

# SUPREME COURT OF QUEENSLAND

CITATION: *LM Investment Management Limited & Anor v Whyte* [2019]  
QSC 245

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 MORTGAGE 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 MORTGAGE 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)

FILE NO/S: BS No 3508 of 2015  
DIVISION: Trial Division  
PROCEEDING: Application filed 17 July 2018  
ORIGINATING COURT: Supreme Court at Brisbane  
DELIVERED ON: 2 October 2019  
DELIVERED AT: Brisbane  
HEARING DATE: 6 September 2018, 3 October 2018  
JUDGE: Jackson J  
ORDER: **The order of the Court is that:**

1. The first applicant's Corporate Remuneration as liquidators for the period 2 August 2013 to 30 June 2018 be determined in the sum of \$736,550.65 (including GST);
2. The first applicant's Category 1 Remuneration as liquidators for the period 1 October 2015 to 30 June 2018 be determined in the sum of \$1,089,078.65 (including GST);
3. The first applicant's Category 2 Remuneration as liquidators for the period 1 October 2015 to 30 June 2018 be determined in the sum of \$306, 792.75 (including GST);
4. The first applicant be paid the sum of \$615,711.64 (including GST) from the scheme property of the AIF for remuneration as liquidators of the second applicant, such sum to include:
  - (a) \$539,013.75 (including GST) for Category 1 Remuneration for the period 1 October 2015 to 30 June 2018; and
  - (b) \$76,698.19 (including GST) for Category 2 Remuneration for the period 1 October 2015 to 30 June 2018.
5. The first applicant be paid the sum of \$393,043.89 (including GST) from the scheme property of the FMIF for remuneration as liquidators of the second applicant, such sum to include:
  - (a) \$316,345.70 (including GST) for Category 1 Remuneration for the period 1 October 2015 to 30 June 2018; and
  - (b) \$76,698.19 (including GST) for Category 2 Remuneration for the period 1 October 2015 to 30 June 2018.
6. The first applicant be paid the sum of \$310,417.39 (including GST) from the scheme property of the ASPF for remuneration as liquidators of the Second Applicant, such sum to include:
  - (a) \$233,719.20 (including GST) for Category 1 Remuneration for the period 1 October 2015 to 30 June 2018; and
  - (b) \$76, 698.19 (including GST) for Category 2 Remuneration for the period 1 October 2015 to 30 June 2018.
7. The parties exchange and file written submissions as to costs by 8 October 2019.

## CATCHWORDS:

CORPORATIONS – WINDING UP – LIQUIDATORS – REMUNERATION – IN VOLUNTARY WINDING UP – Whether liquidator entitled to be paid remuneration from trust property for Corporate Remuneration, Category 1 Remuneration and Category 2 Remuneration – Nature and extent of principles permitting recovery – Whether Goods and Services Tax (“GST”) should be

included in the remuneration as determined and ordered to be paid – Where liquidator entitled to remuneration for Category 1 and Category 2 Remuneration – Where liquidator entitled to receive GST in respect of any remuneration recoverable against the FMIF

*13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) ACSR 377, cited

*Australian Securities and Investments Commission v Drake & Ors (No 2)* (2016) 340 ALR 75, cited

*Beach Retreat Pty Ltd v Mooloolaba Marina Ltd* [2009] 2 Qd R 356, cited

*Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth and Others* (2019) 368 ALR 390, cited

*Chongherr Investments Ltd v Titan Sandstone Pty Ltd* [2007] QCA 278, cited

*Gagner Pty Ltd trading as Indochine Café v Canturi Corporation Pty Ltd* (2009) 77 ATR 157, cited

*Hennessey Glass & Aluminium Pty Ltd v Watpac Australia Pty Ltd* (2007) 69 ATR 374, cited

*Jones v Matrix Partners Pty Ltd* (2018) 354 ALR 436, cited

*LM Investment Management Limited & Anor v Whyte* [2019] QSC 233, cited

*Park v Whyte (No. 2)* [2018] 2 Qd R 413, cited

*Park v Whyte (No. 3)* [2018] 2 Qd R 475, cited

*Pantzer v Wenkart* (2006) 153 FCR 466, cited

*Peet Ltd v Richmond (No. 2)* (2009) 76 ATR 644, cited

*Re Houben Marine Pty Ltd (in liq)* [2018] NSWSC 745, cited

*Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No. 2)*, cited

*Re JML Property Services Pty Ltd* [2018] NSWSC 1069, cited

*Re Primespace Property Investment (in liquidation)* [2016] NSWSC 1821, cited

*Re RMGA Pty Ltd* [2012] NSWSC 678, cited

*Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99, cited

*Staatz v Berry, re Wollumbin Horizons Pty Ltd (in liq) (No. 3)* [2019] FCA 924, cited

*Thackray & Ors v Gunns Plantations Ltd & Ors* (2011) 85 ACSR 144, cited

*A New Tax System (Goods and Services Tax) Act 1999* (Cth), ss 7-10, 9-5, 9-10, 9-15, 9-40, 9-70, 9-75, 11-5, 11-10, 11-15, 11-20, 17-5, 184-1, 195-1

*Corporations Act 2001* (Cth), ss 449E, 473, 601RAB, 1581,

*Corporations Regulations 2001* (Cth), reg 5D.1.01A, Schedule 8AA.

COUNSEL:

J Peden QC for the applicants

D Ananian-Cooper for the respondent

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

**JACKSON J:**

- [1] This application covers a number of matters, all connected because they relate to the applicant liquidator's<sup>1</sup> remuneration for acting either as administrator or liquidator of LM Investment Management Limited (in liquidation) (receivers appointed) ("LMIM") and the liquidator's entitlement to orders that some or all of that remuneration be paid from the trust property of the trusts constituted by registered managed investment schemes known as the:
- (a) LM Australian Income Fund ("AIF");
  - (b) LM Australian Structured Products Fund ("ASPF");
  - (c) LM Cash Performance Fund ("CPF"); and
  - (d) LM First Mortgage Income Fund ("FMIF"),
- collectively the "schemes".
- [2] A number of background matters were dealt with in the court's decision in *Park & Muller (Liquidators of LM Investment Management Ltd) v Whyte (No. 2)*<sup>2</sup> ("First Remuneration Decision") and the related application for payment of expenses in *Park v Whyte (No. 3)*<sup>3</sup> ("Expenses Decision").
- [3] There has been some delay in making this decision associated with the liquidator's application for directions heard in December 2018 and the delay in deciding that application associated with the determination of the first respondent's application to make an interim distribution to unit holders of the FMIF heard in March 2019.
- [4] As in the First Remuneration Decision, the liquidator has categorised remuneration into "Category 1 Remuneration", for work that related to a specific registered scheme of which LMIM is the responsible entity and "Category 2 Remuneration", for work carried out in respect of the schemes generally, but not specifically related to one scheme or another.
- [5] As well, by this application, the liquidator seeks orders for payment from the property of the schemes for "Corporate Remuneration", for work carried out during both the period of the voluntary administration of LMIM and the subsequent period of the liquidation of LMIM, not related to either any particular scheme or to the schemes generally, but carried out in the administration of the winding up of LMIM.

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<sup>1</sup> At the time of this application Mr Park was sole liquidator but at the times of the work for which remuneration is claimed Ms Muller was also an administrator or liquidator.

<sup>2</sup> [2018] 2 Qd R 413.

<sup>3</sup> [2018] 2 Qd R 475.

- [6] As in the First Remuneration Decision, the liquidator does not seek determination by the court of any remuneration for the work carried out during the period of the voluntary administration of LMIM, on the basis that the relevant determination for that remuneration was made by resolutions of LMIM's creditors.<sup>4</sup>
- [7] However, for the work carried out during the period of the liquidation, the liquidator seeks a determination by the court of the remuneration he is entitled to receive under s 473(3) of the *Corporations Act 2001* (Cth) ("CA").
- [8] Other than for Corporate Remuneration, the period of the work in question is from 1 October 2015 to 30 June 2018. For Corporate Remuneration, the periods are from 19 April 2013 to 1 August 2013 (the period of the voluntary administration) followed by the period from 2 August 2013 to 30 June 2018 (the period of the liquidation).
- [9] Summarising, the claims for remuneration made in this application are as follows:

<b>Remuneration category</b>	<b>Amount excl. GST</b>
Corporate Remuneration for voluntary administration	\$658,220.84
Corporate Remuneration for liquidation to 30 June 2018	\$736,550.65
Category 1 Remuneration from 1 October 2015 to 30 June 2018	\$1,089,078.65
Category 2 Remuneration from 1 October 2015 to 30 June 2018	\$306,792.75.

- [10] As to Category 1 Remuneration, the liquidator's claims in respect of each of the registered schemes are for:

<b>Scheme</b>	<b>Amount excl. GST</b>
AIF	\$539,013.75
ASPF	\$233,719.20
CPF	Not claimed
FMIF	\$316,345.70

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<sup>4</sup> *Corporations Act 2001* (Cth), s 449E(1)(b).

- [11] Otherwise, among the schemes, the liquidator seeks an equal apportionment of the total amounts claimed for Corporate Remuneration and Category 2 Remuneration and corresponding orders that the total amount in respect of each registered scheme be paid to the liquidator from the property of that registered scheme.
- [12] Lastly, the liquidator seeks an order that the costs of the application be ordered to be assessed on the indemnity basis and paid from the property of the AIF, FMIF and ASP in equal (one third) shares.

### **Relevant legal principles**

- [13] It is not in dispute that the relevant amounts of the liquidator's remuneration are to be determined under s 473(3) of the CA as it was before the amendments that came into effect on 1 March 2017 when the Insolvency Practice Schedule (Corporations) was introduced and corresponding amendments were made to the CA.<sup>5</sup>
- [14] It is also not in dispute that in the First Remuneration Decision and the Expenses Decision I applied the relevant principles that enabled the liquidator to make a personal claim for remuneration directly against the assets of the schemes. The liquidator submits that since the First Remuneration Decision and the Expenses Decision, in addition to the cases referred to in those decisions, decisions of the Supreme Court of New South Wales have reinforced or applied the same or cognate principles.<sup>6</sup> As well, the recent decision of the High Court in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth and Others*<sup>7</sup> contains a detailed discussion of the nature of a corporate trustee's right to be indemnified out of the assets of the trust in circumstances where the trust is ordered to be wound up.<sup>8</sup>
- [15] The liquidator submits that while there may have been some residual doubt previously as to whether a liquidator may claim his or her general liquidation expenses out of trust assets, both the First Remuneration Decision and the later decisions on which he relies make it clear that such a claim may be made. In my view, there is nothing in the later decisions that changes the relevant questions or answers as to the recoverability of the liquidator's remuneration in the present case. It is unnecessary to discuss those cases in detail.

### **Corporate Remuneration**

- [16] As appears from the table set out above, the largest overall amount for which the liquidator seeks an order that the remuneration be paid from the property of the schemes, generally speaking, comprises the claimed Corporate Remuneration for the period of the voluntary administration (\$658,220.84) and the period of the liquidation (\$736,550.65).

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<sup>5</sup> *Corporations Act* 2001 (Cth), s 1581.

<sup>6</sup> *Re Houben Marine Pty Ltd (in liq)* [2018] NSWSC 745, [20]; *Re JML Property Services Pty Ltd* [2018] NSWSC 1069, [10]-[12].

<sup>7</sup> (2019) 368 ALR 390.

<sup>8</sup> (2019) 368 ALR 390, 415-422 [80]-[97].

- [17] John Park describes Corporate Remuneration work as work which related only to LMIM in its corporate capacity or work which had to be done in the voluntary administration or the winding up of any company, but that was not referable either to an individual scheme or to the schemes generally. He says further that Corporate Remuneration work in respect of both the voluntary administration and liquidation of LMIM was work that was not clearly referable to a particular scheme, or in respect of the funds' management business of LMIM, or work which related to all of the schemes generally, or in respect of the FMIF controllerships (described as "Category 3 Remuneration" work in the First Remuneration Decision).
- [18] Kellie-Ann Trenfield describes the separate recording of Corporate Remuneration in the time recording system of FTI Consulting. That time recording system was designed to comply with the ARITA Code of Professional Practice ("the ARITA Code") in force from time to time. Using the ARITA Code categories, the liquidators, Ms Trenfield and other staff at FTI Consulting recorded time on a daily basis in 6 minute units for the duration of the time spent on a task, as well as a description of the task. A separate cost code number and category was created for work for LMIM as responsible entity of all of the schemes generally and LMIM in its own right. The work in that cost code was further sub-categorised using an activity code as between work for LMIM in its own right, referred to in this application as the work for Corporate Remuneration and work for LMIM as responsible entity of the schemes generally, although not for a particular scheme, sub-categorised as work for LMIM as RE/trustee, referred to in this application and the First Remuneration Decision as Category 2 Remuneration work.
- [19] Ms Trenfield says that detailed instructions were given to FTI Consulting staff members as to how to distinguish the relevant work among the categories and sub-categories now reflected in the liquidator's claims for Category 1 Remuneration, Category 2 Remuneration and Corporate Remuneration. Ms Trenfield is satisfied that those instructions were followed. As well, from time to time, Mr Park and Ms Trenfield have manually reviewed all of the time recorded in respect of all the categories and sub-categories of work.
- [20] For present purposes, the court may be satisfied that the work which is the subject of the claim for Corporate Remuneration does not relate to any of the schemes specifically or to the schemes generally.
- [21] Notwithstanding those facts, the liquidator applies not only for an order determining the amount of the Corporate Remuneration for the period of the liquidation under s 473(3) of the CA but also for orders that the amount so determined, and the amount of Corporate Remuneration for the earlier period of the voluntary administration (determined by resolution of the creditors), be paid from the property of the schemes in equal proportions.<sup>9</sup>
- [22] In support of that application, the liquidator submits that his material establishes the following factual matters:
- (a) LMIM did not carry on business in its own right;
  - (b) to the extent LMIM owned assets in its own right, those assets were held only so that LMIM could occupy the office of trustee of the schemes and other trust funds; and

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<sup>9</sup> However, no order is sought against the CPF as an insolvent scheme.

- (c) LMIM has no resources of its own to satisfy the liquidator's claim for general liquidation expenses.
- [23] There is no difficulty in making the third finding that LMIM has no assets left to satisfy the liquidator's claim for general liquidation expenses. I found so much to be the fact in the First Remuneration Decision. However, in my view, it would be an error to find that LMIM did not carry on business in its own right. LMIM did carry on business in its own right, as a funds manager. It got up, marketed, and acted as the responsible entity of a number of schemes and funds, most of which (although not all) were registered schemes. That its business was to carry on business as a funds manager does not mean that it did not carry on business in its own right. The very substantial remuneration earned by LMIM as the responsible entity or trustee of the relevant registered schemes or trust funds was the business of LMIM carrying on business in its own right.
- [24] The liquidator submits that LMIM only held "passive investments" and did not carry on business other than as trustee. If by that the liquidator means that LMIM did carry on business as a funds' manager, in a way that might be said broadly to be analogous to a commercial trustee company carrying on functions of the kind that would attract Chapter 5D of the CA, if s 601RAB applied that Chapter to a company as a trustee company,<sup>10</sup> I agree. But if what is intended to be conveyed is that LMIM is to be equated to a private company that is a trustee of a private trust that carries on the business of the trust but has no business of its own, I disagree.
- [25] The liquidator submits that to the extent that LMIM held assets in its own right, it did so to comply with a condition of its Australian Financial Services Licence as a responsible entity that it hold at least \$5 million in net tangible assets. I accept that is likely to be true. But that LMIM did not hold more significant assets or that its assets were held in its own right in order to comply with the requirements of its Australian Financial Services Licence, does not mean that it did not carry on a funds' management business for profit.
- [26] The liquidator submits there is a principled basis to permit the liquidator's Corporate Remuneration to be borne by the schemes, notwithstanding that it was not for work done for any one of the schemes in particular or the schemes in general.
- [27] Mr Whyte opposes any order that Corporate Remuneration is recoverable as against the FMIF. There was no appearance on behalf of any of the members of any of the other registered schemes. Mr Whyte's opposition was presented on cascading grounds as follows:
- (a) the liquidators have already sought and obtained orders for payment of their remuneration for the period up to 30 September 2015 from the property of the FMIF on a once and for all basis, so that Corporate Remuneration for either the period of the voluntary administration or the period of the liquidation up to 30 September 2015 may not be ordered to be paid from the property of the FMIF;
  - (b) the total of the amounts of remuneration now claimed and those ordered to be paid and paid for the administrators' remuneration for the period of the voluntary

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<sup>10</sup> See *Corporations Regulations 2001* (Cth), reg 5D.1.01A and Schedule 8AA.

administration exceed the amount of the remuneration determined by resolution of the creditors, so that no further remuneration for that period may be ordered to be paid from the property of the FMIF;

- (c) Corporate Remuneration is not a category of remuneration recoverable against the FMIF; and
- (d) if Corporate Remuneration as a category is recoverable, any amount ordered to be paid from the property of the FMIF should be reduced by reason of the activities or business of LMIM in its own right.

[28] Although it will be necessary to determine the liquidator's remuneration under s 473(3) of the CA, in any event, at least for the period after 1 October 2015, it is appropriate to begin with Mr Whyte's third ground of opposition. Mr Whyte submits that none of the claimed Corporate Remuneration may be ordered to be paid from the FMIF because the remuneration for that work is not recoverable against it as a trust.

[29] In the First Remuneration Decision, I held, *inter alia*, that:

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

...

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

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

[30] As set out above, the liquidator's evidence shows clearly that as administrators and liquidators, the relevant tasks and remuneration and expenses were separated by adequate records so as to separate the non-trust remuneration and expenses.

[31] The question that arises, then, is whether those non-trust remuneration and expenses can be recovered in law, from the trust assets constituting the property of the registered scheme, being the FMIF.

- [32] Mr Whyte submits that it would be inequitable for any Corporate Remuneration to be allowed against the assets of the FMIF. He further submits that the point is one about reasonableness and proportionality. I do not think so. It seems to me that the question is whether, and in what circumstances, remuneration for work not related to the trust or trusts can be recovered from the assets of the trust.
- [33] Not all cases are alike in terms of the factual context. For example, reference was made to *Re Primespace Property Investment (in liquidation)*.<sup>11</sup> In that case administrators and liquidators of Primespace sought orders they be allowed remuneration. Primespace had been the responsible entity and trustee of a number of trusts. Primespace had some limited assets in its own right and had carried on business providing project management services for which it had received substantial income in the past. One question that was decided was whether the liquidators should be paid their remuneration for administering trust assets or for general liquidation work out of trust funds by the court exercising its inherent equitable jurisdiction to allow remuneration out of trust assets in connection with the administration of a trust fund. The court accepted that Primespace did not have sufficient assets in its own right to meet the administrators or liquidators' remuneration. It was satisfied that the work done by the liquidators in both the administration and liquidation and their remuneration for that work was properly paid out of trust property. A point of distinction between Primespace and the present case is that the Corporate Remuneration work was not distinguished from the Category 2 Remuneration work in Primespace. Nevertheless, the Judge referred to the court's power to make a discretionary order for the payment of remuneration on the *Berkeley Applegate* principle, on the basis that absent the liquidators' work in that case, a court appointed receiver would have been appointed to take oversight for the realisation of the assets. That is another point of distinction between that case and the present case, as from 15 August 2013, because Mr Whyte was appointed as receiver of the property of the FMIF for that purpose, as from the date of the order that the FMIF be wound up.
- [34] My reasoning in the First Remuneration Decision does not support any general right of a liquidator to reimbursement from trust property for remuneration for work necessary for the winding up of the company trustee, where that work is not carried out in relation to the trust or relevant trusts, if more than one. I accepted the formulation in *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No. 2)*,<sup>12</sup> that where a company is the trustee of a trading trust and has no other activities, the liquidators are entitled to be paid their costs and expenses for general liquidation work out of the trust assets.<sup>13</sup> But I also referred to *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)*, where it was made clear that where a trustee does not act solely as trustee, the liquidator will be required to estimate those of the costs that are attributable to the administration of trust property and only those costs will be charged against the trust assets.<sup>14</sup> That statement of principle can be sourced to the reasons of King CJ

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<sup>11</sup> [2016] NSWSC 1821.

<sup>12</sup> (2016) 305 LFR 222.

<sup>13</sup> *Park v Whyte (No. 2)* [2018] 2 Qd R 413, 430-432 [82]-[90].

<sup>14</sup> *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) ACSR 377, 385.

in *Re Suco Gold Pty Ltd (in liq)*.<sup>15</sup> Recently, in *Carter Holt*, the High Court endorsed King CJ's analysis as follows:

"The Full Court ... concluded that since the power of exoneration could be used, in each case, to pay the creditors of each of the two trusts of which the company was trustee, and since the liquidator's remuneration and the costs and expenses of winding up were to be given priority over those unsecured creditors, the liquidator was entitled to have recourse to the property of each trust for that remuneration and those costs, *so far as they were incurred in relation to each trust.*"<sup>16</sup> (emphasis added)

- [35] Another recent decision, *Staatz v Berry, re Wollumbin Horizons Pty Ltd (in liq) (No. 3)*,<sup>17</sup> endorses this approach. Having referred to a number of the relevant cases, including *13 Coromandel Place*, the court said:

"The above principles are applicable in the present case and they permit the liquidator to have recourse to the trust assets for his costs and expenses of the liquidation and for recovery of his remuneration to the extent to which his work concerned the assets of the trust. The nature of the work for which such sums are recoverable are referred to, albeit not exclusively, at paragraph [191] in *Lane*. Here, the administration of the trust was a part of the winding up of the Company such that a portion of the cost of the general liquidation matters should also be met out of the trust assets as identified by Finkelstein J."<sup>18</sup>

- [36] In the result, in my view, the liquidator is not entitled to recover the Corporate Remuneration from the FMIF on the *Berkeley Applegate* principle. It follows that no order should be made for the payment of Corporate Remuneration from the assets of the FMIF. It also follows that no order should be made for the payment of Corporate Remuneration from the assets of the other registered schemes.
- [37] Accordingly, it is unnecessary to consider Mr Whyte's other three grounds of opposition to an order for payment of any Corporate Remuneration to the liquidator from the property of the FMIF.
- [38] Notwithstanding that no order will be made that the Corporate Remuneration be paid from the assets of the FMIF or any of the schemes, the court fixes the applicants' Corporate Remuneration for the period 2 August 2013 to 30 June 2018 in the sum of \$736,550.65. In the circumstances, it is unnecessary to expand further on the evidence which supports that determination as an amount which is reasonable.

## Category 2 Remuneration

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<sup>15</sup> (1983) 33 SASR 99, 110.

<sup>16</sup> (2019) 368 ALR 390, 407 [41].

<sup>17</sup> [2019] FCA 924.

<sup>18</sup> [2019] FCA 924, [211].

- [39] Mr Whyte opposes the amount of \$32,668.50 claimed by the liquidator as part of the Category 2 Remuneration for work carried out in connection with litigation. Mr Park says that during the liquidation period the work carried out now claimed as Category 2 Remuneration included some litigation work in respect of, amongst other things, the “Bellpac Proceeding” and the “Drake Proceeding”.
- [40] The Bellpac Proceeding is brought by LMIM as responsible entity of the FMIF,<sup>19</sup> by Mr Whyte, against a number of defendants, including LMIM in its own right. In other words, the work of the liquidators in respect of the Bellpac Proceeding may and would ordinarily be expected to be work in relation to LMIM in its own right as defendant. For the reasons that I give upon the liquidator’s directions decision that is decided at the same time as this application, the liquidator cannot recover remuneration for defending that proceeding from the property of the FMIF, before it is resolved in LMIM’s favour, because that proceeding is brought against LMIM in its own right as a defendant by LMIM as responsible entity for the FMIF, by Mr Whyte, on behalf of the unit holders as beneficiaries of the FMIF.<sup>20</sup>
- [41] The Drake Proceeding was a proceeding by ASIC against the directors of LMIM.<sup>21</sup> It is by no means clear what the liquidators work in connection with the Drake Proceeding was. But if the liquidators’ work in connection with that proceeding was concerned with the custody of the LMIM’s records of the schemes and, possibly, of the Managed Performance Fund (“MPF”) as a separate trust fund of which LMIM had previously been the trustee, it might be recoverable.
- [42] Mr Whyte submits that the relevant work in relation to that litigation is unrelated to the FMIF. Although the evidence is unclear, it seems to me that the liquidator should be permitted to recover this sum as part of the Category 2 Remuneration. The costs of further investigation of that amount do not warrant any other conclusion.
- [43] Mr Whyte also challenges, somewhat, the amount of \$117,045 claimed as part of the Category 2 Remuneration for preparing or doing the work for making remuneration claims. Mr Whyte submits that the aggregate amount of remuneration claimed for Category 2 Remuneration is high, but accepts that a substantial amount of work would have been involved with preparation of the application for the First Remuneration Decision.
- [44] Mr Whyte submits that an error has been made in the allocation of Ms Trenfield’s time on 22 February 2016 for attending the hearing of the application for the First Remuneration Decision, by allocating the full amount as Category 1 Remuneration to the FMIF, notwithstanding the fact that the application concerned remuneration for all of the funds. I agree.
- [45] Mr Whyte further submits that there is a question as to whether the *Berkeley Applegate* principle allows recovery of remuneration from the property of the FMIF for work done to

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<sup>19</sup> Supreme Court of Queensland, BSC No 12317 of 2014.

<sup>20</sup> *LM Investment Management Limited & Anor v Whyte* [2019] QSC 233, [23].

<sup>21</sup> *Australian Securities and Investments Commission v Drake & Ors (No 2)* (2016) 340 ALR 75.

present the liquidator's previous applications for remuneration and expenses. Mr Whyte submits, however, that given such work is allowed as remuneration to a liquidator in a liquidation,<sup>22</sup> in principle it may be recoverable where the liquidator is entitled to make a direct claim to recover remuneration or expenses on the *Berkeley Applegate* principle. In my view, that submission should be accepted.

- [46] Lastly, Mr Whyte questions the narrations for the Category 2 work schedule exhibited to Mr Park's affidavit as showing that a significant portion of the work related to dealing with receipts and payments, dealing with auditors of the schemes, dealing with investors of the schemes, dealing with bank accounts and dealing with defences to claims brought by Mr Whyte on behalf of the FMIF members. These items are challenged, generally, because, respectively, the liquidators did not control the bank accounts of the FMIF, the FMIF's financial statements were not audited due to the exemption from financial reporting and audit relief granted by ASIC to the FMIF, investors in the FMIF were dealt with by Mr Whyte rather than the liquidators, and any work for defences to the claims brought by LMIM as responsible entity of the FMIF, by Mr Whyte, is not properly payable out of the FMIF at this stage.
- [47] However, although the opportunity to do so existed, Mr Whyte did not develop any detail as to what amounts may be involved in these points. This is not an acceptable approach, in my view. Unless the possible amounts are estimated, no assessment can be made as to whether they warrant any further investigation or consideration.
- [48] The liquidator submits that having regard to the statutory factors under s 473(10) of the CA, the Category 2 Remuneration sought is reasonable, based on a number of features of the evidence, as follows:
- (a) the administration of the affairs of LMIM has been a complex and difficult one, involving multiple trust assets, complex assets, ASIC investigation and litigation, multiple legal proceedings, thousands of investors, many creditors and the appointment of numerous insolvency practitioners to differing roles;
  - (b) the work for which remuneration is sought was considered necessary by the liquidator from time to time and work which was not necessary was not done;
  - (c) the remuneration sought covers a significant period of time from 1 October 2015 to 30 June 2018;
  - (d) the work has been performed in accordance with well-established practices under a system of recording time and careful review by senior insolvency practitioners;
  - (e) in relation to proportionality, some of the amount will not be recovered because of the CPF's insolvency; and
  - (f) most of the work in the Category 2 Remuneration claim relates to the quantification of the First Remuneration Decision (\$177,045) and should be found to be reasonable.
- [49] The overall breakdown or summary of the Category 2 Remuneration schedule is as follows:

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<sup>22</sup> *Re RMGA Pty Ltd* [2012] NSWSC 678, [14]; *Pantzer v Wenkart* (2006) 153 FCR 466.

<b>ARITA work category</b>	<b>Amount excl. GST</b>
Administration	\$54,387.50
ASIC	\$18,516.50
Books and records	\$635.50
Creditor's liaison	\$626.00
Investigations	\$312.50
Investors/advisors	\$9,464.50
Litigation	\$32,668.50
Remuneration	\$117,045
Statutory Compliance	\$129.50
Trading	\$45,117
<b>Total</b>	<b>\$278,902.50</b>
<b>Plus GST</b>	<b>\$27,890.25</b>
<b>Total</b>	<b>\$306,792.75</b>

[50] In my view, the amount claimed for Category 2 Remuneration should be determined as remuneration under s 473(3) and be allowed as against and ordered to be paid from the property of the schemes.

### Category 1 Remuneration

#### FMIF

- [51] Mr Park says that the work carried out during the relevant period in respect of the FMIF included work leading up to the court's 17 December 2015 order and work before and after the First Remuneration Decision and the Indemnity Decision. It involved liaising with Mr Whyte and his staff in respect of insurance relevant to the FMIF, the proof of debt process, the settlement of indemnity claims made in respect of the 17 December 2015 order and responding to investor enquiries for the FMIF.
- [52] The liquidator prepared a schedule of all of the relevant entries in the FTI Consulting time recording system in chronological order the Category 1 Remuneration work relevant to the FMIF. The entries identify the name of the staff member who carried out the work, the time spent on each task, the amount charged for the task, the relevant ARITA Code category, and a narrative or description of the task.
- [53] Characterised and summarised in accordance with the ARITA Code categories, the amounts claimed for Category 1 Remuneration for the FMIF are as follows:

Category	Total hours	Amounts excl. GST
Administration	297.20	\$179,885.50
Assets	7.80	\$4,852
Creditors	89.40	\$50,092
Dividend	0	0
Investigations	46.40	\$25,721
Trade on	65.50	\$27,036.50
<b>Total</b>	506.30	\$287,587
<b>Plus GST</b>		\$28,758.70
<b>Total</b>		<b>\$316,345.70</b>

- [54] Mr Park says the types of work carried out included work in respect of the liquidators first application for directions,<sup>23</sup> review of the First Remuneration Decision and the Indemnity

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<sup>23</sup> *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283.

Decision, including calculations in respect of the amounts claimed in those decisions and attendances at court, litigation work including responding to a subpoena for production received from the solicitors for EY in respect of documents relevant to the FMIF, statutory compliance work in respect of the audit relief sought in respect of the FMIF and responding to investor queries relevant to the FMIF. Mr Park also says that the largest part of the work was required because of the need to conduct the contested application for the First Remuneration Decision, the need to review Mr Whyte's circulars and other information provided to FMIF investors, given LMIM's continuing appointment as responsible entity of the FMIF, and the large number of unit holders of the FMIF.

- [55] Mr Whyte does not oppose the determination of the claimed Category 1 Remuneration for the FMIF as reasonable. It is unnecessary to set out further detail of this particular claim.
- [56] In determining remuneration under s 473(3) of the CA in this instance and elsewhere in these reasons, I have regard to the principles I applied in the reasons for the First Remuneration Decision.<sup>24</sup> I also have regard to the discussion in those reasons as to the basis for making an order that the liquidators remuneration be paid from the property of the FMIF.<sup>25</sup>
- [57] In my view, the amount claimed for Category 1 Remuneration should be determined as remuneration under s 473(3) and allowed as against and ordered to be paid from the property of the FMIF.

*The AIF*

- [58] Mr Park says the Category 1 Remuneration work performed for the AIF was carried out in respect of the administration, assets, creditors and trade-on ARITA categories. Major tasks included the June 2016 dividend distribution, work in respect of the sale of units at Lygon Street, Carlton, Melbourne, financial reporting and audit work specific to the AIF, liaising with AIF investors and their advisers, and general fund administration tasks.
- [59] Mr Park says he caused a schedule to be prepared of all of the relevant entries in the FTI Consulting time recording system in chronological order for Category 1 Remuneration work for the AIF in similar form to the schedule for the FMIF.
- [60] He also caused a table to be prepared that characterises and summarises the entries in the schedule by reference to the ARITA categories as follows:

<b>Category</b>	<b>Total hours</b>	<b>Amounts (excl GST)</b>
Administration	223.30	\$92,164
Assets	225.60	\$123,559.50

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<sup>24</sup> *Park v Whyte (No 2)* [2018] 2 Qd R 413, 426-427 [59]-[63] and 450-453 [152]-[164].

<sup>25</sup> *Park v Whyte (No 2)* [2018] 2 Qd R 413, 428-433 [70]-[94] and 433-436 [94]-[107].

Creditors	25.80	\$12,684
Dividend	0.10	\$56.50
Investor	99.40	\$54,903.50
Trade-on	439.70	\$206,645
<b>Total</b>	<b>1013.90</b>	<b>\$490,012.50</b>

- [61] The Category 1 Remuneration work in respect of the AIF included asset work in respect of the sale of the Lygon Street Units, administration work including preparation of business activity statements, attending to financial reporting obligations and audit requirements and the payment of invoices specific to AIF properties, investigative work to reconcile returned funds to the particular investors entitled to receive that money, responding to investor enquiries in respect of the June 2016 dividend distribution, preparing circulars to AIF members in respect of the status of the scheme and calculating the net asset value for the purposes of those circulars, work in attending to distribution to investors and providing instructions to PTAL as custodian of the AIF to attend to the discharge and release of securities and the payment of funds out of the AIF consequent upon the realisation of the assets and the distributions to members.
- [62] Mr Park says that during the relevant period, AIF assets to a value of \$6,229,899.76 were realised. Particular features of complexity in the affairs of LMIM in respect of the AIF included the number of investors in the AIF who made enquiries. As at 16 May 2018, the assets of the AIF totalled \$9,546,794. The construction and resulting sale of the Lygon Street Units proved to be a complex process.
- [63] Mr Park has reviewed the work undertaken, the time spent on each task and the quantum of remuneration sought for approval and opines that each task was necessary, undertaken efficiently and required for the purpose of the liquidation.
- [64] The claimed remuneration amount of \$539,013.75 relates to a period of more than two and a half years.
- [65] In my view, the amount claimed for Category 1 Remuneration for the AIF should be determined as remuneration under s 473(3) and allowed as against and ordered to be paid from the property of the AIF.

*The ASPF*

- [66] Mr Park says the Category 1 Remuneration work carried out in respect of the ASPF included work in respect of the realisation of each of the ASX listed investment series that comprised the assets of the ASPF, the early termination of those investments and resulting conversion of the investments into cash to enable investor distributions to be made.

- [67] He caused a schedule to be prepared setting out all of the entries in the FTI Consulting time recording system in chronological order in similar form to the schedule for the FMIF. He also caused a table to be prepared that characterises and summarises the entries in the schedule by reference to each ARITA category as follows:

<b>Category</b>	<b>Total hours</b>	<b>Amounts (excl GST)</b>
Administration	126.40	\$53,944
Assets	41.50	\$23,535
Creditors	16.40	\$7,446
Investigations	38.30	\$21,537
Trade-on	223.90	\$106,010
<b>Total</b>	<b>446.50</b>	<b>\$212,472</b>

- [68] Mr Park says the work in respect of the ASPF included attending to bank reconciliation, receipts and payments, funds transfers and other banking administrative tasks, work in respect of the valuations received in respect of the ASPF products and work when those products matured, determining whether it was commercial to terminate the ASPF series investments early including notifications to investors, attending to the sale of a substantial shareholding in Newmont Coal, work in respect of the December 2016 distribution to the ASPF unit holders, work in respect of this application and the remuneration relevant to the ASPF, statutory compliance work including seeking audit relief from ASIC and instructing PTAL to attend to the release of funds held for the ASPF.
- [69] Mr Park says the work in respect of the ASPF was complex, given the different investments made in respect of various series comprising subscriptions in Australian equities, the investors per series, the different fixed interest returns that applied in respect of the different series and the different maturity dates in respect of those investments.
- [70] He says the indicative net asset value of the ASPF at 16 May 2018 was \$1,752,692. The distribution that was made to ASPF unit holders on 2 December 2016 was in the amount of \$5,312,219.52.
- [71] Mr Park reviewed the work undertaken, the time spent on each task and the quantum of remuneration sought for approval and opines that each task was necessary, undertaken efficiently, and required for the purpose of the liquidation.
- [72] In my view, the amount claimed for Category 1 Remuneration for the ASPF should be determined as remuneration under s 473(3) and allowed as against and ordered to be paid from the property of the ASPF.

## Goods and Services Tax

- [73] Mr Whyte opposes inclusion of any amount for Goods and Services Tax (“GST”) in the remuneration as determined and ordered to be paid from the property of the FMIF. Although both parties submit that there was a “supply” within the meaning of s 9-5 of *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* (“GST Act”), in the liquidators doing relevant work for which the liquidator is entitled to payment of remuneration, it will be necessary to turn to that question because neither of the parties paid close attention to the legal characterisation of the relevant supplies.
- [74] Mr Whyte submits that the FMIF is a separate entity for the purposes of the GST Act, because it is a trust. The expression “entity” does not appear in the definitions of “supply” or “taxable supply”. In the style of its drafting, relevant provisions of the GST Act refer to “you”, an expression that is defined in s 195-1 and the Dictionary, to apply to “entities generally unless its application is expressly limited”. Section 184-1(1) defines “entity” to mean, *inter alia*, “a trust”. As well, s 184-1(2) provides that the trustee of a trust is taken to be an entity consisting of the person who is trustee at any given time and s 184-1(3) provides that a legal person can have a number of different capacities and is taken to be a different entity in each of those capacities. Accordingly, for the purposes of the GST Act, LMIM is an entity, in its own right or capacity, and LMIM is also an entity in its capacity as responsible entity and trustee of the FMIF.
- [75] The liquidator submits that in doing the work the liquidators made a “taxable supply” under s 9-5 of the GST Act because they made a “supply for consideration... in the course of furtherance of an enterprise... the supply [was] connected with [Australia]... and [the liquidator’s firm] is registered” for GST. The liquidator also relies on that part of the definition of “supply” in s 9-10(1) that defines a supply as “any form of supply whatsoever”. In addition, s 9-10(2) provides that a supply includes a “supply of services”.
- [76] Returning to s 9-5, a “taxable supply” is made if, *inter alia*, the supply is made “for consideration”. Section 9-15(1) provides that consideration includes “any payment... in connection with a supply of anything”, s 9-15(2) provides that “it does not matter whether the payment... was voluntary or whether it was by the recipient of the supply” and s 9-15(2A) provides that “it does not matter whether the payment was... [made] in compliance with an order of a court”.
- [77] The liquidator submits that s 7-10 of the GST Act is the central provision of the Act providing that “GST is payable on taxable supplies” and that “entitlements to input tax credits arise on creditable acquisitions”.
- [78] On the basis of those provisions, the liquidator submits that: the liquidators supplied services as liquidators for LMIM; they have a statutory entitlement to remuneration under s 473(3) of the CA; their services as liquidators were for the ultimate benefit of the trust entity that is the FMIF; and the services supplied constituted a taxable supply in respect of which GST is payable and the liquidator is obliged to remit GST.
- [79] The liquidator submits that as the FMIF is the “ultimate” recipient of the services the proper accounting (presumably meaning for the purposes of providing tax invoices under the GST Act

and payment thereof) is that the liquidators raise a tax invoice to LMIM (presumably in its own right and capacity), that LMIM raises a further tax invoice to LMIM as responsible entity and trustee for the FMIF, that LMIM as responsible entity and trustee for the FMIF pays the amount of the tax invoice to LMIM (presumably in its own right and capacity) and LMIM should pay the amount of the liquidators' tax invoice to the liquidators.

- [80] The liquidator submits that the refusal by Mr Whyte to agree to payment of the liquidator's remuneration inclusive of GST means that the liquidator's tax invoice for remuneration will be reduced by one eleventh and the FMIF will make a "windfall tax gain" by claiming an input tax credit on the creditable acquisition by LMIM as responsible entity of the FMIF (presumably of the services supplied), including seeking a refund of that sum from the Commissioner of Taxation, depending on its GST position.
- [81] In my view, this is an inaccurate analysis or explanation of the supply transaction and the liquidator's claim for remuneration.
- [82] For his part, Mr Whyte submits that the court should focus on the relevant "creditable acquisition" under the GST Act. Creditable acquisitions are provided for under Division 11. Their relevance is that the GST payable on any taxable supply made by a person,<sup>26</sup> is reduced to a net amount for a tax period under s 17-5(1) by deducting any "input tax credits" from the sum of all the GST for the period. Under s 11-20, a person is entitled to an input tax credit for any "creditable acquisition" that they make.
- [83] The reason for Mr Whyte's focus on the creditable acquisition that might be associated with any taxable supply by the liquidator in supplying services relevant to the winding up of the FMIF is not immediately apparent. But leaving that to one side, s 11-5 provides that a person makes a creditable acquisition if they acquire anything solely or partly for a creditable purpose and the supply of the thing to them is a taxable supply, and they are liable to provide consideration for the supply and are registered. Section 11-10(1) defines an acquisition to be an acquisition in any form whatsoever and s 11-10(2) defines acquisition to include an acquisition of services. By s 11-15(1), a person acquires a thing for a creditable purpose to the extent that they acquire it in carrying on their enterprise.
- [84] Mr Whyte submits that if the liquidator issued tax invoices for the liquidators' remuneration to LMIM "in its own right", that would be consistent with the view that LMIM in its own right and capacity became entitled to an input tax credit for the GST component of any tax invoices (presumably raised by the liquidators to LMIM in its own right). Mr Whyte complains that if an order is made that the liquidator be paid an amount from the property of the FMIF that is GST inclusive, LMIM (presumably in its own right or capacity) will "keep or receive a windfall" of the amount of its input tax credits for the creditable acquisitions of the liquidators' services.
- [85] As appears, both sides of the argument focus on a suggestion of an unjust windfall. In my view, both sides focus on the wrong point. The correct starting point and question, in my

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<sup>26</sup> That must be paid under s 9-40 in the amount of 10 percent of the value of the taxable supply under s 9-70, calculated in accordance with s 9-75.

view, is the characterisation of the liquidators' supply, including who is the correct "recipient" of the supply.

- [86] The argument around this point should keep in focus that the right of the liquidator to be indemnified from the assets of the FMIF in respect of remuneration in the present case is a personal right identified in the cases decided in accordance with the *Berkeley Applegate* principle.
- [87] It is convenient to start the analysis of the characterisation of the liquidators' supply of services to LMIM, as if upon a contractual or restitutionary entitlement to services supplied for reward. The statutory requirement that any entitlement to remuneration is that determined under s 473(3) of the CA does not change that character.
- [88] The GST Act necessarily assumes that a taxable supply to LMIM could be made by a supplier either to LMIM in LMIM's own right as an entity or to LMIM as responsible entity and trustee of the FMIF as a trust entity. Mr Whyte's submission propounds that the correct analysis is of one supply to LMIM in its own right and a second supply or on-supply by LMIM in its own right to LMIM as trustee of the FMIF. That analysis is consistent with the invoicing process that the liquidator proposes. However, in my view, it is attended with very significant difficulties.
- [89] First, it is generally artificial to speak of a supply by an entity to itself. However, there is one situation, for the purposes of the GST Act, where such a second or on-supply might be recognised. That is where the entity in its own right acquires a larger whole, and then on-supplies only a proportion of the whole to the trust entity of which it is trustee.
- [90] Nevertheless, that is not an explanation of the transactional nature of the acquisition by a trustee for a single trust of services from a supplier. The idea that a trustee would acquire such services for itself and then, notionally, make a second or on-supply of them to itself in the capacity as trustee of the trust is a potential violation of trust law, because it involves self-dealing by the trustee. Returning to the GST Act, there is nothing in its provisions that requires the characterisation of a transaction where a person makes a supply to a trustee on behalf of the trust to be broken up into a supply to the trustee in its own right and a second or on-supply by the trustee, notionally, to itself as trustee.
- [91] Rather, the application of the provisions of the GST Act requires a proper identification of the "recipient" being, as defined by s 195-1 and the Dictionary, "the entity to which the supply was made". Ordinarily, where services are supplied to a trustee on behalf of a trust, there is no acquisition by the trustee in its own right as an entity. On the contrary, the trustee in the trust capacity and for the entity (within the meaning of the GST Act) that is the trust is the recipient, and the trust as an entity makes the creditable acquisition. So much is recognised by the language and structure of the GST Act.<sup>27</sup>
- [92] In the present case, the provision by the liquidators of services that constituted a supply of services that was a taxable supply for the purposes of the GST Act as well as giving rise to an entitlement to remuneration determined under s 473(3) of the CA that was made in respect of

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<sup>27</sup> See also the Australian Taxation Office GST Ruling 2004/1, [669]-[677].

the administration or winding up of the FMIF will have been made, in the relevant sense, to the FMIF as a trust entity within the meaning of the GST Act. The FMIF in that respect, will have been the recipient of the services that constitute the relevant taxable supply.

Accordingly, in my view, a two-step process whereby invoices are raised by the liquidators to LMIM in its own right and LMIM in its own right invoices LMIM as the trustee of the FMIF does not accord with the relevant legal relationships characterised in accordance with the facts and the entity structure of the GST Act, except for Category 2 Remuneration.

- [93] Beyond that, there may be another point. It will be recalled that s 9-5 requires that a relevant supply of services be made “for” consideration to constitute a taxable supply, where by s 9-15(1), “consideration” includes any payment in connection with a supply and, by s 9-15(2), it does not matter whether the payment is made by the recipient or, by s 9-15(2A), whether the payment was made in compliance with an order of the court.
- [94] Even so, in my view, there is some difficulty in characterising the effect of an order that the liquidator be paid from the property of the FMIF on the *Berkeley Applegate* principle as a supply “for” consideration. So far as the *Berkeley Applegate* principle is concerned, the right of the liquidator is personal. Nevertheless, in my view, that does not change the character of the supply when it was made. When the supply was made, it was made to the relevant trust as an entity, for the purposes of the GST Act. That is to say, to LMIM as responsible entity and trustee of the FMIF.
- [95] It was that liability incurred by LMIM as responsible entity and trustee of the FMIF that was relied on by way of a trustee’s right of exoneration for expenses or debts properly incurred that was answered by Mr Whyte raising the “clear accounts” rule on behalf of the beneficiaries of the trust of the property of the FMIF. The liquidator relies on the *Berkeley Applegate* principle to get around the clear accounts rule. Nevertheless, the application of the *Berkeley Applegate* principle does not create a different or further supply for the purposes of the GST Act.
- [96] Once it is recognised that, on the model of analysis so far adopted, relevant supplies were made by the liquidators to LMIM as responsible entity and trustee for the FMIF and that no further or independent supply is involved in the application of the *Berkeley Applegate* principle, the respective arguments of the parties on both sides fall away, at least for Category 1 Remuneration. The correct analysis is that the personal entitlement of the liquidators is on the *Berkeley Applegate* principle and their entitlement is to the proper amount of the remuneration for the work constituting the services they supplied. The question becomes, then, whether that amount should include the GST component of their tax invoices for the relevant services.
- [97] Mr Whyte relied on a number of cases that deal with the inclusion or exclusion of GST in the calculation of amounts to be paid pursuant to court orders. Some of those cases related to orders made to compensate a party carrying on an enterprise in a way that the party seeking

compensation had an entitlement to a creditable acquisition for the consideration paid by them that was the loss to be compensated.<sup>28</sup>

- [98] In my view, those cases are not to the point in the present case. Whether or not the reasonable remuneration for the services of the liquidators ordered to be paid from the property of the FMIF in accordance with the *Berkeley Applegate* principle should include the amount of their GST liability in respect of the supply is not affected by any creditable acquisition by the liquidators that is relevant.
- [99] The thrust of Mr Whyte's opposition to the inclusion of GST in the calculation of the amount payable is that payment from the FMIF will create a creditable acquisition by LMIM, in its own right, by reason of the back to back invoicing method favoured by the liquidators. Whether or not the Australian Taxation Office accepts such a method of invoicing is a matter for that office, and not for me. I have concluded that there are not two relevant supplies, so far as the liquidators' services were provided to LMIM as responsible entity and trustee for the FMIF, except in the case of Category 2 Remuneration. However, in any event, payment to the liquidator from the property of the FMIF, ordered on the *Berkeley Applegate* principle, calculated to include GST, will not, so far as the liquidators are concerned, create any undue benefit.
- [100] In my view, the amount that the liquidator should receive in respect of any remuneration recoverable against the FMIF on the *Berkeley Applegate* principle should include the amount of the GST included in the liquidators' tax invoice for that remuneration.
- [101] Nevertheless, it is possible to fashion the relevant orders so that if the liquidator is not, in fact, liable to pay GST on the value of the supply of services involved, that amount may be recoverable and recovered by or on behalf of the beneficiaries of the FMIF. And I am prepared to entertain further submissions on the appropriate form of order.
- [102] Accordingly, the amounts that have been determined by this decision as remuneration under s 473(3) of the CA, which were calculated excluding GST, as set out previously, should be increased by ten percent in each case so that they are ordered to be paid as amounts inclusive of GST.

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<sup>28</sup> *Hennessey Glass & Aluminium Pty Ltd v Watpac Australia Pty Ltd* (2007) 69 ATR 374; *Chongherr Investments Ltd v Titan Sandstone Pty Ltd* [2007] QCA 278; *Beach Retreat Pty Ltd v Mooloolaba Marina Ltd* [2009] 2 Qd R 356. Compare *Gagner Pty Ltd trading as Indochine Café v Canturi Corporation Pty Ltd* (2009) 77 ATR 157; *Peet Ltd v Richmond (No. 2)* (2009) 76 ATR 644; *Thackray & Ors v Gunns Plantations Ltd & Ors* (2011) 85 ACSR 144; *Jones v Matrix Partners Pty Ltd* (2018) 354 ALR 436.