SUPREME COURT OF QUEENSLAND

CITATION:	*Whyte v McLuskie & Ors* [2015] QSC 132
PARTIES:	**IN THE MATTER OF DAVID WHYTE AS RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ARSN 089 343 288 AND LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) IN ITS CAPACITY AS RESPONSIBLE ENTITY FOR THE LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ARSN 089 343 288** **DAVID WHYTE AS RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ARSN 089 343 288** (Applicant) **v** **PAULA McLUSKIE, MICHAEL JAMES REID, MANDY DOWNS AND REBECCA BURROWS** (Examinees)
FILE NO/S:	No 10709 of 2014
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2015; further written submissions dated 8 and 14 April 2015
JUDGE:	Burns J
ORDER:	**Application dismissed**
CATCHWORDS:	CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where summonses were ordered pursuant to s 596B of the *Corporations Act* 2001 (Cth) – whether summonses were issued beyond power or are otherwise an abuse of process – whether on an application by a receiver appointed pursuant to s 601NF(2) an examination may be ordered pursuant to s 596B.

Corporations Act 2001 (Cth) s 596B, s 601NF
Uniform Civil Procedure Rules 1999 (Qld) Sch 1A

Ariff v Fong (2007) 63 ACSR 384; [2007] NSWCA 183
Australian Securities and Investments Commission v Tasman Investment Management Ltd (2006) 202 FLR 343; [2006] NSWSC 943
Bruce & Anor v LM Investment Management Ltd (2013) 94 ACSR 684; [2013] QSC 192
Evans & Ors v Wainter Pty Ltd (2005) 145 FCR 176; [2005] FCAFC 114
Excel Finance Corp Ltd (rec and mgr appointed), Re; Worthley v England (1994) 52 FCR 69
Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd (2007) 156 FCR 501; [2007] FCA 13
Hongkong Bank of Australia v Murphy (1992) 28 NSWLR 512
LM Investment Management Limited (in liq) v Bruce & Ors (2014) 102 ACSR 481; [2014] QCA 136
Re Banksia Securities Ltd (2013) 278 FLR 421; [2013] VSC 416
Re Equititrust Ltd (2011) 254 FLR 444; [2011] QSC 353.
Re LED (South Coast) Pty Ltd (2009) 76 NSWLR 428; (2009) 76 NSWLR 428
Re Moage Ltd (in liq); Sheahan v Pitterino & Ors (1997) 25 ACSR 53
Re Peat Resources of Australia Pty Ltd; Ex parte Pollock (2004) 181 FLR 454; [2004] WASCA 122
Re Rubicon Asset Management Ltd (2009) 77 NSWLR 96; [2009] NSWSC 1068
Re Southland Coal Pty Ltd (Rec & Mgrs appointed) (In Liq) (2006) 58 ACSR 113; [2006] NSWSC 184
Re Stacks Managed Investments Ltd (2005) 219 ALR 532; [2005] NSWSC 753
Re Stansfield DIY Wealth Pty Ltd (in liq) [2014] NSWSC 1484
Saraceni v Jones (2012) 42 WAR 518; [2012] WASCA 59
Westfield Management Ltd v AMP Capital Property Nominees Ltd (2012) 247 CLR 129; [2012] HCA 54

COUNSEL: R M Derrington QC, with MJ Luchich, for the applicant
B Roberts SC, with M dell Gallego, for the examinees

SOLICITORS: Gadens Lawyers for the applicant
King & Wood Mallesons for the examinees

[1] Examination summonses were issued by the court on 30 January 2015 and, on 12 February 2015, served on the examinees – Paula McLuskie, Michael Reid, Mandy Downs

and Rebecca Burrows. They contend that the summonses were issued beyond power or are otherwise an abuse of process of the court, and seek their discharge.[1]

[2] The application to discharge the summonses is made out of time, and an extension is sought accordingly. As relief in aid of their application, the examinees also seek access to the affidavit material which was filed in support of the issue of the summonses.

Factual and procedural history

[3] The applicant for the issue of the summonses, David Whyte, is the receiver of the property of the LM First Mortgage Income Fund (the **Fund**), having been appointed as such by an order of this Court made in 2013.[2] The Fund was originally constituted in 1999 for the purpose of establishing a pooled mortgage unit trust to be operated as a managed investment scheme under the *Corporations Act* 2001 (Cth) (the **Act**), and was registered as such. By a provision of the constitution for the scheme, the property of the Fund was, and is, held by the responsible entity – LM Investment Management Limited (**LMIM**) – on trust for its members.[3] The business of the Fund involved the making of secured loans to developers of real property, described in the constitution as "mortgage investments".[4]

[4] In August 2009, LMIM engaged Ernst & Young (**EY**) to audit the Fund along with other schemes in relation to which LMIM was the responsible entity.[5] The examinees, as either members or employees of EY, are said to have been involved in the audits undertaken with respect to the Fund.[6]

[5] On 19 March 2013, LMIM went into voluntary administration and, subsequently, its administrators resolved to wind up the scheme. They were restrained from commencing the winding up until the court determined applications separately made by a member of the Fund (Mr Shotton), two members of a feeder fund (Mr and Mrs Bruce) and the Australian Securities and Investments Commission (**ASIC**). Those applications came on for hearing before Dalton J over several days in July 2013 and her Honour's decision was handed down on 8 August 2013.

[6] For Mr and Mrs Bruce, it was argued that a temporary responsible entity for the Fund be appointed by the court to replace LMIM pursuant to ss 601N and 601FP of the Act, and the responsible entity of the feeder fund in relation to which they were members was nominated for that purpose. ASIC, on the other hand, sought orders for the winding up of the Fund, the appointment of independent liquidators to take responsibility for ensuring that the Fund was wound up in accordance with its constitution, the appointment of those liquidators as receivers of the property of the Fund and a grant of "wide powers to exercise as receivers".[7] By the end of the hearing, Mr Shotton also sought the appointment of receivers.[8]

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1 Pursuant to r 11.5 of the *Corporations Proceedings Rules* (being Schedule 1A to the *Uniform Civil Procedure Rules* 1999).
2 See *Bruce & Anor v LM Investment Management Ltd* (2013) 94 ACSR 684.
3 See clause 2.2. Such a provision reflects the position under the Act: s 601FC(2).
4 See clause 13.2.
5 See Affidavit of William Sugden affirmed on 6 March 2015; paragraphs 8 to 10.
6 See Affidavit of Scott Couper sworn on 12 March 2015; exhibits SC-1 and SC-9.
7 See *Bruce & Anor v LM Investment Management Ltd* (2013) 94 ACSR 684, at [33].
8 Ibid.

[7] Dalton J found the application brought by Mr and Mrs Bruce to be incompetent, and dismissed it for that reason.[9] However, her Honour granted the relief sought by Mr Shotton and ASIC. In particular, LMIM in its capacity as responsible entity was directed pursuant to s 601ND(1)(a) of the Act to wind up the Fund and Mr Whyte was appointed under s 601NF(1) to take responsibility for ensuring that the Fund was wound up in accordance with its constitution. Further, Mr Whyte was appointed pursuant to s 601NF(2) as receiver of the property of the Fund and a number of orders were made to assist him in that regard. Relevantly, Dalton J ordered pursuant to s 601NF(2) that Mr Whyte:

(a) have, in relation to the property of the Fund, the powers set out in s 420 of the Act;[10]

(b) be authorised to take all steps necessary to ensure the realisation of property of the Fund held by LMIM as responsible entity of the Fund by exercising any legal right of LMIM in relation to that property;[11] and

(c) be authorised to bring, defend or maintain any proceedings on behalf of the Fund in the name of LMIM as is necessary for the winding up of the Fund in accordance with clause 16 of its constitution.[12]

[8] As to the decision to appoint Mr Whyte as the receiver of the property of the Fund, her Honour said this:

> "The provision at s 601ND(1) which allows a Court to direct that the responsible entity winds up a scheme, and the provision at s 601NF(1) which allows a Court to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution do not, to my mind, sit happily together. In particular they give the distinct potential for two separate sets of insolvency practitioners to charge a distressed fund. My view in this case is that Mr Whyte should in substance and effect conduct the winding-up of the fund. In *Equititrust*[13] that was the view of Applegarth J and he used a mechanism – constituting the person charged with winding the scheme up as receiver – to give that person the necessary powers. It was not contended by Shotton or Trilogy that I should make any different order in this case."[14]

[9] Subsequently, LMIM brought an appeal against the order made by her Honour pursuant to s 601NF(1) appointing Mr Whyte.[15] No separate argument was directed to the appropriateness of the orders made under s 601NF(2).[16] The Court of Appeal dismissed the appeal on 6 June 2014.

[10] Approximately one month earlier, Mr Whyte had applied to ASIC to be granted "eligible applicant" status for the purposes of the examination provisions contained in Division 1 of Part 5.9 of the Act. On 13 June 2014, ASIC approved his application in these terms:

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9 Supra, at [20].
10 See paragraph 6 of the order.
11 See paragraph 7(a) of the order and the additional powers which are expressly conferred, including the power on the part of Mr Whyte to appoint receivers.
12 See paragraph 7(b) of the order.
13 *Re Equititrust Ltd* (2011) 254 FLR 444.
14 At [121].
15 See *LM Investment Management Limited (in liq) v Bruce & Ors* (2014) 102 ACSR 481.
16 Ibid, at [7] per Fraser JA.

> "The Australian and Securities Investments Commission authorises the applicant as an eligible applicant for the purposes of Division 1 of Part 5.9 of the Act in relation to the Company."[17]

[11] On 17 November 2014, the application for the issue of examination summonses was filed on behalf of Mr Whyte. Notice of that application was given to the liquidators of LMIM, but there was no appearance on their behalf at the hearing of the application before Mullins J, which took place on 27 November 2014.[18] Amongst other orders, Her Honour ordered pursuant to s 596B of the Act that summonses be issued to the examinees for their examination (and production of documents) before a Magistrate at Brisbane, which examination was specified to be with respect to "the examinable affairs" of LMIM as responsible entity for the Fund.

[12] Pursuant to the orders made by Mullins J, the summonses were duly issued and, on 12 February 2015, served on the examinees.[19]

Overview of the examinees' arguments

[13] Before turning to a consideration of the particular contentions advanced on behalf of the examinees to attack the summonses, some broad observations can usefully be made.

[14] The argument for invalidity developed by counsel for the examinees in written and oral submissions was premised on what was submitted to be the "peculiar nature of the role of a receiver appointed under section 601NF of the *Corporations Act* for the receivership of property of a managed investment scheme".[20] This peculiarity, they argued, arose because – unlike the provision applying to the winding up of unregistered managed investment schemes[21] – s 601NF was limited in its scope and would not support the making of an order for the conduct of examinations. Indeed, it was submitted that the power conferred by s 601NF(2) to give directions about how a registered scheme is to be wound up would not allow for the making of orders interfering with third party rights.

[15] It may be accepted that the argument as to the limited scope of the power conferred by s 601NF(2) not only has much force, it is well-supported by authority. Although I would not go so far as to embrace all that has been said about the limits of that power, it is unnecessary in the context of this application to decide that question. That is because the summonses were not issued pursuant to s 601NF(2); they were issued pursuant to s 596B after a receiver who had been appointed pursuant to s 601NF(2) had successfully applied to ASIC to be granted "eligibility status". Moreover, neither the appointment of that receiver (Mr Whyte) nor the grant by ASIC of eligibility status has been criticised by the examinees, let alone challenged.[22] As such, all that remained for the court to be satisfied about on the hearing of the application to issue the summonses was whether, taking the most benign limb of s 596B(1)(b), the examinees may be able to give information about

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17 See Affidavit of Alexander Zivkovic sworn on 12 March 2015; exhibit ASZ-4.
18 Ibid; paragraphs 10-12.
19 Ibid; paragraphs 13-19.
20 T. 1-5.
21 Section 601EE.
22 See, for example, T. 1-8, 9 and paragraph 4 of the Outline of Submissions of the Examinees dated 13 March 2015.

the examinable affairs of a corporation, namely, LMIM, as responsible entity of the Fund.[23]

[16] However, although it was accepted by the examinees that Dalton J relied on s 601NF(2) "entirely regularly" to appoint Mr Whyte as receiver,[24] it was nonetheless argued that some limitation was to be found either in the terms of her Honour's orders or implied from a construction of the Act which operates to curtail Mr Whyte's entitlement as receiver to exercise the very powers the Act confers on him to carry out the obligations entrusted to him by an order of this Court. Put another way, the examinees' argument was to the effect that a receiver appointed by the court under s 601NF(2) would be placed in charge of a form of external administration that was forensically inferior to, for example, a receivership initiated by an ordinary creditor. I can find no such limitation in either her Honour's orders or on a proper reading of the Act.

[17] To the contrary, by the orders made, Mr Whyte was expressly given all of the powers of a receiver under s 420 of the Act, and more. He was authorised to take all steps necessary to ensure the realisation of property of the Fund held by LMIM as the responsible entity and to bring, defend or maintain any proceedings on behalf of the Fund in the name of LMIM as is necessary for the winding up of the Fund. Otherwise, there is no warrant for concluding that the examination provisions in Part 5.9 of Chapter 5 of the Act are beyond the reach of a receiver appointed under a provision of Chapter 5C of the Act, and especially not when no such limitation is expressed in either Chapter.

Chapter 5C

[18] Chapter 5C of the Act provides for the registration, regulation and winding up of managed investment schemes. Its earliest incarnation is to be found in the *Managed Investments Act* 1998 (Cth). It repealed the prescribed interest provisions contained in the *Companies Act* 1981 (Cth) and inserted Chapter 5C into the *Corporations Law* which is now found in the Act.[25]

[19] In the course of his reasons for dismissing the appeal from the orders made by Dalton J,[26] Fraser JA (with whom Gotterson JA and Daubney J agreed) had this to say regarding the statutory scheme:

> "Part 5C.9 of the *Corporations Act* 2001 regulates the winding up of registered schemes. Provisions are made for winding up of a registered scheme where that is required by the scheme's constitution (s 601NA), where the members of the scheme want it to be wound up (s 601NB), and where the responsible entity of the registered scheme considers that a purpose of the scheme has been or cannot be accomplished (s 601NC). Provisions are also made for winding up by order of the Court where the Court thinks it is just and equitable to make the order or where execution or other process on a judgment, decree or order of a Court in favour of a creditor against the

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23 Section 596B(1)(b)(ii). And see, *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501, [41] per French J.

24 T. 1-9.

25 For the history of Chapter 5C, see *Westfield Management Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129, [10]-[12].

26 *LM Investment Management Ltd (in liquidation) (Receivers and Managers appointed) v Bruce & Ors* (2014) 102 ACSR 481.

responsible entity of the scheme in that capacity has been returned unsatisfied (s 601ND). (In this case the winding up order was made on the just and equitable ground). Where the scheme must be wound up, s 601NE(1) requires that the responsible entity of the registered scheme "must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2)…".

The critical provision for the purposes of this appeal is s 601NF(1). Section 601NF provides:

'(1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).

(2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme's constitution are inadequate or impracticable).

(3) An order under subsection (1) or (2) may be made on the application of:

(a) the responsible entity; or

(b) a director of the responsible entity; or

(c) a member of the scheme; or

(d) ASIC.' "[27]

Particular contentions

[20] Turning then to the examinees' particular contentions, they were as follows:

- First, it was submitted that the orders made by Dalton J do not allow Mr Whyte to conduct examinations;[28]

- Secondly, it was submitted that an examination under s 596B is confined to an examination about a "corporation's examinable affairs"[29] and that Mr Whyte's appointment "does not extend over the affairs of any corporation as defined under the Act";[30]

- Thirdly, it was submitted that the "proper scope" of the power conferred by s 596B was "confined to the investigation of the affairs of a corporation which is ancillary to an external appointment under Chapter 5 of the Act"[31] and, for that reason, it would be "collateral to, and inconsistent with, the purpose for the conferral of that

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27 At [8] and [9].
28 Outline of Submissions of the Examinees dated 13 March 2015; paragraph 25.
29 Outline of Submissions of the Examinees dated 13 March 2015; paragraph 26.
30 Ibid.
31 Outline of Submissions of the Examinees dated 13 March 2015; paragraph 27.

power"[32] to deploy it "in furtherance of an agreement to administer the affairs of the Fund".[33] In short, it was submitted that such an "improper purpose would be an abuse of the court's processes";[34]

- Fourthly, it was submitted that it may be inferred that the "existence of authorities denying a receiver appointed under s 601NF the powers of a liquidator"[35] was not drawn to the attention of Mullins J on the hearing of the application to issue the summonses and, for that reason, the summonses should be set aside because there had been a failure to "make full and frank disclosure of material matters"[36] on the hearing of what was essentially an ex parte application.

The first contention – no power to order, or to conduct, an examination

[21] As I have already touched on, it was accepted on behalf of the examinees that s 601NF(2) empowers the court to "give directions (by order) that the person appointed to take responsibility for ensuring the winding up of a scheme … act as a receiver of the property of the scheme".[37] However, it was submitted that s 601NF(2) does "not empower the court to make an order affecting the rights of and imposing duties on third parties (such as an order for the conferral of power to require the production of documents and conduct examinations".[38]

[22] That acceptance and the following submission were, it was argued, based on a consideration of decisions such as *Re Stacks Managed Investments Ltd*,[39] *Re Rubicon Asset Management Ltd* [40] and *Re Equititrust Ltd*.[41]

[23] Then, the following submission was made:

> "The Examinees submit it can be inferred from her Honour's remarks that her Honour generally accepts the proposition that s 601NF(2) does not give the court power to make an order that will affect the rights of and impose duties on third parties. Viewed objectively, that is the proper construction of the orders. Accordingly, in accordance with established authority, the Examinees submit that in carrying out the appointment, and specifically in performing his function as receiver of the property of the Fund, Mr Whyte is not permitted to conduct examinations.
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> If the limited nature of the s 601NF(2) power is accepted, it follows that there is no basis upon which a summons could be issued on the application of Mr Whyte. Therefore, the Summonses as issued were beyond the power of the Court to issue and should be discharged."[42]

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32 Ibid.
33 Ibid.
34 Ibid.
35 Outline of Submissions of the Examinees dated 13 March 2015; paragraph 29.
36 Ibid.
37 Outline of Submissions of the Examinees dated 13 March 2015; paragraph 48(a).
38 Outline of Submissions of the Examinees dated 13 March 2015; paragraph 48(b).
39 (2005) 219 ALR 532.
40 (2009) 77 NSWLR 96.
41 (2011) 254 FLR 444.
42 Outline of Submissions of the Examinees dated 13 March 2015; paragraphs 51 and 52.

[24] The short disposition of that submission is to state, as I have already have, that the summonses were issued pursuant to s 596B and not s 601NF(2). That occurred after Mr Whyte had been appointed by the court as receiver and authorised by ASIC as an "eligible applicant". No issue has been taken with either that appointment or that authorisation.

[25] That said, it is significant that, when appointing Mr Whyte as receiver, Dalton J was cognizant that claims against various persons might in the future be advanced on behalf of the Fund. These, her Honour observed, were "the type of claims which are normally investigated, and if necessary, pursued by insolvency practitioners during the course of a company winding-up".[43] Her Honour continued:

> "Clause 16.7(a) of the constitution obliges a responsible entity winding up the fund to realise its assets. If there are claims to be made on behalf of the fund … then those choses in action would constitute property which the responsible entity, winding-up the scheme, would have power to pursue."

[26] Further, Dalton J did consider the scope of the power conferred on the court by s 601NF(2), but only so far as it was necessary to do in order to determine whether that provision supported the appointment of a receiver. On the question of scope, her Honour said:

> "Sections 601NE and 601NF(1) provide that the scheme is to be wound up "in accordance with its constitution and any orders" which the court makes under s 601NF(2). There has been some consideration in the cases as to the width of the court's power under s 601NF(2) to make directions (by order) about how a registered scheme is to be wound up, and I am grateful to Applegarth J for the review which is found in *Equitrust*[44] at [42]-[49], and his own views expressed at [50] and following in that case. While the scope of the power may not yet be fully explored, it is clear that there is not a wholesale importation of the scheme of company liquidation into the area of managed investment schemes. This is consistent, in my view, with the idea that it is generally the responsible entity which winds up the scheme in accordance with its constitution. Certainly this contrasts with for example, the public aspects of a liquidation."[45]

[27] In the event, Dalton J was satisfied that s 601NF(2) gave the court power, by order, to give directions that the person appointed to take responsibility for ensuring a registered scheme is wound up act as receiver of the property of the scheme. In addition, her Honour decided that Mr Whyte "should in substance and effect conduct the winding-up of the fund".[46] Having done so, her Honour selected the same mechanism that had been used by Applegarth J in *Equititrust*, that is, "constituting the person charged with winding the scheme up as receiver – to give that person the necessary powers."[47]

[28] Her Honour then went on to give Mr Whyte all of the powers of a receiver under s 420 of the Act, as well as authorising him to take all steps necessary to ensure the realisation of property of the Fund held by LMIM as the responsible entity and to bring, defend or maintain any proceedings in the name of LMIM as are necessary for the winding up of

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43 See *Bruce & Anor v LM Investment Management Ltd* (Supra), at [41]. And see [110].
44 (2011) 254 FLR 444.
45 See *Bruce & Anor v LM Investment Management Ltd* (Supra), at [46].
46 Ibid; at [121].
47 Ibid.

the Fund. No limitation in the exercise of those powers was expressed, or may sensibly be inferred. To the contrary, far from giving life to some lesser form of receivership, her Honour must respectfully be taken to have made these orders with it in mind that there may be choses in action which "would constitute property which the responsible entity, winding-up the scheme, would have power to pursue".[48]

[29] As for s 601NF(2), it is a remedial provision which gives the court a "great deal of flexibility".[49] Its true scope is prescribed by the words of the statute. In point, the power conferred is as wide as it needs to be to achieve its evident purpose – to give directions about how a registered scheme is to be wound up if "the Court thinks it necessary to do so".[50] That may be, as the section provides, for the reason that the provisions in the scheme's constitution are inadequate or impracticable, or it may be for another reason.

[30] When determining whether it is necessary to give directions and, if so, what directions, it will always be relevant for the court to consider the legitimate interests of the members of the relevant scheme and the composition, by chose in action or otherwise, of the property of that scheme as well as the means by which that property can be realised. In this case, the power conferred by s 601NF(2) was used to appoint a receiver as the most appropriate mechanism to realise the scheme property. Whilst the examinees accept that as a proposition, they argue that the achievement of that object – the realisation of the scheme property – is to proceed without the benefit of the full range of powers ordinarily conferred on a receiver. I do not accept that argument.

The second contention – a corporation's examinable affairs

[31] The provisions of the Act governing the examination of persons about a corporation can be found in Part 5.9 of Chapter 5. Chapter 5 is entitled "External Administration", and relevantly includes, in Part 5.2, provisions that both regulate and empower receivers of the property of corporations.

[32] Division 1 of Part 5.9 makes provision for both mandatory and discretionary examinations; the former being the subject of s 596A and the latter being the subject of s 596B. The summonses in question were of course issued pursuant to s 596B.

[33] Section 596B empowers the court to summon a person for examination about "a corporation's examinable affairs" if an "eligible applicant" applies for the summons[51] and the court is satisfied that: (1) the person has either taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation;[52] or (2) may be able to give information about examinable affairs of the corporation.[53]

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48 *Bruce & Anor v LM Investment Management Ltd* (Supra), at [41].

49 *Australian Securities and Investments Commission v Tasman Investment Management Ltd* (2006) 202 FLR 343, [19] per Austin J.

50 The expression, "if the Court thinks it necessary to do so", appears in both subsections (1) and (2) of s 601NF. Its meaning was considered by Fraser JA in *LM Investment Management Limited (in liq) v Bruce & Ors* (2014) 102 ACSR 481, at [136]-[138].

51 Section 596B(1)(a).

52 Section 596B(1)(b)(i).

53 Section 596B(1)(b)(ii). And see, *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501, [41] per French J.

[34] Section 9 of the Act defines "corporation" to have "the meaning given by section 57A". Section 57A(1) in turn provides that "***corporation*** includes:

> (a) a company; and
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> (b) any body corporate …; and
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> (c) an unincorporated body that under the law of its place or origin, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose."

[35] The terms "eligible applicant" and "examinable affairs" are also defined in s 9, as follows:

> "***eligible applicant,*** in relation to a corporation, means:
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> (a) ASIC; or
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> (b) a liquidator or provisional liquidator of the corporation; or
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> (c) an administrator of the corporation; or
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> (d) an administrator of a deed of company arrangement executed by the corporation; or
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> (e) a person authorised in writing by ASIC to make:
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> (i) applications under the Division of Part 5.9 in which the expression occurs; or
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> (ii) such an application in relation to the corporation."
>
> "***examinable affairs,*** in relation to a corporation means:
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> (a) the promotion, formation, management, administration or winding up of the corporation; or
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> (b) any other affairs of the corporation (including anything that is included in the corporation's affairs because of section 53); or
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> (c) the business affairs of a connected entity of the corporation, in so far as they are, or appear to be, relevant to the corporation or to anything that is included in the corporation's examinable affairs because of paragraph (a) or (b)."

[36] As can be seen from paragraph (b) of the definition of "examinable affairs", they will embrace anything that is included in the corporation's affairs because of s 53 of the Act. Section 53 is, relevantly, in these terms:

> "For the purposes of the definition of ***examinable affairs*** in section 9, … the affairs of a body corporate include:
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> …
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> (h) the circumstances under which a person acquired or disposed of, or became entitled to acquire or dispose of, shares in, debentures of, or interests in a managed investment scheme made available by, the body;
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> (j) where the body has made available interests in a managed investment scheme – any matters concerning the financial or business undertaking,

scheme, common enterprise or investment contract to which the interests relate; and

(k) matters relating to or arising out of the audit of, or working papers or reports of an auditor concerning, any matters referred to in a preceding paragraph."

[37] Here, LMIM made available interests in a managed investment scheme, namely, the Fund. So much is made clear from the terms of the constitution for the Fund.[54] Under it, interests in the scheme property are described as "units"[55] and LMIM, as trustee of the scheme including the scheme property[56] as well as the responsible entity for the scheme, is authorised to offer units for subscription or sale.[57] Once subscribed or sold, the holder of a unit became a member of the scheme.[58] That of course occurred, and Mr Shotton was one such member.

[38] As such, any matters concerning the financial or business undertaking, scheme, common enterprise or investment contract to which the interests in the Fund relate will be examinable as affairs of LMIM. To the point, any matters relating to, or arising out of, any audits conducted with respect to the Fund are properly to be regarded as examinable affairs of a corporation, namely, LMIM.

[39] For the examinees, however, it was argued "Mr Whyte's appointment does not extend over the affairs of any 'corporation' as defined by the Act" and, for that reason, s 596B, "on its terms, has no application to a receiver of property of a scheme".[59] It is difficult to see how that argument sits comfortably in the face of the provisions to which I have just referred.

[40] Indeed where it has been conceded that Mr Whyte was an "eligible applicant" for the purposes of s 596B(1)(a) of the Act, there can be no issue about Mr Whyte's standing to apply for examination summonses.[60] The only issue possibly arising is whether the involvement of the examinees in the audit of the Fund is caught by the definition of "examinable affairs", and that is to be resolved by a combined reading of ss 9 and 53 of the Act. For the reasons I have already advanced, it clearly is.

[41] To the extent it was argued that Mr Whyte was appointed as a receiver of the property of the Fund, as opposed to the property of a corporation, even if correct, that feature does not in some way make a receiver ineligible to apply for an examination summons.[61] In any event, the terms of the orders made by Dalton J make it clear that Mr Whyte was tasked to realise the property of the Fund held by the corporation, LMIM, as responsible entity.[62]

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54 See affidavit of Alexander Zivkovic sworn on 12 March 2015; exhibit ASZ-1.

55 Clause 1.

56 Clauses 2.1 and 2.2.

57 Clause 5.1.

58 Clause 1.

59 Outline of Submissions of the Examinees dated 13 March 2015; paragraph 54.

60 As to which, see *Excel Finance Corp Ltd (rec and mgr appointed), Re; Worthley v England* (1994) 52 FCR 69; *Saraceni v Jones* (2012) 42 WAR 518, at [107].

61 See, for example, *Hongkong Bank of Australia v Murphy* (1992) 28 NSWLR 512; *Re Peat Resources of Australia Pty Ltd; Ex parte Pollock* (2004) 181 FLR 454; *Re Southland Coal Pty Ltd (Rec & Mgrs appointed) (In Liq)* (2006) 58 ACSR 113; *Re Banksia Securities Ltd* (2013) 278 FLR 421.

62 Order 7(a).

[42] In support of the argument that the subject matter of this receivership could not be regraded as "property of a corporation", the examinees sought to rely on *Re Stansfield DIY Wealth Pty Ltd (in liq)*.[63] However, the court was there concerned with a company in liquidation which had been, but no longer was, the trustee of particular property. The question for determination was whether the liquidator could sell that property. The remarks made by Brereton J,[64] on which the examinees relied, must be viewed in that light. This case is concerned with a different statutory question.

[43] Further, although true it is that the provisions governing managed investment schemes appear in Chapter 5C and not Chapter 5 of the Act, there is nothing in either chapter which limits the extent to which a receiver appointed under Chapter 5C can avail himself of the examination powers in Chapter 5. Indeed, the inclusion of reference in s 53 to matters concerning managed investment schemes, the location of the very provision empowering receivers[65] and the realisation that receiverships are a defined form of external administration[66] are strongly to the opposite effect.

The third contention – abuse of process

[44] It follows that I do not accept the foundation for the third of the examinees' contentions that the "proper scope" of the power conferred by s 596B was "confined to the investigation of the affairs of a corporation which is ancillary to an external appointment under Chapter 5 of the Act"[67] and that, for this reason, it would an abuse of the court's processes for a receiver appointed to realise the property of a managed investment scheme to make use of the examinations power.

[45] The judgment of Lander J in *Evans & Ors v Wainter Pty Ltd*[68] which was relied on by the examinees does not lead to a different conclusion. As his Honour said, the "question of what is a proper purpose must be determined by reference to the legislation itself because it is the legislation which gives the power to issue a summons for an examination".[69] On my view of the legislation, no question of improper purpose arises in this case.

The fourth contention – material non-disclosure

[46] Given that, as I find, there is no substance in the examinees' challenge to the validity of the summonses, no question of non-disclosure on the application before Mullins J can arise.[70]

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63 [2014] NSWSC 1484.
64 At [16].
65 That is, s 420, appearing in Chapter 5.
66 See s 9 and the definition of "externally-administered body corporate".
67 Outline of Submissions of the Examinees dated 13 March 2015; paragraph 27.
68 (2005) 145 FCR 176.
69 At [250].
70 The duty of disclosure on an application for examination summonses is discussed by Lander J in *Re Southern Equities Corporation Ltd (in liq); Bond & Caboche v England* (1997) 25 ACSR 394.

The ancillary applications

[47] The examinees sought an extension of time for the making of this application.[71] For completeness, I should make it clear that, if there had been merit in any of the examinees' contentions, I would have been disposed to grant the extension.

[48] Leave was also sought on behalf of the examinees to inspect the affidavit of Mr Whyte filed on 17 November 2014 and "any other affidavit material filed in support of the application for the issue of the summonses".[72] As to this, it was common ground that it was necessary for the examinees to satisfy me, amongst other things, of the existence of an arguable case for setting aside the summonses before a grant of leave could be considered.[73] For the reasons I stated when considering the examinees' contentions, I am by no means satisfied that an arguable case exists. Shortly stated, I am not persuaded that any error attended the issue of the summonses.[74] Leave to inspect the affidavit material filed in support of the issue of the summonses is refused.

Costs

[49] I shall hear the parties on the question of costs.

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71 Pursuant to r 7(1) of the *Uniform Civil Procedure Rules* 1999 and r 1.10 of the *Corporations Proceedings Rules* (Schedule 1A to the *Uniform Civil Procedure Rules*).

72 See s 596C.

73 See *Ariff v Fong* (2007) 63 ACSR 384, at [21]; *Re Moage Ltd (in liq); Sheahan v Pitterino & Ors* (1997) 25 ACSR 53, 67.

74 As to the need to identify such an error, see *Re LED (South Coast) Pty Ltd* (2009) 76 NSWLR 428, 434 per Barrett J.