

**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**

**APPLICANTS' STATEMENT OF FACTS**

This is a Statement of Facts pursuant to section 96 of the *Trusts Act 1973*, prepared in support of the Application for directions filed 31 January 2020.

**Role as trustee**

1. On 21 August 2013 David Whyte, registered liquidator and partner of the firm BDO was appointed by the Supreme Court in proceeding 3383 of 2013 as receiver and manager of the property of LM First Mortgage Income Fund (FMIF). A copy of the order is **Annexure A** to this Statement.
2. On 19 December 2014, Mr Whyte caused Supreme Court proceeding 12317/14 (the **Director Proceeding**) to be commenced by LM Investment Management Limited (in liquidation) (LMIM) as responsible entity of the FMIF alleging breaches of duty against the former directors of LMIM in relation to loss suffered by the FMIF.

3. The alleged losses suffered by the FMIF were due to payment of settlement funds to the LM Managed Performance Fund (MPF) upon settlement of litigation in relation to land over which FMIF was first mortgagee (the **Bellpac Litigation**)<sup>1</sup>.

### **Trial**

4. The trial of the Director Proceeding commenced on 1 April 2019 and concluded on 9 April 2019<sup>2</sup>.
5. Judgment in the Director Proceeding was delivered on 22 November 2019 dismissing the claim in its entirety (the **Judgment**)<sup>3</sup>.
6. LMIM as responsible entity of the FMIF was ordered to pay the costs of the first, second, third, fourth and sixth defendants in the Director Proceeding pursuant to the order of His Honour Justice Jackson of 6 December 2019<sup>4</sup> and the costs of the seventh defendant pursuant to the decision of His Honour Justice Jackson on 28 February 2020<sup>5</sup>.

### **Proposed appeal**

7. Mr Whyte sought legal advice as to the merits of pursuing an appeal of the Judgment<sup>6</sup>.
8. On considering the advice received from his legal advisors, Mr Whyte formed the view that, on balance, it was appropriate to appeal the Judgment<sup>7</sup>.
9. Mr Whyte maintains a claim of privilege in respect of the legal advices which he received in relation to the proceeding at first instance and in relation to the prospects of an appeal of the Judgment.
10. Subsequent to receiving advice (over which privilege is claimed) as to the prospects of a potential appeal of a Judgment, Mr Whyte caused the LMIM as responsible entity of the FMIF to file a Notice of Appeal of the Judgment on 20 December 2019<sup>8</sup> to ensure that the Notice of Appeal was filed within time.
11. Mr Whyte also formed the view upon obtaining legal advice (over which privilege is claimed) that it was appropriate to bring this application for judicial direction as to

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<sup>1</sup> Paragraph 7 of the affidavit of Mr Whyte filed 4 February 2020 (CD 8)

<sup>2</sup> Paragraph 12 of the affidavit of Mr Whyte filed 4 February 2020 (CD 8)

<sup>3</sup> *LM Investment Management Ltd (receiver appt)(in liq) v Drake & Ors* [2019] QSC 281 exhibited at pages 1-58 of the affidavit of Scott Couper filed 31 January 2020 (CD 3)

<sup>4</sup> Order of 6 December 2019 exhibited at pages 1-2 of the affidavit of David Whyte filed 4 February 2020 (CD 8)

<sup>5</sup> *LM Investment Management Ltd (receivers and managers appointed)(in liquidation) v Drake & Ors* [2020] QSC 19

<sup>6</sup> Paragraph 15 of the affidavit of David Whyte filed 4 February 2020 (CD 8)

<sup>7</sup> Paragraph 16 of the affidavit of David Whyte filed 4 February 2020 (CD 8)

<sup>8</sup> Exhibit at pages 59-67 of the affidavit of Scott Couper filed 31 January 2020 (CD 3)

whether he is justified in making and pursuing the Appeal before taking any other steps in the appeal proceeding.

### **Notice to interested parties**

12. The material filed in support of this application for judicial advice includes the:
  - (a) Notice of Appeal;
  - (b) final versions of the pleadings;
  - (c) the written submissions by the parties at trial; and
  - (d) a number of the documents which Mr Whyte intends to rely upon at the appeal and which are referred to in his written submissions at trial.
13. Mr Whyte has for approximately six years had a practice of communicating with members of the FMIF through a website [www.lmfif.com](http://www.lmfif.com).
14. On 14 February 2020, orders were made in this proceeding for substituted service on members of the FMIF of the court documents filed in this proceeding.
15. Mr Whyte has complied with order 1 made on 14 February 2020 in relation to substituted service<sup>9</sup>.
16. Each of the documents filed in this proceeding prior to this Statement of Facts has been uploaded to the website [www.lmfif.com](http://www.lmfif.com)<sup>10</sup>.

### **Consideration by the trustee of the costs and benefits of appealing**

17. The position of the FMIF as at 31 December 2019 was as follows:
  - (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<sup>11</sup>.
18. The final return to investors depends upon the outcome of the proposed appeal and the outcome of other proceedings and recovery actions which remain on foot,<sup>12</sup> including:
  - (a) The Applicant's claim against the former auditors of the FMIF in Supreme Court of Queensland proceeding numbered 2166 of 2015 (the **EY Proceedings**);
  - (b) Any recovery from Bellpac Pty Limited (receivers and managers appointed)(in liquidation) v Wollongong Coal Limited in Supreme Court of New South Wales proceeding numbered 2016/120239 (the **Bellpac Proceedings**);

<sup>9</sup> Paragraphs 14-25 of the affidavit of Ryan John Whyte filed 17 April 2020

<sup>10</sup> Paragraphs 14-17 and 21-25 of the affidavit of Ryan John Whyte filed 17 April 2020

<sup>11</sup> Paragraph 7-8 of the affidavit of Claudia Jane Dennison filed 17 April 2020

<sup>12</sup> Paragraph 31 of the affidavit of David Whyte filed 4 February 2020 (**CD 8**)

- (c) FTI Consulting's (Liquidators of LMIM) applications from time to time for remuneration and expenses in Supreme Court of Queensland proceeding numbered 3508/15; and
  - (d) Any receipts from any recovery action or from proceedings which may shortly be commenced by David Clout, the trustee in bankruptcy of the bankrupt estate of Ross Lamb, a guarantor (to which PTAL as custodian of the FMIF is a major creditor).
19. The costs liability to the FMIF pursuant to the costs orders of 6 December 2019 and 28 February 2020 is expected to run into the millions of dollars<sup>13</sup>. Mr Whyte's best estimate of the standard basis costs which may be ordered against the FMIF is that, among the various parties, the costs will be in excess of \$2 million when assessed on the standard basis.
20. The potential financial benefit to the FMIF unitholders of a successful appeal is:
- (a) Damages awarded in full of \$15,546,147.85;
  - (b) plus interest;
  - (c) plus costs of the FMIF of both the Director Proceedings and the appeal; plus
  - (d) the financial benefit of no longer being liable for defendant's costs of Director Proceedings<sup>14</sup>.
21. The amount actually recoverable for the FMIF would depend upon what amount (if any) might still be recoverable under the respondents' policies of insurance. Mr Whyte does not know what amount may still be recoverable under those policies.
22. Mr Whyte anticipates that if the appeal proceeds, is fully defended and is unsuccessful, the FMIF will be exposed to a further liability for the costs of the respondents to the appeal. Mr Whyte's best estimate of the standard basis costs which may be ordered against the FMIF if the appeal is unsuccessful is \$500,000<sup>15</sup>.
23. As the other remaining legal proceedings and recovery actions are ongoing, the appeal, should it proceed, is not expected to affect the date of any final return to the FMIF unitholders and will not delay the completion of Mr Whyte's receivership<sup>16</sup>.

Matthew Jones  
Counsel for the Applicant  
17 April 2020

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<sup>13</sup> Paragraph 23 of the affidavit of David Whyte filed 4 February 2020 (CD 8)

<sup>14</sup> Paragraph 25 of the affidavit of David Whyte filed 4 February 2020 (CD 8)

<sup>15</sup> Paragraph 24 of the affidavit of David Whyte filed 4 February 2020 (CD 8)

<sup>16</sup> Paragraph 32 of the affidavit of David Whyte filed 4 February 2020 (CD 8)

**Annexure A**  
**Order appointing Mr Whyte**



*Duplicate*

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: Brisbane  
NUMBER: 3383/13**

**Applicants: RAYMOND EDWARD BRUCE AND VICKI  
PATRICIA BRUCE**

**AND**

**First Respondent: LM INVESTMENT MANAGEMENT LIMITED  
CAPACITY (IN LIQUIDATION) ACN 077 208 461 IN ITS  
MORTGAGE AS RESPONSIBLE ENTITY OF THE LM FIRST  
INCOME FUND**

**AND**

**Second Respondent: THE MEMBERS OF THE LM FIRST  
MORTGAGE INCOME FUND ARSN 089 343 288**

**AND**

**Third Respondent: ROGER SHOTTON**

**AND**

**Intervener: AUSTRALIAN SECURITIES & INVESTMENTS  
COMMISSION**

**ORDER**

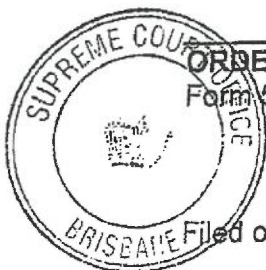
**Before: Justice Dalton**

**Date: 21 August, 2013**

**Initiating document: Application filed 29 April, 2013 by Roger Shotton and  
Application filed 3 May 2013 by Australian Securities  
and Investments Commission ("Applications").**

**THE ORDER OF THE COURT IS THAT:**

- 1. Pursuant to section 601ND(1)(a) of the Corporations Act 2001 (Cth)  
("the Act") LM Investment Management Limited (Administrators**



**ORDER  
Form 59 R.661**

**Filed on behalf of the Third Respondent**

**TUCKER & COWEN  
Solicitors  
Level 15  
15 Adelaide Street  
Brisbane, Qld, 4000.  
Fax: (07) 300 300 33**

Appointed) ACN 077 208 461 ("LMIM") in its capacity as Responsible Entity of the LM First Mortgage Income Fund is directed to wind up the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") subject to the orders below.

2. Pursuant to section 601NF(1) of the Act, David Whyte ("Mr Whyte"), Partner of BDO Australia Limited ("BDO"), is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution ("the Appointment").
3. Pursuant to section 601NF(2), that Mr Whyte:-
  - (a) have access to the books and records of LMIM which concern the FMIF;
  - (b) be indemnified out of the assets of the FMIF in respect of any proper expenses incurred in carrying out the Appointment;
  - (c) be entitled to claim remuneration in respect of the time spent by him and by employees of BDO who perform work in carrying out the Appointment at rates and in the sums from time to time approved by the Court and indemnified out of the assets of the FMIF in respect of such remuneration.
4. Nothing in this Order prejudices the rights of:
  - (a) Deutsche Bank AG pursuant to any securities it holds over LMIM or the FMIF; or
  - (b) the receivers and managers appointed by Deutsche Bank AG, Joseph David Hayes and Anthony Norman Connelly.
5. Pursuant to sections 601NF (2) of the Act, Mr Whyte is appointed as the receiver of the property of the FMIF.
6. Pursuant to sections 601NF (2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to paragraph 5 above, the powers set out in section 420 of the Act.
7. Without derogating in any way from in any way from the Appointment or the Receiver's powers pursuant to these Orders, Mr Whyte is authorised to:
  - (a) take all steps necessary to ensure the realisation of property of FMIF held by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF in relation to the property, including but not limited to:

- (i) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate and/or finalise the sale of the property;
  - (ii) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;
  - (iii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property;
  - (iv) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
  - (v) executing contracts, transfers, releases, or any such other documents as are required to carry out any of the above; and
- (b) bring, defend or maintain any proceedings on behalf of FMIF in the name of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as is necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, including the execution of any documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions.
8. The First Respondent must, within 2 business days of the date of this Order:
- (a) send an email to all known email addresses held by the First Respondent for Members of the FMIF notifying of Mr Whyte's appointment, and a copy of this Order; and
  - (b) make a copy of this order available, in PDF form, on:
    - (i) its website [www.lmaustralia.com](http://www.lmaustralia.com), together with a link to the [www.bdo.com.au](http://www.bdo.com.au) website;
    - (ii) its website [www.lminvestmentadministration.com](http://www.lminvestmentadministration.com), together with a link to the [www.bdo.com.au](http://www.bdo.com.au) website.
9. The costs of the Third Respondent, Roger Shotton, of and incidental to the Applications, including reserved costs, shall be assessed on the indemnity basis, and shall be paid from the FMIF.
10. All other questions of costs of or incidental to the Applications and the Application filed 15 April 2013 by Raymond and Vicki Bruce are adjourned to a date to be fixed by the Court.



**IT IS DIRECTED THAT:**

11. Any party wishing to contend that the First Respondent is not entitled to indemnity from the ~~FMI~~ <sup>FMI</sup> in relation to the Applications shall file an application to be heard and determined at the same time as the other issues as to costs.
12. Any application for the costs of complying with subpoenas issued in the proceedings are adjourned to a date to be fixed, and any time limitation imposed by rule 418 (5) of the UCPR is extended pursuant to rule 7 of the UCPR, to allow for the hearing of any such application at the date to be fixed.

Signed: *ru*