

SUPREME COURT OF QUEENSLAND

CITATION: *LM Investment Management Limited & Anor v Whyte* [2019]
QSC 257

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)

AND

**SAID JAHANI IN HIS CAPACITY AS RECEIVER AND MANAGER OF
THE ASSETS, UNDERTAKINGS, RIGHTS AND INTERESTS OF LM
INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS
THE RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED
AUSTRALIAN INCOME FUND ARSN 110 247 875 AND THE LM
INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME
FUND ARSN 122 052 868**
(Second Respondent)

FILE NO/S: BS No 3508 of 2015

DIVISION: Trial Division

PROCEEDING: Applications for costs
 ORIGINATING COURT: Supreme Court at Brisbane
 DELIVERED ON: 17 October 2019
 DELIVERED AT: Brisbane
 HEARING DATE: Written submissions
 JUDGE: Jackson J

ORDERS: **On the application filed 17 July 2018 the order of the Court is that:**

- 1. In the event that GST is not assessed on some or all of the amounts ordered to be paid to the first applicant from the FMIF by the orders made on 2 October 2019, or, having been assessed, in the event that the first applicant later receives a decreasing adjustment, a refund or other credit on the basis that he was not in fact liable to be assessed on that amount (in whole or in part), the first applicant is to account to the FMIF for the GST included in the amounts ordered to be paid by these orders to that extent.**
- 2. The costs of the application be assessed on the indemnity basis and paid from the property of the AIF, FMIF and ASPF in equal (one third) shares.**

On the application filed 10 October 2018 the order of the Court is that:

- 3. The first respondent's costs of the application be assessed on the indemnity basis and paid from the scheme property of the LM First Mortgage Income Fund.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – RELEVANT CONSIDERATIONS GENERALLY – Whether it was appropriate to reduce the liquidator's costs by reference to a percentage of the liquidator's assessed costs of the application attributable to Corporate Remuneration – Whether costs are to be assessed on the indemnity basis

Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor [2013] QSC 216, cited

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

LM Investment Management Limited & Anor v Whyte [2019] QSC 245, cited

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

Uniform Civil Procedure Rules 1999 (Qld), rr 681, 684, 687

COUNSEL: J Peden QC for the applicants
D Ananian-Cooper for the respondent
P Ahern for Trilogy Funds Management Ltd

SOLICITORS: Russells for the applicants
Tucker & Cowen for the respondent
Squire Patton Boggs for Trilogy Funds Management Ltd

JACKSON J:

- [1] Following delivery of the decisions and orders made in *LM Investment Management Limited & Anor v Whyte*¹ (“Second Directions application and Interim Distribution application”) and *LM Investment Management Limited & Anor v Whyte*² (“Second Remuneration application”) the parties made written submissions as to costs.

Second remuneration application

- [2] The liquidator applies for an order that his costs of the Second Remuneration application be assessed on the indemnity basis and paid from the scheme property of the LM First Mortgage Income Fund (“FMIF”), LM Australian Income Fund (“AIF”) and LM Australian Structured Products Fund (“ASPF”), each as to one third of the total assessed amount.
- [3] The first respondent, Mr Whyte, submits that the liquidator should only be permitted to recover 50 percent of the costs that might otherwise be payable from the scheme property of the FMIF because of the liquidator’s failure to obtain an order for payment of Corporate Remuneration³ from that property.
- [4] In substance, Mr Whyte’s position is at least analogous to treating the question of the recoverability of Corporate Remuneration from the scheme property of the FMIF as an “event” for the purposes of *Uniform Civil Procedure Rules 1999 (Qld)*, r 681(1) or a question in the proceeding to which a percentage of the costs of the proceeding are attributable on a percentage basis for the purposes of r 684(1), so that an order specifying a percentage of assessed costs may be made under r 687(2).
- [5] Mr Whyte submits that regard may be had to the proportion of the liquidator’s total claim for remuneration represented by Corporate Remuneration, i.e. 47 percent. I do not agree. The amount of the claim is not a reliable measure, even for “a rough apportionment of costs

¹ [2019] QSC 233.

² [2019] QSC 245.

³ As that term is used in *LM Investment Management Limited & Anor v Whyte* [2019] QSC 245.

‘intelligently made’⁴, of the costs occasioned by it. Next, Mr Whyte submits that his substantive objections in relation to Corporate Remuneration caused a significant proportion of the supplementary material filed by the liquidator and of the time of the court in the hearing to be taken up by issues related to Corporate Remuneration. In the circumstances, Mr Whyte submits that a 50 percent apportionment of costs to Corporate Remuneration is appropriate so as to reduce the percentage of the assessed costs of the liquidator that might be ordered to be paid from the scheme property of the FMIF.

- [6] That approach glosses over Mr Whyte’s opposition to Corporate Remuneration that was based on four separate grounds that I described as “cascading” in the reasons for decision.⁵ In the result, I found it unnecessary to determine the other three grounds.⁶ However, the very real possibility existed that a great deal of the added time and expense related to the three grounds not decided and that Mr Whyte would not have succeeded on those grounds.
- [7] As well, although I formed the view that Corporate Remuneration is not recoverable from the scheme property of the FMIF, there was some authority that suggested that it might be, unless that authority was distinguished or not followed.⁷ In my view, the liquidator is not to be criticised or “mulcted in costs”⁸ for ascertaining whether it was recoverable in the circumstances of this case, as an aspect of the overall application for remuneration.
- [8] In the result, the conclusion I have reached is that it is not appropriate to reduce the liquidator’s costs of the application by reference to a percentage of the liquidator’s assessed costs of the application attributable to Corporate Remuneration.
- [9] The order that should be made is that the costs of the application filed 17 July 2018 should be assessed on the indemnity basis and be paid from the scheme property of the FMIF, AIF and ASPF, each as to one third of the total amount.
- [10] By the reasons for judgment, I indicated that I was prepared to entertain further submissions on the appropriate form of order so that if the liquidator is not, in fact, liable to pay GST on the value of the supplied services involved, that amount may be recoverable and recovered by or on behalf of the beneficiaries of the FMIF.
- [11] In detailed further submissions on the question of the form of order, Mr Whyte proposes an order that:

“In the event that GST is not assessed on some or all of the amounts ordered to be paid to the first applicant from the FMIF by these orders, or, having been

⁴ *Aion Corporation Pty Ltd v Yolla Holdings Pty Ltd & Anor* [2013] QSC 216, [5] and [15].

⁵ [2019] QSC 245, [27].

⁶ [2019] QSC 245, [37].

⁷ For example see *Primespace Property Investment Limited (in liquidation)* [2016] NSWSC 1821.

⁸ For examples of the courts’ reluctance to make such orders see *The “Leucade”* (1855) 2 Sp Ecc & Ad 228; 164 ER 403; *Attorney-General (Qld) v Holland* (1912) 15 CLR 46; *Woodward v Bernafon Australia Pty Ltd* [2002] QSC 227; *R v Aitkin; Ex parte Smith* [1944] QWN 5.

assessed, in the event that the first applicant later receives a decreasing adjustment, a refund or other credit on the basis that he was not in fact liable to be assessed on that amount (in whole or in part), the first applicant is to account to the FMIF for the GST included in the amounts ordered to be paid by these orders to that extent.”

[12] The liquidator did not oppose the order sought.

[13] Accordingly, I will make that order. I observe that the lengthy submissions received on the hearing of the application for remuneration, by which Mr Whyte unsuccessfully sought to oppose any inclusion of GST in the order for remuneration to be paid from the scheme property of the FMIF, would have been unnecessary had an order to the effect set out above been sought and made (which is similar to orders that have been made in other cases, although perhaps in a more detailed form). That would have decreased the relevant costs to be borne by the unitholders of the FMIF.

Second Application for Directions

[14] Neither the liquidator nor Mr Whyte seeks an order that the other pay his costs of the Second Application for Directions. No other party appeared on the hearing of that application.

[15] Mr Whyte seeks an order that his costs of the application be costs in the winding up of the FMIF to be assessed on the indemnity basis and paid to Mr Whyte from the property of the FMIF.

[16] In my view, it is appropriate to make such an order.

Interim distribution application

[17] Neither Mr Whyte nor Mr Jahani seeks an order in relation to their costs of the Interim Distribution application.

[18] Trilogy Funds Management Ltd (“Trilogy”) seeks an order that its costs of appearing on the interim distribution application be assessed on the indemnity basis and be paid from the scheme property of the FMIF.

[19] Trilogy submits that its costs were incurred as part of the due administration of the FMIF and should be ordered to be paid from the scheme property of the FMIF. Mr Whyte opposes an order that Trilogy’s costs in any amount be paid from the scheme property of the FMIF.

[20] In my view, there is no basis to conclude that Trilogy’s appearance on the hearing of the Interim Distribution application was part of the due administration of the FMIF. On the contrary, Trilogy’s position was intended to protect the settlement of the Feeder Funds Proceeding under the terms of the deed of settlement and release and was taken as the responsible entity of the LM Wholesale First Mortgage Income Fund (“WFMIF”). Trilogy had neither any interest in, nor right to appear in relation to, the administration of the FMIF.

[21] It follows that no order should be made that Trilogy’s costs be paid from the scheme property of the FMIF.