

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVER APPOINTED) (LMIM)
ACN 077 208 461

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

AND

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

AND

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

AND

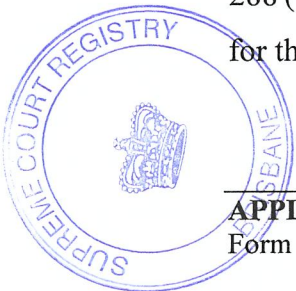
Third Respondent: **ROGER SHOTTON**

AND

Intervener: **AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION**

APPLICATION

TAKE NOTICE that Mr David Whyte ("**Mr Whyte**"), the person 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, is applying to the Court for the following orders:-



APPLICATION:
Form 9 r.32

COWEN SCHWARZ MARSCHKE
Lawyers
Level 8
300 George Street
Brisbane, Qld, 4000.
Tele: (07) 300 300 00
Fax: (07) 300 300 33

Filed on behalf of Mr David Whyte

First Return Date – Substituted Service Orders

1. Under rule 116 of the *Uniform Civil Procedure Rules 1999* (Qld) (“UCPR”), orders that service of this application on the members of the FMIF (including the Applicant and the Third Respondent) be effected by:
 - (a) posting a notice (the **Notice**) to the website “lmfmif.com” (the **Website**) in a form to be approved by the Court;
 - (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 Register.
2. Under rule 116(3) of the UCPR, an order that service of this application be deemed to have been effected on each of the members of the FMIF five (5) days after orders 1(a) to (b) has been complied with.
3. Under rule 116 of the UCPR, an order that service on members of the FMIF of any documents (including any affidavits or submissions) in relation to this Application be effected as follows:
 - (a) For any documents relied upon by Mr Whyte, by Mr Whyte causing such documents to be posted to the Website; and
 - (b) For any documents relied upon by Mr Park, by Mr Park serving those documents on Mr Whyte and Mr Whyte uploading such documents to the Website.
4. Under rule 116(3) of the UCPR, an order that service of any documents referred to in paragraph 3 above be deemed effected on each of the members of the FMIF five (5) days after all the documents are posted to the Website pursuant to order 3 above.
5. Any person wishing to be heard in relation to the orders sought by this application is to file and serve a Form 4 Notice of Appearance on Mr Whyte by no later than fourteen days prior to the second return date of this application.

First Return Date – Directions

6. By no later than 28 days prior to the second return date of this application, that Mr Whyte file and serve an affidavit:
 - (a) identifying and supporting any further claim for approval of his remuneration under paragraph 3(c) of the orders of Dalton J made on 21 August 2013, from 1 May 2022 to 29 February 2024;
 - (b) providing and supporting his estimate of his remuneration (including future remuneration), identifying the tasks required to be performed and the estimated remuneration for such tasks, from 1 March 2024 to the conclusion of his appointments under section 601NF of the Act, in order that they may be fixed;
 - (c) providing and supporting his estimate of his anticipated expenses or liabilities, identified the anticipated expenses and their estimated amount, that will arise after payment of the final distribution to the members of the FMIF, in order that they may be withheld from the final distribution to the members of the FMIF.
7. By no later than fourteen days prior to the second return date of this application, that any party who wishes to be heard at the hearing of this application, including Mr Park and LMIM, file and serve any further affidavit material on which they intend to rely at the hearing of this application, as well as a short statement summarising the grounds, if any, on which they oppose the relief sought by Mr Whyte.
8. By no later than seven days before the second return date of this application, that Mr Whyte file and serve a written outline of submissions in support of the relief sought at the second return date.
9. By no later than two business days before the second return date of this application, that Mr Park and LMIM file and serve any written outline of submissions in relation to the relief sought at the second return date.
10. That paragraphs 3 to 9 of the orders of Justice Callaghan dated 15 October 2020 do not apply to this application.

11. That the orders of P Lyons J made on 1 June 2015 (as amended by orders of Mullins J made on 17 December 2019) do not apply to Mr Whyte's remuneration application.
12. That this application be listed for a further hearing of paragraphs 14 to 30 below, (the **second return date**), to be heard together with Mr Park's remuneration and expenses application filed in BS3508 of 2015, on a date to be fixed by this Honourable Court.
13. Such further orders or directions as to the conduct of this application as this Honourable Court deems fit.

Second Return Date – Remuneration and Expenses

14. That Mr Whyte's remuneration from 1 May 2022 to 29 February 2024, be fixed in the amount identified in the affidavit filed in accordance with paragraph 6(a) above, or such other amount as this Honourable Court thinks fit.
15. That Mr Whyte's remuneration (including future remuneration) for performance of the tasks described in the affidavit filed in accordance with paragraph 6(a) above, from 1 March 2024 to the conclusion of his appointments under section 601NF of the Act be fixed such amount as this Honourable Court thinks fit.
16. That the parties have liberty to apply.

Second Return Date – Orders under Section 601NF(2)

17. Pursuant to section 601NF(2) of the Act, that Mr Whyte is authorised and empowered to exercise the powers of, and is responsible for the obligations of, LMIM as the responsible entity of the FMIF:
 - (a) as set out in clause 16.7(c) of the constitution of the FMIF, to make a further and final distribution of the property of the FMIF, as soon as reasonably practicable after the making of these orders by this Honourable Court;

- (b) as set out in clause 16.8 of the constitution of the FMIF and as required by section 601NG of the Act, to pay or transfer any unclaimed or undistributed money or other property that was part of the scheme property, including any returned payments from members of the FMIF for whom Mr Whyte does not have up to date payment details, to ASIC to be dealt with pursuant to Part 9.7 of the Act;
- (c) (in the alternative to the relief set out in paragraph 19(a) below) as set out in clause 16.10 of the constitution of the FMIF, to arrange for any audit of the final accounts of the FMIF after the FMIF is wound up.

18. That Mr Whyte be authorised, pursuant to section 601NF(2) of the Act:

- (a) to withhold the amounts identified in the affidavit filed in accordance with paragraphs 6(b) and 6(c) above, and such other amounts ordered by this Honourable Court including in relation to Mr Park's remuneration and expenses application in BS 3508 of 2015, that have not yet been paid, from the final distribution to the members of the FMIF made in accordance with paragraph 17(a) above;
- (b) otherwise not to withhold any other amount from the final distribution made to the members of the FMIF in accordance with paragraph 17(a) above, on any account whatsoever.

19. Pursuant to section 601NF(2) of the Act:

- (a) that LMIM is not required to prepare or have audited under clause 16.10 of the constitution of the FMIF final accounts of the FMIF, other than as required under ASIC Instrument 22-0765 dated 14 September 2022;
- (b) in the alternative, that the final accounts to be prepared and audited under clause 16.10 of the constitution of the FMIF are limited to the period from the start of the financial year in which the winding up is concluded, to the conclusion of the winding up.

20. Pursuant to section 601NF(2) of the Act, that LMIM as RE of the FMIF is not liable in the winding up of the FMIF to pay any liability not notified to Mr

Whyte under the orders made on 17 December 2015 by the second return date of this application, or as provided for by these orders.

Second Return Date – Judicial Advice

21. That Mr Whyte is justified causing LMIM as RE of the FMIF to discontinue Supreme Court of Queensland Proceeding 11560/16 (**Clear Accounts Proceeding**).
22. As to the amounts recorded in the Distributions Payable (20400) ledger of the accounts of the FMIF, that Mr Whyte is justified:
 - (a) seeking to pay the amounts that represent the income distributions payable in cash for the November 2010 and December 2010 distribution periods to the members or former members identified in the ledger as entitled to the distribution;
 - (b) seeking to pay the amounts that represent other unpaid income distributions payable to the members or former members identified by BDO from the ledger, and referred to in paragraphs 155 to 158 of the affidavit of David Whyte sworn 9 April 2024;
 - (c) otherwise, having sent notice to all current members of the FMIF requesting any member who believes that they are entitled to a distribution to come forward and provide relevant supporting documentation, taking no further steps apart from assessing claims received from members in response to the notice, and paying those claims which are determined to be valid.
23. As to the amounts recorded in the Investor Funds Payable (Redemptions) (20401) ledger of the FMIF:
 - (a) seeking to pay the amounts that represent unpaid hardship or other redemption entitlements payable to the members or former members identified by BDO from the ledger, and referred to in paragraphs 177 to 180 of the affidavit of David Whyte sworn 9 April 2024;

- (b) otherwise, having sent notice to all current members of the FMIF requesting any member who believes that they are entitled to a payment to come forward and provide relevant supporting documentation, that Mr Whyte is justified taking no further steps apart from assessing claims received from members in response to the notice, and paying those claims which are determined to be valid.

- 24. As to the amounts recorded in the Returned Investor Payments (20003) ledger of the FMIF, that Mr Whyte is justified:
 - (a) seeking to pay the amounts that represent returned redemption payments or other amounts payable to the members or former members identified by BDO from the ledger, and referred to in paragraphs 181 to 184 of the affidavit of David Whyte sworn 9 April 2024;
 - (b) otherwise, having sent notice to all current members of the FMIF requesting any member who believes that they are entitled to a payment to come forward and provide relevant supporting documentation, taking no further steps apart from assessing claims received from members in response to the notice.

- 25. That Mr Whyte is justified in not taking any further steps in relation to the amounts recorded in the following ledgers of the FMIF:
 - (a) Trade – Settlements Payable / Receivable (20040); and
 - (b) Other payables (20001).

Second Return Date – Release of Mr Whyte

- 26. Upon making the final distribution referred to in paragraph 17(a) above, that:
 - (a) Mr Whyte be discharged as the receiver of the property of the FMIF; and
 - (b) Mr Whyte, BDO, its partners, employees and agents forthwith be discharged and released forthwith from any and all claims whatsoever

and howsoever arising in connection with Mr Whyte's appointments under section 601NF of the Act in respect of the FMIF.

27. That Mr Whyte be discharged from his appointment as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution and the orders of the Court under section 601NF(2) of the Act, upon the completion of the following steps:
- (a) making the final distribution referred to in paragraph 17(a) above;
 - (b) paying any unclaimed or undistributed money or other property, including any returned payments, referred to in paragraph 17(b) above, to ASIC; and
 - (c) publishing any audited or unaudited final accounts as required by these orders.
28. That Mr Whyte notify the Court once the winding up of the FMIF has been completed, by filing an affidavit deposing to the taking of the steps required by orders 27 (a) to (c).
29. Such further or other orders as this Honourable Court deems fit.

Costs of Application

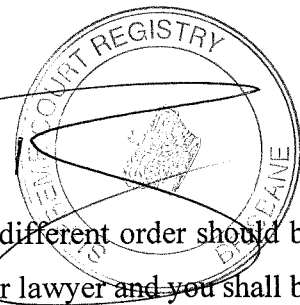
30. That Mr Whyte's costs of and incidental to this application be costs in the winding up of the FMIF, to be paid out of the assets of the FMIF on an indemnity basis.

This application will be heard by the Court at Brisbane

on: 18/4 / 2024 at 10.00 am

Filed in the Brisbane Registry on 12 APR 2024 2024

Registrar:



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 affidavit:

1. Affidavits of David Whyte sworn 9 April 2024.
2. Affidavit of David Whyte to be sworn.

THE APPLICANT ESTIMATES THE HEARING SHOULD BE ALLOCATED:

1. ONE HOUR ON THE FIRST RETURN DATE;
2. A DAY ON THE SECOND RETURN DATE.

Signed:


Cowen Schwarz Marschke

Description: Solicitors for the Applicant, Mr David Whyte

Dated: 12 April 2024

This application is to be served on:

The members of the LM First Mortgage Income Fund ARSN 089 343 288

Mr John Richard Park in his capacity as the liquidator of LM Investment Management Limited (In Liquidation)
C/- Russells Lawyers
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Brisbane QLD 4000

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