SUPREME COURT OF QUEENSLAND

CITATION:	*LM Investment Management Limited & Anor v Whyte* [2019] QSC 233
PARTIES:	**JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTAGE INCOME FUND ARSN 089 343 288** (First Applicant) AND **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTAGE INCOME FUND ARSN 089 343 288** (Second Applicant) **v** **DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001** (First Respondent) AND **SAID JAHANI IN HIS CAPACITY AS RECEIVER AND MANAGER OF THE ASSETS, UNDERTAKINGS, RIGHTS AND INTERESTS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIEDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS THE RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRLAIAN INCOME FUND ARSN 110 247 875 AND THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868** (Second Respondent)
FILE NO/S:	BS No 3508 of 2015
DIVISION:	Trial Division

PROCEEDING:	Application filed 10 October 2018 and an application filed 1 February 2019
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	For the application filed 10 October 2018 – 10 December 2018 For the application filed 1 February 2019 – 13 March 2019
JUDGE:	Jackson J
ORDER:	**On the application filed 10 October 2018 the order of the court is that:** **1. The application is dismissed.** **2. The parties exchange and file written submissions as to costs by 8 October 2019.** **On the application filed 1 February 2019 the order of the court is that:** **1. The first respondent is authorised and empowered to make an interim distribution from the property of the LM First Mortgage Investment Income Fund ("FMIF") among the members of the FMIF of up to $40 million.** **2. It is declared that each member holding "Class C" Units in the FMIF is entitled to be paid in the winding up of the FMIF amounts calculated by reference to the calculation of that member's units in the foreign currency of investment as adjusted for the foreign exchange spot rate between the currency of investment and the Australian dollar prevailing at the date of the commencement of the winding up of the FMIF.** **3. The first respondent's costs of the application be costs in the winding up of the FMIF to be assessed on the indemnity basis and paid to the first respondent from the property of the FMIF.** **4. Trilogy exchange and file with any opposite party submissions as to costs by 8 October 2019.**
CATCHWORDS:	CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – Where the second applicant is the responsible entity of a registered managed investment scheme – Where the first applicant is the liquidator of the second applicant – Where the first respondent was appointed to take responsibility for ensuring the scheme is wound up in accordance with its constitution –

where the first applicant applied to the court for directions that the first applicant take responsibility for ensuring the scheme was wound up in accordance with its constitution – Where the court held that the winding up of the scheme should not be transferred from the first respondent to the first applicant

CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – Where the first respondent was appointed to ensure a registered managed investment scheme is wound up in accordance with its constitution – Where the first respondent applied for orders that he be authorised to make an interim distribution to the members of the scheme in a sum of up to $40 million

CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – Where the first respondent was appointed to ensure a registered managed investment scheme is wound up in accordance with its constitution – Where the first respondent sought a declaration that Class C unit holders were entitled to be paid amounts in the winding up of the scheme – Where the court held that Class C members could receive distributions on the footing their entitlements were ascertained by reference to the appropriate calculation of units in AUD as at the dates of the winding up

ASIC v Atlantic 3-Financial (Aust) Pty Ltd [2004] 1 Qd R 591, cited
ASIC v Letten (No. 7) (2010) 190 FCR 59, cited
ASIC v Letten [2010] FCA 140, cited
Bruce v LM Investment Management Limited (in liquidation) & Ors [2019] QSC 126, cited
Carl Zeiss Stiftung v Herbert Smith & Co (No 2) [1969] 2 Ch 276, cited
Frost v Bovaird (2012) 203 FCR 95, cited
Hung v Warner; re Bellpac Pty Ltd (receivers and managers appointed) (in liquidation) [2013] FCAFC 48, cited
Ide v Ide (2004) 184 FLR 44, cited
LM Investment Management Ltd (in liq) v Bruce and others (2014) 102 ACSR 481, cited
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, cited
Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund) [2015] QSC 283, cited
Park v Whyte (No. 2) [2018] 2 Qd R 413, cited
Park v Whyte (No. 3) [2018] 2 Qd R 475, cited

Re Bruce & Anor v LM Investment Management Limited & Ors [2013] QSC 192, cited
Re Stacks Managed Investments Ltd (2005) 54 ACSR 466, cited

Corporations Act 2001 (Cth), ss 420, 473, 563B, 601NF, 1581,
Insolvency Law Reform Act 2016 (Cth)
Trusts Act 1973 (Qld), s 59

COUNSEL: For the application filed on 10 October 2018 ("first application"):
J Peden QC and S Russell for the applicant liquidator
J McKenna QC and D Ananian-Cooper for the respondent David Whyte
D Turner for Said Jahani

For the application on 1 February 2019 ("second application"):

J McKenna QC and D Ananian-Cooper for the applicant David Whyte

SOLICITORS: For the application on 10 December 2018:
Russells for the applicant liquidator
Tucker & Cowen for the respondent David Whyte
HWL Ebsworth for Said Jahani

For the application on 13 March 2019:
Tucker & Cowen for the respondent David Whyte
HWL Ebsworth for Said Jahani

JACKSON J:

[1] These two applications are related and, accordingly, may be dealt with together in these reasons. They are also related to a separate set of applications that proceeded after these applications were heard.[1]

[2] The first application was heard on 10 December 2018. By it, the liquidator of LM Investment Management Limited (in liquidation) (receivers appointed) ("LMIM") applied for directions as to how the registered managed investment scheme named the LM First Mortgage Investment Fund ("FMIF") is to be wound up consequent upon earlier orders resolving an earlier directions application court made on 8 and 21 August 2013,[2] and 17 December 2015 as varied,[3] that I will

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

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

3 *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283. See also the order made 17 December 2015 and the order made on 18 July 2018 (CFI 138).

term the "First Directions Application",[4] and other relevant decisions as to the liquidator's remuneration and expenses.[5] Although mostly directed to the winding up of the FMIF, the first application sought some orders in relation to two other registered managed investment schemes, the LM Australian Income Fund ("AIF") and the LM Australian Structured Products Fund ("ASPF"). LMIM is the responsible entity of all three schemes. The first respondent, David Whyte is a person appointed[6] to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and any orders made under s 601NF(2) of the *Corporations Act* 2001 (Cth) ("CA").[7] He was also appointed as the receiver of the scheme property of the FMIF, with powers to start and defend proceedings on behalf of LMIM as responsible entity of the FMIF.[8]

[3] The orders applied for in the first application, in substance, would see the management of how the FMIF is to be wound up transferred to the liquidator, subject to the continuation of existing legal proceedings by Mr Whyte as receiver of LMIM as responsible entity of the FMIF. It is necessary to deal with the facts and grounds of the application in some detail. Nevertheless, it is relevant to observe that as long ago as July 2013 the liquidator opposed any order that Mr Whyte be appointed as a person to take responsibility for ensuring that the FMIF was wound up in accordance with its constitution[9] and, since that order was made, the liquidator has sought to overturn or reduce Mr Whyte's role on two previous occasions, by an appeal from the orders made on 8 and 21 August 2013,[10] and by the First Application for Directions.[11] Accordingly, this is not the first occasion on which the liquidator has sought to resist or reduce Mr Whyte's appointed role.

[4] The second application was heard on 13 March 2019, and then adjourned for consideration until after the third related but separate set of applications were heard and decided. The order applied for in the second application would see Mr Whyte authorised to make an interim distribution to the members of the FMIF in a sum of up to $40 million. It is necessary for him to seek such an order because an existing direction as to how the FMIF is to be wound up is

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

5 *Park v Whyte (No. 2)* [2018] 2 Qd R 413; *Park v Whyte (No. 3)* [2018] 2 Qd R 475. As well, there have been a number of decisions relevant to David Whyte's remuneration as receiver and person appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and the court's orders.

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

7 *Corporations Act* 2001 (Cth), s 601NF(1).

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

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

10 *LM Investment Management Ltd (in liq) v Bruce and others* (2014) 102 ACSR 481.

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

that he not make a distribution without an order of the court.[12] Again, it will be necessary to consider the facts and grounds advanced on the second application in some detail, but an appropriate initial observation is that Mr Whyte's application is founded on the winding up of the FMIF coming to an end, subject to two or three important pieces of litigation and other lesser matters, so that it is clear that the proposed interim distribution to members is possible and, accordingly, should be made.

[5] The third related but separate set of applications ("Feeder Funds Proceeding judicial advice applications") were for orders that the trustees and responsible entities that are parties to proceeding BS 13534 of 2016, known colloquially among the parties as the "Feeder Funds Proceeding" were justified in entering into a deed of settlement and release compromising the proceeding. LMIM as responsible entity of the FMIF, by Mr Whyte, is the plaintiff in the Feeder Funds Proceeding. The Feeder Funds are registered managed investment schemes, namely the LM Currency Protected Australian Income Fund ("CPAIF"), the LM Institutional Currency Protected Australian Income Fund ("ICPAIF") and the LM Wholesale First Mortgage Income Fund ("WFMIF"). They are the defendants to the Feeder Funds Proceeding, together with LMIM in its own right. Each of the Feeder Funds holds units in the FMIF.

[6] Orders that the responsible entities were justified in entering into the deed of settlement and release compromising the proceeding were conditions precedent to the performance of the deed of settlement and release, and were made on 22 May 2019.[13] Because those conditions have now been satisfied, it is possible for the second application for interim distribution to proceed without jeopardising the compromise and settlement of the Feeder Funds Proceeding. Because the first application for directions by the liquidator included an order that he be appointed or authorised to act as a contradictor in respect of the Feeder Funds Proceeding, it was not appropriate to resolve either the first or the second applications before the result of the applications for judicial advice or directions as to whether the responsible entities were justified in entering into and implementing the deed of settlement and release was known.

[7] For the reasons that follow, the conclusions I have reached are that the first application should be dismissed and an order should be made on the second application authorising Mr Whyte to make the proposed interim distribution.

First application – directions in the winding up of the FMIF and other schemes

[8] By the first application, the liquidator applies for orders that may be grouped into categories. Summarising, the orders sought are that:

(a) Mr Whyte's appointment continue only in respect of his conduct on behalf of LMIM as responsible entity of the FMIF of proceeding BS 11560 of 2016, colloquially known among the parties as the "Clear Accounts Proceeding", the Feeder Funds Proceeding

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12 *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283, [106].

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

and proceeding BS 2166 of 2015, colloquially known among the parties as the "EY Proceeding";[14]

(b) the liquidator henceforth take responsibility for ensuring that the FMIF is wound up in accordance with its constitution together with such ancillary orders as may be appropriate;

(c) the liquidator or Mr Whyte, in the event that the last order is not made, file an affidavit describing any impediment that might exist to an interim distribution being made forthwith to members of the FMIF;

(d) the liquidator and Mr Whyte file affidavits setting out budgets of remuneration and expenses for the period up to and including the payment of the final distribution to creditors and members of the FMIF (and in the liquidator's case, the AIF and ASPF);

(e) the court approve the budgets for remuneration and expenses to be incurred as reasonable estimates in the winding up of LMIM, the FMIF, the AIF and the ASPF;

(f) the remuneration of the liquidator be paid forthwith in the amount of 50 percent of the amount of the approved budget, with the liquidator to receive the other 50 percent and all other additional remuneration as might be ordered by the court at the final remuneration and expenses determination, or that the initial 50 percent be treated as being "on account" of the final determination;

(g) the remuneration of Mr Whyte henceforth be dealt with in the same way;

(h) 50 percent of the remuneration of the liquidator, in accordance with the approved budget, be paid within 30 days of the order for directions from the respective scheme property of the FMIF, AIF and ASPF, in such proportions as may be just;

(i) 50 percent of the remuneration of Mr Whyte, in accordance with the approved budget, be paid within seven days after payments are made to the liquidator from the scheme property of the FMIF;

(j) the expenses of the liquidator to the conclusion of the winding up of the FMIF, AIF and ASPF be paid from the scheme property of the FMIF, AIF and ASPF, in such proportions as may be just, by payment of 50 percent of the expenses in the approved budget within seven days after the end of each calendar month, with the other 50 percent of the approved budget and all other additional expenses as might be ordered to be paid at the final remuneration and expenses determination, or that the initial 50 percent be treated as being "on account" of the final determination;

(k) the expenses of Mr Whyte henceforth be dealt with on the same basis.

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[14] Surprisingly, the liquidator did not include proceeding BS 12317 of 2014, colloquially known among the parties as the "Bellpac Proceeding", in those Mr Whyte would continue. I assume this to have been an oversight, as the Bellpac Proceeding was ready for trial at the time of hearing of the first application and it would have made no sense to transfer it from Mr Whyte's control to the liquidator's control. Kellie-Anne Trenfield said the most efficient structure moving forward was for Mr Whyte to maintain control of all litigation.

[9] On any view, these proposed directions are unusual. They are opposed by Mr Whyte as to the FMIF. The liquidator's submissions in support of the orders are framed by reference to the grounds of Mr Whyte's opposition. However, at a high level, the liquidator's application is informed by three or four considerations. The most important of them is that the liquidator is unfunded for remuneration and expenses in respect of the FMIF, unless the liquidator is entitled to an indemnity from the scheme property of the FMIF. Second, the liquidator submits that the delay, costs and expenses of the winding up of the FMIF are excessive. Third, the liquidator submits that the proposed budgeting, approval and 50 percent pre-payment mechanism would introduce transparency in relation to remuneration and expenses being charged to the FMIF.

[10] Mr Whyte's opposition to the proposed orders is made only in relation to the FMIF; he has no concern or role in the administration of any other fund.

Progress of winding up the FMIF

[11] At this point, Mr Whyte (and another receiver appointed by a secured creditor of the FMIF), have realised all of the real property assets of the FMIF, resulting in a substantial cash balance of over $60 million that is available to meet further expenses in collecting any remaining assets in legal proceedings and for distribution to members. At the time of the hearing of the first application, the cash assets were held in the name of the custodian of the FMIF and were under the control of the secured creditor's receiver, but that receiver has now retired and Mr Whyte has control of the relevant accounts. Accordingly, the steps to finalising the winding up of the FMIF may be summarised as:

(a) finalising the creditors or claimants who are entitled to indemnity from the FMIF. That is a process provided for by previous orders. That has been partly completed, but not finished, possibly because the liquidator ceased to do the necessary work because he was unfunded;

(b) making an interim distribution to the members of the FMIF;

(c) completing the remaining litigation matters brought by or against LMIM as responsible entity of the FMIF (by Mr Whyte) and any claims against it or him that need to be completed; and

(d) making any final distribution, a final audit and deregistration of the scheme.

Liquidator identifying claims for indemnity

[12] The order made on 17 December 2015 upon the First Directions Application[15] provided that Mr Whyte was authorised to determine whether and to what extent LMIM is entitled to be indemnified from the property of the FMIF in respect of any expense or liability of, or claim against LMIM acting as responsible entity of the FMIF. The order provided for a mechanism directing the liquidators to ascertain the debts payable by and the claims against LMIM, to adjudicate upon those debts and claims in accordance with the provisions of the *Corporations Act* 2001 (Cth) ("CA"), to identify whether LMIM has a claim for indemnity from the property of the FMIF, and to make those claims to Mr Whyte for consideration in accordance with the order. If Mr Whyte rejected a claim for indemnity, provision was made for it to be resolved by the court, if necessary.

[13] Regrettably, that process did not occur as envisaged, or in a timely way. In the event, on 18 July 2018 the court ordered that any further claim by the liquidator for an indemnity and payment from the property of the FMIF be submitted to the court for approval. The process envisaged by that order for the liquidator to make any further claims apparently has not been completed by the liquidators still, although the picture is somewhat crystallised by the evidence that was adduced in support of the second application for an interim distribution that is made by Mr Whyte.

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

Appointment of liquidator as contradictor

[14] At the hearing, the liquidator did not make any detailed oral submissions in support of the application for orders that the liquidator be appointed as a contradictor in either the Feeder Funds Proceeding or the Clear Accounts Proceeding. Nevertheless, it is necessary to deal with those questions as the application for those orders was not withdrawn.

Feeder Funds Proceeding

[15] LMIM as responsible entity of the FMIF claims relief as plaintiff in the Feeder Funds Proceeding as to whether the Feeder Funds were disentitled from receiving distributions in the winding up of the FMIF by reason of benefits or payments previously provided to and received by them, and allegedly made by LMIM as responsible entity of the FMIF in breach of trust, including whether a number of income distributions and deemed reinvestments by the Feeder Funds in units in the FMIF were void.

[16] On 13 June 2018, the court made an order under s 59 of the *Trusts Act* 1973 (Qld) that the interests of LMIM as responsible entity of the CPAIF and the ICPAIF as defendants to the Feeder Funds Proceedings be represented by Said Jahani, a receiver appointed to the assets of those funds by a secured creditor. The WFMIF was represented by Trilogy Funds Management Ltd ("Trilogy") as its responsible entity.

[17] Before the hearing of the first application, the Feeder Funds Proceeding was settled at mediation and the deed of settlement and release was executed by the relevant parties through their representatives. There are, however, a number of conditions precedent to the performance of the deed, including that:

(a) various parties to the deed, including Mr Whyte, obtain such judicial advice as they considered necessary to confirm that they were justified in entering into the deed; and

(b) Mr Whyte is authorised to make an interim distribution to the members of the FMIF of at least $30 million.

[18] Mr Whyte submitted that any order for the liquidator to be a "contradictor" in the Feeder Funds Proceeding to represent the interests of LMIM in its personal capacity was unnecessary. I agree. Alternatively, Mr Whyte and Mr Jahani submitted that if the liquidator sought to be appointed as a contradictor to represent the interests of the members of the CPAIF and ICPAIF that too was unnecessary. Mr Jahani, as receiver of the property of the CPAIF and ICPAIF has the power to conduct the defences of LMIM as responsible entity of those schemes in the Feeder Funds Proceeding, in the interests of the secured creditor and, in effect, on behalf of the members of those schemes.[16] Further, on 13 June 2018, the court ordered that he represent LMIM as responsible entity for the CPAIF and ICPAIF in the Feeder Funds Proceeding. There was no evidence that any member of the CPAIF or the ICPAIF had any concern about Mr Jahani representing LMIM as responsible entity of those schemes, or that Mr Jahani had failed or was failing to defend the proceeding properly. Of course, Trilogy is a defendant to the

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16 *Corporations Act* 2001 (Cth), 420(2)(k).

Feeder Funds Proceeding as the responsible entity for the WFMIF and it is the appropriate party and representative as trustee of the members of that scheme.

[19] The liquidator's submissions seemed to be premised on the fact that because the liquidator has not seen the deed of settlement and release he could not assess the possibility that Mr Jahani may not have acted in the best interests of the members of the CPAIF and the ICPAIF. That is not a reason to order that the liquidator be a contradictor in the Feeder Funds Proceeding. There was no warrant in the circumstances as disclosed on the application for an order appointing the liquidator to act as a contradictor for any party to the Feeder Funds Proceeding. Mr Jahani, as the receiver of the scheme property of the CPAIF and the ICPAIF was the proper representative of LMIM as the responsible entity of the CPAIF and the ICPAIF. Under the terms of the deed of release and settlement, it was a condition precedent that Mr Jahani make a successful application to the court in the Feeder Funds Proceeding judicial advice applications that he was justified in entering into the deed of settlement and release. That has now occurred.[17]

[20] Accordingly, I decline to make an order that the liquidator be directed to act as a contradictor in respect of the Feeder Funds Proceeding.

Clear Accounts Proceeding

[21] The Clear Accounts Proceeding is a proceeding by which LMIM as responsible entity of the FMIF, by Mr Whyte, claims relief against LMIM in its own right, by the liquidator, for alleged breaches of trust by LMIM. On 25 July 2018, the court directed that the liquidator represent the interests of LMIM in its own right in the Clear Accounts Proceeding and ordered that the proceeding be stayed pending completion of the proof of debt process.

[22] The relevant interests being represented in the Clear Accounts Proceeding must be kept in mind. Mr Whyte claims relief to vindicate alleged rights of the unit holders of the FMIF as beneficiaries of the trust of the scheme property of the FMIF to have LMIM as trustee restore trust assets of the FMIF. Accordingly, no question of the liquidator representing the interests of the unit holders of the FMIF as beneficiaries arises. There is no basis for LMIM to seek appointment as contradictor in the interest of the unit holders.

[23] The basis of the liquidator applying to be appointed as a contradictor in the Clear Accounts Proceeding seems to be a suggestion that by doing so he may be entitled to receive payment of remuneration and legal expenses to oppose the proceeding from the scheme property of the FMIF. However, orders to that effect are not sought explicitly.

[24] There are some circumstances where a defendant, including a trustee who has title to or possession of property to which an adverse proprietary claim is made by a plaintiff, may be authorised to utilise some of that property to defend the claim, either by an application for directions under trust legislation,[18] or more generally.[19] But the primary or usual rule is that a

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

18 *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, 94 – 97 [74]-[88].

trustee who defends a claim for breach of trust brought by or on behalf of the beneficiaries is not entitled to indemnity for their costs when incurred, although if the trustee is successful the trustee's costs would ordinarily be ordered to be paid by the opposite party personally or from the trust estate.[20]

[25] Thus, if LMIM in its own right, by the liquidator, successfully defends the Clear Accounts Proceeding, it and he might be entitled to an indemnity from the property of the FMIF for any costs and expenses reasonably incurred that are not compensated by an order for costs that might be made in its favour. But that does not, per se, justify making an order in advance to fund the alleged defaulting trustee's costs from the assets of the trust fund and does not justify an order for appointment of the liquidator as a contradictor so as to fund those costs from the trust estate of the scheme property of the FMIF.

[26] In my view, no appointment of the liquidator as a contradictor for the Clear Accounts Proceeding should be made.

Liquidator's proposed remuneration and expenses regimes

[27] The liquidator submits that the winding up of the FMIF has been a lengthy and expensive task. In particular, the remuneration of Mr Whyte up to the time of making the first application has exceeded $14 million, to which must be added the remuneration of the liquidator (including whilst appointed voluntary administrator) and the external receivers.

[28] The liquidator submits that since all the assets of the FMIF have been realised, apart from any that may be collected in the remaining litigation, any course which lessens the cost burden on the members of the FMIF is desirable and necessary.

Remuneration

[29] To that end, the liquidator proposes[21] that if he were appointed to continue the winding up of the FMIF, he would cap his remuneration for the work necessary to wind it up at $180,000 per annum plus $200,000 for identified one-off tasks that would need to be completed (both exclusive of GST).

[30] The liquidator submits that the continued appointment of Mr Whyte apart from continuing the Feeder Funds Proceeding, the Clear Accounts Proceeding and the EY Proceeding (and I infer the Bellpac Proceeding) is unnecessary. As previously mentioned, there is a substantial issue between Mr Whyte as receiver of the FMIF and LMIM in its own right, by the liquidator, as to whether LMIM in its own right is entitled to recover costs or expenses by an indemnity of exoneration from the scheme property of the FMIF, which is the subject of the Clear Accounts Proceeding.

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19 *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, 283-285.

20 *Frost v Bovaird* (2012) 203 FCR 95, 106-109 [69]-[79].

21 By an affidavit of Kelly-Anne Trenfield.

[31] Notwithstanding this difficulty, the liquidator made submissions as to the differences between his proposals in relation to a number of different subject matters that would remain in the winding up of the FMIF, as matters that will attract remuneration for the insolvency practitioner carrying them out, on the basis that the comparison demonstrates that the liquidator would be more cost effective than Mr Whyte. Perhaps he would be on those matters, but it does not seem to me that is a strong factor in the circumstances viewed overall, because they are relatively minor matters of remuneration and expense in comparison to resolving the remaining litigation.

[32] Another point that assumed some significance in oral argument was Mr Whyte's concern that if responsibility for the winding up of the FMIF were transferred to the liquidator, except for Mr Whyte's conduct of the remaining litigation matters, the cash funds that are presently under Mr Whyte's control would pass to the liquidator. Mr Whyte's submissions expressed concern about both the practical need he would then have to involve the liquidator in seeking payment of sums on account of the remaining litigation and also that the liquidator has conflicts between LMIM's own interests and LMIM's duties as responsible entity of the other registered schemes on the one hand and the interests of the members of the FMIF. However, before reaching those matters there are a number of other points.

[33] First, the fundamental purpose of the liquidator's proposal for orders for budgeting, approval and pre-payment of 50 percent of future remuneration is that the liquidator will receive a substantial sum by way of pre-payment of that remuneration from the scheme property of the FMIF for the responsibility of carrying out the remaining work of winding up the FMIF as a registered scheme.

[34] I have previously decided that because the provisions of the CA require the liquidator of LMIM to call for and adjudicate on proofs of debt of LMIM in LMIM's winding up, and that some of the proofs will be in respect of debts which LMIM incurred as responsible entity and trustee of the FMIF for which LMIM might be entitled to an indemnity by way of exoneration from the property of the FMIF, for expenses properly incurred, the liquidator should call for relevant proofs, adjudicate upon them and notify them to Mr Whyte. That was the subject of the order made on 17 December 2015 and varied on 18 July 2018. Those orders specifically made provision for the liquidator to be reimbursed for his remuneration and expenses of any proofs that should be accepted as debts properly incurred on behalf of the FMIF, although not in advance.

[35] However, by the Clear Accounts Proceeding, Mr Whyte alleges that the members of the FMIF are entitled to set up claims that they have against LMIM in its own right to restore the trust funds of the FMIF as scheme property, as a defaulting trustee, against any claim by LMIM for an indemnity from the scheme property of the FMIF for expenses properly incurred on behalf of the FMIF. Accordingly, Mr Whyte submits that to make the order for pre-payment of remuneration sought by the liquidator would be to require the members of the FMIF to fund the claims of the creditors, beyond the scope of the existing orders. In making submissions in support of the pre-payment of remuneration order, the liquidator did not deal with this difficulty.

[36] Second, because the liquidator proposes that Mr Whyte continue to conduct both the Clear Accounts Proceeding on behalf of the unit holders of the FMIF against LMIM in its own right by

the liquidator, as well as the Feeder Funds Proceeding and the EY Proceeding (and I infer the Bellpac Proceeding), it will be necessary for Mr Whyte to have access to the cash funds of the FMIF for that purpose and to report to unit holders as to the progress of those proceedings.

[37] Given these points, there does not seem to be any logical reason why the functions of managing registry issues or general administration otherwise warrant an order generally handing over the conduct of the winding up of the FMIF, including its substantial cash funds, otherwise, to the liquidator. The point is illustrated by Kellie-Anne Trenfield's affidavit that proposes on the liquidator's behalf that for the ongoing litigation the most efficient structure would be for Mr Whyte to have conduct of the Feeder Funds Proceeding, the Clear Accounts Proceeding, the Bellpac Proceeding and the EY Proceeding and,[22] on the basis that Mr Whyte should estimate his remuneration and expenses through to the conclusion of the proceedings and if approved by the court retain the "sum" (50 percent of the approved budget) without having recourse to the remaining funds of the FMIF and on the basis that the liquidator would maintain a liaison with Mr Whyte. That proposal does not seem to me to be practical. I note that after that affidavit was sworn the Bellpac Proceeding went to a full trial in April 2019, but the EY Proceeding has not significantly progressed.

[38] Even if those reasons were not enough, there are other potential difficulties associated with the liquidator's proposed regime for budgeting, approving and pre-paying 50 percent of the approved amount of remuneration and expenses.

[39] The court's power in respect of the liquidator's remuneration is that provided for by s 473(3) of the CA that a liquidator is entitled to receive such remuneration by way of percentage or otherwise as is determined under that section.[23] Under s 473, there is no provision for a maximum amount of remuneration where an external administrator is entitled to receive remuneration worked out on a time cost basis.[24] As well, in the body of cases developed as to the practices that relate to a liquidator's remuneration, no case identified in submissions, or of which I am aware, supports an order for a budgeting process that would determine, in effect, that an amount of remuneration is approved by court order but is also subject to a right on the part of the liquidator to apply for further remuneration together with a right of pre-payment of 50 percent (or some other percentage) of the relevant amount, in aid of cash flow. It will be observed that the orders applied for do not propose to cap finally the amount of the liquidator's remuneration in a way that transfers the risk of the amount proving to be too low to the liquidator, although on the hearing of the application it was proposed that there be a cap on some items of work.

[40] The driving feature of the liquidator's proposal in relation to his future remuneration is that he receive pre-payment of remuneration to the extent of 50 percent (or some other percentage)

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22 Supreme Court of Queensland, BSC 12317/14.

23 Although s 473 of the *Corporations Act* 2001 (Cth) was repealed by the *Insolvency Law Reform Act* 2016 (Cth), and the introduction under that Act of the Insolvency Practice Schedule (Corporations), s 1581 of the CA provides that despite the repeal of s 473, the old Act continues to apply in relation to the remuneration of a liquidator of a company appointed before 1 March 2017.

24 Compare s 60-10(4) of the *Insolvency Practice Schedule (Corporations)*.

from the scheme property of the FMIF. In my view, for the reasons already mentioned, that is not an appropriate order in this case, assuming there is power to make it in the first place. There is little point in incurring the costs of budgeting and approval only to wait until the final determination of the appropriate remuneration which was not truly fixed.

[41] As to the schemes other than the FMIF, namely the AIF and ASPF, there is some untidiness as to the precise orders sought by the liquidator. This was introduced by the liquidator apparently applying for an order that he prepare a single budget for more than one scheme. The liquidator's submissions continued the difficulty by describing the schemes collectively as the "LMIM Estate", a concept devoid of legal meaning. However, some of the orders applied for can only relate to the FMIF. So far as Mr Whyte is concerned, that is the only scheme in which he was interested. Some orders sought specifically referred to the winding up of the affairs of the FMIF. Yet others did not, yet they would have affected the FMIF. For example, the provision for Mr Whyte's remuneration to be paid as to 50 percent until the "Conclusion", a term defined to mean a date not before an affidavit by the liquidator that there is no impediment to the distribution of funds to members of all schemes, would have had Mr Whyte's remuneration entitlement turn on the progress of the winding up of the AIF and ASPF.

[42] However, it is unnecessary to separately consider the position of the schemes other than the FMIF, with a view to whether any separate order should be made concerning them. No particular or separate reason to warrant the budgeting, approval and pre-payment orders sought in relation to those schemes was relied upon by the liquidator. In any event, the liquidator submitted on the hearing of the first application that the AIF, ASPF and CPF were within weeks of completion of winding up (in December 2018) and the only property of the ACPAIF and CPAIF were cash and units in the FMIF.

Mr Whyte's remuneration

[43] As to the liquidator's application for similar orders in relation to Mr Whyte's remuneration, in my view, the driving feature appears to be to make Mr Whyte take the risk of estimating his remuneration for the remaining litigation and to limit his cash flow to 50 percent of that estimate until the final determination of his remuneration.

[44] The court's power, if any, to order that Mr Whyte's remuneration be determined and paid from the scheme property of the FMIF begins with s 601NF(1) of the CA, by which the court may, by order, appoint a person to take responsibility for ensuring that a registered scheme is wound up in accordance with its constitution and the power under s 601NF(2) to give directions about how the registered scheme is to be wound up. In addition, as in this case, it has been held that in making such an order or orders, the court may appoint the person as receiver of the scheme property of a registered scheme, including orders that confer on the person the powers of a receiver in relation to the property and the scheme, *mutatis mutandis*, to those provided for by s 420(1) and (2) of the CA in relation to a receiver of a company's property. In that context, the court has power, by order, to determine the amount to be paid

by way of remuneration to a receiver, as it does in relation to court appointed receivers generally.[25]

[45] Accordingly, when Mr Whyte was appointed as a person to ensure that the FMIF was wound up in accordance with its constitution and any orders made under s 601NF(2) of the CA, and he was appointed receiver of the scheme property, an order was made that he be entitled to claim remuneration in respect of the time spent by him and by employees of his firm who performed work in carrying out the appointment at rates and in the sums, from time to time, approved by the court and he be indemnified out of the assets of the FMIF in respect of such remuneration. It is in accordance with that order that Mr Whyte's remuneration has been approved by the court from time to time, and he has indemnified himself from the scheme property of the FMIF.

[46] Mr Whyte opposes the liquidator's proposed budgeting, approval and 50 percent pre-payment of remuneration regime to the extent that it might apply to him. He consented to appointment on the basis of the existing provisions in the court's order as to his remuneration. Having consulted with the other members of his firm, he does not consent to an arrangement whereby his remuneration is determined in advance by an estimate and paid only as to 50 percent from time to time until a final determination hearing at the completion of the winding up of the FMIF and the other schemes.

[47] That is not surprising, for a number of reasons. First, the liquidator's proposal would make Mr Whyte and his firm funders of 50 percent of his remuneration for the balance of the period of the winding up of the FMIF. Second, whereas the liquidator's remuneration for other remaining functions in respect of the FMIF would be relatively simple (leaving to one side any defence of the Clear Accounts Proceeding), Mr Whyte's remaining functions include the conduct of complex commercial litigation, including the EY Proceeding.

[48] Third, the liquidator's proposal assumes that Mr Whyte's remaining work and remuneration is capable of being accurately estimated and budgeted in advance. That is an unlikely scenario in terms of the remuneration for the remaining litigation. The amount of that remuneration may be greater or lesser to a very significant degree depending on whether (and when) the litigation is compromised or whether it must be or should be fought to the end.

[49] In support of this part of the application, the liquidator referred in submissions to the estimated remuneration to be incurred by Mr Whyte to 30 June 2019, being in the range between $690,000 and $925,000. The point appeared to be that the amount of the liquidator's proposed budget for remuneration was, in comparison, much less. However, the comparison was not of like with like. The remuneration incurred and to be incurred by Mr Whyte may not have included work of gathering other assets of the FMIF, but they included very substantial work of conducting the legal proceedings on foot during that year, including the Feeder Funds Proceeding, the Clear Accounts Proceeding, the Bellpac Proceeding and the EY Proceeding. These are not items covered by the liquidator's proposal for his remuneration.

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[25] *ASIC v Letten (No. 7)* (2010) 190 FCR 59, [118]-[119], [270]-[271]; *ASIC v Letten* [2010] FCA 140, [47]; *Ide v Ide* (2004) 184 FLR 44, 49-50; *ASIC v Atlantic 3-Financial (Aust) Pty Ltd* [2004] 1 Qd R 591, 597-598, [27]-[32].

[50] Although the liquidator referred to the cost and delay of the winding up of the FMIF to date, Mr Whyte pointed out, first, that the remuneration he has sought and received has been approved by the court in ten successive six monthly applications without reduction, and that his ongoing remuneration is the subject of approval applications made to the same judge.

[51] Second, as to delay, Mr Whyte pointed out that although delay is raised in the liquidator's written submissions, no example or instance of delay on Mr Whyte's part was referred to by the liquidator in written or oral argument.

[52] ASIC has supported Mr Whyte's position by correspondence. It stated that it was concerned that the liquidator's motivation for filing the application might be to prevent Mr Whyte from seeking remuneration as might properly be incurred by him in his capacity as the person charged with the responsibility of winding up the FMIF and that having reviewed the application and the material filed in support of Mr Whyte's then most recent application for remuneration, ASIC did not seek to be heard on the application, consistent with ASIC's position in respect of each of the previous applications for remuneration made by Mr Whyte.

[53] Neither Mr Jahani nor Trilogy support the liquidator's application on the proposed budget, approval and 50 percent pre-payment of remuneration proposal.

[54] In my view, nearly all of the relevant circumstances point against the proposed orders for budgeting, approval and pre-payment of the future remuneration of Mr Whyte's remuneration and no order to that effect should be made in the circumstances of this case.

Liquidator's expenses

[55] In substance, the liquidator's proposal for his expenses is that, like remuneration, they be budgeted and pre-approved and then approved amounts be paid monthly in advance to meet expenses. In my view, in substance, this too, is a pre-payment regime based on forecasts of expenses, driven by the liquidator's lack of funds in the winding up of LMIM generally and in respect of the FMIF, and other insolvent schemes or funds, in particular.

[56] Although the point is not as clear in relation to expenses other than legal expenses of conducting outstanding legal proceedings, in my view, there is no real justification for the budgeting, approval and pre-payment of the liquidator's expenses either, in the circumstances of this case. The amounts involved are relatively less than the expenses by way of legal expenses of the relevant proceedings, which the liquidator does not propose to conduct. Overall, it is difficult to see the attraction in the liquidator's proposal, in relation to the FMIF in particular.

Mr Whyte's expenses

[57] In support of this part of the application, the liquidator referred to the financial statements for the FMIF for the year ended 30 June 2018, that show Mr Whyte's fees and outlays, for investigations, litigation and non-operating costs as $1,0007,573 and operating costs of the FMIF as $1,231,477. However, there was no evidence as to whether any of those amounts is excessive, or unjustified, or what was included in them beyond those descriptions.

[58] Mr Whyte relied on the fact that his expenses were approved for payment by the secured creditor's receiver up to the point in time after the hearing of the application when they retired and they are subject to approval by the custodian of the FMIF.

[59] I have previously summarised the source of the court's powers and the orders under which he was appointed in relation to Mr Whyte's remuneration. Similar points apply to his expenses.

[60] Mr Whyte's expenses will be of a different order and complexity to those proposed by the liquidator, because he retains responsibility for the expenses associated with the remaining litigation that will be significant, in particular because of the likely amounts of legal fees.

[61] Mr Whyte also estimated his expenses for the period to 30 June 2019. However, there is no point in setting the amounts out in these reasons, because they were estimated on the basis of assumptions as to settlement of the EY Proceeding at mediation during that six month period. That possibility did not come about. The EY Proceeding remains in the interlocutory stages of disputes about the pleadings. Inevitably, Mr Whyte will have incurred further expenses than those estimated at December 2018. The example illustrates the lack of utility in attempting to budget, approve and pre-pay 50 percent of the approved budgeted expenses on the footing that until the final determination for the winding up of the FMIF, Mr Whyte should be limited to the budgeted and approved amount.

[62] In my view, the liquidator's proposed budgeting, approval and pre-payment of 50 percent mechanism should not be adopted in relation to Mr Whyte's expenses.

Members registry

[63] Part of the orders sought by the liquidator would see control of and responsibility for the members' registry for the FMIF returned to the liquidator. Mr Whyte presently manages those functions for the FMIF and keeps unit holders informed of the progress of the winding up of the FMIF in regular reports. That he does so is a condition of the relief that ASIC has granted from the reporting requirements that would otherwise apply to the FMIF under Chapter 2M of the CA. To transfer the registry function to the liquidator would involve a transactional cost, although the amount may not be great (Ms Trenfield suggests $10,000). It is suggested on the evidence that the liquidator would obtain ongoing registry services for a lower cost than Mr Whyte does, but the greatest expenses associated with this function are the costs of reports to unit holders from time to time. If Mr Whyte continues to manage the remaining litigation, he or his staff would have to provide reports to the liquidator or his staff who would then have to consider the content of the relevant reports before communicating them to unit holders. In my view, this is unlikely to lead to cost savings to the unit holders of the FMIF.

Audit of the FMIF

[64] Although ASIC has, in effect, relieved the liquidator and Mr Whyte from any obligation to carry out ongoing periodical audits of the FMIF under Chapter 2M of the CA, at the end of the winding up of the FMIF it will be necessary for there to be a final audit. Ms Trenfield estimates the cost of doing so to be in the region of $10,000 to $20,000, so it is not a major cost. At present, Mr Whyte is not appointed to carry out that task. However, assuming it is to be carried out by one of the protagonists to this proceeding, it is not a major prospective saving of expense for the liquidator to carry out the function.

[65] In substance, the point about the liquidator's expenses of winding up the FMIF (that do not include the expenses associated with the remaining litigation) is that those expenses are not likely to be significant in the overall scale of things and, so viewed, they are not a reason to adopt the liquidator's proposed budgeting, approval and pre-payment of 50 percent mechanism.

Limiting Mr Whyte's appointment

[66] Leaving aside the liquidator's proposal for budgeting, approval and pre-payment of 50 percent of both his remuneration and expenses and Mr Whyte's remuneration and expenses, a shift in a number of the functions and responsibilities for some of the proposals previously discussed would follow from an order that limits the future functions of Mr Whyte to continuing and completion of the remaining litigation.

[67] First, Mr Whyte apprehends that he would be required to transfer the cash balance in the accounts under his control to the liquidator. Second, Mr Whyte points out that the liquidator has a position of conflict in relation to LMIM's claims for indemnity from the scheme property of the FMIF arising out of the Clear Accounts Proceeding, as well as in respect of the apportionment or allocation as between the other registered schemes of which LMIM is the responsible entity and the FMIF for common items of remuneration and expenses. Third, in particular, Mr Whyte would no longer have the function to consider and, if he thinks appropriate on behalf of members of the FMIF, to oppose orders sought by the liquidator in respect of claims for indemnity from the scheme property of the FMIF for his remuneration or expenses.

[68] In my view, these reasons remain as reasons why Mr Whyte's appointment to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and the orders of the court made under s 601NF(2) of the CA should not be limited to continuing and completion of the remaining litigation. Subject to one consideration, the reasons why Mr Whyte was appointed in the first place continue and would suggest that he should take the winding up of the FMIF towards completion, to the extent that he can do so.

[69] The exception is that, as I have previously decided, Mr Whyte cannot complete the process of the winding up to the extent that it remains the statutory function of the liquidator to call for proofs of debt, to consider whether LMIM has an entitlement to indemnity from the funds of the FMIF for debts admitted to proof and to apply for an order for indemnity in respect of those amounts in accordance with paragraphs 2 and 3 of the court's order made on 18 July 2018.

[70] However, those functions are not, in my view, a reason why Mr Whyte's appointment should be limited.

[71] Mr Jahani opposes any order that would limit Mr Whyte's functions or powers under the existing orders as endangering the performance of the terms of the settlement of the Feeder Funds Proceeding, which contemplate Mr Whyte making an interim distribution in accordance with the second application for an interim distribution order.

[72] In the result, in my view, the liquidator's application should be dismissed in relation to the scope of Mr Whyte's appointment and functions in relation to the FMIF.

Second application - interim distribution

[73] Mr Whyte makes the second application, for an interim distribution to members of the FMIF, under s 601NF(2) of the CA. First, he seeks an order that he is authorised to make an interim distribution from the property of the FMIF of up to $40 million among the members of the FMIF pursuant to cl 16.7 of the constitution of the FMIF. Alternatively, if any of the conditions precedent to the deed of settlement and release of the Feeder Funds Proceeding have not been satisfied or will not be satisfied by making the interim distribution, Mr Whyte applies for an order that he is authorised to withhold payment of the interim distribution to the responsible entities or the custodians of the Feeder Funds.

[74] Second, Mr Whyte seeks a declaration that each member holding Class C units in the FMIF, having invested in one of the non-Australian dollar currency hedged fixed term investment options for investment, is entitled to be paid amounts in the winding up of the FMIF calculated by reference to that member's unit balance recorded in the investor master register as adjusted for the foreign exchange spot rate between the investment currency recorded in the investor master register and the Australian dollar prevailing as at the time of each distribution or an alternative date.

[75] On the hearing of the application, Mr Whyte and Trilogy appeared, both in support of the application. LMIM as responsible entity of the CPAIF and the ICPAIF by Mr Jahani did not appear but provided a letter from his solicitors supporting the application. No contradictor appeared.

[76] Trilogy's position was that although it supported the application, no order should be made on it until after the Feeder Funds Proceeding judicial advice applications had been decided. That was also the position of Mr Jahani, in effect. On Mr Whyte's part, there was no opposition to the court hearing the application for an interim distribution, but deferring any decision until after the outcome of the Feeder Funds Proceeding judicial advice applications was known. Accordingly, I proceeded to hear the application and at the conclusion of the hearing adjourned it to a date to be fixed. Since the hearing and decision of the other applications no party or person has sought a further hearing.

[77] Mr Whyte identified five issues which may have affected the orders to be made on the second application. First, he referred to the liquidator's application for directions, including to narrow the scope of Mr Whyte's functions which had then been heard but not determined. Mr Whyte's position was that the second application should be heard and determined at the same time as the liquidator's application. In making this decision, I have done so.

[78] Second, Mr Whyte proposed to make one of the applications that formed the Feeder Funds Proceeding judicial advice applications. That concern was met by adjourning the determination of this application until the outcome of those applications was known, as it now is.[26]

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

[79] Third, Mr Whyte was concerned as to the timing of the decisions upon the second application and the Feeder Funds Proceeding judicial advice applications because of the time for performance of conditions precedent under the deed of settlement and release, but as previously discussed, that concern is met by this application being decided after the Feeder Funds Proceeding judicial advice applications.

[80] Fourth, Mr Whyte identified that he is not specifically named as a relevant person or party who has standing to apply for an order under s 601NF(2) or s 601NF(3) of the CA. However, in my view, there is no difficulty of standing for him to make the interim distribution application. Mr Whyte was appointed as a person to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and any orders under s 601NF(2). Clause 16.7(c) of the constitution of the FMIF provides for distributions of the net proceeds of realisations in the winding up. Given the breadth of the power of the court, by order, to give directions about how the registered scheme is to be wound up under s 601NF(2), it is implied that a person appointed under s 601NF(1) has the power to apply for directions about their appointment, particularly where the appointment is made as well to take possession of assets as a court appointed receiver. In any event, in this proceeding, prior directions were made by the order made on 17 December 2015 giving the parties liberty to apply, including Mr Whyte.

[81] Fifth, in the event that an interim distribution is authorised by order, Mr Whyte points to a degree of uncertainty as to the entitlement of the Class C unit holders who made investments in the FMIF in foreign currencies. I deal with that question later in these reasons.

[82] In *Park v Whyte*,[27] I found that LMIM's power as responsible entity to make distributions in the winding up of the FMIF under cl 16.7(c) of the constitution of the FMIF was suspended because as a result of the orders appointing Mr Whyte, LMIM was not in possession of the scheme property. I held further that Mr Whyte was under no obligation to return the property of the FMIF to the liquidator once he had completed collecting and realising the assets of the FMIF, without an order of the court, and that the orders previously made appointing him receiver did not authorise him to make distributions to the members of the FMIF, without an order of the court. By the order made on 17 December 2015, I directed that LMIM shall not be responsible for and was not required to discharge the functions, duties and responsibilities set out in cl 16.7(c) and that Mr Whyte was directed not to make any distribution to the members of the FMIF without the authority or further order of the court. By this second application, Mr Whyte seeks that authority.

[83] The summary of the circumstances under which he does so is that the cash balance under his control exceeds the amount required to satisfy any of the actual and possible contingent liabilities of the FMIF, as estimated by Mr Whyte, by up to $40 million. The amount of cash in bank was approximately $65 million against which the actual liabilities were $2,213,000, approximately, and possible contingent liabilities estimated on a realistic worst case scenario might amount to $21,773,000, approximately. In addition to that assessment of liabilities, there is a further possible contingent liability in respect of a proof of debt lodged by Ernst & Young ("EY") with the liquidator dated 20 December 2018. It will be necessary to explain how that possible alleged liability arises later. But the short of it is that Mr Whyte considers that it

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[27] [2015] QSC 283, [100] – [106].

does not substantially affect whether the proposed interim distribution should be made because the amount of any liability in respect of that proof will be no more than the amount of a corresponding asset that will be payable by EY to LMIM by Mr Whyte as a judgment sum on LMIM's claim against EY as auditors in the EY Proceeding. That is, Mr Whyte assesses the amount of the contingent liability to be a zero sum game when taken together with the corresponding possibility of an increase in the property of the FMIF by litigation recovery from EY.

[84] There is a difficulty that was faced by Mr Whyte in the extent of the evidence that was filed in support of the second application. It is that the precise amount which Mr Whyte may be justified in distributing depends upon matters which are confidential and could not be placed before the court in open court where they may come to the attention of a possible trial judge of the Feeder Funds Proceeding or the other remaining litigation. Accordingly, those matters were dealt with by disclosure in Mr Whyte's application made in the Feeder Funds Proceeding judicial advice applications before Mullins J.

[85] As to the potential difficulty in making appropriate payments to the Class C unit holders under the proposed interim distribution, Mr Whyte identified two points. First, the rights of Class C unit holders are not defined in the constitution of the FMIF and they do not appear to have been defined in any deed or similar document executed by LMIM as the responsible entity. The only relevant documents appears to be a product disclosure statement dated 10 April 2008, as supplemented. Second, the product disclosure statement describes the rights of Class C unit holders in a manner that admits of more than one possible construction. It is clear enough, however, that Class C units were issued with the intention of protecting those unit holders from foreign exchange fluctuations as against the Australian dollar, as at the time of relevant distributions.

[87] It is appropriate to begin a more detailed exposition with the legal framework for making a distribution in the winding up of the FMIF. The winding up is governed by the constitution of the scheme and any directions made by the Court under s 601NF(2).[28] Clause 16.7 of the constitution of the FMIF is as follows:

> "Subject to the provisions of this clause 16 upon winding up the scheme the RE must:
>
> (a) realise the assets of the scheme property;
>
> (b) pay all liabilities of the RE in its capacity as trustee of the scheme including, but not limited to, liabilities owed to any member who is a creditor of the scheme except where such liability is a unit holder liability;
>
> (c) subject to any special rights or restrictions attached to any unit, distribute the net proceeds of realisation among the members in the same proportion specified in cl 12.4;
>
> (d) the members must pay the costs and expenses of a distribution of assets under cl 16.7(c) in the same proportion;
>
> (e) the RE may postpone the realisation of the scheme property for as long as it thinks fit and is not liable for any loss or damage attributable to the postponement;
>
> (f) the RE may retain for as long as it thinks fit any part of the scheme property which in its opinion may be required to meet any actual or contingent liability of the scheme;
>
> (g) the RE must distribute among the members in accordance with cl 16.7 anything retained under cl 16.7(f) which is subsequently not required."

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[28] *Re Stacks Managed Investments Ltd* (2005) 54 ACSR 466, [45] – [46].

[89] In February and March 2019, the FMIF had cash at bank of approximately $65 million. As at that time, there were actual and contingent liabilities. Mr Whyte's estimate of the actual and contingent liabilities[29] in March 2019 were as follows:

Description	**$ Amount**
Actual liabilities	$2,213,000.00
Contingent Liabilities	
Creditor indemnity claims	$949,497.72
Exit entitlements relating to former retirement village assets (approximately)	$5,000,000.00
Potential claims by the liquidator of LMIM	$2,043,889.89
Non-litigation expenses and remuneration of Mr Whyte	$1,800,000.00
The Feeder Funds Proceeding	$1,100,000.00
EY Proceeding	$2,450,000.00
Bellpac Proceeding	$8,200,000.00
Lamb Bankruptcy Proceedings	$230,000.00
Total:	$23,986,387.61

[90] Mr Whyte opined that these amounts are not his best estimate of the extent of the liabilities but are an assessment of a realistic worst case scenario in respect of those liabilities. Taking them into account, Mr Whyte opined that it is possible to distribute a sum of up to $40 million to the unit holders of the FMIF, subject to his assessment of the appropriateness of the amount of contingent liabilities under his control relating to the remaining litigation to recover funds for the benefit of the FMIF. Mr Whyte provides further information as to the categories of contingent liabilities. They include the following matters.

Creditor indemnity claims

[91] Under the 17 December 2015 order, as varied on 18 July 2018, the liquidator was directed to ascertain the debts and claims against LMIM as responsible entity for which LMIM claimed indemnity from the FMIF and to notify the same to Mr Whyte. The liquidator called for proofs of debt in early September 2018, with a due date of 2 October 2018. The liquidator subsequently advised Mr Whyte that proofs of debt had been received from EY in the amount of $158,896.51 and Norton Rose Fulbright Australia in the sum of $315,601.21, totalling $474,497.72, together with provision for interest at the rate of 8 percent under s 563B of the CA for the possible relevant period of $300,000. Mr Whyte originally allowed $774,497.72 in respect of the actual liabilities, but increased that allowance to $949,497.72 as at March 2019.

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[29] Excluding some possible contingent liabilities over which he had control.

Exit entitlements relating to retirement villages

[92] The FMIF held securities over a number of retirement villages which were realised by sale by Mr Whyte and the externally appointed receiver of the secured creditor. There were five relevant retirement villages. Under each of the agreements for sale, the incoming owner and operator of the relevant retirement village provided an indemnity to LMIM as responsible entity of the FMIF for the potential obligation to pay any exit entitlement that may be due to a resident or the resident's estate on exit from the village. Under the legislation which applies, the liability to pay exit entitlements may in some circumstances be enforced against LMIM as the responsible entity (or the custodian) as the operator of the village at the time when the resident's contract was entered into. Accordingly, there is a possibility of liability of LMIM as responsible entity, in the event that the purchaser does not honour the indemnity. The liability is not a likely one, for the reasons that the retirement villages were sold to operators who Mr Whyte believed then and still believes are financially sound and that on average the residents of retirement villages stay for a period of approximately five years and any exit entitlements are met or repaid thereafter. To date, there has been no exit liability that LMIM as responsible entity by Mr Whyte (or the custodian) has been called upon to pay.

[93] Mr Whyte has made an estimate of what is, in his view, a realistic worst case scenario that the amount of any such liability could be up to $5 million on the assumption that there might be a shortfall payable for up to 50 percent of the exit entitlements that were contributed by residents.

Liquidator's remuneration and expenses

[94] On 6 September 2018 and 3 October 2018, the court heard the liquidator's second application for remuneration to be paid from the property of the FMIF in the sum of $743,889.89. Although Mr Whyte opposed the orders sought to determine the remuneration in the amounts applied for or that they should be payable from the assets of the FMIF, he has made a full allowance of the amounts claimed as an amount of the property of the FMIF that should be retained.

[95] Mr Whyte also anticipates the possibility of further applications by the liquidator for payment of remuneration and expenses from the property of the FMIF, including an expressed intention by the liquidator to reallocate approximately $1.6 million in unpaid "corporate" expenses of LMIM, consisting principally of unpaid legal costs and outlays, to the various funds of which it is the responsible entity and to make a claim for a proportion of those expenses from the FMIF. Mr Whyte has estimated that 25 percent of that amount should be retained on the assumption that the amount would reflect an equal apportionment between the various funds of which LMIM is the responsible entity.

[96] Further, Mr Whyte proposes to retain an amount against the liquidator's remuneration and expenses of the first application for directions dealt with by these reasons as another potential liability to be met from the assets of the FMIF.

[97] Lastly, Mr Whyte has estimated the liquidator's expenses of completing the process of ascertaining creditor indemnity claims against the FMIF under the order of 17 December 2015 as varied on 18 July 2017, maintaining LMIM's Australian Financial Services Licence, carrying

out a final audit of the FMIF (assuming that function is not transferred to Mr Whyte) and making a further application or applications for recovery of remuneration and expenses from the FMIF and proposes that amounts be retained for those items.

[98] The summary of the relevant amounts is as follows:

Description	**$ Amount**
Liquidator's remuneration claim heard in September 2018	$743,889.89
Liquidator's further legal expenses notified in the remuneration application but not yet claimed	$400,000
Liquidator's other remuneration and expenses recoverable to the conclusion of the winding up of the FMIF	$200,000
Liquidator's remuneration and legal costs of the September 2018 remuneration application	$200,000
Liquidator's remuneration and legal costs of the Directions Application	$200,000
Liquidator's remuneration and legal costs of further applications for recovery of remuneration and expenses from the FMIF	$300,000.00
Total:	$2,043,889.89

Mr Whyte's remuneration and expenses

[99] Mr Whyte's summary of his further remuneration and expenses to the end of the winding up of the FMIF is as follows:

Description	**$ Amount**
Ongoing administration	$1 million
Completing the Proof of Debt Process	$50,000
Responding to further claims by the Liquidator for remuneration and expenses	$100,000
Applying for authority to make a final distribution	$50,000
Further applications for approval of remuneration	$500,000
Finalising the appointment	$100,000
Total:	$1,800,000

Feeder Funds Proceeding

[100] Although the Feeder Funds Proceeding has been compromised, and it is proposed that the deed of settlement and release be carried into effect, Mr Whyte has estimated the costs that may be associated with the Feeder Funds Proceeding on the assumption that the compromise is not carried into effect. The amount of the potential contingent liabilities in that event were estimated by him as follows:

Description	**$ Amount**
Remuneration and legal expenses of the application to court for judicial advice	$100,000
Liability under adverse costs orders for costs of Mr Jahani and Trilogy of the litigation	$1 million
Total:	$1,100,000

EY Proceeding

[101] Mr Whyte made an estimate of the contingent liability in respect of the EY Proceeding as follows:

Description	**$ Amount**
Remuneration and legal expenses up to and including mediation	$350,000
Legal expenses and remuneration of an application for judicial advice	$100,000
Liability under adverse costs order for costs of the EY Proceeding to date	$2 million
Total:	$2,450,000

Bellpac Proceeding

[102] Mr Whyte estimated the contingent liabilities for the Bellpac proceeding as follows:

Description	**$ Amount**
Mr Whyte's remuneration and legal expenses up to and including trial	$700,000
Liability under an adverse costs order, if claim is unsuccessful	$7.5 million
Total:	$8,200,000

Bankrupt Estate of Ross Lamb

[103] Mr Whyte estimated the contingent liabilities with respect to Mr Lamb's bankruptcy as follows:

Description	**$ Amount**
Trustee's remuneration and legal expenses in relation to public examinations	$200,000
Mr Whyte's remuneration and expenses	$30,000
Total:	$230,000

[104] In my view, the amounts estimated for these contingent liabilities are reasonable.

Class C unit holders

[105] From 2008, 171 unit holders invested in the FMIF in a foreign currency under a product disclosure statement issued on 10 April 2008 as supplemented on a later occasion. However, throughout the relevant time, units in the FMIF were valued for other investors in the FMIF upon subscription and redemption in Australian dollars ("AUD") at $1. The financial statements of the FMIF identify the foreign currency investors as holding "Class C" units. They represent between 2 percent and 3 percent of units in the FMIF.

[106] When a unit holder invested in the FMIF in a foreign currency, according to the product disclosure statement, the amount accepted was converted into AUD and units at the foreign exchange rate as at the date of the investment.

[107] However, from 2011, a unit holder who invested in a foreign currency under the product disclosure statement was recorded in the register of unit holders as a unit holder in units of the foreign currency. The investments were not recorded as converted into AUD at the spot rate of foreign exchange as at the date of the investment, or reinvestment. Instead, by choosing an "Effective Date" of 29 November 2012, an "Effective Unit Price" was set using the spot rate of foreign currency exchange in AUD on that date. I was informed that the intention was that by multiplying the "Unit Balance" recorded in the foreign currency "units" in the register by the "Effective Unit Price" as at the "Effective Date", a "Balance in Currency" of the foreign currency was recorded and a "Balance in AUD" was also recorded as the amount required in AUD to pay the investor's "Balance in Currency". I confess that, having closely examined the copies of the sample records in evidence, the methodology employed in compiling the relevant entries did not make itself clear to me.

[108] In any event, the purported effect of the arrangements, according to the product disclosure statement, was that if an investment in units in the FMIF was made in a foreign currency, a conversion into AUD from time to time would result in a fluctuation of the unit holdings of the foreign investor according to the exchange rate. Against this outcome, LMIM as the responsible entity of the FMIF agreed with the relevant investor under the terms of the product disclosure statement to enter into a forward foreign exchange contract between the foreign currency and the AUD, thereby hedging the investment made by the foreign currency

investor. However, from about the time of the order to wind up the FMIF made in August 2015, forward foreign exchange contracts have not been maintained during the winding up.

[109] Turning to the terms of the constitution of the FMIF, cl 3.2 provides for different classes of units as follows:

> "Different classes (and subclasses) with such rights and obligations as determined by the RE from time to time may be created and issued by the RE in its complete discretion. Such rights and obligations may, but need not be, referred to in the PDS. If the RE determines in relation to particular units, the terms of issue of those units may eliminate, reduce or enhance any of the rights or obligations which would otherwise be carried by such units. Without limitation, the RE may distribute the distributable income for any period between different classes on a basis other than proportionately, provided that the RE treats the different classes fairly."

[110] Clause 3.4 provides:

> "At any time, all the units in a Class are of equal value unless the units are issued under a Differential Fee Arrangement."

[111] There is no evidence that LMIM as responsible entity of the FMIF recorded a determination under cl 3.2 in respect of Class C units.

[112] However, the product disclosure statement issued by LMIM as responsible entity of the FMIF on 10 April 2008 offered "non-AUD dollar currency hedged fixed term investment options" for investment in the FMIF. It stated:

(a) "The fund currency hedges a non-Australian dollar investment through the use of foreign forward exchange contracts ("FFEC")."

(b) "On acceptance of investment funds and the completed application form, the relevant currency is converted at the prevailing spot market rate into Australian dollars and units in the fund issued. The fund simultaneously enters into a FFEC. The FFEC requires the fund to deliver an amount of AUD in exchange for an amount of the relevant foreign currency at a specific time in the future (the specific time is equivalent to the investment term) at a pre-determined exchange rate (forward rate). At the end of the investment period the fund converts the earnings of the investor into the relevant foreign currency at the forward foreign exchange rate".

(c) "Non-AUD investment terms for all currencies commence on the day the manager settles the FFEC".

(d) "At the end of the relevant investment term, the investor's original investment amount and interest distribution (unless the investor elects to have the interest distribution paid direct to the account nominated on the application form), are automatically reinvested and re-hedged in the originally nominated currency for further 1 month investment terms until the investor provides the manager with longer investment term instructions or a written withdrawal notice."

(e) "For all non-AUD dollar investments the manager will continue to hedge (on a 1 monthly basis) the currency exposure of these investments (in the event of a delay in payment of a redemption or the suspension of redemptions)."

[113] On page 26 the product disclosure statement provided further:

> "Investors should however, be aware that **any delay or shortfall in income or capital payments from the fund may result in a loss for the fund due to breaking a FFEC**. In such an event, the investment will not be currency hedged and income and/or capital may be impacted." (emphasis added)

[114] The overall intention pursuant to the product disclosure statement, in my view, was that an investor who invested in the FMIF in a foreign currency would be protected against changes in the exchange rate from the prevailing spot market rate as at the date the units were issued by LMIM taking out a forward foreign exchange contract between the AUD and the foreign currency. Even so, by the terms of the product disclosure statement, the underlying assumption or provision was that the investment would be converted into units in the FMIF issued in AUD at the prevailing spot market rate at the time of investment.

[115] Accordingly, on maturity, it was intended that the foreign currency investor would be entitled to a distribution of an underlying amount in AUD at that date and an adjustment of that amount on conversion into the foreign currency by the net gain or loss made on the forward foreign exchange contract entered into as a hedge to cover the investment for the period of the investment. These arrangements, in my view, reflected the underlying intention that an investment in the FMIF was to be made in units issued in an AUD value and number, although made in a foreign currency. This conclusion is consistent with the contextual circumstances that the scheme property of the FMIF was invested in loans made to borrowers in AUD repayable with interest in AUD and secured by first mortgage over Australian assets. Investors in the scheme were necessarily exposed to the financial risk of it earning income and maintaining capital in AUD only.

[116] Mr Whyte submits that the arrangements disclosed by the product disclosure statement have the effect that at the end of the period of the investment, an investor in foreign currency would be entitled to an increased or decreased amount reflected in a different number of units measured in AUD than the initial investment. I do not agree. The number of units that an investor in a foreign currency received should have been the number of units into which the foreign currency converted as at the date of investment and issue of the units. The adjustment of the amount of the redemption value of those units in AUD under the arrangements provided for by the product disclosure statement was to be made by payment at redemption in the foreign currency of an amount that reflected the AUD amount of the value of the units to be redeemed at the date of redemption together with the adjustment, whether negative or positive, represented by the forward foreign exchange contract made to sell the AUD into the foreign currency.

[117] If those conclusions are correct, it follows logically that a change occurred in the rights of investors in foreign currency who were Class C unit holders when it was ordered that the FMIF be wound up on 8 and 21 August 2013. From that time, there was no reinvestment of the interests of any investor in foreign currency or redemption made under the arrangements

provided for under the product disclosure statement. Any existing unexpired investment terms came and went without repayment and without any continuing hedging cover against the nominal value of those investments. I was not informed of the outcome for LMIM when the relevant hedge covers ceased.

[118] In my view, the relevant date at which a foreign investor's unit holding is to be ascertained is either the date at which they last invested in the FMIF at the conversion rate of the foreign currency into AUD or the date on which it was ordered that the FMIF be wound up at the conversion rate of the foreign currency into AUD as at that date. The conversion of the foreign currency into AUD as at that date yields the number of units to which the investor is entitled and forms the basis of their rateable entitlement to receive distributions from the FMIF as against other members, including other Class C unit holders and unit holders who did not invest in a foreign currency.

[119] Although arguments may be advanced in support of either of those alternatives, in my view, the date of the order that the FMIF be wound up is the better date. Until then, the terms of the product disclosure statement expressly required that the forward foreign exchange contracts be in place, notwithstanding that there was a suspension of redemptions from an earlier date. However, the effect of the order that the FMIF be wound up was to change the business of the FMIF, so that the assets were to be realised, the debts paid and the net proceeds of realisation are to be distributed to the unit holders in the rateable proportions that applied among them.

[120] As between the AUD investors and the foreign currency investors, the calculation of the rateable proportions requires that a choice be made of the date at which the conversion of the foreign currency investor's investments should be made.

[121] The complication lies in the circumstance that LMIM as responsible entity ceased to observe the contractual requirement to investors in Class C units that it would hedge the position of those unit holders against movements between the AUD and the foreign currency by forward foreign exchange contracts. However, LMIM's breach of contract in that respect does not alter the unit entitlement of the Class C members in comparison to the other classes of members under the terms of the constitution of the FMIF. Unless the constitutional arrangements expressly or impliedly provided that in the event of the winding up the investors in a foreign currency were to have an entitlement to a greater distribution based on the arrangements made under the product disclosure statement, the unit entitlements of the members should be treated as crystallised as at that date. The product disclosure statement did not contemplate a greater entitlement in the winding up. To the contrary, it expressly contemplated that a shortfall in income and capital might expose a foreign currency investor to the risk of a break in a forward foreign exchange contract, that the investment would not thereafter be currency hedged and that income and capital may be impacted.

[122] Accordingly, in my view, distributions to Class C members should be made on the footing that their entitlements to units are to be ascertained by reference to the appropriate calculation of units in AUD utilising the spot exchange rate for the investment of foreign currency as at the date of order made for the winding up of the FMIF.