

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVER APPOINTED) (LMIM) ACN 077 208 461

Applicants: RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE

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

Second Respondent: THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND
ARSN 089 343 288

Third Respondent: ROGER SHOTTON

Intervener: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

RECEIVER'S SUBMISSIONS – FINALISATION OF THE WINDING UP OF THE FMIF

1. The winding up of the managed investment scheme known as the LM First Mortgage Income Fund (**FMIF**) is now at a stage when a final distribution can be made to members.
2. The winding up has been ongoing for 11 years, having commenced by a judgment of the Supreme Court dated 8 August 2013, embodied in orders dated 21 August 2013 (**Appointment Order**).¹
3. The Appointment Order, relevantly, also appointed Mr David Whyte of BDO (**Receiver**):
 - (a) as the person to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution, under s.601NF(1) of the *Corporations Act* 2001 (Cth) (**Corporations Act**); and
 - (b) as the receiver of the property of the FMIF, under s.601NF(2) of the *Corporations Act*.
4. Since the Receiver's appointment, all of the remaining assets of the FMIF have been realised, a call for proofs of debt has been issued and all indemnity claims have been dealt with, and all legal proceedings relating to the winding up have been resolved.



¹ Affidavit of David Whyte sworn 9 April 2024 (**Finalisation Affidavit**) at [21] and Exhibit DW-128 at pp 226-229.

SUBMISSIONS
Filed on Behalf of the Receiver

COWEN SCHWARZ MARSCHKE
Level 8, 300 George Street
Brisbane QLD 4000
dschwarz@csmlawyers.com.au

5. By this application, the Receiver seeks the following three categories of relief necessary for him to take the final steps necessary to complete the winding up of the FMIF:
 - (a) **First**, orders authorising him to make a final cash distribution to the members of the FMIF, with ancillary orders to finalise the winding up including as to any final audit of the FMIF's accounts, and a discharge and release of the Receiver and relevant employees of BDO.
 - (b) **Second**, judicial advice in relation to how he proposes to deal with certain unresolved proceedings and other liabilities of the FMIF.
 - (c) **Third**, approval of his remuneration for work done in the period from 1 May 2022 to 29 February 2024, and then for work done and anticipated to be done from 1 March 2024 to the conclusion of his appointments.
6. A draft of the orders sought by the Receiver are annexed to these submissions, as Annexure A (**Draft Order**). The Receiver's list of materials is also annexed as Annexure B.
7. Pursuant to this Court's substituted service orders, this application has been served on all of the members of the FMIF, in addition to the liquidator of LMIM and ASIC.²
8. To date, no member of the FMIF has filed notice of their opposition to the relief sought by this application, nor has the liquidator of LMIM or ASIC.³
9. In addition, ASIC has written that it "*considers that this is a matter properly left for the determination of the Court and confirms that it does not propose to intervene in the application*", but that it should not be taken as expressing "*support for, or opposition to, the orders sought in the application*".⁴

(1) FINALISING THE WINDING UP OF THE FMIF

10. The Receiver seeks orders authorising him to make a final cash distribution to the members of the FMIF, and ancillary orders to finalise the winding up of the FMIF.
11. These are reflected in paragraphs 1 to 7 of the Draft Orders.

Authorisation to make a Final Distribution

12. The Receiver's authority in relation to the conduct of the winding up of the FMIF, under the Appointment Order, is not unlimited and does not extend to making a final distribution to members.
13. The background and terms of the Receiver's appointment, including how they developed after 21 August 2013, are set out in further detail in his affidavit sworn on 9 April 2024 at [4] to [34] (the Finalisation Affidavit).
14. Relevantly, in *Park v Whyte* [2015] QSC 283, followed by the orders made on 17 December 2015, Justice Jackson clarified the division of responsibilities between the Receiver and the liquidator of the FMIF's responsible entity, LM Investment Management Limited (**LMIM**), and the process for calling for proofs of debt and the making of indemnity claims against the FMIF.

² Evidence of service will be tendered in a further affidavit to be read with leave at the hearing.

³ Affidavit of David Whyte sworn 21 May 2024 (**Further Supplementary Affidavit**) at [6].

⁴ Further Supplementary Affidavit at [7] and [8].

15. In particular, in that decision, Justice Jackson held at [100] to [106] that:
- (a) LMIM's obligation under clause 16.7(c) of the FMIF's Constitution⁵ (**Constitution**) to make distributions in the winding up of the FMIF was suspended, because the orders appointing the Receiver meant that LMIM was not in possession of the scheme property;
 - (b) the Receiver was under no obligation to return the property of the FMIF to the liquidator of LMIM once he had completed collecting and realising the assets of the FMIF, without an order of the Court; and
 - (c) the orders appointing the Receiver did not authorise him to make distributions to the members in the responsible entity's place.
16. The Receiver has previously sought and received authorisation to make an interim distribution to members of 6.5 cents per unit (the **Interim Distribution**): see *LM Investment Management Limited v Whyte* [2019] QSC 333. This was paid to members between 16 and 23 October 2019.⁶
17. It is appropriate for the Court to authorise the Receiver to make a further and final distribution (which he estimates will be of around 11.4 cents per unit) because no further steps remain to realise the assets and to pay the liabilities of the FMIF, and because he is best placed to take the steps to pay the distribution to members.
18. Relevantly, in the period from 21 August 2013 to date, substantial work occurred to realise the various assets and undertakings of the FMIF. A detailed outline of that work is at [35] to [141] of the Finalisation Affidavit. In summary:
- (a) All of the real property security assets of the FMIF have been realised, either by the Receiver, or by the receivers privately appointed by Deutsche Bank, a secured lender to LMIM as the responsible entity of the FMIF: [35]-[38], [40] and [41].
 - (b) All of the legal proceedings by or against the FMIF have been finally resolved, save for the proceedings known as the Clear Accounts Proceedings, which the Receiver now proposes to discontinue, as discussed further below: see [48] to [93].
 - (c) Other claims which the Receiver had caused to be made by the FMIF, against borrowers or guarantors, have been resolved: [94]-[107].
 - (d) The liquidator of LMIM called for lodgement of proofs of debt in early September 2018, and all indemnity claims made by the liquidator to the FMIF in relation to proofs lodged in that process have been resolved: [108] to [126].
 - (e) The Receiver obtained relevant financial reporting relief from ASIC, and has complied with its terms: [127] to [141].
19. The only liabilities remaining to be resolved, other than remuneration and expense claims from the Receiver and the liquidator of LMIM, are those addressed further below in the judicial advice sought by the Receiver by this application, and a small number of relatively small claims that have been identified recently that the Receiver intends to resolve promptly.⁷

⁵ Finalisation Affidavit, Exhibit DW-128 at pp 13 to 52.

⁶ Finalisation Affidavit at [31], [32] and [46].

⁷ These are described by the Receiver in the Further Supplementary Affidavit at [11].

20. As to the process of making the final distribution, the Receiver is best placed to engage in that process because he is in control of the bank account holding the cash assets of the FMIF and because, as set out at [142]-[152] of the Finalisation Affidavit:
- (a) he, with the assistance of staff at BDO, has continued throughout the winding up to maintain the register of FMIF members and, to deal with communications from the members;
 - (b) they have experience undertaking the necessary steps required to make a distribution from making of the Interim Distribution in October 2019.
21. In all the circumstances, the Court should authorise the Receiver to make the final distribution to members, in the terms set out in paragraph 1 of the Draft Order.

Terms and ancillary orders

22. The Receiver's authorisation to make the final distribution raises a number of ancillary issues, for which he proposes the following terms and ancillary orders, which are addressed in turn below:
- (a) *First*, that the final distribution be made as soon as reasonably practicable.
 - (b) *Second*, that he be authorised to pay or transfer any unclaimed or undistributed money or other property to ASIC pursuant to Part 9.7 of the Act.
 - (c) *Third*, that LMIM is not liable in the winding up for any liability to indemnify a creditor not notified to the Receiver under the orders made on 17 December 2015, or provided for by the other orders sought by this application.
 - (d) *Fourth*, that LMIM is not required to have final accounts prepared or audited, other than as already required under ASIC Instrument 24-0114⁸. Alternatively, that any final accounts be limited to the period from the start of the financial year in which the winding up is concluded, to the conclusion of the winding up.
 - (e) *Fifth*, that the Receiver is entitled to withhold from the final distribution only the amounts determined by the Court as being required to meet remuneration and expenses of the Receiver and the liquidator of LMIM to conclude the winding up.
 - (f) *Sixth*, that upon making the final distribution, the Receiver is to be discharged from his appointment under s.601NF(1) of the *Corporations Act*, and as the receiver of the property of the FMIF, and that he and BDO, its partners, employees and agents, be discharged and released forthwith from any and all claims whatsoever and howsoever arising in connection with his appointments.
 - (g) *Seventh*, that once the winding up of the FMIF has been completed, the Receiver file an affidavit deposing to the making of the final distribution, paying any unclaimed or undistributed money to ASIC, and publishing any required audited or unaudited final accounts as required.
23. These are reflected in paragraphs 1 to 7 of the Draft Order.

⁸ Exhibit DW-128 to the Finalisation Affidavit, at pages 820-21.

(1) As soon as reasonably practicable (Draft Order, paragraph 1(a))

24. The first issue concerns timing, that is, if the Court authorises the Receiver to make a distribution, then it is desirable that there is some definition as to when it is to be made.
25. The Receiver proposes that his authorisation be in terms that the distribution be made as soon as practical.
26. This is appropriate where the steps required to wind up the FMIF have been substantively completed, and it is in the interests of the members that the distribution be made promptly, but there remain some matters to be resolved by the Receiver before the distribution can be made.

(2) Unclaimed or undistributed money or other property (Draft Order, paragraph 1(b))

27. The second issue concerns who is to deal with unclaimed or undistributed moneys, which are required to be paid to ASIC by s.601NG of the Act, and by clause 16.8 of the Constitution.
28. It is appropriate that the Receiver attend to this task, as he is the person currently with possession of the assets and who, it is proposed, will attend to paying the final distribution to members.

(3) Liability for further claims (Draft Order, paragraphs 2(b) and 4)

29. The third issue concerns the need for certainty that there are no further liabilities to be met from the assets of the FMIF, so that all of the remaining funds can be distributed to members in the final distribution.
30. To that end, the Receiver seeks a further order under s.601NF(2) of the *Corporations Act* that LMIM as responsible entity of the FMIF is not liable to pay any liability not already notified to the Receiver under the orders made on 17 December 2015, or as otherwise provided for by the Court's orders on the present application.
31. The orders made by Justice Jackson on 17 December 2015 essentially sought to mirror and extend the ordinary liquidation process, by providing for the liquidator of LMIM to call for proofs of debt, and for the liquidator to assess those claims and to notify the Receiver of any indemnity claims he determined that LMIM had against the assets of the FMIF arising out of those claims that he admitted to proof against the FMIF.
32. This process has occurred, that is, the liquidator of LMIM issued a call for proofs of debt, and he has made relevant claims for indemnity under the orders made on 17 December 2015.⁹
33. In the winding up of LMIM, the rights of the creditors are relevantly constrained by regulation 5.6.63 of the *Corporations Regulations*, which provides that dividends in the winding up of a company may only be paid to creditors whose debts or claims have been admitted to proof.
34. However, there is no equivalent limitation applicable to the winding up of the FMIF. That is, in theory, LMIM remains exposed to future liabilities for unnotified claims that relate to the affairs of the FMIF, even if all of the assets of the FMIF have been distributed to members.

⁹ Finalisation Affidavit at [108] to [126].

35. To address this, the Receiver proposes an order with similar effect to regulation 5.6.63, to the effect that LMIM is not liable for any liability not notified to it under the orders made on 17 December 2015 for which there would be a right of indemnity against the assets of the FMIF.

(4) Final Audit (Draft Order, paragraph 3)

36. The fourth issue concerns whether there is any need for a further process of checking that the accounts prepared by the Receiver during the winding up are accurate.
37. During the winding up, the Receiver has caused BDO to prepare, and has published, financial statements of the FMIF for each year and half year from 31 December 2013, which he has signed in his capacity as the Court appointed receiver of the assets of the FMIF.¹⁰
38. These accounts were reviewed by the audit division of BDO, but their review did not constitute a full audit as the audit division were unable to sign off the accounts on a formal basis given the Receiver's appointment.¹¹
39. The issue is whether, in the circumstances, the Receiver should also now be required to have the accounts of FMIF, or some of them, formally audited.
40. In the winding up, the FMIF is subject to two separate obligations to have its accounts audited.
41. The ordinary requirement under Part 2M.3 of the *Corporations Act* to audit the annual accounts of a registered scheme continues during the winding up period: *Park v Whyte* [2015] QSC 283 at [128]-[135]; c.f. *Re Environinvest Ltd (No 4)* (2010) 81 ACSR 145.
42. However, the Receiver sought relief from ASIC, first to suspend the operation of those requirements, and then to exempt LMIM from them. Detailed reasons for seeking the exemptions were given.¹² ASIC granted LMIM that relief in a series of instruments, which were all subject to conditions that the Receiver report to members on a regular basis with information, including as to the financial position of the FMIF.¹³
43. The other requirement to audit accounts is provided for by clause 16.10 of the Constitution, which provides that "*The RE shall arrange for an Auditor to audit the final accounts of the Scheme after the Scheme is wound up*".
44. When the Receiver last wrote to ASIC to seek relief on 2 February 2024, he noted the existence of this provision, and that he interpreted it as requiring him to audit the last set of accounts, for the last financial year or half year of the winding up.¹⁴ He also instructed his solicitors to write to ASIC regarding his interpretation of this clause, but has not received a substantive response.¹⁵

¹⁰ Finalisation Affidavit at [128]. By way of example, the financial statements for the 6 months ended 31 December 2023, including the Notes thereto, are at Exhibit DW-128 at pp 743 to 763. The Receiver's report accompanying 43rd report to investors is at pages 729 to 742.

¹¹ Finalisation Affidavit at [129].

¹² Finalisation Affidavit at Exhibit DW-128 at pp 764-789 (application dated 2 August 2022) and pp 792-819 (application dated 2 February 2024).

¹³ Finalisation Affidavit at [130]-[141]; Exhibit DW-128 at pp 721-728 and pp 790-791.

¹⁴ Exhibit DW-128 at p814; see also at pp 766 and 786 and 816.

¹⁵ Finalisation Affidavit at [204]-[206] and Exhibit DW-128 at 897-901.

45. In this application, the Receiver is seeking that LMIM be excused from the requirement of clause 16.10 of the Constitution altogether.¹⁶
46. Relevantly, ASIC has been served with this application, and does not propose to appear to make any submissions; it does not consent but does not oppose the relief that has been sought.
47. On any view, the Receiver considers that it would be unnecessary and inappropriate to now audit all of the FMIF's accounts over the past 10 years. That is for the following reasons:
 - (a) *First*, the winding up of the FMIF is not a usual winding up conducted by the responsible entity, as envisaged by the FMIF's Constitution. Instead, the Court has appointed the Receiver as an independent insolvency practitioner, to ensure that the FMIF is wound up in accordance with its Constitution, and as receiver of the property of the FMIF.
 - (b) *Second*, in carrying out his role, the Receiver has prepared and published regular accounts, that have been reviewed (but not fully audited) by BDO's audit division. Under ASIC Relief 24-0114, the Receiver is also required to report for the period concluding with the "completion of the winding up of the Scheme". He is not aware of any complaint as to the accuracy of his accounts to date.¹⁷
 - (c) *Third*, the FMIF ceased usual operations long ago. Its primary income during the winding up has been from asset realisations, and the proceeds of litigation.¹⁸
 - (d) *Fourth*, as to expenses, the Receiver's remuneration has been subject to periodic Court approval, and his expenses, since the sale of the assets has relieved the FMIF from the burden of any further holding costs, have been primarily legal expenses in advancing the proceedings.¹⁹
 - (e) *Fifth*, the steps remaining in the winding up, including the final distribution, are likely to be relatively mechanical in nature.
48. Furthermore, the time and cost involved in conducting a full audit of the FMIF's accounts from 2013 to the conclusion of the winding up would be considerable, and potentially up to \$757,000, given the need for any auditor to obtain reasonable assurance over the accounts of the FMIF for a period of over 10 years.²⁰
49. As to clause 16.10 itself, it is not explicit about what is meant by the "final accounts" that must be audited, as there is no provision requiring special accounts to be prepared for the winding up, and it is not clear what the final accounts are or what period they are intended to cover.
50. The clause was included to satisfy the requirement of s.601GA(1)(d) of the *Corporations Act* that the constitution of a managed investment scheme "make adequate provision for ... winding up the scheme". Relevantly, ASIC Regulatory Guide 134 (**RG134**), published after the Constitution was

¹⁶ Exhibit DW-128.

¹⁷ Further Supplementary Affidavit at [14].

¹⁸ Further Supplementary Affidavit at [15].

¹⁹ Further Supplementary Affidavit at [16].

²⁰ Further Supplementary Affidavit at [23]-[28]; Supplementary Affidavit at [7] and [7] Note 3.

drafted in July 2018, now sets out ASIC's expectations as to what that requires, including as follows at [134.229]-[134.231]:

"We consider that the constitution needs to include a provision that provides for an independent audit of the final accounts, to be conducted by a registered company auditor or audit firm, after the registered scheme is wound up. This should require that the audit itself is an independent audit, and not merely that the auditor is independent. We do not consider that providing for an independent review in place of an independent audit is sufficient, in light of the different levels of assurance between the two.

On winding up a registered scheme, we consider it is an appropriate safeguard for the accounts to be independently audited to ensure there has been compliance with the Corporations Act.

In our view, an audit of the final accounts provides greater oversight than a review as it involves performing procedures to obtain audit evidence about the amounts and disclosures in the accounts."

51. It is to be recalled, however, that the context of clause 16.10 of the Constitution is a winding up of the FMIF conducted by the responsible entity, not someone independent like the Receiver who was appointed in August 2013.
52. The requirement of clause 16.10 can therefore be compared and contrasted with what is required of liquidators following a winding up of a company. Relevantly, there is no requirement on liquidators to audit accounts, however, s.481(1)(a) of the *Corporations Act* provides that the Court "may" cause a report on "*the accounts of the liquidator*" to be prepared by an auditor appointed under s.70-15 of the Insolvency Practice Schedule (IPC), and s.70-15 of the IPC provides that ASIC "may" cause the end of administration return to be audited by a registered company auditor.
53. Further, a similar order was sought and obtained in *Re Environinvest Ltd (No 4)* (2010) 81 ACSR 145, albeit in a different factual context.
54. In that case, Judd J considered that the responsible entity should be relieved from the requirement to audit the accounts, for the following reasons at [37]:

"The requirement for the appointment of an auditor, and an audit report, presuppose the preparation of accounts to be audited. The appointment of an auditor is designed to provide independent verification of the accuracy of the accounts prepared by the responsible entity after completing the winding-up. The fact that Mr Downey is a certified practising accountant does not substitute for the independent verification and report of an auditor. There are, however, exceptional circumstances which, in my view, justify a departure from the verification process required under the constitution. These circumstances are: (1) the absence of funds to engage an auditor; (2) the relatively modest amount recovered from the sale of scheme assets; (3) the limited nature and number of transactions involved to realise the scheme assets; (4) the fact that the proceeds available for distribution will not be sufficient to satisfy all claims for costs, expenses and remuneration; and (5) the fact that there was no opposition to the proposed course by growers, who have been notified of the application

55. The facts of this case are different to *Re Environinvest Ltd (No 4)*, as in this case there are plainly sufficient funds available to the Receiver to carry out an audit.
56. Nevertheless, in this case, the Receiver contends that it is appropriate for the Court to relieve LMIM from the obligation to have the 'final accounts' of the FMIF audited where, for the reasons set out above, particularly where there has been substantial transparency to members in the

publication of regular periodic accounts by the Receiver which, although not formally audited, were reviewed by the audit department of BDO.

57. In the alternative, if the Court determines that the 'final accounts' of the FMIF must be audited, then the Receiver seeks further orders as follows:
- (a) *First*, that the Receiver be responsible for causing the audit to be performed. This is necessary in circumstances where Jackson J in *Park v Whyte* [2015] QSC 283 at [161]-[162] considered that the existing orders appointing the Receiver did not give him that authority.
 - (b) *Second*, that the 'final accounts' to be audited be limited to accounts for the period from the start of the financial year in which the winding up is concluded, to the conclusion of the winding up.
58. As to the responsibility for carrying out the audit, the Receiver's proposal reflects the fact that he is best placed to prepare the necessary accounts to be audited, and to instruct and provide relevant information to the auditor as to the carrying out of the FMIF.
59. As to the period for the final accounts, if an audit is required, it is appropriate to limit the period of the accounts the subject of the audit, for three reasons:
- (a) *First*, the work required to prepare and audit accounts for the whole period of the winding up would be substantial, and would necessarily involve material cost and delay;
 - (b) *Second*, an audit of the accounts limited to what may be described as the distribution period of the winding up would serve the object of providing assurance to members that the correct final distribution has been made;
 - (c) *Third*, any obligation imposed by clause 16.10 as to the audit of accounts otherwise subject to Part 2M.3 of the *Corporations Act* should be seen as redundant and superfluous, in circumstances where ASIC has seen fit to exempt LMIM from compliance, most recently when on notice of the Receiver's interpretation of clause 16.10 of the Constitution.
60. In conclusion, the Court should make orders under s.601NF(2) of the *Corporations Act*:
- (a) relieving LMIM of the obligation under clause 16.10 of the Constitution; or
 - (b) directing that the Receiver be authorised to cause the necessary audit to be conducted, but with the audit limited to accounts for the period from the start of the financial year in which the winding up is concluded, to the conclusion of the winding up.

(5) Amounts to be withheld (Draft Order, paragraph 2)

61. The fifth issue concerns potential further work required after the final distribution is made, and the arrangements for paying relevant post-distribution expenses and remuneration.
62. The orders sought by the Receiver provides that he will withhold funds from the final distribution:
- (a) to pay the Receiver's unpaid remuneration, as approved by the Court, to the conclusion of his appointments;
 - (b) to pay the estimated expenses and liabilities that will arise after the final distribution is made;
 - (c) to pay the liquidator of LMIM's unpaid expenses and liabilities, as approved by the Court, to be indemnified from the FMIF, that will arise after the final distribution is made.

63. The fixing of these amounts is considered further below.

(6) Discharge and release (Draft Order, paragraphs 5 and 6)

64. The sixth issue arises because, in making the final distribution, the Receiver relinquishes control of a pool of assets which would indemnify him in the event of claims subsequently being against him for which he is ultimately entitled to be indemnified.
65. To address that issue, the Receiver seeks an order discharging and releasing him, as well as BDO, its partners, employees and agents, forthwith from any and all claims whatsoever and howsoever arising in connection with his appointments.
66. An order of this kind is consistent with prior authority concerning Court appointed receivers, including receivers appointed to trust assets, and is made notwithstanding that any limitation period has not expired: *IRC v Hoogstraten* [1985] QB 1077 at 1094; *Re Hutchins, Ardenberg Pty Ltd (in liq) (Admins Apptd) (No 3)* [2021] FCA 519 at [12] to [15] (Yates J); *Re Double Bay Property Management Pty Ltd (in liq)* [2021] NSWSC 996 (Ward CJ in Eq).
67. In some cases, however, the Court has allowed a short period in which claims can be brought, but that is usually from the time of the Court's orders and expires before the distribution of any remaining assets of the receivership: see, e.g., *Re Double Bay Property Management Pty Ltd (in liq)* [2021] NSWSC 996 at [36] to [41].
68. In this case what is proposed, instead, is that the discharge occur automatically and immediately upon the making of the final distribution, which will take some weeks to arrange. If a claim emerges during this period, i.e. before the final distribution is paid, the Receiver will have the usual liberty to apply for further directions.
69. In this case, an order for discharge and release immediately upon making the final distribution is appropriate because:
- (a) the Receiver will, by making the final distribution, be relinquishing the fund against which he would be indemnified to defend any unsuccessful claim against him;
 - (b) a significant amount of time has elapsed since the commencement of the winding up, the work by the Receiver realising real property assets of the FMIF concluded in August 2015,²¹ and the substantive legal proceedings which he caused to be commenced (except for the Clear Accounts Proceeding, considered below) were substantively resolved by June 2022;²²
 - (c) the Notice sent to members advising of the present application specifically notified them that the Receiver would be seeking a discharge and release from liability;²³
 - (d) the Receiver is not presently aware of any unresolved or potential claims against him, or against BDO.²⁴

²¹ Finalisation Affidavit at [40].

²² Finalisation Affidavit at [48] to [81].

²³ Affidavit of David Whyte sworn 28 April 2024 (**Supplementary Affidavit**), Exhibit DW-130 at p 4.

²⁴ Further Supplementary Affidavit at [18].

(7) Affidavit confirming completion of the winding up (Draft Order, paragraph 7)

70. The Receiver proposes to report the conclusion of the winding up to the Court by the filing of an affidavit swearing to the carrying out of the final steps of the winding up.

(2) JUDICIAL ADVICE

71. The Receiver also seeks judicial advice from the Court as to whether he is justified in acting on his proposed approach to certain outstanding liabilities recorded in the FMIF's accounts.
72. This advice is reflected in paragraphs 8 to 12 of the Draft Order.
73. Relevantly, this Court has inherent jurisdiction to give advice to Mr Whyte, in his capacity as a Court appointed receiver.²⁵
74. The various categories of liabilities are addressed below, in turn.

Unresolved Liabilities – November and December 2010 Income Distributions (Draft Order, paragraph 9)

75. The Receiver has identified that the FMIF's accounts include liabilities recorded in a "Distributions Payable" ledger, which appears to have been used to record the balance of income distributions declared and payable, but not yet paid.²⁶
76. He has further categorised the entries as follows:²⁷
- (a) entries totalling \$573,236.63 which represent an income distribution declared for November 2010, that was never paid to members;
 - (b) entries totalling \$619,470.81 which represent an income distribution declared for December 2010, that was never paid to members;
 - (c) other entries made up of missed distributions and returned payments with a net value of \$139,992.58.
77. The issue here can be outlined briefly, and the facts are then set out in further detail below.
78. On the face of it, these were income distributions that were justified by the accounts at the time, and that were partially executed in relation to members who had elected to immediately re-invest their entitlements to income.
79. Upon declaring a trust distribution, and acknowledging an immediate and unconditional obligation to pay, a beneficiary becomes both equitably entitled to payment, and is a creditor of the trustee: see *Fischer v Nemeske Pty Ltd* (2016) 257 CLR 615 at [97]-[100] (Gageler J); [31]-[33] (French CJ and Bell J); *Seoud v Fortythird Garland Pty Ltd* (2019) 57 VR 262.
80. The complication which arises is that, in the proceedings that were brought by the Receiver in LMIM's name against its former auditors (the **Auditors Claim**), the Receiver's position was that

²⁵ *Bruce v LM Investment Management Limited* [2019] QSC 126 at [13], referring to *ASIC v Commercial Nominees* (2002) 42 ACSR 240 (Barrett J), referring to *Glazier Holdings Pty Ltd v Australian Men's Health Pty Ltd* (Unreported, NSWSC, Young J, 30 April 1998).

²⁶ Finalisation Affidavit at [155]-[157].

²⁷ Finalisation Affidavit at [158].

substantial impairment expenses should have been recognised from that date, which would have shown net losses in each period, and a decreasing unit price, from the 6 month period ended 31 December 2008.²⁸

81. This issue was, however, controversial, and the existence of significant impairment was denied by the former auditors in the Auditors Claim.
82. To advance the issue, the Receiver filed detailed and lengthy expert evidence from a forensic accountant, Mr Brian Morris, that was supported by 52 retrospective valuation reports. The matter then settled before the former auditors filed any evidence in response to this material.²⁹
83. If Mr Morris' assessment is correct, however, then there was no income to distribute in November and December 2010, and the income distributions may not have been valid.
84. A further complication arises as LMIM appears to have decided and told investors by letter dated 21 July 2011 that, to the extent that there were no profits in those periods, the declared distributions should be treated as distributions of capital rather than income, which were also permitted under the Constitution.³⁰
85. Finally, some investors may have an arguable change of position defence under section 113(3) of the *Trusts Act 1973* (Qld).
86. In all the circumstances, from the Receiver's point of view, the cost, uncertainty and delay in trying to contest the income distributions to get a final determination of what the position is would be unjustified, particularly where no one has urged the Receiver to take this course by making a claim that the distributions should not be paid, or that re-investments should be reversed.³¹
87. Relevantly, this case is distinguishable from the decision in *Blue Sky Private Equity Limited v Crawford Giles Pty Ltd* [2012] SASC 28, in which the South Australian Supreme Court granted declaratory relief that a trustee of a unit trust was entitled *not* to pay certain income distributions. In that case, the question was whether an income distribution had been required under the terms of the trust's constitution, not whether a declared distribution that had not been paid should be paid, and the issue arose for determination by the Court because certain unit holders had opposed the retrospective recognition and payment of a distribution.
88. On this basis, in this case, an order is sought in paragraph 9 of the Draft Order that Mr Whyte is justified in seeking to pay the balance of the income distributions recorded as liabilities in the FMIF's accounts, insofar as he is able to identify the members entitled, and otherwise to pay the balance of the ledger to ASIC as unclaimed monies.
89. The more detailed background to the matter is as follows:³²
 - (a) Clause 12 of the Constitution provides for the distribution of the FMIF's 'Distributable Income' on a monthly basis.

²⁸ Finalisation Affidavit at [167]-[168]; Further Supplementary Affidavit at [19].

²⁹ Further Supplementary Affidavit at [20] and [21].

³⁰ Finalisation Affidavit at [174].

³¹ Further Supplementary Affidavit at [22].

³² See, generally, Finalisation Affidavit at [159] to [176].

- (b) Consistent with clause 12.6 of the Constitution, the FMIF's Product Disclosure Statement permitted members to elect either to automatically re-invest their distribution entitlement, or to receive distributions in cash.
- (c) From November 2009, the members who had elected to be paid cash were paid increasingly late. For example, the cash income distributions declared for July to October 2010 were only paid in January 2013, and the cash income distributions for November and December 2010 were never paid to any member and remain unpaid to date.
- (d) By contrast, members who had elected to re-invest their income distribution entitlements were issued with additional units in the FMIF immediately, but (if Mr Morris' assessment is accurate) at an inflated unit price.
- (e) After December 2010, LMIM continued to declare income distributions for a short period, however, on 27 June 2011, LMIM published the financial statements for the FMIF for the half year ended 31 December 2010, which recorded a significant net loss for the first time due to the recognition of a substantial impairment expense.
- (f) At a board meeting of the directors of LMIM held on 4 July 2011, the directors resolved to declare a zero distribution for the period 1 January 2011 to 30 June 2011, and to reverse the income distributions already declared for the period January to March 2011.
- (g) LMIM sent correspondence to members dated 21 July 2011 stating that, as a result of the reported net loss, income distributions declared for the period 1 July 2010 to 31 December 2010 "*(once we catch up) are all partial repayments of capital and not income, and therefore will not need to be included in the assessable income in an investor's tax return for the current year*". Relevantly, LMIM also had power under clause 12.4 of the Constitution to distribute the capital of the FMIF, either in cash or by way of bonus Units.
- (h) From May 2010 through to February 2013, LMIM sent correspondence to the members of the FMIF acknowledging that the payments were due and outstanding, that the amounts in question were "*provided for within the fund*", and promising to catch up and pay them.
- (i) In the FMIF's accounts for the period ended 31 December 2010, and in subsequent periods, the unpaid amounts were recorded as a liability against the line item "Distributions payable".

Unresolved Liabilities – Others (Draft Order, paragraphs 10 to 12)

90. The Receiver has identified further liabilities recorded in the FMIF's accounts, as follows:³³

- (a) \$39,828 in an "Investor Funds Payable (Redemptions)" ledger, which appears to have been used to process redemption (including hardship) and capital payments to investors, as a clearing account at the time payments were processed;
- (b) \$43,347.02 in a "Returned Investor Payments" ledger, that appears to have been used to record returned payments, as well as the subsequent attempts to pay the amounts to investors;
- (c) \$92,087.77 in a "Trade – Settlements Payable (Receivable) ledger", which appears to relate to the FMIF's foreign exchange entitlements and liabilities;

³³ Finalisation Affidavit at [177] to [194].

- (d) \$3,766.86 in a "Other Payables" ledger, in which various related party payments and other payables were recorded.
91. These ledgers fall into two categories. The first and second ledgers appear to relate to the entitlements of members, which are also equitable in nature. In contrast, the third and fourth ledgers appear just to be ordinary creditors' claims.
92. As to the first two categories, the Receiver has, with the assistance of staff at BDO, sought to match the entries in the accounts with members of the FMIF, with some but not complete success. He proposes to:
- (a) seek to pay the members who he has identified as being entitled to payments on the basis of BDO's analysis;
 - (b) having written to all current members of the FMIF asking them to come forward by 24 May 2024³⁴ and provide relevant supporting documentation if they believe that they are entitled to a payment that they have not received, assess any claims received and to pay any further members who he determines are entitled;
 - (c) if any payments to members (or former members) of the FMIF who are entitled still cannot be made, to transfer the funds in question to ASIC as unclaimed monies; and
 - (d) as to any balance of the ledgers that cannot be reconciled to particular members, to not take any further steps with respect to those amounts and to include the funds in question in the final distribution to members.
93. To be clear, the Receiver's intention is to consider only claims by members that relate to their equitable entitlements as members. Otherwise, if a claim is properly characterised as a regular creditor's claim, the Receiver considers that falls within the regime established by Jackson J's orders made on 17 December 2015, under which the liquidator is solely responsible for receiving proofs of debt and making indemnity claims against the assets of the FMIF: see also section 601FH(b) of the *Corporations Act*.
94. To date, the Receiver has received eight claims,³⁵ although members still have until 24 May 2024 in which to submit a claim under the timetable set by the Receiver in his letter to investors.
95. The Receiver intends to consider and determine these claims as soon as possible. In the event that there is any dispute, he will apply to re-list the matter for further directions before making the final distribution.
96. The Receiver considers this to be the appropriate course, notwithstanding that entitled members have not issued a proof of debt in the winding up of the FMIF, because the nature of their interest is not just as a creditor, but also an equitable interest in the assets of the FMIF: see above at 79.
97. As to the two remaining "Payables" ledgers, the position is different because they appear to concern third party creditors who do not have an equitable interest in the assets of the FMIF.

³⁴ Supplementary Affidavit at [5] and Exhibit DW-130 at pp 1 to 6.

³⁵ Further Supplementary Affidavit at [10].

98. Relevantly, the liquidator of LMIM has previously called for and adjudicated all proofs of debt that he has received.³⁶
99. In accordance then with the further ancillary orders proposed above, upon making the final distribution, any affected third party creditors (i.e. whose debts are recorded in the two ledgers in question) will lose any right to claim against LMIM, or the assets of the FMIF.
100. In that context, the Receiver seeks advice that he is nevertheless justified in not taking further steps to investigate, and in not paying the liabilities that make up the balance of the "Payables" ledgers, before making the final distribution to members.

Clear Accounts proceeding (Draft Order, paragraph 8)

101. The Receiver caused proceedings to be commenced against LMIM for certain alleged breaches of trust by LMIM in carrying out its responsibilities as responsible entity of the FMIF (**Clear Accounts Proceeding**)
102. The purpose of those proceedings was to establish a defence to a number of very substantial claims that were on foot at the time which sought to rely on LMIM's right of indemnity against the property of the FMIF, exceeding \$25million.³⁷
103. The claims against the property of the FMIF were, however, eventually discontinued, and the Receiver obtained an order that the Clear Accounts Proceedings be stayed until further order.³⁸
104. In circumstances where all of the creditor indemnity claims made by the liquidator of LMIM against the property of the FMIF have now been resolved, the costs of pursuing the Clear Accounts Proceeding would be significant, and the Receiver is otherwise unaware of any unresolved claims by LMIM for indemnity, the Receiver proposes to discontinue the Clear Accounts Proceeding.
105. The Receiver seeks the Court's advice that he is justified in doing so, notwithstanding that the claims in the Clear Accounts Proceedings may have reasonable prospects.

(3) REMUNERATION

106. The Receiver seeks orders approving his remuneration:
 - (a) for work performed in the period from 1 May 2022 to 29 February 2024 (**Relevant Period**) in the sum of \$1,181,293.30 (inclusive of GST). This equates to about \$53,695.15 per month (inclusive of GST) for the Relevant Period,³⁹ and
 - (b) for work performed, and yet to be performed, in the period from 1 March 2024 to the conclusion of the winding up in the sum of \$594,000 (inclusive of GST).⁴⁰
107. These are reflected in paragraphs 13 and 14 of the Draft Order.

³⁶ Finalisation Affidavit at [108]-[126].

³⁷ Finalisation Affidavit at [39] and [83].

³⁸ Finalisation Affidavit at [89]-[93].

³⁹ Remuneration Affidavit at [11].

⁴⁰ Affidavit of David Whyte sworn on 28 April 2024 (**Supplementary Affidavit**) at [22].

108. The Receiver does not, in the event, seek approval to retain any additional amount from the final distribution on account of anticipated expenses.⁴¹
109. At the outset, it is notable that the Receiver's activities have proven to be beneficial to the members, across the period of his appointment.
110. That can be seen from the individual recoveries that he has generated, including the sale of assets securing loans, substantial recoveries from litigation, and other activities. They are summarised at [7] of the Supplementary Affidavit, as well as in separate confidential affidavits that will be filed.
111. This can also be seen from the increase overall of the estimated unit price, which the Receiver estimated as at 31 December 2013 to be 14.4 cents per unit (not accounting for future costs associated with the winding up, or recoveries from litigation), but which has increased to 17.9 cents per unit (being 6.5 cents already paid in October 2019, and a further estimated 11.4 cents in the final distribution).⁴²
112. This reflects an increased return of approximately \$17.2million to investors, or 3.5 cents per unit, *after* all remuneration and other expenses are accounted for.⁴³
113. Furthermore, the remuneration for the Relevant Period is the lowest monthly average amount (\$53,695.15 per month) for all previous remuneration applications, by a reasonable margin, reflecting that the winding up is coming to an end.⁴⁴

Applicable principles

114. The Receiver is entitled to be remunerated in accordance with the Appointment Order.
115. Since his appointment, the Receiver has sought approval of his remuneration periodically, and in every case his remuneration has been approved. This application is the 18th such application.
116. The principles applicable to this application have been addressed and applied by the Court in each prior application. In particular, this Court has accepted and considered the complexity of the task of the Receiver as the person responsible for winding up the Fund, and that it is necessary to pay appropriate amounts to ensure that persons of the Receiver's abilities undertake these tasks⁴⁵.
117. Unlike the case of a liquidator, there are no provisions which provide guidelines as to how the Court should determine the appropriate remuneration.
118. Nevertheless, the principles applied in the context of applications by liquidators provide some guidance to the Court's determination in the present case, and Callaghan J recognized in the

⁴¹ Supplementary Affidavit at [45]-[46].

⁴² Supplementary Affidavit at [11] to [19].

⁴³ Supplementary Affidavit at [19].

⁴⁴ Remuneration Affidavit at [8] and [11].

⁴⁵ See the reasons for judgment of Mullins J dated 27 November 2014 and Jackson J dated 23 June 2015; see also [2020] QSC 317 at [4].

Receiver's 13th remuneration application that "*appropriate submissions will be best formulated by reference to s 425 of the CA*": [2020] QSC 317 at [32]. Relevantly, s.425(8) provides as follows:

In exercising its powers under this section, the Court must have regard to whether the remuneration is reasonable, taking into account any or all of the following matters:

- (a) the extent to which the work performed by the receiver was reasonably necessary;
- (b) the extent to which the work likely to be performed by the receiver is likely to be reasonably necessary;
- (c) the period during which the work was, or is likely to be, performed by the receiver;
- (d) the quality of the work performed, or likely to be performed, by the receiver;
- (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the receiver;
- (f) the extent (if any) to which the receiver was, or is likely to be, required to deal with extraordinary issues;
- (g) the extent (if any) to which the receiver was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
- (h) the value and nature of any property dealt with, or likely to be dealt with, by the receiver;
- (i) whether the receiver was, or is likely to be, required to deal with:
 - (i) one or more other receivers; or
 - (ii) one or more receivers and managers; or
 - (iii) one or more liquidators; or
 - (iv) one or more administrators; or
 - (v) one or more administrators of deeds of company arrangement; or
 - (vi) one or more restructuring practitioners; or
 - (vii) one or more restructuring practitioners for restructuring plans;
- (j) the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors;
- (k) if the remuneration is ascertained, in whole or in part, on a time basis:
 - (i) the time properly taken, or likely to be properly taken, by the receiver in performing the work; and
 - (ii) whether the total remuneration payable to the receiver is capped;
- (l) any other relevant matters.

119. The overriding principle applied by the Court in the cases dealing with the *Corporations Act* provisions, including both s.425(8) and s.472(10), is that the liquidator or receiver is entitled to

remuneration that is fair and reasonable⁴⁶. The Court must determine this question for itself irrespective of the absence of a contradictor.⁴⁷

120. The Receiver's application falls to be determined by a summary procedure in which the rules of evidence are not strictly observed⁴⁸. The Receiver carries the onus in establishing his entitlement.
121. To this end, there must be material before the Court which shows that the work undertaken was appropriate and necessary⁴⁹.
122. As to the basis for the Receiver's claim for remuneration, time-based costing has been recognised as being an appropriate basis for determining the remuneration⁵⁰. However, in determining whether the claimed amount is appropriate the courts are mindful of the disadvantages associated with time-costing. As such, it is recognised that in determining the appropriate remuneration, time spent represents a measure not of the value of the service rendered but of the cost of performing it, whereas remuneration ought to be fixed to reward value rather than to indemnify against cost⁵¹.
123. However, the assessable value is not the net financial gain to the members of the Fund. It is, rather, the value of the services rendered by or on behalf of the Receiver, which is considered by reference to whether the time was reasonably expended in the circumstances of the receivership⁵².
124. The Receiver's expressed views as to what is reasonable are relevant but not decisive. The Court does not gainsay the considered oath of an officer of the Court, but nor does it uncritically accept unsubstantiated assertions⁵³. These principles are reflected in the approach of Callaghan J in [2020] QSC 317 at [15] to [17].
125. Work will not have been reasonably undertaken where it is unnecessary; where it is performed by persons of inappropriate seniority; and, where it is undertaken at inappropriate hourly rates⁵⁴.
126. A cost-benefit analysis is desirable, and work done must be proportionate to the difficulty or importance of the task in the context in which it must be performed.⁵⁵ That is, "[t]he question of proportionality in terms of the work done as compared with the size of the property or activity the

⁴⁶ *Conlan v Adams* (2008) 65 ACSR 521 at [28] per McLure JA (Buss JA and Newnes AJA agreeing).

⁴⁷ *ASIC v Groundhog Developments Pty Ltd & Ors* [2011] QSC 263 at [13] per Dalton J, citing *Computer Machinery Co Ltd v Drescher* [1983] 1 WLR 1379 at 1385 per Sir Robert Megarry VC.

⁴⁸ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 102 per Kennedy and Ipp JJ.

⁴⁹ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 104 per Kennedy and Ipp JJ; *ASIC v Australian Foods Co Pty Ltd & Anor* [2005] WASC 110 at [8] per Sanderson M.

⁵⁰ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at [105]- [106], followed in *Conlan v Adams* (2008) 63 ACSR 521 at [37].

⁵¹ *Mirror Group Newspapers plc v Maxwell & Ors (No 2)* [1998] 1 BCLC 638 at 652 per Ferris J

⁵² *Conlan v Adams & Ors* (2008) 65 ACSR 521 at 532 per McLure JA (Buss JA and Newnes AJA agreeing); see also Dalton J in *ASIC v Groundhog Developments Pty Ltd* [14]

⁵³ *Owen, in the matter of Rivercity Motorway Pty Ltd (admins apptd) (recs and mgrs apptd) v Madden (No 2)* [2012] FCA 312 at [26] per Logan J

⁵⁴ *Conlan v Adams & Ors* (2008) 65 ACSR 521 at 532 per McLure JA (Buss JA and Newnes AJA agreeing)

⁵⁵ *Conlan v Adams & Ors* (2008) 65 ACSR 521 at 532-533 per McLure JA (Buss JA and Newnes AJA agreeing)

subject of the insolvency administration or the benefit or gain to be obtained from the work is an important consideration in determining overall reasonableness⁵⁶.

127. The process of determining whether claimed remuneration is fair and reasonable does not require the item by item analysis that would be necessary on a taxation of a solicitor's costs.⁵⁷
128. There is otherwise no definitive approach to the exercise. Indeed, it has been observed that even where detailed evidence is before the Court, there is no touchstone or reliable independent measure of reasonableness other than judicial impression.⁵⁸

Remuneration for the period from 1 May 2022 to 29 February 2024

129. The Receiver has deposed to the work done by him and his staff during the Relevant Period, and that it was required for the purposes of the winding up of the FMIF, in his affidavit sworn 9 April 2024 (**Remuneration Affidavit**).
130. In the period for which the remuneration is claimed, the principal tasks which the Receiver has undertaken related to the litigious matters were:
- (a) advancing Supreme Court of Queensland Proceeding No 2166/15 against the former auditors of the FMIF, Ernst & Young (**Auditor Claim**), a claim for an amount exceeding \$200 million, including the following:
 - (i) providing instructions to his solicitors in respect of the conduct of the proceeding;
 - (ii) attending a mediation of the proceeding, which resulted in a settlement of the claim;
 - (iii) providing instructions to his solicitors in respect of an application for judicial advice in relation to the settlement;⁵⁹
 - (b) in relation to Supreme Court of Queensland Proceeding 14389/22 (**Liquidator's Proceeding**), work to defend the proceeding commenced by LMIM, in its own capacity and as RE of each of the Fund, the LM Institutional Currency Protected Australian Income Fund and the LM Currency Protected Australian Income Fund, including:
 - (i) providing instructions to his solicitors in relation to the conduct of the proceeding;
 - (ii) participating in two mediations (one held on 21 March 2023 and a second mediation held on 30 October 2023);
 - (iii) a detailed review of documents in relation to the matter in order to provide detailed instructions to his solicitors;
 - (iv) providing detailed instructions and documents to his solicitors in relation to preparation of a Defence and Counterclaim;⁶⁰

⁵⁶ *Templeton v ASIC* (2015) 108 ACSR 545 at [32].

⁵⁷ *ASIC v Atlantic 3 Financial (Aust) Pty Ltd* [2004] QSC 133 at [16] per Mullins J; *Conlan (as liquidator of Oakleigh Acquisitions Pty Ltd)* [2001] WASC 230 at [24] – [27] per Owen J

⁵⁸ *Owen, in the matter of Rivercity Motorway Pty Ltd (admins apptd) (recs and mgrs apptd) v Madden (No 2)* [2012] FCA 312 at [20] per Logan J

⁵⁹ Remuneration Affidavit at [14(a)].

⁶⁰ Remuneration Affidavit at [14(c)].

- (c) in relation to Supreme Court of Queensland Proceeding 3383/13, work to progress the Receiver's 17th application for approval of remuneration, including reviewing and swearing a detailed supporting affidavit, providing instructions to his solicitors regarding the conduct of the application, and attending the hearing on 18 October 2022.⁶¹
131. Other significant tasks which the Receiver undertook during the period for which remuneration is claimed were:
- (a) complying with the conditions of the ASIC relief from financial reporting and audit requirements;
 - (b) reprocessing returned interim capital distributions paid in October 2019 in the amount of 6.5 cents per unit to FMIF members, which involved: corresponding with investors regarding the distribution paid in October 2019; updating investors' bank account details in the FMIF's database to reprocess the distributions that were returned; reprocessing the distributions for any returned distributions from inactive bank account details; providing instructions and information to PTAL to reprocess distributions; creating payment files to reprocess the distributions to the member's nominated bank account;
 - (c) preparation of unit price calculation as at 30 June 2022, 31 December 2022 and 20 June 2023;
 - (d) preparation of management accounts for the year ending 30 June 2022, half year ending 31 December 2022, year ending 30 June 2023;
 - (e) preparation of reports to members issued in June 2022, September 2022, December 2022, March 2023, June 2023, September 2023 and December 2023; and
 - (f) work undertaking the investor management function for over 4,600 members, including answering queries on the winding up of the FMIF and maintaining the investor database, including any change in details or transfer of units⁶².
132. The Receiver also sets out the reasons as to why it was necessary to draw on various teams in his firm to undertake the work done in the relevant period, in the Remuneration Affidavit at [32]-[35]. The work involved in the winding up required the expertise of the Business Restructuring and Audit groups of BDO. The affidavit addresses the work undertaken by each of those teams and why the work was necessary. In particular, the Audit group provided assistance to the Receiver by assisting with the review and completion of the management accounts for the year ended 30 June 2022, half year ending 31 December 2022, year ended 30 June 2023.⁶³
133. During the Relevant Period, the Receiver divided the work he and his staff undertook into the following five categories⁶⁴:
- (a) assets;
 - (b) trade on;

⁶¹ Remuneration Affidavit at [14(b)];

⁶² Remuneration Affidavit at [14(d) to (i)].

⁶³ Remuneration Affidavit at [34].

⁶⁴ Remuneration Affidavit at [36].

- (c) creditors
- (d) dividend; and
- (e) administration.

134. These categories were adopted by the Receiver in order to separate the various strands of the work required in the receivership into rational categories. In a complex external administration such as this one it is impossible to draw clear lines of separation between categories of work, and in consequence there is unavoidable overlap between categories. However, each task and the time for carrying it out has only been recorded once.⁶⁵
135. The Receiver has prepared a schedule providing from his records a description of each task undertaken under each of the above categories, the name and position of the person who undertook the task, the date the task was undertaken, the length of time it took and the amount charged.⁶⁶ At pages 3 to 4 of the Exhibit to the Remuneration Affidavit is a table summarising the time spent on each category of work by each person.
136. The Schedule satisfies the test for adequacy outlined above, when it is read by reference to the detailed explanations the Receiver provides in his affidavit (and which are canvassed below) for why the work was appropriate and necessary.
137. A scale of the hourly rates of the Receiver and his staff is exhibited to the Receiver's Remuneration Affidavit,⁶⁷ and his evidence is that the charges in this scale are reasonable and appropriate.⁶⁸
138. The rates in the scale adopted by the Receiver at all times mirrored the prevailing commercial rates charged by BDO to its private clients, despite the fact that the Receiver's role is, for the reasons outlined above, especially complex and challenging – more so than the ordinary external administration.⁶⁹
139. The Receiver has adopted cost-saving measures where practicable and appropriate. Where possible and appropriate, and as explained below, the Receiver delegated to members of his staff the performance of the least complex of the required tasks.⁷⁰ At paragraphs 32 to 35 of the Remuneration Affidavit, the Receiver refers to the "audit" team to which he delegated work, the specialised expertise they brought to the delegated tasks and why it was necessary to delegate work to those persons.
140. The summary at page 3 of the Exhibit to the Remuneration Affidavit shows tasks of somewhat less complexity were delegated to junior staff members, such as work relating to Creditors and Administration, which had average rates of \$305.00 and \$218.00 per hour (excluding GST) respectively, which is significantly less than the rates charged by Partners of BDO, being \$690.00 per hour (excluding GST) during the Relevant Period.

⁶⁵ Remuneration Affidavit at [37].

⁶⁶ Remuneration Affidavit at [40] and exhibit pages 5 to 178.

⁶⁷ Remuneration Affidavit, exhibit pages 1 and 2.

⁶⁸ Remuneration Affidavit at [44] and [126]

⁶⁹ Remuneration Affidavit [33] and [43]

⁷⁰ Remuneration Affidavit at [41]

141. As mentioned, the work which the Receiver has been required to undertake has been attended by considerable complexity.
142. Further detail of the work performed is canvassed below by reference to each of the five categories of work adopted by the Receiver.

Assets

143. The work falling within this category generally relates to, in summary⁷¹:
- (a) advancing claims against guarantors; and
 - (b) court proceedings.
144. In total, \$32,034 (exclusive of GST) of remuneration is sought for approval in the Relevant Period in respect of the "Assets" category⁷².
145. The bulk of the work relates to the progression and finalisation of the Auditors' Claim.

The Auditor Claim

146. The claim against the former auditors of the FMIF was for a quantum of up to \$249.6 million, and it was being managed on the Commercial List by Dalton J⁷³.
147. During the Relevant Period, a mediation was held between the parties on 31 May 2022 which resulted in a confidential settlement.⁷⁴ The settlement was subject to an application being made for judicial advice to the effect that the Receiver was justified in causing the plaintiff to settle the proceeding.⁷⁵ On 24 June 2021, Justice Kelly gave judicial advice to that effect.⁷⁶
148. The work performed by BDO during the relevant period included the work referred to in paragraph 130(a) above.

The Claim against the MPF / the Director Proceedings

149. The claim against various former directors of LMIM and the trustees of the LM Managed Performance Fund (Brisbane Supreme Court proceeding 12317 of 2014) sought the amount of \$15,546,147.85 plus interest calculated from 2011⁷⁷.
150. Jackson J delivered judgment in the proceeding on 22 November 2019. The Receiver filed a notice of appeal on 20 December 2019 and an application to the Supreme Court for judicial advice in relation to the appeal on 31 January 2020.
151. On 28 August 2020, Callaghan J delivered judgment in *LM Investment Management Ltd v Drake & Ors* [2020] QSC 265 refusing the Receiver's application for judicial advice that he would be

⁷¹ Remuneration Affidavit at [48].

⁷² Remuneration Affidavit at [49].

⁷³ Remuneration Affidavit at [71] and [72].

⁷⁴ Affidavit of David Whyte filed 5 September 2022, paragraph 78 (Court file number 529).

⁷⁵ Affidavit of David Whyte filed 5 September 2022, paragraph 79 (Court file number 529).

⁷⁶ Affidavit of David Whyte filed 5 September 2022, paragraph 79 (Court file number 529); *Re LM Investment Management Ltd* (in liq) [2022] QSC 132.

⁷⁷ Affidavit of David Whyte filed 5 September 2022, paragraph 80 (Court file number 529).

justified pursuing an appeal against the judgment of Jackson J dismissing this claim. The appeal has now been discontinued.

152. The work performed by the Receiver in this Relevant Period has included negotiating a settlement of the quantum of the costs' orders with the director defendants⁷⁸.

The \$2 million and \$8 million WCL Convertible Bonds proceedings

153. Federal Court of Australia proceeding 2014/332566 was successfully prosecuted by the liquidator Bellpac Pty Ltd, a debtor of the FMIF (**Bellpac**), against Wollongong Coal Limited (**WCL**), and the FMIF was entitled as first ranking secured creditor to the funds recovered from the \$2 million bonds, after costs.

154. However, the net proceeds of the \$2 million bonds were retained by Bellpac's liquidator and utilised to fund the recovery of the \$8 million of WCL convertible bonds, which are addressed under the next heading below.

155. A distribution of \$1 million was received by the FMIF from the Bellpac liquidator in November 2019.

Federal Court Proceeding 2016/00120239

156. This proceeding concerned a claim brought by the liquidator of Bellpac against WCL seeking orders requiring WCL to convert the bonds to shares. The Receiver consider that the FMIF, as first ranking creditor, will be entitled to the funds received from this proceeding (after costs)⁷⁹.

157. The Bellpac Liquidator entered into a Heads of Agreement (**HOA**) with WCL to settle this proceeding and it was a condition precedent to the settlement that WCL obtain shareholder approval of the settlement. The time for satisfying that condition precedent was extended, a number of times, ultimately to 31 October 2020⁸⁰.

158. As the condition precedent was not going to be satisfied by 31 October 2020, further settlement negotiations took place, which resulted in a Deed of Settlement being entered into on 30 October 2020, which was subject to creditor approval⁸¹.

159. On 18 November 2020, creditors approved a revised version of this Deed of Settlement resulting in a distribution of \$2.5 million to the FMIF on 27 November 2020, and, a further distribution of \$250,000 to the FMIF on 11 March 2021⁸².

160. During the Relevant Period, a further distribution of \$250,000 was paid by the Bellpac liquidator on 18 May 2022 and \$45,485.77 on 5 July 2022 following the receipt of the proceeds from the compulsory acquisition of the shares⁸³.

⁷⁸ Remuneration Affidavit at [60].

⁷⁹ Affidavit of David Whyte filed 5 September 2022 at [90] (Court file number 529).

⁸⁰ Affidavit of David Whyte filed 5 September 2022 at [91] (Court file number 529).

⁸¹ Affidavit of David Whyte filed 5 September 2022 at [92] (Court file number 529).

⁸² Affidavit of David Whyte filed 5 September 2022 at [93] (Court file number 529).

⁸³ Remuneration Affidavit at [63].

161. The work performed by BDO in this Relevant Period has included liaising with the Bellpac Liquidator regarding the timing and payment of these distributions and finalisation of the winding up of Bellpac.⁸⁴

The Trust Company (PTAL) Ltd v Ross Lamb

162. In New South Wales Supreme Court proceeding *The Trust Company (PTAL) Ltd v Ross Lamb*, PTAL, the FMIF's custodian, obtained default judgment against Mr Lamb for approximately \$3 million plus interest and costs resulting in Mr Lamb's bankruptcy. The bankrupt was, together with others, party to a development agreement and the proceeds of sale of 11 properties owned by the bankrupt and his wife had been paid into a solicitor's trust account (about \$12 million) pending resolution of the dispute.
163. As set out in the Finalisation Affidavit, distributions were received from the Trustee of the Bankrupt Estate on 22 November 2022 and 10 January 2023.
164. The work performed by BDO during the Relevant Period has included reviewing reports or updates from the Trustee regarding the progression of the tax objection (which impacted the amount of the settlement payment to the Trustee) and receiving the distributions⁸⁵.

"Trade on"

165. The quantum of the claimed remuneration for this category is \$328,686.50 excluding GST⁸⁶. The work within this category consists of work which was incidental to the winding up such as⁸⁷:
- (a) work relating to the Liquidator's Proceeding;
 - (b) preparation of unaudited management accounts for the financial year ended 30 June 2022, half year ending 31 December 2022 and year ended 30 June 2023;
 - (c) reviewing and processing payments of expenses;
 - (d) 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;
 - (e) maintenance of the Microsoft AX loan management database, including accounting for payments, reconciling statements and processing month end and year-end adjustments;
 - (f) conducting internal meetings to discuss job management issues including:
 - (i) maintenance of accounts and preparation of the management accounts;
 - (ii) status of litigation matters and work to be done to progress same;
 - (iii) investor issues including content for reports to members, status of litigation matters, creditor claims and the application for approval of remuneration;

⁸⁴ Remuneration Affidavit at [64].

⁸⁵ Remuneration Affidavit at [71].

⁸⁶ Remuneration Affidavit at [75].

⁸⁷ Remuneration Affidavit at [74].

- (g) meeting with members of the BDO Audit practice group regarding the preparation of the management accounts.
166. The Receiver's work in respect of completing the management accounts for the relevant periods included:⁸⁸
- (a) reviewing work papers to verify the accuracy of the management accounts;
 - (b) ascertaining amounts that were outstanding at the relevant date;
 - (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 therelevant financial year or half year,
 to determine the accrued expenses;
 - (f) calculating provisions for the remaining loan accounts or receivable balances and updating the loan spreadsheet;
 - (g) 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.
 - (h) preparing work papers to support the notes to the accounts, including, but not limited to, the movement in impairments as between the relevant accounting periods;
 - (i) preparing the management accounts for distribution to members, which included:
 - (i) a statement of comprehensive income;
 - (ii) a statement of financial position;
 - (iii) a statement of changes in net assets attributable to unitholders; and
 - (iv) notes to the accounts.
 - (j) liaising with the BDO Audit practice group regarding movements in asset values, provisions and default loans between the relevant accounting periods;
 - (k) reviewing and amending the trial balance in respect to changes required by the BDO Audit practice group;

⁸⁸ Remuneration Affidavit at [76].

- (l) reviewing and amending financial statements in respect to changes required by the BDO Audit practice group;
- (m) reviewing and considering disclosure requirements with reference to Australian Accounting Standards; and
- (n) reviewing and amending the management accounts and notes in accordance with Australian Accounting Standards and recommendations by solicitors.

167. The Receiver was directed to apply on behalf of the FMIF to ASIC for relief from compliance with financial reporting and audit obligations under Part 2M.3 and s.601HG *Corporations Act* 2001. He made that application in 2016. It has been necessary for the relief that was granted by ASIC to be extended. The Receiver instructed his solicitors to apply to ASIC for the relief to be extended and complied with the conditions of the relief.

168. During the Relevant Period, the Receiver made three separate applications to ASIC for further financial reporting and audit relief⁸⁹.

169. The work performed in the Relevant Period with respect to the ASIC relief included complying with the conditions of the relief and preparing and submitting applications to ASIC to extend this relief⁹⁰.

Liquidator Proceeding

170. In relation to the Liquidator Proceeding, the work performed in the Relevant Period includes the work referred to in paragraph 130(b) above.

171. The outcome of the Liquidator Proceeding was that, by consent, it was dismissed, but the costs of each party were ordered to be paid from the property of the FMIF on an indemnity basis.

172. This order, self-evidently, did not deal with the Receiver's remuneration, however the position as to the reasonableness of his remuneration would seem to be aligned with the reasonableness of the legal costs that he incurred and for which he was indemnified.

FTI Remuneration Proceeding

173. In the Relevant Period, the Receiver provided instructions in respect of the fixing of the quantum of a costs order made in respect of Mr Park's Fourth Remuneration and Expenses Applications⁹¹.

Creditors

174. The Receiver seeks approval of remuneration of \$652,039 excluding GST for work undertaken in this category⁹².

175. The work falling within this category was extensive and consisted of the Receiver's work in⁹³:

- (a) preparing reports to members;
- (b) attending to queries from members in relation to the reports to members;

⁸⁹ Remuneration Affidavit at [79].

⁹⁰ Remuneration Affidavit at [14(d)].

⁹¹ Remuneration Affidavit at [88].

⁹² Remuneration Affidavit at [92].

⁹³ Remuneration Affidavit at [93].

- (c) maintaining and updating the AX investor management database; and
 - (d) corresponding with investors regarding the interim distribution, returned payments and reprocessing distributions after updating members' details.
176. During the period for which remuneration is sought, the Receiver produced seven reports to members (being his 38th to 44th reports)⁹⁴. The tasks for the purposes of reporting to members of the FMIF, included⁹⁵:
- (a) drafting and reviewing the reports to members;
 - (b) preparing material summarising remuneration for inclusion in the report;
 - (c) liaising with solicitors in relation to 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) forevery second report, setting out the actions taken in the relevant 6 months period and proposed to be undertaken in the next 12-month period.
177. The work undertaken in this category also involves contact between the Receiver and members wherein the Receiver provided information as to⁹⁶:
- (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 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.
178. This category also included⁹⁷:
- (a) liaising with the beneficiaries and/or trustees of deceased members' estates. The Receiver and his staff 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. They were required to undertake tasks including considering the request for a transfer of units, reviewing the documentation provided in support of such request, and processing such transfers; and
 - (b) maintaining the Microsoft AX investor management database. This included work updating investor details, transferring units as requested or as directed by executors of deceased estates and generating reports to attend to members' unit balance enquiries.

⁹⁴ Remuneration Affidavit at [96].

⁹⁵ Remuneration Affidavit at [97].

⁹⁶ Remuneration Affidavit at [98].

⁹⁷ Remuneration Affidavit at [99] and [101].

179. The work involved in maintaining the AX investor database and responding to queries from investors is significant having regard to the number of members of the FMIF.

Dividend

180. The Receiver seeks approval of remuneration of \$4,275 excluding GST for work undertaken in this category⁹⁸. The work falling within this category consists of the Receiver's work in resolving returned payments and reprocessing interim capital distribution to certain investors⁹⁹.

Administration

181. The Receiver claims remuneration of \$55,203.50 excluding GST for work within this category¹⁰⁰. The work within this category includes¹⁰¹:

- (a) preparing reports to members, which include updates as to steps taken in the legal proceedings, an estimated return to members and remuneration work in progress reports;
- (b) ensuring proper accounts and records were maintained, including preparing management accounts of the FMIF;
- (c) preparing applications for approval of remuneration including preparing or reviewing detailed supporting Affidavits, providing instructions as to the progression of the application including the steps required to be taken under the 15 October 2020 orders, and attending the hearing of the application;
- (d) responding to investor queries; and
- (e) residual administrative functions in respect of preparing reports to members, such as copying, mailing and uploading reports to the FMIF website.

182. This work also involved:

- (a) arranging distribution of notice of the application for approval of remuneration to the members of the FMIF. In accordance with the Receiver's usual practice during this administration, the tasks of copying, mailing and uploading reports to members to the FMIF is outsourced to external providers who perform such work at bulk rates¹⁰²;
- (b) answering member enquiries both by telephone and in person. Updating members 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 members¹⁰³;
- (c) attending to general file administration including filing and archiving books and records¹⁰⁴.

⁹⁸ Remuneration Affidavit at [106].

⁹⁹ Remuneration Affidavit at [107].

¹⁰⁰ Remuneration Affidavit at [111].

¹⁰¹ Remuneration Affidavit at [110].

¹⁰² Remuneration Affidavit at [113].

¹⁰³ Remuneration Affidavit at [116].

¹⁰⁴ Remuneration Affidavit at [121].

Conclusions

183. The Receiver's present claim for remuneration, when assessed against the relevant considerations detailed in s 425(8), is appropriate:

- (a) as to s.425(8)(a) and (b), the Receiver has explained in detail the work that he and his employees have done, and are still yet to do, and why it was, in his opinion, reasonably necessary for that work to be done. That opinion is soundly based having regard to the size and complexity of the receivership;
- (b) as to s.425(8)(c), the period during which the work was done is over two years, which is the period for which each remuneration application by the Receiver has been brought. The amount sought for the period 1 May 2022 to 29 February 2024 is the lowest monthly average claimed on any of Mr Whyte's previous applications, by a significant margin;
- (c) as to s.425(8)(d), the quality of the work performed has varied between high value work (ie instructing experts on the Audit Claim) and low value (ie administrative tasks). Importantly, the Receiver has ensured that tasks have been appropriately delegated to people who have the requisite skills so as to reduce expense where possible;
- (d) as to s.425(8)(e) and (f), the receivership is complex and has required the Receiver to deal with extraordinary issues. The nature of the scheme, the assets involved, the litigation that has had to be prosecuted and defended, the number of investors/creditors and having to deal with the liquidators of LMIM have all added to that complexity;
- (e) as to s.425(8)(g), the Receiver has been required to accept a higher level of risk and responsibility than is usually the case. This can be seen particularly in the major litigation that the Receiver has had to take on responsibility for such as the Drake Proceedings and the EY Proceedings. The level of responsibility that the Receiver has had to bear in agitating these claims has been significant;
- (f) as to s.425(8)(h), the value of the property dealt with by the Receiver has been very substantial. \$32 million has been paid out to members to date. Approximately \$56 million in cash is estimated to be available for distribution to members¹⁰⁵;
- (g) as to s.425(8)(i), the Receiver has been required to deal with the Liquidator of LMIM. The history of this matter reveals that the Liquidator has had a propensity to agitate matters. This has added to the complexity and cost of the receivership;
- (h) as to s.425(8)(j), the Receiver has had to deal with a large number of member investors. The nature of the assets and litigation that the Receiver has had to deal with is such that the receivership has gone on for some years; and
- (i) as to s.425(8)(k), the Receiver's remuneration has never been capped.

184. In all the circumstances, the Receiver seeks an order that his remuneration for the period from 1 May 2022 to 29 February 2024 be approved in the amount claimed.

The Receiver's Future Remuneration from 1 March 2024 to the end of the Winding Up

185. The Receiver, finally, seeks orders approving his remuneration in advance, so that the final distribution can be calculated and paid based on known liabilities.

¹⁰⁵ Supplementary Affidavit at [18].

186. The Appointment Orders, which provide for the Receiver's remuneration, do not envisage approval in advance. In accordance with their terms, they provide only for the approval of remuneration for "the time spent" by the Receiver and by employees of BDO.
187. Notwithstanding this, the Court has power under section 601NF(2) of the *Corporations Act* to order the payment of the Receiver's remuneration in advance, that is, in effect to vary the Appointment Order as it applies to the final period from 1 March 2024 to the conclusion of the winding up.
188. The Receiver estimates that the remuneration for his further work from 1 March 2024 to the conclusion of the winding up will be approximately \$594,000 inclusive of GST.
189. This comprises the following work:¹⁰⁶
- (a) The operation of the fund, including maintaining the register of members, responding to member queries, reporting to members and ASIC, in the amount of \$264,000 (**Operating Remuneration**);
 - (b) The finalisation of the winding up, including advancing the present application, updating member bank account details in anticipating of the final distribution, making the final distribution, preparing any final accounts of the Fund, and lodging notification of completion of the winding up, in the amount of \$330,000 (**Finalisation Remuneration**).
190. As to the Operating Remuneration, the Receiver's estimate is based on his analysis of his historical normalised costs of operating the FMIF, of around \$40,000 plus GST per month,¹⁰⁷ and an estimate of 6 months to finalise the winding up.
191. As to the Finalisation Remuneration, the Receiver's estimate is broken down as follows:
- (a) \$38,500 for the prosecution of the present application;
 - (b) \$198,000 for updating member details, and associated dealings with members. The Receiver's evidence is that this estimate is based on his experience with the Interim Distribution in October 2019, in relation to which many members updated bank and other details with him in advance of that distribution being made.
 - (c) \$66,000 to finalise the assets of the fund, including paying the final distribution and taking the proposed steps in relation to the various other unresolved ledgers.
 - (d) \$27,500 to prepare the final accounts (for the limited period from the beginning of the financial year in which the winding up concludes), if required.
192. The Receiver proposes that he be authorised to draw "up to" \$511,500 including GST for his remuneration up to the making of the final distribution.

¹⁰⁶ Supplementary Affidavit at [22].

¹⁰⁷ Supplementary Affidavit at [25].

193. The Receiver further estimates that the balance of \$82,500 including GST will be incurred after the making of the final distribution, and he proposes that that amount be fixed and withheld from the final distribution.

J McKenna KC and D Ananian-Cooper, Counsel for the Receiver
21 May 2024

“ANNEXURE A”

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicants: **RAYMOND EDWARD BRUCE AND VICKI
PATRICIA BRUCE**

AND

First Respondent: **LM INVESTMENT MANAGEMENT LIMITED
(IN LIQUIDATION) ACN 077 208 461 IN ITS
CAPACITY AS RESPONSIBLE ENTITY OF THE
LM FIRST MORTGAGE INCOME FUND**

AND

Second Respondent: **THE MEMBERS OF THE LM FIRST MORTGAGE
INCOME FUND ARSN 089 343 288**

AND

Third Respondent: **ROGER SHOTTON**

AND

Intervener: **AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION**

ORDER

Before: Kelly J

Date: 27 May 2024

Initiating document: Application filed 12 April 2024

ORDER
Form 59 R.661

Filed on behalf of Mr David Whyte

Final Orders (Draft)

COWEN SCHWARZ MARSCHKE
Lawyers
Level 8,
300 George Street
Brisbane, Qld, 4000.
Tele: (07) 300 300 00
Fax: (07) 300 300 33

THE ORDER OF THE COURT IS THAT:-

1. That Mr David Whyte (**Mr Whyte**) be authorised and empowered to exercise the powers of, and is responsible for the obligations of, LMIM as the responsible entity of the FMIF:
 - (a) as set out in clause 16.7(c) of the constitution of the FMIF, to make a further and final distribution of the property of the FMIF, as soon as reasonably practicable after the making of these orders by this Honourable Court;
 - (b) as set out in clause 16.8 of the constitution of the FMIF and as required by section 601NG of the Act, to pay or transfer any unclaimed or undistributed money or other property that was part of the scheme property, including any returned payments from members of the FMIF for whom Mr Whyte does not have up to date payment details, to ASIC to be dealt with pursuant to Part 9.7 of the Act.

2. That Mr Whyte be authorised:
 - (a) to withhold the amounts identified in paragraph 14 below, and such other amounts ordered by this Honourable Court including in relation to Mr Park's remuneration and expenses application in BS 3508 of 2015, insofar as those amounts have not yet been paid, from the final distribution to the members of the FMIF made in accordance with paragraph 1(a) above;
 - (b) otherwise not to withhold any other amount from the final distribution made to the members of the FMIF in accordance with paragraph 1(a) above, on any account whatsoever.

3. That LMIM is not required to prepare or have audited, under clause 16.10 of the constitution of the FMIF, final accounts of the FMIF, other than as required under ASIC Instrument 24-0114.

4. That LMIM as RE of the FMIF is not liable in the winding up of the FMIF to pay any liability not notified to Mr Whyte under the orders made on 17

December 2015 by the second return date of this application, or as provided for by these orders.

5. Upon making the final distribution referred to in paragraph 1(a) above, that:
 - (a) Mr Whyte be discharged as the receiver of the property of the FMIF; and
 - (b) Mr Whyte, BDO, its partners, employees and agents forthwith be discharged and released forthwith from any and all claims whatsoever and howsoever arising in connection with Mr Whyte's appointments under section 601NF of the Act in respect of the FMIF.

6. That Mr Whyte be discharged from his appointment as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution and the orders of the Court under section 601NF(2) of the Act, upon the completion of the following steps:
 - (a) making the final distribution referred to in paragraph 1(a) above;
 - (b) paying any unclaimed or undistributed money or other property, including any returned payments, referred to in paragraph 1(b) above, to ASIC; and
 - (c) publishing unaudited final accounts as required by ASIC Instrument 24-0114.

7. That Mr Whyte notify the Court once the winding up of the FMIF has been completed, by filing an affidavit deposing to the taking of the steps required by orders 6(a) to (c), and annexing the unaudited final accounts of the FMIF.

Judicial Advice

8. That Mr Whyte is justified causing LMIM as RE of the FMIF to discontinue Supreme Court of Queensland Proceeding 11560/16.

9. As to the amounts recorded in the Distributions Payable (20400) ledger of the accounts of the FMIF, that Mr Whyte is justified:
- (a) seeking to pay the amounts that represent the income distributions payable in cash for the November 2010 and December 2010 distribution periods to the members or former members identified in the ledger as entitled to the distribution;
 - (b) seeking to pay the amounts that represent other unpaid income distributions payable to the members or former members identified by BDO from the ledger, and referred to in paragraphs 155 to 159 of the affidavit of David Whyte sworn 9 April 2024;
 - (c) otherwise, having sent a notice on 26 April 2024 to all current members of the FMIF requesting any member who believes that they are entitled to a distribution to come forward and provide relevant supporting documentation by 24 May 2024:
 - (i) in respect of all claims received from members by 24 May 2024, assessing those claims and paying those which he determines to be valid;
 - (ii) in the event of a dispute, applying to relist the matter for directions as to the resolution of the claim prior to the final distribution being made; and
 - (iii) paying the remaining balance of the ledger to ASIC as unclaimed or undistributed money to be dealt with pursuant to Part 9.7 of the Act.
10. As to the amounts recorded in the Investor Funds Payable (Redemptions) (20401) ledger of the FMIF, that Mr Whyte is justified:
- (a) seeking to pay the amounts that represent unpaid hardship or other redemption entitlements payable to the members or former members identified by BDO from the ledger, and referred to in paragraphs 177 to 180 of the affidavit of David Whyte sworn 9 April 2024;

- (b) otherwise, having sent a notice on 26 April 2024 to all current members of the FMIF requesting any member who believes that they are entitled to a distribution to come forward and provide relevant supporting documentation by 24 May 2024:
 - (i) in respect of all claims received from members by 24 May 2024, assessing those claims and paying those which he determines to be valid;
 - (ii) in the event of a dispute, applying to relist the matter for directions as to the resolution of the claim prior to the final distribution being made; and
 - (iii) paying the remaining balance of the ledger to ASIC as unclaimed or undistributed money to be dealt with pursuant to Part 9.7 of the Act.

- 11. As to the amounts recorded in the Returned Investor Payments (20003) ledger of the FMIF, that Mr Whyte is justified:
 - (a) seeking to pay the amounts that represent returned redemption payments or other amounts payable to the members or former members identified by BDO from the ledger, and referred to in paragraphs 181 to 184 of the affidavit of David Whyte sworn 9 April 2024;
 - (b) otherwise, having sent a notice on 26 April 2024 to all current members of the FMIF requesting any member who believes that they are entitled to a distribution to come forward and provide relevant supporting documentation by 24 May 2024:
 - (i) in respect of all claims received from members by 24 May 2024, assessing those claims and paying those which he determines to be valid;
 - (ii) in the event of a dispute, applying to relist the matter for directions as to the resolution of the claim prior to the final distribution being made; and

- (iii) paying the remaining balance of the ledger to ASIC as unclaimed or undistributed money to be dealt with pursuant to Part 9.7 of the Act.
12. That Mr Whyte is justified in not taking any further steps in relation to, and in not paying, the amounts recorded in the following ledgers of the FMIF:
- (a) Trade – Settlements Payable / Receivable (20040); and
 - (b) Other payables (20001).

Approval of Mr Whyte's Remuneration

13. That Mr Whyte's remuneration from 1 May 2022 to 29 February 2024, be approved and fixed in the amount of \$1,181,293.30.
14. As to Mr Whyte's remuneration (including future remuneration) for the period from 1 March 2024:
- (a) that Mr Whyte be authorised to draw up to \$511,500 for remuneration for time spent by him and by employees of BDO performing work in carrying out Mr Whyte's appointments under section 601NF of the *Corporations Act*, up to the payment of the final distribution; and
 - (b) that Mr Whyte be authorised to withhold an amount from the final distribution on account of work to be done in relation to his appointments under section 601NF of the *Corporations Act* after making the final distribution, fixed in the sum of \$82,500.
15. That Mr Whyte have liberty to apply.

Costs of Application

16. That Mr Whyte's costs of and incidental to this application be costs in the winding up of the FMIF, to be paid out of the assets of the FMIF on an indemnity basis.

Signed:

Registrar

“ANNEXURE B”

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**

LIST OF MATERIAL

*on behalf of the Court-appointed Receiver
of the LM First Mortgage Income Fund*

No.	Document	Court No.	Date Sworn / Date Made	Date filed
Application, Order & Submissions				
1.	Application	547	12/04/2024	12/04/2024
2.	Receiver's Submissions – Finalisation of the Winding Up of the FMIF		21/05/2024	
3.	Order of Kelly J	548	18/04/2024	18/04/2024

No.	Document	Court No.	Date Sworn / Date Made	Date filed
Principal Affidavits Relied Upon				
4.	Affidavit of David Whyte (" D. Whyte "), Ex DW-128 (Volumes 1 to 5) (<i>Finalisation Affidavit</i>)	541 - 546	09/04/2024	12/04/2024
5.	Affidavit of D Whyte, Ex DW-129 (Volumes 1 to 2) (<i>Remuneration Affidavit</i>)	549 - 551	09/04/2024	29/04/2024
6.	Affidavit of D Whyte, Ex DW-130 (<i>Supplementary Affidavit</i>)	552	28/04/2024	29/04/2024
7.	Affidavit of D Whyte, Ex DW-131 (<i>Further Supplementary Affidavit</i>)		21/05/2024	
Prior Relevant Affidavits Filed in this Proceeding <i>(This material is read insofar as it is referred to by cross-reference in the Principal Affidavits or in the Receiver's Submissions)</i>				
8.	Affidavit of D. Whyte, Ex DW-1 - DW-20 – (Volumes 1 to 4) (<i>November 2014 Affidavit</i>)	225 - 228	7/11/2014	7/11/2014
9.	Affidavit of D. Whyte, Ex DW-27 to DW-38 (Volumes 1 to 8) (<i>November 2015 Affidavit</i>)	296 - 304	24/11/2015	24/11/2015
10.	Affidavit of D. Whyte, Ex DW-39 to DW-52 (Volumes 1 to 3) (<i>June 2016 Affidavit</i>)	317 - 319	08/06/2016	08/06/2016
11.	Affidavit of D. Whyte, Ex DW-41 to DW-52 (<i>June 2016 Affidavit</i>)	318 - 319	08/06/2016	08/06/2016
12.	Affidavit of D. Whyte, Ex DW-55 to DW-65 (Volumes 1 to 4) (<i>November 2016 Affidavit</i>)	346 - 349	17/11/2016	18/11/2016
13.	Affidavit of D. Whyte, Ex DW-67 to DW-77 (<i>June 2017 Affidavit</i>)	366 - 368	14/06/2017	14/06/2017
14.	Affidavit of D. Whyte, Ex DW-80 to DW-90 (Volumes 1 to 2) (<i>November 2017 Affidavit</i>)	380 - 381	10/11/2017	10/11/2017
15.	Affidavit of D. Whyte, Ex DW-91 to DW-93 (Volumes 1 to 2) (<i>June 2018 Affidavit</i>)	389 - 390	01/06/2018	01/06/2018

No.	Document	Court No.	Date Sworn / Date Made	Date filed
16.	Affidavit of D. Whyte, Ex DW-102 – (Volumes 1 to 3) (<i>November 2018 Affidavit</i>)	401 - 404	14/11/2018	14/11/2018
17.	Affidavit of D. Whyte, Ex DW-119 (<i>June 2019 Affidavit</i>)	438	06/06/2019	06/06/2019
18.	Affidavit of D. Whyte, Ex DW-120 (<i>November 2019 Affidavit</i>)	448	21/11/2019	21/11/2019
19.	Affidavit of D. Whyte, Ex DW-121 (<i>May 2020 Affidavit</i>)	460	11/05/2020	11/05/2020
20.	Affidavit of D. Whyte, Ex DW-124 (Volumes 1 to 3) (<i>March 2021 Affidavit</i>)	485 - 488	02/03/2021	02/03/2021
21.	Affidavit of D. Whyte, Ex DW-125 (Volumes 1 to 4) (<i>July 2021 Affidavit</i>)	498 - 501	14/07/2021	14/07/2021
22.	Affidavit of D. Whyte, Ex DW-126 (Volumes 1 to 3) (<i>December 2021 Affidavit</i>)	512 - 514	02/12/2021	02/12/2021
23.	Affidavit of D. Whyte, Ex DW-127 (Volumes 1 to 3) (<i>September 2022 Affidavit</i>)	529 - 531	29/06/2022	05/09/2022