

**COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

CA NUMBER:
NUMBER:

14258/19

Appellant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE
ENTITY OF THE LM FIRST MORTGAGE INCOME
FUND ARSN 089 343 288**

AND

First Respondent: **PETER CHARLES DRAKE**

AND

Second Respondent: **LISA MAREE DARCY**

AND

Third Respondent: **EGHARD VAN DER HOVEN**

AND

Fourth Respondent: **FRANCENE MAREE MULDER**

AND

Fifth Respondent: **SIMON JEREMY TICKNER**

NOTICE OF APPEAL

To the Respondents

And to the Registrar, Supreme Court of Queensland

TAKE NOTICE that the Appellant appeals to the Court of Appeal against the whole of the order of the Court.

1. THE DETAILS OF THE JUDGMENT APPEALED AGAINST ARE –

Date of Judgment: 22 November 2019

Description of Proceedings: BS 12317/14

Description of parties involved in the proceedings:

LM Investment Management Limited (Receivers & Managers Appointed) (In

NOTICE OF APPEAL
Filed on Behalf of the Appellant
Form 64, Version 4
Uniform Civil Procedure Rules 1999
Rule 747(1)

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Liquidation) ACN 077 208 461 as Responsible Entity of the LM First Mortgage
Income Fund ARSN 089 343 288 as Plaintiff

AND

Peter Charles Drake as First Defendant

AND

Lisa Maree Darcy as Second Defendant

AND

Eghard van der Hoven as Third Defendant

AND

Francene Maree Mulder as Fourth Defendant

AND

John Francis O'Sullivan as Fifth Defendant

AND

Simon Jeremy Tickner as Sixth Defendant

AND

LM Investment Management Limited (Receivers & Managers Appointed) (In
Liquidation) ACN 077 208 461 as Seventh Defendant

AND

Korda Mentha Pty Ltd ACN 100 169 391 in its capacity as Trustee of the LM Managed
Performance Fund

Name of Primary Court Judge: Justice Jackson

Location of Primary Court: Brisbane

2. GROUNDS -

The Appellant relies on the following grounds of appeal:

Construction of Statutory Provisions

1. The learned primary judge erred in holding that:
 - (a) in s 601FD(1)(c) of the *Corporations Act 2001* (Cth), “the interests of the responsible entity” of a registered management investment scheme do not include the duty (or duties) of the responsible entity as trustee of another trust to the beneficiaries of that trust (Reasons at [87]);

- (b) LMIM's duties as trustee of the MPF, an unregistered management investment scheme, were not "interests of the responsible entity" within the meaning of s 601FD(1)(c) (Reasons at [92]); and
 - (c) for those reasons, the statutory duty in s 601FD(1)(c) imposed on the First, Second, Third, Fourth and Sixth Respondents (**Respondents**) as officers of LMIM as responsible entity for the registered management investment scheme FMIF, that, if there is conflict between the interests of members of a registered scheme and the interests of the responsible entity for that scheme, they "must .. give priority to the members' interests", did not require them to give priority to the interests of the members of the FMIF over the interests of the beneficiaries of the MPF (Reasons at [92]).
2. The learned primary judge erred in holding that the statutory duty imposed on the Respondents as officers of LMIM as the responsible entity for the FMIF in s 601FD(1)(c) of the *Corporations Act* to "act in the best interests of the members":
- (a) does not reflect and give statutory force to the equitable principle or rule that applies when a trustee or fiduciary is placed in a position of conflict between two duties (Reasons at [108]);
 - (b) is constrained by, and must take into account of, the fact that the constitution of the FMIF expressly authorised LMIM (i) to act as the responsible entity of another trust, or fund; (ii) to deal with itself as trustee of another trust; and (iii) to be interested in a contract or transaction with itself as trustee of another trust" (Reasons at [116] and [117]); and
 - (c) does not require an officer of a responsible entity necessarily to prefer the members' interests to the interests of the members of another scheme or the beneficiaries of another trust, where they conflict (Reasons at [111], [126]); and
 - (d) only required the Respondents to act in a manner that was "impartial and fair" as between the conflicting interests of the members of the FMIF and the members of the MPF (Reasons at [122] to 125] and [209]).
3. In the alternative to subparagraph 2(d) above, the learned primary judge erred in failing to determine what the statutory duty imposed on the Respondents as officers of LMIM as the responsible entity for the FMIF in s 601FD(1)(c) of the *Corporations Act* to "act in the best interests of the members" required of the Respondents.

Scheme Property

4. The learned primary judge erred in:
- (a) finding that the Appellant did not contend that the entirety of the \$35.5 million settlement proceeds (**Settlement Proceeds**) from the litigation involving Gujarat NRE Minerals Ltd (**Gujarat litigation**) were "scheme property" of the FMIF before part of those proceeds were received by LMIM as trustee of the MPF (Reasons at [136]) in circumstances where such a contention was expressly made by the Appellants in (i) paragraph 37 of the Statement of Claim; (ii) paragraph 2 and 3 of the document entitled "Findings Sought by the Plaintiff" handed up during oral closing submissions; and (iii) paragraph 119 of the Appellant's written closing submissions;

- (b) failing to find that the entirety of the Settlement Proceeds were “scheme property” of the FMIF before part of those proceeds were received by LMIM as trustee of the MPF (Reasons at [210]).

The Understanding

5. The learned primary judge erred in finding that:

- (a) LMIM as trustee for the MPF did not fund the Gujarat Litigation as second mortgagee (Reasons at [185]);
- (b) there was an understanding between the Respondents that it was appropriate for the contribution of LMIM as trustee for the MPF to the Gujarat litigation to be recognized by providing LMIM as trustee for the MPF with a share of the proceeds recovered in that litigation (**Understanding**) (Reasons at [256]-[267]),

in that such findings were glaringly improbable, contrary to compelling inferences and/or against the weight of the evidence in that they were:

- (c) contrary to all the contemporaneous documentary evidence;
 - (d) not supported by any contemporaneous documentary evidence (in circumstances where, in the case of any arrangement such as the Understanding, LMIM’s policies and protocols required such an arrangement to be documented and approved by LMIM’s Risk Management Committee or Board of Directors);
 - (e) based solely on evidence of three Respondents whose evidence as to the Understanding was found by the learned primary judge to be “vague” and where the learned primary judge also observed that it was “quite possible that the defendants believed that they had the understanding at the time when they gave evidence but that their beliefs are mistaken and the product of reconstruction” (Reasons at [265]); and
 - (f) illogical in that LMIM as trustee for the MPF was, at the time of the alleged Understanding, in fact indebted to LMIM as responsible entity for the MPF in the amount of \$36 million.
6. The learned primary judge erred, in assessing whether the Respondents breached their duties under s 601FD(1)(b) and (c), in failing to consider that, even if there was such an Understanding:
- (a) the Respondents had admitted on the pleadings, and in their submissions, that the Understanding was not a legally binding agreement or arrangement;
 - (b) there was no understanding as to what the share of the proceeds was;
 - (c) there was no understanding that the share of the proceeds was to be calculated by reference to the returns of a commercial litigation funder.

Breaches

7. The learned primary judge erred in failing to find that the Respondents breached their duties under s 601FD(1)(c) by causing LMIM to pay \$15.5 million (**Settlement Payment**) from the Settlement Proceeds.

8. The learned primary judge erred in finding that the Respondents did not breach the duty in s 601FD(1)(b) of the *Corporations Act* (Reasons at [283]), and in particular in finding that:

- (a) the Respondents adequately read and considered the legal advice from Allens to LMIM dated 28 March 2011 (**Allens advice**) (Reasons at [192], [200]-[225]);
- (b) the Respondents were not required to obtain independent advice, separate from the Allens advice (Reasons at [193]);
- (c) the Respondents exercised independent judgment in considering the Allens advice (Reasons at [199]);
- (d) the Respondents were justified in concluding that the Allens advice or the advice from WMS to LMIM dated 7 March 2011 (**WMS report**) justified the payment of part of the Settlement Payment to LMIM as trustee of the MPF (Reasons at [226]-[230]);
- (e) the Respondents had proper regard and gave adequate consideration to the fact that PTAL sold the property to Gujarat as mortgagee exercising power of sale, and that PTAL as first mortgagee for the benefit of the FMIF had priority over LMIM as second mortgagee (Reasons at [231]-[239]);
- (f) the Respondents had proper regard and gave adequate consideration to the different interests of the members of the FMIF as a registered scheme and the beneficiaries of the MPF as an investment trust (Reasons at [268]); and
- (g) the Respondents were justified in concluding, in reliance on the Allens advice and the WMS report, that:
 - (i) the use of the litigation funding analogy in reaching their decision as to the division of the settlement proceeds was appropriate; and
 - (ii) a ratio of 65:35 was appropriate for the division of the settlement proceeds (Reasons at [269]-[281]),

in circumstances where the Respondents knew:

- (h) the litigation was being funded by LMIM as trustee for the MPF as a second mortgagee;
- (i) that there was no Understanding and that the Allens Advice and the WMS Advice was premised on the Understanding being in existence;
- (j) that even if there was an Understanding:
 - (i) it was not a legally binding agreement or arrangement;
 - (ii) it did not extend to what share of the proceeds LMIM as trustee for the MPF was entitled to;
 - (ii) it did not extend to the share of the proceeds LMIM as trustee for the MPF was entitled to being calculated by reference to the returns of a commercial litigation funder; and
- (k) no analogy could be drawn between:

- (i) LMIM as trustee for the MPF, as second mortgagee, advancing funds to LMIM as RE for the FMIF as first mortgagee, to fund litigation in to which LMIM as trustee for the MPF was itself a party and stood to benefit and where there was no agreement as to what return LMIM as trustee for the MPF would receive for advancing funds if the litigation was successful; and
- (ii) a commercial litigation funder agreeing to fund the prosecution of litigation, to which it was not a party, for a commercial return.

Causation and loss

- 9. The learned primary judge erred in:
 - (a) failing to find that, but for the Respondents' breaches of the duties in ss 601FD(1)(b) and (c) of the *Corporations Act*, the Respondents (or a sufficient number of them), or hypothetical directors acting reasonably, would have caused LMIM as trustee of the MPF to enter into the Deed of Release and the Deed of Settlement and Release on the footing that all the Settlement Proceeds would be paid to PTAL as custodian for LMIM as responsible entity of the FMIF (Reasons at [165]-[166]);
 - (b) failing to find that the fact that LMIM as responsible entity of the FMIF did not receive the amount of the Settlement Proceeds that was received by LMIM as trustee of the MPF "resulted from" the respondents' breaches of the duties in ss 601FD(1)(b) and (c) within the meaning of s 1317H of the *Corporations Act*; and
 - (c) failing to find that the Respondents should not be excused from their breaches of ss 601FD(1)(b) and (c) of the *Corporations Act* pursuant to s 1317S of the *Corporations Act* (Reasons at [285] to [286]);
 - (d) failing to order, pursuant to s 1317H, that the Respondents compensate the FMIF in the amount of the Settlement Payment received by LMIM as trustee of the MPF.
- 10. In the alternative, the learned primary judge erred in failing to:
 - (a) find that but for the Respondents' breaches of the duty in s 601FD(1)(b) of the *Corporations Act*, the respondents (or a sufficient number of them), or hypothetical directors acting reasonably, would have caused LMIM as trustee of the MPF to enter into the Deed of Release and the Deed of Settlement and Release on the footing that all the Settlement Proceeds would be paid to PTAL as custodian for LMIM as responsible entity of the FMIF, except for an amount to reimburse LMIM as trustee of the MPF for the contribution it made to funding the Gujarat litigation together with interest (Reasons at [173]-[174]);
 - (b) find that the fact that LMIM as responsible entity of the FMIF did not receive the amount of the Settlement Proceeds that was received by LMIM as trustee of the MPF, less the amount by way of reimbursement referred to in paragraph 10(a) above, "resulted from" the respondents' breaches of the duty in s 601FD(1)(b) within the meaning of s 1317H of the *Corporations Act*;

- (c) find that the Respondents should not be excused from their breaches of ss 601FD(1)(b) and (c) of the *Corporations Act* pursuant to s 1317S of the *Corporations Act* (Reasons at [285] to [286]); and
- (d) order, pursuant to s 1317H, that the Respondents compensate the FMIF in the amount of the Settlement Proceeds that were received by LMIM as trustee of the MPF less the amount by way of reimbursement referred to in paragraph 10(a) above.

3. ORDERS SOUGHT -

The Appellant seeks the following orders:

1. The appeal be allowed.
2. The Orders made on 22 November 2019 and subsequent orders as to costs be set aside.
3. As Against each of the Respondents:
 - (a) an order pursuant to s 1317H of the *Corporations Act* 2001 (Cth) that the Respondents pay to the Appellant compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (b) interest under s 58 of the *Civil Proceedings Act* 2011 (Qld) on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) the Respondents pay the Appellants' costs of and incidental to the appeal and of the trial.
4. In the alternative:
 - (a) the proceeding be remitted for the determination of the question of whether relief should be granted in favour or one or more of the Respondents pursuant to section 1317S of the *Corporations Act* 2001 and for the making of final orders; and
 - (b) the Respondents pay the costs of the appeal.

4. RECORD PREPARATION

The Appellant undertakes to cause a record to be prepared and lodged, and to include all material required to be included in the record under the rules and practice directions and any order or direction in the proceedings.

PARTICULARS OF THE APPELLANT:

Name: LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION) ACN 077 208 461 AS
RESPONSIBLE ENTITY OF THE LM FIRST
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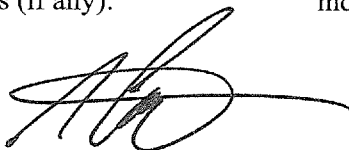
PARTICULARS OF THE FOURTH RESPONDENT:

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Signed:



Description: Solicitor for the Appellant

Dated: 20 December 2019

This Notice of Appeal is to be served on: Peter Charles Drake, Lisa Maree Darcy, Eghard van der Hoven, Francene Maree Mulder and Simon Jeremy Tickner, the Respondents