

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**

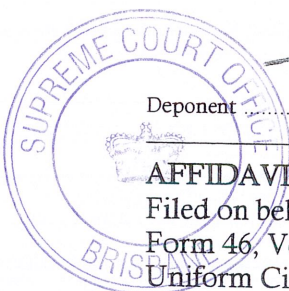
AND

First Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN  
LIQUIDATION) (RECEIVERS AND MANAGERS  
APPOINTED) AS RESPONSIBLE ENTITY OF THE LM  
CURRENCY PROTECTED AUSTRALIAN INCOME FUND  
ARSN 110 247 875**

AND

Second Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN  
LIQUIDATION) (RECEIVERS AND MANAGERS  
APPOINTED) AS RESPONSIBLE ENTITY OF THE LM  
INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN  
INCOME FUND ARSN 122 052 868**

Page 1



Deponent .....

Taken by .....

**AFFIDAVIT**

Filed on behalf of the First Respondent

Form 46, Version 1

Uniform Civil Procedure Rules 1999

Rule 431

**Russells**

Level 18, 300 Queen Street

Brisbane QLD 4000

Tel: (07) 3004 8888

Fax: (07) 3004 8899

Ref: SCR:MKR:20150298

# AFFIDAVIT

I, **JOHN RICHARD PARK** of Level 20, 345 Queen Street, Brisbane in the State of Queensland, Registered Liquidator and Chartered Accountant, state on oath:

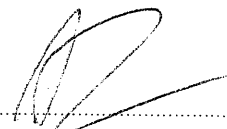
1. I am a Registered Liquidator and Chartered Accountant. I am the Liquidator of the LM Investment Management Limited (Receivers & Managers Appointed) (in Liquidation) ACN 077 208 461 (“**LMIM**”).
2. LMIM is the Responsible Entity of the:
  - (a) LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (“**ICPAIF**”); and
  - (b) LM Currency Protected Australian Income Fund ARSN 110 247 875 (“**CPAIF**”),  
  
(which have come to be known as the “**Feeder Funds**”).
3. Now produced and shown to me and marked “**JRP-01**” is an indexed, paginated bundle of copies of documents to which I shall refer in more detail in my affidavit. References to numbers in [#] are references to the page numbers of the documents in the bundle “**JRP-01**”.
4. The Feeder Funds collectively hold 130,053,430 units in the LM First Mortgage Income Fund ARSN 089 343 288 (“**FMIF**”), being more than 25% of the total units. The Feeder Funds each hold the following number of units in the FMIF:
  - (a) 9,350,801 units are held by the ICPAIF; and
  - (b) 120,702,629 units are held by the CPAIF,  
  
(collectively, the “**Unit Holding**”).
5. By virtue of the Unit Holding, the Feeder Funds are entitled to receive distributions from the FMIF and have a significant interest in the assets and liabilities of the FMIF. That interest naturally extends to the conduct and outcome of any proceedings involving the FMIF in which the FMIF may be liable to pay any amounts, including adverse costs orders.
6. I have been provided with and have read the following documents:

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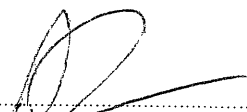
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Deponent .....

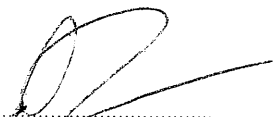
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- (a) reasons for judgment in in Supreme Court proceeding number 1237 of 2014 (“**Bellpac Proceeding**”), reported as *LM Investment Management Ltd (receiver apptd) (in Liq) v Drake & Ors* [2019] QSC 281;
  - (b) notice of appeal dated 20 December 2019 filed in Supreme Court proceeding number 14258 of 2019 (“**Appeal Proceeding**”); and
  - (c) application for judicial advice and associated affidavit material filed in this proceeding (“**Judicial Advice Proceeding**”).
7. As a general proposition, my view as liquidator is that it is, at a basic level, in the interests of the Feeder Funds that an appeal succeed - if the result of the appeal is that the Court of Appeal gives judgment for damages and that the defendants are able to meet that judgment. It was also at a basic level, in my view in the interests of the Feeder Funds that the trial succeed. By that, I mean only that this would (presumably) have increased the funds of the FMIF and therefore the funds notionally available to the Feeder Funds. However, there are now, in my mind, substantial uncertainties in relation to this litigation.
8. Mr Whyte did not consult me before commencing the Bellpac Proceeding or the appeal. As far as I am aware, he did not consult any other beneficiary before doing so.
9. Nor did Mr Whyte consult me at any stage about any possible settlement of the Bellpac Proceeding; about any offers made or received by LMIM. As far as I am aware, he did not consult any other beneficiary about any such matters.
10. I am, in the context of the present application, concerned that I have little or no knowledge of the following matters:
- (a) Beyond Mr Couper’s summary statement that the total costs of the FMIF of the Bellpac Proceedings has been approximately \$2 million, I do not know:-
    - (i) whether Mr Whyte proposes to claim from the FMIF remuneration for and indemnity for the legal costs of this application (or if he has already done so) and, if so, the amount of this remuneration and those legal costs;
    - (ii) how much it cost the FMIF to investigate the Bellpac Proceeding (I understand there were extensive investigations and also public examinations);



- (iii) what remuneration and expenses apart from legal costs Mr Whyte has claimed and been paid or will claim from the FMIF for:-
- (A) attendances to investigate the Bellpac Proceeding;
  - (B) the conduct and trial of the Bellpac Proceeding;
  - (C) the conduct and hearing of the Appeal Proceeding;
  - (D) this application.
- (b) I do not know what legal advice, if any, LMIM (or Mr Whyte on behalf of LMIM) received, or from whom, before instituting the Bellpac Proceeding, regarding:
- (i) evidence required to succeed in the Bellpac Proceeding; or
  - (i) the prospects of success in the Bellpac Proceeding.
- (c) I do not know what assessment, if any, Mr Whyte made, before instituting the Bellpac Proceeding, of the likely commercial result of the Bellpac Proceeding.
- (d) I do not know what may be the prospects of the defendants / respondents in their application under s 1317S of the *Corporations Act 2001*. My understanding is that Justice Jackson has not determined this defence (I refer to paras [285] and [286] of his Honour's judgment.)
- (c) I do not know what legal advice, if any, LMIM (or Mr Whyte on behalf of LMIM) received, or from whom, before instituting the Appeal Proceeding as to:-
- (i) the prospects of success in the Appeal Proceeding;
  - (ii) the prospects of the defendants succeeding in their defence under s 1317S.
- (e) I do not know whether Mr Whyte has undertaken any commercial or economic assessment of the Appeal Proceeding, including the impact on the creditors and members of the FMIF if the Appeal Proceeding succeeds or fails, including:-
- (i) the costs of the further proceedings for the s 1317S defence;
  - (ii) whether the respondents to the Appeal Proceeding are able to pay the



judgment LMIM seeks in the Notice of Appeal.

11. I am concerned that funds that will otherwise be available for distribution to creditors and members of the FMIF, including the Feeder Funds, will be dissipated by prosecution of the Appeal Proceeding, especially given that there is, to the best of my present understanding, a need for further proceedings to determine the s 1317S defences, even if the Appeal succeeds. I appreciate that a great deal of money has already been spent – however, this has been done without any judicial advice of which I am aware and without consulting me or, as far as I am aware, any other beneficiary. While it seems that the costs of the Appeal Proceeding will be far less than the costs of the Bellpac Proceedings, they are nonetheless substantial, especially taking into account the possibility of an adverse costs order and the apparent necessity of further proceedings for the defendants' s 1317S defences -which may render a successful appeal a pyrrhic victory at a very substantial cost.
12. In these circumstances, I am concerned that I am unable to make any informed judgment as to whether the present application represents little more than a pointless last ditch effort.
13. I am also concerned that LMIM may have claims against Mr Whyte, and/or LMIM's solicitors and/or counsel in relation to the institution and conduct of the Bellpac Proceeding, and that he or they might be liable to LMIM to indemnify it for some or all of the following costs and expenses that I understand have been incurred by LMIM in prosecuting the Bellpac Proceeding and the Appeal Proceeding:-
  - (a) The legal costs incurred in the Bellpac Proceeding;
  - (b) The remuneration drawn by Mr Whyte in relation to attendances on the Bellpac Proceedings;
  - (c) The legal costs incurred in the Appeal Proceeding;
  - (d) The remuneration drawn by Mr Whyte in relation to attendances on the Bellpac Proceeding;
  - (e) The liability for adverse costs orders in the Bellpac Proceeding and possibly in the Appeal Proceeding.
14. I am not in a position to say that LMIM has any such claim. These are matters I intend to investigate, if possible. However, I am, in these circumstances, concerned to know

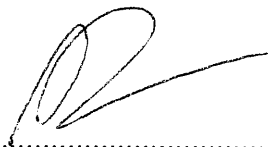
whether LMIM has, for the present application, taken independent advice from solicitors and counsel not involved in the institution or conduct of the Bellpac Proceeding as to the prospects of success of the Appeal Proceeding. This concern arises because LMIM's solicitors on this application are the same solicitors who instituted and conducted the Bellpac Proceeding.

15. In light of all of these concerns, in February 2020, I instructed LMIM's and my solicitors, Russells, to request the following documents from Gadens, the solicitors for the applicant:
- (a) any legal advice on prospects or evidence that exists that led to Mr Whyte instituting the Bellpac Proceeding;
  - (b) any commercial or economic assessment of the appeal which Mr Whyte has performed in respect of the Appeal Proceeding; and
  - (c) Mr Whyte's estimate of his professional fees to conduct the Appeal Proceeding which he will seek to recover from the FMIF.
16. Pages [1] to [8] are true copies of the correspondence between Russells and Gadens between 17 February 2020 and 16 April 2020, which my solicitors have provided to me.
17. I am informed by my solicitors and believe that they have not been provided with copies of any of the documents referred to in paragraph 15 above as at the time of swearing this affidavit.
18. In these circumstances, I intend to make one final attempt to secure from the applicant LMIM – of which I am liquidator – information on a confidential basis so that I may make a private judgment about the matters which are of concern to me. If I remain unable to make any such judgment, I will proceed as I may be advised.
19. All the facts and circumstances herein 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 in this my affidavit.

Sworn by **JOHN RICHARD PARK** on 17 April 2020 at Brisbane in the presence of:



.....  
John Richard Park  
Deponent



.....  
Name: **ADAM SALEEM KHAN**  
Lawyer/Commissioner for Declarations/JP

**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE

NUMBER: BS1146 / 20

Applicant: **LM INVESTMENT MANAGEMENT LIMITED  
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ARSN 089 343 288**

AND

First Respondent: **PETER CHARLES DRAKE**

AND

Second Respondent: **LISA MAREE DARCY**

AND

Third Respondent: **EGHARD VAN DER HOVEN**

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First Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN  
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ARSN 110 247 875**

AND

Second Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN  
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APPOINTED) AS RESPONSIBLE ENTITY OF THE LM  
INSTITUTIONAL CURRENCY PROTECTED  
AUSTRALIAN INCOME FUND ARSN 122 052 868**

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**CERTIFICATE OF EXHIBIT**

Filed on behalf of the Applicants  
Form 47, Version 2  
Uniform Civil Procedure Rules 1999  
Rule 435

**Russells**

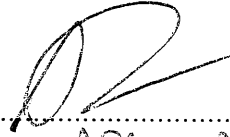
Level 18, 300 Queen Street  
Brisbane QLD 4000  
Tel: (07) 3004 8888  
Fax: (07) 3004 8899  
Ref: SCR:MKR:20150298

**CERTIFICATE OF EXHIBIT**

Exhibit "JRP-01" to the affidavit of John Richard Park sworn on 17 April 2020



.....  
John Richard Park  
Deponent



.....  
Name: ADAM JASEM KHAN  
Lawyer/~~Commissioner for Declarations~~/JP



**SUPREME COURT OF QUEENSLAND**

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AUSTRALIAN INCOME FUND ARSN 122 052 868**

**INDEX TO EXHIBIT "JRP-01"  
TO AFFIDAVIT OF JOHN RICHARD PARK**

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5.	Letter from Gadens to Russells	16.04.2020	8

# RUSSELLS

17 February 2020

Our Ref: SCR:MKR:20150298

Gadens Lawyers  
GPO Box 129  
BRISBANE 4001

By Email: [scott.couper@gadens.com](mailto: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.

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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 on the left and a curved line that starts from the top of the vertical line and extends upwards and to the right.

**Millie Russell**  
*Senior Associate*

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

20150298/2706387

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

gadens

ABN 30 326 150 968

2 March 2020

ONE ONE ONE  
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Australia

Russells Law  
Level 18, 300 Queen Street  
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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](mailto: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**

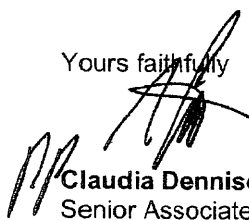
We refer to your letter dated 17 February 2020 requesting provision of copies of certain categories of advice provided to Mr Whyte.

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](mailto: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.

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A more informative discussion of the relevant principles is, we think, that of Justice Edelman in *Plan B Trustees Ltd v Parker* [No. 2].<sup>1</sup> 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].<sup>2</sup>

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  
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20150298/2712450

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<sup>1</sup> [2013] WASC 216, at [42]

<sup>2</sup> [2014] WASC 393, at [98] – [135]

# RUSSELLS

8 April 2020

Our Ref: SCR:MKR:20150298

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[claudia.dennison@gadens.com](mailto: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.

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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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20150298/2722895

Our Reference Scott Couper 201401822  
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Partner Responsible Scott Couper

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ABN 30 326 150 968

ONE ONE ONE  
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Australia

16 April 2020

Russells Law  
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Attention: Millie Russell

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**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 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