SUPREME COURT OF QUEENSLAND

CITATION:	*Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2* [2017] QSC 229
PARTIES:	**JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (first applicants) AND **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (second applicant) AND **DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (respondent)
FILE NO/S:	BS3508/15
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	17 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22 & 26 February and 14 March 2016 and further submissions received on 27 June 2016.
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The first applicants and the respondent may submit a draft order in an agreed amount in accordance with these reasons as to the first applicants' entitlement to be paid from the LM First Mortgage Income Fund ("FMIF") for remuneration as administrators of the second applicant.** **2. If the parties are unable to reach agreement under paragraph 1 two business days before 22**

November 2017, the matter is relisted on that date for further hearing or directions.

3. **The first applicants are entitled to be paid the sum of $120,057.14 (plus GST) from the scheme property of the LM Australian Income Fund ("AIF") for remuneration and expenses as administrators of the second applicant.**

4. **The first applicants are entitled to be paid the sum of $4,569.76 (plus GST) from the scheme property of the LM Australian Structured Products Fund ("ASPF") for remuneration and expenses as administrators of the second applicant.**

5. **The first applicants are entitled to be paid the sum of $4,022.30 (plus GST) from the scheme property of the LM Cash Performance Fund ("CPF") for remuneration and expenses as administrators of the second applicant.**

6. **The first applicants are entitled to be paid the sum of $9,152.70 (plus GST) from the scheme property of the LM Currency Protected Australian Income Fund ("CP-AIF") for remuneration and expenses as administrators of the second applicant.**

7. **The first applicants are entitled to be paid the sum of $3,101.78 (plus GST) from the scheme property of the LM Institutional Currency Protected Australian Income Fund ("ICP-AIF") for remuneration and expenses as administrators of the second applicant.**

8. **The first applicants are entitled to be paid the sum of $550,526.22 from the respective scheme property of the funds referred to in paragraphs 1 and 3 to 5.**

9. **The first applicants' entitlement under paragraph 8 should be divided equally among the funds referred to in paragraphs 1 and 3 to 5 and the Managed Performance Fund until 12 April 2013 and thereafter equally among the funds referred to in paragraphs 1 and 3 to 5.**

10. **The first applicants submit a draft order two business days before 22 November 2017 in an amount in accordance with these reasons fixing the first applicants' entitlement for remuneration as liquidators of the second applicant.**

11. **The first applicants and the respondent may submit a draft order in an agreed amount in accordance with these reasons as to the first**

applicants' entitlement to be paid from the LM First Mortgage Income Fund ("FMIF") for remuneration as liquidators of the second applicant.

12. **If the first applicants and the respondent are unable to reach agreement as to paragraph 11 two business days before 22 November 2017, the matter is relisted on that date for further hearing or directions.**

13. **The first applicants are entitled to be paid the sum of $499,622.96 (plus GST) from the scheme property of the LM Australian Income Fund ("AIF") for remuneration and expenses as liquidators of the second applicant.**

14. **The first applicants are entitled to be paid the sum of $4,569.76 (plus GST) from the scheme property of the LM Australian Structured Products Fund ("ASPF") for remuneration and expenses as administrators of the second applicant.**

15. **The first applicants are entitled to be paid the sum of $119,583.61 (plus GST) from the scheme property of the LM Cash Performance Fund ("CPF") for remuneration and expenses as liquidators of the second applicant.**

16. **The first applicants are entitled to be paid the sum of $82,583.83 (plus GST) from the scheme property of the LM Currency Protected Australian Income Fund ("CP-AIF") for remuneration and expenses as liquidators of the second applicant.**

17. **The first applicants are entitled to be paid the sum of $29,621.37 (plus GST) from the scheme property of the LM Institutional Currency Protected Australian Income Fund ("ICP-AIF") for remuneration and expenses as liquidators of the second applicant.**

18. **The first applicants are entitled to be paid the sum of $651,438 from the respective scheme property of the funds referred to in paragraphs 11 and 13 to 15 for remuneration as the liquidators of the second applicant.**

19. **The first applicants' entitlement under paragraph 18 should be divided equally among the funds referred to in paragraphs 11 and 13 to 15.**

20. **The first applicants and the respondent may submit a draft order in an agreed amount in accordance with these reasons as to the first**

applicants' entitlement to be paid from the LM First Mortgage Income Fund ("FMIF") for expenses as administrators of the second applicant.

21. **If the parties are unable to reach agreement under paragraph 20 two business days before 22 November 2017, the matter is relisted on that date for further hearing or directions.**

22. **The first applicants and the respondent may submit a draft order in an agreed amount in accordance with these reasons as to the first applicants' entitlement to be paid from the LM First Mortgage Income Fund ("FMIF") for expenses as liquidators of the second applicant.**

23. **If the parties are unable to reach agreement under paragraph 22 two business days before 22 November 2017, the matter is relisted on that date for further hearing or directions**.

24. **The parties should exchange submissions on costs two business days before 22 November 2017.**

25. **The question of costs and any outstanding matters under these orders be heard on 22 November 2017 at 10 am.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where the second applicant was the responsible entity of a number of registered investment schemes – where the first applicants were appointed administrators and later liquidators of the second applicant – where the respondent was appointed by order of the court to take responsibility for ensuring that the largest registered investment scheme was wound up in accordance with its constitution and the order – where the first applicants made claims for remuneration and expenses for work done in the administration and liquidation of the second applicant – whether the first applicants' claims for remuneration and expenses should be paid from the trust property of the investment schemes of which the second applicant was the registered entity

Corporations Act 2001 (Cth), s 443D, s 449E, s 555, s 556, s 601FC, s 601FH, s 601GA
Trusts Act 1973 (Qld), s 72, s 96, s 101
Uniform Civil Procedure Rules 1999 (Qld), r 501, sch 1A r 16.1

13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq) (1999) 30 ACSR 377, discussed
Alphena Pty Ltd (in liq) v PS Securities Pty Ltd (2013) 94 ACSR 160, cited

Australian Securities and Investment Commission (ASIC) v Groundhog Developments Pty Ltd & Ors [2011] QSC 263, cited
Australian Securities and Investment Commission (ASIC) v Letten (No 17) (2011) 286 ALR 346, discussed
Gillan v HEC Enterprises Ltd [2017] 1 BCLC 340, discussed
In re Universal Distributing Co Ltd (in liq) (1933) 48 CLR 171, considered
LM Investment Management Limited (in liq) v Bruce & ors [2014] QCA 136, discussed
Macks & Anor v Maka & Anor [2015] SASC 200, discussed
Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360
Owen v Madden (No 5) [2013] FCA 1443, cited
Parbery v ACT Superannuation Management Pty Ltd (2010) 79 ACSR 425, discussed
Park & Muller (liquidators of LM Investment Management Ltd (in liq)) v Whyte [2015] QSC 287, cited
Primespace Property Investment Limited (in liq) [2016] NSWSC 1821, considered
Re AAA Financial Intelligence Ltd (in liq) [2014] NSWSC 1004, cited
Re Berkeley Applegate (Investment Consultants) Ltd (in liq); Harris v Conway [1989] Ch 32, considered
Re Bruce & Anor v LM Investment Management Limited & Ors (No 2) [2013] QSC 347, discussed
Re Bruce & anor v LM Investment Management Limited & ors [2013] QSC 192, discussed
Re Enhill Pty Ltd (1982) 7 ACLR 8, cited
Re Garra Water Investments Pty Ltd (in liq) v Ourback Yard Nursery Pty Ltd [2012] SASC 44, discussed
Re GB Nathan & Co Pty Ltd (in liq) (1991) 24 NSWLR 674, discussed
Re Independent Contractor Services (Aust) Pty Ltimited (in liq) (No 2) (2016) 305 FLR 222, considered
Re National Buildplan Group Pty Ltd (subject to deed of company arrangement) [2014] NSWSC 146, cited
Re Obie Pty Ltd [1984] 1 Qd R 371, cited
Re Solfire Pty Ltd (in liq) (No 2) [1999] 2 Qd R 182, cited
Re Suco Gold Pty Ltd (in liq) (1983) 33 SASR 99, considered
Re Sutherland (2004) 50 ACSR 297, cited
Re Sutherland; French Caledonia Travel Service Pty Ltd (2003) 59 NSWLR 361, cited
Re Timeshare Resort Club Ltd (in liq) (2010) 187 FCR 13, cited
Re Traditional Values Management Ltd (in liq) (No 2) [2015] VSC 126, discussed
Re Walker (2005) 221 ALR 320
RWG Management Ltd v Commissioner for Corporate Affairs [1985] VR 385, applied
Sanderson as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr (2017) 93 NSWLR 459, considered

Templeton v Australian Securities and Investment Commission (ASIC) (2015) 108 ACSR 545, cited
Thackray v Gunns Plantations (2011) 85 ACSR 144, cited
Venetian Nominees Pty Ltd v Conlan (1998) 20 WAR 96, cited
Whyte v LM Investment Management Limited (in liq) (recvrs & mgrs apptd) & ors [2015] QSC 303, cited

COUNSEL: P McQuade QC and J Peden for the applicant
S Brown QC and D de Jersey for the respondent

SOLICITORS: Russells for the applicant
Tucker & Cowen for the respondent

[1] **Jackson J**: Some of the travails of LM Investment Management Ltd ("LMIM") and the registered managed investment schemes and other trust funds which it administered are sketched in a number of judgments in this court.[1]

Remuneration application

[2] The present application is for orders that the remuneration of the first applicants as administrators and liquidators and some expenses are to be paid from the trust property of one or other of the relevant funds and for a determination of the proportion to be borne by each fund for amounts of non-specific remuneration or expenses. A second aspect is that the first applicants apply for an order to determine their remuneration as liquidators of LMIM, from 1 August 2013 to 30 September 2015. I will call this application the "Remuneration application".

[3] One of the registered managed investment schemes is the LM First Mortgage Income Fund ("FMIF"). LMIM is the responsible entity of the FMIF. LMIM has been directed by order to wind up the FMIF. As well, David Whyte has been appointed by order to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and the order. For that purpose, he was appointed receiver of the property of the FMIF. He appears on the application to represent the interests of the members of the FMIF only.

[4] Notice of the application was given to other interested parties by email, advertisement and on the relevant internet website, but none apart from Mr Whyte appears to support or oppose.

[5] The applicants for determination of the remuneration are the first applicants, Mr Park and Ms Muller. Both are official liquidators and accountants with expertise in insolvency who are consultants and directors of FTI Consulting. They also seek orders for the direct payment to them of the remuneration and expenses claimed from the trust property of the funds. LMIM, as the second applicant, is an additional applicant for the other orders.

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1 *Re Bruce & anor v LM Investment Management Limited & ors* [2013] QSC 192; *Re Bruce & Anor v LM Investment Management Limited & Ors (No 2)* [2013] QSC 347; *LM Investment Management Limited (in liq) v Bruce & ors* [2014] QCA 136; *Park & Muller (liquidators of LM Investment Management Ltd (in liq)) v Whyte* [2015] QSC 287; *Whyte v LM Investment Management Limited (in liq) (recvrs & mgrs apptd) &ors* [2015] QSC 303.

Background facts

[6] On 19 March 2013, the first applicants were appointed administrators of LMIM by a resolution of the directors.

[7] At that time and since, LMIM was (as it remains) the responsible entity of the following registered investment schemes:

(a) LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF");
(b) LM Australian Income Fund ARSN 133 497 917 ("AIF");
(c) LM Australian Structured Products Fund ARSN 149 875 669 ("ASPF");
(d) LM Cash Performance Fund ARSN 087 304 032 ("CPF");
(e) LM Currency Protected Australian Income Fund ARSN 110 247 875 ("CP-AIF"); and
(f) LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 ("ICP-AIF").

[8] As well, LMIM was then trustee of a private trust known as the LM Managed Performance Fund ("MPF").

[9] Prior to the administrators' appointment, LMIM acquired services from LM Administration Pty Ltd ("LMA"). Under a written service agreement dated 1 July 2010, as varied on 24 September 2012, ("First Services Agreement") LMA provided employees, and leased premises and equipment necessary to operate the funds management business conducted by LMIM. The services supplied by LMA were identified as funds management services of an administrative nature and the preparation of financial statements. A term of the First Services Agreement provided that it terminated upon the appointment of an administrator to LMIM or LMA.

[10] Each of the registered investment schemes was constituted with a custodian trustee. The Trust Company Limited ("PTAL") was and is the custodian trustee. A custodian agreement was made between LMIM and PTAL relating to each of the schemes. When a loan was made to a borrower from a fund, PTAL as lender would be the lender to the borrower under the loan agreement and the mortgagee or chargee under any associated security.

[11] At relevant times, if a borrower defaulted, PTAL entered into separate agreements with LMIM relating to any enforcement of the loan agreement or exercise of any rights under any associated security. The agreements were styled an "Appointment of Agent" and "Agents Indemnity" (collectively "Appointment of Agent Agreement"). PTAL appointed LMIM as agent to exercise PTAL's rights under the relevant loan agreement and securities. These arrangements were called "controllerships" in the evidence.

[12] From about April 2011, if a borrower defaulted, PTAL, LMIM and LMA entered into a further separate agreement, in relation to the loan and relevant securities, for that borrower. It was styled a "Loan Management Agreement". In addition to the fees payable by LMIM to LMA under the First Services Agreement, a fee called a "loan management fee" was charged under the Loan Management Agreement for the services provided by LMA for enforcement of the loan in default, payable by

PTAL to LMA. LMIM (as agent on behalf of PTAL) would pay the loan management fee to LMA from the assets of the FMIF.

[13] If the enforcement actions were successful, it was intended that the borrower would be responsible to pay the loan management fee as a recoverable cost or expense under the mortgage or other securities and thereby reimburse the FMIF. The evidence does not show that any borrower did repay any loan management fees, in fact.

[14] On 19 March 2013, the first applicants were also appointed administrators of LMA.

[15] On 21 March 2013, the first applicants on behalf of LMIM and LMA entered into a further services agreement ("Second Services Agreement"). That agreement continued for a period of approximately four and a half months, ending in July 2013.

[16] Also from that time, the first applicants decided to continue with the appointment of LMIM and the retainer of LMA in relation to the controllerships and payment of loan management fees to LMA under the Loan Management Agreements for the loans in default.

[17] On 1 April 2013, the first creditors' meeting of LMIM was held.[2]

[18] On 12 April 2013, LMIM was removed as trustee of the MPF. It was replaced by KordaMentha Pty Ltd and Calibre Capital Ltd.

[19] On 11 July 2013, Deutsche Bank AG was a secured creditor of the FMIF. It appointed Joseph Hayes and Anthony Connelly of McGrathNicol ("DB Receivers") as receivers and managers of the assets and undertaking of the FMIF.[3]

[20] On 26 July 2013, David Clout and Lorraine Smith were appointed liquidators of LMA.

[21] On 31 July 2013, a meeting of a committee of creditors of LMIM resolved to approve the first applicants' remuneration as administrators of LMIM for the period 19 March 2013 to 30 June 2013 in the sum of $2,429,702.49.[4]

[22] On 1 August 2013, the second meeting of creditors of LMIM resolved that LMIM be wound up.[5] LMIM thereby went into a deemed creditors voluntary winding up.[6] The administrators were appointed liquidators.

[23] On 8 August 2013 and 21 August 2013, a Judge of the court made the orders directing LMIM to wind up the FMIF and appointing Mr Whyte as previously mentioned.[7] The final orders other than as to costs were made on 21 August 2013.

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2 *Corporations Act* 2001 (Cth), s 436E.

3 This language is taken from the affidavit material that treats the FMIF as a legal entity, which it is not. But I take it to mean that LMIM or the custodian gave securities to Deutsche Bank which enabled Deutsche Bank to appoint receivers to assets of the FMIF.

4 *Corporations Act* 2001 (Cth), s 449E(i)(a).

5 *Corporations Act* 2001 (Cth), s 439C(c).

6 *Corporations Act* 2001 (Cth), s 446A.

7 *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192. The final orders other than as to costs were made on 21 August 2013.

[24] From the time of the administrators' appointment, the only property of the CP-AIF and ICP-AIF were units in the FMIF, approximating 26.6 percent of the units on issue in the FMIF. Accordingly, they are referred to as "Feeder Funds" in the evidence.

[25] The FMIF, MPF and AIF accounted for more than 95 percent of the funds under management by LMIM at the time of the appointment of the administrators and liquidators.

[26] On 25 September 2014, PTAL terminated LMIM's appointments under six remaining Appointment of Agent agreements.

Business of the FMIF

[27] At the time of the appointment of the first applicant as administrators, the FMIF had 4,500 members holding varying numbers of units. They were investors who had purchased units in the fund at the price of $1 per unit.

[28] Also at that time, the FMIF had a portfolio of assets comprising 27 commercial loans made with respect to projects to develop properties in the aged care, commercial, industrial, residential and specialised residential sectors. The historical book value of the loans was $326,102,759. The majority of the loans were in default. The underlying properties were in various stages of planning or development. There was a high exposure to the aged care sector.

[29] The administration work for the LMIM and the other funds was undertaken by LMA.

[30] From their appointment as administrators on 19 March 2013 until the appointment of the DB Receivers on 11 July 2013, the first applicants were solely responsible for the administration of the FMIF and the other funds.

[31] From 11 July 2013 until Mr Whyte was appointed on 8 and 21 August 2013, the first applicants and LMIM's control of the property of the FMIF was subject to the powers and direction of the DB Receivers. Mr Park says that the DB Receivers did not assume day to day control of the business of the FMIF.

[32] After 21 August 2013, the property of the FMIF passed from LMIM into the control of Mr Whyte, subject to two points: first, the DB Receivers appointment; second, under the Appointment of Agent agreements (and/or Loan Management Agreements) LMIM retained a role in what are called the controllerships. Thereafter, the administration of the property of the FMIF focussed on the sale and readiness for sale of the properties.

[33] By the end of January 2014, Deutsche Bank's debt was repaid. However, curiously, the appointment of the DB Receivers was not terminated. It is not necessary to say more about that in these reasons.

Summary of claims for remuneration and expenses

[34] The applicants break up their claims for payment of remuneration and some expenses from the trust property of the funds and determination of the liquidators'

remuneration by reference to the different appointments, different time periods and the connection of the claimed item to a particular fund.

[35] First, amounts are identified and claimed for the period of the appointment of the first applicants as administrators between 19 March 2013 and 31 July 2013. Second, separate amounts are identified and claimed for the period of the first applicants' appointment as liquidators between 1 August 2013 and 30 September 2015. There are other relevant dates within those periods, as will appear later. Third, the claims over both periods are broken into separate claims for remuneration specific to one of the funds, labelled as a "Category 1" claim, and undifferentiated claims for remuneration that is not specific to any one fund, labelled as the "Category 2" claims, which areto be apportioned among the funds. Fourth, separate amounts are identified for some expenses, included in both Category 1 and Category 2 claims.

[36] Overall, the applicants claim to be entitled to indemnity and payment from the trust property of the relevant funds for their claims for remuneration and some expenses for a period of over two years and seven months. Ultimately, the applicants submitted that the total amount was in excess of $4.23 million..

Statutory framework for remuneration and expenses

[37] For a trust subject to the law of this state, the trust instrument may expressly provide for the trustee's remuneration.

[38] Section 101(1) of the *Trusts Act* 1973 (Qld) ("TA") provides:

> "The court may, in any case in which the circumstances appear to it so to justify, authorise any person to charge such remuneration for the person's services as trustee as the court may think fit."

[39] Similarly, for a trust subject to the law of this state, the trust instrument may expressly provide for the trustee to be indemnified by recoupment or exoneration of expenses.

[40] Section 72 of the TA 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."

[41] For a registered managed investment scheme, there are specific further statutory provisions. Section 601GA(2) of the *Corporations Act* 2001 (Cth) ("CA") provides:

> "(2) 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:
> (a) must be specified in the scheme's constitution; and
> (b) must be available only in relation to the proper performance of those duties;

> and any other agreement or arrangement has no effect to the extent that it purports to confer such a right."

[42] Section 601FH provides:

> "If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated:
>
> (a) a provision of the scheme's constitution, or of another instrument, is void against the liquidator, or the administrator of the company or the deed, if it purports to deny the company a right to be indemnified out of the scheme property that the company would have had if it were not being wound up, were not under administration, or had not executed a deed of company arrangement; and
> (b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed."

[43] As the responsible entity of the FMIF, LMIM is a trustee of the trust property of the fund.[8] Under the constitution of the fund and the law of trusts, it has a potential entitlement to indemnity for remuneration or fees and expenses, subject to s 601GA(2) of the CA. Thus, LMIM's right to be paid fees, or to be indemnified for a liability or an expense out of scheme property must be specified in the scheme's constitution, is only available for the proper performance of its duties as responsible entity and may only be exercised by the first applicants.

Constitution of the FMIF

[44] Clause 18.4 of the constitution of the FMIF provides:

> "The RE shall be entitled to fees in relation to the following duties:
> (a) the subscription and withdrawal of Units;
> (b) the transfer or transmission of Units;
> (c) the establishment/loan application fees;
> (d) the structuring or packaging of loan proposals;
> (e) loan management;
> (f) the rollover of a loan facility;
> (g) due diligence enquiries generally;
> (h) the sale of real estate or assets of the Scheme Property;
> (i) the promotion and management of the Scheme;
> (j) the appointment of the Custodian pursuant to the Custody Agreement;
> (k) the winding-up of the Scheme;
> (l) the performance of its duties and obligations pursuant to the Law and this Constitution."

[45] Clause 18.5 of the constitution of the FMIF provides:

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8 *Corporations Act* 2001 (Cth), s 601FC(2).

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

(a) Auditor's fees;
(b) legal fees and outgoings in relation to settlement, rollover, default or recovery of loans;
(c) barrister/QC - legal counsel fees;
(d) search fees including property searches, company, bankruptcy, CRAA searches and any other searches which may be necessary to enable location, identification and/or investigation of borrowers/guarantors/mortgagors;
(e) valuation fees;
(f) independent expert's or consultant's fees including but not limited to marketing agents, property specialists, surveyors, quantity surveyors, town planners, engineers;
(g) property report/property consultant fees;
(h) process servers' fees;
(i) private investigator fees;
(j) fees in relation to the marketing and packaging of security properties for sale;
(k) real estate agent's-sales commissions;
(l) costs of maintenance of mortgage securities;
(m) outstanding accounts relating to mortgage securities such as council rates;
(n) locksmith for changing locks of mortgage securities as appropriate;
(o) insurance (property and contents);
(p) removalists for removal of borrower's property as appropriate;
(q) security guards to attend mortgage securities as appropriate;
(r) building and/or property inspection report fees - i.e. building, town planning experts and the like;
(s) all ASIC charges;
(t) all costs of supplying Members with copies of this Constitution and any other documents required by the Law to be provided to Members;
(u) all costs and expenses incurred in producing PDS' and Supplementary PDS' or any other disclosure document required by the Law;
(v) reasonable costs incurred in protesting or preserving all assets offered as security;
(w) all liability, loss, cost, expense or damage arising from the proper performance of its duties in connection with the Scheme performed by the RE or by any agent appointed pursuant to s 601FB(2) of the Law;
(x) any liability, loss, cost, expense or damage arising from the lawful exercise by the RE and the Custodian of their rights under the Power of Attorney contained in clause 20;
(y) fees and expenses of any agent or delegate appointed by the RE;
(z) bank and government duties and charges on the operation of bank accounts;
(aa) costs, charges and expenses incurred in connection with borrowing money on behalf of the Scheme under the Constitution;
(bb) insurances directly or indirectly protecting the Scheme Property;

(cc) fees and charges of any regulatory or statutory authority;
(dd) taxes in respect of the Scheme but not Taxes of the RE [save and except any goods and services or similar tax ("GST")] which are payable by the RE on its own account;
(ee) costs of printing and postage of cheques, advises, reports, notices and other documents produced during the management of the Scheme;
(ff) expenses incurred in connection with maintaining accounting records and registers of the Scheme and of the Scheme Auditor;
(gg) costs and disbursements incurred in the preparation and lodgement of returns under the Law, Tax Act or any other laws for the Scheme;
(hh) costs of convening and holding meetings of Members;
(ii) costs and disbursements incurred by or on behalf of the RE in connection with its retirement and the appointment of a substitute;
(jj) costs and disbursements incurred by the RE in the initiation, conduct and settlement of any court proceedings;
(kk) costs of any insurance premiums insuring against the costs of legal proceedings (whether successful or not) including legal proceedings against Compliance Committee Members not arising out of a wilful breach of a duty referred to in S601 JD of the Law;
(ll) costs of advertising the availability of funds for lending;
(mm) brokerage and underwriting fees;
(nn) if and when the RE becomes responsible to pay any GST in respect of any services provided to the Scheme or any payments in respect of GST to be made by the Members or the RE in respect of the Scheme or under the terms of this Constitution then the RE shall be entitled to be indemnified in respect of such GST from the Scheme Property;
(oo) if there is any change to the Law or ASIC policy whereby the RE is required to alter the structure of the Scheme or amend this Constitution, then the costs of the RE in complying with these changes will be recoverable out of the Scheme Property."

[46] Clause 19 of the Constitution of the FMIF further provides:

"19.1 The following clauses apply to the extent permitted by law:

(a) The RE is not liable for any loss or damage to any person (including any member) arising out of any matter unless, in respect of the matter, it acted both:
  (i) otherwise than in accordance with the Constitution and its duties; and
  (ii) without a belief held in good faith that it was acting in accordance with this Constitution or its duties.

  In any case, the liability of the RE in relation to the Scheme is limited to the Scheme Property, from which the RE is entitled to be, and is in fact, indemnified.
(b) In particular, the RE is not liable for any loss or damage to any person arising out of any matter where, in respect of that matter:

(i) it relied in good faith on the services of, or information or advice from, or purporting to be from, any person appointed by the RE;
(ii) it acted as required by Law; or
(iii) it relied in good faith upon any signature, marking or documents.

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

(d) …"

[47] The applicants rely only in a general way on those provisions for the orders sought. The constitutions of the other funds do not differ in a material way.

First applicants as administrators

[48] Under s 449E(1) of the CA, an administrator of a company under administration is entitled to receive such remuneration as is determined by the committee of creditors or resolution of the company's creditors or by the court.

[49] As there has been agreement between the administrators and a committee of creditors and a resolution of LMIM's creditors as to the first applicants' remuneration as administrators, the applicants do not require a determination of the court for the first applicants' entitlement to that remuneration as administrators as against LMIM, for the following periods and amounts:

Period	Amount
19 March 2013 – 30 June 2013	$2,429,702.49
1 July 2013 – 31 July 2013	$817,782
Total	**$3,247,484.49**

[50] The orders sought by the application for payment of the first applicants' remuneration as administrators are for a direction under s 96 of the TA or pursuant to s 449E of the CA that their remuneration (and some expenses) as administrators be borne as to particular amounts by the respective funds. The amount of the administrators' remuneration for which those orders are sought by the application is $2,185,229.81, not the approved remuneration of $3,247,489.49. It does not appear how that difference is to be reconciled.

[51] By the time of the final written submissions the amount claimed for payment of the first applicants' remuneration and expenses as administrators was further reduced to $2,152,321.05. That was also the total of the amounts for remuneration and expenses sought by the applicants in a draft order submitted after the hearing of the application ("Draft Order").

[52] Under s 449E(4) of the CA, when the court exercises the power to determine the remuneration of an administrator, it must have regard to whether the remuneration is "reasonable", taking into account the following factors:

"(a) the extent to which the work performed by the administrator was reasonably necessary;
(b) …
(c) the period during which the work was … performed by the administrator;
(d) the quality of the work performed … by the administrators;
(e) the complexity (or otherwise) of the work performed … by the administrator;
(f) the extent (if any) to which the administrator was … required to deal with extraordinary issues;
(g) the extent (if any) to which the administrator was … 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 … by the administrator;
(i) Whether the administrator was … required to deal with:
    (i) …
    (ii) one or more receivers and managers;
(j) the 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 … by the administrator in performing the work; and
    (ii) whether the total remuneration payable to the administrator is capped; and
(l) any other relevant matters."

[53] Section 449E is concerned with remuneration, not expenses.[9]

[54] Ordinarily, the expenses of administration of a company would be met from the property of the company.

[55] Under s 443D of the CA, where an administrator of a company is liable for a debt under Pt 5.3A Div 9 Subdiv A of the CA, or for any other debts or liabilities incurred in good faith and without negligence by the administrator in the performance or exercise of his or her functions or powers as administrator, they will be entitled to an indemnity from the company's property. This is not subject to the court's determination under s 449E(1). In addition, the right of indemnity extends to remuneration that has been determined under s 449E: s 443D(b).

[56] Any entitlement of the first applicants to be indemnified from the trust property of a relevant fund for their remuneration and expenses as administrators is not otherwise provided for in the statutory framework.

First applicants as liquidators

[57] The voluntary winding up of LMIM is regulated by Pt 5.5 of the CA. Under s 499(3) the remuneration of the liquidators may be fixed by a committee of inspection, if one is appointed, or by resolution of the creditors. Neither of those steps was taken in relation to the first applicants' remuneration as liquidators.

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9 *Re Timeshare Resort Club Ltd (in liq)* (2010) 187 FCR 13, [41]-[44].

[58] In the case of a winding up by the court, where there is no agreement between the liquidator and any committee of inspection or resolution of the creditors, a liquidator appointed by the court is entitled to receive remuneration as is "determined" by the court: s 473(3)(b)(ii) of the CA.

[59] Under s 473(10), in exercising the power under s 473(3) to determine the remuneration the Court must have regard to whether the remuneration is "reasonable" taking into account the following factors:

> "(a) the extent to which the work performed by the liquidator was reasonably necessary;
> (b) …;
> (c) the period during which the work was… performed by the liquidator;
> (d) the quality of the work performed… by the liquidator;
> (e) the complexity (or otherwise) of the work performed… by the liquidator;
> (f) the extent (if any) to which the liquidator was.. required to deal with extraordinary issues;
> (g) the extent (if any) to which the liquidator was… 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… by the liquidator;
> (i) whether the liquidator was… required to deal with:
> (i) …
> (ii) one or more receivers and managers;
> (j) the 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 liquidator in performing the work; and
> (ii) whether the total remuneration payable to the liquidator is capped;
> (l) any other relevant matters."

[60] Under s 511(1) of the CA, a liquidator of a company in a creditor's voluntary winding up may apply to the court to exercise all or any of the powers that the court might exercise if the company were being wound up by the court.

[61] The application seeks an order that the first applicants' remuneration as liquidators be determined and fixed, presumably meaning as if under s 473(3). Although no committee of inspection or meeting of creditors has considered the first applicants' remuneration as liquidators, there is no dispute that the first applicants are entitled to apply to the court to determine and fix the remuneration.[10]

[62] Again, the remuneration to be determined and fixed under these provisions does not include expenses.

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[10] Compare *Alphena Pty Ltd (in liq) v PS Securities Pty Ltd* (2013) 94 ACSR 160, 164 [32]; *re Walker* (2005) 221 ALR 320, 329-330 [32]-[34].

[63] Accordingly, the function of the court in determining the remuneration of the first applicants as liquidators is informed by the statutory criterion of reasonableness having regard to the list of relevant considerations to be taken into account.

[64] The statutory provisions relating to the court's determination of an administrator's or liquidator's entitlement to remuneration have been amended from time to time. The relevant provisions set out previously were introduced from December 2007.

[65] However, the relevant considerations and the process to be followed on such an application had been well canvassed in earlier case law.[11] A number of principles are well established. The recent amendments introduced by the *Insolvency Law Reform Act* 2016 (Cth) do not apply to this case under the transitional arrangements.

[66] It is not envisaged under the CA that a liquidator will be liable personally on all transactions made on behalf of the company in liquidation, and a liquidator is not liable to incur any expense in relation to the winding up of the company unless there is sufficient available property: s 545(1).

[67] No specific provision is made in the CA for a liquidator to have a right of indemnity from the property of the company either for their remuneration or for expenses they may properly incur. But those rights are assumed to exist, and the priority of payment of debts and expenses recognises their existence.

[68] Section 556(1) provides that in the winding up of a company some debts and claims must be paid in priority to all other unsecured debts and claims. In particular, s 556(1)(a) provides that the debts and claims that must be paid in priority to all other unsecured debts and claims include "expenses… properly incurred by a [liquidator] in preserving, realising or getting in property of the company or in carrying on the company's business."

[69] Second, s 556(1)(de), provides that the debts and claims that must be paid in priority to all other unsecured debts and claims include "deferred expenses". As defined in s 556(2)(a), "deferred expenses" means expenses properly incurred by a liquidator in so far as they consist of remuneration or fees for services payable to the liquidator or expenses incurred by a liquidator in respect of the supply of services to the liquidator by an employee of the liquidator.

Liquidators' direct payment claims

[70] The first applicants claim direct payment for their remuneration as liquidators and for some expenses from the trust property of the funds. That is not provided for in the CA in the statutory framework of a liquidator's management of a company in liquidation.

[71] Section 555 of the CA provides that, except as provided by the CA, all debts and claims proved in a winding up rank equally and if "the property of the company" is insufficient to meet them in full, they must be paid proportionately. The assumption is that debts and claims will be paid from the property of the company. However,

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[11] *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96, 99F, 102-104; *Re Solfire Pty Ltd (in liq) (No 2)* [1999] 2 Qd R 182, 190-192 and 194.

where a company is trustee of a private trading trust, including the funds in the present case, the trust property is not property of the company.[12]

[72] As previously mentioned, the applicants do not rely on LMIM's express right to remuneration under the constitution of the FMIF as justifying the orders for payment of the first applicants' remuneration. Nor do they rely on any possible right to remuneration under s 101 of the TA.

[73] Instead, they rely upon the court's powers, in the context of a company winding up, to order that the liquidator of a trustee company be paid remuneration and expenses from trust property. The cases on which the applicants rely accept a right to an indemnity or allowance from trust property in some circumstances. However, it must be acknowledged that the basis in principle for that conclusion is not clearly settled. More than one basis is discussed in the cases. In this case, it is necessary to deal with part of the first applicants' claim for an order for the payment of their remuneration from trust property at the level of principle, so it will be necessary to say something more about the cases.

[74] Given that LMIM is the responsible entity and trustee, not the first applicants, the starting point is that the first applicants' remuneration as liquidators is not payable from the trust property, as a matter of course.

[75] In the usual course, a company, as trustee, has a right of indemnity by recoupment from the trust assets for debts properly incurred and paid from the property of the company. That right of indemnity is property. If a trustee company that is entitled to an indemnity goes into liquidation the right of indemnity is property of the company from which the liquidator would be entitled to pay his or her remuneration, and expenses, as priority debts in the winding up under s 556 of the CA.[13] This is no more than a conventional statement of a liquidator's right to payment of remuneration as deferred expenses from the property of the company. It is not apposite to a direct claim by a liquidator to payment of remuneration or expenses from the property of a trust of which the company is trustee.

[76] However, an alternative basis for a liquidator's direct claim to payment of remuneration and expenses from trust property exists. In *re Suco Gold Pty Ltd (in liq)*,[14] a liquidator sought orders that he would be entitled to apply moneys from the sale of trust assets in payment of the costs and expenses (including remuneration) properly incurred in the winding up. The company had carried on business as trustee of the relevant trust as its sole business.

[77] There are a number of points that emerge from the reasons of King CJ in *re Suco Gold*. The passage of interest is:

> "It is now necessary to consider the position of the liquidator's costs, expenses and remuneration in the light of the above principles. Although I have not found myself able to agree with certain of the reasoning in *Re Enhill Pty Ltd* , it is, as a decision of the Full Supreme Court of Victoria, a highly persuasive authority for the proposition that the liquidator's costs, expenses and remuneration may be paid out of the trust property. There are

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12 *Re Obie Pty Ltd* [1984] 1 Qd R 371, 376.
13 *Re Enhill Pty Ltd* (1982) 7 ACLR 8.
14 (1983) 33 SASR 99.

> clearly strong practical considerations in favour of such a course. Unless that course can be followed, the liquidation of a trustee company without assets of its own cannot proceed. It seems to me that that course can be justified by reference to the obligations of the trustee company arising out of the carrying on of the business authorized by the trusts. It is part of the duty of the trustee company to incur debts for the purposes of the trust businesses and, of course, to pay those debts. Upon winding up, those debts can only be paid in accordance with the provisions of the Companies Act. This requires necessarily that there be a liquidator and that he incur costs and expenses and be paid remuneration. Section 292 provides that there be paid the costs and expenses of winding up, the taxed costs of the petitioner and the remuneration of the Liquidator "in priority to *other* unsecured debts" (emphasis mine). The expression "*other* unsecured debts" appears to imply that the costs and expenses of winding up, the petitioner's costs and the liquidator's remuneration are regarded by the statute as debts of the company. As the company's obligation as trustee to pay the debts incurred in carrying out the trust cannot be performed unless the liquidation proceeds, it seems to me to be reasonable to regard the expenses mentioned above as debts of the company incurred in discharging the duties imposed by the trust and as covered by the trustee's right of indemnity. If that reasoning is wrong, I would, like Lush J in *Re Enhill Pty Ltd*, be prepared to rely on the principle enunciated by Dixon J in *In re Universal Distributing Co Ltd (in Liquidation)*"[15] (footnotes omitted)

[78] Dixon J's statement in *In re Universal Distributing Co*[16]was:

> "The debenture-holders are creditors who have a specific right to the property for the purpose of paying their debts. But if it is realised in the winding up, a proceeding to which they are thus parties, the proceeds must bear the cost of the realisation just as if they had begun a suit for its realisation or had themselves realised it without suit…
>
> In applying this principle, only those expenses appear to have been thrown against the fund belonging to the debenture-holders which have been reasonably incurred in the care, preservation and realisation of the property. In the present case the liquidator has employed a material part of his time and energies in recovering moneys, both uncalled capital and debts, which enure for the debenture-holder, and in so far as these services increase the remuneration which he receives, I see no reason why the burden should not be thrown upon the proceeds. The question is not whether moneys available for unsecured creditors should be relieved at the expense of the security. In such a case it may be said that the service of collecting enough to discharge the debenture must in any event be performed in order that a surplus may then arise in which the unsecured creditors may participate."[17]

[79] A similar, but wider, principle has informed later decisions. In 1989, in *re Berkeley Applegate (Investment Consultants) Ltd (in liq); Harris v Conway*,[18] a liquidator applied for directions as to whether any part of his expenses and remuneration could

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15 (1983) 33 SASR 99, 110.
16 (1933) 48 CLR 171.
17 (1933) 48 CLR 171, 174.
18 [1989] Ch 32.

be paid out of trust assets. The trust assets were loans to borrowers secured by real property mortgages held by the company as trustee on behalf of the beneficiary investors. The court held:

> "The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest… or by a receiver appointed by the court whose fees would have been borne by the trust property… and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity...".[19]

[80] This basis has been relied on in later cases, although the statements of principle are not always clear or consistent.

[81] So, in *re GB Nathan & Co Pty Ltd (in liq)*,[20] in a case where the trusts were not active trading trusts, it was held that a liquidator's work in relation to trust assets for the purpose of winding up the affairs of the company should be paid from the non-trust assets first, after which it would be appropriate to apply the *Berkeley Applegate* principle.[21]

[82] And in *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)*,[22] Finkelstein J went further again:

> "These cases establish, clearly enough in my opinion, that provided a liquidator is acting reasonably he is entitled to be indemnified out of trust assets for his costs and expenses in carrying out the following activities: identifying or attempting to identify trust assets; recovering or attempting to recover trust assets; realising or attempting to realise trust assets; protecting or attempting to protect trust assets; distributing trust assets to the persons beneficially entitled to them.
>
> The position is a little more involved as regards work done and expenses incurred in what may be described as general liquidation matters. If that work is unrelated to the beneficiaries and their claims it is difficult to see how the cost could be charged against their assets. In the case of a company that has carried on the business of trustee it might be that much of the work involved in the liquidation is chargeable against trust assets if it can be shown that the liquidation is necessary for the proper administration of the trust. But it is unlikely that this will be so where the company did not act solely as trustee or at least did not act in that capacity to a significant extent. In that event, the liquidator will be required to estimate those of his

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19 [1989] Ch 32, 50.
20 (1991) 24 NSWLR 674.
21 (1991) 24 NSWLR 674, 689.
22 (1999) 30 ACSR 377.

> costs that are attributable to the administration of trust property and only those costs will be charged against the trust assets."[23]

[83] See also *re Sutherland; French Caledonia Travel Service Pty Ltd*[24] and *re AAA Financial Intelligence Ltd (in liq)*.[25]

[84] In Australia, more recent cases would appear to reinforce a liquidator's right to indemnity from the property of the trust for remuneration or expenses of the administration of the winding up when the only business of the company was acting as trustee of a private trust.

[85] In *Parbery v ACT Superannuation Management Pty Ltd & ors*,[26] it was held that a liquidator's costs and expenses in relation to one trust could not be charged to another trust where the company is trustee of more than one trust, but that if expenses of administration between various trusts cannot be apportioned with some accuracy, they were to be borne equally.[27]

[86] In *re Garra Water Investments Pty Ltd (in liq) v Ourback Yard Nursery Pty Ltd*,[28] it was held that where a company's only business had been to act as trustee of a trust business, the liquidator's expenses of finalising creditors' claims (for debts incurred as trustee) against the company and steps taken to preserve assets to meet those debts were the subject of a right of indemnity from the company's assets as trustee, notwithstanding that the company had been removed as the trustee after the winding up commenced.

[87] In *re Independent Contractor Services (Aust) Pty Ltimited (in liq) (No 2)*[29] Brereton J said:

> "The liquidators of a company which is the trustee of a trading trust and has no other activities, are entitled to be paid their costs and expenses, whether for administering the trust assets or for 'general liquidation work', out of the trust assets."[30]

[88] And in *Primespace Property Investment Limited (in liq)*[31] Black J re-stated the principles he had formulated in *re National Buildplan Group Pty Ltd (subject to deed of company arrangement)*[32] as follows:

> "the court has an inherent jurisdiction to allow an insolvency practitioner, in his or her capacity as trustee of a fund, to receive payment of remuneration, costs and expenses out of trust assets: ... [and] a liquidator may, if acting reasonably, be indemnified out of trust assets for costs and expenses

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23 (1998) 30 ACSR 377, 385.
24 (2003) 59 NSWLR 361, 422-429.
25 [2014] NSWSC 1004, [13]-[18].
26 (2010) 79 ACSR 425.
27 (2010) 79 ACSR 425, 434 [34]. Compare *Brisconnections Management Company Ltd v Dalewon Pty Ltd* (2010) 79 ACSR 530, 539 [22].
28 [2012] SASC 44.
29 (2016) 305 FLR 222.
30 (2016) 305 FLR 222, 232 [27]. See also *Re North Food Catering Pty Ltd* [2014] NSWSC 77, [9]-[17].
31 [2016] NSWSC 1821.
32 [2014] NSWSC 146.

> incurred in recovering or attempting to recover, realising or attempting to realise, or protecting or attempting to protect, trust assets and in distributing those assets to the persons beneficially entitled to them…".

[89] As may be apparent, some of these formulations tie the entitlement to indemnity for remuneration to the activities of the company as trustee (as the sole business of the company), whereas others tie it to costs and expenses incurred in relation to protection of the trust assets that would have to be incurred in any event. They are not the same things. A simple example illustrates the difference. There may not be any difficulty or significant costs associated with a liquidator preserving trust assets. For example, they might be liquid funds held in a bank account. Yet the administration of the company in liquidation may involve a significant amount of work to settle the list of creditors of the company (who all are also creditors of the trust). It would be inequitable, in my view, for the beneficiaries of the trust to be permitted to say that the liquidators' remuneration and expenses of admitting the creditors to proof are not recoverable against the assets of the trust when the creditors' debts are trust debts.

[90] For that reason, in my view, the formulation in *re Independent Contractor Services* is to be preferred, where the business of the company was only carried on as trustee of the relevant trust.

[91] I note that this may go further than one of the underpinnings for the right of indemnity referred to by King CJ in *re Suco*, namely that based on the principle of protection of trust assets stated in *In re Universal Distributing Co Ltd*.

[92] I also note that the operation of the *Berkeley Applegate* principle was recently discussed in *Gillan v HEC Enterprises Ltd*.[33] That discussion is consistent with the entitlement of a liquidator to an allowance against the property of the trust for costs incurred and for skill and labour expended in connection with the administration of property where the work would have had to be done either by the person entitled to the property or by a receiver appointed by the court whose fees would have been borne by the trust property.[34] Nevertheless, the English cases have not gone so far as to accept that general liquidation work may also be covered where the company had no other business than the trust business and in general appear to accept that an allowance is usually made when the beneficiary requires the assistance of the court to obtain the trust property.

[93] Summarising, although there is no shortage of cases under Australian law to suggest that a liquidator may not be entitled to a complete indemnity for the general costs of the liquidation, that reasoning does not appear to apply where the only business of the company that is identified is that the company acted as trustee of the relevant trust or trusts.

Not solely a trustee of one trust

[94] Mr Whyte submits that LMIM did not carry on business solely as responsible entity and trustee of the FMIF. There are really two connected points. First, the FMIF was only one of the funds administered by LMIM as responsible entity and trustee. It also acted as responsible entity and trustee of each of the other registered schemes

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33 [2017] 1 BCLC 340, [71]-[89].

34 [2017] 1 BCLC 340, [72].

and as trustee of the MPF (until 12 April 2103). Second, LMIM had assets in its own right and was carrying on business as a funds' manager on its own account.

[95] The question raised where a trustee carries on business as the trustee of more than one trust was considered in *Parbery*. Brereton J said:

> "…beneficiaries of a group of trusts are, in law, entitled to insist that the common trustee, or common administrators or liquidators of a common trustee, treat each trust separately and act in the best interests of each trust. The general equitable right of fiduciary loyalty in such a situation is clearly and expressly recognised in s 601FC(1)(c) of the CA, which provides that a responsible entity must act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, it must give priority to the members' interests.
>
> It is clear that the trustee of several separate trusts cannot charge the beneficiaries of one trust with the costs and expenses incurred in relation to work done for the benefit of another trust. If the trustee cannot, with some accuracy, apportion the expenses of administration between the various trusts, "'the maxim that equality is equity should provide the solution to the problem of apportionment'…".

[96] Accordingly, the circumstance that the trustee is acting for more than one trust does not preclude an order for payment of the liquidators' remuneration and expenses from trust property, but requires that the recourse be the appropriate amount attributable to each of the relevant trusts.

[97] Where the trustee also carries on non-trust business, the position ordinarily requires a separation of the liquidator's remuneration and expenses that are attributable to the trust from that part of the liquidator's costs and expenses attributable to the company's non-trust business.

[98] Mr Whyte relies on the following statement from *re AAA Financial Intelligence Ltd (in liq)*:[35]

> "(1) Where the company is trustee of a trading trust and has no other activities, the liquidators are entitled to be paid their costs and expenses, whether for administering the trust assets or for "general liquidation work", out of the trust assets.
>
> (2) Where the company does not act solely as trustee, costs and expenses referable to work done in relation to trust assets which may nonetheless be considered as having been done for the purpose of winding up the company ought ordinarily be borne primarily by the (non-trust) property of the company, to the extent that the assets permit.
>
> (3) At least where the non-trust assets do not permit that course, and perhaps even when they do, a liquidator is entitled to be indemnified out of trust assets for his costs and expenses, but only to the extent that they are referable to administering the trust assets. This is pursuant to the court's

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35 [2014] NSWSC 1004.

> equitable jurisdiction to allow a trustee remuneration costs and expenses out of trust assets, which extends to a person such as a liquidator who is, for practical purposes, controlling a trustee.
>
> (4) In principle, where the liquidator does work which would entitle him both to remuneration as liquidator by the company, and recovery from the trust assets, there are two funds liable and there should be contribution between them. However, where there are no assets of the company available, it is unnecessary to consider the question of contribution. If a liquidator has done work which is attributable equally to the winding up of the company and the administration of trust assets, and there are no assets of the company at all to meet his expenses in doing so, the expenses are payable solely from the trust assets
>
> (5) Where the liquidator is administering, through the company of which he/she is liquidator, more than one trust, the liquidator is not entitled to charge the beneficiaries of one trust with the costs and expenses incurred in relation to the other, although where allocation is not possible a *pari passu* allocation may be permitted."[36] (citations omitted)

[99] The evidence was not clear on this question in Mr Park's first affidavit. There was no relevant balance sheet of LMIM showing its non-trust assets and liabilities. Mr Park said that the business of the company consisted only of operating its funds management business. Mr Whyte contended for the contrary view by his first submissions.

[100] In his second affidavit, Mr Park stated that based on his investigations as administrator and liquidator of LMIM it is his opinion that it would be appropriate to characterise both LMIM and LMA as "professional trustees" and the "predominant purpose" of those companies as to act as responsible entity and trustee.

[101] There are some difficulties with this evidence. First, although not objected to, it is not obviously a matter of accounting expertise to express an opinion that a company is a professional trustee. Still, the point does not seem contentious.

[102] Second, the statement that LMA was a responsible entity or a professional trustee is incorrect. LMIM chose to conduct its business by contracting with LMA to provide services that encompassed functions and responsibilities that LMIM was required to carry out as responsible entity. Doing so did not constitute LMA as either the responsible entity or trustee of any of the funds. It was not stated by Mr Park that LMA operated so that its services were supplied under the First Services Agreement or Second Services Agreement without profit, except possibly from some time after the appointment of the first applicants as administrators, as the result of a decision they made not to charge for LMA's services in accordance with the terms of the Second Services Agreement, for the periods of their appointment as administrators and liquidators.

[103] LMA was also appointed by PTAL to provide services on specific retainers under the Loan Management Agreements in relation to loans in default. These specific

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36 [2014] NSWSC 1004, [13].

contractual relationships were associated with PTAL's appointments of LMIM as agent under the Appointment of Agent agreements, at least insofar as LMIM was concerned. They resulted in loan management fees being charged by LMA to PTAL. LMIM would pay the fee to LMA as agent on behalf of PTAL, from the assets of the relevant fund. In my view, nothing suggests that under these contractual relationships LMA was acting as responsible entity or as trustee of the relevant fund.

[104] Mr Park's second affidavit exhibited an estimated statement of position of LMIM as at 31 January 2016. Apart from a cash amount of $409,707, it showed that the assets were receivables from insurers and other sundry debtors. Before payment of unsecured creditors, the deficiency was in the range between $1,470,796 (on the optimistic case) and $2,433,416 (on the pessimistic case). Because of the priority of debts and claims payable under s 556 of the CA,[37] there are no assets in the administration of LMIM to pay the administrators or liquidators remuneration.

[105] However, included in that estimated statement of position were liabilities for liquidators' remuneration in the amount of $1,347,025.00 and liquidators' disbursements of $33,466.00. In each case, the liability was also described as "LMIM Corporate". Although the parties devoted little attention to them, it appears that these items are for remuneration and expenses in the winding up of LMIM that do not relate to the funds. The other side of that coin is that the amounts claimed in this application are all amounts that relate to or are intended to relate to the funds.

[106] In my view, overall, these facts do not show that this is a case where the remuneration and expenses subject to this application should not be allowed as remuneration or expenses to be paid from the property of the funds on the ground that they are the general costs of the administration or liquidation of LMIM, incurred in circumstances where LMIM had a non-trust business to which the claimed remuneration and expenses should be allocated, thereby limiting recovery to the non-fund property of LMIM.

[107] It is not unusual that a liquidator of a trustee company must administer the trust for the company, dealing with the creditors of the company who are creditors of the company as trustee. It is a necessary function of the liquidator to separate the "trust" liabilities from other liabilities of the company and to separate the property of the trust from any property of the company in liquidation in its own right.

[108] I reject any general notion that a liquidator who does so and who may have a direct right to payment from the property of the trust for remuneration and expenses that must be incurred in carrying out those tasks is prejudiced if the company has some non-trust business as well as the business of the trust. It is up to the liquidators to separate the relevant tasks and remuneration and expenses. It is a question of adequate record keeping, not a lack of any legal entitlement, if the liquidator is unable to separate the non-trust remuneration and expenses.

Administrators' remuneration and expenses from the funds

[109] It is not suggested that the principles that apply as to the first applicants' claims as liquidators for an order for payment of their remuneration from the trust property of

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37 Remuneration as "deferred expenses" ranks ninth in the order of payment under s 556(1)(de) of the CA.

the funds do not apply equally to the first applicants' claims as administrators for an order for payment of their remuneration and expenses from the trust property of the funds.[38]

Evidence of the work performed for remuneration

[110] As previously stated, whether the remuneration in question is that of an administrator under s 449E(1)(c) of the CA or a liquidator under s 473(3)(b)(ii) of the CA the same principles apply, namely that a court determining remuneration must have regard to whether the remuneration is reasonable, taking into account the matters referred to in s 449E(4) and 473(1).

[111] In his first affidavit, Mr Park set out the way in which the work for which the first applicants seek to be remunerated was carried out. There are some differences in the level of detail of the supporting documents that have been prepared for the different funds.

[112] The Australian Restructuring Insolvency and Turnaround Association ("ARITA") publishes a Code of Professional Practice ("the ARITA Code"). Mr Park says that the systems used by FTI Consulting for time recording were designed to ensure compliance with the ARITA Code.

[113] The ARITA Code recommends dividing work into seven categories. It also gives examples of the sort of work which falls into each category, which is the most useful means of explaining the categories. The categories and some of the relevant examples are:

(a) "Assets" – including work relating to:
  (i) the sale of real property or of a business as a going concern;
  (ii) debtors;
  (iii) identifying, managing and valuing stock;

(b) "Creditors" – including work relating to:
  (i) responding to creditor enquiries;
  (ii) preparing reports to creditors;
  (iii) identifying and dealing with retention of title claims;
  (iv) convening meetings of creditors;

(c) "Employees" – including work relating to:
  (i) responding to employee enquiries;
  (ii) calculation of employee dividends and entitlements;
  (iii) dealing with matters relating to the Commonwealth Fair Entitlements Guarantee and General Employee Entitlements and Redundancy Scheme;

(d) "Trade On" – including work relating to:
  (i) managing an ongoing business;
  (ii) processing receipts and payments;
  (iii) budgeting and financial reporting;

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38 *Re Sutherland* (2004) 50 ACSR 297, 299-301, [10]-[17].

(e) "Investigation" – including work relating to:
  (i) conducting investigations into the affairs of the company;
  (ii) litigation or other Court matters (for example, public examinations);
  (iii) reporting to ASIC;

(f) "Dividend" – including work relating to:
  (i) processing proofs of debt;
  (ii) determining and conducting the procedures relating to the declaration of a dividend; and

(g) "Administration" – including work relating to:
  (i) general correspondence, document maintenance and the review of files;
  (ii) dealing with insurers and administering the bank accounts of the winding up;
  (iii) statutory reporting functions.

[114] For the Category 1 claims, the base level document is a narration of each time entry for time claimed. The narrations are compiled into a chronological schedule. Each entry includes the name of the person doing the task, their position in the first applicant's firm, the charge out rate, the time charged (in hours and 6 minute units), the amount of the charge, a task description allocation to an ARITA code category and a one, two or three line narrative description. There are schedules in this form for the FMIF, AIF, ASPF, CPF, CP-AIF and ICP-AIF.

[115] For the FMIF Category 1 claims, there is a further schedule styled "Fee Summary Descriptions – LM First Mortgage Income Fund". This schedule collects the work done into further categories and subcategories over particular periods. It sets out the work that was done according to an allocation to a particular subject area, a task description code and a summary of the tasks undertaken. It breaks the tasks down into more than 60 different categories across ten subject areas. The ten subject areas are Deutsche Bank reporting, general administration time, loan book management, controllership time not specifically allocated to category 3 [loan book management], fund level strategies and cash flow preparation, litigation, responsible entity statutory compliance, travel time – general, remuneration calculation and investor communications. The schedule collects, according to those allocations, the task description code, task description, number of recorded hours in units of one tenth of an hour and the resultant dollar amount. The allocations are spread over nine consecutive time periods.

[116] As previously indicated, where a work item or line in the schedules is allocated specifically to a particular fund it is labelled as a Category 1 item or claim. The applicants, through Mr Park, say that all of the work claimed as Category 1 remuneration for the FMIF is for work which was directly associated with the external control of the FMIF.

[117] The system for recording work deployed by the first applicants and their employees required the work producer to allocate the particular task or work to a code. There were codes for work specifically related to the FMIF. Mr Park says that some proportion of those allocations, although he could not presently say what proportion, was directly connected with the identification, recovery, realisation, protection or distribution of the assets of the FMIF or attempts at those things. In

addition to the Fee Summary Descriptions schedule, and the detailed schedule of narratives that underlie it, Mr Park described the work carried out by the first applicants and their staff over the period of the applicants' claims.

[118] Mr Park says that the work he believes to be directly referable to the FMIF involved the principal tasks of:

(a) reporting to and dealing with the FMIF's secured creditor, Deutsche Bank, and its receivers, McGrath Nichol;
(b) managing the loan book of the FMIF;
(c) controllership time not specifically allocated to the loan accounts of one of the borrowers, but which nevertheless related to the FMIF;
(d) preparation of budgets, strategic overviews and cash flows for the FMIF;
(e) complying with the statutory obligations of LMIM as responsible entity;
(f) communicating with members;
(g) litigation involving LMIM as responsible entity of the FMIF; and
(h) general administrative time related to those tasks.

[119] Mr Park says that the Category 2 work generally comprised the time for carrying out tasks referrable to LMIM and the funds as a whole, being general funds management remuneration and expenses. The tasks include:

(a) dealing with issues relating to the books and records of the funds, that were intermingled and not practicably separable;
(b) dealing with issues relating to insurance;
(c) administration and management of LMIM's fund management operations and its relationship with LMA;
(d) complying with the statutory obligations of LMIM as a responsible entity under the CA and other relevant legislation;
(e) tasks where it would be inequitable and impractical to make multiple entries across multiple funds for the item of work; and
(f) general administrative tasks for those matters.

[120] Mr Park says that the delegation of the work to a particular staff member reflected the nature of the work. Less complex work was performed by junior staff members and more complex work was performed by senior staff members and the applicants.

[121] Where the first applicants judged that work was not necessary for the efficient conduct of the administration of the liquidation of LMIM it was not performed. For example:

(a) following Mr Whyte's appointment the first applicants minimised contact with members of the FMIF;
(b) following Mr Whyte's appointment the first applicants did not cause financial statements to be prepared in respect of the FMIF;
(c) the first applicants did not conduct a line by line review of Mr Whyte's application for approval of his remuneration;
(d) the applicants did not intervene in a Federal Court proceeding brought by ASIC against some of the former directors of LMIM; and
(e) the applicants have limited their involvement in proceedings in this court where possible.

[122] Mr Park says that in his experience as an official liquidator the time recorded for each of the tasks in the schedules was commensurate with what was required to be undertaken and that the records are accurate.

[123] The quantum of the remuneration for the period of the first applicants' appointment as administrators and liquidators up to 21 August 2013 is not disputed by Mr Whyte, subject to the questions specifically raised below.

[124] After 21 August 2013, the tasks related to the Category 1 remuneration for the FMIF included:

(a) reviewing and updating cash flow models;
(b) liaising with the DB Receivers and Mr Whyte concerning:
(i) the handover of day to day FMIF operations;
(ii) queries related to the ongoing processes for managing the undifferentiated financial records;
(iii) the scope of the work for LMIM;
(iv) staffing levels, the status of the various assets and insurance issues;
(v) the possibility of refinancing the debt of Deutsche Bank with a view to the DB Receivers retiring;
(vi) the administrators' and liquidators' right of indemnity;
(c) dealing with the controllership matters where the work is not referrable to the specific asset;
(d) reviewing loan book documentation, preparing loan book strategy, reviewing and facilitating requests for payments out of the FMIF, liaising with the custodian in respect of securities and releases;
(e) investigating and considering the possibility of a settlement with LMIM's insurer over a variety of claims;
(f) receiving inquiries from creditors who may be indemnified out of the property of the FMIF;
(g) perusing the various updates from Mr Whyte as to the status of the winding up of the FMIF;
(h) reviewing the material prepared by Mr Whyte in support of each of the various applications for remuneration;
(i) preparing and reviewing claims for indemnity against the property of the FMIF for creditors who may be indemnified out of the FMIF and for operational costs, legal costs and remuneration;
(j) responding to requests for information from Mr Whyte, his lawyers and the DB Receivers; and
(k) responding to litigation brought against LMIM and bringing applications.

[125] Mr Park identifies that the Category 2 work for the same period includes:

(a) dealing with LMA employees and their role;
(b) tasks incidental to running the business;
(c) obtaining and dealing with legal advice in relation to LMA;
(d) maintaining accounts and financial records;
(e) preparing and updating cash flow projections;
(f) dealing with leasing issues relating to LMA; and
(g) analysing, calculating and paying operational costs.

[126] By way of further explanation of his view that the Category 2 work was for the benefit of the funds, Mr Park says that the work:

(a) was such that it would be inequitable to charge to a particular fund;
(b) tasks were incidental to the ongoing trading of the funds' business such as protocols for payments;
(c) included dealing with media requirements;
(d) included responding to requests for information from ASIC;
(e) included dealing with matters relating to the various books and records issues;
(f) included communicating and closing various "satellite offices" of LMIM; and
(g) included dealing with inquiries from investor advisors.

[127] These summary descriptions are not an exhaustive statement of Mr Park's evidence relating to the nexus between the work that was done and the purposes of the funds including the FMIF.

Category 1 remuneration claims

FMIF

[128] As set out in Mr Park's first affidavit, broken down into the ARITA Code categories for particular periods in accordance with the chronology of the administration and liquidation, the first applicants' claims for Category 1 remuneration as administrators and liquidators of LMIM relating to the FMIF were as follows:

Category	Total Hours	Amount (net of GST)
Assets		
For the period 19 March, 2013 to 10 July, 2013	807.90	$284,031.50
For the period 11 July, 2013 to 7 August, 2013	54.1	$26,516.00
For the period 8 August, 2013 to 31 December, 2013	24.7	$12,841.00
For the period 1 January, 2014 to 31 March, 2014	7.2	$3,525.50
For the period 1 April, 2014 to 30 June, 2014	0.7	$411.00
For the period 1 July, 2014 to 30 September, 2014	12.1	$6,532.00
For the period 1 October, 2014 to 31 December, 2014	2.4	$1,215.00
For the period 1 January, 2015 to 30 June, 2015	0.7	$394.00
For the period 1 July, 2015 to 30 September, 2015	0.4	$120.00
SUBTOTAL	**910.20**	**$335,586.00**
Creditors		
For the period 19 March, 2013 to 10 July, 2013	234.2	$98,587.00
For the period 11 July, 2013 to 7 August, 2013	137.9	$71,522.50
For the period 8 August, 2013 to 31 December, 2013	53.0	$27,645.00
For the period 1 January, 2014 to 31 March, 2014	6.5	$3,352.00
For the period 1 April, 2014 to 30 June, 2014	1.4	$728.00
For the period 1 July, 2014 to 30 September, 2014	11.3	$4,669.00
For the period 1 October, 2014 to 31 December, 2014	7.4	$2,881.00
For the period 1 January, 2015 to 30 June, 2015	31.6	$13,149.00
For the period 1 July, 2014 to 30 September, 2014	15.7	$7,051.00
SUBTOTAL	**498.6**	**$229,364.50**

Trade on		
For the period 19 March, 2013 to 10 July, 2013	1,164.80	$415,868.96
For the period 11 July, 2013 to 7 August, 2013	234.30	$122,064.50
For the period 8 August, 2013 to 31 December, 2013	455.60	$210,425.00
For the period 1 January, 2014 to 31 March, 2014	152.80	$64,820.50
For the period 1 April, 2014 to 30 June, 2014	79.5	$39,308.00
For the period 1 July, 2014 to 30 September, 2014	136.1	$65,877.50
For the period 1 October, 2014 to 31 December, 2014	36.2	$16,228.00
For the period 1 January, 2015 to 30 June, 2015	68.0	$37,057.00
For the period 1 July, 2015 to 30 September, 2015	32.2	$17,900.50
SUBTOTAL	**2,359.50**	**$989,549.96**
Investigations		
For the period 19 March, 2013 to 10 July, 2013	34.4	$17,259.00
For the period 11 July, 2013 to 7 August, 2013	10.5	$6,061.50
For the period 8 August, 2013 to 31 December, 2013	47.6	$26,731.50
For the period 1 January, 2014 to 31 March, 2014	6.7	$3,705.00
For the period 1 April, 2014 to 30 June, 2014	9.1	$4,959.00
For the period 1 July, 2014 to 30 September, 2014	2.8	$1,644.00
For the period 1 October, 2014 to 31 December, 2014	2.1	$937.00
For the period 1 January, 2015 to 30 June, 2015	6.1	$2,289.00
For the period 1 July, 2015 to 30 September, 2015	4.1	$2,040.00
SUBTOTAL	**123.4**	**$65,626.00**
Dividend		
For the period 19 March, 2013 to 10 July, 2013	0.0	$0.00
For the period 11 July, 2013 to 7 August, 2013	0.0	$0.00
For the period 8 August, 2013 to 31 December, 2013	0.0	$0.00
For the period 1 January, 2014 to 31 March, 2014	0.0	$0.00
For the period 1 April, 2014 to 30 June, 2014	1.0	$299.00
For the period 1 July, 2014 to 30 September, 2014	1.8	$486.00
For the period 1 October, 2014 to 31 December, 2014	0.0	$0.00
For the period 1 January, 2015 to 30 June, 2015	3.5	$1,538.00
For the period 1 July, 2015 to 30 September, 2015	0.0	$0.00
SUBTOTAL	**6.3**	**$2,323.00**
Administration		
For the period 19 March, 2013 to 10 July, 2013	79.4	$37,728.40
For the period 11 July, 2013 to 7 August, 2013	50.8	$26,718.50
For the period 8 August, 2013 to 31 December, 2013	42.5	$14,329.50
For the period 1 January, 2014 to 31 March, 2014	32.4	$10,238.50
For the period 1 April, 2014 to 30 June, 2014	52.7	$26,559.00
For the period 1 July, 2014 to 30 September, 2014	82.8	$39,921.00
For the period 1 October, 2014 to 31 December, 2014	26.6	$10,398.50
For the period 1 January, 2015 to 30 June, 2015	9.3	$3,467.00
For the period 1 July, 2015 to 30 September, 2015	8.1	$3,508.00
SUBTOTAL	**384.6**	**$172,868.40**
TOTAL	**4,283.0**	**$1,795,537.86**

[129] Mr Park said that $36,092.50 was paid against those amounts, leaving $1,759,445.36 as the amount originally claimed for remuneration from the FMIF in the application.

[130] By the Draft Order, the applicants separated the amounts claimed as Category 1 remuneration and expenses from the FMIF to $1,059,322.37 for the period of the first applicants' appointment as administrators (including Mr Corbett's consultancy fees) up to 31 July 2013 and $739,323.31 for the period of the first applicant's appointment as liquidators, from 1 August 2013 to 30 September 2015. By his final submissions in response to the Draft Order, Mr Whyte does not challenge the calculation of the final amounts in the Draft Order.

Other Funds

[131] As set out in Mr Park's first affidavit, the Category 1 claims for payment of remuneration and expenses from the other funds were not broken down to the same extent as was done for the FMIF. The amounts for each fund over the relevant periods were:

Fund	Hours	Amount (ex GST)
For the period 19 March, 2013 to 30 June, 2013		
AIF		$83,962.34
CPF		$2,973.80
ASPF		$2,087.76
CP-AIF		$5,580.70
ICP-AIF		$1,151.78
For the period 1 July, 2013 to 30 June, 2014		
AIF		$273,124.35
CPF		$34,905.54
ASPF		$45,848.93
CP-AIF		$24,724.75
ICP-AIF		$11,520.76
For the period, 1 July 2014 to 30 June, 2015		
AIF		$191,416.16
CPF		$36,112.59
ASPF		$53,000.35
CP-AIF		$45,785.20
ICP-AIF		$13,637.64
For the period, 1 July 2015 to 30 September, 2015		
AIF		$71,177.25
CPF		$18,777.08
ASPF		$23,214.35
CP-AIF		$15,645.88
ICP-AIF		$6,412.97
Total		**$961,060.18**

[132] However, by the Draft Order, the applicants also altered those amounts, so that the total claimed as Category 1 remuneration for those funds is now $454,776.40 broken up as follows:

(a) AIF - the amounts claimed as Category 1 remuneration are $119,131.90 for the period of the first applicants' appointment as administrators (including Mr Corbett's consultancy fees) and $88,096 for the period of the first applicant's appointment as liquidators, totalling $207,227.90;

(b) CPF - the amounts claimed as Category 1 remuneration are $3,927.50 for the period of the first applicants' appointment as administrators and $118,858.50 for the period of the first applicant's appointment as liquidators, totalling $122,786.00;

(c) ASPF - the amounts claimed as Category 1 remuneration are $4,463.00 for the period of the first applicants' appointment as administrators (including Mr Corbett's consultancy fees) and $81,983.00 for the period of the first applicant's appointment as liquidators, totalling $86,446.00;

(d) CPF-AIF - the amounts claimed as Category 1 remuneration are $9,060.50 for the period of the first applicants' appointment as administrators (including Mr Corbett's consultancy fees) and $29,256.00 for the period of the first applicant's appointment as liquidators, totalling $38,316.50;

[133] For the period after 1 August 2013, the first applicants claim an order determining and fixing remuneration as liquidators as well as an order for payment from the funds of the relevant amounts.

[134] Unfortunately, the evidence as to the Category 1 amounts for the other funds was not organised by reference to the same periods as stated in the application. That evidence broke the amounts into the periods 19 March 2013 to 30 June 2013, 1 July 2013 to 30 June 2014, 1 July 2014 to 30 June 2015 and 1 July 2015 to 30 September 2015. There was no explanation for the different timings. A logical reason is that neither the DB Receivers nor Mr Whyte were appointed to the property of the other funds.

[135] As well, the total amounts of the Category 1 claims for the other funds in the evidence did not reconcile with the total of the amounts for which an order was sought in the Draft Order as set out above. The total of the amounts in the evidence appears to be higher.[39]

Category 2 remuneration claims

[136] As set out in Mr Park's first affidavit, again adopting the ARITA Code categories, the amount of remuneration and expenses as administrators and liquidators that the applicants applied to be paid from the funds for general funds management of all the funds (described as the "Category 2" claims) was as follows:

Category	Total Hours	Amount (net of GST)
Assets		
For the period 19 March, 2013 to 30 June, 2013		$5,747.50
For the period 1 July, 2013 to 31 July, 2013		$2,344.00
For the period 1 August, 2013 to 31 August, 2013		$3,540.50
For the period 1 September, 2013 to 30 September, 2013		$1,617.50
For the period 1 October, 2013 to 31 October, 2013		$954.50
For the period 1 November, 2013 to 30 November, 2013		$1,732.50
For the period 1 December, 2013 to 31 December, 2013		$271.00
For the period 1 January, 2014 to 31 March, 2014		$10,571.00
For the period 1 April, 2014 to 30 June, 2014		$10,748.50

[39] Mr Park's first affidavit, Ex JRP-1, pp 682-701.

For the period 1 July, 2014 to 30 September, 2014		$1,348.00
For the period 1 October, 2014 to 31 December, 2014		$3,363.00
For the period 1 January, 2015 to 30 June, 2015		$1,490.00
For the period 1 July, 2015 to 30 September, 2015		$771.00
SUBTOTAL		**$44,499.00**
Creditors		
For the period 19 March, 2013 to 30 June, 2013		$9,050.00
For the period 1 July, 2013 to 31 July, 2013		$3,013.00
For the period 1 August, 2013 to 31 August, 2013		$2,066.50
For the period 1 September, 2013 to 30 September, 2013		$898.00
For the period 1 October, 2013 to 31 October, 2013		$650.00
For the period 1 November, 2013 to 30 November, 2013		$1,252.00
For the period 1 December, 2013 to 31 December, 2013		$1,123.50
For the period 1 January, 2014 to 31 March, 2014		$5,001.00
For the period 1 April, 2014 to 30 June, 2014		$5,634.00
For the period 1 July, 2014 to 30 September, 2014		$2,097.00
For the period 1 October, 2014 to 31 December, 2014		$1,539.00
For the period 1 January, 2015 to 30 June, 2015		$3,462.00
For the period 1 July, 2015 to 30 September, 2015		$0.00
SUBTOTAL		**$35,786.00**
Employees		
For the period 19 March, 2013 to 30 June, 2013		$16,856.00
For the period 1 July, 2013 to 31 July, 2013		$1,046.00
For the period 1 August, 2013 to 31 August, 2013		$3,215.00
For the period 1 September, 2013 to 30 September, 2013		$2,880.50
For the period 1 October, 2013 to 31 October, 2013		$1,193.50
For the period 1 November, 2013 to 30 November, 2013		$0.00
For the period 1 December, 2013 to 31 December, 2013		$365.50
For the period 1 January, 2014 to 31 March, 2014		$1,115.00
For the period 1 April, 2014 to 30 June, 2014		$0.00
For the period 1 July, 2014 to 30 September, 2014		$0.00
For the period 1 October, 2014 to 31 December, 2014		$0.00
For the period 1 January, 2015 to 30 June, 2015		$0.00
For the period 1 July, 2015 to 30 September, 2015		$0.00
SUBTOTAL		**$26,671.50**
Trade on		
For the period 19 March, 2013 to 30 June, 2013		$216,228.00
For the period 1 July, 2013 to 31 July, 2013		$32,295.50
For the period 1 August, 2013 to 31 August, 2013		$53,148.00
For the period 1 September, 2013 to 30 September, 2013		$12,894.50
For the period 1 October, 2013 to 31 October, 2013		$12,904.50
For the period 1 November, 2013 to 30 November, 2013		$8,782.00
For the period 1 December, 2013 to 31 December, 2013		$4,567.50
For the period 1 January, 2014 to 31 March, 2014		$27,331.50

For the period 1 April, 2014 to 30 June, 2014		$9,102.00
For the period 1 July, 2014 to 30 September, 2014		**$7,**049**.00**
For the period 1 October, 2014 to 31 December, 2014		$9,191.00
For the period 1 January, 2015 to 30 June, 2015		$26,520.00
For the period 1 July, 2015 to 30 September, 2015		$22,277.00
SUBTOTAL		**$442,290.50**
Investigations		
For the period 19 March, 2013 to 30 June, 2013		$15,233.50
For the period 1 July, 2013 to 31 July, 2013		$1,218.00
For the period 1 August, 2013 to 31 August, 2013		$0.00
For the period 1 September, 2013 to 30 September, 2013		$5,141.00
For the period 1 October, 2013 to 31 October, 2013		$1,358.00
For the period 1 November, 2013 to 30 November, 2013		**$**2,376.50
For the period 1 December, 2013 to 31 December, 2013		$436.50
For the period 1 January, 2014 to 31 March, 2014		$3,143.00
For the period 1 April, 2014 to 30 June, 2014		$469.00
For the period 1 July, 2014 to 30 September, 2014		$4,341.00
For the period 1 October, 2014 to 31 December, 2014		$1,993.00
For the period 1 January, 2015 to 30 June, 2015		$732.00
For the period 1 July, 2015 to 30 September, 2015		$362.00
SUBTOTAL		**$36,803.50**
Administration		
For the period 19 March, 2013 to 30 June, 2013		$406,429.49
For the period 1 July, 2013 to 31 July, 2013		$47,444.00
For the period 1 August, 2013 to 31 August, 2013		$56,201.00
For the period 1 September, 2013 to 30 September, 2013		$52,198.00
For the period 1 October, 2013 to 31 October, 2013		$28,908.00
For the period 1 November, 2013 to 30 November, 2013		$15,793.50
For the period 1 December, 2013 to 31 December, 2013		$9,546.00
For the period 1 January, 2014 to 31 March, 2014		$22,230.00
For the period 1 April, 2014 to 30 June, 2014		$38,896.50
For the period 1 July, 2014 to 30 September, 2014		$35,773.00
For the period 1 October, 2014 to 31 December, 2014		$24,061.50
For the period 1 January, 2015 to 30 June, 2015		$64,481.50
For the period 1 July, 2015 to 30 September, 2015		$20,480.00
SUBTOTAL		**$822,442.49**
TOTAL		**$1,408,492.99**

[137] However, by the Draft Order the applicants claim the total amount of $1,603,532.99 for Category 2 remuneration and expenses over the relevant period, as set out below.

[138] The amounts claimed by the Draft Order as Category 2 remuneration and expenses for the period of the first applicants' appointment as administrators up to 31 July 2013 total $952,094.99, allocated to the relevant funds in accordance with the applicants' submissions as follows:

(a) FMIF - $785,315.68;
(b) AIF - $133,046.69;
(c) CPF - $1,663.79;
(d) ASPF - $32,068.83.

[139] These amounts include the expense item described and dealt with below as the LMA Remuneration.

[140] Similarly, the amounts claimed by the Draft Order as Category 2 remuneration and expenses for the period of the first applicants' appointment as liquidators from 1 August 2013 to 30 September 2015, total $651,438.00, allocated to the relevant funds in accordance with the applicants' submissions as follows:

(a) FMIF - $481,479.09;
(b) AIF - $137,212.71;
(c) CPF - $1,527.76;
(d) ASPF - $31,218.44.

LMA remuneration

[141] Paragraph 4 of the Draft Order for Category 2 remuneration and expenses for the period of the first applicants' appointment as administrators up to 31 July 2013, includes the sum of $401,468.78 ($473,712.50 less $72,243.72 as an allocation to the MPF that is not within this application). It is for services supplied to LMA by the first applicants as administrators of LMA between 19 March 2013 and 31 July 2013. It does not relate to work performed by the administrators or liquidators or their staff directly for LMIM. I will call it "LMA Remuneration".

Expenses that are not remuneration

[142] The application and the Draft Order request orders in relation to "remuneration and expenses" in a number of different paragraphs. The majority of the amounts claimed are for remuneration as administrators or liquidators of LMIM. Unfortunately, the expenses are not clearly distinguished from the remuneration in the application ofr the Draft Order. It is appropriate to identify them in three groups as follows.

[143] The first group of expenses is that part of the Category 2 claim that is for the LMA Remuneration. As previously mentioned, the final amount claimed is $401,468.78.

[144] The second group of expenses is part of the Category 1 claim for the FMIF. In Mr Park's first affidavit, at par 89, he refers to expenses of the first applicants that were incidental to the work done for the remuneration the subject of the Category 1 claim for the FMIF as listed in a schedule.[40] The amount claimed is $35,919.18.

[145] The third group of expenses appears in a number of the schedules breaking down the Category 1 and Category 2 claims. It is called or identified as "OOPE", an abbreviation for out of pocket expenses. With some other adjustments, it explains the difference between the amounts claimed for remuneration in the tables set out above and the evidentiary schedules supporting the Category 1 and Category 2 claims. A reconciliation between the amounts claimed in the application and the

[40] Mr Park's first affidavit, Ex JRP-1, pp 679-681.

draft order on the one hand and the evidence in those schedules on the other hand was exhibited to Mr Park's fourth affidavit.[41]

[146] There is an existing regime in the winding up of the FMIF to deal with creditors' claims for which LMIM seeks indemnity from the FMIF as expenses.[42] The amounts for these three categories of expenses could have been included in that regime, but were not.

[147] I consider the amount claimed for LMA Remuneration later in these reasons.

[148] As to the second group of expenses, having regard to the entries in the schedule exhibited to Mr Park's first affidavit,[43] it seems unlikely that those amounts will be contentious, in any event. They are for minor travel and accommodation expenses, telephone, printing and other sundry items.

[149] As to the third group of expenses, although numerous amounts are identified as being for out of pocket expenses, no other information is provided as to what those amounts were for.

[150] It is enough for present purposes to note that these three groups of expenses were the only claims for expenses identified in the evidence as included in the amounts claimed for payment, either by the application or the draft order. Otherwise, the claims made in the application were for remuneration of the administrators and liquidators.

[151] All the amounts of remuneration sought to be recovered have been calculated without the inclusion of GST. As well, the amounts of out of pocket expenses for reimbursement have been included in the total amount of indemnity sought by various paragraphs of the application, as an amount "(plus GST)". The basis may be that the reimbursement of the out of pocket expense itself forms part of a taxable supply. No question was raised as to this method of calculation.

Reasonableness of remuneration

[152] Subject to what follows, and what appears below, it is unnecessary to explore some of the detail of the evidence in the present case beyond the facts summarised above. The first applicants have proved that the work for which they claim remuneration was done and was recorded in accordance with well-established practices under a system of recording of time costing.

[153] The identification of the subject matter of a particular time spent was also made in accordance with industry practices. That applies to the rates of charge and seniority of the relevant producers of work. The applicants' proof of those matters is not in dispute.

[154] However, Mr Whyte does challenge whether that proof establishes that the remuneration claimed is reasonable. He argues that by failing to depose to the purpose and reasoning behind the actions carried out and the decisions made in the administration and the liquidation, the applicants have not established their case for

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41 Mr Park's fourth affidavit, Ex JRP-4, pp 9-10.
42 Paras [228]-[229].
43 Mr Park's first affidavit, Ex JRP-1, pp 679-681.

determination and payment of remuneration in the amounts claimed from the trust property of the FMIF.

[155] There is an overlap about these submissions as between the remuneration of the first applicants as administrators and their remuneration as liquidators. In part, this was because the evidence of the work done and the charge out rates encompassed the period as administrators between 19 March 2013 and 31 July 2013 as well as the period as liquidators between 1 August 2013 and 30 September 2015. However, it must be kept in mind that the applicants do not seek an order for determination of their remuneration as administrators.

[156] Mr Whyte's challenge on this point is the same objection in substance as was taken in *Macks & Anor v Maka & Anor*.[44] Although a number of different submissions are made, in summary Mr Whyte challenges the sufficiency of the evidence of the correlation between the evidence of what was done and the necessary tasks to be performed as administrators or liquidators in relation to work said to have been performed for the FMIF or the funds generally. A separate submission was made as to the proportionality of the amount of remuneration claimed. Yet another submission was made generally questioning the necessity for work carried out after the appointment of the DB Receivers on 11 July 2013 or after Mr Whyte's appointment on 8 August 2013.

[157] It is not unusual for an opponent to assert that the evidence of a liquidator does not sufficiently correlate the work which is proved to have been done with that which was reasonable for the purposes of a claim for remuneration. Thus Mr Whyte relied on *ASIC v Groundhog Developments Pty Ltd & Ors*,[45] *Thackray v Gunns Plantations*[46] and *Templeton v ASIC*.[47]

[158] Reference might have been made also to *Macks & Anor v Maka*,[48] and *Re Traditional Values Management Ltd (in liq) (No 2)*.[49] As Gardiner AsJ said in the last case:

> "There is no absolute rule regarding the amount of detail required to support such a claim but it should enable potential objectors to review the amounts claimed and to ascertain whether there are matters to which objection should be taken. If a prima facie case is established, the application should provide for an objection procedure to enable objections to be made. If there are objectors, the court should then establish the validity of those objections."[50]

[159] Mr Whyte submits that if I form the view that there is insufficient detail on this point, the order that should be made is either to dismiss the application or to adjourn it to enable further affidavit material to be filed.[51]

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44 [2015] SASC 200, [12].
45 [2011] QSC 263, [14].
46 (2011) 85 ACSR 144 [160].
47 (2015) 108 ACSR 545, [30]-[34].
48 (2015) SASC 200, [12]-[16].
49 [2015] VSC 126.
50 [2015] VSC 126, [18].
51 *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96, 103.

[160] Both parties accept that the determination of remuneration does not require a line by line analysis of the kind that sometimes occurs in the assessment of legal costs.[52] It is also common ground that the application falls to be determined by a summary procedure in which the rules of evidence are not strictly observed.[53]

[161] The leading recent case on remuneration (decided after the argument in the present case) is *Sanderson as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr*.[54] The NSW Court of Appeal, constituted by a bench of five Judges, heard a liquidator's appeal from a decision where the primary Judge had reduced the liquidator's remuneration calculated on time-based charging, on the ground of proportionality, to a much lesser "ad valorem" amount.

[162] The court held that in fixing a liquidator's remuneration the critical question is the determination of a reasonable remuneration having regard to the factors identified (in that case) under s 473(10) of the CA.[55] In doing so, the court may fix remuneration on the basis of any method of calculation and, depending on the work done, a time-based calculation may or may not be appropriate.[56] In determining reasonableness, the court should consider whether the work done is proportionate to the size of the insolvent estate, the benefit to be obtained from the work and the difficulty and importance of the tasks.[57] Importantly, that work does not augment the funds available for distribution does not mean that a liquidator is not entitle to remuneration for it.[58]

[163] As appears from the summary I have set out previously, the extent of the description and necessity of the task performed in the course of the administration and the liquidation is brief. Nevertheless, in determining remuneration it is not the function of the court to hypercritically assess the day by day activities or tasks carried out in the course of a complex administration over a lengthy period of time with the benefit of hindsight. In this context, it is sometimes remarked that the remuneration available to insolvency practitioners should be sufficient to encourage them to carry out the important public function of the administration of insolvent entities for the benefit of the creditors, investors (whether company members or fund members) and the public administration of the insolvency laws in general.

[164] As well, the preparation of detailed affidavit material setting out extensive support for the correlation of individual or groups of line items and charges to particular tasks and functions of sufficient utility to be classed as reasonable remuneration is itself a time consuming and expensive exercise. In the usual course, those costs must be added to the costs of the application for remuneration to be paid to the relevant administrators or liquidators.

[165] The applicants submit that the determination of any particular dispute as to the question of reasonableness of the remuneration should be referred to a registrar or special referee.

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52 *ASIC v Atlantic Three Financial (Austin) Pty Ltd* [2004] QSC 133, [16]; *Re Conlan (as liquidator of Oakley Acquisitions Pty Ltd)* [2001] WASC 230, [24]-[27].

53 *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96, 102.

54 (2017) 93 NSWLR 459.

55 (2017) 93 NSWLR 459, 470 [51].

56 (2017) 93 NSWLR 459, 470 [51].

57 (2017) 93 NSWLR 459, 470-471 [55]-[56].

58 (2017) 93 NSWLR 459, 471 [57].

[166] As to the appointment of a special referee, UCPR 501(1) provides that the court may refer a question of fact to a special referee to decide the question or to give written opinion on the question to the court. That rule used to be supported by the positive statutory provisions conferring powers on the court to appoint a special referee under the *Supreme Court Act* 1995 (Qld) ss 255 and 256. However, those sections were repealed by the *Civil Proceedings Act* 2011 (Qld). The present rule is supported by the rule making power in s 85(1)(a) and item 14 of Schedule 1 of the *Supreme Court of Queensland Act* 1991 (Qld).

[167] The nature of a proceeding before a special referee is often akin to that of a trial before a judge sitting alone, unless the court otherwise orders.[59] The alternative is to make an order for an inquiry to enable the special referee to decide the question or to give an opinion.[60] The specific concern I have in the present case is that if any disputed questions were referred to a special referee there would be the additional costs of the proceeding before the special referee and the costs of the special referee to be borne.

[168] As to a registrar, Sch 1A to the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") known as the *Corporations Proceedings Rules*, r 16.1(1) provides that a registrar may exercise power of the court under a provision of the *Corporations Act* 2001 or the rules mentioned in Sch 1B to the *Corporations Proceedings Rules*. Schedule 1B specifically refers to the power to fix the remuneration of an administrator under s 449E of the *Corporations Act* 2001 and to determine a liquidator's remuneration under s 473(3).

[169] The definition of "registrar" in Sch 4 of the UCPR relevantly defines that term when used within schedules 1 to 3 to mean an assessing registrar within the meaning of r 679 or a cost assessor appointed under r 743L or otherwise includes a deputy registrar of the court. The court staff no longer include registrars or deputy registrars who regularly carry out cost assessing functions comparable to the determination of the remuneration in question in the present case. In those circumstances, an order referring the matter to a registrar does not present as an apt process to resolve any matters remaining in dispute as to reasonable remuneration. It seems to me that for those reasons the applicant's proposal of a referral to a registrar or special referee has drawbacks that should be avoided, if possible.

[170] I have given consideration to whether the court should or could proceed by some form of summary alternative for particular disputes. For example, the court might require the attendance of Mr Park on the part of the applicants, together with sufficient of his senior staff who may be able to provide relevant information to him for the purposes of examination upon any question or subject matter of inquiry that Mr Whyte wishes to raise. Bearing in mind that all of those involved in such an informal process would be expert accountants and the principal actors would be official liquidators of the court, conscious of their duties as officers of the court, it might be possible to proceed relatively informally and expeditiously to reach particular conclusions on any subject matters of concern.

[171] However, there are drawbacks of such an informal procedure as well. First, from Mr Park's point of view, he would not have advance notice of the subject matter of

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59 *Uniform Civil Procedure Rules* 1999 (Qld), r 502(3).

60 *Uniform Civil Procedure Rules* 1999 (Qld), r 502(1).

interest or questions that might be raised with him. That might operate unfairly. Possibly more importantly, it might result in him and those who can assist him in court being unable to provide useful answers straight away.

[172] On the other hand, an underlying theme of Mr Whyte's complaints or questions as to the remuneration sought on this application is the absence of sufficient material to correlate the relevant purposes, aims, strategies and functions in the administration and liquidation on the one hand and the tasks performed as described in the applicants' schedules of information on the other hand.

[173] For those reasons, I considered whether in circumstances like this case the interests of justice would be served best by a two-stage process. The first stage would be that having regard to the cases mentioned and the reasons I have set out above, the applicants provide affidavits as they may be advised upon the question of particular disputes as to the reasonableness of the remuneration they claim. After that affidavit or those affidavits are filed and served, the objector should identify the particular areas of remaining concern, if any, by reason of which he or she seeks to challenge the applicants' prima facie right to have the amounts of remuneration claimed determined.

[174] After that, the hearing of a contested application could proceed using the informal process I have outlined. This method may hark back to the proceedings in chambers in the days when the court in its equitable jurisdiction examined and passed the claims of receivers and others analogous to the administrator and liquidator. But it is not necessary to delve in detail to the processes of yesteryear. What should be fashioned is a practical and summary method for resolving any factual dispute that remains in the context of the applicants' claims for determination of their remuneration.

[175] I will return to whether orders of that kind should be made in this case. As the hearing progressed, the parties followed a path where to some extent the issues were so defined, although there was no request to cross-examine any of the deponents whose affidavits were read on the hearing of the application.

Categories 1 and 2 - remuneration and the constitution

[176] As previously stated, the applicants do not present the claims for remuneration or expenses as claims made under the constitution of the FMIF. Clauses 18.4 and 18.5 of the constitution, as previously set out, provide for remuneration and expenses.

[177] Mr Park gave an explanation why the first applicants did not proceed that way. He said that, under the Constitution of each fund, the relevant entitlement to a management fee, is a percentage, inclusive of GST, of the Net Fund Value[61] on a per annum basis, as follows:

(a) FMIF - 5.5 per cent;

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61 "Net Fund Value" is defined in the constitution to mean the value of the Scheme Property less the Liabilities at the relevant time. "Scheme Property" is defined to include the assets of the scheme, including contributions, money borrowed by the RE for the purposes of the scheme, property acquired with contributions or borrowed money and income or property derived therefrom. "Liabilities" are defined to include the liabilities of the RE in respect of the scheme, excluding amounts owing from the scheme to members for their interest in the scheme property.

(b) AIF - 5.5 per cent;
(c) ASPF - 1.1 per cent;
(d) CPF - 2.2 per cent;
(e) CP-AIF - 3.3 per cent; and
(f) ICP-AIF - 5.5 per cent.

[178] If remuneration were sought on a funds under management basis, based on those percentages, the amounts for remuneration would have been very considerable. Mr Park said that the management fee for the funds for the financial year ended 30 June, 2015 could have been "in the order of" the following amounts:

(a) FMIF - $4,066,482.70;
(b) AIF - $1,669,389.19; and
(c) ASPF - $86,060.84.

[179] I don't understand the logic of what this calculation may have been intended to show. First, the constitutional management fee percentages were not of funds under management but Net Fund Value, so the fund's Liabilities would have had to be deducted from the gross amount of funds under management before the constitutional percentage would have applied.

[180] Second, from the appointment of the first applicants as administrators, the funds were operating in an impaired way. New contributions were not being taken. With a few exceptions, distributions were not being made. The loans and securities representing the Scheme Property of the funds or the underlying assets of the Scheme Property of the funds were mostly distressed or in default. Accordingly, it was not a case of "business as usual" for LMIM as responsible entity.

[181] Third, in any event, from 8 August and 21 August 2013, Mr Whyte was appointed as the receiver of the property of the FMIF. Mr Whyte was thereby charged with the functions of taking possession of and realising the property of the FMIF as part of his appointment as the person to take responsibility to ensure that the FMIF is wound up in accordance with its constitution and the orders. LMIM was no longer responsible for those functions. In my view it would have been wholly inappropriate for LMIM to have charged management fees for winding up the FMIF under the constitutional provisions for payment of management fees as if LMIM were continuing to manage all of the Scheme Property of the FMIF.

[182] Mr Whyte submits that any claim for remuneration should be made as a claim by LMIM for fees as responsible entity under the constitutional provisions. In my view, that submission should be rejected, given the matters I have already mentioned. The submission appears to have been related to his further submission based on the clear accounts rule considered below, namely that LMIM is not entitled to payment or indemnity for remuneration or management fees or expenses because of claims that Mr Whyte as receiver has or would have on behalf of the FMIF against LIMIM for breach of duty as responsible entity or breach of trust. Mr Whyte did not submit or tender evidence to show that the amount of fees charged under the constitution would have been less than the amounts of remuneration and expenses claimed.

[183] However that may be, the first applicants' claims for remuneration are not made under the constitutions of the funds. They are predicated on a right to direct payment from the trust property of the FMIF and other funds on the principles of the cases previously discussed. There is no basis of which I am aware for concluding that any right they may have to direct payment from the trust property of the funds is to be disallowed because LMIM might have, but has not, made a claim for management fees in the course of the administration of the FMIF, including during the winding up of that fund.

[184] I do not accept that the first applicants' claims should be rejected because of the possibility that LMIM might have made a claim for management fees or expenses under the constitutions.

[185] It was not suggested otherwise by Mr Whyte that the method of assessing the remuneration payable to LMIM as responsible entity or the first applicants as administrators or liquidators should not be based on the work that they carried out having regard to the time spent on the work and appropriate time based rates of charge for the work producers who carried out the work.

First applicants and the clear accounts rule

[186] In *RWG Management Ltd v Commissioner for Corporate Affairs*,[62] Brooking J identified a series of inter-related principles relating to a trustee's right of indemnity for expenses. First, a trustee has a right to an indemnity for expenses, limited to the expenses properly incurred. Second, where a trustee's conduct in relation to incurring the expense is in breach of duty any liability thereby incurred is usually not properly incurred. Third, however, a trustee may have a right to an indemnity for a liability not properly incurred that benefits the trust estate. Fourth, there is no absolute rule that a trustee in breach of duty may not recover an indemnity for other expenses properly incurred. Fifth, where a trustee's entitlement to an indemnity for a liability properly incurred is subject to a counter-liability for its breach of trust, a balance is to be ascertained on the cross-liabilities and the trustee is entitled to payment of any balance in its favour.

[187] The balancing exercise described by Brooking J in *RWG Management* was interpreted by Gordon J in *Australian Securities and Investment Commission (ASIC) v Letten (No 17)*[63] to require that the trustee in breach make good any loss caused to the estate as a condition precedent to payment upon the right of indemnity, which her Honour described as the clear accounts rule. An important point made by Gordon J is that a trustee's right to indemnity may be diminished by breaches unrelated to the liabilities for which the right of indemnity is claimed.[64] However, the balance Brooking J referred to is arrived at by the application of the counter-liabilities to the right to payment of the indemnity. If the balance favours the trustee in breach of duty there is not some other condition precedent that the trustee make good the loss.

[188] By claim BS12317/14 Mr Whyte as receiver of the property of the FMIF claims damages or compensation against, inter alia, LMIM for LMIM's liability as a person involved in contraventions of the CA by its directors agreeing to the release

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62 [1985] VR 385.
63 (2011) 286 ALR 346, 351-352 [14]-[19].
64 (2011) 286 ALR 346, 353 [20].

of sums realised on the sale of mortgaged property. The claim is for compensation or damages of $15,546,147. Mr Whyte alleges that LMIM as agent for the mortgagee PTAL on behalf of the FMIF had an entitlement to all of the proceeds of the sale, after giving credit for the expenses of the proceeding and sale which yielded the proceeds.

[189] On 17 February 2016, Mr Whyte (by his solicitors) wrote to the applicants about a number of potential claims that as receiver of the FMIF he might have against LMIM.[65] The subject matters raised were:

(a) loan management fees and costs paid by LMIM to LMA under the Loan Management Agreements. The periods and amounts identified were as follows:

Period	Amount
Year ended 30 June 2011	$5,381,516
Year ended 30 June 2012	$4,817,414
1 July 2012 to 28 Feb 2102	$2,304,635.68
From 1 Mar 2013	$928,483.39

(b) payments to LMIM as responsible entity of the Feeder Funds as class B unitholders of the FMIF while redemptions and distributions to class A unitholders of the FMIF were suspended as follows:

Period	Amount
Year ended 30 June 2010	$23,212,460
Year ended 30 June 2011	$23,610,149
Year ended 30 June 2012	$4,497,306

(c) pre-payment by LMIM to LMA of fees under the First Services Agreement (and perhaps the Second Services Agreement as well), but no amount was identified as relating to the period of the appointment of the first applicants.

[190] So far as LMIM is concerned, these subject matters might have been raised as counter-liabilities for breach of trust that would resolve in a balance that no amount remains payable to LMIM for remuneration or fees or expenses. However, the application proceeded without any extensive submissions on that question. The first applicants sought to avoid any balancing of that kind by relying on their rights as administrators and liquidators of LMIM to direct payment for their remuneration from the property of the FMIF. Their position was, in effect, that it is unnecessary to determine whether the clear accounts rule would operate as an answer to LMIM's application for orders for payment from the property of the FMIF because the clear

65 Mr Whyte's First affidavit, Ex DW-11.

account rule does not operate as an answer to their right to direct payment for remuneration and expenses.

[191] On the hearing of this application, Mr Whyte relied on the clear accounts rule as an answer to the whole of LMIM's claims for indemnity by reason of counter-liabilities of LMIM.

[192] In this application, Mr Whyte did not generally seek to pursue the claims made or foreshadowed against LMIM to demonstrate that they were amounts to be brought into a balance of any amounts otherwise payable to the first applicants on their direct payment claims under the clear accounts rule. These are not matters that have only recently come to light. Mr Whyte had raised questions as to the extent of the payments by LMIM to LMA in his early reports to creditors following his appointment on the basis that he was then investigating those matters. Nevertheless, it is not necessary to further consider the application of the clear accounts rule to LMIM, because the first applicants submit that it does not apply to their claims for orders for direct payment from the property of the funds to them.

[193] As to the first applicants, Mr Whyte relied on the clear accounts rule only in a limited way, namely that the first applicants' entitlement, if any, to direct payment from the trust property of the FMIF should be subject to any counter-liabilities that arose for alleged breaches of duty by the first applicants after their appointment as administrators.

[194] Beyond that, Mr Whyte accepted that any application of the clear accounts rule in respect of the first applicants' claims to direct payment from the property of the funds would not extend to breaches of duty or trust by LMIM prior to their appointment.

[195] However, Mr Whyte has not made an express allegation that the first applicants are subject to any particular counter-liability for alleged breaches of duty by the first applicants after their appointment as administrators.

[196] In my view, it is not appropriate or equitable, in those circumstances, to hold that any entitlement that the first applicants would otherwise have for remuneration or expenses by way of direct payment or indemnity from the property of the FMIF should be further delayed by a possibility of a counter-liability of a relevant kind.

Categories 1 and 2 - remuneration not included in the application

[197] The period of the applicants' claims covers four different periods of insolvency administration, as far as the FMIF is concerned. First, from 19 March 2013, the first applicant were appointed administrators of LMIM. Second, from 11 July 2013 the DB Receivers were appointed receivers and managers of the property of the FMIF while the first applicants' appointment as administrators continued. Third, on 1 August 2013, the first applicants' appointment as administrators ceased and they were appointed liquidators of LMIM while the appointment of the DB Receivers continued. Fourth, on 8 and 21 August 2013, LMIM was directed by order to wind up the funds, subject to other orders. Mr Whyte was ordered to take responsibility for ensuring that the FMIF is wound up and appointed as receiver of the property of the FMIF for that purpose. The first applicants' appointment as liquidators of LMIM continued as did the appointment of the DB Receivers.

[198] The first point of significance from that sequence of events is that since 8 August and 21 August 2013, three sets of insolvency practitioners have been involved in the realisation of or winding up of the FMIF and have been remunerated or sought remuneration for their work.

[199] A second point of significance that emerges from the affidavit evidence is that although the amount of remuneration sought by the first applicants upon this application by the Draft Order for the period between 19 March 2013 and 30 September 2015 is for a sum in total in excess of $4.2 million, it does not represent all of the amounts payable to the first applicants for remuneration for work in connection with the FMIF during the relevant period.

[200] Mr Parks said in his first affidavit that his staff recorded time into three categories. Category 1 and Category 2 have been mentioned previously. Category 3 was for work that related only to the controllerships of loans and securities in the FMIF recorded to specific loan book sub-task time codes, which he said were paid from the property of the FMIF as a a contractual entitlement of LMIM to its reasonable costs and expenses. I take that to mean that the DB Receivers authorised the payments where that was required. Mr Park says that he is confident that there has been no "double dipping" between the amounts of the Category 3 remuneration (which he did not identify) and the claims for Category 1 and Category 2 remuneration. That may be so. Although Mr Whyte sought a reconciliation of all amounts of remuneration claimed and paid, the applicants did not provide one. Even so, accepting there has been no double counting, the work carried out by the applicants for the controllership appointments has already been separately remunerated and the balance of the applicants claims for remuneration must be seen in that light.

[201] In a CA Form 524 for the Presentation of Accounts and Statement of the first applicants dated 17 August 2015, the first applicants stated that the remuneration paid to them from the date of their appointment as liquidators on 1 August 2013 to 31 July 2015 was $1,220,159.88.

[202] My Park's second affidavit explained how the $1,220,159.88 was made up. It consisted of payments made (inclusive of GST) for work done between 19 March 2013 and 31 July 2013 as follows:

Fund and Remuneration Category	**Amount**
AIF Category 1	$121,854.00
CPF Category 1	$4,320.25
FMIF Category 1	$32,005.60
MPF Category 1	$280,489.35
AIF and CPF Category 2	$83,523.85
Category 3 FMIF	$122,142.90
LMIM General Corporate (no category)	$575,823.93
Total	**$1,220,159.88**

[203] Because no reconciliation is given in Mr Park's evidence for all amounts received for remuneration, it may be that there are other amounts of remuneration of the first applicants that are not included in the claims for remuneration in this application. In any event, there is a significant amount of remuneration that has been imposed on

the assets of the FMIF or the other funds, in addition to the remuneration the subject of the present application, or that payable to Mr Whyte or the DB Receivers.

[204] However, Mr Park adhered to his statement that there was no double counting over the remuneration in Categories 1, 2 and 3 and general corporate remuneration work. As to the latter, he said that it was not included in the remuneration claimed in the application. The remuneration in Category 2 is for work related to the funds generally, not to general corporate matters for LMIM.

[205] I proceed on the footing that there should be no general reduction in the amounts claimed because the applicants have received payment for or have other claims for remuneration. That is subject to the specific items of Category 1 FMIF remuneration – Category 3 and the controllerships for the FMIF after 21 August 2013, referred to below.

Category 1 FMIF - remuneration for July and August 2013 court hearings and September 2013 costs application

[206] Mr Whyte questions whether the first applicants should receive any remuneration for their work related to the applications heard in proceeding BS3383/13. On 15, 16 and 17 July 2013, a Judge heard contested applications over whether LMIM should be replaced as responsible entity of the FMIF by a temporary responsible entity, whether the FMIF should be wound up and whether Mr Whyte should be appointed as a person to take responsibility for ensuring the winding up of the FMIF, among other things ("FMIF winding up applications").

[207] On 8 August 2103, the court gave reasons deciding the applications.[66] The final orders were made on 21 August 2013. Later, on 6 September 2013, the court heard argument on the question of costs. There were written submissions filed beforehand.

[208] During that argument, Mr Shotten's lawyers provided a draft order to the court that the first applicants "shall not recover their professional costs or disbursements (including legal costs) of responding to the application..." As well, counsel for ASIC submitted that "whilst the court concludes that [the first applicants] weren't acting in the interests of the fund at all but in their own interests, they shouldn't be indemnified for any of their costs." That, too, appears to have been a reference to remuneration as opposed to legal costs only.

[209] In the result, the first applicants offered an undertaking to the court not to claim some costs associated with calling a meeting of unitholders of the FMIF. As to the legal costs of the application, the court ordered that LMIM was to be indemnified only to the extent of 20 per cent of its costs of the proceeding. The court did not otherwise make an order that the first applicants should not recover any of their remuneration.[67] The basis of the order as to costs that was made was that LMIM should only be indemnified from the property of the FMIF to the extent that its legal costs were properly incurred, so that an order other than in accordance with r 700 of the *Uniform Civil Procedure Rules* (Qld) was made. The grounds included that the first applicants were acting in their own interests to keep control of the winding up and that most of the costs were incurred in the dispute as to whether another person

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66 *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

67 *Re Bruce & Anor v LM Investment Management Limited & Ors (No 2)* [2013] QSC 347.

should be appointed to take responsibility for ensuring the winding up of the FMIF. However, I note that the first applicants were not parties to the proceeding.

[210] On the hearing of this application, Mr Whyte sought to re-agitate the first applicants' conduct of the proceedings in the FMIF winding up applications (although not of the subsequent appeal to the Court of Appeal)[68] as a ground for depriving them of an order for payment of their remuneration in connection with the applications from the property of the FMIF.

[211] Surprisingly, however, neither of the parties sought to identify what the quantum of the relevant costs might have been with precision. Mr Whyte identified the amount of $262,678 in the "Litigation" section of the Fee Summary Descriptions table from 19 March 2013 to 30 June 2014, which would include the first applicants' charges for work for both the hearings in question and the appeal from the orders of 8 August 2013 and 21 August 2013 to the Court of Appeal.

[212] It would not be appropriate to simply allocate the same percentage of the legal costs (20 percent) as assessed by the court on the hearing of the proceeding before appeal. First, where the bulk of the legal costs were incurred and where the bulk of the remuneration claimed for the applications were incurred are not necessarily correlated. Second, the allocated percentage of the costs at first instance did not relate to the costs of the appeal and the appeal was unsuccessful.

[213] Except by dividing the amounts claimed in the Litigation section of the Fee Summary Descriptions table before 6 September 2013 and those afterwards as representing the dividing line between the costs at first instance and those on appeal, there is no basis for separating out the remuneration claimed for work on the appeal.

[214] The first applicants entered their time spent in connection with litigation into codes F1 to F9. Up to 8 August 2013, the total amount allocated to those codes was $187,137.50. In my view, the applicants should only receive a proportion of that amount, having regards to the findings made by the court in deciding the application[69] and also having regard to the findings made in the Court of Appeal in dismissing the appeal.[70]

[215] In my view, the first applicants should not obtain an order for payment from the FMIF of all of their remuneration associated with proceeding BS3383/13 before the court that resulted in the orders of 8 August 2013 and 21 August 2013. On the contrary, although the committee of creditors or the creditors may have approved some of those amounts for the purposes of s 449E of the CA up to 1 August 2013, the amount of that remuneration should not be ordered to be paid from the property of the FMIF if it was not properly incurred as a trust expense and so as to come within the operation of the *Berkeley Applegate* principle.

[216] Looking at the entries in the schedule of narratives does not really assist in seeking to distinguish time spent in LMIM's defence of Trilogy's application which was in the interest of the FMIF and time spent in LMIM's defence of ASIC and Mr Shotten's applications which were not in the interest of the FMIF, as the court

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68 *LM Investment Management Limited (in liq) v Bruce & Ors* [2014] QCA 136.

69 *Re Bruce & anor v LM Investment Management Limited & ors* [2013] QSC 192; *Re Bruce & Anor v LM Investment Management Limited & Ors (No 2)* [2013] QSC 347.

70 *LM Investment Management Limited (in liq) v Bruce & ors* [2014] QCA 136.

found, so as to allocate the proportion of the amount of $187,137.50 that was not improperly incurred.

[217] In my view, the majority of the remuneration claimed for this work will have been properly incurred. Although LMIM unsuccessfully resisted the appointment of Mr Whyte as a person to take responsibility for ensuring that the FMIF is wound up in accordance its constitution and the orders, it successfully resisted the appointment of another responsible entity. As a broad brush allocation, I conclude that the amount of $187,137.50 should be reduced to $120,000.00.

[218] In my view, that amount, $120,000.00 should be ordered to be paid to the first applicants from the property of the FMIF.

Category 1 FMIF - remuneration otherwise up to 8 August 2013

[219] Apart from the question of remuneration related to the July and August 2013 court hearing, Mr Whyte has reviewed and does not challenge the reasonableness of the amount that the applicants claim for Category 1 FMIF remuneration up to the date of his appointment on 8 August 2013.

[220] From the Fee Summary Description table, the total amount of the Category 1 FMIF remuneration claimed to 8 August 2013 is $1,106,357.86. The total amount allocated into the litigation codes F1 to F9 up to 8 August 2013 was $187,137.50. The difference is $919,220.36.

[221] In my view, that amount, $919,220.36 should be ordered to be paid to the first applicants from the property of the FMIF.

Category 1 FMIF - remuneration for appeal to the Court of Appeal heard in November 2013

[222] Additionally, the first applicants seek their remuneration for the work in connection with the appeal in CA8895/13 to the Court of Appeal from the orders of the court made on 8 August 2013 and 21 August 2103.

[223] In the Expenses application, the first applicants made a submission that they should be paid their legal costs of the appeal as expenses properly incurred. It is not necessary to repeat the discussion of the relevant considerations upon that question in order to decide the cognate question in this application whether they should be entitled to recover their remuneration in connection with the appeal as properly incurred as a trust expense and as coming within the *Berkeley Applegate* principle.

[224] The relevant work for the appeal largely took place between 8 August 2013 and 30 June 2014, although any time spent in relation to the question of costs on the orders made on 8 August 2013 and 21 August 2013 would have been incurred in early September or thereabouts. The total amount recorded against codes F1 to F9 between 8 August 2013 and 30 June 2014 is $75,540.50.

[225] In my view, the first applicants' remuneration in connection with the appeal should not be paid from the property of the FMIF.

[226] Looking at the entries in the schedule of narratives assists in determining what amount in the Litigation codes of the Fee Summary Description table may have

been incurred in connection with the appeal. The relevant looking entries between 7 August 2013 and 12 June 2014 total approximately $33,000. I do not consider that it would be worthwhile to further identify the amounts.

[227] In the result, in my view, the amount of the remuneration to which the first applicant might otherwise be entitled to payment from the FMIF should be reduced by the amount of $33,000 as remuneration relating to the appeal that should not be ordered to be paid from the property of the FMIF. The difference between $75,540.50 and $33,000 is $42,540.50. That amount should be ordered to be paid to the first applicants from the property of the FMIF.

Category 1 FMIF - remuneration for the application for directions as to powers in July 2015

[228] On 20 July 2015, the applicants applied for directions as to the powers and responsibilities of the applicants and Mr Whyte in relation to the winding up of the FMIF. On 15 October 2015, the court decided the application and made orders requiring the applicants and Mr Whyte to reach agreement upon and to submit further orders relating to a regime for the ascertainment of the creditors of LMIM for whose debts LMIM may be entitled to indemnity from the property of the FMIF.[71]

[229] On 17 December 2015, the court made an order by consent giving effect to the agreement reached for such a regime.

[230] In the period between 30 June 2014 and 30 September 2015 the first applicants recorded the total amount of $36,641.50 against codes F1 to F9.

[231] In my view, all of that amount of $36,641.50 should be allowed as remuneration and ordered to be paid from the property of the FMIF.

Category 1 FMIF - Category 3 and the controllerships for the FMIF after 21 August 2013

[232] As previously discussed, the first applicants separately charged for what they called the controllerships under their Appointment of Agent agreements with PTAL for work allocated to Category 3 in their charging system. That separate work was separately remunerated and paid and is not claimed in this application.

[233] However, a curious twist on this structure appeared in Mr Park's third affidavit. He said that in reviewing the Category 1 claims for the FMIF after 21 August 2013, an unstated amount of the work was for reviewing loan book documentation, preparing loan book strategy, reviewing and facilitating requests for payments out of the FMIF, liaising with PTAL in respect of issues relating to security and releases and liaising with McGrath Nicol and BDO staff in that regard, reflected in codes C2, C4 and C5 of the remuneration codes. The total amount shown against those codes in the Fee Summary Descriptions table after 8 August 2013 was $125,767.

[234] Mr Park continued that most of the work therein also relates to controllership time not specifically allocated to Category 3. He said that following legal advice he

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71 *Park & Muller (liquidators of LM Investment Management Ltd (in liq)) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283.

formed the view that the controllership appointment documents (presumably the Appointment of Agent agreements) required LMIM to exercise its judgment objectively and independently in discharging its functions as controller and "[f]or that reason it was appropriate for LMIM to maintain independent oversight of what was occurring in respect of loan book management".

[235] In my view, this is not a persuasive explanation as to why the first applicants are entitled to remuneration as liquidators of LMIM as the responsible entity of the FMIF that should be ordered to be paid from the property of the FMIF. As at 8 August and 21 August 2013, Mr Whyte was appointed as the person to take responsibility for ensuring the FMIF was wound up in accordance with the constitution and the order, was appointed as the receiver of the property of the FMIF with the powers of a receiver to deal with the property of the FMIF. That property included the "loan book" meaning the debts payable to LMIM by borrowers and the securities held by PTAL as custodian of the property of the FMIF, subject to the appointment of the DB Receivers.

[236] If the first applicants were in doubt as to their responsibilities in relation to the management of the loan book, the proper course was to apply to the court for directions about the point. They did not do so.

[237] None of the arrangements made under the orders appointing Mr Whyte could be interfered with by PTAL appointing LMIM under an Appointment of Agent agreement. If LMIM had responsibilities under the Appointment of Agent agreements, or the Loan Management Agreements, they were contractual obligations, but they gave no entitlement to "maintain independent oversight" over Mr Whyte's performance of the functions conferred on him under the orders of the court, and in particular gave no entitlement for the first applicants to do so on the basis that their remuneration for carrying out that oversight was to be laid at the door of the FMIF.

[238] It follows, in my view, that the first applicants are not entitled to an order that their remuneration for carrying out those tasks should be paid from the property of the FMIF. However, the parties addressed no particular submissions as to the relevant amount or amounts of the claimed Category 1 remuneration relating to the FMIF that would be affected.

[239] A second, similar, question of concern emerged from Mr Park's third affidavit. He said that some of the time entries for Category 1 claims for the FMIF related to dealing with controllership matters. The relevant codes were D1 to D7 in the Fee Summary Descriptions table. After 8 August 2013, the total amount posted against those codes was $46,422.50.

[240] LMIM did not cease acting as controller in all such matters until 24 September 2014. Mr Park said that where several controllerships were dealt with at once, such as a list of payments relating to several assets or borrowers, it would be inequitable to charge each controllership a unit of time, so it would be recorded as general Category 1 remuneration of the FMIF.

[241] This, too, seems to me to be questionable. Mr Whyte was appointed receiver of the property of the FMIF subject to the DB Receivers' appointment. That made it his responsibility to deal with the assets and borrowers. The applicants relied on the

controllerships as giving them a continuing role, from the contractual relationship under the Appointment of Agent agreements and whatever authority may have been given to them by the DB Receivers. Hence, the Category 3 remuneration in performing those functions was rightly seen as outside the scope of this application. That authority did not extend to charging back to the FMIF as remuneration for managing the assets of the FMIF amounts claimed for carrying out these separate functions that were not properly allocated to the Category 3 tasks.

[242] It follows, in my view, that the first applicants are also not entitled to an order that their remuneration of carrying out those tasks should be paid from the property of the FMIF. However, again the parties addressed no particular submissions as to the relevant amount or amounts of the claimed Category 1 remuneration relating to the FMIF that would be affected. It will be necessary for the parties to address this question further by filing further material and submissions.

Category 1 FMIF – 8 August 2013 to 4 September 2013

[243] Mr Park's third affidavit further referred specifically to the Category 1 remuneration for the FMIF during two relevant periods. The first period was between 8 August 2013 and 21 August 2013, in the claimed amount of $76,745.00, during which the final orders relating to Mr Whyte's appointment had not been made. The first applicants continued to carry out the functions of managing the property of the FMIF. Mr Park says that it was necessary for LMIM to continue the day to day operations of the FMIF during this period.

[244] I proceed on the footing that the amount of Category 1 remuneration for the FMIF for this period should not be reduced on account of Mr Whyte's appointment.

[245] The second relevant period was between 21 August 2013 and 4 September 2013, in the claimed amount of $53,328.00. This period was the first two weeks of Mr Whyte's appointment following finalisation of the orders on 21 August 2013. It seems likely from the task descriptions that much of the remuneration claimed will have been for the tasks of dealing with Mr Whyte and his employees and the DB Receivers relating to the handover of possession and management of the property of the FMIF to Mr Whyte. Mr Park says that he and his staff were still required to perform work of direct relevance to the FMIF and which was reasonably necessary.

[246] Again, I proceed on the footing that the amount of Category 1 Remuneration for this period should not be reduced on account of Mr Whyte's appointment.

Category 2 – Basis of apportionment

[247] If it is determined that Category 2 remuneration and expenses are recoverable from the property of the funds, it is necessary to determine how the relevant amounts are to be allocated or apportioned among the funds.

[248] Mr Park says in his first affidavit that, in his view, the fairest way to assess the differing interests of each fund in work undertaken which is applicable to all funds, is to calculate the ratios of the funds under management[72] of each of the following funds:

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72 *Owen v Madden (No 5)* [2013] FCA 1443, [38]-[40].

(a) FMIF;
(b) AIF;
(c) CPF;
(d) ASPF; and
(e) MPF (for the period to 12 April 2013).

[249] For the period 1 January 2015 onwards, Mr Park says that the CPF should be removed from the proposed funds under management allocation schedules due to the minimal assets remaining in that. For example, as at 31 December, 2015, the net assets of the CPF were valued at approximately $44,908.69.

[250] Mr Park says further that the Feeder Funds should be excluded from the proposed allocations, given that the only assets of the CP AIF and the ICP AIF are units in the FMIF. It is his view that excluding the Feeder Funds in any proposed allocation will avoid the unit holders of those funds bearing a disproportionate amount.

[251] The applicants submit that the possible methods of apportionment are:

(a) method 1, being an equal split among all the funds and the MPF (until 12 April 2013);
(b) method 2, being an equal split between the non-Feeder Fund funds and the MPF (until 12 April 2013);
(c) method 3, being an equal split between the asset holding funds (being FMIF, AIF and the ASPF) and the MPF (until 12 April 2013); and
(d) method 4, being a rateable distribution among the funds based on assets in the funds, with two alternative bases, being:
    (i) gross realisations (less directly secured debt) as the best approximation of net asset values and for currently unrealised properties, estimating a realizable value for each based on such real property valuations that each Fund has commissioned over time as are now available (that is, without new valuations being required), with the assumption that the asset values do not change over time, calculated using the formula:

        GROSS ASSET REALISATIONS TO 2 MARCH, 2016
        LESS
        PAYMENTS TO DIRECT SECURED CREDITORS (NAMELY DEUTSCHE BANK)
        PLUS
        ESTIMATED REALISABLE VALUE (of remaining assets) BASED ON ANY REAL PROPERTY VALUATION IF AVAILABLE, OR IF NOT, THEN THE LIQUIDATORS/RECEIVERS CURRENT BEST ESTIMATE

    (ii) each fund's Net Fund Value (that is, LMIM's own book values) excluding FTI Consulting's fees as identified.

[252] The applicants' preference is method 4, basis (i).

[253] Mr Whyte submits that method 1 is the appropriate method supported by authority.[73] He opposes methods 2 and 3 as unprincipled. Method 2 would allocate the remuneration for the administration of the Feeder Funds to the non-Feeder

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73 *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377, 386; *Parbery v ACT Superannuation Management Pty Ltd* (2010) 79 ACSR 425, [37]ff.

Funds and method 3 assumes, in the absence of evidence, that the Category 2 work was largely confined to the major asset holding funds.

[254] If a rateable apportionment were to be made, he submits it should be on the net fund value rather than on a gross realisable value or funds under management basis. He submits that net fund value was the basis of the entitlement to remuneration under the funds' constitutions and that the applicants did not have the function of realising the FMIF's assets, from the commencement of the winding up of the FMIF. As well, from the appointment of the DB Receivers and the appointment of Mr Whyte the relative proportion to be allocated to the FMIF should be reduced to reflect the reduced role of the applicants in the winding up of the FMIF.

[255] In my view, there is substance in the proposition that the Feeder Funds should be excluded from the apportionment. There is no suggestion in the evidence that any substantial additional amount relates to the administration of those funds. As members of the non-Feeder Funds, they bear a relevant proportion of the Category 2 expenses allocated to the non-Feeder Funds.

[256] Second, in my view, the MPF should be excluded from the funds bearing the apportionment after 12 April 2013. After that date, the applicants had no business doing work for the MPF as remuneration.

[257] Third, in my view, there is no sufficient basis to conclude that the Category 2 remuneration should be more heavily allocated to the FMIF based on the ratios calculated using method 1 or funds under management of the remaining funds. By definition, Category 2 work is not specific to the FMIF. No basis was put forward in the evidence to find that although it is not possible to ascertain that the work was done for one fund or another, the ratio of the values using method 1 or funds under management for the various funds reflects the relative value of the amounts of the undifferentiated work that was done for them. A risk is that some of the funds will not be able to bear their share and the first applicants may be out of pocket. In my view, that is not a reason to throw a higher proportion of the amount upon the FMIF.

[258] It follows, in my view, that method 2 should be adopted, but excluding the MPF from 12 April 2013.

Category 2 - LMA Remuneration

[259] It is necessary to identify clearly what amount is claimed in respect of the LMA Remuneration.

[260] The calculation begins with two invoices from LMA to LMIM raised by LMA under administration by the first applicants, copies of which were tendered[74] ("LMA Remuneration Invoices") more particularly described as follows:

Number	Date	Description	Amount (ex GST)
8973Inv007	30 June 2013	Administrators remuneration for work undertaken in relation to… LMA as service entity to LMIM…[for] funds	$403,873.50

[74] Mr Park's first affidavit, Ex JRP-1, pp 834-835.

8973Inv009	26 July 2013	[as for inv 8973Inv007]	$69,839.00
Total			**$473,712.50**

[261] The manner in which those invoices were arrived at is not dealt with in detail in the evidence. There are, however, schedules of narratives in evidence of the work done by the first applicants' employees in support of the first applicants' claims for payment from the property of the FMIF for remuneration as administrators of LMA for the relevant periods.[75]

[262] That evidence was reduced to a schedule[76] identifying the 17 employees whose time was charged in 8973Inv007, the employee's position, the total hours spent in the period and the rate of remuneration per hour claimed and corresponding to the total amount charged in 8973Inv007.

[263] There was a similar schedule for inv 8973Inv009,[77] but the period of the schedule (and the underlying narratives) extended beyond the date of that invoice and so the total amounts do not correspond.

[264] Paragraph 7(b) of the application as filed applies for payment to the applicants of $952,095 for Category 2 remuneration in accordance with the allocation shown in the attached schedule 4. It is necessary to explain how that amount was arrived at. The total amount of the Category 2 claims for remuneration as set out above for the period from 19 March 2013 to 31 July was $756,905. The sum of that amount and $473,712.50 as the total amount of the LMA Remuneration Invoices, as set out above, is $1,230,618. A spreadsheet exhibited to Mr Park's first affidavit showed that the LMA Remuneration Invoices were included in the calculation of that total amount.[78] The amount of $952,095 was arrived at by deducting $278,522 from $1,230,618 as an allocation a proportion of the Category 2 amounts to the Managed Performance Fund.

[265] However, by the Draft Order the applicants reduced the amount of their claim for LMA Remuneration from $473,712.50 to $401,568.78, by subtracting from $473,**8**12.50 (sic) the amount of $72,243.72, as an allocation for the MPF.

[266] At first blush, the inclusion of any of the first applicants' remuneration for services supplied to LMA as administrators of LMA in the present application seems counterintuitive. As previously described, LMA supplied services to LMIM during the first applicants' appointment as administrators of both companies under the Second Services Agreement. LMA was the employer of the staff who carried out many of the tasks to be performed by LMIM in managing the various funds.

[267] The evidence about the relevant amounts is not clear. Mr Park in his second affidavit characterised both companies as professional trustees whose predominant purpose was to act as responsible entity and trustee. Surprisingly, that ignored the separate legal personalities of the two companies, their contractual relationships under the Second Services Agreement and the Loan Management Agreements and the fact that in liquidation they have different assets and liabilities and different rights and obligations.

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75 Mr Park's first affidavit, Ex JRP-1, pp 934-987 and 988-1014.

76 Mr Park's first affidavit. Ex JRP-1, p 832.

77 Mr Park's first affidavit, Ex JRP-1, p 837.

78 Mr Park's first affidavit, Ex JRP-1, p 592.

[268] Because LMA was not a responsible entity or trustee of any of the funds it had no entitlement to any indemnity for any of its expenses from the trust property, except possibly as a creditor of LMIM subrogated to a right of indemnity of LMIM as trustee of the relevant trust on the principle of *Octavo Investments Pty Ltd v Knight*.[79] Any debt in that respect would have been for the fees that were payable or paid under the Second Services Agreement between LMIM and LMA, or possibly for an amount payable under the Loan Management Agreements.

[269] Mr Park says that before entering into the Second Services Agreement between LMIM and LMA the first applicants formed the view that it was essential for LMIM to retain the services of LMA as provided under the First Services Agreement, so that the business could continue. As well as obtaining continuity, he formed the view that the rates paid to staff of LMA were less expensive than would be the costs of FTI Consulting employees doing that work.

[270] All that may be so, but it is to be remembered that as between LMIM and LMA under both the First Services Agreement and the Second Services Agreement a commercial rate was to be paid, and the question of who should staff LMA was a question that arose in the LMA administration and liquidation, not LMIM's administration and liquidation, as such.

[271] Mr Park says that the work undertaken in the administration of LMA was "claimed as remuneration in LMA", meaning (I assume) that the work was undertaken by the first applicants and the employees of FTI Consulting in that administration. He says further that the remuneration has been approved by the creditors in that administration. He then says that where tasks were undertaken by LMA for the ongoing services provided by LMA they were invoiced by LMA to LMIM "who is in turn seeking to recover these costs as part of its Category 2 claims from the various funds."

[272] Mr Park said in his first affidavit that the relevant amounts were invoiced by LMA to LMIM pursuant to cl 4.2(b) of the Second Services Agreement. That clause provided for the calculation of the Resources Fee payable under cl 4.3. I can understand that LMA would have invoiced LMIM for services under the Second Services Agreement. I do not readily understand why LMA would have invoiced LMIM for the remuneration payable to the first applicants as administrators of LMA, unless that were provided for under the Second Services Agreement or some other agreement. It was not suggested that there was any such formal agreement. And it was not suggested either that remuneration of the first applicants as administrators of LMA is remuneration of the first applicants in the administration of LMIM.

[273] In Mr Park's second affidavit, he appeared to say that he was mistaken in saying that the LMA Remuneration Invoices were payable as part of the Resources Fee under the Second Services Agreement. However, he did not otherwise identify any basis on which LMIM or the funds were obliged to pay them.

[274] Mr Park says that the tasks which he considers to be part of the general funds management remuneration and expenses included the services provided by LMA pursuant to the Second Services Agreement which relate to the management of the

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[79] (1979) 144 CLR 360.

business of LMIM being a funds' manager generally. It will be noticed that unlike the remuneration the subject of the Category 1 claims and Category 2 claims, LMA's entitlement to payment of the LMA Remuneration Invoices represents an expense of LMIM payable to LMA, not remuneration of the liquidators of LMIM recoverable under s 556 of the CA.

[275] As previously mentioned, it is no part of the court's function under the CA to approve sums payable by LMIM to LMA as an expense. The court's determination of remuneration under the CA on this application is as to remuneration of the first applicants as liquidators of LMIM only.

[276] The first applicants submit, accurately as I think, that there is no question of approval of their remuneration as administrators of LMA on this application. So it is not surprising that there is no evidence to which they point of the work done to justify the relevant amounts. However, the first applicants further submit that the creditors of LMA have approved the remuneration as though the amount as approved is to be taken to be established for the purposes of this application.

[277] I do not agree. Whether LMIM is liable for the first applicants' remuneration as an expense properly incurred under the Second Services Agreement or otherwise and in what amount having regard to any other amounts paid by LMIM for services provided by LMA, are not questions that have been properly raised or litigated on this application.

[278] What the first applicants seek to do in this application is to have the court decide whether their remuneration incurred in LMA as invoiced by LMA to LMIM in the LMA administrators' invoices is recoverable as an expense of LMIM from the various funds on the principle of the cases discussed above. But in none of those cases was the suggestion made that the remuneration of the liquidator (or administrator) of another company was recoverable against the trust fund assets administered by the trustee company in liquidation.

[279] Even if the first applicants' remuneration as administrators of LMA were an expense of LMIM which is properly recoverable from the trust property of the funds, the indemnity that would be payable from those funds is in the amount that LMIM "incurred in relation to the performance of its duties" as responsible entity and "only in relation to the proper performance of those duties"[80] or "reasonably incurred in or about the execution of the trusts".[81] In my view, the applicants cannot foreclose those questions in the administration of any of the trusts of the funds by pointing to the resolution of the creditors in the administration of LMA approving their remuneration as establishing the amount.

[280] In my view, no order should be made that the FMIF or other funds should bear the expense of the LMA Remuneration Invoices or any lesser amount representing a partial allocation of the amount of those invoices

[281] In accordance with para 100 of Mr Park's first affidavit, the amount of Category 2 remuneration, apart from the LMA Remuneration Invoices was $1,408,492.99for the whole of the relevant periods, less any appropriate allocation for the Managed

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80 *Corporations Act* 2001 (Cth), s 601GA(2).

81 *Trusts Act* 1973 (Qld), s 72.

Performance Fund as previously mentioned.[82] It may be necessary to review the reduction of $278,522 as previously described.

[282] By par 4 of the Draft Order, the applicants propose that their Category 2 remuneration and expenses as administrators be paid in the amount of $952,095. That sum must be reduced by deducting $401,568.78 included for the LMA Remuneration, resulting in the claimed amount of $550,526.22.

[283] Further, by par 10 of the Draft Order, the applicants propose that their Category 2 remuneration and expenses as liquidators be paid, in the amount of $651,438.00.

In my view, those amounts that should be allowed for the Category 2 remuneration, subject to consideration of the remaining arguments raised by Mr Whyte about particular subject matters, as follows.

Category 2 - media and other inquiries

[284] In Mr Park's third affidavit, at par 38(c), he refers to dealing with media inquiries as to the state of the funds and that there was substantial media interest in the administration at the time. In Mr Whyte's third affidavit, at par 50(a), he says that dealing with media and inquiries is a matter he would regard as an incidental function, rather than work that benefits the funds.

[285] I agree with the observation that this work was incidental, if what is meant is that it was incidental to the funds operations as investments made by many members of the public, and that the FMIF was clearly the largest fund with the most members of the public in question. It does not make sense, in my view, to regard this work as not related to the operation of the funds.

[286] In my view, the remuneration for these tasks should be ordered to be paid from the property of the funds, including the FMIF. There should be no reduction of the amount claimed on this account.

Category 2 - books and records

[287] In Mr Park's third affidavit, at par 38(e), he refers to dealing with matters relating to the various books and records issues which have arisen as work that was performed in relation to LMIM that he believes was for the benefit of the funds including the FMIF. In Mr Whyte's third affidavit, at par 50(b), he says that the books and records were held by LMA and, insofar as any issues arose after his appointment, any work by the first applicants was for the benefit of LMIM or in respect of funds other than the FMIF. Mr Whyte negotiated access to the books and records via the liquidator of LMA and he considers that he represented the interests of the FMIF in applications to the court about the books and records.

[288] It is right, in my view, that LMIM's role as responsible entity of the FMIF in relation to matters dealing with the various books and records should have been reduced by Mr Whyte's appointment as receiver of the property of the FMIF. But it does not appear to me to follow that none of the work in question was for the benefit of the FMIF or that the first applicants were not required to deal with

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82 Para [264].

matters relating to the various books and records in relation to the creditors of the FMIF.

[289] In my view, the remuneration for these tasks should be ordered to be paid from the property of the funds, including the FMIF. There should be no reduction of the amount claimed on this account.

Category 2 - closing satellite offices

[290] In Mr Park's third affidavit, at par 38(f), he refers to communicating with and closing various satellite offices which LMIM maintained for marketing purposes around the world as work performed in relation to LMIM which he believes was for the benefit of the funds, including the FMIF. In Mr Whyte's third affidavit, at par 50(c), he says that he is not aware of the benefit or connection to the FMIF as a result of this work. Mr Whyte says further that he apprehends that the work related to the MPF or to LMA and its own business of marketing and raising funds for investment, but gives no basis for that apprehension. He does not say it as a matter of personal knowledge or that there is some other basis for his being able to give evidence of those matters as matters of fact.

[291] Mr Whyte submits that his "apprehension" is more likely to be correct. In my view, it would not be safe to proceed on Mr Whyte's evidence in this respect, rather than the view that the winding up of the funds' businesses, including the FMIF, required closure of the various satellite offices.

[292] In my view, the remuneration for these tasks should be ordered to be paid from the property of the funds, including the FMIF. There should be no reduction of the amount claimed on this account.

Category 2 - investor advisors inquiries

[293] In Mr Park's third affidavit, at par 38(g), he refers to dealing with enquiries from investor advisors who may have promoted investment in several of the funds for many different unitholders, as work performed in relation to LMIM that he believes was for the benefit of all the funds, including the FMIF. In Mr Whyte's third affidavit, at par 50(d), he says that he has not yet received any creditor indemnity claim with respect to claims by any such advisers.

[294] Mr Whyte submits that is a matter of concern. Whether or not it is, I do not understand how that concern dispels the conclusion that this work and the remuneration for it should be allowed. There is no logical connection between whether the first applicant performed work answering enquiries from investor advisors and whether LMIM or an advisor has sought indemnity from Mr Whyte against specific claims advisors may have made as creditors.

[295] In my view, the remuneration for these tasks should be ordered to be paid from the property of the funds, including the FMIF. There should be no reduction of the amount claimed on this account.

Future remuneration and expenses

[296] By par 12 of the application the applicants seek a general order that the remuneration and expenses of the first applicants in the winding up of LMIM as

may be approved from time to time shall be borne and paid by the FMIF and the other funds in a proportion to be determined in the same manner as that which the court directs their remuneration to be borne and paid in the present application.

[297] The basis for such an order was not identified by reference to either principle or authority. In my view it is not an order that should be made.

Resolving the remaining questions

[298] In considering the matters dealt with up to this point I have kept an eye upon the proportionality of the remaining amounts claimed by the applicants for their remuneration. I have given the question anxious consideration.

[299] However, in my view, any further reductions in the remuneration to be allowed on this account would be a matter of speculation. The applicants bear the onus of proof, and there must be concern about the overall amounts that have been charged for the winding up of the FMIF for the period after 21 August 2013. It may be that if regard were had to the remuneration and expenses of Mr Whyte and the DB Receivers, a lack of proportionality would clearly emerge. But no evidence of that kind was put before me on this application as to the relevant amounts. Mr Whyte's opposition was limited to a generally stated "concern" as to the matter of proportionality.

[300] In the circumstances, despite those concerns, I have decided not to reduce the amounts otherwise allowable as reasonable amounts on the ground of proportionality.

[301] As appears from these reasons, I have concluded that only a limited amount of further material or submissions is required in order to finalise the orders to be made. In those circumstances, I do not propose to order that the remaining questions be referred to a registrar or referee.

[302] The appropriate course is to give the applicants and the respondent an opportunity in the light of these reasons to agree upon the appropriate form of orders or, if no agreement can be reached, to set directions to resolve the remaining questions.

[303] Any further form of draft order should separately identify the relevant expenses for the FMIF in accordance with the section of these reasons headed "Expenses that are not remuneration", not including the LMA Remuneration.

[304] The order sought fixing the first applicants' remuneration as liquidators should excise any expenses and not include remuneration not allowed under these reasons.

Costs

[305] Paragraph 14 of the application seeks an order that the costs of the application shall be borne by and paid from the assets of the FMIF and the other funds in the same proportion in which the remuneration is to be paid. However, by the draft order the applicants submit that they should have the opportunity to make submissions as to costs in the light of these reasons.

[306] In my view, it is appropriate that the parties have the opportunity to make submissions as to costs.