PW-3

FTI CONSULTING

30 April 2013
Our Ref: JED_8974l44.doc

RECEIVED
30 APR 2013
BY: .....

Trilogy Funds Management Ltd
Level 10, 241 Adelaide Street
BRISBANE QLD 4000

**Attention: Company Secretary**

Dear Sir

**LM Investment Management Limited Pty Limited (Administrators Appointed) ("LMIM") ACN 077 208 461 as Responsible Entity of the LM First Mortgage Income Fund ARSN 089 343 288 ("LMIF")**

I refer to the appointment of John Park and I as Administrators of the Company on 19 March 2013 pursuant to Section 436A of the *Corporations Act 2001 (Cth)*.

In accordance with the Notice of Meeting called in relation to LMIF, please find ***attached** the register of Members and the Notice of Meeting.

Yours sincerely
**FTI Consulting**

**Ginette Muller**
**Administrator**

***Attach.**

cc: Mr Rodger Bacon
Trilogy Funds Management Ltd
Level 10, 241 Adelaide Street
BRISBANE QLD 4000

PW-4

Our Ref: AKB.384396
Your Ref:

PiperAlderman

6 May 2013

**By Email: SRussell@Russellslaw.com.au;**
**dpyers@russellslaw.com.au**
**Original forwarded by Post**

Russells
Level 21
300 Queen Street
BRISBANE QLD 4000

Attention: Mr Stephen Russell


**Lawyers**

**Sydney • Melbourne**
**Brisbane • Adelaide**

ABN 42 843 327 183

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**Partner:**
Amanda Banton
t +61 2 9253 9929
abanton@piperalderman.com.au


Dear Sir

**Raymond & Vicki Bruce v LM Investments Management Limited (Administrators Appointed) in its capacity as Responsible Entity of the LM First Mortgage Income Fund and The Members of The LM First Mortgage Income Fund**

1. We have been provided with a copy of a Notice of Meeting dated 26 April, 2013 (**Notice**) which has been issued by your client LM Investment Management Limited (Administrators Appointed) and sent to unit holders in the Fund.

2. The means by which a responsible entity may be changed is set out in Division 2 of Chapter 5C.2 of the Corporations Act, 2001.

3. There are only two bases on which your client may call a meeting of members for the purposes of changing the responsible entity being as follows:

   3.1 If your client wishes to retire as the responsible entity of the Fund then your client must call a members' meeting to explain their reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new responsible entity (section 601FL(1) of the Corporations Act, 2001).

   It is clear on the face of the Notice that the meeting has not been called because your client wishes to retire as the responsible entity of the Fund.

   3.2 If members of the Fund want to remove your client as the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that your client should be removed as the responsible entity and a resolution choosing a company to

PiperAlderman

be the new responsible entity (section 601FM(1) of the Corporations Act, 2001).

4. It is clear on the face of the Notice that the meeting has not been called as a result of the members taking action under Division 1 of Part 2G.4 for the calling of a members' meeting for this purpose.

5. Therefore the Notice is invalid.

6. It is requested that your client withdraw such notice forthwith and that you provide us with an undertaking in writing that your client will not proceed with the proposed meeting by close of business 7 May, 2013.

Our client reserves it position to take action against your client in relation to the Notice and any meeting that is held as a result of the invalid Notice.

Yours faithfully

**Piper Alderman**

Per: 
for
**Amanda Banton**
Partner

Copy: Ms Anne Gubbins (ASIC)
By Email: Anne.Gubbins@asic.gov.au

PW-4

NORTON ROSE

8 May 2013

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Amanda Banton
Piper Alderman
Governor Macquarie Tower
Level 23, 1 Farrer Place
Sydney NSW 2000

Your reference:
AKB.384396

Our reference:
2796586

Direct line
+61 2 9330 8166

Email
john.moutsopoulos@nortonrose.com

Dear Ms Banton

**Without Prejudice**

**Raymond & Vicki Bruce v LM Investment Management Limited (Administrators Appointed) in its capacity as Responsible Entity of the LM First Mortgage Income Fund and The Members of the LM First Mortgage Income Fund**

1 We act for LM Investment Management Limited (Administrators Appointed) (**LM**) in its capacity as responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288 (**FMIF**) in respect of a meeting of members of the FMIF to be held on 30 May 2013 (**Meeting**).

2 We refer to your letter to Russells dated 6 May 2013 regarding the Notice of Meeting dated 26 April 2013 (**Notice**) in respect of the Meeting (**Letter**). A copy of the Letter has been provided to us by Russells.

3 We disagree with your assertion at paragraph 5 of your Letter that the Notice is invalid.

4 We agree that there are two bases on which our client may call a meeting of members for the purposes of changing the responsible entity, namely s601FM and s601FL of the *Corporations Act 2001* (Cth) (the **Act**).

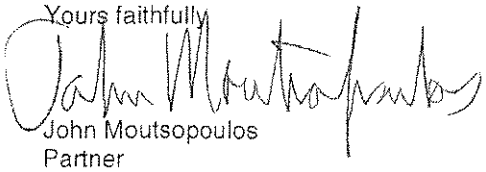
5 In regards to s601FM, we note that our client did in fact receive a request from a member of FMIF in accordance with s601FM(1). In addition, it is our view that s601FM does not preclude the responsible entity of a scheme calling a members' meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity.

6 In regards to s601FL, there is no requirement that the Notice should explain the responsible entity's reason or reasons for wanting to retire.

7 As such, our client will not withdraw the Notice and the Meeting will proceed as scheduled.

8 As a final matter, we would like to ask you to clarify for us on behalf of which client your Letter was written and provided to Russells.

Yours faithfully



John Moutsopoulos
Partner
Norton Rose Australia

CC Stephen Russell, Russells
Anne Gubbins, Australian Securities & Investments Commission

PW-4

Our Ref: AKB.AEF.384396
Your Ref: 2796586

PiperAlderman

8 May 2013

**By Email: john.moutsopoulos@nortonrose.com**
**Original forwarded by Post**

**Norton Rose**
**DX 368 Sydney**

Attention: John Moutsopoulos

Dear Mr Moutsopoulos

**Raymond & Vicki Bruce v LM Investment Management Limited (Administrators Appointed) in its capacity as Responsible Entity of the LM First Mortgage Income Fund and The Members of the LM First Mortgage Income Fund**

We refer to your letter dated 8 May 2013.

We note that your letter is marked "Without Prejudice". We see no basis for that marking, given that our respective clients are not in any negotiation. Please explain why you consider your correspondence to be in aid of settlement?

So that there is no misunderstanding, this letter and our letter dated 6 May 2013 directed to Russells are open letters and may be tendered.

We also note your assertion that your client received a request from a member of the Fund in accordance with section 601FM(1). Please provide a copy of the request received by your client under section 252B and the details of the member/s proposing the resolutions at the meeting as a matter of urgency.

While we agree that there is no requirement that the Notice should explain the responsible entity's reason or reasons for wanting to retire, it is apparent on the face of the Notice that your client does not wish to retire. In those circumstances, section 601FL cannot apply.

Finally, it should be apparent given that we wrote to Russells in relation to this meeting in the context of the above proceedings that we wrote our letter on behalf of our clients in the proceedings, namely the Bruces.

We look forward to hearing from you.

Yours faithfully
**Piper Alderman**

Per:

**Amanda Banton**
Partner

pcc. Anne Gubbins, ASIC
Stephen Russell, Russells

28104731v1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PW-4

NORTON ROSE

9 May 2013

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Your reference:
AKB.384396

Our reference:
2796586

Direct line
+61 2 9330 8166

Email
john.moutsopoulos@nortonrose.com

Dear Ms Banton

**Meeting of Members of the LM First Mortgage Income Fund ARSN 089 343 288**

1 We act for LM Investment Management Limited (Administrators Appointed) (**LM**) in its capacity as responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288 (**FMIF**) in respect of a meeting of members of the FMIF to be held on 30 May 2013 (**Meeting**).

2 The purpose of the Meeting is to consider a proposal for Trilogy Funds Management Limited (**Trilogy**) to replace LM as the responsible entity of FMIF.

3 As stated in the Notice of Meeting dated 26 April 2013 (**Notice of Meeting**) our client has deliberately provided more than the statutory required time for the Meeting so that Trilogy could (if they wanted) provide additional information to members as to why LM should be removed and Trilogy should be appointed responsible entity of FMIF. Further, our client has done everything they could to assist this process by providing your client, in a timely manner, with an up-to-date copy of the register of members of FMIF, the LM Currency Protected Australian Income Fund ARSN 110 247 875 (**CPAIF**) and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (**ICPAIF**, together with CPAIF the **LM Feeder Funds**) of which LM is responsible entity. Our client recommended that members delay making a decision on the resolutions until they have the benefit of receiving expected written correspondence from Trilogy as to why LM should be removed and Trilogy should be appointed as responsible entity of the FMIF.

4 At this stage we note that:

(1) on 6 May 2013, Trilogy in their capacity as the responsible entity of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511(**WFMIF**) (a feeder fund of FMIF) wrote to members of the WFMIF advising them that they believed the FMIF Meeting was invalid and that as such they did not intend to provide them with the FMIF Meeting documents (including the Notice of Meeting);

(2) Piper Alderman wrote to Russells at 7.46pm on 6 May 2013 stating the reasons why they believed the FMIF Notice of Meeting was invalid – in reaching their conclusions they made assumptions (which were not checked with our client); and

(3) on behalf of our client, Norton Rose responded to Piper Alderman's assertions at 12.36pm on 8 May 2013 setting out why Piper Alderman was wrong including that it was based on erroneous assumptions.

5 We are surprised that Trilogy have not yet written to members in FMIF and the LM Feeder Funds (of which Trilogy is not the responsible entity) as to Trilogy's views.

6 In this regard, we note that clause 5.1 of the See Through Voting Provisions of the WFMIF Constitution requires the responsible entity to pass on a copy of "*any notice or other document or circular in respect of a See Through Voting Resolution*". Trilogy's refusal to do so is in breach of the WFMIF Constitution and as such is a contravention of s601FC(1)(m) the *Corporations Act 2001* (Cth). This is a contravention of a civil penalty provision.

7 If your client, Trilogy does not intend to write to members, please can you urgently advise us such that our client can write to members and note that they will not, as we had indicated, receive an information package from Trilogy. In those circumstances, members in consultation with their professional advisers may make a decision based upon the information already provided.

8 In light of the above we would ask you that Trilogy confirm with us by **5pm on Friday 10 May 2013** whether or not Trilogy intend to provide any information to members. If we receive no response, our client will assume that Trilogy will not provide any information and will so advise members.

Yours faithfully

John Moutsopoulos
Partner
Norton Rose Australia

CC Stephen Russell, Russells
Anne Gubbins, Australian Securities & Investments Commission

PW-4

Our Ref: AKB.AEF.384396
Your Ref: 2796586

PiperAlderman

10 May 2013

**By Email: john.moutsopoulos@nortonrose.com**
**Original forwarded by Post**

**Norton Rose**
**DX 368 Sydney**

Attention: John Moutsopoulos

Dear Mr Moutsopoulos

**Raymond & Vicki Bruce v LM Investment Management Limited (Administrators Appointed) in its capacity as Responsible Entity of the LM First Mortgage Income Fund and The Members of the LM First Mortgage Income Fund**

We refer to your letter dated 9 May 2013.

We note that you have failed to respond to our letter dated 8 May 2013. Your response to that letter is of significance to the question of the validity of the meeting your clients have convened for 30 May 2013.

Without a response to the queries raised in our letter, we remain of the view that the Notice of Meeting is invalid.

In the circumstances, it is inappropriate for your clients to provide further information to members in the absence of a satisfactory response to our queries, and your clients should not contact members further about the meeting.

Yours faithfully
**Piper Alderman**

Per: _____
for
**Amanda Banton**
Partner

pcc. Anne Gubbins, ASIC
Stephen Russell, Russells


Lawyers

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PW-4

NORTON ROSE

10 May 2013

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Your reference:
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Our reference:
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Direct line
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Email
john.moutsopoulos@nortonrose.com

Dear Ms Banton

**Raymond & Vicki Bruce v LM Investment Management Limited (Administrators Appointed) in its capacity as Responsible Entity of the LM First Mortgage Income Fund and The Members of the LM First Mortgage Income Fund**

We refer to your letter dated 8 May 2013 in response to our letter to you of the same date.

We agree with your point regarding the reference in our letter to the words "Without Prejudice". As such that letter is an open letter.

In regards to your request of a copy of the request received by our client under s252B of the *Corporations Act 2001* (Cth) (the **Act**), we note that this is an internal matter for our client and there is no obligation to provide a copy of this document to you. We note that LM is satisfied that the request received is a proper request received in accordance with the Act.

In regards to your assertions in respect of s601FL, it is obvious we have different views on this section of the Act.

Yours faithfully

John Moutsopoulos
Partner
Norton Rose Australia

CC Stephen Russell, Russells
Anne Gubbins, Australian Securities & Investments Commission

APAC-#18606710-v1

PW-4

NORTON ROSE

14 May 2013

Email: abanton@piperalderman.com.au

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Your reference:
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2796586

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Email
john.moutsopoulos@nortonrose.com

Dear Ms Banton

**Raymond & Vicki Bruce v LM Investment Management Limited (Administrators Appointed) in its capacity as Responsible Entity of the LM First Mortgage Income Fund and The Members of the LM First Mortgage Income Fund**

We refer to your letter dated 10 May 2013 received by us by way of email at 5:32pm on 10 May 2013 (**Letter**).

We note that contrary to your assertion at paragraph 2 of your Letter, we have not failed to respond to your letter dated 8 May 2013. Our response to that letter was dated 10 May 2013 and sent to you by way of email at 11.06am on 10 May 2013.

For clarity, we note that the issue of the validity of the Notice of Meeting dated 26 April 2013 (**Notice of Meeting**) raised once again in your Letter have been thoroughly addressed in our letter to you dated 8 May 2013 (sent by way of email at 12:36pm on 8 May 2013). This letter of course would have been considered by you as it is the basis on which you wrote to us on 8 May 2013.

As such, we feel that that there is no basis to the allegations contained in your Letter. Our client has instructed us that if the extraordinary resolutions are passed at the meeting of members of the LM First Mortgage Income Fund (**FMIF**) to be held on 30 May 2013 (**Meeting**) then our client will on the day that they are passed sign and lodge with ASIC the Form 5107 notifying the change of responsible entity. As you would be aware the change of responsible entity will take effect when ASIC processes that form.

As you will be aware, in calling the Meeting, our client noted that *"LM has encouraged Trilogy to provide Members with information to assist them make a decision as to whether to vote for the resolutions to see Trilogy replace LM as Manager of your Fund ... [i]t is recommended that investors defer lodging a proxy form until they have had an opportunity to consider the information expected to be circulated by Trilogy."*

It appears that the only communication by Trilogy Funds Management Limited (**Trilogy**) was to members of the LM Wholesale First Mortgage Income Fund (**WFMIF**) dated 6 May 2013 (**Trilogy Letter**) which states that Trilogy believes that the meeting is invalid and as such does not propose to send the meeting materials to members of the WFMIF (despite the fact that it is constitutionally bound to do so).

In light of our correspondence with you regarding the validity of the Meeting and the fact that our client wishes to provide each member of the FMIF and the FMIF's Feeder Funds (being the WFMIF, the LM Currency Protected Australian Income Fund (**CPAIF**) and the LM Institutional Currency Protected Australian Income Fund (**ICAPIF**)) with sufficient opportunity to consider Trilogy's arguments as to why it should replace

LM as responsible entity of the FMIF, our client proposes to support an adjournment of the Meeting from 30 May 2013 for no longer than 3 weeks if Trilogy wishes to reconsider its position and write to members.

Please let us have your client's instructions regarding this proposed adjournment by 5pm on 15 May 2013.

Yours faithfully

John Moutsopoulos
Partner
Norton Rose Australia

CC Stephen Russell, Russells
Anne Gubbins, Australian Securities & Investments Commission

PW-4

Our Ref: AKB.AEF.384396
Your Ref: 2796586

PiperAlderman

15 May 2013

**By Email: john.moutsopoulos@nortonrose.com**
**Original forwarded by Post**

**Norton Rose**
**DX 368 Sydney**

Attention: John Moutsopoulos

Dear Mr Moutsopoulos

**Raymond & Vicki Bruce v LM Investment Management Limited (Administrators Appointed) in its capacity as Responsible Entity of the LM First Mortgage Income Fund and The Members of the LM First Mortgage Income Fund**

We refer to your letter dated 14 May 2013 and to your letter dated 10 May 2013.

We note your clients' refusal to provide details of the unit holders which they say requested them to convene the meeting on 30 May 2013 (**Meeting**).

We also note that neither your clients' letter to unit holders dated 26 April 2013 nor the Notice itself give any indication that they are calling the Meeting in response to a request from a unit holder or unit holders, nor that they have satisfied themselves that those unit holders meet the necessary requirements of the Act in requesting the responsible entity to convene a meeting.

To the contrary, your clients' letter dated 26 April 2013 states that *"LM decided to call the Meeting because a unitholder has made an application to the Supreme Court of Queensland for Trilogy to be appointed as the Manager of the Fund in place of LM."*

The Notice states *"LM decided to call the Meeting because, following receipt from two unitholders of an application to the Supreme Court of Queensland for Trilogy…to be appointed as the Manager of the Fund in replacement of LM, and immediate consultations with ASIC, LM wished to consult Members in the proper forum, with adequate notice….Please refer to the following Explanatory Memorandum for general background and additional details as to why LM has convened the meeting of Members"* The Explanatory Memorandum at paragraph 2.3 on page 4 sets out the *"additional details"*. No reference is made to your clients having been requested to convene the Meeting. It is surprising that no reference is made given that would seem to be a relevant background matter for the unitholders to consider.

Finally, we also refer to the Affidavit of Ms Muller sworn 2 May 2013 in the above proceedings. In paragraphs 11-18 of that Affidavit, Ms Muller deposes to the actions she and Mr Park undertook following service of these proceedings. At paragraph 14, Ms Muller explains that she and Mr Park resolved on behalf of LMIM to convene the Meeting. No mention is made in

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Piper Alderman

that affidavit of Ms Muller having received a request from a unit holder or unit holders to convene the Meeting.

In these circumstances, we repeat our request for a copy of the request received by your clients, and the details of the unit holder/unit holders making the request.

In circumstances in which the validity of the Meeting remains unconfirmed, our clients have no position regarding your clients' proposed adjournment of it.

Yours faithfully
**Piper Alderman**

Per: 

**Amanda Banton**
Partner

pcc. Anne Gubbins, ASIC
Stephen Russell, Russells

PN-4

NORTON ROSE

16 May 2013

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Your reference:
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Our reference:
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Email
john.moutsopoulos@nortonrose.com

Dear Ms Banton

**Raymond & Vicki Bruce v LM Investment Management Limited (Administrators Appointed) in its capacity as Responsible Entity of the LM First Mortgage Income Fund and The Members of the LM First Mortgage Income Fund**

We refer to your letter dated 15 May 2013 (**Letter**).

As you know, our position is that the Notice of Meeting dated 26 April 2013 (**Notice of Meeting**) is valid. We have previously explained our position to you, and that position has not changed.

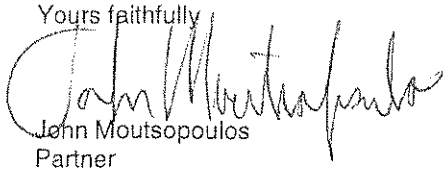
The Meeting scheduled be held on 30 May 2013 (the **Meeting**) will be valid unless and until a Court finds otherwise. As previously advised, our client has instructed us they will not challenge or support a challenge to the validity of the Meeting. Further, we have advised that if the resolutions are passed then our client will immediately lodge with ASIC the Form 5109 notifying ASIC of the change of responsible entity. Under the *Corporations Act 2001* (Cth) (the **Act**) ASIC must comply with the notice when it is lodged by changing the responsible entity shown on the record of the scheme's registration. This means that should the resolutions pass Trilogy Funds Management Limited (**Trilogy**) will become the responsible entity of the LM First Mortgage Income Fund (**FMIF**). Given this, we cannot understand why Trilogy is unwilling to participate in a process which provides investors with a more direct, democratic and cost effective approach of determining who should manage the FMIF than the Bruce application which is being funded by Trilogy. We can only assume that Trilogy knows it does not enjoy the support of members.

It appears from your Letter that your "clients" for the purposes of your Letter is a reference to Trilogy. Please can you clarify for us whether the last paragraph (ie *"In circumstances in which the validity of the Meeting remains unconfirmed, our clients have no position regarding your clients' proposed adjournment of it."*) is in fact a reference to your "clients" being Trilogy, the Bruces or both.

Finally, our client reiterates that it wishes to provide each member of the FMIF and the FMIF's Feeder Funds (being the LM Currency Protected Australian Income Fund (**CPAIF**), the LM Institutional Currency Protected Australian Income Fund (**ICAPIF**) and the LM Wholesale First Mortgage Income Fund (**WFMIF**)) with sufficient opportunity to consider Trilogy's arguments as to why it should replace LM as responsible entity of the FMIF, and that our client again proposes to support an adjournment of the Meeting from 30 May 2013 for no longer than 3 weeks if Trilogy wishes to reconsider its position and write to members.

Please let us have your client's (that is, Trilogy) final instructions regarding this proposed adjournment by **5pm on Friday 17 May 2013**. Our client intends to shortly communicate to investors whether or not an adjournment is to be proposed.

Yours faithfully



John Moutsopoulos
Partner
Norton Rose Australia

CC Stephen Russell, Russells
Anne Gubbins, Australian Securities & Investments Commission

PW-4

Our Ref: AKB.AEF
Your Ref:

PiperAlderman

20 May 2013

**By Email: john.moutsopoulos@nortonrose.com**
**Original forwarded by Post**

Norton Rose Australia
DX 368
SYDNEY

Attention: John Moutsopoulos

Dear Sir

**Meeting convened by LM Investment Management Limited (Administrators Appointed) of the members of the LM First Mortgage Income Fund ("Fund")**

We refer to your letter dated 16 May 2013.

We now have instructions to act for Trilogy Funds Management Limited (**Trilogy**) in relation to the meeting that has been convened by your clients and currently scheduled for 30 May 2013 (**Meeting**).

We note that your clients have persisted in their refusal to provide details of the unit holder or unit holders who have requested that your clients convene the Meeting. In those circumstances, we remain of the view that the Meeting is invalid and our client will take such steps as it considers necessary in relation to the Meeting, including seeking urgent relief, given that it is not in the best interests of the unit holders for an invalid Meeting to proceed, especially when properly commenced proceedings are on foot in relation to the issues the Meeting proposes to address. Indeed, our client is surprised and disappointed that your clients seek to use the assets of the Fund in this process when they are on notice that our client considers the process to be invalid.

Even if our client is wrong about the validity of the Meeting (which is denied), it would also be apparent to your clients that there are real issues about LMIM continuing to remain as responsible entity of the Fund (which would occur if the resolutions do not pass or the Meeting is invalidated). Those issues include

- the requirements LMIM must meet to hold an AFSL, including requirements as to net tangible assets;
- the restrictions on LMIM's AFSL, namely only to provide financial services *"reasonably necessary for, or incidental to, the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of"* the Fund. Although your clients expressed their views to unit holders that the AFSL *"adequately authorises LM through FTI to continue to control the Fund"*, the restrictions on the licence mean that LMIM cannot your clients take action in relation to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the Fund's assets which may increase the return to unit holders, such as developing assets.

These matters are live issues in the proceedings in the Bruces' application currently before the Court. These issues remain live regardless of the outcome of the Meeting. Unit holders should not have to pay from their assets in the Fund for the Meeting when the Meeting will not ultimately determine these issues.

Our client is most concerned that your clients' Notice of Meeting did not adequately address these matters, nor have your clients sought to explain them to unit holders in a circular. In particular, your clients have not explained that the Meeting will not resolve the question of whether LMIM can continue as responsible entity. They have not adequately explained what activities it cannot now undertake as a result of the restrictions on its AFSL. Nor have they explained, from ASIC's Statement of Reasons dated 9 April 2013, that the only reason that LMIM's AFSL was suspended and not cancelled was the possibility that LMIM may cease to be an externally-administered body. It must be apparent to your clients that this is no longer a possibility. The only way that your clients can now remain "in control of the Fund" in these circumstances is if the Fund is wound up. However, that has not been explained to unit holders.

This raises questions as to whether unit holders have been led to believe that there will be no ongoing issue in LMIM remaining as responsible entity. Clearly that is not the case.

Given each of these matters, our client rejects the suggestions made in your letter about its unwillingness to participate in the process.

Our client also notes from the contents of the Circular to Investors sent by your clients and dated 17 May 2013 that your clients intend to provide the result of the Meeting to the Court. Given the serious issues that have been raised by our client, we trust that any such provision to the Court is made together with a fulsome explanation of why unit holders were not advised of the matters raised in this letter.

Finally, we refer to the "*Notification of commencement or completion of winding up of a registered scheme*" that is exhibit "SCR16" to the affidavit of Stephen Charles Russell sworn 7 May 2013 in the Bruce Proceedings. That notification attaches a Circular to Investors in the Fund from your clients dated 6 May 2013 and a Notice under Section 601NC of the *Corporations Act* of a proposal to wind up.

Please advise by the close of business today if and when the Circular to Investors dated 6 May 2013 and the attached Notice were sent to unit holders of the Fund and provide evidence that this Circular and attached Notice was sent to Trilogy.

Yours faithfully
**Piper Alderman**

Per: A Banton

**Amanda Banton**
Partner

PW-4

NORTON ROSE

20 May 2013

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Your reference:
AKB.AEF

Our reference:
2796586

Direct line
+61 2 9330 8166

Email
john.moutsopoulos@nortonrose.com

Dear Ms Banton

**Meeting convened by LM Investment Management Limited (Administrators Appointed) of the members of the LM First Mortgage Income Fund ("Fund")**

We refer to your letter dated 20 May 2013.

Thank you for confirming on whose behalf you are acting.

The Notice under Section 601NC (**Notice**) and the Circular to Investors dated 6 May 2013 (**Circular**) were both prepared on the basis that the administrators on behalf of LM Investment Management Limited (Administrators Appointed) (**LM**) had resolved on 6 May 2013 to wind up the LM First Mortgage Income Fund (**FMIF**).

As you are aware, LM through its solicitors, Russells, undertook to the Court on 7 May 2013 not to take any further steps in the winding up. Your firm supported the proposal that such an undertaking be given. As a result, the Circular has not been distributed to Investors.

Yours faithfully

John Moutsopoulos
Partner
Norton Rose Australia

CC Stephen Russell, Russells
Anne Gubbins, Australian Securities & Investments Commission

APAC-#18728952-v1

PW-4

Our Ref: AKB.AEF.384881
Your Ref: 2796586

PiperAlderman

23 May 2013

**By Email: john.moutsopoulos@nortonrose.com**
**Original forwarded by Post**

Norton Rose Australia
DX 368
SYDNEY

Attention: John Moutsopoulos

Dear Sir

**Meeting convened by LM Investment Management Limited (Administrators Appointed) of the members of the LM First Mortgage Income Fund ("Fund")**

We refer to your letter dated 20 May 2013.

We note your client's intention to wind up the Fund, we also note your confirmation that the Circular to Investors dated 6 May 2013 and the Notice under Section 601NC have not been distributed to members of the Fund. We assume that they will not be distributed unless your client seeks the leave of the Court to vary the undertaking given. Please let us know if this is not the case.

We note again the restrictions on your client's AFSL. Now that your client is not taking any step to wind up the Fund and it cannot be wound down prior to the meeting it has convened, which is currently scheduled to occur on 30 May 2013 (**Meeting**), please advise how your client says that the AFSL adequately authorises it to control the Fund when the licence only allows the provision of services *"reasonably necessary for, or incidental to, the transfer to a new responsible entity"* or *"investigating or preserving the assets and affairs of the Fund"*.

Our client did not and does not consent to its appointment as responsible entity via the resolutions proposed to be considered and voted on at the Meeting. Your client did not even attempt to seek our client's consent in that regard. Had it done so, our client would have advised your client that it did not want to be seen to circumvent the Court proceedings (which had been on foot for approximately two weeks) and would not give its consent to be appointed other than by the Court as the resolutions would not be determinative as to whether your client could remain the responsible entity.

Your client has indicated to unit holders that whatever the outcome of the Meeting, the voting outcome will be used in the Court proceedings. This is an acceptance by your client that the Meeting may not be determinative of the issues before the Court.

**Lawyers**

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**Brisbane • Adelaide**

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Given your client will not provide our client with access to the email addresses of the members of the Fund, our client requires your client to circulate by email the attached Circular to Investors (and their advisers) which contains the following information:

- Due to the proceedings before the Court, the fact that the resolutions would not be determinative of whether your client could remain as responsible entity and the concerns it holds about the Meeting, Trilogy did not and does not consent to be appointed as responsible entity of the Fund pursuant to the resolutions to be voted on by members at the Meeting.

- Trilogy's strong view is that your client cannot remain as the responsible entity of the Fund because of restrictions on its AFSL, and because it does not meet the requirements as to capital adequacy required by ASIC of those entities operating as responsible entities of registered managed investment schemes and as explained in the Explanatory Statement to ASIC Class Order 11/1140 (**Class Order**). The Explanatory Statement for the introduction of the Class Order states that the Class Order was set against the backdrop of *"recent high-profile collapses of responsible entities where arguably the quantum of financial resources held by the responsible entity has made it difficult for the scheme to be wound up in an orderly fashion"*. The purpose of the Class Order is to ensure that for responsible entities there are arrangements to meet operating costs, there is some level of assurance that, if the responsible entity does fail, there is money available for the orderly transition to a new responsible entity, or to wind up the scheme.

- The Meeting will not dispose of all the issues before the Court and as such, it is not appropriate to continue with the Meeting and it should be abandoned.

- Your client prepared a notice in relation to the proposed winding up of the Fund but has not circulated that to members of the Fund as the Administrators have now provided an undertaking to the Court not to take any step to wind up the Fund until further order of the Court.

- The restrictions on your client's AFSL mean that it can only provide services *"reasonably necessary for, or incidental to, the transfer to a new responsible entity"* or *"investigating or preserving the assets and affairs of the Fund"*.

- ASIC has indicated that the only reason your client's licence was not cancelled was because of the possibility that it might cease to be an externally administered body, a possibility that you have acknowledged is unlikely to occur.

As a result, please confirm by 4pm today that the Meeting will be abandoned and that your client will notify unit holders of the Fund and three feeder funds of the Meeting cancellation and that your client will send the circular by email (or mail if not available) by close of business tomorrow. In this regard we note that unit holders have been contacting this firm indicating that they are very confused about what if anything they are to do and in what timeframe. They have also requested information about why the meeting was called when proceedings are on foot to deal with the issues.

We look forward to your prompt response.

Piper Alderman

Yours faithfully
**Piper Alderman**

Per: 

**Amanda Banton**
Partner

CC. Stephen Russell, Russells
Anne Gubbins, ASIC

TRILOGY
FUNDS

**CIRCULAR TO INVESTORS IN THE**
**LM FIRST MORTGAGE INCOME FUND (the FUND)**
**LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND**
**LM WHOLESALE FIRST MORTGAGE INCOME FUND**
**LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND**

Dear Investor,

**Court Proceedings**

As you are aware, there are current proceedings on foot in the Supreme Court of Queensland which seek to remove LM Investment Management Limited (**LM**) as responsible entity of the Fund and have Trilogy Funds Management Limited (**Trilogy**) appointed as temporary responsible entity (**Proceedings**).

The Proceedings have been brought by some of your fellow investors because of concerns held about LM continuing to be responsible entity of the Fund.

Those concerns include:

1. The restrictions which have been placed on LM's Australian Financial Services Licence (**AFSL**) by ASIC. According to the restrictions, LM is only entitled to provide financial services which are *"reasonably necessary for, or incidental to, the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of"* the Fund.

2. That LM does not meet the legislative requirements to continue as responsible entity in that it does not appear to have the necessary assets and cash required by the legislation to be the responsible entity.

3. That LM, as the existing responsible entity will not investigate its own conduct and put a proof of debt in the administration of LM (or any subsequent liquidation) and a new responsible entity will investigate the potential claims against LM on behalf of the Fund and lodge any necessary proof of debt for any such claim.

**The Meeting**

Following the issue of the Proceedings and after the first hearing of the Proceedings, the Administrators of LM convened a meeting of the members of the Fund by Notice of Meeting dated 26 April 2013 (**Notice**). You will have received that Notice. That meeting is currently scheduled to take place on 30 May 2013 (**Meeting**) and requires any proxy to be returned by 28 May 2013.

The Proceedings had been on foot for approximately two weeks before the Notice was sent and the Administrators seem to accept that the Meeting will not be determinative as to whether LM could remain as responsible entity as they have indicated that they will use the outcome of the Meeting vote in the Proceedings.

Trilogy was not consulted by the Administrators prior to the issuing of the Notice and at no time have the Administrators sought Trilogy's consent to being appointed as responsible entity of the Fund pursuant to the resolutions set out in the Notice and to be voted on at the Meeting. Had they done so, Trilogy would have advised the Administrators that it did not want to be seen to circumvent the Court proceedings and would not give its consent to be appointed other than by the Court as the resolutions would not be determinative as to whether LM could remain responsible entity.

**Winding Up of the Fund**

The Administrators have determined to wind up the Fund and prepared a notice dated 6 May 2013 proposing to wind up the Fund. LM has not distributed that notice to investors as they gave an undertaking to the Supreme Court not to take any step to wind up the Fund until further order of the Court.

That undertaking means that LM can only provide financial services which are reasonably necessary for, or incidental to, the transfer to a new responsible entity or for investigating or preserving the assets and affairs of the Fund.

Trilogy and the investors who have brought the Proceedings hold the view that these restrictions mean that LM cannot properly continue as responsible entity.

Further, Trilogy and the investors who have brought the Proceedings take the strong view that LM must be removed as responsible entity because it does not meet the requirements as to capital adequacy required by ASIC of those entities operating as responsible entities of registered managed investment schemes and as explained in the Explanatory Statement to ASIC Class Order 11/1140 (the **Class Order**).

The stated purposes of the Class Order, set against the backdrop of *"recent high-profile collapses of responsible entities where arguably the quantum of financial resources held by the responsible entity has made it difficult for the scheme to be wound up in an orderly fashion"*, are to ensure that for responsible entities there are arrangements to meet operating costs throughout the life of the registered scheme, there is some level of assurance that, if the responsible entity does fail, there is money available for the orderly transition to a new responsible entity or to wind up the scheme, and there is an alignment of interests of responsible entities and scheme investors (by providing responsible entities with a real financial incentive to successfully manage scheme assets).

In addition, ASIC gave some reasons when it put restrictions on LM's AFSL. In its Statement of Reasons dated 9 April 2013, ASIC stated that the only reason that LM's AFSL was suspended and not cancelled was the possibility that LM may cease to be an externally-administered body, that is, no longer in administration or liquidation.

Trilogy believes that there is little prospect that LM will cease to be externally administered unless a deed of company arrangement is entered into with the likelihood that unit holders will miss out on claiming their rights against LM.

The Meeting will not and cannot address these matters and these issues will remain regardless of the outcome of the Meeting.

The Court is the appropriate forum to determine these serious issues. Each member of the Fund is a party to the Proceedings and is entitled to have his/her or its voice heard through the Proceedings.

Trilogy does not consider it to be appropriate to try to circumvent the Proceedings relating to the Fund by way of the Meeting.

Trilogy also has concerns that the Meeting has not been validly convened under the provisions of the *Corporations Act* and that any voting undertaken will be invalidated.

In all these circumstances, Trilogy considers that the Meeting is not in the best interests of the members of the Fund and a waste of money.

Given that Trilogy takes the view that:

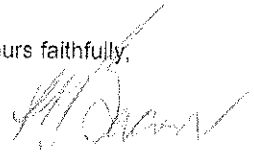
- the Proceedings should not be circumvented;
- there remain live issues in the Proceedings which the Meeting cannot resolve;
- there is a question over the validity of the Meeting,

and because it has never consented to being appointed as responsible entity by way of resolutions to be voted on at the Meeting, Trilogy does not consent to be appointed as responsible entity of the Fund via the resolutions proposed in the Notice and to be voted on at the Meeting.

Trilogy has advised LM of these matters and has asked the Administrators to abandon the Meeting.

Should investors have any concerns or questions, please contact Trilogy on 1800 176 559 (within Australia), 021 675 244 (within New Zealand) or +61 7 3039 2888 (outside Australia and New Zealand).

Yours faithfully,



Rodger Bacon
Deputy Chairman

Trilogy Funds Management Limited

23 May 2013

PW-4

NORTON ROSE

27 May 2013

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Your reference:
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Our reference:
2796586

Email
john.moutsopoulos@nortonrose.com

Dear Ms Banton

**Meeting convened by LM Investment Management Limited (Administrators Appointed) of the members of the LM First Mortgage Income Fund ("Fund")**

Thank you for your letter dated 23 May 2013 (**Letter**).

As to the matters raised in the second paragraph of your Letter in respect to the notice under s601NC, as you know, Russells act for our client in the ongoing litigation. We have referred your letter to Russells.

We do not agree with your interpretation of the scope of our client's AFSL.

Our client confirms that it will not be abandoning the meeting of members scheduled for 30 May 2013 (**Meeting**).

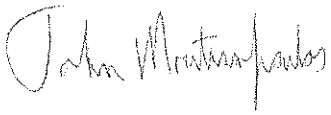
Our client finds it surprising that now, after some four weeks after the Notice of Meeting (**Notice**) has been posted, that your client "... *does not intend to consent to its appointment as responsible entity via the resolutions proposed to be considered and voted on at the Meeting.*" This is particularly surprising considering your client's central position in the Bruce's proceedings including your client's decision that it was appropriate for the LM Wholesale First Mortgage Income Fund (**WFMIF**) to fund your client's appointment as responsible entity of the LM First Mortgage Income Fund (**FMIF**) through the Court.

Our client is of the view that the Meeting will either appoint your client as the responsible entity of the FMIF in place of our client, or alternatively will provide evidence of the outcome of the vote at the Meeting. We consider that the evidence of the outcome of the vote at the Meeting will be great assistance to the court.

Our client does not consider that it is appropriate, as your clients proposed flyer states, that if members wish to have a say in who should be the responsible entity of the FMIF, they should do so through the Court proceedings. This would require members to seek, and pay for, legal advice and representation which in our client's view is an unnecessary burden. Taking into account the number of members, it is also totally impractical.

Our client will not be circulating your client's Circular to Investors. Our client has provided your client with an up to date copy of the FMIF unitholder register so as to allow them to circulate documents to members themselves.

Yours faithfully



John Moutsopoulos
Partner
Norton Rose Australia

CC Stephen Russell, Russells
Anne Gubbins, Australian Securities & Investments Commission

PW-4

Our Ref: AKB.384881
Your Ref: 2796586

PiperAlderman

3 June 2013

**By Email: john.moutsopoulos@nortonrose.com**
**Original forwarded by Post**

Norton Rose Australia
DX 368
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Attention: John Moutsopoulos


Lawyers

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**Partner:**
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abanton@piperalderman.com.au


Dear Sirs

**Meeting convened by LM Investment Management Limited (Administrators Appointed) of the members of the LM First Mortgage Income Fund ("Fund")**

We refer to your letter dated 27 May 2013 and to the document circulated by your client's administrators to members of the Fund on 27 May 2013 entitled "Questions & Answers" by which the administrators notified members of the adjournment of the meeting convened by your client by notice dated 26 April 2013 (**Meeting**).

At the outset, we are most surprised that your letter failed to mention the adjournment and the contents of the "Questions & Answers" document, given the obvious relevance of these matters to the issues about which we have been corresponding.

In relation to your letter, it cannot be a surprise to your client that our client does not consent to their appointment by way of the Meeting. Your client did not seek or obtain the consent of our client. What is surprising is that your client called the Meeting seeking to vote on a resolution (which necessarily involves our client) which it did not seek to discuss with our client notwithstanding the requirements of the Act to get our client's consent and that Court proceedings were on foot.

The requirements of section 601FM(3) of the Act will currently not be able to be satisfied if your client proceeds with the Meeting and should the resolutions pass. In those circumstances, it is apparent that your client's purpose in pursuing the Meeting is simply to provide evidence in the proceedings before the Supreme Court initiated by our clients, Mr and Mrs Bruce. That is not a proper purpose of the Meeting and if your client proceeds with the Meeting, we anticipate instructions to seek a declaration that the Meeting was invalid, and an order that the administrators personally pay the costs of the Meeting, and that those costs not be met out of the assets of the Fund. Our client is concerned that your client is furthering its own interest in holding the Meeting, and not those of the members of the Fund.

We note in this regard that ASIC has apparently expressed concern to Russells that the Meeting may now lack utility.

Your client's refusal to provide our client's circular to members is inappropriate, particularly in the following circumstances:-

1. Your client has refused to provide emails addresses of the members, which is the most cost effective and efficient means of ensuring that members receive the notification in good time. Instead, your client requires our client to expend substantial sums of money posting approximately 4,500 letters where it was reasonable to assume that members would not receive such letters by the time the Meeting was originally scheduled.

2. Your client purports to adopt an independent and "democratic" approach. Indeed, in the circular to advisors of 17 May 2013 the administrators stated "*It is our strong view that the Court process being pursued by Trilogy fails to provide investors with the democratic right, as enshrined in the Corporations Act, to choose which entity should manage your Fund. This is the reason we have called for a meeting of investors ...*"

3. The administrators have now chosen to circulate the "Questions & Answers" document which fails to properly set out the reasons that our client has not consented to be appointed via the Meeting, and indeed may misrepresent the reasons Trilogy has not consented due to the failure to set out fully our client's reasoning. In particular, the answer to question 2 in the "Questions & Answers" document does not explain that Trilogy does not so consent because:

    3.1 your client failed to seek our client's consent when issuing to Notice of Meeting, and if the consent had been sought, your clients would have been advised that Trilogy did not want to circumvent the Court proceedings, which had been issued well before the Meeting notice;

    3.2 the Meeting will not dispose of the issues that are currently before the Court for determination, including whether LMIM can remain as responsible entity given the restrictions on its AFSL and its net tangible assets position; and

    3.3 there are questions as to whether the Meeting has been validly convened and therefore a risk that any resolution will be invalidated.

    These are important reasons for our client's position to be properly explained to members so that members are not under a misapprehension because of the administrators' incomplete description of Trilogy's reasoning.

Your client cannot advocate a democratic and independent approach and yet when requested to despatch a notice to members, refuse to do so because it does not agree with what is contained in the notice. As responsible entity of the Fund, your client must ensure that all relevant information is provided to members such that they are aware of the current state of the proposed resolutions and circumstances surrounding the Meeting. At this stage, members are not fully aware of what Trilogy's position is and what the possible outcomes of the Meeting are (including a winding up of the Fund). In this regard we note that members' confusion continues as we continue to receive enquiries from members as to what they should be doing in relation to the Meeting.

Piper Alderman

In view of the above, please confirm by return that your client will despatch our client's circular to members by email and upload it to the website (www.lminvestmentadministration.com) and cancel the Meeting or at least let members know the true state of affairs by providing an addendum to the "Questions & Answers" document which accurately explains both Trilogy's position, and what will happen at the Meeting.

Yours faithfully
**Piper Alderman**

Per: 

**Amanda Banton**
Partner

CC. Stephen Russell, Russells
Anne Gubbins, ASIC

PW-4

NORTON ROSE FULBRIGHT

5 June 2013

Email: abanton@piperalderman.com.au

**Private & Confidential**

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**Direct line**
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**Email**
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**Your reference:** AKB 384881

**Our reference:** 2796586

Dear Ms Banton

**Meeting convened by LM Investment Management Limited (Administrators Appointed) of the members of the LM First Mortgage Income Fund ("Fund")**

We refer to your letter dated 3 June 2013 (**Letter**).

Your Letter raises a number of issues to which we are instructed to respond on behalf of our client LM Investment Management Limited (**LM**).

1 **Trilogy's purported withdrawal of Consent to be responsible entity**

1.1 Throughout the meeting process and the Court proceedings, our client has held the best interests of the members as the primary consideration.

1.2 Prior to the calling of the meeting, it had been Trilogy Fund Management Limited's (**Trilogy**) publicly stated position that it intended to call a meeting of members of the Fund to vote on the removal of LM, and the appointment of Trilogy as responsible entity of the Fund. We refer to the affidavit of Paul Wood (Trilogy Lending Manager), sworn 6 May 2013, paragraph 12.

1.3 Prior to the meeting being called, Trilogy had consented in writing to being the responsible entity of the Fund. Trilogy's express consent dated 10 April 2013 was exhibited to Mr Bruce's affidavit sworn 14 April 2013. A copy of that written consent is attached for ease of reference.

1.4 That consent was not qualified as applying only to the Court proceedings. We are not aware that this consent has been withdrawn.

1.5 There is no requirement under s601FM or s601FL for our client to seek Trilogy's prior consent. Trilogy's consent is only required if Trilogy is voted in by members to replace LM as responsible entity of the Fund. Section 601FL(3) clearly envisages that a vote on a replacement of a responsible entity can take place before the replacement responsible entity has given their consent.

1.6 If, at the meeting, a resolution to remove LM and appoint Trilogy is passed, Trilogy will be given an opportunity to consent, or LM may choose to rely upon the consent dated 10 April 2013.

1.7 Trilogy may very well change its mind and consent based on the fact that the whole objective of Mr and Mrs Bruce's application is to install Trilogy as responsible entity with the Court's assistance.

Trilogy would not require the Court's assistance if the resolutions were passed. It would mean that Mr and Mrs Bruce would be saved the substantial cost of appearing at the court hearing set down in July.

1.8 We note that Trilogy (seemingly in its capacity as responsible entity of the Wholesale Fund) has agreed to indemnify Mr and Mrs Bruce for the costs of the court proceedings (see paragraphs 6-9 of Paul Wood's affidavit sworn on 6 May 2013).

1.9 We question how, if the objective (namely the appointment of Trilogy as responsible enitity of the Fund) is achieved via the meeting, Trilogy can determine that it would be in the best interests of members of the Wholesale Fund to continue to cover the costs of that litigation, particularly on an indemnity basis.

1.10 Accordingly, our client does not accept that because Trilogy has now, for tactical reasons, purported to conditionally withdrawn its consent, the meeting should not proceed.

2 **Cancelling the meeting**

2.1 Your Letter suggests that the meeting should be cancelled.

2.2 For a number of reasons, including the matters addressed above, our clients do not agree.

2.3 Trilogy's circular to investors dated 29 May 2013 suggests that the meeting should not proceed and that *"Each member of the Fund ..... is entitled to have his/her or its voice heard through the Proceedings"*

2.4 The logistics of them doing so and the associated legal costs make such a proposition unreasonable and practically difficult. This would result in a significantly larger cost burden (and inconvenience) to members than attending the members' meeting.

2.5 The members' meeting and the opportunity for members to vote on the resolutions that have been put, is a sensible and entirely appropriate process to obtain members' views. Members do not need legal representation and can vote by proxy if they do not want to attend in person.

2.6 As noted above, the holding of such a meeting was, prior to issuing the proceedings, Trilogy's preferred course of action. Your Letter gives no sound basis why that position has changed.

2.7 In any event, it is not apparent that a responsible entity can unilaterally cancel a meeting once called.

3 **Trilogy's Circular to Investors**

3.1 Our clients have added an addendum to the Questions & Answers document on their website which inserts the direct link to Trilogy's website regarding the LM Fund (being http://www.trilogyfunds.com.au/lm-funds), so members who wish to view it can do so.

For the reasons set out in this letter, our client maintains the view that the meeting of members should proceed.

Yours faithfully

John Moutsopoulos
Partner
Norton Rose Fulbright Australia

cc Stephen Russell, Russells
Anne Gubbins and Hugh Copley, Australian Securities & Investments Commission

Trilogy Funds Management Limited ACN 080 383 679

Consent to act as the Responsible Entity for the LM First Mortgage Income Fund ARSN 089 343 288 DATED 10 April 2013

We the Directors of Trilogy Funds Management Limited consent to act as the Responsible Entity for the LM First Mortgage Income Fund ARSN 089 343 288.

Executed by Trilogy Funds Management Limited ACN 080 383 679
in accordance with section 127(1) of the Corporations Act 2001
by:

Director
Rodger Bacon

Director
John Barry

Dated 10 April 2013

Trilogy Funds Management Limited ACN 080 383 679

Consent to act as the Responsible Entity for the LM First Mortgage Income Fund ARSN 089 343 288 DATED 10 April 2013

We the Directors of Trilogy Funds Management Limited consent to act as the Responsible Entity for the LM First Mortgage Income Fund ARSN 089 343 288.

Executed by Trilogy Funds Management Limited ACN 080 383 679
in accordance with section 127(1) of the Corporations Act 2001
by:

Director
Rodger Bacon

Director
John Barry

Dated 10 April 2013

PW-4

Our Ref: AKB.384881
Your Ref: 2796586

PiperAlderman

6 June 2013

**By Email: john.moutsopoulos@nortonrosefulbright.com**
**Original forwarded by Post**

Norton Rose Fulbright
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Attention: John Moutsopoulos


**Lawyers**

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Dear Sirs

**Meeting convened by LM Investment Management Limited (Administrators Appointed) of the members of the LM First Mortgage Income Fund ("Fund")**

We refer to your letter dated 5 June 2013.

We do not intend to repeat the concerns that our client has in relation to the Meeting. They have been thoroughly canvassed in our previous correspondence and largely ignored by your client.

However, we do make the following points in response to your letter:

1. We do not see the relevance of Trilogy's previous position as referred to in paragraph 1.2 of your letter. Any such meeting would have been validly called by Trilogy. The issues regarding the validity of your client's convened Meeting would not have arisen. Further, such a meeting was contemplated prior to the commencement of proceedings in the Supreme Court. As we have stated on numerous occasions, your client convened the Meeting after those proceedings were commenced, and apparently for its own purposes, namely to gather evidence for use in those proceedings. For those reasons, amongst others of which your client has been made well aware, Trilogy has not consented to being appointed via the Meeting.

2. Your client has consistently avoided dealing with the concerns raised by our client as to the validity of the Meeting. Does your client intend to resign as responsible entity? If so, that should be made clear to the members of the Fund. If it does not, our client considers the Meeting to have been invalidly convened. If it is, however, your client's intention to remain as responsible entity (which intention appears obvious from the contents of the information it has provided to members about the Meeting), its ability to do so given its failure to meet the requirements of its AFSL is a matter that is before the Supreme Court and should be properly determined in that forum, and not in a forum that has been

Piper Alderman

convened for your client's own purposes, and at the expense of the members.

3. As you are no doubt aware, each of the members of the Fund has been sent information by this firm in relation to the Supreme Court proceedings. That information included a form for members to return, indicating whether they supported Trilogy replacing your client as responsible entity. We did that so that members would not be put to any cost in order to have their views heard, and so that their views could be put before the Court to avoid them needing to otherwise become involved in the proceedings. We consider that was and is an appropriate process to obtain members' views and it will not require them to obtain legal representation or expend any costs other than the cost of a stamp or an email. Many members have indicated their views in this manner. Those forms will be put before the Supreme Court in the proceedings and we assume that your client will have no objection to that evidence, given its stated intention to put into evidence the outcome of the Meeting.

4. In relation to paragraph 3.1 of your letter, we note that at the time of writing this letter, no such addendum appears to have been added. Please advise when it will be added.

5. We also note that your client now apparently concedes, by its agreement to add an addendum to its "Questions and Answers" document, that the information it has provided to members to date is incomplete and potentially misleading. In light of this, our client considers it to be insufficient for members to be informed by simply placing material on your client's website, which members may not check. Members should be sent via email our client's circular, as we have repeatedly requested, so that they are properly informed about the Meeting and Trilogy's position. Please confirm by the close of business on Friday, 7 June 2013 that your client will do so.

Yours faithfully
**Piper Alderman**

Per: 

**Amanda Banton**
Partner

CC. Stephen Russell, Russells
Anne Gubbins, ASIC

PW-4

NORTON ROSE FULBRIGHT

12 June 2013

Email: abanton@piperalderman.com.au

**Private & Confidential**

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**Direct line**
+61 2 9330 8166

**Email**
john.moutsopoulos@nortonrosefulbright.com

| **Your reference:** | **Our reference:** |
|---|---|
| AKB 384881 | 2796586 |

Dear Ms Banton

**Meeting convened by LM Investment Management Limited (Administrators Appointed) of the members of the LM First Mortgage Income Fund ("Fund")**

We refer to your letter dated 6 June 2013 (**Letter**).

We reject your contention in the prelude to your Letter that our client has "*largely ignored*" concerns raised by your client. Where appropriate for our client to do so, all concerns raised by your client have been thoroughly addressed in our responses. Similar to your position stated in the prelude to your Letter, we do not propose to rehash our client's responses to issues raised by your client throughout our previous correspondence.

We respond to your numbered paragraphs on behalf of our client as follows:

1 **Trilogy's previous position**

1.1 You have stated that you do not see the relevance of Trilogy Fund Management Limited's (**Trilogy**) previous position as referred to in paragraph 1.2 of our letter dated 5 June 2013 (ie that Trilogy intended to call a meeting of members of the LM First Mortgage Income Fund (**Fund**) to vote on the removal of LM Investment Management Limited (**LM**) and the appointment of Trilogy as responsible entity of the Fund).

1.2 Trilogy's publicly stated position is entirely relevant as Trilogy's position was to call a meeting of members of the Fund to determine if Trilogy should be appointed responsible entity of the Fund. The calling of a meeting is undoubtedly the most democratic and cost effective way of members being able to decide who should be the responsible entity of their Fund, and is the reason for which our client has called the meeting.

1.3 Our client strongly denies that it convened the Meeting for its own purposes. The rationale behind convening the Meeting has been thoroughly canvassed in a number of our letters to you. In short, LM called the meeting to allow members of the Fund to decide who they want to be responsible entity of their fund. Our client's position has not changed.

1.4 We note that your Letter did not address the fact that your client had signed a clear, unqualified and unambiguous consent to be the responsible entity of the Fund.

2 **Validity of the Meeting**

2.1 Our client strongly denies that it has "*avoided dealing with the concerns raised*" by your client as to the validity of the Meeting. To the contrary, our client has openly engaged with you on your client's various queries. We refer you to our letters to you dated 8 and 14 May 2013. For clarity, we confirm that our client's position has not changed.

3 As advised in our letter to you dated 16 May 2013, LM has indicated that if the resolutions are passed, it will file with ASIC the ASIC Form 5109. Once filed, ASIC is required to process it and when it does the responsible entity is changed. Thus, both legally and practically it is clear that LM believes the meeting is validly called and will act on those beliefs (even when to do so is clearly against their personal interests. It should be abundantly clear from the above that LM will effectively resign as responsible entity of the Fund if the members want to appoint Trilogy.

4 **Information received by Piper Alderman**

4.1 We note that the collection of the views of certain members who have returned your form as described, is a process controlled completely by your firm and your client (Trilogy). Our client has not been copied or provided with the material and has not been given an opportunity to consider it. This should be contrasted with the meeting process convened by our client which is regulated by both statute and general law, where the votes lodged my members in respect to the meeting are collected and independently verified by Computershare.

4.2 Your assumption at the end of paragraph 3 of your Letter is not correct.

5 **Addendum to Questions & Answers document**

5.1 The addendum appears at Question 15 of the Questions & Answers document. This was added on 5 June (being the date of our last letter to your firm).

6 **Addendum to Questions & Answers document**

6.1 Our client strongly denies your client's assertion that our client "*apparently concedes, by its agreement to add an addendum ... that the information it has provided to members to date is incomplete and potentially misleading*".

6.2 Our client has inserted the link to your client's website as an addendum to the Question & Answers document at the request of your client and to avoid further unnecessary argument on the issue.

6.3 Further, our client has provided your client with a copy of the unitholder register of the Fund on 30 April 3013. Your client has had ample time to distribute correspondence to members of the Fund if it chose to do so.

6.4 For clarity, our client will not be sending your client's circular to members.

Yours faithfully

John Moutsopoulos
Partner
Norton Rose Fulbright Australia

cc Stephen Russell, Russells
Anne Gubbins and Hugh Copley, Australian Securities & Investments Commission

PW-5

TRILOGY
FUNDS

6 May 2013

Dear Investor

LM Investment Management Limited (Administrators Appointed) (LMIM) has issued a Notice of Meeting dated 26 April 2013 (Notice) to unitholders in the LM First Mortgage Income Fund (Income Fund) for a Unitholder meeting on 30 May 2013. This meeting is purporting to vote on the replacement of LMIM as Responsible Entity (RE) with Trilogy. Under the Constitution for the LM Wholesale First Mortgage Income Fund (the Wholesale Fund), we must notify you of the meeting.

**We believe that the meeting is invalid and has been designed to fail. The question as to who should be RE of the Fund is currently subject to proceedings being conducted in the Supreme Court of Queensland to be heard on 13 May and we will contact you with an update once the outcome is known. If the Court appoints Trilogy as a Temporary RE, then Trilogy must within 90 days call a meeting of Unitholders of the Income Fund to vote on the appointment of a permanent RE.**

Given the large number of offshore unitholders and the way the 'see through' provisions of the LM Currency Protected Australian Income Fund and your Fund currently work, the meeting is likely to lead to a large number of votes not being cast. If a vote has not been cast, then it is in effect a vote against a change in RE.

**The means by which a Responsible Entity can be changed**

The means by which an RE may be changed is set out in Division 2 of Chapter 5C.2 of the Corporations Act 2001. There are only two bases on which LM may call a meeting of members for the purposes of changing the RE:

1. If it wishes to retire as the responsible entity of the Fund then it must call a members' meeting to explain its reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new responsible entity (section 601FL(1) of the Corporations Act 2001). In this case, the meeting has not been called because it wishes to retire as the responsible entity of the Fund.

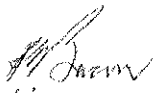
2. If members of the Fund want to remove LM as the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that LM should be removed as the responsible entity and a resolution choosing a company to be the new responsible entity (section 601FM(1) of the Corporations Act 2001). In this case, the meeting has not been called as a result of the members taking action under Division 1 of Part 2G.4 for the calling of a members' meeting for this purpose.

**Trilogy Funds Management Limited**
Level 10, Brisbane Club Tower, 241 Adelaide Street, Brisbane QLD 4000 | GPO Box 1648, Brisbane QLD 4001
T +61 7 3039 2828 F +61 7 3039 2829 W www.trilogyfunds.com.au ABN 59 080 383 679 | AFSL 261425

We are writing to LMIM to request it withdraw such notice forthwith and in the circumstances we do not propose to send you the meeting documents.

If you have any questions please contact Client Services from Monday to Friday between 8.30am and 5.00pm AEST on 1800 176 559 (within Australia) or +61 7 3039 2888 (outside Australia).

Yours sincerely



**Rodger Bacon**
Executive Deputy Chairman

This letter has been prepared as general information only and is not intended to take the place of professional financial advice.

PW-6

FTI CONSULTING

# Questions & Answers

| | |
|---|---|
| Date | 27 May 2013 |
| Re: | LM Investment Management Limited (Administrators Appointed) as Responsible Entity of the LM First Mortgage Income Fund<br>Meeting of Members |

These Question & Answers have been prepared by FTI Consulting as administrators of LM Investment Management Ltd (Administrators Appointed) ("**LM**") to assist members by providing them with additional information on some of the key matters relevant for the meeting of members of the LM First Mortgage Income Fund ("**FMIF**") scheduled to take place on 30 May 2013. This document supplements and is intended to be read together with the Notice of Meeting and the Explanatory Memorandum dated 26 April 2013.

**To allow members time to consider the additional information included in this document LM will arrange for the Chairman of the meeting to adjourn the meeting till 11am (AEST) on Thursday 13 June 2013 at the same location (the Institute of Chartered Accountants, Level 32, Central Plaza One, 345 Queen Street, Brisbane, Queensland, 4000). As the meeting on 30 May 2013 will be adjourned (and the resolutions not put) there is no need to attend the meeting on 30 May 2013.**

1. **Will the meeting dispose of the various Court applications which have been made?**

   *When the notice of meeting was sent out to investors (on 26 April 2013) the only Court application on foot at that time was Trilogy Funds Management Ltd ("Trilogy") attempting to replace LM as the responsible entity of FMIF.*

   *LM had hoped that by calling a meeting to allow members to vote on the issue of who should manage FMIF that the Court would adjourn the proceedings to allow the meeting to take place. If the meeting chose to appoint Trilogy then clearly the application would have been withdrawn. If the members did not support the appointment of Trilogy then it was expected that the results of the meeting would be helpful to the Court in deciding what to do. Thus LM reasonably expected that by calling the meeting it would minimise legal costs associated with the application to appoint Trilogy. LM still believes that holding the meeting continues to be in the best interests of the members of FMIF. In any event, even if Trilogy is not voted in as responsible entity at the meeting, the voting results will help inform the Court as to how members of the FMIF want their fund to be managed.*

   *Since the original application was made two other parties (being another unitholder and ASIC) have made separate and different applications.*

   *While all three of the Court proceedings have been adjourned until 15 July 2013 (after the date of the meeting), in light of the further applications it is at this stage unclear whether or not the meeting will dispose of all the Court proceedings.*

**2. Has Trilogy consented to being appointed as responsible entity of FMIF?**

*As the notice of meeting was sent out after the application made to Court to have Trilogy appointed as temporary responsible entity of FMIF, LM assumed that Trilogy would (if members voted to appoint them) consent to be appointed as responsible entity of FMIF.*

*On 23 May 2013 (some 4 weeks after the notice of meeting was posted out) Trilogy has advised LM that it does not consent to being appointed as responsible entity by members at the meeting scheduled for 30 May 2013.*

*The reason that Trilogy has provided for not consenting is that they believe that the matter should be determined by the Court. Trilogy states that each member of FMIF is entitled to turn up to Court to make their views known to the Court and that this makes the Court the appropriate forum to determine who should manage their fund.*

*It seems that Trilogy prefers to put both you (should you elect to put your views to the Court) and your fund to the significant costs associated with the Court proceedings rather than allow the matter to be determined in the more usual and democratic manner in a meeting of members. This is particularly so given the Court adjourned the proceedings till 15 July 2013 in part to allow the meeting to run its course.*

**3. I am only a small unitholder do I still need to vote?**

*Yes – it is very important that you vote so that your views are known. As noted in the answer to the previous question, LM intends to provide to the Court all details of the voting so that the Court is accurately informed as to the current wishes of unitholders.*

**4. What are the resolutions which will be considered at the meeting on 30 May (now to be adjourned to 13 June)?**

*There are 2 resolutions specified in the notice of meeting which are to be considered at the meeting.*

*Resolution 1 seeks to remove LM as the Responsible Entity of FMIF.*

*Resolution 2 seeks to appoint Trilogy as the replacement Responsible Entity of FMIF.*

*Resolutions 1 and 2 are interlinked. Unless both resolutions are approved, neither resolution can be approved. This means that even if the resolution to remove LM is passed, the resolution falls away if Trilogy is not appointed as the replacement Responsible Entity.*

*Resolutions 1 and 2 are extraordinary resolutions which require at least 50% of the total votes that may be cast by eligible members in the Fund (including members not present in person or by proxy) to vote in favour in order for each resolution to be passed. These votes must be conducted by a poll and each member has 1 vote for each dollar value of the total Units they hold in FMIF.*

*It is possible that there may be other procedural resolutions which are put forward at the meeting. If there are, then these will be decided on a show of hands and each member has one vote on each resolution determined by a show of hands. However, importantly under the FMIF constitution a proxy appointed by member is not entitled to vote on a show of hands.*

5. **Are unitholders in the two LM managed feeder funds (being the LM Currency Protected Australian Income Fund (CPAIF) and the LM Institutional Currency Protected Australian Income Fund (ICPAIF) able to direct LM (their responsible entity) how they wish LM to vote at the FMIF meeting?**

   *The constitutions of the two feeder funds each have "See Through Voting" provisions. These were introduced to allow members of CPAIF and ICPAIF to give voting directions (based on their proportionate see through voting percentage) to their responsible entity (LM) as to how to vote at the FMIF meeting. This was seen as a direct benefit to members of the feeder funds by giving them (rather than LM as responsible entity) the right to make decisions on important matters put to an FMIF meeting.*

   *As the FMIF meeting is to be adjourned to 13 June 2013 the Feeder fund voting directions need to be received by Friday 7 June 2013 at 4pm.*

   *LM considers that these provisions are valid and effective to enfranchise members of the two feeder funds. However, in case there are parties with alternative views, LM will ensure that when the votes are counted they are recorded to separately show the feeder fund votes.*

6. **Will the FMIF be wound-up?**

   *The AFSL given to the Administrators by ASIC on 9 April 2013 authorises the Administrators to remain as the responsible entity of the FMIF to investigate and preserve the assets and affairs of the FMIF and to:*

   1. *Wind-up the scheme; or*
   2. *Transfer the functions of the responsible entity to an entity not externally-administered.*

   *Whilst we have now reached our view that it is in the best interests of members to formally wind up the FMIF, we have given an undertaking (and the Court may order) that we not take any steps pending the hearing on 15 July 2013, to formalize the winding up.*

7. **Is FMIF currently being wound up?**

   *Technically a wind up of FMIF has not actually commenced.*

   *It took many weeks to investigate the assets and form a view on whether it was in the best interests of members for FMIF to be wound up and, more importantly, how best to achieve that.*

   *The only assets of FMIF are loans which are secured by mortgages. Most of the loans are in default. The function of LM is to realize those loans – it does this by taking the appropriate action to enforce its rights under those loans or sell those loans. As a result of the global financial crisis LM has been unable to make new loans on acceptable terms. Accordingly, in accordance with the "go forward" strategy which was announced by LM on 20 December 2012, when loan moneys are recovered they are used to pay FMIF liabilities with the surplus being distributed to members. Thus while a technical wind up of FMIF has not commenced, the action in relation to FMIF loan assets and moneys recovered which is being taken by LM would be no different if a technical wind up had commenced*

**8. If the Court did appoint Trilogy as temporary responsible entity would Trilogy need to subsequently call a meeting of members?**

*Yes. If the Court appointed Trilogy as temporary responsible entity then, under the Corporations Act, Trilogy would need to call a meeting of members of FMIF within 90 days of its appointment to choose a new permanent responsible entity. It is likely that Trilogy would propose themselves as the new permanent responsible entity and, if so, would put a resolution to members which was essentially the same as the second resolution to be considered at the meeting called by LM for 30 May 2013.*

*If Trilogy did not have the support of members to be appointed as the permanent responsible entity at this meeting, then under the Corporations Act this would trigger a requirement that Trilogy apply to the Court for an order directing it to wind up the FMIF and Trilogy would remain as the responsible entity and be required to wind up FMIF if so ordered. In that case, Trilogy would have to conduct its own review and formulate its own strategy and approach. As mentioned, this might call into question the ability to make interim capital distributions.*

*It would thus be possible, and indeed highly likely, that if Trilogy was appointed by the Court as temporary responsible entity they could remain as responsible entity for the rest of the term of FMIF even if they did not enjoy the necessary support of members of FMIF to be chosen as the permanent responsible entity.*

**9. Was the Notice of Meeting reviewed or approved by ASIC?**

*LM was solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting.*

*Prior approval of such Notices by ASIC is not required.*

**10. If LM remains as responsible entity but is put into liquidation, will the clawback provisions of the Corporations Act provide advantages to members?**

*As advised in the Notice of Meeting, the Corporations Act has a number provisions that allow a Liquidator of a Company to "Clawback" money from Directors, related parties and creditors ("Clawback provisions"). The Clawback provisions will only apply if LM goes into Liquidation.*

*As previously stated, the application of these Clawback provisions to FMIF's property is untested, and not free from doubt. But, LM remains of the view that the application of those provisions is at least arguable.*

*If LM is removed as responsible entity:*

1. *the new responsible entity will not be able to rely upon the Clawback provisions.*

2. *the Clawback provisions cannot be used by the new responsible entity to increase the recovery from FMIF property. It is not known at this stage whether any transaction involving fund property could be the subject of action under these Clawback provisions, but investigations are continuing.*

3. *the Clawback provisions will still allow for the Liquidators to recover funds for the benefit of unsecured creditors of LM (as opposed to members of the FMIF). If that occurs, members may still benefit if the funds recovered reduce the amount that LM is entitled to be paid from the FMIF Property for expenses incurred on behalf of FMIF.*

**11. How should the Proxy Form be completed?**

*The proxy form needs to be signed and the various boxes completed. However, a signed proxy form (with no boxes completed) is still a valid proxy and constitutes an AGAINST vote on all resolutions. If no proxy is lodged or vote cast at the meeting, this is effectively support of LM's continued management. This is because to replace LM as Responsible Entity, over 50% of units eligible to vote must vote in favour of the change.*

**12. When must I vote & how do I Vote?**

*As the Chairman will adjourn the meeting on 30 May 2013 to 13 June 2013 there is no need to attend the meeting on 30 May 2013.*

*Unless you intend to vote at the adjourned meeting in Brisbane on Thursday 13 June 2013, you will need to lodge a Signed Proxy Form with Computershare no later than 11.00 am on Tuesday 11 June 2013.*

*You can post, email or fax your Proxy Form to Computershare – details are set out below.*

| | |
|---|---|
| *By Post:* | *Computershare Investor Services Pty Ltd*<br>*GPO Box 2062*<br>*MELBOURNE VIC 8060 Australia* |
| *Hand Deliver:* | *Computershare Investor Services Pty Ltd*<br>*452 Johnston Street*<br>*ABBOTSFORD VIC 3067 Australia* |
| *Facsimile:* | *03 9473 2145 (within Australia) or*<br>*+61 3 9473 2145 (outside Australia)* |
| *Email:* | *quorum@computershare.com.au* |

**13. What happens if I have lost my Proxy Form?**

*Please contact LM on one of the below numbers to receive pre-printed replacement forms.*

*Australia Toll Free – 1800 062 919*
*New Zealand Toll Free – 0800 142 919*
*International +61 7 5584 4500*

*Or alternatively, you can send an email to mail@LMaustralia.com.*

**14. If I have any questions who should I call?**

*Please contact your Financial Adviser or if you do not have a Financial Adviser please contact LM on one of the numbers listed in the previous answer.*

PW-7

# Australian Financial Services Licence

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

was licensed as an Australian Financial Services Licensee pursuant to section 913B of the Corporations Act 2001. The conditions of the licence are hereby varied from the date hereunder. The licensee shall continue to be licensed as an Australian Financial Services Licensee subject to the conditions and restrictions which are prescribed, and to the conditions contained in this licence and attached schedules.

Effective 19 June 2013

## Authorisation

1. This licence authorises the licensee to carry on a financial services business to:
   (a) provide financial product advice for the following classes of financial products:
      (i) deposit and payment products limited to:
         (A) basic deposit products; and
      (ii) interests in managed investment schemes limited to:
         (A) own managed investment scheme only;
   (b) deal in a financial product by:
      (i) issuing, applying for, acquiring, varying or disposing of a financial product in respect of the following classes of financial products:
         (A) derivatives; and
         (B) interests in managed investment schemes limited to:
            (1) own managed investment scheme only; and
      (ii) applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of the following classes of products:
         (A) deposit and payment products limited to:
            (1) basic deposit products;
         (B) derivatives;
         (C) foreign exchange contracts;
         (D) general insurance products;
         (E) interests in managed investment schemes excluding investor directed portfolio services; and
         (F) securities; and
   (c) operate the following kinds of registered managed investment schemes (including the holding of any incidental property) in its capacity as responsible entity:
      (i) schemes which only hold the following types of property:
         (A) direct real property;
         (B) financial assets; and
         (C) mortgages;

to retail and wholesale clients.

ASIC

TRILOGY FUNDS MANAGEMENT LIMITED

ABN: 59 080 383 679

Licence No: 261425

Effective 19 June 2013

## Schedule of Conditions

### Key Person Requirements

2. If any of the following officer(s) or key person(s) cease to be officers of the licensee or to perform duties on behalf of the licensee with respect to its financial services business:
   (a) **Rodger Ingle BACON;**
   (b) **David John HOGAN;**
   (c) **Trevor John GIBSON; and**
   (d) **Paul Ernest DORTKAMP;**

   the licensee must notify ASIC in writing within 5 business days of the following matters:
   (e) the date the officer or key person ceased to be an officer of the licensee or to perform duties on behalf of the licensee with respect to its financial services business; and
   (f) the name, address, date of commencement, educational qualifications and experience of any replacement officer or key person the licensee has appointed to perform duties on behalf of the licensee with respect to its financial services business; and
   (g) if the licensee does not have a replacement officer or key person, detailed reasons as to why the licensee has not nominated a replacement; and
   (h) a detailed description of how the licensee will continue to comply with the Act and the conditions of this licence following the officer or key person(s) identified above, or any replacement of such person, ceasing to be an officer of the licensee or to perform duties on behalf of the licensee with respect to its financial services business.

### Compliance Measures to Ensure Compliance with Law and Licence

3. The licensee must establish and maintain compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the provisions of the financial services laws.

### Training Requirements for Representatives

4. The licensee must for any natural person who provides financial product advice to retail clients on behalf of the licensee (including the licensee if he or she is a natural person):
   (a) identify the tasks and functions that person performs on behalf of the licensee; and
   (b) determine the appropriate knowledge and skills requirements required to competently perform those tasks and functions; and
   (c) implement procedures for continuing training.

5. The licensee must ensure that any natural person who provides financial product advice to retail clients on behalf of the licensee (including the licensee if he or she is a natural person):
   (a) has completed training courses at an appropriate level that are or have been approved by ASIC in writing that are relevant to those functions and tasks; or
   (b) has been individually assessed as competent by an assessor that is or has been approved by ASIC in writing; or

ASIC

(c) in respect of financial product advice on basic deposit products and facilities for making non-cash payments that are related to a basic deposit product or First Home Saver Accounts issued by an ADI (i.e. FHSA deposit accounts), has completed training courses that are or have been assessed by the licensee as meeting the appropriate level that are relevant to those functions and tasks.

6. Condition 5 does not apply in relation to:
   (a) a natural person who is a customer service representative and who provides financial product advice:
      (i) derived from a script approved by a natural person who complies with paragraphs 5(a), (b) and (c) ("qualified person"); or
      (ii) under the direct supervision of a qualified person present at the same location; or
   (b) a natural person who is a para-planner or trainee adviser and who provides advice under the direct supervision of a qualified person who is, in addition to the licensee, responsible for:
      (i) ensuring that any financial product advice that is provided by the para-planner or trainee adviser for which a Statement of Advice must be given, is reflected in a Statement of Advice that has been reviewed by the qualified person before the Statement of Advice is given, to ensure that the Statement of Advice would comply with all the requirements of the Act; and
      (ii) managing and leading any verbal explanation of the financial product advice to the client,

   where the licensee has established procedures to ensure that the natural person does not provide financial product advice to retail clients on behalf of the licensee, other than in the manner specified in this paragraph, and the licensee monitors whether or not those procedures are effective.

7. Condition 5 does not apply in relation to financial product advice:
   (a) given to retail clients in advertising to which section 1018A applies, provided that:
      (i) this licence authorises the provision of financial product advice; and
      (ii) a responsible officer of the licensee approves such advertising before its publication or dissemination to retail clients; or
   (b) for which there is an exemption under the Act from the obligation to hold a licence.

**Notification to Current or Former Representative's Clients**

8. Where, under Division 8 of Part 7.6:
   (a) ASIC makes a banning order against a current or former representative of the licensee; or
   (b) the Court makes an order disqualifying a current or former representative of the licensee;

   the licensee must, if directed in writing by ASIC, take all reasonable steps to provide the following information in writing to each retail client to whom the representative had provided personal advice within 3 years prior to the date of the banning order or disqualification order:
   (c) the name of the representative; and
   (d) any authorised representative number allocated to the representative by ASIC; and
   (e) the terms of the banning or disqualification order; and

ASIC

(f) contact details of the licensee for dealing with enquiries and complaints regarding the banning or disqualification or the conduct of the representative as a representative of the licensee.

**Financial Requirements for Market Participants and Clearing Participants**

9. Where the licensee is a market participant, or a clearing participant, conditions 10 to 18 (inclusive) do not apply to the licensee.

**Base Level Financial Requirements**

10. The licensee must:

(a) be able to pay all its debts as and when they become due and payable; and

(b) either:

(i) have total assets that exceed total liabilities as shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's total assets would currently not exceed its total liabilities; or

(ii) have adjusted assets that exceed adjusted liabilities calculated at the balance date shown in the licensee's most recent balance sheet lodged with ASIC and have no reason to suspect that the licensee's adjusted assets would currently not exceed its adjusted liabilities; and

(c) for all licensees except those with an authorisation to operate registered managed investment schemes in the capacity of a responsible entity, meet the cash needs requirement by complying with one of the following five options:

(i) Option 1 (reasonable estimate projection plus cash buffer)—refer to definition of "Option 1" under this licence; or

(ii) Option 2 (contingency based projection)—refer to definition of "Option 2" under this licence; or

(iii) Option 3 (financial commitment by an Australian ADI or comparable foreign institution)—a requirement that an Australian ADI or a foreign deposit-taking institution approved in writing by ASIC as an eligible provider gives the licensee an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee, or the amount for which the licensee is liable to its creditors at the time of the demand to the licensee's creditors or a trustee for the licensee's creditors, that the licensee reasonably expects will apply for at least 3 months, taking into account all commercial contingencies for which the licensee should reasonably plan; or

(iv) Option 4 (expectation of support from an Australian ADI or comparable foreign institution)—a requirement that the licensee:

(A) is a subsidiary of an Australian ADI or a corporation approved by ASIC in writing for the purpose of this condition; and

(B) reasonably expects that (based on access to cash from its related bodies corporate) it will have adequate resources (when needed) to meet its liabilities for at least the next 3 months (including any additional liabilities that the licensee might incur during that period), taking into account all adverse commercial contingencies for which the licensee should reasonably plan; and

(C) ensures that a responsible officer of the licensee has documented that the officer has the reasonable expectation for at least the following 3-month period together with the reasons for forming the expectation, the contingencies for which the licensee considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; or

(v) Option 5 (parent entity prepares cash flow projections on a consolidated basis)—a requirement that the licensee ensures that:

(A) the cash flows of the licensee and each of its related bodies corporate, other than any body regulated by APRA ("licensee group"), are managed on a consolidated basis; and

(B) there is a body corporate within the licensee group of which all members of the licensee group are subsidiaries that is not a body regulated by APRA ("parent entity"); and

(C) the parent entity complies with Option 1 or Option 2 as if it were the licensee, cash flows of any member of the licensee group were cash flows of the licensee and any cash held by a member of the licensee group, other than as trustee or as trustee of a relevant trust, were so held by the licensee; and

(D) a report by the parent entity's auditor that is a registered company auditor is given to ASIC with the licensee's annual audit report under condition 19 of this licence, in relation to each financial year of the licensee and for any other period that ASIC requests, by a date that ASIC requests, with respect to compliance by the parent entity with Option 1 or Option 2 as they would apply in accordance with subparagraph (C), reflecting the report that would be required from the auditor of a licensee, for that period purporting to comply with Option 1 or Option 2; and

(E) either of the following applies:

Alternative A—the parent entity has provided an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee or to meet the licensee's liabilities which the licensee reasonably expects will apply for at least the next 3 months taking into account all adverse commercial contingencies for which the licensee should reasonably plan; or

Alternative B—the licensee reasonably expects that (based on access to cash from members of the licensee group), it will have adequate resources to meet its liabilities (including any additional liabilities that the licensee might incur while the commitment applies) for at least the next 3 months taking into account all adverse commercial contingencies for which the licensee should reasonably plan and a responsible officer of the licensee has documented that the officer has the reasonable expectation in respect of at least the following 3 months together with the reasons for forming the expectation, the contingencies for which the licensee considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; and

(F) the licensee has no reason to believe that the parent entity has not complied with the requirement at subparagraph (C) or has failed to comply in a material respect with its obligations under Chapter 2M or, if the parent entity is not a company, under any other laws (whether law in Australia or not) relating to financial reporting that apply to it.

For 5 years after the end of the last financial year that includes a part of the period to which any document prepared for subparagraph (c)(iv)(C) or Alternative B in subparagraph (c)(v)(E) relates, the licensee must keep the document and give it to ASIC if ASIC requests.

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**Financial Requirements for Managed Investments and Custody Services**

11. The licensee must hold at least $5 million net tangible assets ("NTA"), unless for each registered scheme operated by the licensee:
    (a) all the scheme property and other assets of the scheme(s) not held by members are held by a custodian appointed by the licensee, that has $5 million NTA or is an Australian ADI (or a sub-custodian appointed by that custodian); or
    (b) all the scheme property and other assets of the scheme(s) not held by members are special custody assets or the Tier $500,000 class assets held by the licensee or a custodian appointed by the licensee (or a sub-custodian appointed by that custodian), where the person holding the scheme property or other assets is:
        (i) the licensee and the licensee has $500,000 NTA; or
        (ii) the custodian or sub-custodian and the custodian has $500,000 NTA; or
    (c) the only scheme property and other assets of the scheme(s) that are not held under paragraph (a) or (b) of this condition are special custody assets, each of which is held by:
        (i) the licensee; or
        (ii) a custodian that has the same level of NTA as the licensee is required to have under the remainder of this condition; or
        (iii) the members of the scheme;

    in which case the licensee must hold NTA of 0.5% of the value of:
    (d) assets (including mortgages held by members of a mortgage scheme and managed as part of the scheme); plus
    (e) any other scheme property not counted in calculating the value of assets;

    of the registered scheme(s) operated by the licensee with a minimum NTA requirement of $50,000 and a maximum NTA requirement of $5 million.

12. The custodian need not have the required NTA under paragraph 11(c)(ii) of this licence if the only assets it holds for the scheme are those contained in paragraphs (a), (c) or (h) of the definition of special custody assets under this licence, or if the audited trust account is a regulated trust account, described in paragraph (d) of the definition of special custody assets under this licence.

**Financial Requirements for Holding Client Money or Property**

13. If at any time the licensee:
    (a) is required to hold money in a separate account under Division 2 of Part 7.8; or
    (b) holds money or other property on trust for a client or is required to do so under regulation 7.8.07(2) of the Corporations Regulations or otherwise; or
    (c) has the power to dispose of a client's property under power of attorney or otherwise;

    the licensee must ensure that the licensee has at least $50,000 in surplus liquid funds ("SLF") unless the total value of the money and property for all clients is less than $100,000 excluding:

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(d) money that has satisfied a client's liability on an insurance contract where the licensee is acting under a binder or section 985B applies, or property acquired by investment of that money; or

(e) the value of property where the licensee merely holds a document of title, and the client has legal title to the property.

**Financial Requirements for Licensee Transacting with Clients**

14. If the licensee incurs actual or contingent liabilities of the relevant kind by entering into a transaction with a client(s) in the course of providing a financial service to the client(s), the licensee must have adjusted surplus liquid funds ("ASLF") of the sum of:

(a) $50,000; plus

(b) 5% of adjusted liabilities between $1 million and $100 million; plus

(c) 0.5% of adjusted liabilities for any amount of adjusted liabilities exceeding $100 million,

up to a maximum ASLF of $100 million.

This condition does not apply to the licensee if:

(d) the total of:

(i) the current liabilities that would be included in the calculation of the licensee's adjusted liabilities; and

(ii) the contingent liabilities that if crystallised would be a current liability and be included in the calculation of the licensee's adjusted liabilities,

is less than $100,000; or

(e) the licensee has no:

(i) liabilities to clients that would be included in calculating its adjusted liabilities; or

(ii) contingent liabilities to clients which if crystallised would be included in calculating its adjusted liabilities,

other than under debentures the licensee issued under Chapter 2L.

For the purpose of paragraphs (d) and (e), the licensee may disregard a liability or a contingent liability that:

(f) is a contingent liability that is neither a derivative nor a liability from underwriting securities or managed investment products; or

(g) the licensee reasonably estimates has a probability of less than 5% of becoming an actual liability; or

(h) is covered by money or property that the licensee holds in a separate account under Part 7.8 or on trust for clients; or

(i) is adequately secured as defined in paragraph (a) or (b) of the definition of "adequately secured" under this licence; or

(j) is a liability incurred by entering into a transaction on a licensed market that is to be settled using a clearing and settlement facility, the operation of which is authorised by an Australian CS facility licence; or

(k) is under a foreign exchange contract and the licensee is required to have $10 million of tier one capital under another condition of this licence because the licensee has entered a foreign exchange contract as principal; or

(l) is under a derivative where:

(i) the licensee does not make a market in derivatives; and

(ii) the licensee entered into the dealing for the purposes of managing a financial risk; and

(iii) either the licensee's dealings in derivatives are not a significant part of its business or of the business of it and its related bodies corporate taken together; and

(iv) the licensee did not enter into the dealing on the instructions of another person; or

(m) is under a foreign exchange contract where the licensee:

(i) does not make a market in foreign exchange contracts; and

(ii) entered into the contract for the purposes of enabling a payment in one of the currencies under the foreign exchange contract; and

(iii) did not enter into the foreign exchange contract on the instruction of another person; or

(n) is under a margin lending facility where the licensee agrees to provide credit to another person, to the extent that any portion of the credit remains undrawn.

In this condition, a reference to a client includes a person who acquires or disposes of financial products in a transaction that the licensee entered into at a price the licensee stated in the course of making a market.

**Reporting Triggers and Requirements for Financial Requirement Conditions of this Licence**

15. The licensee must ensure the reporting requirements under conditions 16 and 17 of this licence are met where either paragraph (a) or paragraph (b) applies:

(a) the trigger points described in paragraphs (i) and (ii) below occur:

(i) the licensee has adjusted liabilities of more than $1 million and less than or equal to $100 million; and

(ii) the licensee has an ASLF of less than 5.5% of adjusted liabilities; or

(b) the trigger points described in paragraphs (i), (ii) and (iii) below occur:

(i) the licensee has adjusted liabilities of more than $100 million; and

(ii) the licensee does not have $100 million ASLF; and

(iii) the licensee has an ASLF that is less than $500,000 above the minimum ASLF required under condition 14 of this licence.

16. Where the licensee's ASLF is below the trigger points, the licensee must not enter into any transactions with clients that could give rise to further liabilities, contingent liabilities or other financial obligations until the licensee's board or other governing body has certified in writing that, having conducted reasonable enquiry into its financial position, there is no reason to believe that the licensee will fail to comply with its obligations under section 912A.

17. Where the licensee's board or other governing body has made the certification required under condition 16, the licensee must ensure that the licensee's board or other governing body certifies in writing at least monthly that, having conducted reasonable enquiry into its financial position, there is no reason to believe that the licensee will fail to comply with its obligations under section 912A until the licensee's ASLF continuously exceeds the trigger

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point for a period exceeding one month.

18. The licensee must keep each certification issued by the licensee's board or other governing body under conditions 16 and 17 of this licence for at least 5 years from the date of such certification. The licensee must provide ASIC with a copy of each certification within 3 business days of the date of each certification.

**Audit Opinion on Financial Requirements**

19. The licensee must lodge with ASIC an opinion by a registered company auditor ("the audit opinion") addressed to the licensee and ASIC for the following periods:
    (a) for each financial year, at the same time the licensee is required to lodge a balance sheet under Part 7.8; and
    (b) for any period of time that ASIC requests, by the date ASIC requests the audit opinion to be lodged,

    that states whether during:
    (c) any part of the period for which the licensee:
        (i) relied on being a market participant or a clearing participant, on a positive assurance basis, the licensee was a participant in the:
            (A) ASX market; or
            (B) Chi-X market; or
            (C) ASX 24 market, and restricted its financial services business to participating in the ASX 24 market and incidental business; or
            (D) licensed CS facility operated by ASX Clear Pty Limited; or
            (E) licensed CS facility operated by ASX Clear (Futures) Pty Limited, and restricted its financial services business to participating in the licensed CS facility and incidental business; and
        (ii) relied on being a body regulated by APRA, on a positive assurance basis, the licensee was a body regulated by APRA; and
    (d) any part of the period for which the licensee was not authorised to operate registered schemes in the capacity of a responsible entity:
        (i) in the auditor's opinion, the licensee:
            (A) complied with all the financial requirements under conditions 10 to 18 (inclusive) of this licence other than paragraph 10(c) of this licence, except for paragraph (e) of the definition of "Option 1" under this licence if the licensee purports to comply with "Option 1"; and
            (B) except for any period stated in the report when the licensee purports to comply with subparagraph 10(c)(iii), (iv) or (v), had at all times a projection (covering at least the following 3 months) that purports to, and appears on its face to comply with, paragraph (a) of the definition of "Option 1" or paragraph (a) of the definition of "Option 2" under this licence (depending on which option the licensee purports to be complying with); and
            (C) except for any period stated in the report when the licensee purports to comply with subparagraph 10(c)(iii), (iv) or (v), correctly calculated the projections on the basis of the assumptions the licensee adopted for the projections described in subparagraph (d)(i)(B) of this condition; and

(D) for any period when the licensee relied on subparagraph 10(c)(iii) of this licence, has obtained from an Australian ADI or a foreign deposit-taking institution approved in writing by ASIC as an eligible provider an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee, or the amount for which the licensee is liable to its creditors at the time of demand to the licensee's creditors or a trustee for the licensee's creditors; and

(E) for any period when the licensee relied on subparagraph 10(c)(iv), following an examination of the documents prepared for subparagraph 10(c)(iv)(C), the licensee complied with subparagraph 10(c)(iv)(A) and subparagraph 10(c)(iv)(C) for the period to which the report relates; and

(F) for any period when the licensee relied on subparagraph 10(c)(v), the licensee complied with subparagraph 10(c)(v)(A) and (B); and

(G) for any period when the licensee relied on Alternative A in subparagraph 10(c)(v)(E), the parent entity has provided an enforceable and unqualified commitment to pay on demand from time to time an unlimited amount to the licensee or to meet the licensee's liabilities.

(ii) except for any period stated in the report when the licensee purports to comply with subparagraph 10(c)(iii), (iv) or (v), following an examination of the documents the licensee relies on in complying with "Option 1" or "Option 2" as defined under this licence, the auditor has no reason to believe that:

(A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) for managing the risk of having insufficient financial resources to comply with the conditions of this licence; or

(B) the licensee failed to comply with the cash needs requirement using either "Option 1" or "Option 2" as defined under this licence (as applicable) except for:

(1) paragraphs (a), (c) and (e) of the definition of "Option 1" as defined under this licence; or

(2) paragraphs (a) and (c) of the definition of "Option 2" as defined under this licence; or

(C) if the licensee relied on "Option 1" as defined under this licence, the assumptions the licensee adopted for its projection were unreasonable; or

(D) if the licensee relied on "Option 2" as defined under this licence, the basis for the selection of assumptions to meet the requirements for the projection adopted was unreasonable; and

(iii) for any period when the licensee relied on subparagraph 10(c)(iv), following an examination of the documents prepared for subparagraph 10(c)(iv)(C), the auditor has no reason to believe that:

(A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) for managing the risk of having insufficient financial resources to comply with the conditions in this licence; and

(B) the basis for the selection of the assumptions adopted was unreasonable; and

(iv) for any period when the licensee relied on subparagraph 10(c)(v) under Alternative B, following an examination of the documents prepared for Alternative B, the auditor has no reason to believe that:

(A) the licensee did not satisfy the requirements of paragraph 912A(1)(h) for managing the risk of having insufficient financial resources to comply with the conditions in this licence; or

(B) the basis for the selection of the assumptions adopted was unreasonable.

**Professional Indemnity Compensation Requirements**

20. The licensee must maintain an insurance policy covering professional indemnity and fraud by officers that:

(a) is adequate having regard to the nature of the activities carried out by the licensee under the licence; and

(b) covers claims amounting in aggregate to whichever is the lesser of:

(i) $5 million; or

(ii) the sum of the value of all IDPS property of all IDPS for which it is the operator and all scheme property of all registered schemes for which it is the responsible entity.

**External Disputes Resolution Requirements**

21. Where the licensee provides financial services to retail clients, the licensee must be a member of one or more External Disputes Resolution Scheme(s) ("EDRS") which covers, or together cover, complaints made by retail clients in relation to the provision of all of the financial services authorised by this licence.

22. Where the licensee ceases to be a member of any EDRS, the licensee must notify ASIC in writing within 3 business days:

(a) the date the licensee ceases membership of the EDRS(s); and

(b) the reasons the licensee's membership of the EDRS(s) has ceased (including circumstances where the EDRS is no longer operating, failure by the licensee to renew their membership of the EDRS or where the EDRS has terminated the licensee's membership of the EDRS); and

(c) details of the new EDRS(s) the licensee intends to or has joined (including the date the membership commences and the name of the EDRS); and

(d) details that provide confirmation that the licensee is covered by EDRS(s) covering complaints made by retail clients in relation to the provision of all of the financial services authorised by this licence.

**Agreement with Holder of Financial Product on Trust**

23. If the licensee:

(a) operates a registered scheme in the capacity of a responsible entity; or

(b) operates an IDPS as an IDPS operator; or

(c) provides a custodial or depository service;

and in the course of operating that scheme or providing that service the licensee enters into an arrangement:

(d) with another person ("holder") to hold scheme property, IDPS property or to hold financial products on trust for or on behalf of the licensee or another person; or

(e) between a responsible entity or IDPS operator in that capacity and another person ("master custodian") under which the master custodian is authorised to arrange for a third person ("subcustodian") directly or indirectly to hold scheme property or IDPS property; or

(f) with a subcustodian arranged by a master custodian;

the licensee must ensure that at all times:

(g) the arrangement is covered by a contract that is in writing; and

(h) the contract clearly specifies:

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(i) the nature of the arrangement and the obligations of each party; and

(ii) the rights that the parties will have in relation to ongoing review and monitoring of the holder or any subcustodian or for an agreement made by the licensee with a master custodian ("master agreement"), the master custodian and the standards against which their performance will be assessed; and

(iii) how the holder, any subcustodian, or for a master agreement, the master custodian will certify that it complies with, and will continue to comply with, the requirements of ASIC Regulatory Guide 133 (formerly referred to as Policy Statement 133) when read in conjunction with ASIC Regulatory Guides 148 and 167 (formerly referred to as Policy Statements 148 and 167) (as each of those Regulatory Guides is in force as at the date of this licence); and

(iv) how instructions will be given to the holder, subcustodian or for a master agreement, the master custodian; and

(v) how the client of the licensee will be compensated if the client suffers any loss due to a failure by the holder, any subcustodian, or for a master agreement, the master custodian, to comply with its duties or to take reasonable care based on the standards applying in the relevant markets for the assets held and the extent to which the holder, any subcustodian, or for a master agreement, the master custodian, must maintain a minimum level of professional indemnity insurance; and

(vi) that the holder, any subcustodian, and for a master agreement, the master custodian is prohibited from taking a charge, mortgage, lien or other encumbrance over, or in relation to, the assets held under the arrangement unless it is for expenses and outlays made within the terms of the contract (but not including any unpaid fees of the holder, master custodian or subcustodian) or in accordance with the licensee's instructions; and

(vii) in the case of a responsible entity or IDPS operator who has a master agreement, what should be in the written contract with any subcustodian used in accordance with these conditions including the liability of the subcustodian to the master custodian and the licensee when acts or omissions of the subcustodian are in breach of the subcustodian's obligations; and

(viii) how records of the assets held will be kept and maintained by the holder, any subcustodian or for a master agreement, the master custodian; and

(ix) requirements for reporting by the holder, any subcustodian, or for a master agreement, the master custodian, including notifications of any dealing in or transfers of the assets; and

(x) requirements for the holder to provide all reasonable access and assistance to any registered company auditor engaged to conduct an audit in relation to the licensee.

The contract is not required to contain the matters specified in paragraph (iii), (v) or (vi) or to be in writing to the extent that the licensee establishes by documentary evidence that it is not practicable for the licensee to:

(a) hold the relevant financial products (being property outside Australia) itself; or

(b) engage a custodian that is willing to include such matters in the contract to hold that property on reasonable commercial terms;

and provided that the licensee has disclosed to the client that these terms will not be included.

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**Property**

24. The licensee must, in relation to a registered scheme for which the licensee is the responsible entity, ensure that at all times the holder of any scheme property:
    (a) complies with the requirements of ASIC Regulatory Guide 133 (formerly referred to as Policy Statement 133) (as in force as at the date of this licence) relating to the holding of scheme property; and
    (b) maintains proper records identifying the scheme property.

**Prohibition to Operate Managed Discretionary Account Service**

25. The licensee must not provide an MDA service to a retail client except when operating a registered scheme.

**Retention of Financial Services Guides, Statements of Advice and Material Relating to Personal Advice**

26. Where the licensee provides financial product advice to retail clients, the licensee must ensure that copies (whether in material, electronic or other form) of the following documents are retained for at least the period specified:
    (a) each Financial Services Guide ("FSG") (including any Supplementary FSG) given by or on behalf of the licensee, or by any authorised representative of the licensee while acting in that capacity - for a period commencing on the date of the FSG and continuing for at least 7 years from when the document was last provided to a person as a retail client; and
    (b) a record of the following matters relating to the provision of personal advice to a retail client (other than personal advice for which a Statement of Advice ("SOA") is not required or for which a record of the advice is kept in accordance with subsection 946B(3A) ):
        (i) the client's relevant personal circumstances within the meaning of subparagraph 945A(1)(a)(i); and
        (ii) the inquiries made in relation to those personal circumstances within the meaning of subparagraph 945A(1)(a)(ii); and
        (iii) the consideration and investigation conducted in relation to the subject matter of the advice within the meaning of paragraph 945A(1)(b); and
        (iv) the advice, including reasons why advice was considered to be "appropriate" within the meaning of paragraphs 945A(1)(a) to (c),

    for a period of at least 7 years from the date that the personal advice was provided;
    (c) any SOA provided by or on behalf of the licensee, or by any authorised representative of the licensee while acting in that capacity - for a period of at least 7 years from the date the document was provided to the client.

27. The licensee must establish and maintain measures that ensure, as far as is reasonably practicable, that it and its representatives comply with their obligation to give clients an FSG as and when required under the Act. The licensee must keep records about how these measures are implemented and monitored.

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### Terms and Definitions

In this licence references to paragraphs, subsections, sections, Divisions, Parts and Chapters are references to provisions of the Corporations Act 2001 ("the Act") unless otherwise specified. Headings contained in this licence are for ease of reference only and do not affect interpretation. Terms used in this licence have the same meaning as is given to them in the Act (including, if relevant, the meaning given in Chapter 7) and the following terms have the following meanings:

**actual or contingent liabilities of the relevant kind** means:

(a) an actual or contingent monetary liability; or

(b) an actual or contingent liability under a non-standard margin lending facility, in the circumstances determined under the terms of the facility, to transfer marketable securities to the client.

**adequately secured** means:

(a) secured by an enforceable charge over a financial product (other than a financial product issued by the licensee or its associate) if:

(i) the financial product is:

(A) regularly traded on:

(1) a financial market (as defined in subsection 767A(1) and disregarding subsection 767A(2)) operated by a market licensee or a licensee other than the licensee or its associate that in the reasonable opinion of the licensee produces sufficiently reliable prices to assess the value of the security provided by the charge;

(2) an ASIC-approved foreign market under ASIC Regulatory Guide 72 (formerly referred to as Policy Statement 72) as at the date of this licence; or

(3) a foreign market approved in writing for the purpose by ASIC; or

(B) an interest in a registered scheme for which withdrawal prices are regularly quoted by the responsible entity and the licensee believes on reasonable grounds that withdrawal may be effected within 5 business days; and

(ii) the market value of the financial product is:

(A) if the financial product is a debt instrument—at least 109% of the amount owing; or

(B) otherwise—at least 120% of the amount owing; or

(b) secured by a registered first mortgage over real estate that has a fair market valuation at least equal to 120% of the amount owing; or

(c) owing from an eligible provider; or

(d) secured by an enforceable charge over amounts owing to another licensee which themselves are adequately secured.

**adjusted assets** means the value of total assets as they would appear on a balance sheet at the time of calculation made up for lodgement as part of a financial report under Chapter 2M if the licensee were a reporting entity:

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(a) minus the value of excluded assets that would be included in the calculation; and

(b) minus the value of any receivable of the licensee that would be included in the calculation, up to the amount that the licensee has excluded from adjusted liabilities on the basis that there is an enforceable right of set-off with that receivable; and

(c) minus the value of any assets that would be included in the calculation that are encumbered as a security against liability to a person that provides a security bond to ASIC up to the amount of the bond; and

(d) minus the value of any assets that would be included in the calculation that may be required to be applied to satisfy a liability under a credit facility that is made without recourse to the licensee up to the amount of that liability excluded from adjusted liabilities; and

(e) plus

(i) the amount of any eligible undertaking that is not an asset; or

(ii) if the eligible undertaking is for an unlimited amount, an unlimited amount;

provided that if the eligible undertaking is given by a person who is an eligible provider only because of paragraph (b) of the definition of "eligible provider" under this licence, the amount added may be no more than one quarter of the eligible provider's net assets (excluding intangible assets) as shown in the most recent audited financial statements lodged with ASIC; and

(f) for calculating ASLF, plus the value of any current assets of any trust (other than a registered scheme) of which the licensee is trustee as if they would appear on the balance sheet as assets of the licensee except to the extent the value exceeds the sum of:

(i) the current liabilities of the trust as if they would appear on the balance sheet as assets of the licencee; and

(ii) any adjustments to ASLF that are a result of current assets, liabilities and contingent liabilities of the trust for accounting purposes being included in calculating adjustments; and

(g) for calculating ASLF, plus the value of the applicable percentage as set out in paragraphs (c)(i) and (iii) of the definition of "standard adjustments" under this licence of the value of any current assets that would be acquired in return for paying a contingent liability as set out in paragraphs (c)(i) and (iii) of the definition of "standard adjustments" under this licence up to the value of the applicable percentage of the relevant contingent liability.

**adjusted liabilities** means the amount of total liabilities as they would appear on a balance sheet at the time of calculation made up for lodgement as part of a financial report under Chapter 2M if the licensee were a reporting entity:

(a) minus the amount of any liability under any subordinated debt approved by ASIC that would be included in the calculation; and

(b) minus the amount of any liability that is the subject of an enforceable right of set-off that would be included in the calculation, if the corresponding receivable is excluded from adjusted assets; and

(c) minus the amount of any liability under a credit facility that would be included in the calculation, if it is made without recourse to the licensee; and

(d) for calculating ASLF, plus the amount of the total current liabilities of any trust (other than a registered scheme) of which the licensee is trustee as if they would appear on the balance sheet as liabilities of the trustee; and

(e) plus the value of any assets that are encumbered as a security against another person's liability where the licensee is not otherwise liable, but only up to the lower of:
  (i) the amount of that other person's liability; or
  (ii) the value of the assets encumbered after deducting any adjustments under this licence.

**adjusted surplus liquid funds or ASLF** means surplus liquid funds minus either:
(a) the standard adjustments (refer to the definition of "standard adjustments" under this licence); or
(b) such other adjustments as ASIC may from time to time consent to in writing.

**ASX market** means the licensed financial market operated by ASX Limited.

**ASX 24 market** means the licensed financial market operated by Australian Securities Exchange Limited.

**Chi-X market** means the licensed financial market operated by Chi-X Australia Pty Limited.

**clearing participant** means a participant as defined in section 761A in relation to a clearing and settlement facility ("CS Facility") where that clearing and settlement facility is the licensed CS facility operated by ASX Clear Pty Limited or ASX Clear (Futures) Pty Limited.

**customer service representative** means call centre staff or front desk staff who deal with initial queries from customers.

**derivative** means "derivatives" as defined in section 761D (including regulation 7.1.04 of the Corporations Regulations) and:
(a) includes "managed investment warrants" as defined in this licence; and
(b) excludes "derivatives" that are "foreign exchange contracts" as defined in this licence.

**eligible custodian** means:
(a) an Australian ADI; or
(b) a market participant or a clearing participant of ASX Clear Pty Limited; or
(c) a subcustodian appointed by a person of the kind referred to in (a) or (b) of this definition.

**eligible provider** means:
(a) an Australian ADI; or
(b) an entity (other than a registered scheme of which the licensee or the licensee's associate is the responsible entity):

ASIC

(i) whose ordinary shares are listed on a licensed market or an ASIC-approved foreign exchange under ASIC Regulatory Guide 72 (formerly referred to as Policy Statement 72) as at the date of this licence; and

(ii) that had net assets (excluding intangible assets) of more than $50 million, as shown in the most recently audited financial statements of the provider lodged with ASIC; and

(iii) that the licensee has no reason to believe no longer has net assets of at least that amount; or

(c) an Australian government (i.e. the Commonwealth or a State or Territory government) or a government of a country that is a member of the Organisation for Economic Co-operation and Development ("OECD country government"), or an agency or instrumentality of an Australian or OECD country government; or

(d) a foreign deposit-taking institution that is regulated by an ASIC - approved regulator; or

(e) a foreign deposit-taking institution approved in writing by ASIC for this purpose; or

(f) an Australian CS facility licensee; or

(g) an entity approved by ASIC in writing for this purpose.

**eligible undertaking** means the amount of a financial commitment that is:

(a) payable on written demand by the licensee (disregarding any part previously paid or any amount that would be repayable as a current liability or, for calculating NTA, as a liability by the licensee if money were paid), provided by an eligible provider in the form of an undertaking to pay the amount of the financial commitment to the licensee, and that:

(i) is an enforceable and unqualified obligation; and

(ii) remains operative (even if, for example, the licensee ceases to hold an AFS licence) until ASIC consents in writing to the cancellation of the undertaking; or

(b) approved in writing by ASIC as an eligible undertaking.

**excluded assets** means:

(a) intangible assets (i.e. non-monetary assets without physical substance); and

(b) except when allowed under paragraphs (e) or (f) of this definition, assets owing or receivables ("receivables") from, or assets invested in, any person who:

(i) is an associate of the licensee; or

(ii) was an associate of the licensee at the time the liability was incurred or the investment was made; or

(iii) became liable to the licensee because of, or in connection with, the acquisition of interests in a managed investment scheme the licensee operates; and

(c) except when allowed under paragraph (g) of this definition, assets:

(i) held as a beneficial interest or an interest in a managed investment scheme; or

(ii) invested in any superannuation product, in respect of which the licensee or its associate may exercise any form of power or control; and

(d) except when allowed under paragraphs (e) or (f) of this definition, receivables from the trustee of any trust in respect of which the licensee or its associate may exercise any form of power or control; and

(e) despite paragraphs (b) and (d) of this definition, a receivable is not an excluded asset to the extent that:

(i) it is adequately secured; or

(ii) the following apply:

(A) it is receivable as a result of a transaction entered into by the licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the licensee on an arm's length basis; and

(B) no part of the consideration in relation to the transaction is, in substance, directly or indirectly invested in the licensee; and

(C) the total value of such assets (before any discount is applied) is not more than 20% of the assets less liabilities of the licensee; and

(D) for the purposes of calculating ASLF, the amount is further discounted by 10% of the value after any adjustment required by paragraph (a) or (b) of the definition of "adjusted surplus liquid funds" in this licence; or

(iii) the following apply:

(A) it is receivable from an insurance company that is a body regulated by APRA and results from a transaction entered into by the licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the licensee on an arm's length basis; and

(B) there is no reason to believe that any amount invested in the licensee would not have been invested if the transaction that caused the receivable had not taken place or was not at the time of the investment expected to take place; and

(C) there is no reason to believe that the recoverability of the receivable will materially depend on the value of an investment by any person in the licensee; and

(D) the total value of the receivables under this subparagraph (iii) before any adjustment required by paragraph (a) or (b) of the definition of "adjusted surplus liquid funds" in this licence is applied is not more than 60% of the adjusted liabilities of the licensee disregarding this subparagraph (iii); or

(iv) ASIC consents in writing to the licensee treating the amount owing as not being an excluded asset; and

(f) despite paragraphs (b) and (d) of this definition, the licensee can include a receivable amount to the extent that it is owing by way of fees from, or under rights of reimbursement for expenditure by the licensee out of property of, a superannuation entity as defined in the Superannuation Industry (Supervision) Act 1993, an IDPS or a registered scheme to the extent that the receivable:

(i) exceeds amounts invested by the entity, IDPS or scheme in, or lent (other than by way of a deposit with an Australian ADI in the ordinary course of its banking business) directly or indirectly by the entity, IDPS or scheme to, the licensee, a body corporate the licensee controls, a body corporate that controls the licensee or a body corporate that the licensee's controller controls; and

(ii) if receivable by way of fees, represents no more fees than are owing for the last 3 months; and

(iii) if receivable under rights of reimbursement for expenditure by the licensee, has not been receivable for more than 3 months; and

(g) despite paragraph (c) of this definition, the licensee does not have to exclude a managed investment product unless any part of the amount invested is, in substance, directly or indirectly, invested in the licensee.

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**financial asset** means cash, cheques, orders for payment of money, bills of exchange, promissory notes, securities, deposit products and interests in managed investment schemes (including where the managed investment scheme invests in direct real property or mortgages) but does not include a derivative.

**foreign exchange contracts** means "foreign exchange contracts" that are financial products and includes "derivatives", as defined in section 761D (including regulation 7.1.04 of the Corporations Regulations), that are foreign exchange contracts.

**incidental property** means:

(a) assets of any kind which are necessary for, or incidental to the effective operation of the scheme, the total value of which, and the total liability that may arise from the holding of which, does not exceed 10% of the value of the assets net of liabilities other than liabilities to members as members of the scheme; and

(b) cash (including foreign currency), deposits or current accounts with an Australian ADI or units in a cash management trust that are held for no more than 3 months pending investment in assets to which the scheme relates, or expenditure or distribution to members, and foreign exchange contracts that are not derivatives for section 761D (including regulation 7.1.04 of the Corporations Regulations) held for enabling payment in the foreign currency or receipt in Australian currency of proceeds of receipts in foreign currency; and

(c) derivatives and foreign exchange contracts that are derivatives under section 761D (including regulation 7.1.04 of the Corporations Regulations), where:

  (i) the value or amount of the derivative or foreign exchange contract will ultimately be determined, derived or varied by reference to something else for the purposes of paragraph 761D(1)(c) which is related to or may significantly and directly affect the receipts or costs of the fund; and

  (ii) the derivative or foreign exchange contract is acquired or disposed of by the licensee as a hedge which has the primary purpose of avoiding or limiting the financial consequences of fluctuations in, or in the value of, receipts or costs of the fund.

**managed investment warrant** means a financial product:

(a) that is a financial product of the kind referred to in subparagraph 764A(1)(b)(ii) or 764A(1)(ba)(ii); and

(b) would be a derivative to which section 761D applies apart from the effect of paragraph 761D(3)(c); and

(c) that is transferable.

**market participant** means a participant as defined in section 761A in relation to a financial market:

(a) in the ASX market, that is required to comply with the ASIC Market Integrity Rules (ASX Market) 2010 that relate to financial requirements, taking into account any waiver by ASIC; or

(b) in the Chi-X market, that is required to comply with the ASIC Market Integrity Rules (Chi-X Australia Market) 2011 that relate to financial requirements, taking into account any waiver by ASIC; or

(c) in the ASX 24 market, that:

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(i) restricts its financial services business to participating in the ASX 24 market and incidental business; and

(ii) complies with the ASIC Market Integrity Rules (ASX 24 Market) 2010 that relate to financial requirements, taking into account any waiver by ASIC.

**MDA service** means a service with the following features:

(a) a person ("the client") makes client contributions; and

(b) the client agrees with another person that the client's portfolio assets will:

(i) be managed by that other person at their discretion, subject to any limitation that may be agreed, for purposes that include investment; and

(ii) not be pooled with property that is not the client's portfolio assets to enable an investment to be made or made on more favourable terms; and

(iii) be held by the client unless a beneficial interest but not a legal interest in them will be held by the client; and

(c) the client and the person intend that the person will use client contributions of the client to generate a financial return or other benefit from the person's investment expertise.

**net tangible assets or NTA** means adjusted assets minus adjusted liabilities.

**old law securities options contracts** means "options contracts" as defined under section 9 of the Act immediately prior to 11 March 2002 which were "securities" as defined under subsection 92(1) of the Corporations Act immediately prior to 11 March 2002.

**Option 1** means the reasonable estimate projection plus cash buffer basis where the licensee is required to:

(a) prepare a projection of the licensee's cash flows over at least the next 3 months based on the licensee's reasonable estimate of what is likely to happen over this term; and

(b) document the licensee's calculations and assumptions, and describe in writing why the assumptions relied upon are the appropriate assumptions; and

(c) update the projection of the licensee's cash flows when those cash flows cease to cover the next 3 months or if the licensee has reason to suspect that an updated projection would show that the licensee was not meeting paragraph (d) of this definition; and

(d) demonstrate, based on the projection of the licensee's cash flows, that the licensee will have access when needed to enough financial resources to meet its liabilities over the projected term of at least 3 months, including any additional liabilities the licensee projects will be incurred during that term; and

(e) hold (other than as trustee) or be the trustee of a relevant trust that holds, in cash an amount equal to 20% of the greater of:

(i) the cash outflow for the projected period of at least 3 months (if the projection covers a period longer than 3 months, the cash outflow may be adjusted to produce a 3-month average); or

(ii) the licensee's actual cash outflow for the most recent financial year for which the licensee has prepared a profit and loss statement, adjusted to produce a 3-month average.

For the purposes of this definition references to the licensee's cash flow include the licensee's own cash flow and any cash flow of a relevant trust but do not include cash flows of any other trust.

For the purposes of paragraph (e) of this definition, "cash" means:

(A) current assets valued at the amount of cash for which they can be expected to be exchanged within 5 business days; or

(B) a commitment to provide cash from an eligible provider that can be drawn down within 5 business days and has a maturity of at least a month;

but does not include any cash in a relevant trust if the licensee has reason to believe that the cash will not be available to meet all of the projected cash flows of the licensee.

**Option 2** means the cash needs requirement on the contingency-based projection basis where the licensee is required to:

(a) prepare a projection of the licensee's cash flows over at least the next 3 months based on the licensee's estimate of what would happen if the licensee's ability to meet its liabilities over the projected term (including any liabilities the licensee might incur during the term of the projection) was adversely affected by commercial contingencies taking into account all contingencies that are sufficiently likely for a reasonable licensee to plan how they might manage them; and

(b) document the licensee's calculations and assumptions, and describe in writing why the assumptions relied upon are the appropriate assumptions; and

(c) update the projection of the licensee's cash flows when those cash flows cease to cover the next 3 months or if the licensee has reason to suspect that an updated projection would show that the licensee was not meeting paragraph (d) of this definition; and

(d) demonstrate, based on the projection of the licensee's cash flow, that the licensee will have access when needed to enough financial resources to meet its liabilities over the projected term of at least 3 months, including any additional liabilities the licensee might incur during that term.

For the purposes of this definition references to the licensee's cash flow include any cash flow of a relevant trust.

**regulated trust account** means:

(a) a trust account maintained by a trustee company that provides traditional services; or

(b) a trust account maintained by a solicitor unless money in the account includes money that is excluded from regulation as trust money under the laws of the State or Territory relating to legal practitioners that are relevant to the operation of the trust account by the solicitor; or

(c) a real estate agent's trust account; or

(d) a trust account maintained by an entity other than the licensee and that provides protections similar to the accounts described in paragraphs (a) to (c) of this definition, and is approved by ASIC for the purpose in writing.

**relevant trust** means, for the purposes of the definitions of "Option 1" and "Option 2" of this licence, a trust:

(a) where substantially all of the financial services business carried on by the licensee is carried on as trustee of a trust;

(b) that is not a registered scheme or a superannuation entity as defined in subsection 10(1) of the Superannuation Industry (Supervision) Act 1993; and

(c) that is not a trust to which a trustee company provides traditional services.

**standard adjustments** means:

(a) discounts as follows:

(i) 8% for the values that reflect obligations to pay the licensee a certain sum maturing beyond 12 months unless the interest rate applicable is reset to reflect market interest rates at least annually; and

(ii) 16% for the values that reflect any assets other than:

(A) an obligation to pay the licensee a certain sum; or

(B) a derivative; or

(C) an interest in property held in trust by another licensee under Division 3 of Part 7.8 or the rights to money held by another licensee in an account under section 981B; and

(b) 8% of the values that reflect others' obligations to pay the licensee a certain sum except to the extent that the asset is adequately secured or is a right against another licensee in respect of money or property held by that other licensee in an account under section 981B or held in trust under Division 3 of Part 7.8; and

(c) the following amounts for contingent liabilities and contingent liabilities of any trust (other than a registered scheme) of which the licensee is trustee:

(i) 5% of any contingent liabilities that can be quantified under an underwriting or sub-underwriting of financial products except:

(A) during the 5 business days after the commitment is assumed; and

(B) during any period it is unlawful to accept applications for the financial products to which the underwriting relates (such as under subsection 727(3) or section 1016B) and the period ending 5 business days after the first day on which it becomes lawful to accept applications; and

(C) to the extent that the underwriter holds funds from persons seeking to acquire the financial products subject to the underwriting; and

(ii) 5% of the potential liability of any contingent liabilities that can be quantified under a derivative other than to the extent there is an offsetting position in any of the following or a combination of the following:

(A) the "something else" for the purposes of paragraph 761D(1)(c); and

(B) another derivative relating to that something else; and

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(C) a thing that is so similar to the something else as to make the probability of net loss from the liability under the derivative exceeding any increase in the value of the thing less than 5% in the reasonable and documented opinion of the licensee,

except to the extent that the licensee is of the reasonable opinion that the risk that they will become liabilities (or become liabilities to a greater extent than taken into account for the purposes of applying the adjustment) because of a change in the price or value of the something else is trivial; and

(iii) 20% of the potential liability of any contingent liabilities that can be quantified under a guarantee or indemnity;

(d) the relevant percentage as set out in subparagraphs (c)(ii) and (c)(iii) of the amounts that in the licensee's reasonable opinion is the maximum amount that the licensee may be liable for in relation to a contingent liability referred to in paragraph (c) where the maximum liability cannot be quantified; and

(e) where the licensee has agreed to sell an asset that it does not hold, the amount of the adjustment that would apply if it held that asset is to be applied against adjusted assets.

For the purposes of this definition, the risk that a contingent liability will become a liability may be treated as trivial if the probability that this will occur is reasonably estimated by the licensee as less than 5%.

For the purposes of paragraphs (a) and (b) of this definition, discounts apply against the value of current assets:

(f) used in calculating "adjusted assets" in this licence; and

(g) of any trust (other than a registered scheme) of which the licensee is a trustee (see subparagraph (f)(ii) of the definition of "adjusted assets" in this licence); and

(h) that are deducted under paragraph (c) of the definition of "adjusted assets" in this licence as assets to which recourse may be had for a liability of the licensee where the licensee's liability is limited to those assets but the total discounts applied to those assets shall not exceed any excess of the value of the licensee's assets to which recourse may be taken over the amount of the liability; and

(i) that is the applicable percentage of the current assets that would be acquired in return for paying a contingent liability referred to in subparagraph (c)(i) or (iii) of this definition including rights against a sub-underwriter (see paragraph (g) of the definition of "adjusted assets" in this licence).

The licensee does not have to apply the discounts to the value of amounts payable from a client in the ordinary course of its financial services business for financial products that the client has agreed to buy, if the money is required to be—and in the reasonable estimation of the licensee probably will be—paid no more than 5 business days after the client became liable.

**surplus liquid funds or SLF** means adjusted assets minus adjusted liabilities:

(a) plus any non-current liabilities that were used in calculating adjusted liabilities and the value of any assets that are encumbered (where the licensee is not liable and the assets do not secure another person's current liability) that were deducted when calculating the licensee's adjusted liabilities; and

(b) minus any non-current assets that were used in calculating adjusted assets; and

(c) if the licensee is an eligible provider under paragraph (b) of the definition of "eligible provider" under this licence—plus one quarter of the value of the licensee's non-current assets minus any intangible assets and the amount of its non-current liabilities.

**trigger point** means either of the trigger points described in condition 15 of this licence.

**value of assets** means, for the purpose of condition 20 of this licence, the value of assets and other scheme property and/or IDPS property determined as follows:

(a) in the case of assets that would be recognised in preparing a balance sheet for members under Chapter 2M - their value as if at that time such a balance sheet was being prepared; and

(b) in the case of any other scheme property and/or IDPS property - its market value. For the purpose of this calculation mortgages held by members of a registered scheme and managed as part of the scheme must be treated as assets of the scheme.

PW-8

# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Kosho Pty Ltd & Anor v Trilogy Funds Management Ltd, Trilogy Funds Management Ltd & Ors v Fujino* [2013] QSC 135 |
| PARTIES: | **KOSHO PTY LTD ACN 104 663 792**<br>(first plaintiff)<br>and<br>**CITY CO PTY LTD ACN 099 0723 748**<br>(second plaintiff)<br>v<br>**TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679**<br>(defendant)<br><br>**TRILOGY FUNDS MANAGEMENT LIMITED ACN 020 383 679 IN ITS CAPACITY AS THE CUSTODIAN OF THE PACIFIC FIRST MORTGAGE FUND**<br>(first plaintiff)<br>and<br>**THE TRUST COMPANY (AUSTRALIA) LIMITED ACN 000 000 993 IN ITS CAPACITY AS THE CUSTODIAN OF THE PACIFIC FIRST MORTGAGE FUND**<br>(second plaintiff)<br>and<br>**THE PUBLIC TRUSTEE OF QUEENSLAND**<br>(third plaintiff)<br>v<br>**RIEKO FUJINO**<br>(defendant) |
| FILE NOS: | BS 4728 of 2010<br>BS 10543 of 2010 |
| DIVISION: | Trial Division |
| PROCEEDING: | Claim |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 29 May 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 24 – 27 September 2012, 2 October 2012, 26 – 27 November 2012 and 28 March 2013 |
| JUDGE: | Applegarth J |
| ORDER: | **1. Direct the plaintiffs in the Fujino proceeding to submit draft minutes of judgment in each proceeding** |

**in accordance with these reasons, namely:**

a) **judgment for nominal damages for breach of contract in the Kosho proceeding and the plaintiffs' claims in the Kosho proceeding otherwise be dismissed; and**

b) **judgment for the plaintiffs in the Fujino proceeding.**

**2. Liberty to the parties to make submissions on costs and the form of orders.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where developer (Kosho) entered into a finance facility with a lender (Trilogy) for a proposed development on the Gold Coast – where offer of finance subject to numerous Special Conditions – where Special Condition (p) required an "unconditional copy of the sale contract for the commercial property" to be provided and a 10 per cent deposit – whether Kosho's provision of a Put and Call Option Deed and Security Bond satisfied Special Condition (p)

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – CONDITIONS – GENERAL MATTERS – where Special Condition (s) required Trilogy to prepare a deed of assignment and consent which was satisfactory to Trilogy as lender and the Department of Main Roads – where Kosho claims that Trilogy engaged in unreasonable delay in negotiating and preparing a satisfactory deed – whether the delay by Trilogy was unreasonable

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where Kosho alleges certain terms are implied into the finance facility– whether those terms meet the conditions for implication – whether a duty of good faith should be implied – whether Trilogy breached any implied terms

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTION FOR BREACH OF CONTRACT – REMOTENESS AND CAUSATION – GENERAL PRINCIPLES – where the Kosho and a third party mortgagor seek damages for loss of the opportunity to derive a profit from proposed developments and loss of equity in their respective properties – whether any loss or damage was

caused by Trilogy's alleged breach of contract – whether the plaintiffs have proved the quantum of their claimed loss and damage

*Australian Securities and Investments Commission Act* 2001 (Cth) s 12DA
*Competition and Consumer Act* 2010
*Trade Practices Act* 1974 (Cth) s 51AC, s 52

*Attorney-General (NSW) v World Best Holdings Ltd* [2005] NSWCA 261; (2005) 63 NSWLR 557, applied
*Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104, cited
*BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] HCA 40; (1977) 180 CLR 266, cited
*Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187; (2001) 69 NSWLR 558, cited
*Butt v M'Donald* (1896) 7 QLJ 68, cited
*Canon Australia Pty Ltd v Patton* [2007] NSWCA 246; (2007) 244 ALR 759, cited
*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* [1982] HCA 24; (1982) 149 CLR 337, cited
*Commonwealth Bank of Australia v Renstel Nominees Pty Ltd* [2001] VSC 167, cited
*Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471, cited
*Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903; [1999] ATPR 41-703, cited
*Higgins and Fidge v Drysdale* [1996] VicRp 22; [1996] 1 VR 346, cited
*Hospital Products Ltd v United States Surgical Corp* [1984] HCA 64; (1984) 156 CLR 41, cited
*Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd* [2006] QCA 126, cited
*K & K Real Estate Pty Ltd v Adellos Pty Ltd* [2010] NSWCA 302, cited
*Laurelmont Pty Ltd v Stockdale & Leggo (Queensland) Pty Ltd* [2001] QCA 212, cited
*Lewis v Hillhouse* [2005] QCA 316, cited
*Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, cited
*McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579, cited
*McGrath v Australia Naturalcare Products Pty Ltd* [2008] FCAFC 2; (2008) 165 FCR 230, cited
*Ministry of Defence v Wheeler* [1998] 1 All ER 790; 1 WLR 637, cited
*Mullins v Kelly-Corbett* [2010] QCA 354; (2011) Q ConvR 54-748, cited
*Nilon v Bezzina* [1988] 2 Qd R 420, applied
*Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004)

218 CLR 451, cited
*Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* [1954] HCA 25;(1954) 90 CLR 235, cited
*Peters (WA) Ltd v Petersville Ltd* [2001] HCA 45; (2001) 205 CLR 126, cited
*PSAL Ltd v Kellas-Sharpe* [2012] QSC 31, cited
*Questband Pty Ltd v Macquarie Bank Ltd* [2009] QSC 7, cited
*Rainy Sky S.A. and Ors v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, cited
*Ratcliffe v Evans* [1892] 2 QB 524, cited
*Renard Constructions (ME) v Minister for Public Works* (1992) 26 NSWLR 234 cited
*Secure Parking (WA) Pty Ltd v Wilson* [2008] WASCA 268;(2008) 38 WAR 350, cited
*Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596, cited
*Sellars v Adelaide Petroleum NL* [1994] HCA 4; (1994) 179 CLR 332, applied
*South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541; (2000) 177 ALR 611, cited
*The Commonwealth v Amann Aviation Pty Ltd* [1994] HCA 54; (1991) 174 CLR 64, applied
*Toll (FGCT) Pty Limited v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, cited
*Watson v Foxman* (2000) 49 NSWLR 315, cited

COUNSEL: R G Bain QC and I A Erskine for the plaintiffs in BS 4728 of 2010 and the defendant in BS 10543 of 2010 ("the Kosho/Fujino interests")
P J Flanagan SC and J M Horton for the defendant in BS 4728 of 2010 and for the plaintiffs in BS 10543 of 2010 ("the Trilogy interests")

SOLICITORS: Tress Cox for the Kosho/Fujino interests
Clayton Utz for the Trilogy interests

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This is a case about a proposed development on the Gold Coast that did not proceed because of lack of funds. In the first proceeding, the developer ("Kosho") sues over the alleged failure of a lender to provide funds under a 2009 Facility. The lender says that it was not obliged to do so because certain special conditions were not satisfied. In the second proceeding, the lender sues the director and sole shareholder of Kosho, Ms Fujino, pursuant to a guarantee dated 19 October 2007 for monies which it says are payable by Kosho under the terms of an earlier facility agreement.

**The Kosho proceeding**

[1] In 2004 Kosho acquired land on the Nerang-Broadbeach Road at Nerang. It hoped to develop the 4.44 ha site into an integrated, mixed-use, master-planned development to be known as the Abadi Residential Village. The development was to be on a large scale incorporating 333 apartments (or 328 apartments and a 32 suite hotel) in addition to commercial/retail space. The first stage was to include 124 units in five separate buildings, with 1600 m² of shops and restaurants. The first stage, in turn comprised five individual stages: 1A, B1, B2, C and D.

[2] By mid-2007 Kosho's debt needed to be refinanced. It approached City Pacific Limited ("CPL"). On or about 17 October 2007 CPL as responsible entity of the Pacific First Mortgage Fund ("PFMF") offered Kosho a finance facility of $12,610,000 (2007 Facility). This offer was accepted by Kosho. The security provided for the 2007 Facility included a first registered mortgage over the development site at Nerang (which Kosho in these proceedings describes as "the Carrara land"), a first registered third party mortgage granted by City Co Pty Ltd ("City Co") over land situated at 3 Beach Road, Surfers Paradise ("the Surfers Paradise land") and a deed of guarantee and indemnity granted by Ms Fujino. City Co was associated with Kosho and formed part of a group known as Coast Land International. A proposal existed to develop a 19 storey boutique hotel on the Surfers Paradise land. In excess of $10m was advanced under the 2007 Facility. The 2007 Facility was for a term of 18 months.

[3] In early 2009 the Kosho interests (which I will refer to simply as Kosho) began negotiations for a new facility which would cover its existing debt and assist with sales and marketing, development and construction costs in relation to Stage 1A of the Abadi Residential Village. This culminated in a Letter of Offer dated 24 June 2009 from CPL for that purpose. This offer was promptly accepted by Ms Fujino on behalf of Kosho and on behalf of City Co as third party mortgagor. The 2009 finance facility (2009 Facility) was for a total amount of $16m and the Letter of Offer dated 24 June 2009 stated:

> "· $16,000,000.00 (Sixteen Million Dollars) to be advanced generally to meet the following costs:
>
> | | |
> |---|---|
> | · Current Position | $12,610,000 |
> | · Construction/Consultants | $2,193,830 |
> | · Interest (to be retained) | $860,000 |
> | · Contingency | $336,170 |
> | **Total Facility** | **$16,000,000** |
> | Less proceeds from sale of Commercial Property | *($2,647,937)*" |

[4] The 2007 Facility, which was originally due to expire on 19 April 2009, was extended, initially to 30 April 2009, and later to 30 June 2009, so as to enable Kosho to negotiate the 2009 facility. The term of the 2009 Facility was 12 months. In that regard, the letter stated:

> "Facility to expire 30 June 2010. An option to extend the facility may be approved by the Lender provided the Lender is satisfied with the progress of the project and no event of default exists. It is the intention of the City Pacific First Mortgage Fund to finance the entire project (as per proposal dated March 2009), using best endeavours, however the facility will be reviewed on 30 June 2010 at which time a decision will be made on extending the facility if at all possible. Any extension will be at the sole discretion of the City Pacific First Mortgage Fund."

The offer was subject to numerous Special Conditions. Special Condition (g) related to progress payment claims in respect of construction. Special Condition (k) related to the mortgage over the Surfers Paradise land and provided:

> "(k) The Lender agrees to release any encumbrance over Lot 3 Beach Road upon provision of a $3,000,000.00 cash payment and/or achieving Project (Stage 1A) loan to value ratio of 67% and/or future Project Sub-stages achieving a loan to value ratio less than 70%. Any release of security will be subject to an updated valuation of the remaining security property dated within 30 days of the release."

[5] The Special Conditions which assume greatest importance in the Kosho proceedings are Special Conditions (p), (q) and (s). These provide as follows:

> "(p) This offer is subject to an unconditional copy of the sale contract for the commercial property being provided to the Lender's solicitor and confirmation from the Lender's solicitor that the sale is unconditional and a deposit of 10% has been paid.
>
> (q) This offer is conditional upon the commercial property settling on or before 28 February 2010.
>
> ...
>
> (s) This offer of finance is conditional on, and subject to:
>
> (i) the borrower entering into a deed of assignment and consent in relation to the agreement between the Department of Main Roads, Kosho Pty Ltd and Club Cavill Pty Ltd (**Assignment Deed**) to be prepared by, and on terms satisfactory to the Lender;
>
> (ii) the borrower causing Club Cavill Pty Ltd to enter into the Assignment Deed.
>
> (iii) the Department of Main Roads confirming that it is satisfied with the terms of the Assignment Deed; and

(iv) the Assignment Deed being entered into and binding on the Borrower and Club Cavill Pty Ltd (and the Borrower providing two originals of the Assignment Deed executed by both the Borrower and Club Cavill Pty Ltd to the Lender) within 2 business days of receipt of the Assignment Deed."

[6] On 20 July 2009 Trilogy Funds Management Limited replaced CPL as responsible entity of PFMF.

[7] The funds to meet construction and consultant costs of $2,193,830 were never advanced. The Trilogy interests (which I will refer to simply as Trilogy) say that this was because Special Conditions (p), (q) and (s) were never satisfied.

[8] Kosho contends that Special Condition (p) was satisfied and that it was disabled from complying with Special Conditions (q) and (s) by Trilogy's conduct. Kosho's essential allegation is that Trilogy unreasonably delayed in its consideration and determination of Kosho's compliance with the requirements of the 2009 Facility, and, in particular, delayed in entering into a deed of assignment on terms satisfactory to Trilogy and terms satisfactory to the Department of Main Roads ("DMR") in accordance with Special Condition (s). It alleges that by failing to advance funds under the 2009 Facility by, at the latest, the end of October to early November 2009 so as to enable Kosho to commence the development and the construction of Stage 1A, Kosho was disabled from complying with Special Condition (q).

[9] Kosho alleges that by acting as it did, Trilogy breached certain implied terms of the 2009 Facility. Trilogy contests the existence of most of the alleged implied terms, and also denies that it breached any implied terms.

[10] Kosho makes a multi-million dollar claim for damages for breach of contract in respect of the profit which it says it would have earned from the successful development of the project. Trilogy responds that:

(a) the lender had no obligation to advance the funds, having regard to the terms of the offer and Special Conditions (p), (q) and (s);

(b) even if there was such an obligation, the additional funding was for Stage 1A of the development, and Kosho would therefore have had, in any event, to seek a great deal more funding in order to be in a position to derive profit;

(c) it is totally unrealistic to suggest that such funding could have been obtained at a cost which would have allowed Kosho to profit from the development (assuming it could in fact have been obtained); and

(d) the development would not, in any event, have returned a profit: the global financial crisis intervened and the Gold Coast property market fell into a major decline from which it has not, even yet, emerged.

[11] Kosho also advances claims for alleged misleading and deceptive conduct and alleged unconscionable conduct. Each of Kosho's claims give rise to the same

essential issue of causation. There also is a substantial issue about the assessment of Kosho's alleged loss and damage.

[12] A separate issue arises in relation to CPL's alleged failure to discharge the mortgage over the Surfers Paradise land pursuant to a request made on 8 April 2009. The short answer to this claim is that the request to release the mortgage was superseded by negotiations whereby the Surfers Paradise land was to be offered as security as part of the 2009 Facility.

**The Fujino proceeding**

[13] In this proceeding Trilogy claims as a debt from Ms Fujino monies owing under the guarantee granted by her dated 19 October 2007. Ms Fujino defended this proceeding, and the substantive ground of defence was that, by reason of her alleged limited ability to read English, she was in a position of disadvantage when signing the guarantee, CPL was aware of the possibility that such disadvantage might exist and that the transaction was unfair. After this "unconscionability" issue was litigated and identified as the only substantive issue in the Fujino proceeding, Trilogy made written submissions filed 10 December 2012. It was only in the Kosho submissions filed 1 February 2013 that Ms Fujino abandoned reliance on the matters relating to her alleged position of disadvantage in executing the guarantee, which featured in her defence and counterclaim. The late abandonment of this defence and counterclaim has implications for costs.

[14] The remaining issue in the guarantee action is whether Kosho has a claim for damages which can be set-off against its liability under the 2007 Facility (as varied), and thereby reduce or extinguish the debt which Ms Fujino guaranteed. Accordingly, the Fujino proceeding depends on the resolution of the damages claim in the Kosho proceeding.

**The issues**

[15] The substantial issues may be summarised as follows:

(1) Was Special Condition (p) satisfied?

(2) Did conduct by Trilogy, in breach of contract, disable Kosho from complying with Special Conditions (q) and (s)?

(3) Did Trilogy engage in the misleading and deceptive conduct which is alleged?

(4) Did Trilogy engage in the unconscionable conduct which is alleged?

(5) Issues of causation. The relevant inquiry is about the position that Kosho and City Co each would have been in if Trilogy had performed the contract and not engaged in the alleged conduct in breach of statute. A particular inquiry is whether Kosho would have been entitled to obtain an advance for the purpose of consultants' fees and construction costs if Trilogy had not conducted itself as alleged, and what would have happened if Kosho had obtained the requested funds.

(6) The final issue is the assessment of the quantum of any loss and damage that was caused to Kosho by any breach of contract and/or contravention of statute that is established by Kosho. Kosho and City Co each claim substantial damages on the basis of the loss of the opportunity to develop the Carrara land and the loss of the opportunity to develop the Surfers Paradise land and that each has suffered loss of equity in those properties.

**Was Special Condition (p) satisfied?**

[16] It is convenient to set out again the words of Special Condition (p):

> "(p) This offer is subject to an unconditional copy of the sale contract for the commercial property being provided to the Lender's solicitor and confirmation from the Lender's solicitor that the sale is unconditional and a deposit of 10% has been paid."

It is common ground that the "commercial property" referred to in Special Condition (p) and also in Special Condition (q) is a commercial property comprising Stage 1A.

[17] On 3 January 2009 Kosho (as grantor) entered into a Put and Call Option Deed with a Japanese businessman, Hiroo Ota (as grantee). In simple terms, the Put and Call Option Deed granted Mr Ota a Call Option to purchase proposed Lots 1 to 10 (inclusive) in the commercial property that was to be constructed. It also granted Kosho a Put Option to require Mr Ota to purchase the lots. If the Call Option was exercised then a contract for the sale and purchase of each of the lots in the form of a contract contained in Schedule 2 to the Deed was to be delivered to Kosho along with a deposit amounting to 10 per cent of the purchase price of $8m plus GST. The unconditional contract contained in Schedule 2 was in the form of contract approved by the Real Estate Institute of Queensland and the Queensland Law Society for commercial land and buildings.

[18] The Put Option constituted an irrevocable offer by Mr Ota to enter into such a contract. The exercise of the Put Option required Kosho to deliver to Mr Ota an executed copy of the contract. The Put and Call Option Deed provided that a contract for the sale and purchase would come into existence between Mr Ota and Kosho upon the delivery of that executed contract. Mr Ota was required to execute the contract and cl 14.1 of the Deed granted Kosho an irrevocable power of attorney to sign on Mr Ota's behalf any contract of sale that came into existence under the Deed.

[19] Clause 12 of the Put and Call Option Deed required Mr Ota to pay a Security Bond to Kosho's solicitors when he signed the Deed, and provided for the Security Bond to be held by that firm as security for the performance of Mr Ota's obligations under the Deed. Clause 12.2 provided that if the Call Option or the Put Option was exercised, the part of the Security Bond set out in the Deed as relevant to each lot would be "credited towards the deposit payable" under the contract applicable to that lot. If neither the Call Option nor the Put Option was exercised any remaining amount of the Security Bond was to be refunded. A Security Bond of $800,000 was paid on 28 January 2009 and was held in Kosho's solicitor's trust account until October 2010, when Kosho terminated the Put and Call Option Deed and released the Security Bond back to Mr Ota.

[20] Clause 28 of the Put and Call Option conferred upon Kosho an entitlement to terminate the Deed in certain events, including if any approval by a federal, state or local government authority was not given, or was withdrawn, changed, suspended or declared invalid. Kosho also was able to terminate the Deed if any approval was subject to a condition that it was unable to comply with, or was dissatisfied with because, in Kosho's opinion, complying with a condition may prevent or hinder or delay the profitable completion and/or disposal of the development.

[21] CPL knew of the Put and Call arrangement as early as February 2009. Kosho's revised March 2009 funding submission which was provided to CPL on 2 April 2009 contained a copy of the Put and Call Option Deed.

[22] Kosho did not exercise its option, and neither did Mr Ota.

[23] Kosho submits that Special Condition (p) was satisfied by the provision of the Put and Call Option Deed on various dates after the 2009 Facility was agreed, including 29 June 2009, 2 July 2009 and 11 August 2009.

[24] Trilogy responds that Special Condition (p) was never satisfied since:

(a) what was provided by Kosho was a Put and Call Option Deed, and not a "sale contract";

(b) there was no deposit but a Security Bond which was to be credited "towards the deposit" payable under a yet to be executed sale contract and which, unlike a deposit, was to be refunded to the grantee if the option was not exercised; and

(c) the Put and Call Option Deed was not "unconditional" since it was conditional upon approvals and other conditions specified in cl 28.

[25] These contentions raise three issues as to whether Special Condition (p) was satisfied:

(a) Is the Put and Call Option Deed a "sale contract for the commercial property" within the meaning of Special Condition (p)?

(b) Was the Security Bond a "deposit" within the meaning of that Special Condition?

(c) Was the Put and Call Option Deed an "unconditional" sale contract for the commercial property?

If Trilogy is correct in its contention that Special Condition (p) was not satisfied, then Kosho argues that performance of the Special Condition was dispensed with by Kosho in the circumstances so that it was excused from actual performance.

**The issue of construction: is the Put and Call Option Deed a "sale contract for the commercial property"?**

[26] The principles of construction are not disputed. They can be shortly stated.

[27] The meaning of the contract is to be determined objectively according to what a reasonable person in the position of the parties would understand the words to mean. If there is ambiguity, regard may be had to the commercial purpose of the transaction and background knowledge which would have been available to the parties. An interpretation which will give the contract a businesslike operation is to be preferred. Commercial contracts should be construed to make commercial sense of them. An absurd, unreasonable or capricious result is to be avoided.

[28] The starting point is the natural and ordinary meaning of the expression. The Court seeks to ascertain what the parties meant by the words they have used. An objective approach is applied.[1] It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.[2]

[29] Evidence of the surrounding circumstances is only admissible where the words are ambiguous. Unambiguous language cannot be disregarded simply because the contract would have a more commercial and businesslike operation if an interpretation different to that dictated by the language was adopted.

[30] The interpretation should accord with what commercial people in the position of the parties would understand the words to mean. The interpretation should be "consistent with business common sense."[3] In the case of an ambiguous expression, the "more commercially sensible" construction should be preferred.

[31] In summary, interpreting a commercial document such as the Letter of Offer requires attention to "the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure."[4]

[32] Kosho submits that a Put and Call Option Deed is the style of contract often used in off-the-plan "multiple lot" commercial sales in the development industry in Queensland. So much may be accepted. But that is not the present issue. The issue is whether the Put and Call Option Deed dated 3 January 2009 is a "sale contract for the commercial property" within the meaning of Special Condition (p). Kosho points to the terms of the Put and Call Option Deed, and submits that there were no rights to terminate reposed in the buyer and that "all the flexibility lay with the Seller". If the buyer did not exercise the Call Option, Kosho was entitled to exercise the Put Option and compel execution of a contract in terms of the unconditional contract appearing in Schedule 2. However, the fact that Kosho could have compelled Mr Ota's entry into (and later settlement of) an unconditional sale contract for the commercial property does not mean that the Put and Call Option Deed was itself a "sale contract for the commercial property" within the meaning of

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1 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at 483 [34]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461 – 462 [22].

2 *Toll (FGCT) Pty Limited v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40].

3 *Rainy Sky S.A. and Ors v Kookmin Bank* [2011] 1 WLR 2900 at 2911, [29] – [30].

4 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 [22].

Special Condition (p). The language of Special Condition (p) and its context do not favour Kosho's construction of it.

[33] I accept Trilogy's submission that, by this condition, the lender sought the certainty of a pre-sale of the very first stage of the development which it was to fund. The 24 June 2009 Letter of Offer anticipated that the funding would be used, among other things, to meet consultants and construction costs in relation to Stage 1A and that the total amount of the 2009 Facility of $16m would be reduced by the proceeds of sale of the commercial property. Special Condition (q) indicates that as at 24 June 2009 the parties anticipated the construction of Stage 1A and settlement of the sale of the commercial property occurring on or before 28 February 2010.

[34] An unconditional sale contract for the commercial property, which bound the buyer of that property to pay an agreed purchase price, would provide a commercial lender with a higher degree of assurance of its loan being repaid or reduced in amount than a Put and Call Option Deed, which did not oblige either party to enter into such a contract and which permitted Kosho to terminate the Put and Call Option Deed in certain events. Such a Deed would provide the lender with no assurance that a sale contract for the commercial property would come into existence. No such contract would come into existence if neither party exercised its option, and no such contract would come into existence if Kosho chose to terminate the Deed (for example because it was dissatisfied with a condition which a local government authority placed upon the proposed development).

[35] Special Condition (p) came to be negotiated in circumstances in which the parties had communicated about the Put and Call Option Deed dated 3 January 2009. If that Deed and the payment of the Security Bond under it were sufficient to meet the commercial purpose of Special Condition (p), then its inclusion seemingly was unnecessary. The inclusion of Special Condition (p) and the fact that its terms were not confined to provision of the previously agreed Put and Call Option Deed suggest that the parties envisaged that the provision of some other form of contract and confirmation of the payment of a 10 per cent deposit might satisfy the condition. It does not necessarily mean that provision of the Put and Call Option Deed and confirmation that a Security Bond had been paid pursuant to it would satisfy Special Condition (p). The condition might have been satisfied by the provision of a copy of the sale contract entered into upon the exercise of either the Put Option or the Call Option. It might have been satisfied by the provision of a different sale contract for the commercial property in the event that neither option was exercised. The language of Special Condition (p) indicates that before advancing funds under the 2009 Facility, CPL wished to obtain a copy of a contract for the sale of the commercial property, not simply a contract which would give rise to an unconditional, binding sale contract if and when an option was exercised.

[36] The conclusion that Special Condition (p) required a sale contract of the kind that was in Schedule 2 to the Deed, or some other form of immediately binding contract for the sale of the commercial property, and was not satisfied by provision of the Deed, is reinforced by the requirement that the contract be "unconditional" and that a "deposit" of 10 per cent had been paid. The payment of a deposit of 10 per cent was an earnest of a committed buyer's performance of its obligation to complete the sale contract and might be forfeited to the benefit of both the lender and the borrower if the buyer did not complete. By contrast, the provision of a copy of the Put and Call Option Deed and confirmation that a Security Bond had been paid

pursuant to it provided no assurance that a "sale contract" would be entered into and a deposit paid pursuant to it. Either party to the Put and Call Option Deed might choose for either good or idiosyncratic reasons to not exercise the option. Kosho might choose for good or idiosyncratic reasons to terminate the Deed pursuant to cl 28, perhaps in the hope of finding a buyer which would offer a higher purchase price. Such a course would provide a lender with far less assurance than a binding sale contract that the commercial property would be sold with the proceeds of sale available to reduce the loan.

[37] The text and context of Special Condition (p) lead me to conclude that the "sale contract for the commercial property" was one which imposed binding contractual obligations on a buyer which could be enforced to the benefit of the lender and the borrower, being in the form of a "sale contract", rather than a contract which gave each party to it an option to require the other to enter a sale contract for the commercial property if certain events came to pass.

[38] I conclude that the Put and Call Option Deed dated 3 January 2009 was not a "sale contract for the commercial property" within the meaning of Special Condition (p).

**Was the Security Bond "a deposit"?**

[39] In addition, any confirmation that the Security Bond provided for in cl 12 of the Deed had been paid did not amount to confirmation that "a deposit of 10 per cent" had been paid. The Security Bond was not a deposit. If a sale contract eventuated then the amount paid under the Security Bond might have been "credited towards the deposit payable" under the contract. The Security Bond was not a deposit and the absence of confirmation that "a deposit" of 10 per cent had been paid provides an additional ground upon which Special Condition (p) was not satisfied.

**Was the Deed "unconditional"?**

[40] This makes it unnecessary to determine the third sub-issue as to whether the Put and Call Option Deed was "unconditional". In its context I consider that the word "unconditional" was intended to require the sale contract to be one which was not subject to a condition which might result in it not being performed, such as a condition making it subject to finance. Trilogy argues that conditions such as those appearing in cl 28 of the Put and Call Option Deed, which reserved to Kosho wide discretions to not proceed with the project and to terminate the Deed in certain events, including changes to an approval or the imposition of conditions upon approval which Kosho was "dissatisfied with", made the Put and Call Option Deed a conditional one. Clause 28.3 made Kosho's obligations conditional upon it obtaining, by 15 January 2010, pre-sales of lots in the residential component of the development of an aggregate gross value of at least $50m. In response, Kosho submits that it obtained the relevant development approval on 20 January 2009, and the fact that it might terminate the Deed in certain circumstances under cl 28.1 ignores:

- the fact that it was entirely in Kosho's interests to obtain finance and settle the sale of the commercial property;
- that the relevant conditions were expressed to be for the benefit of Kosho and could be waived by it; and

- that upon the Call Option being exercised by it, Mr Ota became unconditionally and irrevocably bound to execute an unconditional contract in the form appearing in Schedule 2, and if he did not execute the contract, then Kosho might do so pursuant to its power of attorney.

[41] I am inclined to conclude that if the Put and Call Option Deed was in fact a "sale contract for the commercial property" and if Kosho had waived the benefit of the conditions contained in cl 28 then it would have become "unconditional" within the meaning of Special Condition (p). However, Kosho did not waive those conditions. Accordingly, the agreement was not "unconditional".

[42] If, however, Kosho is correct in submitting that the agreement was "unconditional", notwithstanding the presence of cl 28 which made the Deed and Kosho's obligations under it subject to certain conditions, then this tends to reinforce the conclusion which I have reached about the meaning of "sale contract for the commercial property". On Kosho's case it was sufficient for it to satisfy Special Condition (p) to again provide on 29 June 2009 a copy of the Put and Call Option Deed and to confirm that the Security Bond had been paid. On such an approach, the Special Condition having been satisfied, it would have been open to Kosho to terminate the Deed pursuant to cl 28 a short time afterwards if one or more of the circumstances stated in cl 28 existed. According to Kosho, Special Condition (p) would have been satisfied in circumstances in which neither party to the Put and Call Option Deed exercised its option, so as to cause an unconditional binding contract for the sale of the commercial property to come into existence. I decline to conclude that the parties, by their choice of the words contained in Special Condition (p), should be taken to have intended that Special Condition (p) would be satisfied in such a case. In their context, the words "sale contract for the commercial property" should be interpreted to refer to an immediately binding contract for the sale of the commercial property, not an agreement which conferred an option to require the other party to enter into such a contract in certain events.

[43] The interpretation urged by Trilogy, and which I prefer, best accords with the apparent commercial objective of Special Condition (p), namely to provide the lender with the assurance that an unconditional contract for the sale of the commercial property had been entered into, supported by the payment of a 10 per cent deposit, being a contract which would yield sale proceeds and thereby reduce the amount of the loan.

[44] I conclude that Kosho did not provide a "sale contract for the commercial property" within the meaning of Special Condition (p). There was no confirmation that such a sale contract was "unconditional" and that a "deposit" of 10 per cent had been paid. Kosho failed to satisfy Special Condition (p) and by reason of its non-compliance Trilogy was entitled not to advance the further funds that were the subject of the 2009 Letter of Offer.

**Dispensation with performance of Special Condition (p)**

[45] As an alternative to its contention that Special Condition (p) was satisfied, Kosho submits that it was excused from performance of the condition in the circumstances. This contention rests largely upon Trilogy's delay in advising Kosho that in Trilogy's view, Special Condition (p) was not satisfied.

[46] In response, Trilogy says that its delay in advising that Special Condition (p) had not been satisfied is immaterial since:

(a) Kosho does not plead that Trilogy's alleged omission amounted to a waiver of the condition or that some form of estoppel arose;

(b) no cause of action is advanced by Kosho which provides any other basis to ignore the condition; and

(c) a failure to advise another party to a contract that they have not met their obligations is, without more, no basis to say that the relevant obligation is expunged from the contract.

Kosho accepts that it has not claimed that the condition was waived or that Trilogy is estopped from relying upon it. It does not advance any cause of action based upon Trilogy's delay and silence. It does not contradict the third proposition advanced by Trilogy and which I have summarised at (c) above. Instead, Kosho argues that it was for Trilogy to reject "the proffered performance" if it thought it had such an entitlement, and that, in the circumstances, it was excused from performing Special Condition (p).

[47] The essential facts concerning Trilogy's delay and the communication of its position in relation to satisfaction of Special Condition (p) are as follows. On 20 October 2009 Trilogy's then solicitors wrote to Kosho's then solicitors and noted that there were "a number of outstanding conditions precedent in respect of the above facility". The first outstanding condition that was nominated was "an unconditional sales contract for the commercial property". By letter dated 27 October 2009 Kosho's solicitors stated that a copy of the unconditional commercial sales contract had been provided on 29 June 2009 and that on 11 August 2009 Kosho's solicitors had confirmed that this document, namely the Put and Call Option Deed, was held on file. The letter also confirmed that $800,000 was held in the solicitors' trust account being the "security bond paid by the Grantee under the Put and Call Option Deed". Kosho's solicitors contended that all the required items had been provided. There was no immediate response to that correspondence, despite follow-up communications from Kosho's solicitors and its "Chief Executive Officer – project partner", Mr Slijderink.

[48] In February 2010 Trilogy and its solicitors were negotiating with DMR and its solicitors in connection with a deed of assignment that would satisfy Special Condition (s). They advised that once the final deed with DMR was satisfactory, and subject to the "conditions precedent" being satisfied, the PFMF would advance funding. On 17 February 2010 Trilogy's solicitors, Clayton Utz, declined to comment on specific Special Conditions until such time as the deed had been agreed with all parties. On 23 February 2010 Clayton Utz described an assertion in Mr Slijderink's email of 18 February 2010 that Trilogy was satisfied with all other conditions and/or Special Conditions as "totally incorrect", and advised that Trilogy would not review the status of the loan conditions until the terms of the deed with DMR had been settled.

[49] Trilogy's solicitors' email of 23 February 2010 did not communicate an acceptance of Kosho's position in relation to Special Condition (p). The status of Special Condition (p) and other conditions was to be reviewed, but Trilogy did not resile

from the position which it had adopted on 20 October 2009, namely that an unconditional sales contract for the commercial property had not been provided.

[50] In the absence of any plea or submission based upon principles of waiver or estoppel, Kosho's written submissions relied upon authorities concerned with "Dispensation with performance of condition" in arguing that it was excused from satisfying Special Condition (p). The authorities relied upon by Kosho in this regard are to the effect that "a plaintiff may be dispensed from performing a condition by the defendant expressly or impliedly intimating that it is useless for him to perform it and requesting him not to do so."[5] In oral submissions, Kosho's Senior Counsel acknowledged that the principle concerning dispensation with performance required an express or implied intimation that it was useless for Kosho to perform, and that no such intimation was given. This acknowledgment was correctly made since the evidence does not demonstrate that Trilogy intimated, either expressly or impliedly, that Kosho need not perform Special Condition (p), or that it was useless for it to do so.

[51] Kosho advanced a different argument, which had not been developed in its written submissions, or pleaded by it, that the provision of the Put and Call Option Deed and confirmation that the Security Bond had been paid constituted "substantial performance" of Special Condition (p). I am unable to agree that proffering the Put and Call Option Deed in lieu of a "sale contract for the commercial property" constituted substantial performance, or that it was accepted as such by Trilogy. For the reasons discussed in connection with the issue of construction, the Put and Call Option Deed differs substantially from a binding and unconditional sale contract of the kind which might have come into existence had Kosho or Mr Ota exercised their respective options. In addition, no deposit was paid and the absence of a deposit is another reason why there was not substantial performance of Special Condition (p). The payment of a Security Bond which was refundable in the event an option was not exercised is unlike a non-refundable deposit that is paid under an unconditional contract of the kind appearing in Schedule 2 to the Put and Call Option Deed.

**Conclusion – Special Condition (p)**

[52] The failure of Kosho to satisfy Special Condition (p) (either according to its terms or in substance), coupled with the fact that Trilogy did not intimate to Kosho that it need not satisfy the condition, entitled Trilogy to not advance the further funds that were the subject of the 2009 Facility.

**Special Condition (q)**

[53] As noted, Special Condition (q) provides:

> "(q) This offer is conditional upon the commercial property settling on or before 28 February 2010."

It is common ground that this condition was not satisfied. Kosho argues that it was disabled from being in a position to satisfy Special Condition (q) because of the failure of Trilogy to advance monies intended for consultants' costs in relation to the design of the commercial property and the costs needed to construct it. Documents

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5 *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 246-247, cited in *K & K Real Estate Pty Ltd v Adellos Pty Ltd* [2010] NSWCA 302 at [92] – [93]; *Mullins v Kelly-Corbett* (2011) Q ConvR 54-748 at 63,523 [18] – [20].

associated with the requested funding, including a spreadsheet annexed to a funding submission anticipated that the construction costs for Commercial Building A would be $880,000, spread over five months with an anticipated settlement of the commercial property in the seventh month of the project timeline yielding $2,750,000. Kosho had no other source of available funds to meet the required construction costs, let alone consultants' costs which would have to be incurred to specify the construction that was to be undertaken so as to facilitate entry into an anticipated tripartite agreement between Kosho, the builder and CPL as mortgagee.

[54] If Kosho had established that it satisfied Special Condition (p) and satisfied the other conditions (particularly Special Condition (s)) so as to entitle it to have further funds advanced to it in mid to late 2009, then I may have been satisfied that Trilogy's breach of agreement in not advancing the funds disabled Kosho from being in a position to satisfy Special Condition (q). However, Kosho's failure to comply with Special Condition (p) meant that there was no obligation on Trilogy to advance funds under the 2009 Facility. Therefore, whilst the failure to advance monies intended for construction costs disabled Kosho from satisfying Special Condition (q) Trilogy was not obliged to advance those monies because Special Condition (p) was not satisfied.

[55] As to Special Condition (q), if both Conditions (p) and (s) had been satisfied then Trilogy would have been obliged to advance monies intended for construction costs once those conditions were satisfied. Any failure to do so may have disabled Kosho from satisfying Special Condition (q), depending on questions of timing. Since Trilogy was not obliged to advance monies because Kosho failed to satisfy Special Condition (p) Kosho's inability to satisfy Special Condition (q) was not the result of a breach of contract by Trilogy. Kosho's failure to satisfy Special Condition (q) is not excused by reason of Trilogy's breach of an obligation to advance the required construction costs.

[56] I have concluded that Trilogy was not obliged to advance further funds under the 2009 Facility including funds intended for construction costs, because Special Condition (p) was not satisfied. In the circumstances, Kosho's failure to satisfy Special Condition (q) provides an additional ground upon which Trilogy can rely in defence of Kosho's claim that it was entitled to have further funds advanced to it.

**Special Condition (s) and its contractual context**

[57] It is convenient to again set out Special Condition (s):

> "(s) This offer of finance is conditional on, and subject to:
>
> (i) the borrower entering into a deed of assignment and consent in relation to the agreement between the Department of Main Roads, Kosho Pty Ltd and Club Cavill Pty Ltd (**Assignment Deed**) to be prepared by, and on terms satisfactory to the Lender;
>
> (ii) the borrower causing Club Cavill Pty Ltd to enter into the Assignment Deed.
>
> (iii) the Department of Main Roads confirming that it is satisfied with the terms of the Assignment Deed; and

(iv) the Assignment Deed being entered into and binding on the Borrower and Club Cavill Pty Ltd (and the Borrower providing two originals of the Assignment Deed executed by both the Borrower and Club Cavill Pty Ltd to the Lender) within 2 business days of receipt of the Assignment Deed."

Subclause (s)(i) requires the deed of assignment and consent to be "in relation to" the 5 June 2007 Deed of Agreement. The deed of assignment and consent is to be prepared by the lender. Its terms are to be "satisfactory" to the lender. They also must be satisfactory to DMR which, of course, was not a party to the 2009 Facility, and was not an entity which Trilogy could direct. DMR was free to withhold any confirmation that it was satisfied with the terms of the deed of assignment and consent for whatever reason. Special Condition (s) envisaged that Kosho would cause its related entity, Club Cavill Pty Ltd ("Club Cavill"), to enter into the deed and that it and Club Cavill enter into it within two days of receipt.

[58] Special Condition (t) provides an important context. It relevantly provides:

"As part of this facility the City Pacific First Mortgage Fund agrees to rebate costs and fees to the borrower to a maximum amount of $2,800,000.00. This is compensation for the transfer of the rights and obligations to Sunrise Waters Pty Ltd as agreed between Club Cavill (a related entity of the borrower) and the Department of Main Roads, in relation to the adjacent Sunrise Waters property in accordance with special condition (s).

The compensation is paid on the basis that it is in full and final settlement of all claims that the Borrower and/or Club Cavill may have at any time in relation to the resumption of the land from the property by the Department of Main Roads. ..."

Special Condition (t) then continues to describe that the compensation will be paid by way of a discount to prevailing interest rates as well as a rebate on certain fees that would otherwise have been charged on the 2009 Facility.

[59] Special Condition (s) was not satisfied. Kosho submits that this is because of Trilogy's unreasonable delay or its absence of good faith in seeking illegitimately to exploit the opportunity to extract new and additional rights for the benefit of itself and a defaulting borrower of the PFMF, Sunrise Waters Pty Ltd ("Sunrise Waters").

[60] Trilogy's case is that:

(a) It understandably sought the assignment of those rights, which had a relationship to the subject matter of the 2007 Deed of Agreement that was to be assigned.

(b) Considerable effort was made to reach agreement between the various parties in relation to the terms of a deed of assignment and consent that would be satisfactory to the various parties, including Trilogy as lender and DMR.

(c) DMR understandably wanted something in return for the valuable rights that were being negotiated, and never communicated its satisfaction of the terms of any proposed deed of assignment and consent.

(d) The delay in concluding negotiations and documenting an assignment that was satisfactory to all parties was for reasons that cannot be attributed to Trilogy, or which cannot be attributed solely or principally to Trilogy.

(e) The allegation of unreasonable delay and a lack of good faith on its part cannot be sustained on the evidence.

[61] These submissions require consideration of the background to the Deed of Agreement between Club Cavill, Kosho and the State of Queensland (acting through DMR) made on 5 June 2007, and the lengthy course of negotiations about the terms of a deed that would be satisfactory to Trilogy and DMR.

[62] Issues of construction arise about the meaning of Special Condition (s), particularly:

(a) whether the matters in respect of which Trilogy sought specific provision were "in relation to" the agreement between Club Cavill, Kosho and DMR; and

(b) the constraints on Trilogy's freedom to decide that the terms of a deed of assignment and consent were not "satisfactory" to it, or that a deed of assignment and consent would be "satisfactory" to it only if it included certain provisions. What are the matters about which Trilogy might legitimately seek satisfactory terms? Must it act in good faith in seeking the inclusion of terms that are satisfactory to it?

The last issue may be approached as a matter of construction: that properly construed, Special Condition (s) requires good faith on Trilogy's part in preparation of terms, their negotiation with DMR and arriving at a state of satisfaction with those terms. Expressed differently, the argument is that, as a matter of construction, Trilogy cannot find terms to be unsatisfactory on grounds that are capricious, advanced for an illegitimate purpose or otherwise advanced without good faith. If, however, Special Condition (s) is not construed as necessarily importing notions of good faith, then the issue of good faith may arise for consideration in the context of an implied term. Part of Kosho's case is that the 2009 Facility included an implied term that CPL "would in (sic) all times act in good faith in their dealings with Kosho in relation to their consideration of, and determining issues of satisfaction in relation to, the conditions precedents under the finance facility".

[63] It is appropriate to defer consideration of whether, as a matter of law, Trilogy was obliged to act in good faith in determining whether it was satisfied with the terms of a proposed deed of assignment and consent until I have made findings of fact about Trilogy's conduct, including its alleged unreasonable delay in determining issues of satisfaction.

**Background to the negotiation of Special Condition (s)**

[64] Club Cavill is a related entity of Kosho and City Co. Club Cavill and Kosho owned adjoining parcels of land. Part of Club Cavill's land was resumed under the

*Acquisition of Land Act* 1967 (Qld) by DMR for the purpose of future road construction. Club Cavill obtained compensation rights as a result in 2005.

[65] On 4 August 2006 the Council issued preliminary approval in respect of a development application that had been lodged in 2003. The preliminary approval was in respect of the Club Cavill land, land owned by Kosho and the resumed land. An appeal was filed on 13 September 2006 in relation to the approval, and at the time of the 5 June 2007 Deed of Agreement this appeal remained unresolved.

[66] If Club Cavill, or any successor in title to the Club Cavill land, wished to pursue its development in accordance with the preliminary approval or any future Council approval then it required access to the resumed land to complete flood mitigation works in respect of the development. Mr Slijderink on behalf of Club Cavill and Kosho negotiated the Deed of Agreement with the State of Queensland acting through DMR. One aspect of the Agreement was a grant by DMR to Club Cavill and to Kosho (if required), their respective successors in title and any future owners of the land, rights of access for all purposes connected with the execution of the works contemplated by the preliminary approval and any future approvals. An important right was the right to excavate and remove from the resumed land soil for the purposes of flood mitigation and as otherwise required by the approval, and to transport the soil to the Club Cavill and Kosho lands for use as fill material on those lands in accordance with the building approval and any future approvals. In return for these valuable rights Club Cavill agreed "with effect from the date on which it commences development" on the Club Cavill land to waive any rights to compensation under the *Acquisition of Land Act* 1967 it may have against the DMR for the taking of the resumed land. In short, Club Cavill agreed with DMR to forego its compensation rights, but only on a conditional basis. If it did not commence development on the Club Cavill land, then its compensation rights were not waived.

[67] The soil rights that Club Cavill acquired were valuable. As Mr Slijderink explained, there was a significant advantage in acquiring the soil rights. Otherwise the owner would have to obtain operational works approvals and in a flood plain that may take many years.

[68] Club Cavill agreed to sell its land to Sunrise Waters. Significantly, the agreement did not convey the soil rights. This worked greatly to the disadvantage of Sunrise Waters. Officers of DMR later privately expressed some sympathy for Sunrise Waters' predicament and harboured some suspicion that Sunrise Waters acquired the Club Cavill land without knowing that it had not bargained to acquire the soil rights.

[69] The sale of the property to Sunrise Waters settled in August 2007. Club Cavill continued to assert its entitlement to compensation. In a letter to Crown Law, which acted on behalf of DMR, dated 30 January 2008, Club Cavill and Kosho's lawyers noted that Club Cavill's waiver of its right to compensation only took effect "from the date on which it commences development" on the lot which had been sold to Sunrise Waters on 17 August 2007. Since Club Cavill had not commenced or carried out any works on that lot the right to compensation remained. Kosho and Club Cavill's lawyers sought confirmation that DMR and Crown Law had not had any dealings with Sunrise Waters which had the effect of according it any of Kosho and Club Cavill's rights and entitlements under the Deed of Agreement dated

5 June 2007 "or which has otherwise touched upon the rights or entitlements held by our clients pursuant to the Deed". Kosho and Club Cavill continued to assert a right to claim compensation from the State of Queensland in relation to the resumption.

[70] A meeting was held on 13 February 2009 at the offices of CPL to discuss Club Cavill's compensation rights and the entitlements afforded to it under the Deed of Agreement with DMR and the possible assignment of those rights to CPL. The meeting also discussed the future funding of Kosho's Abadi Residential Village project. Mr Slijderink on behalf of Kosho advanced what he told the meeting was a "commercially practical and equitable solution in regards to mitigating the PFMF financial exposure to Sunrise Waters". At the time receivers had been appointed to sell the land and an expression of interest campaign was due to end in March. Mr Slijderink referred to his company's continuing right to claim compensation from DMR and the fact that Sunrise Waters needed to obtain the rights and entitlements afforded to Club Cavill under the Deed of Agreement so that it could maximise the development potential of the land and commence bulk earthworks. Mr Slijderink went on to assert that the claim to compensation was worth well in excess of $10m and probably exceeded $20m. He proposed a mutually beneficial outcome that would involve a payment in exchange for the compensation rights. This was the genesis of what eventually became Special Conditions (s) and (t) in the 2009 Facility. Kosho and Club Cavill were offering the opportunity for CPL to maximise the development potential of the Sunrise Waters land.

**The course of events concerning satisfaction of Special Condition (s)**

[71] The negotiation of a deed of assignment and consent that was satisfactory to Trilogy, DMR and otherwise satisfied Special Condition (s) proved complicated and protracted. It is necessary to canvass these events in some detail in order to determine the validity of Kosho's claim that Trilogy engaged in unreasonable delay and that Trilogy's "illegitimate pursuit of self interest" in seeking to settle upon a form of document with DMR manifests an absence of good faith on Trilogy's part.

[72] On 24 June 2009, the same day as Kosho and City Co confirmed that they wished to proceed in accordance with the 24 June Letter of Offer, Club Cavill confirmed it would be waiving all rights, including rights to compensation, in respect of the resumed land and would release the lender from all liability in relation to the resumption or matters related to the resumption.

[73] On 23 June 2009 CPL's then solicitors, Minter Ellison had sent to Crown Law a draft deed of assignment and consent for its "urgent consideration". Mr Slijderink sought a copy of the proposed document. CPL's lending manager, Mr McCosh, followed up with Minter Ellison as to how negotiation of the agreement was progressing. Crown Law was unable to respond due to the workload of the Assistant Crown Solicitor with the conduct of the matter. However, she wrote to Minter Ellison on 22 July 2009 with comments and proposed changes to the draft deed. Importantly, the letter of 22 July 2009 advised:

> "As your client is obtaining access rights over the resumed land to enable your client to exercise its development rights under the development approval, then in consideration of my client agreeing to the assignment of Club Cavill's rights under the Deed of Agreement,

my client requires your client to waive any compensation rights that it may have."

[74] On 27 July 2009 Kosho and Club Cavill wrote to the solicitors for the other parties confirming acceptance of the changes proposed by Crown Law/DMR. In that email, Mr Slijderink wrote:

> "In advancing this matter and for clarity we reiterate the purpose of the Assignment Deed is to achieve the following mutually beneficial outcomes:
>
> - Grant access to the resumed lands to facilitate the Sunrise Waters development approval; which without such rights being granted the existing development consent would be unable to be utilized (invalid); and
> - Secure development rights in accordance with the Preliminary Development Approval and associated Operational Works Approvals (OPW Approvals) for the benefit of future land owners...and to specifically facilitate sale of the subject Sunrise Waters lands to a third party (on said basis); and
> - Sale proceeds from the sale of the subject Sunrise Waters Lands are to be used to discharge their existing Loan facility (benefiting the fund)".

He went on to note that upon the proposed assignment taking place "access to the lands will be granted to all successors in Title (sic) to facilitate any works required to implement the preliminary development approval (and associated approval requirements)." The letter concluded with a request for the proposed changes to be accepted so that the matter could be finalised.

[75] There followed a lengthy gap between July and December 2009 when little, if anything, was done to progress the required deed. Part of the delay may be explained by Trilogy's appointment as responsible entity of the PFMF on or about 20 July 2009. However, this cannot explain, let alone justify, a delay of five months.

[76] Trilogy appointed new solicitors, Clayton Utz, and on 7 December 2009 a Senior Credit Manager from Trilogy attended upon Mr Campbell, a Project Manager from DMR, in order to brief Mr Campbell about matters. In an email to Mr Wakerley of DMR on that day, Mr Campbell canvassed the possibility of appointing Clayton Utz to act for DMR "to try and resolve this mess once and for all." Part of the mess involved the Sunrise Waters land. Sunrise Waters required access rights over the resumed land for a services corridor and pedestrian access. In his evidence, Mr Wakerley explained that that issue arose after an objection to the grant of the approval and a planning appeal was submitted. Those rights were needed by any owner of the land to complete the development.

[77] In December 2009 Mr Hinrichsen of Trilogy assumed carriage of the matter. Trilogy suggested that it might be possible for another Clayton Utz partner to act for DMR if it resulted "in a smoother, more timely progress of the matter." DMR retained Crown Law to continue to act on its behalf.

[78] On 11 December 2009 the partner from Clayton Utz with carriage of the matter on behalf of Trilogy, Mr Noble, sent a draft deed to Crown Law. At about this time Mr Slijderink was aware that DMR was reviewing the deed. On 14 December 2009 Mr Hinrichsen requested DMR review the deed "as quickly as possible." DMR officers for their part did not wish to deal directly with Mr Slijderink and on 15 December 2009 Mr Wakerley decided that Mr Slijderink should be referred to Mr Noble at Clayton Utz to respond to his inquiries.

[79] Discussions continued between Clayton Utz and Crown Law and on 22 December 2009 Clayton Utz sent to Crown Law an updated version of the deed which provided in cl 4(d):

> "(d) Kosho and Club Cavill covenant that on payment of the amount which is not to exceed $2.8 million referred to in paragraph (t) of the special conditions in the letter dated 24 June 2009 from City Pacific Limited to Kosho is in full and final settlement of all claims that Kosho and/or Club Cavill may have at any time had in relation to the Resumption (including the Deed of Agreement) as those rights now vest entirely with Trilogy."

[80] On 14 January 2010 Crown Law provided its comments on the draft and relevantly advised:

> "My client requires Club Cavill, Sunrise and Trilogy to waive their compensation rights under the *Acquisition of Land Act*. As Trilogy will be obtaining access rights over the resumed land to enable the exercise of the development rights in respect of the River Central Precinct Land, then my client requires a waiver of compensation."

In other words, DMR required an unconditional waiver of compensation rights in return for access rights over the resumed land to enable the development to proceed in accordance with the approvals.

[81] On 9 February 2010 Clayton Utz sent to Crown Law a document which marked up the changes which Trilogy accepted and commented on other amendments which were not acceptable to it. Clayton Utz sought any further comments from Crown Law on the document, following which it was to be sent to Kosho and Club Cavill for their approval. Sunrise Waters, which was made a party to the draft deed, agreed to the document in the proposed form.

[82] On 23 February 2010 Mr Slijderink wrote to Clayton Utz and inquired about the status of the deed of assignment, noting "for completeness" that "your client has now had 8 months to have settled the Deed of Assignment".

[83] Kosho appointed new lawyers, Q5 Lawyers, which on 26 February 2010 wrote to Clayton Utz, requesting a copy of the draft deed of assignment for urgent review. Throughout this period Kosho and its lawyers complained about the delay and sought to be involved in the negotiation of the final deed. Mr Slijderink sought an urgent meeting with Trilogy's CEO, Mr Griffin, in order to discuss matters.

[84] In the first two weeks of March 2010 Trilogy and DMR, through their solicitors, continued communications about the finalisation of the deed, including making provision for the access corridor. On 9 March 2010 Mr Noble wrote to Kosho's solicitors, apologised on Trilogy's behalf for the delay and advised that Trilogy would prefer to finalise its negotiations with DMR prior to providing the deed to

Kosho for its input. At that stage Crown Law was seeking further instructions on a few issues and had promised to revert to Mr Noble later that week. He proposed to chase them up the next day if he had not heard from them. Mr Noble advised that Trilogy was "very keen to finalise this matter and as evidence, executives of my client were in Brisbane last week to meet with senior government officers to move this matter along."

[85] On 11 March 2010 Mr Wakerley communicated with Mr Campbell in connection with advice received from Crown Law in relation to the proposed deed. At that stage it was proposed that Crown Law would submit queries and requirements to Clayton Utz for response, to be followed by a meeting of all parties to discuss resolution of the matter. One point raised in the advice was that there was still a conditional waiver of the right to claim compensation for the land resumed, and the waiver was tied to commencing a proposed development within a certain time frame. Mr Wakerley expressed the view that the stage had been reached where DMR would only agree to the assignment if the conditional waiver was made unconditional. Mr Wakerley expressed the opinion that DMR was free to make this commercial judgment. He was concerned that the current circumstances could be repeated if the land was on-sold and the agreement was not amended in this respect.

[86] On 19 March 2010 Mr Hinrichsen wrote directly to Crown Law seeking an early meeting to finalise the matter. I mention in passing that this and other communications from Trilogy at this time are inconsistent with an intent on Trilogy's part to delay matters and frustrate Kosho's satisfaction of Special Condition (s). Mr Hinrichsen's email of 19 March 2010 explained that it was Trilogy's responsibility as replacement manager for the PFMF to gain the most value for its unit holders and that the way forward for the Fund was to achieve a full development approval for the Sunrise Waters land as soon as possible. The deed that had been submitted to Crown Law and DMR was said to be the only way to move forward. Mr Hinrichsen complained about Trilogy incurring significant legal bills in the back and forth between lawyers without any real progress. He sought to have the matter settled as soon as possible and therefore proposed a meeting.

[87] Ms Hill of Crown Law sought instructions in relation to the proposed meeting. On 22 March 2010 Mr Hinrichsen wrote directly to DMR officers seeking to set up a meeting to sort out the final issues on the Sunrise Waters land. It appears that a meeting was scheduled for 25 March 2010, however, there is no account of what was discussed at any such meeting. In late March 2010 Mr Slijderink continued to request to be included in the negotiations over the deed.

[88] Negotiation of the final terms of the deed appears to have stalled after March 2010. The reason for this is largely unexplained. Matters were revived in July 2010, despite the term of the 2009 Facility having expired on 30 June 2010. On 7 July 2010 Crown Law wrote to Clayton Utz, and on 9 July 2010 it responded with a marked-up version of the document in response which was said to provide a solution which should be acceptable to both parties. On 16 July 2010 Mr Hinrichsen wrote to Clayton Utz with a copy to Crown Law requesting that Clayton Utz chase up Crown Law in the matter. He remarked:

> "The delay in final agreement is becoming quite ridiculous given we had an agreed position back in March. I am almost inclined to let Club Cavill/Kosho back in to sort this out".

[89] On 16 July 2010 Crown Law responded and Ms Hill remarked that she also thought:

> "... we had reached agreement in March, but unfortunately, the amended document provided to me did not reflect that agreement. Subsequent documentation has introduced new issues which were not originally part of the negotiations. Accordingly, the delay is not Crown Law's."

[90] Negotiations continued with further revisions to the deed being exchanged in September 2010. In September 2010 Mr Campbell of DMR advised that he was happy with the proposed deed and would recommend that it be signed if the other parties were happy with it. He noted that Club Cavill had lodged a $66m claim against the State which was being handled by Crown Law.

[91] Kosho submits that the email exchanges in July 2010 were "apparently manufactured" in order "to serve and protect Trilogy's interests" after proceedings had been commenced by Kosho in May 2010. I am not persuaded that this is the case. Mr Fazzolari was copied in on the email of 16 July 2010, and may be assumed to have had an interest in the matter in his capacity as Senior Credit Manager. He was not cross-examined and the evidence does not permit me to conclude that the July 2010 emails were manufactured by Trilogy. Like earlier emails, Mr Hinrichsen's email of 16 July 2010 expresses frustration at the delay in achieving final agreement. Still, matters were permitted to drift between March and July 2010. There is no adequate explanation as to why matters were not resolved more expeditiously during this time.

[92] One issue which arose in the course of negotiation was the express provision of access rights in respect of a services corridor and for pedestrian access. As noted, Trilogy submits, based upon the evidence of Mr Wakerley, that these rights were needed for any owner to undertake the development of the Sunrise Waters land. Kosho in response advances substantial arguments to the effect that the 2007 Deed of Agreement between Club Cavill, Kosho and DMR already granted full rights and entitlements to enter the resumed land and to complete all works required to implement the preliminary approval and any future approvals. It submits that Club Cavill already was able to undertake any works required to satisfy any development approval or future approval, including the access corridor and pedestrian access. Although there is some force in these arguments I am not persuaded that it was unreasonable of Trilogy and its lawyers to seek clarification by way of specific provision in the deed of assignment in relation to such matters. I am not persuaded that the terms of cl 4 of the 2007 Deed of Agreement and the rights of access granted under it were sufficient to ensure the creation and maintenance of a services corridor and a pedestrian corridor on the resumed land.

**A simple matter within Trilogy's control?**

[93] Kosho submits that it was incumbent on Trilogy to facilitate "the timeous satisfaction" of Special Condition (s), and that it lay "entirely in the control of Trilogy to facilitate what was contemplated by the Letter of Offer - a simple deed of assignment of rights already existing under the 2007 Deed of Agreement". I am not satisfied that satisfaction of Special Condition (s) lay entirely in the control of Trilogy, or that satisfaction of it would necessarily be achieved by a simple deed of assignment.

[94] Three sets of interests needed to be satisfied with the terms of any "deed of assignment and consent in relation to" the 2007 Deed of Agreement. The first was the Trilogy interests, being CPL prior to Trilogy's replacement of it as responsible entity for the PFMF on 20 July 2009, and thereafter Trilogy. The Trilogy interests were entitled to protect their legitimate interests, subject to any contractual or other duties owed to the Kosho interests. The second interests were those of the State of Queensland, represented by DMR. It needed to be satisfied with the terms of the deed of assignment and consent. It was not obliged to accommodate the interests of the other parties to the deed and could pursue what it perceived to be its interests. It might delay in considering its position, prolong negotiations and insist on terms that suited it. Next, it fell to Kosho to cause Club Cavill to enter into the deed and to itself enter into the deed within two days of receiving it if it wished to satisfy Special Condition (s).

[95] The need for the Trilogy interests and DMR to agree on terms which satisfied each of them meant that satisfaction of Special Condition (s) did not lay entirely in the control of Trilogy. Depending upon the terms which each party sought, any deed may not be a simple one.

**The meaning of "in relation to" in its context**

[96] The new agreement to be prepared by Trilogy and put to, amongst others, DMR was to be "in relation to" the 2007 Deed of Agreement between DMR, Kosho and Club Cavill. Whether or not proposed terms were "in relation to" the 2007 Deed of Agreement is to be determined by reference to the purpose of Special Condition (s) in its context. That context includes Special Condition (t). Special Condition (t) provides for Kosho to obtain a rebate of up to $2,800,000 as compensation for the transfer of rights and obligations to Sunrise Waters in accordance with Special Condition (s). These Special Conditions were included for the purpose of achieving what Mr Slijderink on 13 February 2009 had identified as "a commercially practical and equitable solution in regards to mitigating the PFMF financial exposure to Sunrise Waters", and so as to enhance the Fund's prospects of being able to maximise the development potential of the land and commence earthworks. The first and second dot points which I have quoted from his letter of 27 July 2009 in [75] accurately state that their purpose was to facilitate development approval of the Sunrise Waters land so the land could be sold.

[97] The Special Conditions which were negotiated created the possibility of reuniting soil rights and the owner of the land to which the preliminary approval applied and the execution of works contemplated by the Council approval. In negotiating the terms of the proposed deed of assignment and consent it was understandable that the Trilogy interests provide for the transfer of the soil rights specifically referred to in cl 4 of the 2007 Deed of Agreement and to ensure that the present approval and any future approval for the development not be jeopardised.

[98] The fact that an early draft of the deed in July 2009 did not seek the inclusion of certain rights did not make it illegitimate for Trilogy later to seek their inclusion in the deed. The evidence of Mr Wakerley was that rights over the resumed land for services and pedestrian access were needed for any owner to complete the development. The deed which Trilogy's lawyers drafted sought the inclusion of these rights. There was nothing unreasonable in Trilogy seeking to facilitate development of the land then owned by Sunrise Waters. This was the commercial

objective for which it was prepared to grant a rebate of $2.8m. This rebate was compensation "for the transfer of the rights and obligations" to Sunrise Waters pursuant to the deed which it was to prepare, on terms satisfactory to it.

[99] If the rights to construct and maintain a services corridor and pedestrian access over the resumed land were already comprehended in cl 4 of the 2007 Deed of Agreement, then no question of Trilogy seeking to include "additional rights" in the new agreement arose. If, however, Trilogy sought the assignment of additional rights in this regard then it was understandable that it would do so. Any additional rights which Trilogy sought to be assigned were not inconsistent with the commercial objectives of Special Conditions (s) and (t). At the very least, it was not unreasonable or illegitimate of Trilogy to request their inclusion in the new deed. Requiring such terms to be included in a deed of assignment and consent involved a legitimate pursuit of Trilogy's interests, and something which was not extraneous to the purpose which Special Conditions (s) and (t) served.

[100] Trilogy was not obliged to prepare the simplest form of assignment. It might have done so, and if it had been satisfied with such a simple document then DMR might also have been satisfied. But, as matters developed, and having appointed lawyers to protect its interests, Trilogy sought to protect those interests by the inclusion of additional terms. An agreement containing terms which specifically addressed rights over the resumed land for services and pedestrian access would be "in relation to" the 2007 Deed of Agreement, which was concerned with, among other things, the development of the Sunrise Waters land in accordance with the Council's preliminary approval and any future approvals.

**DMR's satisfaction**

[101] DMR was subject to compensation claims which, according to DMR's records, Club Cavill claimed to be worth $70m. This seems to have been a grossly inflated claim, since Mr Slijderink told the 13 February 2009 meeting that he thought the claim was worth well in excess of $10m and might exceed $20m. He was prepared to bargain it away for far less. Whatever the true value of Club Cavill's compensation claim, the 2007 Deed of Agreement had not waived it. Any waiver was conditional upon Club Cavill commencing development on the land. Club Cavill's lawyers had reminded DMR's lawyers in January 2008 after the land had been sold that there had been no waiver of the claim for compensation and that Club Cavill's claim to compensation subsisted. In the circumstances, it was in the interests of the State to negotiate an unconditional waiver of Club Cavill's rights. Mr Campbell from DMR wanted an unconditional waiver of compensation.

[102] DMR's requirement in this regard was communicated as early as Crown Law's letter of 22 July 2009. Its requirement in this regard was not in response to a request by Trilogy for additional rights in the form of an access corridor and pedestrian access over the resumed land. When those matters later arose in the course of negotiations, DMR reiterated its requirement for a complete waiver.

**Was there an unreasonable delay by the Trilogy interests in respect of Special Condition (s)?**

[103] The appointment of a new responsible entity to the Fund in July 2009 was apt to delay matters. Still, individuals such as Mr McCormick and Mr McCosh who had been involved in the matter on behalf of CPL were available if Trilogy required

their input. The apparent delay in progressing matters in relation to Special Condition (s) in the second half of 2009 was not for want of urging by Mr Slijderink on behalf of the Kosho interests. He met with Trilogy staff on 1 September 2009 and confirmed Kosho's cashflow and finance requirements. Various emails in the following months reiterated the matter and disclosed Kosho's concern about delay. Negotiations between the Trilogy interests and DMR revived between December 2009 and March 2010. By March 2010 the parties may have reached a broad consensus about matters, but the terms of a deed were not finally negotiated and approved by the respective parties at that time. The matter then appears to have drifted for some months for reasons that were not fully explained.

[104] Trilogy makes the valid point that it did not control DMR's conduct in negotiating the deed and the fact that negotiations were never finalised cannot be attributed solely to it. The evidence shows periods of delay on the part of DMR and its legal advisers. Not being a party, DMR was not obliged to meet timelines required by the Trilogy interests or the Kosho interests.

[105] Trilogy had access to the Letter of Offer which contained a cashflow schedule. The cashflow schedule was in the form of Month 1, Month 2 etc., rather than specific dates. Discussion with Mr McCormick or Mr McCosh would have confirmed Kosho's finance requirements, particularly for construction activities during the first seven months of the 2009 Facility, and Mr Slijderink's communications with Trilogy staff reinforced the fact that Kosho was seeking funding as a matter of urgency. Special Condition (q) made the offer conditional upon the commercial property settling on or before 28 February 2010, and this required the commercial property to be constructed by then.

[106] The reasonableness or otherwise of Trilogy progressing and finalising an agreed deed of assignment and consent falls to be determined against that background. The slow progress in finalising negotiations about the document cannot be attributed entirely to Trilogy. Some substantial period of time would have been required in any event to negotiate mutually agreed terms with DMR before submitting a draft agreement to Kosho. However, negotiations were protracted and still had not been concluded more than 12 months after the 2009 Facility was agreed when its term expired on 30 June 2010. The periods of delay between July and December 2009 and between March and July 2010 are largely unexplained. I am not satisfied that DMR or any other party was solely or predominantly responsible for them. It appears those delays occurred much to the frustration of Mr Hinrichsen, who in March 2010 was exasperated by the delay and proposed a meeting to finalise the matter. The matters were not finalised. I conclude that delay by Trilogy in preparing a deed, the terms of which were satisfactory to it as lender and also might have satisfied DMR, was unreasonable.

**Was the delay and Trilogy's conduct concerning Special Condition (s) illegitimate and part of a deliberate strategy?**

[107] Kosho submits that the delay on the part of Trilogy to attend to satisfaction of the Special Conditions was not simply unreasonable. It submits that it was "cynical and inexcusable". Kosho went so far as to plead that the Court should infer that Trilogy's conduct was a "deliberate tactic to ensure that it did not have to provide the funds under the Finance Facility". Whilst I have found that Trilogy's conduct

involved unreasonable delay on its part, the evidence does not satisfy me that its conduct was cynical, let alone a deliberate tactic of the kind pleaded.

[108] In various communications Trilogy attempted to expedite matters. It was not unreasonable for it to attempt to reach agreement with DMR over the terms of the deed before involving Kosho. Mr Slijderink on behalf of Kosho wished to be involved in the negotiations from an early stage. However, it appears that officers of DMR were reluctant to deal with him directly. It was logical to first agree terms with DMR before presenting them to Kosho for its consideration.

[109] The course of contemporaneous correspondence does not support the conclusion that Trilogy was deliberately slowing down the process.

[110] Kosho's "deliberate tactic" pleading relies in part upon a meeting that occurred in early 2010 between Trilogy's CEO and Mr Peter Madrers and Mr Paul Brinsmead. Whilst the "deliberate tactic" phrase is not deployed in Kosho's submissions, reference is made to the evidence of Mr Madrers and Mr Brinsmead in support of the submission that Trilogy sought to leverage "a simple assignment to negotiate additional benefits for the Sunrise Waters development" while, it can be inferred "obtusely ignoring its extant obligations under the Kosho loan facility".

[111] By early 2010 Mr Madrers and Mr Brinsmead, as joint Managing Directors of Pearls Australasia Pty Ltd, had been involved in discussions over the Sunrise Waters land. They had had an interest in the land for quite some time, having been introduced to it a few years earlier, and having discussed a possible joint venture with a Mr Mewett from Sunrise Waters. Mr Mewett suggested that they might form a joint venture and acquire the land fairly cheaply from CPL. Mr Madrers and Mr Brinsmead investigated the land and decided not to pursue it. In early 2010 they were contacted by a real estate agent who advised that Sunrise Waters had gone into receivership and that they might wish to discuss any interest they had in the land with Trilogy. An initial meeting was held with a representative of Trilogy and a further meeting was organised with Mr Griffin. This meeting probably occurred around March or April 2010.

[112] Mr Madrers and Mr Brinsmead knew Mr Slijderink and conducted some preliminary due diligence about the property. They thought it "severely challenged" in terms of development costs, infrastructure and potential yield. When they went to see Mr Griffin they contemplated proposing a "workout" by which their company and Trilogy would make contributions and that Mr Slijderink would be engaged in the workout. They thought that Mr Slijderink would be able to "bring to the table" his knowledge of the land and solutions to fix some of the problems as well as injecting some capital into it. On the basis of what Mr Slijderink told them, they believed that he would be able to help them resolve issues with the Council and also with DMR. Mr Slijderink claimed to them that he had some way to resolve these issues. They expected Trilogy would contribute the land and possibly finance and that they would collectively achieve a mutually beneficial outcome.

[113] At the meeting with Mr Griffin, Mr Madrers and Mr Brinsmead raised Mr Slijderink's name as someone who could assist in resolving issues. When they did, Mr Griffin made clear to them that he had little time for Mr Slijderink. According to Mr Madrers, Mr Griffin was focused on discrediting Mr Slijderink's claims that Mr Slijderink was able to resolve issues. Mr Griffin said that he