

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

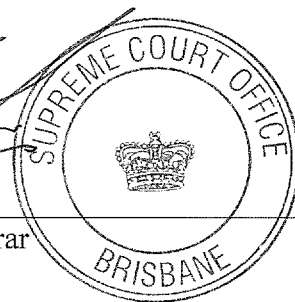
- (d) in relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the postal address of a financial advisor, service is to be effected by sending the Notice by post addressed to the member "care of" the postal address of the financial advisor.
2. Pursuant to Rule 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 appt) (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. 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