

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: **BS1146/20**

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**

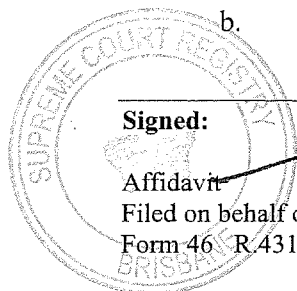
AND

Fifth Respondent: **SIMON JEREMY TICKNER**

AFFIDAVIT

I, **DAVID WHYTE** of Level 10, 12 Creek Street, Brisbane in the State of Queensland, Registered Liquidator, say on oath:

1. I am a Registered Liquidator and a Partner of the firm BDO. I am an affiliate member of the Chartered Accountants of Australia and New Zealand and a professional member of the Australian Restructuring, Insolvency and Turnaround Association (**ARITA**).
2. By Orders of this Honourable Court made in proceeding 3383 of 2013 on 8 August 2013 I was appointed:
 - a. pursuant to section 601NF(1) of the *Corporations Act 2001* (Cth) ("the **Act**") to take responsibility for ensuring that the LM First Mortgage Income Fund ARSN 089 343 288 ("**FMIF**") is wound up in accordance with its Constitution; and
 - b. pursuant to section 601NF(2) of the Act, as receiver of the property of FMIF.



Signed:

Affidavit
Filed on behalf of the Applicant
Form 46 R.431

Taken by: [Signature]

GADENS LAWYERS
Level 11, 111 Eagle Street
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Tel No.: 07 3231 1666
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3. The terms of my appointment were further articulated in the Order of the Honourable Justice Dalton dated 21 August 2013, and the orders of the Honourable Justice Jackson dated 17 December 2015 made in Supreme Court proceedings 3508 of 2015 exhibited to my affidavit sworn 30 January 2020 and filed in these Proceedings in relation to substituted service.
4. In the performance of my duties as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution, I have had and continue to have access to certain books and records of the FMIF. The statements made by me concerning the FMIF in this affidavit concern matters known to me on the basis of my inspection and knowledge of those books and records or from my direct knowledge of the events in question.
5. I swear this affidavit in support of my application dated 31 January 2020 (the **Judicial Advice Application**), for an Order that I am and was justified in making and pursuing the Notice of Appeal number 14258 of 2019 dated 20 December 2019 ("**the Appeal**") in respect of the Judgment of the Supreme Court of Queensland in *LM Investment Management Ltd (receiver appt) (in liq) v Drake & Ors* [2019] QSC 281 ("**the Judgment**") and causing LM Investment Management Limited (in liquidation) (**LMIM**) as responsible entity of the FMIF (receiver appointed) to make and pursue the Appeal.

Director Proceeding

6. I caused Supreme Court proceeding 12317/14 (the **Director Proceeding**) to be commenced by LMIM as RE of the FMIF by claim filed on 19 December 2014, against LMIM in its own right, LMIM as the trustee of the LM Managed Performance Fund ("**MPF**") and former directors of LMIM.
7. The Director Proceeding concerned allegations of breaches of duty against the former directors of LMIM in relation to loss suffered by the FMIF due to payment of settlement funds to the MPF upon settlement of litigation in relation to land over which FMIF was first mortgagee (the "**Bellpac Litigation**").
8. The sum of \$15,546,147.85 was received by LMIM as trustee of the MPF from the settlement proceeds. That amount, plus interest and costs, was the amount of the claim in the Director proceeding.
9. The claim as against the Fifth Defendant did not proceed. The Fifth Defendant was not served with the claim and no relief was sought against him.
10. By order made on 28 April 2016 the Seventh Defendant was excused from further appearance in the Director Proceeding with no order as to costs.
11. Prior to the trial, an agreement was reached with the Eighth Defendant in order to settle the claim the subject of the Director Proceeding as well as other claims between the FMIF and the Eighth Defendant. The terms of that agreement were effected and, as a consequence, orders were made by Justice Jackson on 27 March 2019 that the Applicant have leave to discontinue the Director Proceeding as against the Eighth Defendant and that there be no order as to costs.
12. The Director Proceeding otherwise proceeded to trial before His Honour Justice Jackson commencing on 1 April 2019 and finishing on 9 April 2019 as against the following defendants, (collectively the "**Director Defendants**"):
 - (a) First Defendant – Peter Drake – director of LMIM from 31 January 1997 until 9 January 2015;
 - (b) Second Defendant - Lisa Darcy - director of LMIM from 12 September 2003 until 21 June 2012;

Signed:



Taken by:



- (c) Third Defendant - Eghard van der Hoven - director of LMIM from 22 June 2006 and remaining so;
 - (d) Fourth Defendant – Francene Mulder - director of LMIM from 30 September 2006 and remaining so; and
 - (e) Sixth Defendant – Simon Tickner - director of LMIM from 18 September 2008 until 13 July 2012.
13. His Honour Justice Jackson delivered Judgment in the Director Proceeding on 22 November 2019 dismissing the claim in its entirety.
14. Following Judgment, the Applicant was ordered to pay the costs of the First, Second, Third, Fourth and Sixth Defendants pursuant to the Order of Justice Jackson of 6 December 2019. Exhibited hereto and marked "DW-1" is a true copy of the order.

Advice and Notice of Appeal

15. On receiving the Judgment in the Director Proceeding on 22 November 2019 I sought legal advice as to the merits of pursuing an appeal of the decision. That legal advice is privileged and will be provided to the Court at the hearing of this Judicial Advice Application by way of a confidential affidavit. By referring to the advice I do not intend to waive privilege in the advice.
16. Having considered the legal advice obtained I instructed my legal advisors to file the Applicant's Notice of Appeal on 20 December 2019. A copy of the Notice of Appeal is exhibited at "SC-2" to the affidavit of Scott Couper dated 31 January 2020 in support of this Judicial Advice Application.

Appeal Considerations

17. In addition to the merits of the Appeal, I have taken the following matters into account when considering whether it is in the interests of members of the FMIF to pursue the Appeal.

FMIF Accounts

18. During the course of the receivership to 30 November 2019 (being the date used in my most recent receivership report of 19 December 2019) I have received in approximately \$10 million in addition to the (approximate) \$165 million received by McGrath Nicol (as receivers appointed to the Applicant) until their retirement in December 2018.
19. From the amounts received I have so far distributed approximately \$32 million representing a return of 6.5 cents per unit to the FMIF unitholders.
20. As at 30 November 2019 the estimated net amount available to FMIF unitholders was \$37,364,589 and the total number of investor units was 492,125,624.
21. Accordingly, as at 30 November 2019 the expected final distribution to the unitholders is 7.6 cents per unit, bringing the total return to unitholders to 14.1 cents per unit.
22. This expected final distribution is subject to change depending on the costs and recoveries associated with the Director Proceeding, the potential Appeal and a further four sets of legal actions and recovery proceedings which have not yet concluded.

Signed:



Taken by:



Costs

23. As it presently stands, the Applicant has been ordered to pay the costs of the entire Director Proceeding, including the trial costs, of all five Director Defendants. Whilst the total amount owed has not been quantified to date, it is expected to run into the millions of dollars, reducing the return I am able to provide to the FMIF members.
24. Should the Applicant fail in the Appeal it will likely face a further adverse costs order, albeit those appeal costs are likely to be a far lesser amount than those of the proceeding at first instance. I would estimate such costs to be no more than approximately \$500,000 (on the basis that there will be four sets of legal representatives for the five Director Defendants).

Potential Recovery on Appeal

25. If however the Appeal is successful, the potential benefit to the unitholders of the FMIF is:
- (a) as a starting point, an Order made in the Applicant's favour in the amount of the damages claimed, being \$15,546,147.85;
 - (b) plus interest;
 - (c) plus costs incurred by the Applicant in both the Director Proceeding and the Appeal;
 - (d) plus the financial benefit of no longer being liable to pay the Director Defendant costs which could exceed \$2 million.
26. I note that notwithstanding the amounts potentially awarded to the Applicant in damages, interest and costs as referred to above, the actual amount received to the FMIF to the benefit of the unitholders is likely to be much less.
27. I believe that each of the Director Defendants has the benefit of a Directors and Officeholders insurance policy. The amount available under that policy has likely been significantly eroded by the defence of the proceeding to which the proposed appeal relates and the defence of other proceedings.
28. I am not aware of the financial asset position of the Director Defendants. However, as they have been subject to litigation for a number of years, there is a risk that they have structured their financial affairs such that little may be recovered from them if a judgment is executed against their assets.

Amount and timing of return to investors

29. Therefore, I estimate that if the Applicant is successful in its appeal, the FMIF unitholders might realistically expect the following benefits:
- (a) a payment from the Director Defendants' insurer; plus
 - (b) the financial advantage of the FMIF no longer being liable for the costs ordered following Judgment in the Director Proceeding, which, given the length and complexity of trial and given the fact that four sets of legal representatives acted for the Director Defendants, could exceed \$2m when assessed on the standard basis.
30. To put that in terms of a return to investors in the FMIF, a benefit to the FMIF of, say, \$5m resulting from the Appeal would result in a return of a further 1 cent per unit increasing the current expected return by approximately 7.1%.

Signed:



Taken by:



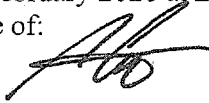
31. The final distribution to investors will depend on the costs of and recovery from a further four sets of legal proceedings which are yet to be finalised. I am not at this stage able to depose to what those costs and what that recovery may be.
32. Because the other remaining legal proceedings are ongoing, the Appeal should not affect the date of any final return to the FMIF and will not delay the completion of my receivership.

Decision regarding Appeal

33. On balance, I believe there are considerations which weigh both for and against pursuing the Appeal. However, in my judgement, having regard to the financial position of the FMIF, the proposed grounds of appeal, the financial benefit to the FMIF of success on the appeal and the relatively modest costs of pursuing the Appeal in light of those advantages, I consider that it is reasonable and appropriate and in the interests of the FMIF unitholders to pursue the Appeal.

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 **DAVID WHYTE** on this 3rd
day of February 2020 at Brisbane in the
presence of:



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~~A Justice of the Peace / Solicitor /
Commissioner for Declarations~~

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS1146/20

Applicant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
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ENTITY OF THE LM FIRST MORTGAGE INCOME FUND
ARSN 089 343 288**

AND

First Respondent: **PETER CHARLES DRAKE**

AND

Second Respondent: **LISA MAREE DARCY**

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Third Respondent: **EGHARD VAN DER HOVEN**

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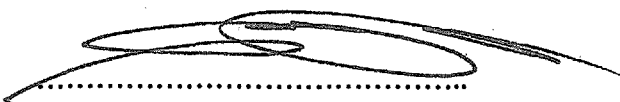
Fifth Respondent: **SIMON JEREMY TICKNER**

CERTIFICATE OF EXHIBIT

INDEX TO EXHIBITS

Exhibit "DW-1" to the affidavit of **DAVID WHYTE** sworn at Brisbane on this 3rd day of February 2020.

Exhibit	Description	Page No.
DW-1	Order of Justice Jackson of 6 December 2019	1-2


.....
Deponent


.....
Solicitor

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

GADENS LAWYERS
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BRISBANE QLD 4000
Tel No.: 07 3231 1666
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"DW-1"

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 12317/14

Plaintiff: **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 Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**


AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

Seventh Defendant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461**

AND

 Eighth Defendant: **KORDA MENTHA PTY LTD ACN 100 169 391 IN ITS
CAPACITY AS TRUSTEE OF THE LM MANAGED
PERFORMANCE FUND**

ORDER

Before: The Honourable Justice Jackson

Date: 6 December 2019

BY CONSENT, THE ORDER OF THE COURT IS THAT:

1. The plaintiff pay the first, second, third, fourth and sixth defendants' costs of the proceeding.