

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 1146/2020

Applicant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & 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**

AFFIDAVIT

I, **CLAUDIA JANE DENNISON** of c/- Gadens Lawyers, Level 11, 111 Eagle Street, Brisbane in the State of Queensland, Solicitor, state on oath:

1. I am a solicitor in the employ of Gadens Lawyers, the solicitors for the Applicant instructed by David Whyte, the court appointed receiver of the property of the LM First Mortgage Income Fund ARSN 089 343 288 (**FMIF**).
2. I assist with carriage of this matter on behalf of the plaintiff subject to the supervision of my employers, and I have access to Gadens' files in relation to this matter.
3. I have sworn this affidavit to update the court on matters which have occurred since the first hearing of this application on 14 February 2020.

Seventh Defendant's costs

4. On 28 February 2020 Justice Jackson delivered judgment in relation to the costs of the Seventh Defendant in Supreme Court of Queensland proceeding 12317/14 (**the Director Proceeding**) following the judgment in *LM Investment Management Ltd (receiver appt)(in liq) v Drake & Ors* [2019] QSC 281.
5. The Seventh Defendant was awarded its costs in the Director Proceeding.

Signed By: 

Witnessed By: 

Certificate of Exhibit
Filed on behalf of the Plaintiff Applicant
Form 47 R.435

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
SZC:JSO:201401822

6. Exhibited hereto and marked "CJD-1" is a copy of the *LM Investment Management Ltd (receivers and managers appointed)(in liquidation) v Drake & Ors* [2020] QSC 19 dated 28 February 2020.

Receiver's Report

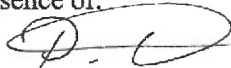
7. On 31 March 2020 David Whyte provided his 29th receiver's report to investors. Pursuant to the report, as at 31 December 2019:
 - a) the total number of FMIF investor units was 492,125,624; and
 - b) the estimated net amount available to FMIF unitholders was \$31,427,400.
8. Exhibited hereto and marked "CJD-2" is a true copy of the 29th receiver's report to investors dated 31 March 2020.

Correspondence with Russells Solicitors

9. On 17 February 2020 Russells Solicitors (**Russells**), representing the liquidator of LM Investment Management Limited (receivers and managers appointed)(in liquidation) as Responsible Entity of both the LM Currency Protected Australian Income Fund (receiver appointed) and the LM Institutional Currency Protected Australian Income Fund (receiver appointed) wrote to Gadens in relation to this current proceeding to request copies of any confidential and legal professional privileged advices received by David Whyte in relation to the Director Proceeding and the appeal of the Director Proceeding (Notice of Appeal no. 14258 of 2019). Exhibited hereto and marked "CJD-3" is a true copy of the letter received from Russells.
10. On 2 March 2020 Gadens responded to Russells. Exhibited hereto and marked "CJD-4" is a true copy of the letter of 2 March 2020 from Gadens to Russells.
11. On 3 March 2020 Russells sent further correspondence to Gadens. Exhibited hereto and marked "CJD-5" is a true copy of the letter received from Russells dated 3 March 2020.
12. On 12 March 2020 Gadens responded to Russells. Exhibited hereto and marked "CJD-6" is a true copy of the letter dated 12 March 2020 from Gadens to Russells.
13. On 8 April 2020 Russells sent further correspondence to Gadens. Exhibited hereto and marked "CJD-7" is a true copy of the letter received from Russells dated 8 April 2020.
14. On 16 April 2020 Gadens responded to Russells. Exhibited hereto and marked "CJD-8" is a true copy of the letter dated 16 April 2020 from Gadens to Russells.

ALL THE FACTS and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my affidavit.

SWORN by **CLAUDIA JANE DENNISON**)
 on this 17TH day of April 2020 at Brisbane in)
 the presence of:)



Solicitor

Petar Damjanovic
 Solicitor



Signed By:

Witnessed By:

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 1146/2020

Applicant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & 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**

CERTIFICATE OF EXHIBIT

INDEX TO EXHIBITS

Exhibits "CJD-1" to "CJD-8" to the affidavit of **CLAUDIA JANE DENNISON** sworn at Brisbane on this 17TH day of April 2020.

Exhibit	Description	Page No.
CJD-1	Judgment of 28 February 2020 in proceedings 12317/14	1-3
CJD-2	29 th Receiver's Report dated 31 March 2020	4-22
CJD-3	Letter from Russells to Gadens dated 17 February 2020	23-24
CJD-4	Letter from Gadens to Russells dated 2 March 2020	25
CJD-5	Letter from Russells to Gadens dated 3 March 2020	26-27
CJD-6	Letter from Gadens to Russells dated 12 March 2020	28
CJD-7	Letter from Russells to Gadens dated 8 April 2020	29-30

Signed By:



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Filed on behalf of the Plaintiff Applicant
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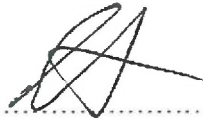
Witnessed By:



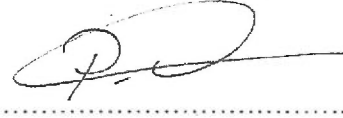
Petar Damjanovic
Solicitor

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Exhibit	Description	Page No.
CJD-8	Letter from Gadens to Russells dated 16 April 2020	31



Deponent



Solicitor

Petar Damnjanovic
Solicitor

SUPREME COURT OF QUEENSLAND

CITATION: *LM Investment Management Ltd (receivers and managers appointed) (in liquidation) v Drake & Ors* [2020] QSC 19

PARTIES: **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**

(plaintiff)

v

PETER CHARLES DRAKE

(first defendant)

and

LISA MAREE DARCY

(second defendant)

and

EGHARD VAN DER HOVEN

(third defendant)

and

FRANCENE MAREE MULDER

(fourth defendant)

and

JOHN FRANCIS O'SULLIVAN

(fifth defendant)

and

SIMON JEREMY TICKNER

(sixth defendant)

and

**LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461
(seventh defendant)**

and

KORDA MENTHA PTY LTD ACN 100 169 391 IN ITS

**CAPACITY AS TRUSTEE OF THE LM MANAGED
PERFORMANCE FUND**
(eighth defendant)

FILE NO/S: BS12317/14

DIVISION: Trial Division

PROCEEDING: Application for costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 28 February 2020

DELIVERED AT: Brisbane

HEARING DATE: Written submission provided 29 November 2019

JUDGE: Jackson J

ORDER: **The order of the Court is that:**

1. The plaintiff pay the seventh defendant's cost of the proceeding.

CATCHWORDS: PROCEDURE— CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS— COSTS— GENERAL RULE: COSTS FOLLOW EVENT— where the seventh defendant applied (informally) for an order that the plaintiff pay the seventh defendant's costs of the proceeding— where the seventh defendant contends that the costs were properly incurred in defending the proceeding— where the plaintiff made no submissions as to the costs of the seventh defendant— where the court ordered that the costs of the proceeding should follow the event.

Uniform Civil Procedure Rules 1999 (Qld), r 681

LM Investment Management Ltd (receiver appointed) (in liquidation) v Drake & Ors [2019] QSC 281

SOLICITORS: Gadens for the plaintiff
Russells Law for the seventh defendant

Jackson J:

- [1] On 22 November 2019, the court gave judgment in the proceeding dismissing the plaintiff's claim against the defendants.¹ The trial had proceeded against the first to fourth and sixth defendants. It did not proceed against the fifth defendant because he was not served. It did not proceed against the seventh defendant either, because the claim against the seventh defendant was deleted from the statement of claim.
- [2] As to the seventh defendant, LMIM by the liquidators was involved in the proceeding until 28 April 2016. On that date, the court ordered that the liquidators and the solicitors for the seventh defendant be excused from further appearances.
- [3] Prior then, the seventh defendant had been involved in a number of steps, including filing a defence. However, by April 2016, it appeared that LMIM was not insured and the proceeding against it did not continue.
- [4] On 29 November 2019, the seventh defendant applied (informally) for an order that the plaintiff pay the seventh defendant's costs of the proceeding. By written submission, the seventh defendant contends that it remains a party to the proceeding and that it had, by the liquidators, properly incurred costs in defending the proceeding.
- [5] The seventh defendant submits that in circumstances where the plaintiff's claim was dismissed, including for reasons pleaded in the seventh defendant's defence as appropriate, the plaintiff should be ordered to pay the seventh defendant's costs.
- [6] Following receipt of the seventh defendant's application, the court enquired whether the plaintiff intended to make any submissions as to costs of the seventh defendant. The plaintiff replied that it did not.
- [7] In my view, in those circumstances, r 681 of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR") applies. The costs of the proceeding should follow the event. No reason to make another order has been advanced by the seventh defendant or the plaintiff.

¹ *LM Investment Management Ltd (receiver appointed) (in liquidation) v Drake & Ors* [2019] QSC 281.



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TO THE INVESTOR AS ADDRESSED

31 March 2020

**LM FIRST MORTGAGE INCOME FUND (RECEIVER APPOINTED)
ARSN 089 343 288 ('the Fund' or 'FMIF')**

I refer to my appointment as the Receiver of the Fund's assets and the person responsible for ensuring the winding up of the Fund in accordance with the terms of its constitution by Order of the Supreme Court of Queensland on 8 August 2013.

I now provide my 29th update report to investors. This report is prepared in accordance with the deferral granted by the Australian Securities and Investments Commission (ASIC Exemption) in relation to financial reporting obligations of the Fund. In this regard, the ASIC Exemption requires a report to be made available to investors for each period of six months starting on 1 January 2016, within three months of the end of each period, which includes the following information:

- (i) Information about the progress and status of the winding up of the Fund, including details of:
 - A. The actions taken during the period;
 - B. The actions required to complete the winding up;
 - C. The actions proposed to be taken in the next 12 months; and
 - D. The expected time to complete the winding up.
- (ii) The financial position of the Fund as at the last day of the relevant period (based on available information);
- (iii) Financial information about receipts (and payments) of the Fund during the period; and
- (iv) The following information at the end of the period:
 - A. The value of the Fund's property; and
 - B. The potential return to investors.

This report covers, the period 1 July 2019 to 31 December 2019 (the Period).

On 3 March 2020 ASIC extended the deferral of financial reporting obligations of the Fund until 16 March 2022. A copy of the relief instrument is available for viewing at www.lmfimf.com.

1. Executive Summary

The key developments in the winding up of the Fund, during the Period, are:

- Justice Jackson has handed down decisions in respect of:
 - a. Authorising me to make an interim distribution which was paid at the rate of 6.5 cents per unit in October 2019 (refer to section 5.2);
 - b. The trial of the proceedings against LMIM, certain directors of LMIM and the MPF which was heard between 1 and 9 April 2019. As previously reported, on 22 November 2019 the Court handed down judgment in favour of the defendants, dismissing my claims alleging certain breaches by the directors of LMIM of the Corporations Act 2001 (Cth).
 - c. The Leave Application in the proceedings against the auditors which is progressing to trial (refer to section 2.1.2);
 - d. FTI's Second Remuneration Application filed on 17 July 2018 seeking \$743,889.89 from the property of the FMIF. On 2 October 2019 the Court delivered judgment approving remuneration totalling \$393,043.89 and disallowing remuneration of \$348,692.87 (refer to section 2.1.6.2);
 - e. FTI's dual appointment application which was dismissed by the Court on 2 October 2019 (refer to section 2.1.6.5).

A summary of the other matters covered in this report is as follows:

- Cash at bank as at 31 December 2019 was \$36.97 million;
- The further estimated return to investors as at 31 December 2019 is 6.4 cents per unit (providing a total estimated return of 12.9 cents per unit) before taking into account future costs and recoveries from legal proceedings on foot;
- For the settlement of the Bellpac Liquidator's \$8M Bonds litigation, discussions are currently ongoing in relation to extending the Sunset Date to 31 July 2020 for complying with the remaining condition precedent beyond 31 March 2019 and the terms to apply to the same (refer to section 2.1.3);
- FTI may have a further claim against the Fund for expenses (refer to section 2.1.6.4).

2. Progress and Status of the Winding Up

2.1 Legal Actions/Potential Recoveries

2.1.1 Proceedings against the MPF, LMIM and the Directors of LMIM

I refer to my previous updates to investors in relation to a statement of claim I caused to be filed in the Supreme Court of Queensland, against a number of parties, including the MPF Trustee and a number of directors of LMIM, in respect of loss allegedly suffered by the FMIF as a result of an amount paid to the MPF in the Bellpac litigation matter. The claim was for approximately \$15.5M plus interest.

As previously advised, the Judge dismissed my claim against the directors of LMIM on 22 November 2019.

Costs have now been awarded in favour of the defendants.

On 20 December 2019 I filed an appeal of the decision. The progress of the appeal is presently awaiting the outcome of an application for judicial advice I have made to the Court seeking advice from the

Court that I am justified in making and pursuing the appeal. That application is due to be heard by the Court on 2 June 2020.

2.1.2 Claim against the former auditors (EY Proceeding)

I refer to my previous updates to investors and provide a brief summary of the key events during the Period and subsequently as follows:

The following applications were made towards the end of FY2019:

- on 10 June 2019 the defendants applied to be excused from certain pleading requirements under the Court rules in relation to their defence on the basis of a claim for privilege (**Relief Application**);
- on 21 June 2019, the defendants applied for leave to proceed against LMIM under section 500 of the *Corporations Act 2001* (Cth) (**Leave Application**); and
- on 21 June 2019, I applied to be joined to the proceedings constituted by the Third Party Notice filed by the defendants (**Representation Application**).

Each of the Relief Application, the Leave Application and the Representation Application were heard by the Supreme Court on 26 July 2019.

- On 4 October 2019 the Court delivered judgement together with an order that:
 - The defendants application for leave to proceed against LMIM be dismissed;
 - The third party notice be struck out against the first, second, third and fourth parties (namely, LMIM and the Feeder Funds);
 - The third party statement of claim be struck out;
 - The first, second, third and fourth third parties be removed as parties to the proceeding, and
 - Leave be granted to the defendants to re-plead the third party statement of claim against the remaining third parties.
- On 17 October 2019 the Court delivered judgement in relation to the cost of the applications decided on 4 October 2019 and an order was made that:
 - the defendants pay my costs in relation to the leave application, and
 - I pay the costs of LMIM in respect of the representation application, such costs to be indemnified from the FMIF with both LMIM's costs together with my own costs to be costs in the proceeding.
- On 21 November 2019 at a review hearing the Court ordered that:
 - Privilege Claims - I was to file material to strike out the defendants' privilege claims by 29 November 2019 and a hearing is to be listed for my application with submissions to be filed and served five days before the hearing date.
 - Leave Application - I was to confirm any opposition to the defendants' Leave Application by 6 December 2019 and the application is to be listed for hearing with submissions to be filed and served five days before the hearing date.

- Pleadings - by Friday 29 November 2019 the defendants were to serve any draft counterclaim. The defendants are also to provide their further and better particulars by 20 December 2019 and I am to file any reply and answer to the counterclaim by Friday 28 February 2020.
- Disclosure - All parties are to seek to agree a disclosure protocol and provide it to the Court by Friday 20 December 2019. Failing agreement each party is to provide their own proposed protocols to the Court.
- Expert evidence - all parties are to provide to the Court either a joint proposal or respective proposals as to the preparation of reports by expert witnesses by 6 December 2019.
- Since the review hearing on 21 November 2019:
 - My material was filed on 29 November 2019 in support of my application to strike out the defendant's privilege claims.
 - The defendants served a draft counterclaim on 29 November 2019.
 - On 6 December 2019 I confirmed I would not oppose the defendants' Leave Application.
 - Proposals in relation to expert evidence were provided to the Court on 13 December 2019.
- My application to strike out the Privilege Claims was heard on 14 February 2020 (the Privilege Application).

Following the hearing of the Privilege Application, the parties were required to provide a schedule to the Court of the various parts of the defence where privilege was claimed and the arguments for and against the maintaining of the privilege claimed. That schedule was provided to the Court on Friday, 20 March 2020. When this decision is provided by the Court, further directions will be made for the progress of the claim.

An Answer to the Counterclaim filed by the defendants is currently being prepared and will be completed shortly.

The matter is otherwise presently being progressed including briefing essential expert witnesses and agreeing between the parties the process and manner in which electronic disclosure of evidence is to occur.

The proceedings are ongoing and an update will be provided in the next report.

2.1.3 Bellpac Proceedings - Wollongong Coal Ltd (WCL)

I refer to my previous updates to investors and provide a brief summary as follows:

- The liquidator of Bellpac has received the settlement amount of \$2 million from WCL in relation to the claim for redemption of the \$2 million Bonds held in WCL. A partial distribution of \$1M was received from the Bellpac liquidator in October 2019;
- The defendants' appeal of the decision of the Court which acknowledged that Bellpac (under the control of a liquidator) is the true owner of the \$8 million convertible bonds was unsuccessful;
- In January 2016, the Bellpac Liquidator applied for the conversion of the \$8 million Bonds to shares. As WCL did not issue all of the shares as required under the terms of the Bonds, the Bellpac Liquidator brought proceedings against WCL seeking orders requiring WCL to perform its obligation to redeem the Bonds converted to shares outside of the required time;
- The Bellpac liquidator and WCL have entered into a binding heads of agreement (HOA) which relates to the settlement of the litigation commenced against WCL. The terms of the heads of

agreement include that WCL will pay to Bellpac a settlement sum of \$6.3 million in return for certain releases and Bellpac returning or cancelling the WCL shares issued to Bellpac;

- The conditions precedent to the settlement with WCL include obtaining necessary approvals to undertake the settlement transactions. In this regard:
 - The Bellpac Liquidator has obtained creditor approval to enter into the settlement with WCL;
 - The Court declined to exercise its discretion on WCL's application for approval to acquire and or cancel Bellpac's holding of WCL shares. WCL is now preparing to seek shareholder approval.

The remaining condition precedent (Sunset Date) to the settlement with WCL has been extended several times and the Liquidator was successful in negotiating, as part of the agreement to extend the Sunset Date, that WCL will pay interest at 3% p.a. from 2 October 2017 until settlement. The Liquidator last entered into a further agreement with WCL, extending the sunset date to satisfy the conditions precedent to 31 March 2019. To date WCL has paid \$3M towards the settlement into their solicitors' trust account, which is to be released upon receiving shareholder approval of the settlement. Discussions have been ongoing in relation to extending the Sunset Date beyond 31 March 2019 and the Liquidator is in negotiations extend the sunset date to satisfy the conditions precedent to 31 July 2020. To date no further payments have been made by WCL into their solicitors' trust account.

A further update will be provided in the next report.

2.1.4 Claims against guarantors

There are two remaining matters, that can be summarised, as follows:

- A deed of settlement was entered into with a guarantor for \$100,000 payable over the period to 1 November 2019 with \$82,000 paid to date. A revised payment plan was negotiated with the balance of \$18,000 due to be received by 1 July 2020. However, due to the guarantor not being able to make further payments at this time or in the foreseeable future as a result of the effects of the coronavirus outbreak the remaining \$18,000 has been waived.
- PTAL as custodian of the FMIF obtained judgment against a guarantor, for approximately \$3 million, plus interest and costs. The trustee in bankruptcy has identified potential recoveries for the benefit of creditors of which the Fund is a major creditor. The bankrupt, along with other parties, contributed land to a development. The land was subdivided, developed and sold, and the net proceeds of sale in the sum of approximately \$12 million is presently held in a solicitors trust account on an interim basis, protected by certain undertakings given by the solicitor holding the funds. The trustee claims an entitlement in respect of at least a portion of the funds held in the solicitors trust account however, other parties to the dispute allege that associated entities of the bankrupt are entitled to the funds. I instructed PTAL as custodian of the FMIF to enter into a Deed of Indemnity to fund a public examination and any agreed recovery proceedings in respect of this matter. A public examination, was held in the Federal Court on 7, 12, 13, 18 and 19 November 2019. Subsequently, demands were served on several parties with discussions taking place to hold a mediation by the end of April 2020.

An update on the latter matter will be provided in the next report.

2.1.5 Liquidators of LMIM (FTI Consulting)

2.1.5.1 Remuneration claim and expenses claim

I refer to my previous reports to investors.

The judgements regarding and orders made in relation to FTI's first remuneration claim and indemnity claim are available on the websites www.lmfimf.com and www.lminvestmentadministration.com.

2.1.5.2 Second FTI Remuneration Application

On 17 July 2018, Mr Park of FTI, who is now the sole Liquidator of LMIM, filed an application in the Court seeking payment of remuneration of \$743,889.89 inclusive of GST from property of the FMIF, relating to various periods between 19 March 2013 and 30 June 2018. I opposed certain parts of the application. The application was heard on 6 September 2018 and 3 October 2018.

On 2 October 2019, the Court delivered judgment:

- Disallowing the claim for corporate remuneration (work which related only to LMIM in its corporate capacity, and is not referable to an individual fund or the funds generally) sought from the FMIF of \$348,692.87, on the basis that such remuneration is not recoverable from a trust, as a matter of law;
- Allowing the claim for Category 1 remuneration (work referable to the FMIF) sought from the FMIF of \$316,345.70 which had not been opposed by me, and
- Allowing the claim for Category 2 remuneration (work referable to the funds generally) sought from the FMIF in the sum of \$76,698.19.

On 17 October 2019, the Court ordered that one-third of the Liquidator's costs of the application be paid from property of the FMIF.

I anticipate that further remuneration applications will be made by the Liquidator in due course and may incorporate remuneration of \$179,481.86 (inc GST) that I have been advised was incurred up to 31 December 2019.

2.1.5.3 Indemnity claim against the Fund and proof of debt process

If a debt or claim is admitted by FTI in the winding up of LMIM and a claim for indemnity out of the FMIF with respect to such debt or claim is identified, or if certain other types of claims for indemnity from the FMIF are identified by FTI, I summarise the required process as outlined in the Orders made on 17 December 2015, as follows:

- FTI must notify me within 14 days of the identification of the claim for indemnity against the assets of the Fund;
- Within 14 days I may seek further information in relation to the claim;
- Within 30 days of receipt of the claim from FTI or from receipt of further information I have requested, I am required to:
 - Accept the claim, or
 - Reject the claim, or
 - Accept part of it and reject part of the claim; and
 - To give FTI written notice of the decision;

- I am required to give FTI written reasons for rejecting any part of a claim within 7 days after giving notice of my decision including those claims identified through the proof of debt process mentioned above;
- Within 28 days of receiving a notice of rejection, FTI may apply to the Court for directions in relation to the rejection and advise the creditor of my decision and other specified matters.

FTI have informed me they have identified Creditor Indemnity Claims with respect to a proof of debt lodged by Norton Rose for the sum of \$315,601.21 (**Norton Rose Proof**) and a proof of debt lodged by EY in the sum of \$158,896.51 (**First EY Proof**).

I have written to FTI rejecting the Creditor Indemnity Claim made in respect of the claim notified by the Norton Rose Proof and provided reasons for my decision.

I am awaiting the provision of further information in relation to the First EY Proof before the time period for me to accept or reject that Creditor Indemnity Claim begins to run.

A counter-claim for costs has been made by EY in the EY Proceeding, which, if successful, has the potential to exceed any judgment in the EY Proceeding itself by the difference between indemnity costs and a standard costs order.

These claims for indemnity may be subject to the “clear accounts rule” as described in previous reports to investors, and if so, a set off against that claim may be available.

An update will be provided to investors in relation to this matter in my next report.

2.1.5.4 Expenses

FTI’s solicitors have notified my solicitors that FTI intends to claim indemnity from the FMIF (and other funds) for a portion of certain expenses incurred during the administration and Liquidation of LMIM.

On 24 January 2020, the Liquidator filed an application seeking orders of the Court approving payment of the sum of \$98,647.27 to the Liquidator from property of the FMIF, being legal costs incurred by the Liquidator in relation to a proof of debt lodged by EY for professional fees rendered by EY to LMIM for the audit of the FMIF and legal costs incurred by the Liquidator in relation to the EY Proceeding. The application was heard on 30 January 2020. The Court delivered judgment on 28 February 2020 granting the Liquidator’s application: *Park & anor v Whyte* [2020] QSC 18.

On 24 January 2020, the Liquidator filed a further application seeking orders of the Court approving payment of the sum of \$157,107.81 to the Liquidator from property of the FMIF, for legal costs incurred by LMIM in relation to the claim against the MPF, LMIM and the Directors of LMIM referred to in section 2.1.1 of this report. The application was subsequently amended to increase the amount claimed to \$289,285.77. The application was listed for hearing on 28 February 2020. On 28 February 2020, orders were made by consent, approving, on certain terms, payment of the sum of \$157,107.81 to the Liquidator from property of the FMIF.

2.1.5.5 Further application by FTI for directions

On 10 October 2018, Mr Park filed an application seeking directions in relation to the dual appointments of Mr Park and I to wind up the FMIF including directions to the effect that:

- My appointment continues only in relation to certain specific legal proceedings and Mr Park take responsibility for ensuring the FMIF is wound up in accordance with its Constitution;

- That Mr Park is directed to act as contradictor to the claim filed against LMIM referred to in section 2.1.6.6, and the Feeder Fund Proceedings;
- That Mr Park and I each submit budgets of remuneration and expenses to the conclusion of the winding up, that the remuneration of the Liquidator and the Receiver be fixed or determined on the hearing of the application in the amount of 50% of the amount stated in the relevant budget and paid during the course of the winding up, with all other remuneration and expenses of the Liquidator and Receiver to be deferred and sought at the conclusion of the winding up at which time the amounts stated in the budgets can be reduced, increased or stay the same.

The application was heard on 10 December 2018. I opposed the application.

On 2 October 2019, the Court delivered judgment dismissing the application: *LM Investment Management Limited & Anor v Whyte* [2019] QSC 233.

2.1.5.6 Claim filed against LMIM

The claims made in this proceeding and the key steps to date in the proceeding, are summarised in paragraph 2.1.5.6 of my report to investors dated 19 December 2019. The current status of this claim is that it remains stayed until further order. I will keep investors updated as to the progress of this claim.

3. Financial Position of the Fund

The management accounts for the half-year ending 31 December 2019 are available on the website www.lmfimif.com on the page titled 'Financial Statements & Other Key Documents'.

A summary of the financial position of the Fund as at 31 December 2019 is provided below.

Description	31 December 2019
ASSETS	\$
Cash and cash equivalents	36,970,946
Receivables	82,311
Loans & Receivables	33,000
TOTAL ASSETS	37,086,257
LIABILITIES	
Payables	1,703,384
Distributions payable	3,955,473
Total liabilities excluding net assets attributable to unitholders	5,658,857
NET ASSETS	31,427,400

These figures are subject to the disclaimers and qualifications set out in the management accounts.



3.1 Fund Assets

The total assets of the Fund as at 31 December 2019 were \$37,086,257.

The balance includes cash at bank of \$36,970,946, receivables of \$82,311 and net default loans of \$33,000.

3.2 Fund Liabilities

The total liabilities of the Fund as at 31 December 2019 were \$5,658,857, consisting of payables of \$1,703,384 and distributions payable of \$3,955,473.

The distributions payable balance is made up of:

- \$1,372,036 relates to distributions that appear to have been declared prior to the date of the Court Receiver's appointment which were not paid, or have not cleared or were returned unclaimed. These liabilities have not been verified and Court approval or directions may be required before any payment is made.
- \$2,583,437 relates to distributions that were returned/unclaimed from the interim capital distribution to investors paid by BDO in October 2019 in accordance with the Court order dated 2 October 2019.

The Payables balance of \$1,703,384 primarily consists of trade creditors, custodian fees, legal fees, receiver's fees and fees and expenses claimed by FTI, which remain unpaid as at 31 December 2019.

Some of these liabilities have not been verified, or may be subject to Court approval being obtained.

3.3 Net Assets Attributable to Unit Holders

Net assets attributable to unit holders as at 31 December 2019 were \$31,427,400.

The net assets of the Fund and number of units on issue as at 31 December 2019 and 30 June 2019 is detailed in the table below.

Description	31 December 2019	30 June 2019
Estimated net amount of assets available to investors as at 31 December 2019 (\$)*	31,427,400	60,103,100
Total investor units (# of units)**	492,125,624	478,100,386
Estimated net asset amount per unit available to investors as at period end (cents in the dollar)	6.4 cents	12.6 cents

*The estimated net amount of assets available to investors as at 31 December 2019 changed substantially due to an interim capital distribution to investors of 6.5 cents per unit in October 2019 (providing a total estimated return of 12.9 units per unit). Please refer to section 5.2 for further information.

**A discrepancy between the units recorded in the investor register and the units recorded in the audited and management accounts for the 2012 financial year was identified. Investigations indicate that the discrepancy relates to the following:



- Reduction of the unit holdings in the unit holdings ledger for the two capital distributions to investors in 2013 totalling approximately \$12M.
- The Fund's migration to a new financial database in 2010 whereby the units of investors who subscribed in a foreign currency were incorrectly recorded in the foreign currency equivalent amount, and not in the AUD equivalent amount in accordance with the PDS and Constitution.

An application was made to the Court seeking directions to determine the amounts to be distributed to the foreign currency investors. On 2 October 2019, the Court declared that each member holding Class C units (foreign currency investors) in the FMIF is entitled to be paid in the winding up of the FMIF amounts calculated by reference to the calculation of that member's units in the foreign currency of investment as adjusted for the foreign exchange spot rate between the currency of investment and the Australian dollar prevailing at the date of the commencement of the winding up of the FMIF.

The above table does not include the estimated benefit of the Feeder Funds settlement up to the amount of the net amount of assets as at 31 December 2019. Therefore, below is an estimate that includes the benefit of the Feeder Funds settlement up to the amount of the net amount of assets at 31 December 2019.

Description	31 December 2019
Estimated net amount of assets available to investors as at period end (\$)	31,427,400
Benefit of Feeder Fund settlement of amounts withheld	4,059,108
Total investor units (AUD Equivalent as at appointment being 8 August 2013)	492,125,624
Estimated return in the dollar	7.2 cents

If further recoveries are made this will increase the amount due from the Feeder Funds settlement.

Please note that the estimate and prior estimates do not take into account future operating costs and future Receiver's fees or any legal recoveries against borrowers, valuers or other third parties.

The Feeder Fund settlement will reduce the amount of cash to be paid to the Feeder Funds. Based on the amounts in the above table, I attach at Annexure 1 calculations showing the net amounts payable to the Feeder Funds, as follows:

Feeder Fund	Estimated return
LM Currency Protected Australian Income Fund ("CPAIF")	3.8 cents
LM Institutional Currency Protected Australian Income Fund ("ICPAIF")	3.8 cents
LM Wholesale First Mortgage Income Fund ("WMIF")	5.6 cents

These are the amounts that would be paid to the responsible entities of each of the Feeder Funds, the costs and expenses of the Feeder Funds would need to be distributed from the net cash that is paid to each of the Feeder Funds before distributions are made to Feeder Fund investors.



4. Receipts and Payments of the Fund

All receipts and payments for the Fund since McGrathNicol's appointment on 10 July 2013 until their retirement on 10 December 2018 are on the website www.lmfmf.com under Financial Statements & Other Key Documents.

Following the Receivers and Managers retirement and relinquishment of control of the bank accounts, I have taken over responsibility for all receipts and payments and will upload copies of the Receipts and Payments lodged with ASIC to the www.lmfmf.com website from time to time.

The receipts and payments of the Fund, for the period 1 July 2019 to 31 December 2019 is summarised in the table below.

Description	\$
Receipts	
Interest	432,499
GST received	126,628
Loan Reductions	1,028,270
Refunds from legal costs	31,977
Returned/Unclaimed Interim Capital Distributions to investors	2,583,437
Total receipts	4,202,811
Payments	
Bank charges	9,387
Receivers fees and disbursements (BDO)	1,946,935
Liquidators fees and disbursements (FTI)	393,044
Custodian fees	11,000
Legal and other fees	1,113,496
IT expenses	59,896
Printing and stationary	15,636
Record management and storage	6,376
Interim Capital Distribution to investors (Cash)	27,856,630
Total payments	31,412,400
Net receipts/(payments)	(27,209,589)



5. Investor Information

5.1 Estimated Unit Price as at 31 December 2019

The estimated unit price as at 31 December 2019 is 6.4 cents.

Description	\$
Total Value of Fund Assets as at 31 December 2019	37,086,257
Less Creditors and Other Payables	5,658,857
Total Net Value of Fund Assets	31,427,400
Total Number of Units	492,125,624
Unit Price Estimate	6.4 cents

I attach a copy of a letter confirming the unit price as at 31 December 2019, which may be forwarded to Centrelink to assist with the review of investors' pensions.

5.2 Distributions to Investors and investments made in Foreign Currencies

I applied to court on 1 February 2019 seeking directions to make an interim distribution to investors and seeking orders as to the treatment of the foreign currency investors in that distribution. The application was heard on 13 March 2019 and the decision was reserved.

I am pleased to advise that the Court authorised and empowered me on 2 October 2019 to make an interim capital distribution of 6.5 cents per unit to investors of the LM First Mortgage Income Fund. I confirm the interim distribution was paid to investors in October 2019.

The court declared that each member holding Class C units (foreign currency investors) in the FMIF is entitled to be paid in the winding up of the FMIF amounts calculated by reference to the calculation of that member's units in the foreign currency of investment as adjusted for the foreign exchange spot rate between the currency of investment and the Australian dollar prevailing at the date of the commencement of the winding up of the FMIF.

5.3 Ongoing Reporting to Investors

Reports will be distributed to investors in accordance with the preferred method of correspondence recorded for each investor in the Fund's database. In order to assist in reducing distribution costs, it would be appreciated if investors could nominate an email address as their preferred method to receive correspondence. Investors may update their details as outlined in Section 5.4 below. For those investors that do not have an email address, correspondence will continue to be sent to you via post.

My next report to investors will be issued by 30 June 2020.

5.4 Investors Queries

Arrangements are in place to ensure that any reasonable questions asked by members of the FMIF, about the winding up of the FMIF, will be answered within a reasonable period of time (generally seven days) and without charge to the investor.



For any changes to investors details, please review the Useful Forms/Procedures tab on the website www.lmfmfif.com which includes information regarding the following procedures:

- Change of Contact Address/Bank Account Details
- Change of Contact Address/Bank Accounts Details of a Deceased Estate
- Change of Trustee of Self-Managed Super Fund
- Transfer of Unit Holding from a Super Fund/ Trustee Company to Personal Name(s)
- Transfer of Unit Holding from a Deceased Estate to a Sole Survivor
- Transfer from a Deceased Estate to a Beneficiary of an Estate

It is a requirement that advisors or other third parties acting on behalf of Unit Holders are doing so pursuant to a relevant Authority/Power of Attorney. Please ensure that a relevant Authority/Power of Attorney accompanies the abovementioned documents as necessary (if an Authority/Power of Attorney has not previously been provided).

It is preferable that all questions about the winding up, or communications are sent via email to enquiries@lmfmif.com with original documents to be mailed as required to:

BDO
GPO Box 457
Brisbane QLD 4001
Phone: +61 7 3237 5999
Fax: +61 7 3221 9227

6. Receiver's Remuneration and Expenses

There have been twelve applications to Court to date to approve my remuneration from the date of my appointment on 8 August 2013 until 31 October 2019.

The twelfth application for the approval of my remuneration for the period 1 May 2019 to 31 October 2019 was heard by the Court on 17 December 2019. My remuneration for this period was approved in the amount of \$652,328.05 (inclusive of GST) in relation to my role as the person responsible for ensuring the FMIF is wound up in accordance with its constitution. My outlays for this period were \$20,759.22 (inclusive of GST).

A copy of all documentation in relation to my applications can be found on the website www.lmfmfif.com.

In addition to the remuneration previously approved by the Court and the twelfth application set out above, I calculate that, on a time basis, I have incurred further remuneration of \$548,559.50 (exclusive of GST) plus outlays of \$1,091.81 (exclusive of GST) from 1 November 2019 to 29 February 2020 as detailed in the attached summaries.

My next application to Court for the approval of my remuneration is likely to cover the period 1 November 2019 to 31 April 2020. A copy of my application in this respect will be posted to the website www.lmfmfif.com and investors will be notified when this application has been lodged.

6.1 Actions taken during the Period

I provide below a summary of actions taken during the period from 1 July 2019 to 31 December 2019:

- Work undertaken in relation to the litigation matters detailed at Section 2.1 of this report;
- Payment of an interim distribution in October 2019;
- Maintaining the financial records of the Fund and preparation of management accounts for the year ended 30 June 2019 and the half-year ended 31 December 2019;
- Undertaking the investor management function for approximately 4,600 investors including answering queries on the winding up of the Fund and maintaining the investment database, including any change in details or transfer of units;
- Preparing affidavit and supporting material for an application to Court for approval of the receiver's remuneration for the period 1 May 2019 to 31 October 2019;
- Attending to compliance with ASIC's grant of relief from the requirements of a half year review and annual audit of the financial reports and compliance plan;
- Preparation of unit price calculations as at 30 June 2019 and 31 December 2019; and
- Preparation of update reports to investors in September 2019 and December 2019.

6.2 Proposed actions to be taken in the next 12 months

I provide below a summary of the proposed actions to be taken in the next 12 months in relation to the winding up of the Fund:

- Take steps to progress/finalise the various ongoing litigation matters outlined in this report;
- Continue to monitor and assist the Bellpac liquidator to achieve finalisation of the recovery in the \$8M bonds claim;
- Finalise all claims against guarantors;
- Receive and then resolve or have determined FTI's foreshadowed further indemnity claim against the Fund;
- Maintain the accounts of the Fund and prepare management accounts for the year ending 30 June 2020 and half-year ending 31 December 2020;
- Maintain the investor management database;
- Report to investors on a quarterly basis; and
- Make applications to Court for remuneration approval.

Please note that the timing to finalise some of the above matters will be subject to the progress of court proceedings.

6.3 Key actions required to complete the winding up of the Fund

I provide below a summary of the key actions required to complete the winding up of the Fund:

- Finalise all litigation currently on foot;
- Resolve or have determined FTI's further remuneration or indemnity claims against the Fund;



- Discharge all liabilities of the Fund;
- Obtain approval from the Court to process a final distribution to investors;
- Prepare final accounts for the Fund;
- Arrange for an auditor to audit the final accounts of the Fund after the Fund is wound up; and
- Obtain court orders in relation to the finalisation of my role in relation to the Fund.

I anticipate that the winding up of the Fund will be finalised in approximately 12 to 24 months, however, this may vary subject to the progression of the outstanding legal matters detailed in this report.

7. Queries

Should unit holders wish to advise of any changes in details or require further information, please contact BDO as follows:

BDO
GPO Box 457
Brisbane QLD 4001
Phone: +61 7 3237 5999
Fax: +61 7 3221 9227
Email: enquiries@tmfmif.com

Yours sincerely

David Whyte
Receiver



ANNEXURE 1
ESTIMATED RETURN TO FEEDER FUNDS

Feeder Fund	Number of Units	Further Estimated Return to Feeder Funds as at 31 December 2019			
		Distribution (\$)	Amounts withheld (\$)	Net Amount Paid (\$)	Net Cents per Unit
CPAIF	120,702,630	7,708,133	3,083,253	4,624,880	3.8
ICPAIF	9,350,802	597,147	238,859	358,288	3.8
WFMIF	99,488,929	6,353,415	736,996	5,616,419	5.6
Total	229,542,361	14,658,695	4,059,108	10,599,587	



REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 November 2019 to 29 February 2020
LM First Mortgage Income Fund (Receiver Appointed)

Employee	Position	Rate	Totals		Task Area									
			hrs	\$	Assets		Creditors		Trade On		Dividends		Administration	
					hrs	\$	hrs	\$	hrs	\$	hrs	\$	hrs	\$
David Whyte	Partner	615	143.7	88,375.50	88.3	54,304.50	4.1	2,521.50	31.2	19,188.00			20.1	12,361.50
Clark Jarrold	Partner	615	29.6	18,204.00	29.6	18,204.00								
Craig Jenkins	Partner	540	10.2	5,508.00	10.2	5,508.00								
Charles Haines	Associate Director	525	73.1	38,377.50	0.2	105.00	50.7	26,617.50			14.1	7,402.50	8.1	4,252.50
Craig Jenkins	Partner	525	0.5	262.50	0.5	262.50								
Arthur Taylor	Senior Manager	500	66.0	33,000.00	49.8	24,900.00			16.2	8,100.00				
Julie Pagcu	Associate Director	465	2.8	1,302.00	2.8	1,302.00								
Jayden Coulston	Manager	460	26.9	12,374.00			25.1	11,546.00					1.8	828.00
Chris Demeyere	Manager	460	0.8	368.00									0.8	368.00
Julie Pagcu	Associate Director	450	69.0	31,050.00	69.0	31,050.00								
Antoinette Fielding	Senior Accountant	330	0.1	33.00			0.1	33.00						
Ryan Whyte	Accountant	275	552.4	151,910.00	33.8	9,295.00	445.0	122,375.00	43.7	12,017.50	23.9	6,572.50	6.0	1,650.00
George Lethbridge	Accountant	275	80.7	22,192.50			80.7	22,192.50						
Antoinette Fielding	Senior Accountant	275	0.1	27.50			0.1	27.50						
Jordan Devery	Graduate Accountant	225	435.3	97,942.50	36.4	8,190.00	398.9	89,752.50						
Sarah Cunningham	Accounting Assistant	225	75.6	17,010.00									75.6	17,010.00
Liam Landrigan	Graduate Accountant	225	117.2	26,370.00			117.2	26,370.00						
Moira Hattingh	Practice Assistant	105	40.5	4,252.50									40.5	4,252.50
TOTALS			1,724.5	548,559.50	320.6	153,121.00	1,121.9	301,435.50	91.1	39,105.50	38.0	13,975.00	152.9	40,722.50
GST				54,855.95										
TOTAL INC GST				603,415.45										
AVERAGE HOURLY RATE				318		478		269		431		368		266

Note: All amounts exclude GST unless otherwise noted



Disbursements for the period 1 November 2019 to 29 February 2020

LM First Mortgage Income Fund (Receiver Appointed)

Expense Type	Amount (\$ ex GST)
Postage	815.45
Searches	224.36
Travel	52.00
TOTAL	1,091.81
GST	109.18
TOTAL INC GST	1,200.99



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Fax: +61 7 3221 9227
www.bdo.com.au

Level 10, 12 Creek St
Brisbane QLD 4000
GPO Box 457 Brisbane QLD 4001
Australia

31 March 2020

TO WHOM IT MAY CONCERN

**LM FIRST MORTGAGE INCOME FUND (RECEIVER APPOINTED)
ARSN 089 343 288 ('the Fund' or 'FMIF')**

I refer to my appointment as the Receiver of the Fund's assets and the person responsible for ensuring the winding up of the Fund in accordance with the terms of its constitution by Order of the Supreme Court of Queensland on 8 August 2013.

I provide an update on the estimated unit price of the fund as at 31 December 2019, calculated as follows:

Description	\$
Total Value of Fund Assets as at 31 December 2019	37,086,257
Less Creditors and Other Payables	5,658,857
Total Net Value of Fund Assets	31,427,400
Total Number of Units	492,125,624
Unit Price Estimate	6.4 cents

Should you have any queries in respect of the above, please contact my office on (07) 3237 5999 or enquiries@lmfmif.com.au.

Yours faithfully,

David Whyte
Receiver

"CSD-3"

RUSSELLS

17 February 2020

Our Ref: SCR:MKR:20150298

Gadens Lawyers
GPO Box 129
BRISBANE 4001

By Email: scott.couper@gadens.com

Dear Colleagues

LM Investment Management Limited as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v Drake & Ors – Supreme Court of Queensland Proceeding No. 1146 of 2020 ("Judicial Advice Application")

As you know, we act for LM Investment Management Limited as Responsible Entity of the:

1. LM Currency Protected Australian Income Fund; and
2. LM Institutional Currency Protected Australian Income Fund.

As holders of approximately 30% of the units in the FMIF, our clients have an interest in the Judicial Advice Application.

To assist our clients in considering whether it is necessary or appropriate for them to appear in the Judicial Advice Application, would you please let us have copies of:

1. Any advice on prospects or evidence that exists that led to your client instituting the original proceedings (BS12317 of 2014); and
2. Any advice on the prospects of the appeal.

We assume that some confidentiality arrangement in respect of such advice will be required. Would you please advise what arrangement your client seeks in respect of the advice. Naturally, our clients will accede to any reasonable regime to maintain the privilege in such advice.

We would appreciate if you would let us know the terms on which your client will release the advice and confirm that your client will, in fact, release the advice as soon as possible and in any event by this Friday, 21 February 2020.

Liability limited by a scheme approved under professional standards legislation

Brisbane
Postal – GPO Box 1402, Brisbane QLD 4001 / Street – Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899
RussellsLaw.com.au

Please do not hesitate to call the writer should you wish to discuss.

Yours faithfully

A handwritten signature in black ink, consisting of a vertical line followed by a long, sweeping curve that extends to the right and then slightly downwards.

Millie Russell
Senior Associate

Direct (07) 3004 8829
Mobile 0409 153 692
MRussell@RussellsLaw.com.au

20150298/2706387

"CJD-4"

Our Reference Scott Couper 201401822
Direct Line 3231 1688
Email claudia.dennison@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

2 March 2020

Russells Law
Level 18, 300 Queen Street
BRISBANE QLD 4000

GPO Box 129
Brisbane QLD 4001

Attention: Millie Russell

T +61 7 3231 1666
F +61 7 3229 5850

By email: MRussell@RussellsLaw.com.au

gadens.com

Dear Colleagues

LM Investment Management Ltd as Responsible Entity of the LM First Mortgage Income Fund v Drake & Ors - Supreme Court of Queensland Proceeding No 1146 of 2020

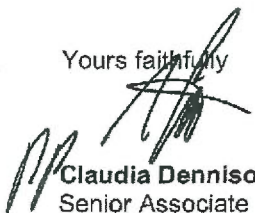
We refer to your letter dated 17 February 2020 requesting provision of copies of certain categories of advice provided to Mr Whyte.

Your letter constitutes a request for copies of communications which are both confidential and legally professionally privileged. We confirm Mr Whyte does not waive privilege in the advice provided to him in relation to the first instance proceeding or the appeal.

There is no need for those confidential and privileged advices to be disclosed in relation to the application for judicial advice. In that regard, we refer to *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 and *Macedonian Orthodox Community Church St Petka Inc v Petar* (2006) 66 NSWLR 112.

Otherwise, we note that as your firm acts for the responsible entity of the two funds referred to in your letter, you have been provided with access to the court documents which have been filed in the judicial advice proceeding through the regime for substituted service which was put in place on 14 February 2020. That material should be sufficient for those funds to determine whether it is necessary or appropriate for them to appear in the judicial advice application.

Yours faithfully


Claudia Dennison
Senior Associate

RUSSELLS

3 March 2020

Our Ref: SCR:MKR:20150298

Gadens Lawyers
GPO Box 129
BRISBANE 4001

By Email: scott.couper@gadens.com

Dear Colleagues

LM Investment Management Limited as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v Drake & Ors – Supreme Court of Queensland Proceeding No. 1146 of 2020

Thank you for your letter dated 2 March 2020.

I apologise if we seem to be at cross-purposes. We act for LMIM which, together with Trilogy Funds Management Limited ("Trilogy") are the responsible entities for funds which account for 50% of the equity in the LM First Mortgage Income Fund ("FMIF").

The appeal is being conducted primarily for the benefit of our clients and Trilogy.

Not only do our respective clients have the same interest, but Mr Whyte – who is authorised to sue in the name of LMIM – is, in a very real sense, serving our clients and Trilogy and prosecuting the appeal to their benefit.

The Bellpac litigation and the proposed Bellpac appeal is litigation involving a trustee in the third category described by Lightman J in *Alsop Wilkinson (a firm) v Neary*. Accordingly, the litigation involves no dispute about the trusts on which the scheme property of the FMIF is held and nor does the Bellpac litigation or the Bellpac appeal involve any dispute with our clients, Trilogy or any other beneficiary of the FMIF.

In these circumstances, we are unable to see any reason why Mr Whyte would not – and, more importantly, should not – share with us any confidential legal advice on which he proposes to rely in seeking judicial advice. This is particularly so since we are of course perfectly willing to provide whatever undertakings as to confidentiality Mr Whyte might reasonably require.

We refer, in this context, to your reference to the *Macedonian Church* case. With respect, the question about the "need" to share "confidential and privileged advices" in that litigation was not decided and, as we have mentioned, in any event is radically different where, as here, the relevant parties – the trustee and our client beneficiaries – are not in dispute.

Liability limited by a scheme approved under professional standards legislation

Brisbane
Postal – GPO Box 1402, Brisbane QLD 4001 / Street – Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899
RussellsLaw.com.au

A more informative discussion of the relevant principles is, we think, that of Justice Edelman in *Plan B Trustees Ltd v Parker* [No. 2].¹ To similar effect are the doubts expressed by Kenneth Martin J in *Wood (as co-executor and trustee of the Will of the deceased) v Wood* [No. 4].²

Moreover, because Mr Whyte is litigating on behalf of and for the benefit of our clients and the other members of the FMIF (in conformity with the order of Dalton J appointing him to this role), we do not think that the provision to our clients of any legal advice could possibly be said to amount to a waiver of the legal professional privilege that subsists in that advice. Plainly, our client, in its respective trustee capacities of each of the two feeder funds, has a common interest in the subject matter of the advice with Mr Whyte.

After all, the appellant is the same company as our client – it is just that you are instructed by one of its officers and we by another.

We therefore ask Mr Whyte to reconsider his refusal to supply the legal advice to us, in the light of what we have said above.

The liquidator has no desire to litigate the question of whether the views expressed by Justices Edelman and Kenneth Martin in the cases we have mentioned is now to be preferred in Queensland. Rather, because we each act for the same company, we think there is neither any need nor any justification for that issue to be litigated and for yet more of the funds of the beneficiaries to be wasted by unnecessary debates with Mr Whyte.

We look forward to hearing from you.

Yours faithfully



Millie Russell
Senior Associate

Direct (07) 3004 8829
Mobile 0409 153 692
MRussell@RussellsLaw.com.au

20150298/2712450

¹ [2013] WASC 216, at [42]

² [2014] WASC 393, at [98] – [135]

Our Reference Scott Couper 201401822
Direct Line 3231 1688
Email claudia.dennison@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

12 March 2020

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
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Russells Law
Level 18, 300 Queen Street
BRISBANE QLD 4000

GPO Box 129
Brisbane QLD 4001

Attention: Millie Russell

T +61 7 3231 1666
F +61 7 3229 5850

By email: MRussell@RussellsLaw.com.au

gadens.com

Dear Colleagues,

**LM Investment Management Ltd as Responsible Entity of the LM First Mortgage Income Fund
Supreme Court of Queensland Proceeding No 1146 of 2020**

We refer to your letter dated 3 March 2020.

Our client's position remains unchanged.

It is not necessary for your client to review the confidential and privileged advices to form a view about the appropriateness of the proposed appeal. Your client has available to it the judgment, the notice of appeal and the affidavit material which includes the first instance submissions and key evidence. That affidavit material also addresses the other relevant considerations such as the cost of the appeal and the anticipated financial effect of the proceeding on the assets of the FMIF.

As Edelman J (as His Honour then was) pointed out in *Plan B Trustees Ltd v Parker [No 2]* 2013 WASC 216 at [46] to [48], the main significance of providing the advices to the court is to show that Mr Whyte sought to properly inform himself of the issues before seeking judicial advice. The views of counsel for Mr Whyte are not evidence. Your client has ample material before it to form a considered position about the proposed appeal. Further, prior to the hearing, you will receive our client's written submissions on the question of judicial advice.

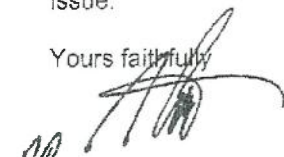
Mr Whyte deposes on an open basis to having formed the view that the appeal has reasonable prospects of success. Your client does not need to read the confidential and privileged advices to understand what conclusion Mr Whyte drew from the advice.

There is also a matter of practicality. If our client entered into a confidentiality agreement with your client and provided the advices, that may be seen as unfair to the other beneficiaries of the FMIF. If the advices were also made available to all other beneficiaries, there is a real risk that the advices would enter the public domain and the legal professional privilege would be lost.

It is wrong to say that Mr Whyte is bringing the appeal primarily for the benefit of your client and Trilogy. Mr Whyte proposes advancing the appeal for the benefit of the members of the FMIF as a whole. Mr Whyte represents a different interest to your firm.

Your letter indicates your client has no interest in litigating the point. We trust that this letter resolves this issue.

Yours faithfully


Claudia Dennison
Senior Associate

RUSSELLS

8 April 2020

Our Ref: SCR:MKR:20150298

Gadens Lawyers
GPO Box 129
BRISBANE 4001

By Email: scott.couper@gadens.com
claudia.dennison@gadens.com

Dear Colleagues

LM Investment Management Limited as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v Drake & Ors – Supreme Court of Queensland Proceeding No. 1146 of 2020

We refer to our recent correspondence in respect of the above proceeding.

As you will appreciate, our clients' affidavit material is due on 17 April 2020.

In order to properly consider the position in respect of your client's application, it is necessary for us and our clients to review and consider:

1. Any legal advice Mr Whyte received in respect of the appeal;
2. Any commercial/economic assessment of the appeal which Mr Whyte has performed in respect of the appeal – including any assessment which demonstrates the position of the FMIF if it is successful in the appeal versus if it is unsuccessful in the appeal;
3. Mr Whyte's estimate of his professional fees to conduct the appeal, which (we assume) he will seek to recover from the FMIF. We note that Mr Couper has provided an estimate of the legal fees to prosecute the appeal in his affidavit sworn on 31 January 2020.

We reiterate that our respective clients have the same interest, but your client, Mr Whyte – who is authorised to sue in the name of LMIM – is, in a very real sense, serving our clients and Trilogy and prosecuting the appeal to their benefit.

In our letters dated 17 February 2020 and 3 March 2020, we have clearly set out our clients' position in respect of any claim for legal professional privilege. For the reasons set out in our previous correspondence, there is no basis on which your client can refuse to provide our client with copies of any advices (or, for that matter, the other documents now requested). The same reasoning applies to any claim for legal professional privilege your client makes in respect of the other documents sought by our clients.

Liability limited by a scheme approved under professional standards legislation

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It is clear that those documents and information are necessary to allow our clients to form a considered view about the application and the appeal.

There is no basis on which the provision to our clients of the documents sought could possibly be said to amount to a waiver of the level professional privilege that subsists. Plainly, our client, in its respective trustee capacities of each of the two feeder funds, has a common interest in the subject matter of the advice with Mr Whyte and, as such, common interest privilege will apply.

Your client's position that provision of the advice would be unfair and unduly open the door for provision of the advice to other members at large is, with respect, irrelevant. Our client has a common interest in the subject matter of the advice with Mr Whyte. Other members are not in the same position as our respective clients.

In addition, our clients have offered undertakings reasonable to maintain the privilege.

We ask that your client reconsider his refusal to supply the legal advice to our clients and that he provide the other documents sought

If a review of those documents and the legal advice demonstrates that there is a reasonable basis for the appeal, both legally and commercially, our clients will not oppose your client's application for judicial advice to approve his prosecution of the appeal.

If your client does not provide the documents sought, our clients will have no choice but to oppose the application.

In circumstances where our client's material is due next Friday, 17 April 2020, we ask that your client provide the documents or advise his reconsidered position by 4:00pm on Tuesday, 14 April 2020.

Yours faithfully



Millie Russell
Senior Associate

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16 April 2020

Russells Law
Level 18, 300 Queen Street
BRISBANE QLD 4000

Attention: Millie Russell

By email: MRussell@RussellsLaw.com.au

Dear Colleagues

LM Investment Management Ltd as Responsible Entity of the LM First Mortgage Income Fund v Drake & Ors - Supreme Court of Queensland Proceeding No 1146 of 2020

We refer to your letter dated 8 April 2020.

We have already set out Mr Whyte's position in relation to this issue. That position has been consistent throughout, in particular since our letter of 2 March 2020. Your clients have had ample time to decide whether to file evidence on 17 April 2020.

The central issue is that you have indicated that your clients will not oppose the application for judicial advice if there is material which demonstrates a reasonable legal and commercial basis to appeal. As to the legal basis, we refer to the written submissions relied upon by the parties at first instance, but particularly the submissions by the Plaintiff. As to the commercial basis, the key factors which influence that assessment are already in evidence.

One further issue should be noted. Your letters have referred to your client and Trilogy together accounting for 50% of the equity in the FMIF and have contended that the appeal is being conducted primarily for the benefit of your client and Trilogy. Mr Whyte understands that Trilogy does not oppose the application for judicial advice.

Please advise if any of the investors of the feeder funds have approached your client or your firm with any concerns about the proposed appeal or the application for judicial advice.

Yours faithfully


Claudia Dennison
Senior Associate