

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: 3383 of 2013

Applicants: RAYMOND EDWARD BRUCE AND VICKI  
PATRICIA BRUCE

AND

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

AND

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

AND

Third Respondent: ROGER SHOTTON

AND

Intervener: AUSTRALIAN SECURITIES &  
INVESTMENTS COMMISSION

APPLICATION

TAKE NOTICE that the first respondent, LM Investment Management Limited, on its own account and as responsible entity for the LM First Mortgage Income Fund and as responsible entity for the LM Currency Protected Australian Income Fund and as responsible entity for the LM Institutional Currency Protected Australian Income Fund is applying to the Court for the following orders:

1. That David Whyte (“**the Receiver**”) be authorised, subject to any later order, to withdraw from the Scheme Property of the LM First Mortgage Income Fund

APPLICATION

Filed on behalf of the Respondent, LM Investment Management Ltd (in liq) on its own account and as responsible entity of two members of the LM First Mortgage Income Fund

Form 9 Rule 31

**Russells**  
Level 18  
300 Queen Street  
**BRISBANE 4000**  
Phone: 07 3004 8888  
Fax: 07 3004 8899  
Ref: MKR:20141556

ARSN 089 343 288 the sum of \$840,967.52, on account of his claim for remuneration for the period from 1 November 2019 to 30 April 2020.

2. That the Receiver shall, within 14 days:-
  - (a) deliver to the other parties appearing today a report setting out:-
    - (i) his best estimate of the remuneration, legal costs and other expenses (respectively) likely to be incurred in respect of each of the court proceedings referred to in the Table in para [21] of the Receiver's affidavit filed herein on 11 May 2020 (CFI [460]) ("the Receiver's Affidavit"), including a range if appropriate; and
    - (ii) his best estimate of the time likely needed to resolve each such proceeding, including a range if appropriate;
    - (iii) his best estimate of the likely amount of adverse costs orders in the event that each such proceeding fails; and
    - (iv) his current assessment of a realistic worst-case scenario, updated from his previous evidence referred to by Justice Jackson in *LM Investment Management Limited & Anor v Whyte* [2019] QSC 233 at [83], [90]; and
  - (b) deliver such report to the Associate to Justice Callaghan, together with an envelope marked:

"Confidential Report of David Whyte: Not to be opened save in accordance with an order of a Judge of this Honourable Court.

By order of Justice Callaghan made on 27 May 2020";

3. That, on final determination of this Application, such report shall be placed into the said envelope, sealed, placed on the court file and shall not to opened, save in accordance with an order of a Judge of this Honourable Court.
4. The parties who receive such report from the Receiver shall, subject to further order, keep the same confidential and that they shall not further publish the same, save to their solicitors and counsel in this proceeding.

5. Pursuant to rule 501 of the Uniform Civil Procedure Rules 1999 (Qld), that the Court refer the questions in the Schedule to a referee or referees.
6. That the respondent, LM Investment Management Ltd (in liq) on its own account and as responsible entity of two members of the LM First Mortgage Income Fund (“the Respondent”) shall forthwith deliver to the referees:-
  - (a) the Order made; and
  - (b) this Application;
  - (c) the Receiver’s Affidavit;
  - (d) the Receiver’s further affidavit filed on 11 June 2020; and
  - (e) the Receiver’s report served pursuant to subparagraph 2 hereof.
7. That the Receiver and the Respondent shall extend all reasonable cooperation and assistance to the referees, including to provide to them any further documents or information they may request in writing from time to time.
8. That the referees shall report to the Court:-
  - (a) as near as practicable in the form of an expert’s report, governed by Division 3 of Part 5 of the Uniform Civil Procedure Rules 1999 (Qld), which, to avoid doubt, shall apply to the referee’s report as though it was a report made pursuant to an order under UCPR 429I;
  - (b) as soon as reasonably practicable, by providing their report to the Registrar and copies to the parties who appear on the hearing of the Receiver’s application.
9. The further hearing of the Receiver’s application be adjourned to a date to be fixed by Justice Callaghan, to be brought on by any party then appearing, after receipt of the referees’ report, giving not less than seven days’ notice in writing to his Honour’s Associate and to the other parties.
10. That the Respondent shall, in the first instance, bear and pay the costs of the referees.

11. That the costs of and incidental to the Receiver's Application and this Application, including the costs of the referees' report as between the parties, be reserved.

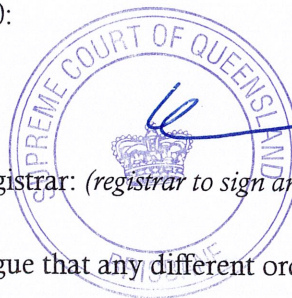
Signed:



Registrar

This application will be heard by the Court at QE II Courts Complex George Street Brisbane, Queensland on 2 July 2020 at 10 am.

Filed in the Brisbane Registry on 24 June 2020:



Registrar: *(registrar to sign and seal)*

If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application the applicant intends to rely on the following material:

1. Affidavit of Millicent Kathryn Russell sworn 24 June 2020;
2. Affidavit of Stephen Charles Russell sworn 24 June 2020.

THE APPLICANT ESTIMATES THE HEARING SHOULD BE ALLOCATED 10 MINUTES

Signed:

A handwritten signature in black ink, appearing to read "Russell", is written over the "Signed:" label.

Description: Solicitor for respondent

Dated: 24 June 2020

This application is to be served on:

The Applicant, David Whyte

c/ his solicitors Tucker & Cowen

## SCHEDULE

### QUESTIONS REFERRED TO REFEREES

1. Look at:-
  - (a) the affidavit of David Whyte (“the Receiver”), filed herein on 11 May 2020 (CFI [460]) (“the Receiver’s First Affidavit”); and
  - (b) the affidavit of David Whyte (“the Receiver”), filed herein on 12 June 2020 (CFI [465], [466]) (“the Receiver’s Second Affidavit”);
  - (c) the report of the Receiver, dated [*insert date*];
2. What is your opinion as to the overall reasonableness of the amount of remuneration sought by Mr Whyte (namely the sum of \$316,167.50, per paragraph 90 of the Receiver’s Second Affidavit), for work in respect of legal proceedings including:-
  - (a) Were staff of appropriate seniority allocated in proportion to the nature, importance and complexity of the tasks undertaken;
  - (b) Was the work undertaken with reasonable efficiency; and
  - (c) Was the time taken for such tasks reasonable?
3. What is your opinion as to the overall reasonableness of the amount of remuneration sought by Mr Whyte (namely the sum of \$580,263.00), for other work (namely the work in subparagraphs 22(g) to (m) of the Receiver’s First Affidavit) including:-
  - (a) Were staff of appropriate seniority allocated in proportion to the nature, importance and complexity of the tasks undertaken;
  - (b) Was the work undertaken with reasonable efficiency; and
  - (c) Was the time taken for such tasks reasonable?
4. Would the assessment of the reasonableness of the claims by the Receiver for approval of his remuneration be simpler and more efficient under any and if so which of the following methods:-

- (a) The systems presently used by the Receiver; or
- (b) If he and other BDO Personnel were to record their time by reference to the individual pieces of litigation and the categories of work in subparagraphs 22(g) to (m) of the Receiver's First Affidavit, with a reasonably informative summary of the work done; or
- (c) Some other and if so what systems?