

SUPREME COURT OF QUEENSLAND

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

PARTIES: **RAYMOND EDWARD BRUCE AND VICKI PATRICIA
BRUCE**
(applicants)
v
**LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) ACN 077 208 461 IN ITS CAPACITY
AS RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND**
(first respondent)
**THE MEMBERS OF THE LM FIRST MORTGAGE
INCOME FUND ARSN 089 343 288**
(second respondent)
ROGER SHOTTON
(third respondent)
**AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION**
(intervener)

**IN THE MATTER OF: LM INVESTMENT
MANAGEMENT LIMITED (IN LIQUIDATION)
(RECEIVERS AND MANAGERS APPOINTED)
ACN or ARBN 077 208 461
SAID JAHANI AS RECEIVER AND MANAGER OF
THE ASSETS, UNDERTAKING, RIGHTS AND
INTEREST OF LM INVESTMENT MANAGEMENT
LIMITED (IN LIQUIDATION) (RECEIVERS AND
MANAGERS APPOINTED) ACN 077 208 461 IN ITS
CAPACITY AS THE RESPONSIBLE ENTITY OF THE
LM CURRENCY PROTECTED AUSTRALIAN
INCOME FUND ARSN 110 247 875 (RECEIVER
APPOINTED) AND THE LM INSTITUTIONAL
CURRENCY PROTECTED AUSTRALIAN INCOME
FUND ARSN 122 052 868 (RECEIVER APPOINTED)**
(applicant)

v
**LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) ACN 077 208 461**
(first respondent)
**THE MEMBERS OF THE LM CURRENCY
PROTECTED AUSTRALIAN INCOME FUND ARSN
110 247 875**
(second respondent)
THE MEMBERS OF THE LM INSTITUTIONAL

**CURRENCY PROTECTED AUSTRALIAN INCOME
FUND ARSN 122 052 868**

(third respondent)

**TRILOGY FUNDS MANAGEMENET LIMITED ACN
080 383 679 AS RESPONSIBLE ENTITY OF THE LM
WHOLESALE FIRST MORTGAGE INCOME FUND
ARSN 099 857 511**

(first applicant)

**THE TRUST COMPANY LIMITED ACN 004 027 749
AS CUSTODIAN OF THE PROPERTY OF THE LM
WHOLESALE FIRST MORTGAGE INCOME FUND
ARSN 099 857 511**

(second applicant)

v

**THE MEMBERS OF THE LM WHOLESALE FIRST
MORTGAGE INCOME FUND ARSN 099 857 511**

(respondents)

FILE NOS: BS3383 of 2013
BS1031 of 2019
BS2000 of 2019

DIVISION: Trial Division

PROCEEDINGS: Applications for judicial advice/directions

DELIVERED ON: 22 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 2-3 May 2019

JUDGE: Mullins J

ORDER: **In each proceeding, order as per amended draft initialled by Mullins J and placed with the file.**

CATCHWORDS: CORPORATIONS – RECEIVERS, CONTROLLERS AND MANAGERS – POWERS – TO APPLY TO COURT FOR DIRECTIONS – where a court appointed receiver applies for directions in the inherent jurisdiction of the court – whether the court appointed receiver is justified in entering into and performing, and in causing the company in receivership as responsible entity of a managed investment scheme to enter into and perform, a deed of settlement that compromises complex litigation – whether the court appointed receiver is justified in making the interim distribution proposed in the deed

CORPORATIONS – RECEIVERS, CONTROLLERS AND MANAGERS – POWERS – TO APPLY TO COURT FOR DIRECTIONS – where a privately appointed receiver applies for a direction under s 424 of the *Corporations Act 2001*

(Cth) – whether the privately appointed receiver is justified in entering into and performing, and in causing the company in receivership, as responsible entity of two managed investment schemes, to enter into and perform a deed of settlement that compromises complex litigation

EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – GENERALLY – where the applicants which are the trustee and custodian of the property of a managed investment scheme apply for directions under s 96 of the *Trusts Act* 1973 (Qld) – whether the applicants are justified in entering into and performing a deed of settlement that compromises complex litigation

Corporations Act 2001 (Cth), s 424, s 601NF

Trusts Act 1973 (Qld), s 96

Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd (2002) 42 ACSR 240; [2002] NSWSC 576, considered

Expo International Pty Ltd v Chant [1979] 2 NSWLR 820, considered

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66; [2008] HCA 42, considered

Re One.Tel Ltd (2014) 99 ACSR 247; [2014] NSWSC 457, considered

COUNSEL: J D McKenna QC and D J Ananian-Cooper for the applicant
D Whyte as receiver of the property of LM First Mortgage Income Fund in proceeding BS3383 of 2013
D B O’Sullivan QC and D M Turner for the applicant in proceeding BS1031 of 2019
P Ahern for the applicants in proceeding BS2000 of 2019

SOLICITORS: Gadens Lawyers for the applicant D Whyte in proceeding BS3383 of 2013
HWL Ebsworth Lawyers for the applicant in proceeding BS1031 of 2019
Squire Patton Boggs for the applicants in proceeding BS2000 of 2019

[1] Three related applications in separate proceedings brought by three separate sets of applicants were heard together. The applicants are some of the parties to another proceeding in this court BS13534 of 2016 (referred to as the Feeder Fund Proceeding) and are parties to a deed of settlement and release as amended by the insertion of clauses 8.12 to 8.16 (the deed) in respect of the Feeder Fund Proceeding. Each of the

applications is brought, in general terms, for judicial advice or directions as to whether the relevant applicant would be justified in entering into and implementing the deed. Consistent with the nature of the applications, there was no contradictor.

- [2] Mr Whyte is a registered liquidator. By order of this court made on 8 August 2013, he was appointed pursuant to s 601NF(1) of the *Corporations Act 2001* (Cth) (the Act) to take responsibility for ensuring that the LM First Mortgage Income Fund (FMIF) is wound up in accordance with its Constitution and pursuant to s 601NF(2) of the Act as receiver of the property of FMIF.
- [3] FMIF was registered as a managed investment scheme in 1999 and LM Investment Management Limited (Receivers & Managers appointed) (in liq) (LMIM) is and has been the responsible entity of the FMIF since its inception. LMIM has been in liquidation since 1 August 2013 and Mr Park is the liquidator.
- [4] FMIF has over 4,500 ordinary unitholders. The members of FMIF subscribed capital for investment purposes that was used to advance funds to borrowers under loan agreements on the security of first registered mortgages. There are three different classes of issued units in FMIF, class A units issued to ordinary unitholders, class B units held for the Feeder Funds and class C units issued to unitholders who invested in foreign currencies. The class B units are divided among three Feeder Funds.
- [5] Each of the Feeder Funds was a managed investment scheme in its own right. LMIM is the responsible entity for two of the Feeder Funds: LM Currency Protected Australian Income Fund (CPAIF) and the LM Institutional Currency Protected Australian Income Fund (ICPAIF). Registered liquidator Mr Jahani is the privately appointed receiver and manager of LMIM in its capacity as responsible entity of CPAIF and ICPAIF. Mr Jahani was appointed to that role by a secured creditor of those two Feeder Funds.
- [6] Trilogy Funds Management Limited is now the responsible entity of the LM Wholesale First Mortgage Income Fund (WFMIF) which is the third Feeder Fund. The Trust Company Limited is the custodian of the property of WFMIF as agent for Trilogy.
- [7] Substituted service orders had been made on 22 February 2019 in respect of each application and the associated non-confidential court documents on the unitholders of FMIF or each of the Feeder Funds, as required by the relevant application. These orders were complied with.
- [8] Mr Whyte as receiver of FMIF commenced the Feeder Fund proceeding against CPAIF and ICPAIF as the first and third defendants, Trilogy and Trust Company as the second and fifth defendants, and LMIM (in liq) as the fourth defendant. In the Feeder Fund Proceeding, Mr Whyte is seeking to confirm that FMIF is entitled to withhold further distributions to each of the Feeder Funds to the extent of the value of redemptions that were allowed in their favour at a time when redemptions were suspended other than in circumstances of hardship, between 11 May 2009 and 31 January 2013, as it is alleged those redemptions had been allowed by LMIM without power under the Constitution of FMIF and/or in breach of trust. Mr Whyte is also seeking relief to authorise him to reinstate those redeemed units to each of the respective Feeder Funds. Mr Whyte also

seeks authorisation to cancel further units issued to each of the Feeder Funds between 1 July 2011 and 1 November 2012 as the purported reinvestment of income distributions, at a time when there was no Distributable Income of the FMIF and it is alleged that those distributions were without power and in breach of trust. Mr Jahani disputes the allegations made in the Feeder Fund Proceeding against CPAIF and ICPAIF. Trilogy and Trust Company dispute the allegations made in the Feeder Fund Proceeding against WFMIF. The resolution of the questions raised in the Feeder Fund Proceeding is critical to the winding up of FMIF.

- [9] The further amended claim and second further amended statement of claim in the Feeder Fund Proceeding were filed in June 2018. Defences had not yet been filed by any of the defendants. A mediation was organised to commence on 5 November 2018 with The Hon Richard Chesterman AO RFD QC as mediator. Detailed position papers were prepared by Mr Whyte and the active defendants for the purpose of the mediation. The mediation continued on 6 and 20 November 2018 and was successful in that Mr Whyte entered into the deed with Mr Jahani on behalf of CPAIF and ICPAIF and Trilogy and the Trust Company on behalf of WFMIF. The fourth defendant is not a party to the deed. The liquidator of LMIM was aware of, but did not appear on, these applications.
- [10] In broad terms, the deed provides for an agreed settlement sum reflecting a compromise of the FMIF's claims, for the FMIF retaining some (but not all) of each distribution payable to the Feeder Funds (up to the amount of the settlement sums) with the proportion and timing of each distribution fairly and equitably distributed over the course of the winding up, and for the units that would ordinarily have been restored to the Feeder Funds upon the FMIF recovering the amount of redemptions that were allowed in the past, by providing for rebate payments to be made and/or set off against the settlement sums in place of relief rectifying the register of members to formally reinstate the units.
- [11] There are conditions precedent to the deed coming into effect. One is that Mr Whyte obtains an order from the court to the effect that he is justified in settling the Feeder Fund proceeding on the terms set out in the deed and in causing LMIM as responsible entity of the FMIF to enter and perform the deed. There is a similar condition precedent applying to Mr Jahani that he obtain an order from the court pursuant to s 424 of the Act that in his capacity as receiver and manager of the assets of LMIM as responsible entity respectively of CPAIF and ICPAIF is justified in entering into and performing and in procuring the first defendant and the third defendant to enter into and perform the deed. It is also a condition precedent that Trilogy as responsible entity of WFMIF and Trust Company obtain an order from this Court pursuant to s 96 of the *Trusts Act 1973* (Qld) that they are justified in entering into and performing the deed. It was also a condition precedent to the deed coming into effect that the interim distribution from FMIF be in an amount of at least \$30m.
- [12] It became apparent by the hearing on 2 May 2019 that there were two points of potential ambiguity in the interpretation of the deed. Those ambiguities were appropriately resolved by agreement among all the parties by the resumption of the hearing on 3 May 2019. It also became apparent by the hearing on 2 May 2019 that there was a discrepancy between the number of units in FMIF recorded in the financial accounts of

478,100,385 and the number of units recorded in the unit register of FMIF as 493,792,150.36. That discrepancy had a minimal effect on the calculation of proposed distribution amounts, but the parties agreed that did not materially alter the operation of the deed and did not preclude the applications from proceeding. A revised economic analysis of the proposed distributions was prepared and exhibited to the affidavit of Mr Melrose filed by leave on 3 May 2019 in proceeding BS3383 of 2013.

Mr Whyte's application

- [13] Mr Whyte makes his application in reliance on the inherent jurisdiction of the court to give him advice in his capacity as a court appointed receiver: *Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd* (2002) 42 ACSR 240 at [11].
- [14] Mr Whyte made a separate application in proceeding BS3508 of 2015 that was heard by Jackson J seeking authority as a court appointed receiver to make the distribution pursuant to the deed. That authority was necessary as Mr Whyte, not being the responsible entity of the FMIF, does not have the authority to make any distributions without a further order of the court. That authority is a separate question from the issue of whether Mr Whyte is justified in entering into the deed and carrying out its terms. The decision on the application before Jackson J was reserved, pending the outcome of the application before me.
- [15] In addition to seeking the advice as to whether he is justified in entering into and performing the deed, Mr Whyte also seeks advice (if the deed is approved) on the quantum of the interim distribution proposed under the deed.
- [16] Guidance on the approach that should be taken by the court on the giving of advice is found in authorities that have considered applications in similar circumstances by a trustee, liquidator or privately appointed receiver. In *Re One.Tel Ltd* (2014) 99 ACSR 247 Brereton J considered the approach to be taken in giving directions to liquidators under s 511 of the Act (as it then stood) to the effect they had acted properly and reasonably in entering into a deed of settlement in respect of litigation. Brereton J noted at [36]:
- “While the court’s function under s 511 does not involve it in reconsidering every factor that has informed the liquidator’s decision, let alone developing alternatives or deciding whether the court would have made the same decision, the court needs to be satisfied, before making a direction, that the decision is proper and reasonable; at least usually, this will necessitate consideration of the liquidator’s reasons, and the process by which the decision has been reached.”
- [17] That approach is appropriate to follow in considering whether or not to make the directions that are sought by Mr Whyte as the court appointed receiver. Extensive affidavits were filed on behalf of Mr Whyte for the purpose of this application, including his confidential affidavit that exhibits an extremely detailed advice provided by Mr McKenna of Queen’s Counsel and Mr Ananian-Cooper of Counsel in relation to the issues in the Feeder Fund Proceeding, Mr Whyte’s prospects and a consideration of

the appropriateness of the deed. Legal professional privilege has not been waived in respect of that advice. What can be said is that there are many legal and factual issues to be determined in the Feeder Fund Proceeding and many of the legal issues are finely balanced.

- [18] When the application was heard, Mr Whyte was holding about \$64m from the proceeds of the assets he had collected on behalf of FMIF. Apart from the Feeder Fund Proceeding, he has commenced other proceedings that are ongoing for which he needs to preserve funds for paying costs and any costs orders that are made against him. He has caused LMIM as the responsible entity for FMIF to bring proceeding BS2166 of 2015 in this court against EY, the former auditors of FMIF, in which EY has (with leave before defending) issued multiple third party notices, including against LMIM as responsible entity of the Feeder Funds. In correspondence with the solicitors for Mr Whyte, Mr Jahani and Trilogy, EY expressed a concern that the deed might compromise EY's indemnity, subrogation and proprietary claims in respect of the Feeder Funds that are the subject of the third party notices. Mr Whyte considers that some of the claims in the third party notice may be affected by the covenants not to sue in the deed. It appears likely that there will be a dispute regarding the extent and effectiveness of the covenants not to sue in the deed which may arise for determination in the proceeding against the auditor. EY was advised of the hearing date of Mr Whyte's application and the other applications before me, but did not appear to make any submissions on any of the applications. The proceeding against the auditor is still at an early stage. Mr Whyte has foreshadowed that he will in due course seek judicial advice, as to whether he is justified in continuing to prosecute the claim against the auditor and the way the proceeding should be conducted.
- [19] Apart from estimating costs of conducting the proceeding against the auditor and potential costs orders made in that proceeding against him, Mr Whyte has outlined in detail his estimates of likely further recoveries on behalf of FMIF and other liabilities, including contingent liabilities, and his remuneration. In view of the fact that his administration has been ongoing for almost six years without any distribution to the unitholders, Mr Whyte is obviously keen to proceed to a distribution and would prefer to do so on the basis that possible exposures of FMIF in the proceeding against the auditor are managed as that proceeding progresses. It is apparent from the fact that Mr Whyte applies for advice to the effect he was justified in causing LMIM as responsible entity of FMIF to enter into and perform the deed that he is of the view that the preferred course is to obtain the benefit for FMIF of the compromise of the Feeder Fund Proceeding now, notwithstanding the complication of the ongoing proceeding against the auditor.
- [20] As Mr Whyte's reasons for pursuing the application are set out in his confidential affidavit that discloses the confidential legal advice he has obtained, I cannot summarise those reasons, but merely note that they exist and are supported by legal opinion.
- [21] In all these circumstances and even allowing for the complication of the proceeding against EY, I am satisfied that the decision that Mr Whyte has made in relation to the deed is proper and reasonable and that I should make the direction he seeks in the exercise of the court's inherent jurisdiction that he is justified in settling the Feeder Fund Proceeding on the terms set out in the deed and in causing LMIM as responsible

entity of the FMIF to enter into and perform the deed and, subject to obtaining the authority from the court to do so, he is justified in making the interim distribution in the quantum provided for in the deed.

[22] It is therefore appropriate to make the following orders:

1. It is directed in the inherent jurisdiction of this Honourable Court that David Whyte as the person appointed under section 601NF(1) of the *Corporations Act* 2001 (Cth) to ensure that the LM First Mortgage Income Fund (**FMIF**) is wound up in accordance with its constitution and any orders of the Court, and as the receiver of the property of the FMIF (**Mr Whyte**), is justified in settling Supreme Court proceeding 13534 of 2016 on the terms set out in the Deed of Settlement and Release as varied by the Deed of Variation (**'the Deed of Settlement'**), and in causing LM Investment Management Limited (in liquidation) (**LMIM**) as responsible entity of the FMIF (receiver appointed) to enter into and perform the Deed of Settlement.
2. It is directed in the inherent jurisdiction of this Honourable Court that Mr Whyte is justified in making an interim distribution to the members of the FMIF, if he is conferred with the authority to do so on his application dated 1 February 2019 filed in Supreme Court proceeding 3508 of 2015, of 6.5 cents per unit in the FMIF.
3. Mr Whyte's costs of and incidental to the application filed 1 February 2019 be paid from the assets of the FMIF.

[23] As a draft order was provided by Mr Whyte's solicitors that is substantially in those terms, the formal order that I make will be order as per the amended draft initialled by me and placed with the file.

Mr Jahani's application

[24] Because Mr Jahani is a receiver appointed by a secured creditor, his primary duty is to his appointor to protect and preserve the assets he obtains principally for the benefit of his appointor. He owes secondary duties to LMIM to act in good faith and to use his powers for the sole purpose of securing payments of the debt owed to his appointor, but this duty includes a duty not to sacrifice the interests of the company recklessly: *Expo International Pty Ltd v Chant* [1979] 2 NSWLR 820, 834. The Feeder Fund Proceeding is on the court's Commercial List under the management of Jackson J and on 13 June 2018 Jackson J made an order pursuant to s 59 of the *Trusts Act* 1973 (Qld) that the first and third defendants in that proceeding be represented by Mr Jahani. Mr Jahani did not oppose the making of the order, but made clear his position in regard to his primary duty as a privately appointed receiver to his appointor and his secondary duty to LMIM.

[25] As Mr Jahani is a privately appointed receiver, he can seek to rely on s 424 of the Act in applying to the court for directions. Reference was made to authorities that appear to be against the proposition that s 424 permits a court to give a direction that a receiver is justified to enter a compromise of a legal proceeding. As is apparent from the

allegations in the Feeder Fund Proceeding and the provisions of the deed, the compromise of the Feeder Fund Proceeding from any party's perspective involved more than the exercise of a commercial judgment. Because of the complexity of the Feeder Fund Proceeding, I consider the approach of Brereton J in *Re One.Tel Ltd* as to whether the liquidators were justified in entering into the deed of settlement as much more preferable than declining to apply s 424 in the circumstances. The approach taken in *Re One.Tel Ltd* at [35]-[36] applies equally to a privately appointed receiver in Mr Jahani's position, as it does to a court appointed receiver in Mr Whyte's position.

- [26] Mr Jahani's affidavit filed on 26 April 2019 explains the extensive work that was undertaken by him and his staff in preparing for the mediation and his consideration of the advices he obtained from Mr O'Sullivan of Queen's Counsel and Mr Turner of Counsel prior to, during and subsequent to the mediation. Legal professional privilege is claimed in respect of those advices which have been exhibited to the separate confidential affidavit filed by leave on 2 May 2019 of Mr Jahani's solicitor, Mr O'Farrell.
- [27] The portion of the proposed interim distribution under the deed that would be paid to Mr Jahani as the receiver and manager of LMIM as the responsible entity of CPAIF and ICPAIF will result in the secured creditor of those Feeder Funds being paid in full, with a balance remaining for distribution to the unitholders of those Feeder Funds. Mr Jahani has provided detail of the anticipated calculation of the distributions to CPAIF and ICPAIF that reflects the agreed compromise of FMIF's claim against those two Feeder Funds.
- [28] Mr Jahani sets out in paragraph 74 of his affidavit the reasons for his support of the settlement reflected in the deed. He notes that the interim distribution in the sum of at least \$30m will result in his being able to finalise the receivership, removing the ongoing burden of receivership costs from the unitholders of CPAIF and ICPAIF. The repayment of the secured debt stops interest accruing on that debt. The settlement was consistent with the pre-mediation advice that Mr Jahani had received on prospects of success. There would have been additional costs if the Feeder Fund Proceeding had gone to a trial and the settlement avoids the risk of the plaintiff being entirely successful in its claims and saves the expense of further costs. Mr Jahani believes that the deed is proper and consistent with his primary duty to the secured creditor and his secondary duties to LMIM as responsible entity of the CPAIF and the ICPAIF.
- [29] Mr Jahani discloses that EY has served third party notices and a third party statement of claim on LMIM as responsible entity of the CPAIF and the ICPAIF seeking indemnity against those Feeder Funds against any liability to the plaintiff in that proceeding on the basis of allegations, among others, that LMIM as responsible entity of those two Feeder Funds is liable to make equitable contribution to EY in respect of the liability to LMIM as the responsible entity of FMIF. Despite the correspondence that passed between EY's solicitors and Mr Jahani's solicitors, EY did not seek to be heard on Mr Jahani's application and Mr Jahani considered it appropriate to proceed with the application.
- [30] Even allowing for the potential complication of EY's third party notices, I am satisfied that Mr Jahani's decision to enter into the deed was a proper and reasonable one in the

circumstances and it is therefore appropriate to make the direction that Mr Jahani seeks in the following terms:

Pursuant to section 424 of the *Corporations Act 2001 (Cth)*, the applicant is justified in entering into and performing, and in causing the first respondent in its capacity as the responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875 and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 to enter into and perform, the Deed of Settlement and Release a copy of which appears at exhibit SJ-12 to the Affidavit of Said Jahani affirmed on 24 April 2019, as varied by the Deed of Variation a copy of which appears at exhibit SJ-13 to that affidavit.

- [31] The draft order provided by Mr Jahan's solicitors that includes that direction also included an order that it is now no longer necessary to make. I will therefore make an order as per the amended draft initialled by me and placed with the file.

Application by Trilogy and the Trust Company

- [32] Trilogy and the Trust Company bring their application pursuant to s 96 of the *Trusts Act 1973*. The directions are sought on the basis of a statement of facts that is exhibited to the affidavit of their solicitor Ms Goodman that was filed on 1 May 2019. Reliance on s 96 is appropriate for the responsible entity of a managed investment scheme which holds the scheme property on trust for scheme members. Trust Company as the holder of the legal title of the scheme property on trust for Trilogy is also clearly a trustee. The nature of the advice given to a trustee under provisions such as s 96 of the *Trusts Act 1973* is explained in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [64] and [196].
- [33] Mr Ryan who is the managing director of Trilogy and was authorised by both Trilogy and the Trust Company to do so made the affidavit which was filed on 1 May 2019 that summarised, in general terms, the reasons for those parties entering into the deed. Those reasons are:
- (a) settlement of the Feeder Fund Proceeding obviates the need for those applicants to incur further legal costs in defending the Feeder Fund Proceeding;
 - (b) as litigation is unpredictable, there is a risk that the applicants' defence of the claims against them will be unsuccessful;
 - (c) the applicants' solicitors have estimated that the costs of defending the Feeder Fund Proceeding to trial will be in the order of \$1.3m exclusive of GST;

- (d) the settlement will lead to the interim distribution being made within a short timeframe, instead of members of the WFMIF having to wait until the conclusion of the trial of the Feeder Fund Proceeding;
- (e) if the applicants do not successfully defend the Feeder Fund Proceeding, the WFMIF may not receive any distribution at all, or may receive a smaller distribution than it would do if the proposed settlement proceeds;
- (f) the settlement is consistent with the legal advice the applicants received on prospects of success in the Feeder Fund Proceeding.

[34] Mr Ryan's confidential affidavit exhibited advice obtained from Ms Ahern of Counsel on whether the settlement of the Feeder Fund Proceeding on the terms of the deed was reasonable and a further advice obtained from Ms Ahern of Counsel on the prospects of success in the Feeder Fund Proceeding and the settlement. Legal professional privilege is not waived by Trilogy and the Trust Company in respect of those advices.

[35] Notwithstanding the potential complication of the third party notice against Trilogy as the responsible entity of WFMIF in the proceeding against the auditor, it is appropriate in the circumstances to make the direction that the applicants Trilogy and the Trust Company seek in the following terms:

Pursuant to s.96 of the *Trusts Act 1973* (Qld), the Applicants are justified:

- (a) in settling Supreme Court proceeding 13534 of 2016 on the terms set out in the Deed of Settlement and Release as varied by the Variation to the Deed of Settlement and Release (**Deed of Settlement**); and
- (b) in entering into and performing the Deed of Settlement.

[36] The draft order provided by the solicitors for Trilogy and the Trust Company incorporated that direction (as well as orders that are now not necessary to make). The formal order that I will make in this proceeding is also an order as per the amended draft initialled by me and placed with the file.

Conclusion

[37] Because each set of applicants has relied on legal opinions that remain confidential and other material disclosed in the confidential affidavits (which I had the benefit of considering), these reasons have been limited to general statements to support the conclusion that I reached in respect of each application, that it was appropriate to give the direction in the terms in which it was sought. The Feeder Fund Proceeding is complex litigation that would have absorbed significant resources of each of the parties, if it had proceeded to a hearing (and also significant court resources), with the attendant risks and delays for each of the parties that are inevitably associated with complex litigation. The unitholders of FMIF and the Feeder Funds would have borne the consequences. The fact that parties to the deed were able to resolve the Feeder Fund

Proceeding on terms that were satisfactory to the respective parties (from the perspective of each of the parties) in a mediation is a matter of some public interest.