

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS3508/2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)

First Applicant: **JOHN RICHARD PARK AS LIQUIDATOR OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 007 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

AND

Second Applicant: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

AND

First Respondent: **DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001**

AND

Second Respondent: **SAID JAHANI IN HIS CAPACITY AS RECEIVER AND MANAGER OF THE ASSETS, UNDERTAKING, RIGHTS AND INTERESTS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS THE RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 AND THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868**



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Deponent

Witness

FIFTH AFFIDAVIT OF MILLICENT

KATHRYN RUSSELL

Filed on behalf of the Applicants

Form 46, Version 2

Uniform Civil Procedure Rules 1999

Rule 431

3213331

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FIFTH AFFIDAVIT OF MILLICENT KATHRYN RUSSELL

I, **MILLICENT KATHRYN RUSSELL** of Level 18, 300 Queen Street, Brisbane in the State of Queensland, solicitor, state on oath:

1. I am a solicitor of this Honourable Court and a Partner of Russells, Solicitors for the Applicants. I have the conduct of this proceeding and conduct or supervision of a number of matters and proceedings for the Applicants.
2. In this affidavit I refer to:-
 - (a) Mr Park's sixteenth affidavit to be filed in support of this application (**Mr Park's Sixteenth Affidavit**);
 - (b) Mr Stephen Charles Russell's ninth affidavit filed 7 March 2022 in this proceeding (CFI-324) (**Mr Russell's Ninth Affidavit**).
3. In this affidavit I have adopted the terms defined in the above affidavits.
4. This present application is for, *inter alia*, approval of expenses of the Applicants, being legal costs and disbursements, pursuant to the order of Justice Jackson, made on 17 December 2015 (CFI-36), as varied by his Honour on 18 July 2018 (CFI-137).
5. The invoices the subject of this Application are those referred to in and exhibited to Mr Park's Sixteenth Affidavit; they were rendered for legal advice and services provided by my firm to the Liquidator of the Second Applicant (**LMIM**) acting as Responsible Entity for the LM First Mortgage Investment Fund ARSN 089 343 288 (**FMIF**) in relation to the following matters (identified by the following matter numbers):
 - (a) 20131258 – an interim distribution application of the First Respondent, Mr Whyte (**Interim Distribution Application Retainer**);
 - (b) 20141556 - Remuneration applications of Mr Whyte (**Mr Whyte's Remuneration Applications Retainer**);
 - (c) 20170918 - Supreme Court of Queensland proceeding BS11560 of 2016 (**Clear Accounts Rule Proceeding Retainer**);
 - (d) 20170943 - Supreme Court of Queensland Proceeding BS13534 of 2016 (**Feeder Funds Proceeding Retainer**);

- (e) 20171166 - Remuneration applications of Mr Park as Liquidator of LMIM subsequent to September 2015 (**Liquidator's Remuneration Applications Retainer**);
- (f) 20180413 - Expenses Applications of Mr Park as Liquidator of LMIM (**Liquidator's Expenses Applications Retainer**);
- (g) 20190007 - EY Claim and Proof of Debt (**EY Claim and Proof of Debt Retainer**);
and
- (h) 20190072 - Supreme Court of Queensland proceeding BS2166 of 2015 (**EY Proceeding Retainer**);
- (i) 20201040 – Supreme Court of Queensland proceeding BS14389 of 2020 (**Costs Order Proceeding**).

6. Since in or about July 2019, I have had principal carriage of the retainers the subject of this application along with various solicitors and support staff working under the ultimate supervision of Mr Russell as Managing Partner.

Interim Distribution Application Retainer

- 7. A description of the work undertaken by my firm in respect of this retainer is set out at paragraphs 19 to 23 of Mr Russell's Ninth Affidavit. The written retainer agreement for this matter appears at pages 1 to 8 of the exhibit "SCR-9" to Mr Russell's Ninth Affidavit.
- 8. The services provided by my firm the subject of this application under the Interim Distribution Application Retainer were general advices in respect of various administrative matters and applications made to this Honourable Court in respect of:
 - (a) Mr Whyte's remuneration and expenses, including counsel's fees;
 - (b) whether proofs of debt issued to the Liquidator were recoverable from the scheme property of the FMIF;
 - (c) various work undertaken before it was necessary to open a separate matter for the Clear Accounts Proceeding (described in paragraphs 12 to 15 below);
 - (d) work undertaken in respect of the terms of the order of Justice Jackson, made on 17 December 2015 (CFI-36), as varied by his Honour on 18 July 2018.

Mr Whyte's Remuneration Applications Retainer

- 9. A summary of the scope of this retainer is set out at paragraphs 5 to 13 of Mr Russell's Ninth Affidavit. The written retainer agreement for this matter appears at pages 1 to 8 of the exhibit "SCR-9" to Mr Russell's Ninth Affidavit.
- 10. The services provided by my firm the subject of this application were in respect of an application filed by Mr Whyte on 5 September 2022 in proceeding 3383 of 2013 (CFI-528 of that proceeding).
- 11. The work undertaken in respect of that application was similar to the work undertaken in respect of Mr Whyte's earlier Remuneration Applications, which Mr Russell describes in paragraph 11 of his Ninth Affidavit; namely, reviewing the application and supporting affidavit material, advising the First Applicant in respect of the remuneration sought by Mr Whyte and corresponding with Mr Whyte's solicitors.

Clear Accounts Rule Proceeding Retainer

- 12. On 9 November 2016, Mr Whyte – in his capacity as receiver of the scheme property of the FMIF – commenced proceedings in this Honourable Court (proceeding number 11560 of 2016) seeking declarations to the effect that LMIM, in its capacity as RE of the FMIF, acted in breach of its obligations as trustee and in contravention of s 601FC(1) of the *Corporations Act* by causing certain payments to be made from the assets of the FMIF (**the Clear Accounts Proceeding**).
- 13. On 3 August 2017, my firm accepted service of an Amended Claim and Amended Statement of Claim on behalf of LMIM. That document appears at CFI-2 of the Court File Index.
- 14. My firm was retained by LMIM (by Mr Park as Liquidator) to advise and act on its behalf in respect of the Clear Accounts Proceeding. The services rendered by my firm under the retainer included:-
 - (a) advising LMIM on the claim generally;
 - (b) corresponding with Mr Whyte's solicitors;
 - (c) advising LMIM in respect of an application by Mr Whyte for orders and directions pursuant to sections 500(2) of the *Corporations Act* and 59 of the *Trusts Act* (CFI-4). This included reviewing and advising on Mr Whyte's Affidavit in

support of the application, which, including exhibits, went to some 905 pages in length.

15. On 25 July 2018, his Honour Justice Jackson ordered, *inter alia*, that the proceeding be stayed until further order of the Court.

Feeder Funds Proceeding Retainer

16. The retainer the subject of this matter concerned a claim brought by Mr Whyte, in his capacity as receiver of the scheme property of the FMIF, against LMIM in its:-

(a) corporate capacity; and

(b) capacity as responsible entity of the:-

(i) LM Currency Protected Australian Income Fund (CPAIF); and

(ii) LM Institutional Currency Protected Australian Income Fund (ICPAIF).

17. The claim was also brought against Trilogy Funds Management Limited as responsible entity of the Wholesale First Mortgage Income Fund (WFMIF). The proceeding was Supreme Court of Queensland proceeding number 13534 of 2016 (**Feeder Funds Proceeding**).

18. On 4 August 2017, my firm accepted service on behalf of LMIM of an Amended Claim and Amended Statement of Claim filed by Mr Whyte. My firm was subsequently retained by Mr Park (as Liquidator) to advise and act on LMIM's behalf in the Feeder Funds Proceeding.

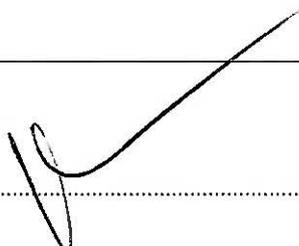
19. On 1 September 2017, my firm sent a letter to Mr Whyte's solicitors to the effect that: *firstly*, the receivers appointed over the scheme property of the CPAIF, ICPAIF (primarily Mr Said Jahani of Grant Thornton), would assume responsibility for the litigation for LMIM in its capacity as RE for the CPAIF and ICPAIF; and *secondly*, as LMIM in its corporate capacity was without funds, it would not be taking an active role in the litigation.

20. On 13 June 2018, Justice Jackson made orders that, *inter alia*, the interests of LMIM in its capacity as RE of the FMIF continue to be represented by Mr Whyte, the interests of LMIM in its capacity as RE of the CPAIF and ICPAIF be represented by Mr Jahani, and LMIM interests in its corporate capacity be represented by Mr Park.

21. On 5 and 6 November 2018, the parties participated in a two-day mediation. The mediator was the Honourable Richard Chesterman AO RFD. In addition to the parties in the Feeder Funds Proceeding, representatives of Ernst & Young (EY) were also in attendance.
22. The work required for the mediation was fairly involved; there were some 18 people in attendance on behalf of the various participants. Ms Kelly Trenfield of FTI, with Mr Peden KC and Mr Julian Walsh, Special Counsel in the employ of Russells at the time, attended the mediation representing the interests of LMIM in its corporate. Ms Trenfield and Messrs Peden KC and Walsh did not attend the second day of the mediation on 6 November 2018.
23. The matter failed to resolve at mediation.
24. Ultimately, the matter was resolved and the Feeder Funds Proceeding discontinued in November 2019.
25. In addition to preparing for and attending the mediation, the services provided by my firm under this retainer extended to advising LMIM in respect of the proceeding, reviewing various court documents and corresponding with the other parties' solicitors.

Liquidator's Remuneration Applications Retainer

26. On 27 October 2017, my firm was retained by Mr Park (as Liquidator of LMIM) to advise and act for him in applying to the Court for approval of his remuneration in acting as Liquidator of LMIM as RE of the FMIF, CPAIF, ICPAIF, LM Australian Income Fund (AIF), LM Australian Structured Products Fund (ASPF) and LM Cash Performance Fund (CPF).
27. An application for approval of Mr Park's remuneration was filed in this proceeding on 17 July 2018 (CFI-131).
28. On 10 October 2018, my firm filed an application on Mr Park's behalf (as Liquidator) for directions on the extent of Mr Park's and Mr Whyte's duties as Liquidator and Receiver of LMIM as RE of the FMIF respectively (CFI-173).
29. On 2 October 2019, his Honour Justice Jackson delivered judgment approving payment of Mr Park's remuneration from the various funds: *LM Investment Management Limited & Anor v Whyte* [2019] QSC 245.



30. On 17 October 2019, Justice Jackson delivered judgment on the matter of costs of the above two applications: *LM Investment Management Limited & Anor v Whyte* [2019] QSC 257.
31. The costs the subject of the order of Justice Jackson made 17 October 2019 have been paid. The amounts claimed in this application for work undertaken by my firm in respect of this retainer are those amounts for work completed in respect of the above applications and subsequent costs assessment which were not claimed as part of the costs payable under his Honour's order.

Liquidator's Expenses Applications Retainer

32. Similarly to the Liquidator's Remuneration Applications Retainer, my firm was retained to advise and act for Mr Park (as Liquidator of LMIM) in applying to the Court for approval of Mr Park's expenses incurred in his capacity as Liquidator of LMIM as RE of the funds referred to in paragraph 26 above.
33. On 24 January 2020, my firm filed two applications (on Mr Park's instructions) for approval of Mr Park's expenses as Liquidator of LMIM in its capacity as responsible of the FMIF incurred in respect of the following matters:-
- (a) *firstly*, the institution and then abandonment of a claim by Mr Whyte (as receiver of the scheme property of the FMIF) against LMIM in its corporate capacity as part of what is known as the "Bellpac proceeding", being Supreme Court of Queensland proceeding number 12317 of 2014 (CFI-243) (**the Bellpac Proceeding**); and
 - (b) *secondly*, expenses incurred in respect of the:-
 - (i) EY Claim and Proof of Debt Retainer;
 - (ii) joinder by EY of LMIM as First Third Party to proceeding BS 2166 of 2015 (**EY Proceeding**) and the subsequent order of Justice Jackson made 4 October 2019 striking out the third proceeding against LMIM (CFI-244).
34. On 25 February 2020, Mr Park filed an amended version of application CFI-243 (CFI-263).
35. The application for approval of Mr Park's expenses in respect of the Bellpac proceeding was resolved by agreement.

36. On 28 February 2020, his Honour Justice Jackson:-

- (a) in respect of application CFI-243, made orders by consent for payments from the property of the FMIF for both the expenses the subject of that application and the costs of the application itself. That order appears at CFI-300;
- (b) in respect of application CFI-244, delivered judgment allowing the application and ordering that Mr Park's expenses the subject of the application be paid out of the property of the FMIF: *Park & Anor v Whyte* [2020] QSC 18.

37. Amended orders were made in respect of the application at CFI-244 to deal with GST (CFI-272).

38. The services rendered by my firm under this retainer included acting for the Liquidator in the above applications, corresponding with Mr Whyte's solicitors, appearing at the hearing of the applications and acting in the subsequent costs assessments for the costs payable under the above orders of Justice Jackson.

EY Claim and Proof of Debt Retainer

39. On 23 January 2019, my firm was retained to advise Mr Park, as Liquidator of LMIM, in respect of a proof of debt submitted by EY in the winding up of LMIM; pursuant to the terms of that retainer, my firm provided advice to Mr Park.

40. The services provided by my firm the subject of this application under this retainer are for correspondence with Mr Whyte's solicitors about the proof of debt lodged by EY.

EY Proceeding Retainer

41. A summary of the scope of this retainer is set out at paragraphs 14 to 18 of Mr Russell's Ninth Affidavit. The written retainer appears at [9] to [19] of "SCR-09" to that affidavit.

42. The services provided by my firm under this retainer the subject of the costs of which are the subject of this application include:-

- (a) correspondence with EY's solicitors in respect of Justice Jackson's costs orders made 17 October 2019;
- (b) the review of additional potentially privileged documents proposed to be disclosed by Mr Whyte; and

- (c) advising in respect of and appearing at the open-court component of Mr Whyte's application for judicial advice that he would be justified in settling the EY Proceeding with the defendants on the terms of settlement agreed (subject to the Court's approval).

Costs Order Proceeding

43. On 19 December 2014, Mr Whyte caused LMIM to commence the Bellpac Proceeding against six former directors of LMIM.
44. On 22 November 2019, his Honour Justice Jackson dismissed the claim against the former directors.
45. On 6 December 2019, his Honour ordered, by consent, that LMIM pay the former directors' costs of the proceeding.
46. On 20 December 2019, Mr Whyte caused LMIM to institute an appeal against the whole of Jackson J's Order made 22 November 2019 (CA 14258/19).
47. On 31 January 2020, Mr Whyte caused LMIM to apply to the Supreme Court of Queensland for judicial advice for, *inter alia*, judicial advice as to the commencement and pursuit of the appeal. That application was heard by his Honour Justice Callaghan on 2 June 2020.
48. On 28 August 2020, Callaghan J delivered judgment refusing Mr Whyte's application for judicial advice: *LM Investment Management Ltd (receiver apptd) (in liq) v Drake & Ors* [2020] QSC 265.
49. On 23 September 2020, Mr Whyte caused LMIM to file in the appeal proceeding a Memorandum of Agreement to Dismissal of Appeal recording an agreement between the appellant and respondents that:-
- (a) the appeal be dismissed by consent;
- (b) the appellant should pay the respondents' costs of the appeal on the standard basis, as agreed or otherwise assessed.
50. On 11 November 2022, Russells received a letter from Mr Whyte's solicitors stating that:-
- (a) Mr Whyte had reached a settlement with the former directors for their costs of the Bellpac Proceeding and its appeal on the basis that LMIM would pay them the total sum of \$5M from the scheme property of the FMIF (**Adverse Costs Claim**);

(b) unless Mr Park caused LMIM, within seven days, to bring an application to prevent him from doing so, Mr Whyte would make the \$5M payment to the former directors.

51. My firm was retained by Mr Park, in his capacity as liquidator of LMIM, to file an application seeking to prevent Mr Whyte from paying the Adverse Costs Claim. That application was filed on 17 November 2022 in Supreme Court of Queensland proceeding number 14389 of 2022 (**Costs Order Proceeding**). Pages [572] to [577] of exhibit "JRP-16" to Mr Park's Sixteenth Affidavit are a true copy of my firm's retainer in this proceeding.

52. On 19 February 2024, his Honour Justice Kelly made orders, by consent, to the effect that:-

(a) Mr Whyte is empowered to cause LMIM to pay the Adverse Costs Order from the scheme property of the FMIF;

(b) LMIM's costs of the Costs Order Proceeding be paid out of the scheme property of the FMIF.

53. In addition to preparing and filing the application in the Costs Order Proceeding, my firm advised and represented Mr Park (as Liquidator of LMIM) throughout the proceeding, at the mediation and at the reviews of the matter. Those costs were paid pursuant to the order made by his Honour Justice Kelly on 19 February 2024.

54. Because Mr Park did not have funding to pay my firm's fees and disbursements throughout the course of most of this proceeding, my firm charged interest on the outstanding payments. Interest on those outstanding invoices are claimed in this application.

General

55. All the professional fees were rendered on my firm's usual rates of charge in accordance with our agreement with LMIM and the Liquidators and the fees rendered to the Liquidators were incurred in connection with LMIM acting as responsible entity for the FMIF.

56. When rendering invoices for professional services, it is my firm's practice that the supervising partner examines the time recorded before the time is charged; and that only time that can properly and reasonably be charged is the subject of a charge for

professional fees. That practice was followed in respect of each of the invoices the subject of the present application.

57. Having reviewed the invoices the subject of the present application, I am not aware of any reason why the expenses comprised by these legal fees and disbursements, incurred by LMIM and its Liquidator would not be payable out of the property of the FMIF.
58. In addition to my firm's legal fees and disbursements, my firm and Mr Peden KC have charged interest on the outstanding amounts under our retainer agreements and in accordance with the *Legal Profession Regulation 2017*. Schedules detailing the interest charged are at pages [461] to [465] of exhibit "JRP-16" to Mr Park's Sixteenth Affidavit.
59. I am not aware of any reason why my firm and Mr Peden KC could not properly charge interest on our outstanding invoices or why those sums incurred by LMIM and its Liquidator would not be payable out of the property of the FMIF.
60. All the facts and circumstances herein deposed to are within my own knowledge, save such as are deposed to from information only, and my means of knowledge and sources of information appear in this my affidavit.

SWORN by **MILLICENT KATHRYN RUSSELL** on 18 April 2024 at Brisbane
in the presence of:

.....
Millicent Kathryn Russell
Deponent

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Name: Francisco Cardona
Lawyer/Commissioner for Declarations/JP