute arose as to the appropriate treatment for GST purposes (by FTI, LMIM, and the FMIF) of any GST attributable to the work performed by FTI.
143. The liquidators filed an application on 19 December 2017 for further orders against me for payment of the amounts ordered on 22 November 2017 plus GST ("**Payment Application**").
144. The amount of \$1,827,205.23 being the remuneration (excluding any amount for GST) for the period to 30 September 2015 as approved by the Court, was paid on 20 December 2017 together with an amount of interest.
145. Following entry into a Terms of Agreement between Mr Park, Ms Muller, LMIM and myself:
  - (a) The Payment Application was dismissed, by consent, with no order as to costs;
  - (b) orders were made by consent fixing the quantum of the Liquidators costs of the First Remuneration Application payable out of the FMIF in the sum of \$230,889.50; and
  - (c) the sum of \$212,700.83 was paid to the FMIF by the LM Australian Income Fund (AIF) and the LM Australian Structures Products Fund (ASPF), to reimburse the FMIF for amounts paid from the FMIF, at LMIM's request, to LMA for services rendered and operating expenses incurred for the period from 26 July 2013 to 23 December 2014 for the benefit of LMIM in its capacity as responsible entity of the AIF and the ASPF.

  
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*Second FTI Remuneration Application*

146. On 17 July 2018, Mr Park of FTI, who is now the sole Liquidator of LMIM, filed an application in the Court seeking payment of remuneration of \$743,889.89 inclusive of GST from property of the FMIF, relating to various periods between 19 March 2013 and 30 June 2018 (“**Second FTI Remuneration Application**”). I opposed certain parts of the application. The application was heard on 6 September 2018 and 3 October 2018.
147. On 2 October 2019, the Court delivered judgment:
- (a) Disallowing the claim for corporate remuneration (work which related only to LMIM in its corporate capacity, and is not referable to an individual fund or the funds generally) sought from the FMIF of \$348,692.87, on the basis that such remuneration is not recoverable from a trust, as a matter of law;
  - (b) Allowing the claim for Category 1 remuneration (work referable to the FMIF) sought from the FMIF of \$316,345.70 which had not been opposed by me (for the most part, at least);
  - (c) Allowing the claim for Category 2 remuneration (work referable to the funds generally) sought from the FMIF in the sum of \$76,698.19.

See LM Investment Management Limited & Anor v Whyte [2019] QSC 245.

148. On 17 October 2019, the Court ordered that the Liquidator’s costs of the application be assessed on the indemnity basis and paid out of the property of the AIF, FMIF and ASPF in equal shares.
149. During the Relevant Period, the work of my staff and I has included:
- (a) The work referred to in paragraph 21(d);
  - (b) Liaising with FTI in relation to the issue of tax invoices to LMIM as trustee of the FMIF for the amounts ordered to be paid from property of the FMIF, including GST, and corresponding with my solicitors in relation to this issue;

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- (c) Instructing PTAL to effect payment of the amounts ordered to be paid from property of the FMIF, to the Liquidator.

*FTI Indemnity Proceeding – Supreme Court of Queensland proceeding 3508 of 2015*

150. Pursuant to the Residual Powers Orders, I was directed to take certain steps to review, and decide on, claims by LMIM with respect to expenses sought to be paid from the assets of the FMIF.
151. The background to this proceeding is detailed in paragraphs 112 to 124 of my November 2017 affidavit.
152. Pursuant to the Residual Powers Orders, Mr Park and Ms Muller submitted two claims for indemnity for expenses to me, \$241,453.54 and \$375,499.78 against the assets of the Fund.
153. The first claim of \$241,453.54 related to legal costs incurred in relation to the appeal of the decision appointing me as receiver to wind up the Fund. I rejected this claim in full.
154. In respect of the second claim, I accepted and paid \$84,954.41 (\$93,449.85 less GST of \$8,495.44) (“**Accepted Claim**”), rejected \$169,243.26 and deferred \$5,473.59 pending the judgement to be handed down in relation to FTI’s remuneration application.
155. On 20 May 2016, Mr Park and Ms Muller filed an application seeking orders that they be indemnified from property of the FMIF for expenses in the total sum of \$410,694.84.
156. On 30 May 2017, I obtained judicial advice to the effect that I was justified in raising the clear accounts rule in response to these indemnity claims.
157. The application was heard on 19 and 20 June 2017.
158. On 17 October 2017, His Honour delivered reasons for judgment: *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 3 [2018] 2 Qd R 475; [2017] QSC 230*. His Honour found that the legal costs of the appeal in 8895 of 2013 of \$263,127.13 and costs of assessment of those costs

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in the sum of \$9,068.68 cannot be paid out of the property of the FMIF, that the Liquidators are entitled to direct indemnity out of the FMIF for various amounts totalling \$44,158, and that the clear accounts rule operates to suspend LMIM's claimed right to payment from the assets of the FMIF until the resolution of the claim made in the proceeding 11560/16 ("**the LMIM Claim**") and that LMIM's indemnity claims, to the extent that they are otherwise maintainable, should not be finally resolved until the LMIM Claim is resolved.

159. On 22 November 2017, orders were made reflecting His Honour's reasons for judgment delivered on 17 October 2017.
160. The amount of \$44,158 was paid to the liquidators on 20 December 2017 pursuant to the orders.
161. Orders were made by consent fixing the quantum of the Liquidators costs of the Indemnity Application payable out of the FMIF initially the sum of \$220,859.31, which was subsequently, by consent, increased to \$266,084.31, as an invoice had been overlooked.
162. On 7 August 2019, Mr Park notified me of a claim for indemnity made against the FMIF with respect to an invoice from Russells to LMIM dated 31 July 2019 in the sum of \$74,494.70, with respect to the Auditor's Claim ("**August 2019 Claim**").
163. On 20 August 2019, I wrote to Mr Park to query whether this claim ought to be submitted to the Court, rather than notified to me under the orders made on 17 December 2015. FTI subsequently clarified that this claim was not intended to be submitted to me under the 17 December 2015 orders.
164. During the Relevant Period, the work of my staff and I has included:
  - (a) reviewing and considering the August 2019 Claim;
  - (b) instructing my solicitors and reviewing correspondence from my solicitors, in relation to the August 2019 Claim;

  
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- (c) reviewing and sending correspondence to Mr Park in relation to the August 2019 Claim and considering the responses received from FTI in relation to same.

165. I expect to receive, or be given notice of, further claims by the Liquidator for indemnity for expenses during the course of my appointment.


### **Creditor Indemnity Claims**

166. Under the Residual Powers Orders:-

- (a) The Liquidator was directed to ascertain the debts payable by and the claims against LMIM and to identify any debts or claims in respect of which LMIM has a claim for indemnity from the FMIF (“**Creditor Indemnity Claims**”), and certain other types of claims for indemnity from the FMIF and to notify me of same within 14 days;
- (b) Within 14 days of notification of any such indemnity claims, I may request from the Liquidator any further information I reasonably consider necessary to assess the claim;
- (c) Within 30 days of notification of any such indemnity claims or receipt of the further information requested, I am required to accept the claim, reject the claim, accept part and reject part of the claim, and to give the Liquidator written notice of my decision;
- (d) I am required to give the Liquidator a written reason for rejecting any part of the claim within seven days after giving notice of my decision to the Liquidator; and
- (e) Within 28 days of receiving a notice of rejection, the Liquidator may apply to Court for directions in relation to whether the claim is one for which LMIM has a right to be indemnified out of the scheme property of the FMIF and must notify the creditor for any rejected claim of, *inter alia*, my decision, any reasons for that decision and whether the liquidator intends to apply to Court for directions in respect of my decision.

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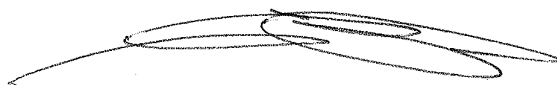
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167. The Liquidator has notified me of Creditor Indemnity Claims made in respect of:
- (a) A claim notified by a proof of debt lodged by Ernst & Young (“EY”) for the amount of \$158,896.51 (“**First EY Proof**”), plus interest and legal costs; and
  - (b) A claim notified by proof of debt lodged by Norton Rose Fulbright Australia (“**Norton Rose**”) in the sum of \$315,601.21 (“**Norton Rose Proof**”).
168. The Liquidator has also notified me of a further proof of debt lodged by EY for the sum of approximately \$180 million (“**Second EY Proof**”) asserting that, to the extent the Auditor’s Claim is successful, EY will suffer loss or damage which is recoverable from LMIM.
169. I have rejected the Creditor Indemnity Claim made in respect of the claim notified by the Norton Rose Proof, relying upon the Clear Accounts Rule and provided reasons for my decision to the Liquidator.
170. The time for me to adjudicate upon the First EY Proof has not yet begun to run as I am awaiting a further response to a request for information made in relation to it but I have written to the Liquidator to inform him of my provisional view in relation to it.
171. The Liquidator requested further information in relation to the Further EY Proof and has not yet notified me whether a Creditor Indemnity Claim will be made in relation to it.
172. During the Relevant Period, the work performed by me or BDO staff under my supervision with respect to Creditor Indemnity Claims has included:-
- (a) Reviewing advice from my solicitors in relation to indemnity claims against the FMIF foreshadowed by certain former directors of LMIM;
  - (b) Providing instructions to my solicitors in respect of correspondence to the solicitors for those directors identifying potential difficulties with respect to such claims;

  
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- (c) Reviewing correspondence from the solicitors for the Liquidator in relation to the EY Proofs of debt;

*Further application by FTI for directions - Supreme Court of Queensland proceeding 3508 of 2015*

173. On 10 October 2018, Mr Park filed an application seeking directions in relation to the dual appointments of Mr Park and myself to wind up the FMIF including directions to the general effect that:
- (a) My appointment continues only in relation to certain specified legal proceedings and Mr Park take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution;
  - (b) That the Liquidator is directed to act as contradictor to the Breach of Trust Proceeding (SC 11560/2016) and the Feeder Fund Proceeding (SC 13534/16); and
  - (c) That the Liquidator and Receiver each submit budgets of remuneration and expenses to the conclusion of the winding up, that the Remuneration of the Liquidator and the Receiver be fixed or determined on the hearing of the application in the amount of 50% of the amount stated in the relevant budget and paid during the course of the winding up, with all other remuneration and expenses of the Liquidator and the Receiver to be deferred and sought at the conclusion of the winding up at which time the amounts stated in the budgets can be reduced, increased or stay the same.
174. The application was heard by His Honour Justice Jackson on 10 December 2018.
175. On 2 October 2019, His Honour delivered judgment dismissing the application: LM Investment Management Limited & Anor v Whyte [2019] QSC 233.
176. On 17 October 2019, His Honour ordered that my costs of the application be assessed on the indemnity basis and paid from property of the FMIF.

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Witnessed by:



177. During the Relevant Period, the work of my staff and I has included:
- (a) The work referred to in paragraph 21(d);
  - (b) providing instructions to my solicitors in relation to steps to be taken to assess the costs order made by His Honour.

*Application to Court for authority to make interim distribution and declarations as to the entitlements of "C Class" members – BS3508/15*

178. On 1 February 2019, I applied to His Honour Justice Jackson for authority to make an interim distribution to FMIF members and for declarations as to the proper entitlements of "C Class" members (the members who invested with a foreign currency).
179. The making of this application was a condition precedent to the settlement of the Feeder Fund Proceeding.
180. The application was heard by Justice Jackson on 13 March 2019.
181. On 2 October 2019, His Honour delivered judgment, granting the relief sought by the Authority Application and declaring that each "C Class" member is entitled to be paid in the winding up of the FMIF amounts calculated by reference to the calculation of that member's units in the foreign currency of investment as adjusted for the foreign exchange spot rate between the currency of investment and the Australia dollar prevailing at the date of commencement of the winding up of the FMIF.
182. During the Relevant Period, the work performed by me or BDO staff under my supervision in relation to this Application has included:
- (a) the work referred to in paragraph 21(d) and 37(b); and
  - (b) Instructing my solicitors in relation to, and reviewing advice from my solicitors in relation to issues concerning the interim distribution and the calculation thereof.

  
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*Creditors*

183. I am seeking approval for remuneration in the order of \$193,601.50 (exclusive of GST) in respect of work that is categorised as “Creditors”.
184. Generally, work attributed to this category includes or has included:-
- (a) Preparing reports to members;
  - (b) Attending to queries from members in relation to the reports to members;
  - (c) Maintaining and updating the AX investor management database; and
  - (d) work in relation to claims by LMIM (by its Liquidators) for indemnity against the FMIF.

*Reports to Members*


185. During the Relevant Period, I published on the FMIF website two reports to members of the FMIF updating them as to the ongoing winding up of the FMIF. At pages:-
- (a) 171 to 186 of the Bundle is a copy of the twenty-sixth report to members; and
  - (b) 187 to 206 of the Bundle is a copy of the twenty-seventh report to members.

Each of those reports contains information which is, or was at the time of the report, correct, to the best of my knowledge and belief.

186. 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 the reports to members;
  - (b) Preparing material summarising my remuneration for inclusion in the report;

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- (c) Liaising with my solicitors in relation to my reports to members;
- (d) Updating the status of litigation matters;
- (e) Reconciling the cash at bank and the loan balances;
- (f) Considering and calculating the updated estimated return to members;
- (g) Considering and calculating the updated unit price; and
- (h) For my twenty-seventh report, setting out the actions taken in the relevant 6 months period and proposed to be undertaken in the next 12 month period.

*Contact with members in respect of reports to members*

187. 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 and their financial advisors. This contact required responses regarding:-

- (a) The status of the receivership and the winding up of the FMIF;
- (b) Updating contact details;
- (c) Confirming unit balances and distributions paid prior to my appointment;
- (d) The transfer of units and the documentation required to effect same;
- (e) Queries arising from the reports to members regarding the receivership; and
- (f) Queries in relation to the interim distribution and the timing thereof.

188. During the Relevant Period my staff and I have also liaised with the beneficiaries and/or trustees of deceased members' estates. Where appropriate we have liaised with the beneficiaries, trustees and/or their solicitors/advisors to effect a transfer of the unit holding at the request of the investor's estate. My staff and I were required to undertake tasks including considering the

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request for a transfer of units, reviewing the documentation provided in support of such request, and processing such transfers.

189. Work undertaken in relation to communications with members is sometimes also recorded in the "Administration" category of work depending on the context of the call or correspondence, and the work required following that communication. However, time for carrying out any task is only recorded once.

*AX Database*

190. During the Relevant Period my staff and I were required to continue to maintain the Microsoft AX investor management database. This included work:-


- (a) Updating investor details;
- (b) Transferring units as requested or as directed by executors of deceased estates; and
- (c) Generating reports to attend to members' unit balance enquiries.

191. The AX Database is where the Register of Members is kept and maintained. In accordance with the Residual Powers Orders, this is a duty charged to me.

192. 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.

*MPF Proceedings – Queensland Supreme Court proceedings 8032 of 2014, and 8034 of 2014*

193. On 27 August 2014, KordaMentha filed two proceedings, namely, proceeding 8032 of 2014, and 8034 of 2014. These proceedings were brought against LMIM. The claim relates to two loans allegedly assigned from the FMIF to the MPF on 28 August 2008. The relief sought in these proceedings included

  
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equitable compensation against LMIM and claims against the assets of the FMIF in the total sum of about \$24.1 million, plus interest.

194. Further steps taken in this proceeding are summarised in paragraphs 86 to 97 of my November 2015 Affidavit, paragraphs 161 to 164 of my June 2016 Affidavit, paragraphs 148 to 150 of my November 2016 Affidavit, paragraphs 140 to 142 of my June 2017 Affidavit, paragraphs 149 and 150 of my November 2017 Affidavit and paragraphs 141 to 144 of my June 2018 affidavit.
195. I formed the view that it was necessary in the winding up of the FMIF for me to defend these proceedings, in order to fulfil my obligation to protect the interests of the FMIF in the best interests of the members, and I was joined as a Defendant to those proceedings.
196. The plaintiff applied to Court for directions that it would be justified in discontinuing these proceedings and on 7 June 2018, the Court directed it would be. Notices of discontinuance have been filed in the Court.
197. Following the discontinuance of the proceeding, various costs orders made in my favour upon the discontinuance of the proceedings, and costs orders made against me with respect to a strike out application, were yet to be agreed or assessed (“**Outstanding Costs Orders**”).
198. I proceeded to take steps to recover the costs orders made in my favour and a costs assessor was appointed to assess the costs.
199. On 14 May 2019, the MPF Trustee and I agreed upon the quantum of the Outstanding Costs Orders.
200. During the Relevant Period, the work I have undertaken in respect of these proceedings included reviewing correspondence and advices from my solicitors relating to, and providing instructions to my solicitors in respect of, issues relating to the conduct of the costs assessment, an offer to settle the quantum of the Outstanding Costs Orders and finalisation of the matter.

  
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*AIIS Proceeding - Supreme Court of Queensland Proceeding No. 12716/15*

201. This proceeding was a claim by the MPF Trustee against LMIM, in relation to a loan made by LMIM as trustee for the MPF to AIIS, for equitable compensation against LMIM in the sum of approximately \$16.82 million, and for a constructive trust and other proprietary relief against assets of the FMIF in the sum of approximately \$3.9 million.
202. The claims for proprietary relief alleged that LMIM at the FMIF received certain interest payments on a loan facility that it had provided to AIIS from LMIM as trustee of the MPF, with knowledge that the payments were made by LMIM as trustee of the MPF in breach of trust. The work performed by me in relation to this claim is detailed in the affidavits sworn by me in support of previous applications, including paragraph 177 of my November 2018 Affidavit. .
203. The plaintiff applied to Court for directions that it would be justified in discontinuing this proceeding and was given such directions.
204. This proceeding was discontinued by the plaintiff on 10 August 2018.

*Dividend*

205. During the course of the winding up, my staff and I have undertaken various tasks that can be described as falling within the category “*Dividend*”.
206. This category relates to work undertaken in pursuit of my interim capital distribution to investors in the amount of 6.5 cents per unit as per the Court order dated 2 October 2019.
207. In total, \$38,491.50 (exclusive of GST) in remuneration is sought for approval in respect of the “*Dividend*” category.
208. The work in the Relevant Period in this category relates primarily to the interim capital distribution to investors in the amount of 6.5 cents per unit, made in accordance with the Court’s orders between 16 and 23 October 2019 and is detailed in paragraph 37(b) of this Affidavit.

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209. All of this work was necessary for the winding up of the FMIF in accordance with its constitution.

*Administration*

210. In my role, my staff and I have undertaken various tasks that can be described as falling within the category "Administration".

211. Generally, work attributed to this category includes:-

- (a) Work my staff and I undertook that was necessary for the proper and efficient administration of the winding up;
- (b) Ensuring proper accounts and records were maintained;
- (c) Preparing applications for approval of my remuneration; and
- (d) Residual administrative functions in respect of preparing reports to members, such as organising for copying, mailing and uploading to the FMIF website. The tasks of copying, mailing and uploading reports to members to the FMIF is outsourced to external providers who perform such work at bulk rates.

212. In total, \$64,092.50 (exclusive of GST) of remuneration is sought for approval in respect of the "Administration" category.

213. The main tasks my staff and I undertook in the Relevant Period are set out further below.

*Applications for approval of remuneration*

214. For the purposes of my remuneration application filed on 6 June 2019, work was undertaken in respect of the preparation of my detailed supporting affidavit and arranging distribution of notices to the members of the FMIF. My staff and I were required to liaise with, and provide instructions to, my solicitors in respect of that application and my affidavit. In accordance with my usual practice during this administration, the tasks of copying, mailing and

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uploading reports to members to the FMIF is outsourced to external providers who perform such work at bulk rates.

*Job management*

215. 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) Maintenance of the accounts and preparation of the management accounts for the financial year ended 30 June 2019;
  - (c) Investor issues and content for my regular reports to members;
  - (d) Status of the various investigations, claims and court proceedings;
  - (e) Status of creditor claims; and
  - (f) Coordinating my application for approval of my remuneration.
216. 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. These meetings also allow me to delegate tasks in accordance with the complexity of the work to be undertaken, and my staff's individual charge out rates.

*Investor relations and communications*

217. During the Relevant Period, my staff and I have attended to answering member enquiries both by telephone and in person. Members are updated as to the progress of the winding up, including the status of court proceedings to recover funds for the benefit of members and the expected return to members.
218. Regularly during the Relevant Period enquiries were fielded from members regarding changes to their details.

  
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219. For the purposes of member communications, including my two reports to members exhibited to this affidavit, my staff and I have been required to prepare and collate relevant material, including:-
- (a) information concerning the status of the various legal proceedings;
  - (b) Updates as to the estimated value of the FMIF and estimated return to members; and
  - (c) “work in progress” and remuneration reports.
220. 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.
221. Some work undertaken in relation to communications with members may be recorded in other categories, that is, under Creditors and/or Trade On, depending on the context of the phone call or correspondence. However, time for carrying out each task is only recorded once.

*General*

222. In addition to the above specific matters, my staff and I also conducted the following ongoing tasks and activities in the Relevant Period:-
- (a) Attending to general file administration including filing and archiving books and records.
223. I consider that each of these tasks was necessary for the proper administration of the winding up so as to keep accurate records of my work, progress of the winding up of the FMIF, and keeping members informed and up to date.
224. Work undertaken in respect of “*Administration*” may be recorded in other categories. However, the work undertaken is only recorded once.

*Write-offs & reductions*

225. I have conducted a detailed review of all time charged by BDO staff in the Relevant Period. I have reduced the amount of remuneration sought by \$6,007.00 excluding GST.

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226. The amount of the reduction represents, in summary, the value of work which I considered, while appropriate to be performed, was not directly connected to, or in furtherance of, my appointment (for example discussions and correspondence with investors of other LMIM investment funds).

### **Remuneration approval**

#### *Winding up*

227. Given the nature and volume of the work involved in this winding up, I believe that the sum of \$652,328.05 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.

228. I respectfully request this Honourable Court to make orders that my remuneration in relation to my receivership appointment for the relevant period be fixed in the amount of \$652,328.05 inclusive of GST.

229. 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.


#### *Statements of Receipts and Payments*

230. Copies of the statements of receipts and payments lodged by the DB Receivers with the Australian Securities and Investments Commission with respect to the winding up of the FMIF, appear at:

- (a) the following pages of the Bundle of exhibits to my November 2018 Affidavit:
  - (i) Pages 494 to 506 – Receipts and payments account for the period 11 July 2013 to 10 January 2014;
  - (ii) Pages 507 to 520 – Receipts and payments account for the period 11 January 2014 to 10 July 2014;

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- (iii) Pages 521 to 536 – Receipts and payments account for the period 11 July 2014 to 10 January 2015;
  - (iv) Pages 537 to 568 – Receipts and payments account for the period 11 January 2015 to 10 July 2015;
  - (v) Pages 569 to 583 – Receipts and payments account for the period 11 July 2015 to 10 January 2016;
  - (vi) Pages 584 to 597 – Receipts and payments account for the period 11 January 2016 to 10 July 2016;
  - (vii) Pages 598 to 610 – Receipts and payments account for the period 11 July 2016 to 10 January 2017;
  - (viii) Pages 611 to 622 – Receipts and payments account for the period 11 January 2017 to 10 July 2017;
  - (ix) Pages 623 to 632 – Receipts and payments account for the period 11 July 2017 to 10 January 2018; and
  - (x) Pages 633 to 640 – Receipts and payments account for the period 11 January 2018 to 10 July 2018;
- (b) The following pages of the Bundle of exhibits to my June 2019 Affidavit:
- (i) Pages 156 to 166 – End of administration return showing receipts and payments for the period 11 July 2018 to 10 December 2018; and
  - (ii) Pages 167 to 169 – Request for correction of end of administration return showing receipts and payments for the period 11 December 2018 to 14 December 2018.



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231. I also lodge my own statements of receipts and payments with ASIC, but prior to the retirement of the DB Receivers, and the transfer of control of the bank accounts of the FMIF to me, such statements of receipts and payments only contained limited information including my remuneration and disbursements.
232. A summary of receipts and payments for the period 15 December 2018 (when I took over operation of the Fund's bank accounts), until 30 April 2019, appears at paragraph 227 of my June 2019 Affidavit. A summary of the receipts and payments for the period from 1 May 2019 until 31 October 2019, appears hereunder:

<b>Description</b>	<b>Amount (\$)</b>
<b>Receipts</b>	
Interest	536,753.73
GST received	308,574.05
Litigation recoveries	117,000.00
Bellpac Pty Ltd (In Liquidation) recoveries (See Note 1)	1,000,000.00
Refund of Legal costs	32,077.30
Reimbursement of costs from LM Administration Pty Ltd (In Liquidation)	77,278.95
Refund of unclaimed trust monies in relation to a borrower	1,270.11
Feeder Fund repayments as per Deed of Settlement	4,739,539.07
Returned First Interim Distribution to investors (6.5 cents per unit)	2,939,806.48
<b>Total receipts</b>	<b>9,752,299.69</b>
<b>Payments</b>	
Bank charges	(7,990.26)
Custodian fees	(11,000.00)
Receivers fees and disbursements	(1,273,847.25)
Bankrupt Trustee's fees in relation to Bankrupt Estate of Guarantor	(175,926.01)

Signed:



Witnessed by:



<b>Description</b>	<b>Amount (\$)</b>
Legal fees and disbursements(see Note 2 below)	(1,178,755.62)
Consultant Fees – Auditor Claim	(6,975.45)
Liquidators Fees - FTI Consulting	(393,043.89)
IT expenses	(59,123.00)
Printing and stationary	(14,108.11)
Record management and storage	(6,396.26)
First Interim Distribution to investors (6.5 cents per unit)	(31,988,165.79)
<b>Total payments</b>	<b>(35,115,331.64)</b>
<b>Net receipts (payments)</b>	<b>(25,363,031.95)</b>

Note 1 – Following settlement of litigation with the MPF trustee , the MPF trustee denounced its claims to \$678,000 held by the Bellpac liquidator to allow \$1 million to be paid to the FMIF, and payment of legal costs to the FMIF of \$100,000.

Note 2 – The legal fees included, work in relation to my application to Court for judicial advice in relation to the settlement of the Feeder Fund Proceeding and satisfying the conditions precedent of the settlement of the Feeder Fund Proceeding, the progression of the proceedings against the auditors and the other legal matters addressed in this affidavit.

*Financial Reports*

233. Copies of the following financial statements of the FMIF prepared by BDO during the winding up, appear:

(a) At the following pages of the Bundle of exhibits to my November 2018 Affidavit:

(i) Pages 641 to 665 - Financial statements of the FMIF for the year ending 30 June 2014;

Signed:



Witnessed by:



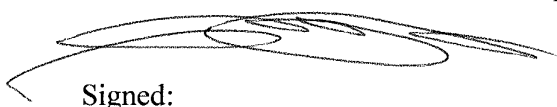
- (ii) Pages 666 to 688 - Financial statements of the FMIF for the year ending 30 June 2015;
  - (iii) Pages 689 to 711 - Financial statements of the FMIF for the year ending 30 June 2016;
  - (iv) Pages 712 to 736 - Financial statements of the FMIF for the year ending 30 June 2017; and
  - (v) Pages 737 to 762 - Financial statements of the FMIF for the year ending 30 June 2018.
- (b) At the following pages of the Bundle of exhibits to my June 2019 Affidavit:
- (i) At pages 170 to 195 – financial statements of the FMIF for the half-year ending 31 December 2018.
234. At pages 207 to 231 of the Bundle of exhibits to this Affidavit is a copy of the financial statements of the FMIF for the financial year ending 30 June 2019.
235. These financial statements include details of the remuneration, disbursements and legal fees of the DB Receivers, myself, and the Liquidators in the winding up of the FMIF.

*Legal professional privilege*

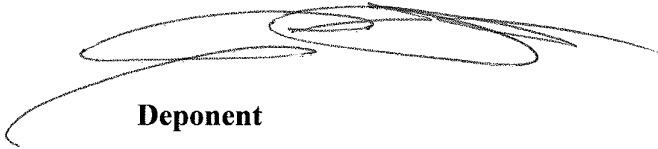
236. In this affidavit, I have referred to dealings with solicitors and Counsel in order to explain work undertaken for which I seek to be remunerated. I do not intend, in doing so, to waive any legal professional privilege that may attach to communications between me and my solicitors and Counsel.
237. 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.

Signed:


Witnessed by:



Sworn by **DAVID WHYTE** on the 21<sup>st</sup> day of November 2019 at Brisbane in the presence of:



**Deponent**



**Solicitor/A Justice of the Peace**