

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE  
NUMBER: 1146/20

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 OF SERVICE**

I, **RYAN JOHN WHYTE** of c/- Level 10, 12 Creek Street, Brisbane in the State of Queensland,  
Graduate Accountant, say on oath:

1. I am a Graduate Accountant in the employ of the firm BDO.
2. I assist David Whyte (the **Receiver**), who by Order of this Honourable Court made on 21 August 2013 (the **Order**) in proceeding 3383 of 2013:
  - (a) was appointed 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;
  - (b) was appointed pursuant to section 601NF(2) of the Act as the receiver of the property of the FMIF; and
  - (c) has, in relation to the property of the FMIF for which he is appointed receiver, the powers set out in section 420 of the Act.
3. I am authorised by the Receiver to swear this affidavit.

**Director Proceeding**

4. On 19 December 2014, the Receiver caused Supreme Court proceeding 12317/14 (the **Director Proceeding**) to be commenced by LM Investment Management Limited (in liquidation) (**LMIM**)

Signed:



Taken by:



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

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

as responsible entity of the FMIF alleging breaches of duty against the former directors of LMIM in relation to loss suffered by the FMIF.

5. Judgment in the Director Proceeding was delivered on 22 November 2019 dismissing the claim in its entirety (the **Judgment**).
6. The Receiver caused the LMIM as responsible entity of the FMIF to file a Notice of Appeal of the Judgment on 20 December 2019 (the **Appeal**).

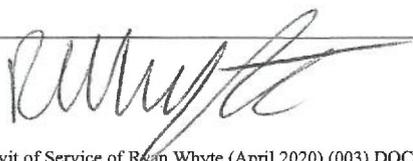
#### **Application for Judicial Advice**

7. On 31 January 2020 the Receiver caused to be filed an application in these proceedings seeking directions as to whether the Receiver is justified in making and pursuing the Appeal of the Judgment and seeking an order for substituted service of the application upon the members of the FMIF (the **Application**).
8. The following affidavits were filed in support of the Application:
  - (a) affidavit of David Whyte dated 30 January 2020 filed on 31 January 2020 (the **Receiver's First Affidavit**);
  - (b) affidavit of Scott Couper dated and filed 31 January 2020 (**Affidavit of Scott Couper**); and
  - (c) affidavit of David Whyte dated 3 February 2020 filed 4 February 2020 (the **Receiver's Second Affidavit**).

#### **Order of Justice Callaghan**

9. The first part of the application was listed before Justice Callaghan on 14 February 2020 concerning the application for substituted service of the material filed in the Application (the **Substituted Service Application**).
10. On 14 February 2020, Justice Callaghan made an Order directing the method by which service of the Application and the Affidavit were to be effected on the members of the FMIF.
11. Now produced and shown to me and marked "**RJW-1**" is a true and correct copy of the Order of Justice Callaghan dated 14 February 2020 (the **Order**) and "**Annexure A**" to the Order, being a notice to the members of the FMIF in respect of the Application (the **Notice**).
12. By the terms of the Order, service is to be effected in the following manner:
  - (a) posting a notice substantially in the form of Annexure A to the Order to the Website "**Imfmif.com**" (the **Website**);
  - (b) sending a copy of the Notice to all members of the FMIF by each member's preferred method for distribution of notices recorded on the FMIF's register of members, maintained by BDO on behalf of the Receiver;
  - (c) in relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the email address of a financial advisor, service is to be effected by sending the Notice to the financial advisor by email and identifying in the email the member to whom the Notice is directed; and
  - (d) in relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the postal address of a financial advisor, service is to be effected by sending the Notice by post addressed to the member "care of" the postal address of the financial advisor.
13. These are each addressed below.

Signed:



Taken by:



**Service in accordance with the Order by publishing documents on the website**

14. In accordance with the terms of the Order, on 18 February 2020, I instructed the FMIF's IT consultant to publish the following material on the homepage of the Website under the heading "*LM v Drake – application for substituted service – Supreme Court of Queensland proceedings 1146/20 – Hearing Date 2 June 2020*"
- (a) the Notice;
  - (b) the Application;
  - (c) the Receiver's First Affidavit;
  - (d) the Receiver's Second Affidavit; and
  - (e) the Notice of Appeal dated 20 December 2019.
15. I also instructed the FMIF's IT consultant to publish the following notice on the home page of the Website:

***"Application filed by the FMIF Receiver on 31 January 2020 for directions as to whether he is justified in making and pursuing the Notice of Appeal in Supreme Court of Queensland proceedings 1146/20 – Hearing Date 2 June 2020***

*TAKE NOTICE that David Whyte, as the person appointed pursuant to section 601NF of the Corporations Act 2001 (Cth) to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and as receiver of the property of the FMIF (Mr Whyte), has applied to the Supreme Court of Queensland for directions as to:-*

*"whether Mr Whyte is and was justified in making and pursuing the Notice of Appeal number 14258 of 2019 dated 20 December 2019 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 Director Proceedings Judgment) on behalf of the Applicant in this proceeding"*

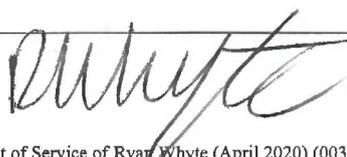
*The Notice to the Members of the LM First Mortgage Income Fund (Receiver Appointed) in relation to the application together with a copy of the application and supporting material can be found below."*

16. Now produced and shown to me and marked "R JW-2" is a true and correct copy of the Notice and screen shots as at 20 February 2020 of the Website showing the publication of the documents referred to in paragraph 14 above.
17. The above documents were published on the Website on 20 February 2020.

**Service in accordance with the Order by sending a copy of the Notice to all members of the FMIF by each member's preferred method for distribution of notices**

18. In accordance with the terms of the Order, on or about 20 February 2020, I personally undertook or caused the staff of BDO to undertake the following tasks:
- (a) in relation to members of the FMIF who had elected to receive correspondence by post only:

Signed:



Taken by:

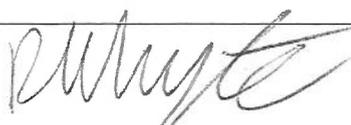


- (i) exporting a list of the last known mailing address of each such member of the FMIF from the FMIF's investor management system to Microsoft Excel;
  - (ii) formatting the Microsoft Excel spreadsheet to allow Kwik Kopy to barcode the last known mailing address of each such member of the FMIF from the Microsoft Excel file directly onto prepaid post envelopes; and
  - (iii) instructing Kwik Kopy to print copies of the Notice to be sent to each such member of the FMIF, source prepaid post envelopes suitable for the size and weight of the Notice, print/barcode the addresses onto the prepaid post envelopes and insert a copy of the Notice in each envelope and then seal the prepaid post envelope; and
- (b) in relation to members of the FMIF whose preferred method of distribution is by forwarding it to the postal address of a financial advisor:
- (i) exporting a list of the last known mailing addresses of the financial advisor of each such member of the FMIF, addressed to the member "care of" the postal address of the financial advisor, from the FMIF's investor management system to Microsoft Excel;
  - (ii) formatting the Microsoft Excel spreadsheet to allow Kwik Kopy to barcode the last known mailing addresses of the members of the FMIF from the Microsoft Excel file directly onto prepaid post envelopes; and
  - (iii) instructing Kwik Kopy to print copies of the Notice to be sent to each member of the FMIF, source prepaid post envelopes suitable for the size and weight of the Notice, print/barcode the addresses onto the prepaid post envelopes and insert a copy of the Notice in each envelope and then seal the prepaid post envelope.
19. In accordance with the terms of the Order, on or about 20 February 2020, I personally undertook or caused the staff of Bing Intelligent Communication to undertake the following tasks:
- (a) in relation to members of the FMIF who had elected to receive correspondence by email, to send, by email to their last known email address, a copy of the Notice; and
  - (b) in relation to members of the FMIF whose preferred method of distribution is by forwarding it to the email address of a financial advisor, to send by email to that advisor a copy of the Notice and identifying in the email the member to whom the Notice is directed.
20. On 25 February 2020, each of the envelopes referred to in paragraph 18 above (including those addressed to investors residing in Australia and those investors residing internationally) were delivered to Australia Post at the Brisbane General Post Office located at 261 Queen Street, Brisbane in the State of Queensland for mailing.

### Service of Further Documents

21. On 25 February 2020 I caused the heading "*LM v Drake – application for substituted service – Supreme Court of Queensland proceedings 1146/20 – Hearing Date 2 June 2020*" to be deleted from the Website and retained the heading and wording as detailed in paragraph 15 above.
22. On 24 February 2020 I caused the following further documents to be uploaded to the Website:
- (a) the Order; and
  - (b) Affidavit of Scott Couper and exhibits volumes 1-5.

Signed:



Taken by:





SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE  
NUMBER: 1146/20

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**  
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AND  
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INDEX TO EXHIBITS

Exhibits "RJW-1" to "RJW-3" to the affidavit of RYAN JOHN WHYTE sworn at Brisbane on this 16<sup>th</sup> day of April 2020.

Exhibit	Description	Page No.
RJW-1	Order of Justice Callaghan dated 14 February 2020	1-4
RJW-2	Copy of the Notice and screen shots of the home page of the FMIF website as at 20 February 2020	5-9
RJW-3	Screenshot of the home page of the FMIF website as at 9 April 2020	10

.....  
Deponent

.....  
Solicitor / Commissioner for Declarations /  
Justice of the Peace

Certificate of Exhibit  
Filed on behalf of the Court Appointed Receiver  
Form 47 R.435

GADENS  
Level 11, 111 Eagle Street  
BRISBANE QLD 4000  
Tel No.: 07 3231 1666  
Fax No.: 07 3229 5850  
SZC:JSO:201619858

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 1146/20

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**

**ORDER**

Before: Justice Callaghan

Date: 14 February 2020

Initiating document: Originating Application filed on 31 January 2020

THE ORDER OF THE COURT IS THAT:

**Substituted service on members of the FMIF**

1. Pursuant to Rule 116 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the **UCPR**), service of this proceeding on the members of the FMIF is to be effected by:
  - (a) posting a notice substantially in the form of Annexure A to this Order (the **Notice**) to the website "lmfmif.com" (the **Website**);
  - (b) sending a copy of the Notice to all members of the FMIF by each member's preferred method for distribution of notices recorded on the FMIF's register of members, maintained by BDO on behalf of Mr Whyte;
  - (c) in relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the email address of a financial advisor, service is to be effected by sending the Notice to the financial advisor by email and identifying in the email the member to whom the Notice is directed;



**ORDER**  
 Filed on Behalf of the Applicant  
 Form 59, Version 1  
 Uniform Civil Procedure Rules 1999  
 Rule 661

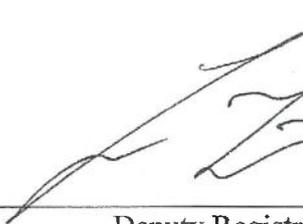
**GADENS LAWYERS**  
 Level 11, 111 Eagle Street  
 BRISBANE QLD 4000  
 Tel No: 07 3231 1666  
 Fax No: 07 3229 5850  
 Ref: 201401822

- (d) in relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the postal address of a financial advisor, service is to be effected by sending the Notice by post addressed to the member "care of" the postal address of the financial advisor.
2. Pursuant to Rule 116(3) of the UCPR, that service of this application will be deemed to have been effected on each of the members of the FMIF five days after orders 1(a) to 1(d) above have been complied with.

**Hearing of the Originating Application**

3. The Originating Application be listed for hearing before Justice Callaghan on 2 June 2020 at 10am.
4. The Applicant is to file and serve a list of the authorities on which it primarily relies by 28 February 2020.
5. Any person who wishes to be heard on the date referred to at paragraph 3 above must file and serve any affidavits on which they intend to rely (save for any affidavits which are proposed to be read and filed on a confidential basis) by 17 April 2020.
6. Any affidavits in reply to the affidavits referred to at paragraph 5 above must be filed and served by 8 May 2020.
7. Any person who wishes to be heard on the date referred to at paragraph 3 above must file and serve any written submissions on which that person proposes to rely by 22 May 2020.
8. That the costs of the application be reserved.

Signed: \_\_\_\_\_

  
Deputy Registrar



## ANNEXURE A

### **TO THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (RECEIVER APPOINTED) ("FMIF")**

TAKE NOTICE that David Whyte, as the person appointed pursuant to section 601NF of the *Corporations Act 2001* (Cth) to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and as receiver of the property of the FMIF (**Mr Whyte**), has applied to the Supreme Court of Queensland for directions as to:-

“whether Mr Whyte is and was justified in making and pursuing the Notice of Appeal number 14258 of 2019 dated 20 December 2019 in respect of the Judgment of the Supreme Court of Queensland in *LM Investment Management Ltd (receiver apt) (in liq) v Drake & Ors* [2019] QSC 281 (**the Director Proceedings Judgment**) on behalf of the Applicant in this proceeding”

The Director Proceedings Judgment concluded proceedings numbered 12317 of 2014 (**the Director Proceedings**) commenced by Mr Whyte in the name of LMIM as responsible entity of the FMIF seeking:

- (a) an order that the first to sixth defendants pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of certain legal proceedings together with interest;
- (b) further interest;
- (c) costs.

A trial was held in the Director Proceedings on 1 April 2019 to 9 April 2019.

The Director Proceedings Judgment was delivered by His Honour Justice Jackson on 22 November 2019.

His Honour Justice Jackson dismissed the Plaintiff's claim and the Plaintiff was ordered to pay the costs of the first, second, third, fourth and sixth defendants on a standard basis.

The Director Proceedings did not proceed as against the Fifth Defendant.

The Seventh Defendant was granted leave to withdraw from the proceedings by order dated 28 April 2016. A decision as to the costs of the Seventh Defendant is pending.

The claim as against the Eighth Defendant was settled prior to trial with no order as to costs.

Mr Whyte filed a Notice of Appeal of the decision on 20 December 2019 (proceedings 14258 of 2019). The Appeal timetable is currently on hold pending this application for directions.

**This application is set down to be heard by the Supreme Court of Queensland at Brisbane on**

**[date to be inserted] at [time to be inserted].**

Copies of the court documents in respect of the application, including a copy of the Notice of Appeal, will be made available on the website [www.lmfimif.com](http://www.lmfimif.com). Court documents will be made available progressively, as and when they are filed with the Court.

Any member who reasonably requires a hard copy of the application and supporting material should call BDO on +61 7 3237 5999.

Dated:

David Whyte - Court Appointed Receiver



Tel: +61 7 3237 5999  
Fax: +61 7 3221 9227  
www.bdo.com.au

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

**TO THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND  
ARSN 089 343 288 (RECEIVER APPOINTED) ("FMIF")**

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“whether Mr Whyte is and was justified in making and pursuing the Notice of Appeal number 14258 of 2019 dated 20 December 2019 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 **Director Proceedings Judgment**) on behalf of the Applicant in this proceeding”

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The Appeal timetable is currently on hold pending this application for directions.

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Dated: 18 February 2020



David Whyte - Court Appointed Receiver

# LM First Mortgage Income Fund

(Receiver Appointed)



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## **LM v Drake – application for substituted service – Supreme Court of Queensland proceedings 1146/20 – Hearing Date 2 June 2020:**

**Application filed by the FMIF Receiver on 31 January 2020 for directions as to whether he is justified in making and pursuing the Notice of Appeal in Supreme Court of Queensland proceedings 1146/20 – Hearing Date 2 June 2020**

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The Notice to the Members of the LM First Mortgage Income Fund (Receiver Appointed) in relation to the application together with a copy of the application and supporting material can be found below.

- Notice to Members of the Receiver's Court application (1.5 MB)
- Sealed originating application filed 31 January 2020 (0.3 MB)
- Sealed Affidavit of David Whyte dated 31 January 2020 (3.2 MB)
- Sealed Affidavit of David Whyte dated 3 February 2020 (0.5 MB)
- Sealed Notice of Appeal dated 20 December 2019 (0.5 MB)

Further documents filed in the proceedings will be uploaded to this website as and when they become available.

# LM First Mortgage Income Fund

(Receiver Appointed)



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Useful Forms / Procedures Contact Us



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*Judgment of Justice Fraser & Justice Gotterson & Justice Daubney delivered on 6 June 2014 (7.1 MB)*

### **Recent Updates**

- LM v Drake – application for substituted service – Supreme Court of Queensland proceedings 1146/20 – Hearing Date 2 June 2020
- 28th report to investors dated 19 December 2019 (0.4 MB)
- FMIF Receiver’s Court Application for Remuneration Approval – Hearing Date 17 December 2019
- LMFIF Estimated Unit Price as at 30 June 2019 (0.1 MB)
- 27th report to investors dated 30 September 2019 (0.2 MB)
- FMIF Financial Statements for the year ending 30 June 2019 (1.3 MB)
- Order of the Supreme Court of Queensland dated 2 July 2019 (1.6 MB)
- 26th report to investors dated 01 July 2019 (0.2 MB)
- FMIF Receiver’s Court Application for Remuneration Approval – Hearing Date 2 July 2019
- Affidavit of David Whyte sworn 1 May 2019 (8.1 MB)

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- Sealed Notice of Appeal dated 20 December 2019 (0.5 MB)
- Sealed Order of Justice Callaghan dated 14 February 2020 (0.2 MB)
- Sealed Affidavit of Scott Couper dated 31 January 2020 (Volume 1 of 5) (8.4 MB)
- Sealed Affidavit of Scott Couper dated 31 January 2020 (Volume 2 of 5 – Part 1 of 2) (6.8 MB)
- Sealed Affidavit of Scott Couper dated 31 January 2020 (Volume 2 of 5 – Part 2 of 2) (6.4 MB)
- Sealed Affidavit of Scott Couper dated 31 January 2020 (Volume 3 of 5) (5.2 MB)
- Sealed Affidavit of Scott Couper dated 31 January 2020 (Volume 4 of 5) (8.2 MB)
- Sealed Affidavit of Scott Couper dated 31 January 2020 (Volume 5 of 5) (5.6 MB)
- Sealed order of Justice Callaghan dated 21 February 2020 (0.1 MB)
- Sealed List of Authorities as filed on 28 February 2020 pursuant to the order dated 14 February 2020 (0.1 MB)

**Further documents filed in the proceedings will be uploaded to this website as and when they become available.**