SUPREME COURT OF QUEENSLAND

CITATION:	*Bruce & Anor v LM Investment Management Limited & Ors (No 2)* [2013] QSC 347
PARTIES:	**RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE** (Applicants) **v** **LM INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND** (First Respondent) **and** **THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (Second Respondent) **and** **ROGER SHOTTON** (Third Respondent) **and** **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** (Intervener)
FILE NO/S:	BS 3383 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2013
JUDGE:	Dalton J
ORDER:	**UPON THE UNDERTAKING of the first respondent that it will not seek from the FMIF any remuneration, costs or expenses (including legal fees) of or incidental to the meeting convened by notice dated 26 April 2013 (including the adjournment thereof):** **1. I vacate the order made at paragraph 2 of the orders of Justice P Lyons of 7 May 2013.**

2. **Trilogy Funds Management Ltd is to pay 7 per cent of the first respondent's costs (excluding reserved costs) of this proceeding on a standard basis to be assessed or agreed.**

3. **The first respondent is to be indemnified from the FMIF only to the extent of 20 per cent of its costs of and incidental to this proceeding, excluding any reserved costs.**

COUNSEL: B O'Donnell QC, with P Ahern, for the applicants
D Savage QC, with S Cooper, for the first respondent
GJ Litster (Solicitor) for a member of the second respondent
DR Tucker (Solicitor) for the third respondent
SJ Forrest for the intervener

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

[1] This is a decision on applications for costs made consequent on a judgment I delivered on 8 August 2013 in this matter. The substantive proceedings were three applications together over three days in the civil list. Each concerned who ought to manage the affairs of the financially stricken first respondent. The contest was between (i) the then administrators of the first respondent; (ii) Trilogy Funds Management Ltd (Trilogy), and (iii) a member, Shotton, and ASIC, intervening, who both contended for an independent liquidator. There were no pleadings, but the various issues were well enough defined, and success on them was somewhat scattered amongst the various parties.

[2] The normal rule is that costs follow the event – r 681. Even before the introduction of r 684, the approach of the Courts was, in appropriate cases, to make costs orders which reflected parties' success or failure on various parts of litigation.[1] The fairest way of determining the costs issues falling out of this litigation seems to me to make orders in accordance with r 684 as to particular parts of the litigation. In doing so the Court takes an impressionistic and pragmatic view as to what were the real heads of controversy in the litigation, and strives to avoid assessment in a complicated form according to issues in the technical sense.[2] The general purpose of an award of costs – indemnity to the successful party – and the effect of the costs orders made, as compared to the extent of the parties' success in litigation, must be borne in mind.

[3] In litigation of any complexity, there will be various alternative possible ways to divide the litigation into units for the purpose of allocating costs – see eg., the various alternatives discussed in *Thiess,* a defamation case: imputations found

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1 *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156, 207-208.

2 *Thiess* (above) pp 208-210; *Coomera Resort Pty Ltd v Kolback Securities Ltd & Ors* [1998] QSC 296; *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64.

proved; occasions of publication, etc. Following the approach in *Thiess,* I have looked to find a division which fairly represents "the true emphases of the litigation" or "discrete areas of dispute" (p 208). In substance, there were three heads of controversy[3] in the substantive hearing before me:

(a) The legal point as to the competence of the originating application filed 15 April 2013. This was an application for Trilogy to be appointed as temporary responsible entity of a managed investment scheme, FMIF, with a view to its appointment as the responsible entity in the long term. Under the *Corporations Act* 2001 (the Act), such an application was not available to anyone but ASIC or a member of the scheme, so the Bruces were named as applicants, but took on the litigation with an indemnity from Trilogy, and Trilogy's counsel at the hearing told me that he expressed Trilogy's views to the Court.[4]

There was a legal argument as to the competence of this application pursuant to s 601FA of the Act or reg 5C.2.02 of the *Corporations Regulations.* I found that the application was not competent – see my judgment [9]-[20]. This legal point was a distinct part of the hearing. I think it is fair to assume that while it may have accounted for say 15 per cent of the hearing time, it accounted for a significantly less percentage of overall costs incurred, for it was not the subject of factual dispute and did not require lengthy affidavits or cross-examination of witnesses. In terms of estimating what percentage of costs of the first respondent attached to this separate part of the application, I put it at 7 per cent.

(b) On the assumption that the application referred to at (a) was competent in law, there were discretionary arguments as to whether or not Trilogy ought be appointed temporary responsible entity. These arguments were factual and based on the suitability of Trilogy to have conduct of the affairs of FMIF, and the unsuitability of the first respondent.

Associated with, and very similar to, the factual matters raised in support of this discretionary argument, were arguments advanced by Trilogy resisting both a winding-up order in relation to the first respondent and an order to appoint an independent liquidator to supervise the winding-up and as receiver of FMIF. These orders were sought by Shotton and ASIC by separate applications filed 29 April 2013 and 3 May 2013 respectively. Trilogy's arguments were based on the asserted superiority of Trilogy as a manager of the affairs of FMIF over a liquidator and receiver.

These two associated points were substantial factual disputes which took Court time and involved considerable affidavit material and cross-examination.

My judgment was that even if the application by Trilogy were competent, I would not, for discretionary reasons, appoint it as temporary responsible entity – [21]-[31] of my judgment. The applicant (Trilogy) was the only party before me who contended that a winding-up order ought not be made. It lost on that point. Trilogy and the first respondent both lost on the issue about independent supervision by a liquidator and receiver.

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3 This term is used in *Thiess* (above), p 208.

4 In my judgment of 8 August I call this the Trilogy application. I continue that reference here, and refer to the applicants as Trilogy, rather than the Bruces.

(c) The issue raised on the Shotton and ASIC applications was the subject of considerable factual dispute entailing the need for affidavit material and cross-examination of witnesses, as ASIC and Shotton demonstrated that the then current administrators of the first respondent, Ms Muller and Mr Park, were unsuitable to wind-up the managed investment scheme without independent supervision. On this issue ASIC and Shotton were successful and the first respondent unsuccessful.

As noted, Trilogy opposed any one other than itself controlling the affairs of the first respondent. However, factual material and argument by Trilogy as to why the first respondent was unsuitable to control the affairs of the FMIF was substantial. It coincided with the interests ASIC and Shotton had in demonstrating that same unsuitability.

[4] Dealing with costs according to the above division means that I will not deal with the three separate applications *qua* application. But the above division better reflects the reality of the way the litigation was conducted.[5] Because Trilogy was wholly unsuccessful on its application, there is an attraction in dealing with it separately, and dealing with the ASIC and Shotton applications as representing the remainder of the litigation. Like the approach taken by the primary judge in *Thiess* (division according to occasions of publication), division of this litigation along the lines of Trilogy application on the one hand, and ASIC/Shotton applications on the other, has an initial simplicity and attraction but does not allow an allocation of costs which fairly reflects the emphases and successes in the litigation.

[5] Dealing with the three heads of controversy identified at paragraph [3] above allows a more nuanced approach which reflects the reality that much of the factual material led by Trilogy was relevant to the questions on the ASIC and Shotton applications and was important to my understanding of the conduct of the then administrators appointed to the first respondent, and thus my decision. In particular, the issue as to the propriety of those administrators' actions in relation to the meeting of 13 June 2013 was one carried largely, although not exclusively, by Trilogy. A smaller, but significant issue, about which the same observation can be made, is the behaviour of the administrators in the conduct of the litigation about Trilogy's financial worth and the propriety of Trilogy's conduct during the period of contention between it and the first respondent surrounding this litigation.

[6] There were three uncontroversial matters. ASIC did not seek an order for its costs. All parties agreed that Shotton should have his costs out of the managed investment scheme, and I have already made an order in his favour. The first respondent offered an undertaking not to charge FMIF with the costs of a meeting which it held on 13 June 2013 and which I found was invalid. These were not strictly litigation costs. The undertaking should nonetheless be recorded in the order.

[7] It seems to me that Trilogy ought to pay the costs of the first respondent of and incidental to the legal point I identify at paragraph [3](a) above. I fix these at 7 per cent of the first respondent's costs of the proceeding. There were reserved costs; it is not appropriate that they are included in this order.

[8] Next, as to the factual matters raised by the two associated points at [3](b) above, Trilogy's exposition of the conduct of the first respondent had a significant bearing

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5 cf *West & Ors v Blackgrove & Anor* [2012] QCA 321 [52].

on the making of the orders sought by ASIC and Shotton. Not only that, but as far as the hearing was concerned, there was certainly an economy as, by and large, counsel sensibly adopted an approach whereby Trilogy had primary carriage of the 13 June meeting issue; ASIC had primary carriage of points about conduct of the litigation and interaction with ASIC, and Shotton of the conflict points. Trilogy was ultimately unsuccessful on both its argument that it was the most suitable candidate to take charge of the first respondent, and its argument that a liquidator and receiver ought not be appointed to the first respondent. And there was no mistaking that any support it had for an independent liquidator and receiver was a distant alternative to its main position.[6]

[9] All things considered, it would be fairest to both Trilogy and the first respondent to make no costs order as to this second head of controversy. Trilogy will bear its own costs of that part of the litigation, but given the importance of the matters ventilated to the orders I made, I do not think it should bear the first respondent's costs as well. The first respondent did succeed so far as the result of the Trilogy application was concerned. However, in substance it lost the factual battle: the matters demonstrated by Trilogy went a significant way to persuading me that the conduct of the administrators of the first respondent was such that I ought to make the orders sought by ASIC and Shotton.

[10] I turn to the third head of controversy, the ASIC/Shotton applications. As noted, they were made individually some four or five days apart. They sought very similar relief. In terms of both submissions at the hearing, and in affidavit material filed in support of their applications, there was a difference in emphasis. ASIC relied particularly on the conduct of the administrators of the first respondent in dealing with ASIC, and in the litigation, whereas the Shotton interests put more emphasis on the potential financial conflicts which the administrators of the first respondent would face, were they to continue in control of the affairs of the first respondent.

[11] ASIC relied upon s 1101B of the Act to support its application. I did not act pursuant to that section and did not think it appropriate to do so. Nonetheless, I had power to act otherwise, and argument as to that legal point formed a very small part of the hearing and, I would have thought, almost no part of the preparation. It is not a point substantial enough to affect the costs orders I make. ASIC and Shotton contended for different persons to be appointed as liquidator and receiver to the first respondent. There was little in this point. Again, only a small fraction of the material and the hearing time could be said to have been taken up with this issue. The main controversy was whether or not someone independent ought to be appointed.

[12] The first respondent was unsuccessful in relation to the substance of both applications. ASIC does not seek its costs and Shotton's costs are not opposed. The only issue is that the first respondent contends it ought to have its costs of the ASIC application. This was put on four different bases. The first was that ASIC's application was unnecessary because Mr Shotton had filed his some four or five days earlier. As noted, there was a great similarity between the relief sought in the applications. Nonetheless, in circumstances where the regulator had intervened to revoke almost entirely the first respondent's Australian Financial Services Licence; had tried unsuccessfully to engage the administrators of the first respondent in a

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6 See tt 3-16.30-3-18.10.

co-operative effort to resolve the issues facing the first respondent short of litigation and failed, and in circumstances where ASIC had intervened in this litigation, it seems to me appropriate that ASIC made its own application. As discussed, Shotton was a very small percentage unit-holder. He acted no doubt in his own interests, rather than the public interest, and ASIC could have no assurance as to how he might choose to conduct his application.

[13] The second point put forward by the first respondent as to why it should have its costs of the ASIC application was that I appointed the liquidator advocated for by Mr Shotton, rather than the liquidator advocated for by ASIC. As explained, there was not sufficient in this point to warrant any effect on the costs orders I make. The third point was the s 1101B point, again, I am not persuaded that ought to influence my costs orders.

[14] The last point made by the first respondent was that ASIC did not identify the fact that it relied on the first respondent's conduct of these proceedings as a reason to demonstrate that the administrators of the first respondent could not be relied upon to act properly. The point was raised in submissions which were delivered in a timely way. There were no pleadings. I think the point was a fair one and fairly taken in a timely enough fashion. There is no suggestion that the first respondent would have acted any differently had the point been taken earlier. It seemed oblivious to the very clear warning it was given by P Lyons J on 7 May 2013 (see below).

[15] I am not persuaded that the first respondent should have its costs of the ASIC application.

Second Respondent

[16] I make no orders as to the costs of the second respondent. The second respondent took the position that it supported the first respondent. It was clear enough on the material that there was some historical connection between the second respondent and the first respondent, and while I would not go so far as to say the second respondent was not independent of the first respondent, there was something of that flavour about the relationship. In any event, the submissions of the second respondent added nothing, except to indicate the view of a tiny percentage unit-holder in the FMIF. This could just as readily have been achieved by the second respondent's swearing an affidavit for the first respondent to read. The views of unit-holders are relevant to issues such as those before me. The unit-holder Shotton played a very significant role in the litigation, notwithstanding his tiny percentage holding. But I would not encourage participation as a party when there was no purpose but to indicate support for another party. For the same reasons the second respondent should not have its costs from the FMIF.

Trilogy

[17] Trilogy was in substance, if not in name, a party to the litigation. As discussed, senior counsel for the Bruce applicants made submissions to the Court in which he expressed Trilogy's views. A great deal of the Bruces' evidence was sworn by officers of Trilogy, and it was clear throughout the entire hearing, and indeed it has been clear on the submissions made on this costs hearing, that the moving party on the originating application is Trilogy, rather than the Bruces. I was told that Trilogy

had given an indemnity to the Bruces as to their costs. At one point it became controversial in the proceedings as to what the terms of this indemnity were. So far as I am aware, it was never produced.

[18] Trilogy had a clear commercial interest in the relief sought in the Bruces' name. Had it been successful it would have been appointed as temporary responsible entity of the first respondent with a view to becoming the responsible entity of the first respondent. Its position was that a formal liquidation was not necessary; that it would not operate the first respondent as a going concern, but wind its affairs up in as orderly and commercial manner as possible. No doubt it would have charged substantial fees for doing so.

[19] I note that the Bruces are residents of New Zealand and there is no evidence at all that they have the means to pay any costs order made against them in this litigation.

[20] It is true that Trilogy was, via one of the three wholesale funds, a unit-holder of about 20 per cent of the FMIF and thus its views were relevant and important to what ought to happen to the first respondent. And indeed I took them into account where appropriate. However, it would be wrong to characterise Trilogy's participation in the litigation as simply that of a concerned unit-holder expressing its views. Counsel acting for ASIC described Trilogy as conducting the Trilogy application as part of "an entrepreneurial frolic". I do not think that there was anything improper about Trilogy's conduct of the application and would thus reject the term "frolic". However, I do think that Trilogy, like the administrators of the first respondent, was engaged in this litigation in its own commercial interests, it participated in a partisan and robust way.

[21] It seems to me that in accordance with the principles laid down in *Knight v FP Special Assets Ltd,*[7] the order I make as to payment of these costs should be made against Trilogy. The first respondent made a formal application to this effect – Court document 113. There was no submission to the contrary. Trilogy appeared at the costs hearing, by the same counsel as the Bruces.[8]

[22] It is not appropriate that any of Trilogy's costs be borne by the FMIF. It was unsuccessful, and indeed its own application was not competent at law. Further, as noted, it engaged in the litigation in its own commercial interests in my view.

First Respondent's Right to be Indemnified from FMIF

[23] Rule 700 applies to a party who sues or is sued as a trustee. Rule 700(2) provides, "Unless the court orders otherwise, the party is entitled to have costs of the proceeding, that are not paid by someone else, paid out of the fund held by the trustee." The *Trusts Act* 1973*,* s 72, provides: "A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers."

[24] This is in line with the common law rule that a trustee is entitled to be indemnified from the trust estate when acting properly for the purposes of the trust. The rule is stated by King CJ in *In re Suco Gold Pty Ltd (in liq)*:[9]

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7 (1992) 174 CLR 178.

8 See p 8-9 of the written submissions for the applicants and t 1-2.

9 (1983) 7 ACLR 873, 878-879.

> "The right of indemnity which a trustee possesses is therefore in essence a right to resort to the trust property for the protection and preservation of his personal estate against liabilities which he has incurred in the proper performance of the trust.
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> … A trustee, however, has no legal right to use or apply the trust property other than for the authorized purposes of the trust. In particular he has no legal right to apply the trust property for his own benefit or for the benefit of third parties, *Keech v Sandford* (1726) Eq Cas Abr 741."

[25] Bearing on the first respondent's rights here are the terms of the constitution of FMIF. At cl 18.5 it provides a right to be indemnified for liabilities or expenses in relation to the performance of the responsible entity's duties including legal fees, and at cl 19:

> "19.1 The following clauses apply to the extent permitted by law:
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> …
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> (c) In addition to any indemnity under any Law, the RE has a right of indemnity out of the Scheme Property on a full indemnity basis in respect of a matter unless, in respect of that matter, the RE has acted negligently, fraudulently or in breach of trust."

[26] Bearing on the interpretation of cl 19.1 is s 601GA of the Act which makes provision for the contents of the constitution of a registered scheme and provides:

> "(2) **[Responsible entity rights in constitution]** If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:
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> (a) must be specified in the scheme's constitution; and
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> (b) must be available only in relation to the proper performance of those duties;
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> and any other agreement or arrangement has no effect to the extent that it purports to confer such a right."

[27] If, and in so far as cl 19.1 purports to allow the responsible entity of the FMIF an indemnity in circumstances where, short of negligence, fraud or breach of trust, it has acted improperly, or not for the purpose of the trust,[10] then my view is that clause of the constitution does not so operate by reason of the provision at s 601GA(2)(b).

[28] The words of s 601GA(2)(b) very much reflect the common law formulation of costs being recovered when they are "proper", or "not improper" – see Lindley LJ in *Re Beddoe.*[11] Costs will be improperly incurred if they are in furtherance of the trustee's own interests rather than in furtherance of the interests of the members: *Miller v Cameron*.[12] In *Adsett v Berlouis*[13] the Full Court of the Federal Court said, "In this context, [of a trustee's indemnity] 'properly' means work reasonably and

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10 As seemed to be implied by the written submissions on behalf of the first respondent at paragraph 21ff.

11 [1893] 1 Ch 547, 558.

12 (1936) 54 CLR 572.

13 (1992) 37 FCR 201.

bona fide undertaken for the purpose of administering the estate or performing any public duty imposed by the [*Bankruptcy Act*], conformably with the trustee's duty to perform the work with reasonable care and skill and in an efficient and economic way."

[29] In examining the propriety or otherwise of a trustee's conduct it is relevant to have regard to the nature of the trust, and trustee, in question. See for example the Full Court in *Adsett* at the paragraph beginning, "A number of observations must be made about these submissions." The Court examined the nature and obligations attaching to a trustee appointed to a bankrupt estate, contrasting that, for example, with the duties of a gratuitous trustee, and referring to the public nature of the duty of a trustee in bankruptcy.

[30] In my opinion, the administrators of the first respondent occupied a position of trust which was distinct from a traditional trustee at general law because first, the trust of which the responsible entity was trustee was established by the *Corporations Act* in respect of a managed investment scheme that was essentially a vehicle for commercial investment; second, because the responsible entity was well-remunerated for its skill in performing the duties which amounted to performing the trust, and thirdly, because the administrators appointed to this responsible entity trustee were appointed to a fund which was financially stricken and which is now being wound up. In *Adsett* the Court referred to the general law duty that a trustee has to exercise judgment so as to save the estate unnecessary expenditure of money and, in terms of the role of a trustee in bankruptcy, emphasised that that duty was one to administer the estate in such a manner as to maximise the return from estate assets. In my view that is very much applicable to the current case. The FMIF differs from many other failed investment schemes in that there does remain a large surplus of assets to be administered. The administrators of the trustee responsible entity here should have squarely understood that their role was to maximise the amount of assets available to investors and creditors. Instead I found that, "the conduct of the first respondent in this litigation was combative and partisan in a way which I see as reflective of the administrators acting in their own interests to keep control of the winding-up of the FMIF, rather than acting in the interests of the members." – [89] and see also [82], [86], [88], [92], [93], [94], [95], [114], [117] of my judgment.

[31] It was said on behalf of the first respondent that it acted on legal advice, but if costs are otherwise improper, that is no excuse – see the statements in *Re Beddoe* at p 562, extracted at *Adsett.*

[32] Counsel for Trilogy submitted that the first respondent's resistance of the Trilogy application (and I would add the ASIC and Shotton applications) went above and beyond what would have been required had the administrators been acting solely in the interests of the fund. I accept this submission. However, it entails a proposition that some level of expenditure, and some level of representation in the litigation, was justifiable and proper within the meaning of the cases. It seems to me that what was reasonable and proper was well less than half of the costs incurred. I have in mind matters such as the issuance of subpoenas and the applications and antagonism between the first respondent and Trilogy concerning these; the expert report of Mr Hellen; the extensive material that seemed irrelevant (or almost so) at the hearing – for example [93]-[96] of my reasons for judgment; the unusual and partisan attack on Trilogy's solicitors both in correspondence and in affidavit

material; challenges to Trilogy's solvency; the refusal to co-operate with ASIC which is detailed at [57] ff of my judgment in circumstances where ASIC was trying to limit costs to the FMIF, and the linking of the 13 June 2013 meeting with the litigation and the refusal to meaningfully respond to serious (and ultimately well-founded) complaints that this meeting was invalid.

[33] That some costs incurred by the first respondent might have been reasonable and proper was acknowledged in the submissions of ASIC. ASIC proposed that I order that the first respondent not be indemnified from the assets of FMIF save with the consent of the unit-holders. The difficulty with that is that the unit-holders are never going to be informed in appropriate detail of the facts relevant to such an apportionment. I think that a fair percentage of the first respondent's own costs to be paid out of the FMIF is 20 per cent, bearing in mind 7 per cent of its costs will be paid by Trilogy, albeit on a standard basis. On the costs application the first respondent pointed to its undertaking not to claim costs of the 13 June 2013 meeting from the funds of the FMIF. That concession is appropriate, but does not go far enough in my opinion.

[34] There were reserved costs from 7 May 2013. The matter was adjourned on that date at the behest of the first respondent who sought an adjournment principally so that the proceeding could be determined after the meeting of 13 May 2013. As I explain in my reasons for judgment on the substantive matter, the first respondent's thinking in relation to that meeting was quite wrong-headed. For this reason I do not think that the first respondent is entitled to any reserved costs and this is reflected in the order I make as to indemnity from the FMIF.

Order Justice P Lyons 7 May 2013

[35] This matter came before Justice Peter Lyons on 7 May 2013. He was asked to adjourn the matter to the civil list. There was discussion before Justice Lyons as to the propriety of the administrators' conduct of the litigation to that point and Justice Lyons made an order that the "administrators not seek to exercise any right to be indemnified out of the assets of [FMIF] for costs in relation to these proceedings without leave of the Court, to be sought at the hearing." The transcript shows that his concerns were along the lines which came to be realised in my judgment after the hearing. Justice Lyons said:

> "I have a bit of a general impression that at this stage, that your fight is about who's going to control the fund after orders are made at this hearing and who will earn the fees from it. Now, I could be wrong about that. The judge who hears the matter may have a clearer view about what's really behind all this. That person may think my suspicion is well-grounded and that might be a reason why the ordinary right [to indemnity from the trust fund] shouldn't be exercised. In other words, the actions of the administrators aren't really to further the interests of the members of the fund but for some other reason."

[36] I will vacate Justice Lyons' order as part of my orders dealing with costs.

[37] The orders I make are:

UPON THE UNDERTAKING of the first respondent that it will not seek from the FMIF any remuneration, costs or expenses (including legal fees) of or incidental to

the meeting convened by notice dated 26 April 2013 (including the adjournment thereof):

1. I vacate the order made at paragraph 2 of the orders of Justice P Lyons of 7 May 2013.

2. Trilogy Funds Management Ltd is to pay 7 per cent of the first respondent's costs (excluding reserved costs) of this proceeding on a standard basis to be assessed or agreed.

3. The first respondent is to be indemnified from the FMIF only to the extent of 20 per cent of its costs of and incidental to this proceeding, excluding any reserved costs.