SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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

First Applicant: **JOHN RICHARD PARK AS LIQUIDATOR OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 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 MANAGER APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

AND

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**

CERTIFICATE OF EXHIBIT

VOLUME 3 OF 3

Exhibit "**DW-126**" (pages 399 – 511) to the Affidavit of **DAVID WHYTE** sworn this 3rd day of December2018

Deponent

Solicitor/A Justice of the Peace

Alexander Philip Nase
Solicitor

SUPREME COURT OFFICE BRISBANE

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the Respondent
Mr David Whyte

Document1

TUCKER & COWEN
Solicitors
Level 15, 15 Adelaide Street
Brisbane, Qld, 4000
Tel: (07) 300 300 00
Fax: (07) 300 300 33

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
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FTI CONSULTING

FTI Consulting Standard Rates effective 1 March 2017 (excluding GST)		
Typical classification	**All Offices $/hour**	**General guide to classifications**
Senior Managing Director	625	Registered/Official Liquidator and/or Trustee, with specialist skills and extensive experience in all forms of insolvency administrations. Alternatively, has proven leadership experience in business or industry, bringing specialist expertise and knowledge to the administration.
Managing Director	580	Specialist skills brought to the administration. Extensive experience in managing large, complex engagements at a very senior level over many years. Can deputise for the appointee. May also be a Registered/Official Liquidator and/or Trustee. Alternatively, has extensive leadership/senior management experience in business or industry.
Senior Director	570	Extensive experience in managing large, complex engagements at a very senior level over many years. Can deputise for the appointee, where required. May also be a Registered/Official Liquidator and/or Trustee or have experience sufficient to support an application to become registered. Alternatively, has significant senior management experience in business or industry, with specialist skills and/or qualifications.
Director	510	Significant experience across all types of administrations. Strong technical and commercial skills. Has primary conduct of small to large administrations, controlling a team of professionals. Answerable to the appointee, but otherwise responsible for all aspects of the administration. Alternatively, has significant senior management experience in business or industry, with specialist skills and/or qualifications.
Senior Consultant 2	440	Typically an ARITA professional member. Well developed technical and commercial skills. Has experience in complex matters and has conduct of small to medium administrations, supervising a small team of professionals. Assists planning and control of medium to larger administrations.
Senior Consultant 1	380	Assists with the planning and control of small to medium administrations. May have the conduct of minor administrations. Can supervise staff. Has experience performing more difficult tasks on larger administrations.
Consultant 2	360	Typically ICAA qualified (or similar). Required to control the tasks on small administrations and is responsible for assisting with tasks on medium to large administrations.
Consultant 1	315	Qualified accountant with several years experience. Required to assist with day-to-day tasks under the supervision of senior staff.
Associate 2	280	Typically a qualified accountant. Required to assist with day-to-day tasks under the supervision of senior staff.
Associate 1	260	Typically a university undergraduate or graduate. Required to assist with day-to-day tasks under the supervision of senior staff.
Junior Associate	185	Undergraduate in the latter stage of their university degree.
Administration 2	185	Well developed administrative skills with significant experience supporting professional staff, including superior knowledge of software packages, personal assistance work and/or office management. May also have appropriate bookkeeping or similar skills.
Junior Accountant	155	Undergraduate in the early stage of their university degree.
Administration 1	155	Has appropriate skills and experience to support professional staff in an administrative capacity.

The FTI Consulting Standard Rates above apply to the Corporate Finance & Restructuring practice and are subject to review at 1 January each year.

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: **Brisbane**
NUMBER: **3383 of 2013**

Applicant:	**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**

ORDER

Before:	Daubney J
Date:	18 December, 2014
Initiating documents:	Applications filed 2 and 11 December 2014 in proceeding 3383/13 and 15 December 2014 in proceeding 3691/13

SUPREME COURT OF QUEENSLAND BRISBANE

ORDER

Filed on behalf of the Applicant, David Whyte

Form 59 Rule 661

TUCKER & COWEN
Solicitors
Level 15
15 Adelaide Street
BRISBANE QLD 4000
Phone: (07) 300 300 00
Fax: (07) 300 300 33

THE ORDER OF THE COURT IN PROCEEDINGS NUMBERED 3383/13 AND 3691/13 IS THAT:-

1. Pursuant to s 12 of the *Civil Proceedings Act* 2011 Mr David Clout (the "**Receiver**") be appointed, without security, Receiver of the books and records held by LM Administration Pty Ltd (in liquidation) ("**LMA**") as at the date of this order insofar as the books and records relate to:

(i) LM Investment Management Limited (In Liquidation) ("**LMIM**") in its own capacity or in its capacity as responsible entity of the following registered managed investment schemes:

A. LM Australian Income Fund ("**AIF**");

B. LM Australian Structured Products Fund ("**ASPF**");

C. LM Cash Performance Fund ("**CPF**");

D. LM Currency Protected Australian Income Fund ("**CPAIF**");

E. LM Institutional Currency Protected Australian Income Fund ("**ICPAIF**)

F. LM First Mortgage Income Fund ("**FMIF**");

(collectively, the "**LMIM Funds**");

(ii) KordaMentha Pty Ltd and Calibre Capital Limited in their capacity as the trustees ("**MPF Trustees**") of the LM Managed Performance Fund ("**MPF**");

(the LMIM Funds and MPF being together, the "**Funds**" and all books and records being collectively, the "**LM Group Books and Records**")

2. The purposes of the Receiver's appointment ("**the Appointment**") are to:

(a) take possession and preserve the LM Group Books and Records and permit access to the LM Group Books and Records in accordance with paragraphs 2(c), 3(b)(vii) and 3(b)(viii) below on an interim basis until 29 January 2015 or further or earlier order;

(b) facilitate the endeavours of the parties to develop a solution to the problem of the LM Group Books and Records being intermingled, such that information of the various Funds may be properly made available to LMIM, MPF Trustees and Mr David Whyte in his capacity as receiver appointed by the Court to oversee the winding up of the FMIF ("**Mr Whyte**") without confidentiality or privilege of information of any Fund being compromised;

(c) By himself, his servants or the engagement of necessary personnel, extract information from the LM Group Books and Records as requested in writing by LMIM, the MPF trustees and Mr Whyte (or by such of their duly authorised partners, servants or agents as are nominated to the Receiver and the other parties) and provide such information to the requesting entity in the same manner as has been provided by LMA up to the date of this order, redacted as necessary to limit the information provided to information about or concerning the Fund or entity making the request. Any request in writing for information must be limited to information which is reasonably required by the particular party for the performance of their duties and attending to matters reasonably required to be addressed between the date of this Order and 29 January 2015.

Powers

3. The Receiver has:-

(a) power to do all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the purposes of the Appointment;

(b) Specifically, and without limiting the generality of the foregoing, the power to:

(i) Collect in and preserve the LM Group Books and Records;

(ii) engage as subcontractors Mr Steven Hannan or such former staff of LMA as the Receiver considers appropriate to assist him as Receiver;

(iii) retain solicitors and counsel to represent the Receiver and engage employees;

(iv) engage Cloud Plus Pty Ltd and/or other cloud server, IT and software suppliers to provide and maintain the cloud and other infrastructure and software to store and host the soft copy LM Group Books and Records;

(v) engage Grace Records Management or other storage facility provider to store the hard copy LM Books and Records;

(vi) retain a computer expert to assist in developing the solution referred to in paragraph 2(b) and providing the recommendation pursuant to paragraph 3(b)(x);

(vii) allow access to the LM Group Books and Records to any person:-

A. legally entitled;

B. with the consent of LMIM, the MPF trustees and Mr Whyte; or

C. having approval of this Honourable Court,

upon such terms (including as to payment for such access) as are prescribed by law, agreed by the Receiver or ordered;

(viii) without limiting the foregoing, allow access by the following nominated BDO personnel:-

A. Jo-Anne Garcia;

B. Nicola Kennedy;

C. Daniel Tipman; and

D. Dermot O'Brien,

to the 'AX Database' component of the environment in which the LM Group Books and Records are held, solely for the limited purpose of inputting and maintaining data enabling the preparation of periodic accounts and for updating the:-

E. Records of members of the FMIF as notices of changes of member details;

F. Financial records of the FMIF, specifically the FMIF General Ledger and Borrower Loan Modules,

Provided that the Receiver shall first obtain from each such person to whom such access is granted a written undertaking to observe that sole limited purpose;

(ix) convene a meeting to which LMIM, the MPF Trustees and Mr Whyte and/or their representatives are invited, to investigate and attempt to achieve a negotiated solution to the abovementioned problem of access to intermingled books and records;

(x) make any preliminary recommendations to the parties, about the options for the ongoing access by LMIM, the MPF Trustees and Mr Whyte to the LM Group Books and Records.

4. The Receiver's appointment by this Order is without prejudice to, and does not derogate from, the rights, powers and obligations of Mr David Clout arising from or connected with his appointment as liquidator of LMA.

5. The Receiver shall be entitled to claim fees and remuneration in respect of the time spent by him and by employees of Clout & Associates who perform work in carrying out the receivership at the rates set out in the consent to act as receiver of Mr Clout dated 18 December 2014.

COSTS

6. LMIM, the MPF Trustees and Mr Whyte are to pay the costs, fees and expenses of the Receiver in connection with the Appointment:-

(a) On an interim and provisional basis until 29 January, 2015 in proportions as follows:-

Name	**Various Percentages**
Mr Whyte (as receiver of the FMIF and as a proper expense of the FMIF receivership)	59%
The MPF Trustees	23%
LMIM (in its own capacity and as responsible entity for the LMIM Funds excluding the FMIF)	18%

(b) Such costs, fees and expenses to include (for the avoidance of doubt) any liability incurred by the Receiver acting in good faith in the course of the conduct of the Appointment.

7. Any party affected by this Order, including LMIM, the MPF Trustees, Mr Whyte and the Receiver, have liberty to apply.

8. On account of the liability set out in paragraph 6, each of the following is ordered to pay to the Receiver on or before the dates set out below the following:-

(a) By 5 January, 2015, LMIM – **[18% of $134,750 being $24,255]**;

(b) By 5 January 2015, Mr Whyte (as receiver of the FMIF and as a proper expense of the FMIF receivership) – **[59% of $134,750 being $79,502.50]**;

(c) By 5 January, 2015, MPF Trustees– **[23% of $134,750 being $30,992.50]**;

9. In the event the funds received in accordance with paragraph 8 are insufficient to meet the Receiver's costs, fees and expenses of the receivership, LMIM, Mr Whyte and the MPF Trustees agree to contribute within 14 days such further sum as requested by the Receiver on account of the liability set out in paragraph 6 in the proportions set out in paragraph 6.

10. The Receiver is not obliged to provide access to the LM Group Books and Records unless he has sufficient funds to do so.

11. The Receiver is entitled to pay from the funds received in accordance with paragraphs 8 and 9 above:

(a) subject to 11(b), expenses incurred by the Receiver;

(b) his remuneration and legal costs, as approved by the Court if not agreed by LMIM, the MPF Trustees and Mr Whyte.

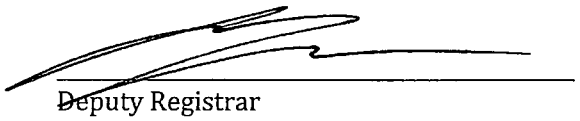
12. Mr Whyte is to be indemnified from the assets of the FMIF in respect of amounts paid by Mr Whyte pursuant to this Order, such amounts being amounts to which the indemnity provided by paragraph 3(b) of the Order of Justice Dalton of this Honourable Court dated 21 August 2013 applies.

13. By 4:00pm on 27 January, 2015, the Receiver is to file in the Court and serve upon each of LMIM, the MPF Trustees and Mr Whyte a report as to the number of requests made by each of the parties from Monday 22 December, 2014.

14. The applications are adjourned to 29 January 2015.

15. Costs of all parties to this application be their respective costs in the Funds to which they are respectively responsible entity, trustee or receiver.

16. The costs of Mr Clout of and incidental to this application will form part of the costs of the receivership.

Signed: 

Deputy Registrar

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: **Brisbane**
NUMBER: **3383 of 2013**

Applicant:	**RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE**
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	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:	Daubney J
Date:	29 January, 2015
Initiating documents:	Applications filed 2 and 11 December 2014 in proceeding 3383/13 and 15 December 2014 in proceeding 3691/13

SUPREME COURT OF QUEENSLAND BRISBANE

ORDER

Filed on behalf of the Applicant, David Whyte

Form 59 Rule 661

TUCKER & COWEN
Solicitors
Level 15
15 Adelaide Street
BRISBANE QLD 4000
Phone: (07) 300 300 00
Fax: (07) 300 300 33

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UPON THE UNDERTAKINGS OF MR WHYTE, THE MPF TRUSTEES, LMIM AND THE FMIF RECEIVERS IN THE FORMS SET OUT IN EXHBIT 1 TO BE EXECUTED, FILED AND SERVED ON OR BEFORE 5 FEBRUARY 2015, THE ORDER OF THE COURT IN PROCEEDINGS NUMBERED 3383/13 AND 3691/13 IS THAT:-

1. In this Order:

   (a) the terms **LM Group Books and Records, Mr Whyte, MPF Trustees, LMIM, Receiver, FMIF, LMA, LMIM Funds, MPF** and **Funds** have the same meaning as in the Order made in this application on 18 December 2014 ("**Previous Order**");

   (b) the term **LM Group Minutes** means the minutes of the meetings of the LMIM board of directors and the credit committees of LMIM and the Funds as saved in the soft copy LM Group Books and Records on the storage drive labelled "G" in subdirectories "G:\LM Data\Office General\LM Board\", "G:\LM Data\Office General\LM Executive Meetings\2013\February 2013", "G:\LM Data\Finance\Financial Accounting and Audit\Audit matters\Accounts 2013\FMIF 31 Dec 2012 - Half-Yr Review\Meeting Minutes\Credit Committee", "G:\LM Data\Clients\Borrowers\G\Green Square Property Development Corp Pty Ltd\1. MIF\1. Loan Control\3. Credit Synposis" and "G:\LM Data\LM Property Asset Management ex Commercial Lending\Credit Committee" and as identified by the Receiver; and

   (c) the term **FMIF Receivers** means Anthony Connelly and Joseph Hayes in their capacity as receivers and managers of FMIF appointed by Deutsche Bank AG.

SUPREME COURT OF QUEENSLAND BRISBANE

2. By 4:00pm on 26 February 2015, the Receiver is to provide each of Mr Whyte, the MPF Trustees, LMIM and the FMIF Receivers with the following:

(a) an image of the server ("**Server**") (including an extract of the email and drive data) which stores and hosts the soft copy LM Group Books and Records except the LM Group Minutes; and

(b) a final account in relation to the receivership pursuant to rule 270 of the Uniform Civil Procedure Rules.

3. By 4:00pm on 12 March 2015 or such later date agreed in writing between Mr Whyte, the MPF Trustees, LMIM and the FMIF Receivers, the Receiver is to:

(a) provide each of Mr Whyte, the MPF Trustees, LMIM and the FMIF Receivers with an extract of the LM Group Minutes, redacted as set out in paragraph 4 below; and

(b) file in the Court in this application as a sealed confidential exhibit to an affidavit sworn by the Receiver an unredacted copy of the LM Group Minutes.

4 (a) The Receiver will redact the extract of the LM Group Minutes provided to each of Mr Whyte, the MPF Trustees, LMIM and the FMIF Receivers in accordance with paragraph 3(a) above so that the extract provided to each relevant party contains only:

(i) minutes of the meetings of the LMIM board of directors and the credit committees of LMIM; or

(ii) minutes of the meetings of the credit committees,

of the Fund or Funds pursuant to which that party has been appointed to.

(b) For the avoidance of doubt, the effect of paragraph 4(a) above is that the extract provided to:

(i) Mr Whyte will contain only information directly relating to the FMIF;

(ii) the MPF Trustees will contain only information directly relating to the MPF;

(iii) LMIM will contain only information directly relating to the LMIM Funds; and

(iv) the FMIF Receivers will contain only information directly relating to the FMIF;

(c) The Receiver must undertake the task of redacting the extracts personally with the assistance of his staff and solicitors subject to further order.

5. By 4:00pm on 12 March 2015 or such later date agreed in writing between Mr Whyte, the MPF Trustees, LMIM and the FMIF Receivers, the Receiver is to provide to LMA the hard copy LM Group Books and Records to store and permit access to those documents by Mr Whyte, the MPF Trustees, LMIM, LMA and the FMIF Receivers subject to further order and payment of the storage and access costs as follows:

(a) Mr Whyte (as Court receiver of the FMIF and as a proper expense of the FMIF Court receivership): 59%;

(b) the MPF Trustees: 23%; and

(c) LMIM (in its own capacity and as responsible entity for the LMIM Funds excluding the FMIF): 18%.

6. Unless within 14 days of provision by the Receiver of the final receivership accounts under paragraph 2(b) above a notice of objection is filed in this Court and served on the Receiver, then the appointment of the Receiver is terminated and the Receiver is released and discharged from all liability in respect of the receivership of the LM Group Books and Records.

7. In the event that the termination, release and discharge takes effect in accordance with paragraph 6above:

(a) the Receiver shall promptly, after deducting any remuneration and legal costs approved pursuant to paragraph 9 below and any other expenses incurred by the Receiver, pay the balance of funds remaining in the receivership to

SUPREME COURT QUEENSLAND BRISBANE

Mr Whyte, the MPF Trustees and LMIM in the proportions set out in paragraph 6(a) of the Previous Order; and

(b) the Receiver shall be at liberty to cease all arrangements relating to the storage of the LM Group Books and Records and the hosting of the Server and to delete all soft copy LM Group Books and Records remaining in his possession.

8. The Receiver's termination by this Order is without prejudice to, and does not derogate from, the rights, powers and obligations of Mr David Clout arising from or connected with his appointment as liquidator of LMA.

9. The Receivers' remuneration and legal costs as Court appointed receiver of the LM Group Books and Records be approved as follows:

(a) for the period up to 22 January 2015, remuneration for the Receiver and employees of Clout & Associates in the amount of $29,193.45 (inclusive of GST) and legal costs of King & Wood Mallesons in the amount of $33,170.50 (inclusive of GST); and

(b) for the period 23 January 2015 up to the termination of the receivership, in an amount for remuneration for the Receiver and employees of Clout & Associates not exceeding $48,150 (including GST) and legal costs of King & Wood Mallesons in an amount not exceeding $35,500 (including GST).

10. On account of the liability set out in paragraph 6 of the Previous Order, each of the following is ordered to pay to the Receiver on or before 5 February 2015 the following amounts:-

(a) LMIM – [18% of $170,244.25] being $30,643.97;

(b) Mr Whyte (as Court receiver of the FMIF and as a proper expense of the FMIF Court receivership) – [59% of $170,244.25] being$100,444.11; and

SUPREME COURT OF QUEENSLAND BRISBANE

(c) MPF Trustees– [23% of $170,244.25] being $39,156.18

11. In the event the funds received in accordance with paragraph 10 above and paragraph 8 of the Previous Order are insufficient to meet the Receiver's costs, fees and expenses of the receivership, LMIM, Mr Whyte and the MPF Trustees agree to contribute within 7 days such further sum as requested by the Receiver on account of the liability set out in paragraph 6 of the Previous Order in the proportions set out in paragraph 6 of the Previous Order.

12. The Receiver and LMA are not obliged to provide access to the LM Group Books and Records or perform the functions of the receivership unless they have sufficient funds to do so.

13. The Receiver is entitled to pay from the funds received in accordance with paragraphs 10 and 11 above and paragraph 8 of the Previous Order:
    (a) subject to 13(b), expenses incurred by the Receiver;
    (b) his remuneration and legal costs, as approved by the Court in paragraph 9 above.

14. The appointment of the Receiver to take possession and preserve the LM Group Books and Records and permit access to the LM Group Books and Records in accordance with paragraphs 2(c), 3(b)(vii) and 3(b)(ix) of the Previous Order shall continue except that any references to "LMIM, the MPF trustees and Mr Whyte" in the abovementioned paragraphs of the Previous Order shall be deemed to be deleted and replaced with "LMIM, the MPF trustees, Anthony Connelly and Joseph Hayes in their capacity as receivers and managers of FMIF appointed by Deutsche Bank AG and Mr Whyte" until termination of the receivership in accordance with paragraph 6 above or further or earlier order and the reference to

"29 January 2015" in paragraph 2(c) of the Previous Order being deleted and replaced with "the date of termination of the receivership".

15. Mr Whyte is to be indemnified from the assets of the FMIF in respect of amounts paid by Mr Whyte pursuant to this Order, such amounts being amounts to which the indemnity provided by paragraph 3(b) of the Order of Justice Dalton of this Honourable Court dated 21 August 2013 applies.

16. Nothing in this order affects or applies to any information, record or document which has been produced in consequence of the order of the Honourable Justice Jackson of 29 November 2013 in proceedings BS 11112 of 2013 ("**Justice Jackson's Order**").

17. Nothing in Justice Jackson's Order affects or applies to the Server referred to in this order or to any information, record or document stored in that Server.

18. Any party affected by this Order, including LMIM, the MPF Trustees, Mr Whyte, the FMIF Receivers, the Receiver and LMA, have liberty to apply.

19. Costs of all parties to this application be their respective costs in the Funds to which they are respectively responsible entity, trustee or receiver.

20. The costs of Mr Clout of and incidental to this application will form part of the costs of the receivership.

SUPREME COURT OF QUEENSLAND BRISBANE

Signed:

Deputy Registrar

UNDERTAKING TO THE SUPREME COURT OF QUEENSLAND

I, David Whyte, of 10 Eagle Street, Brisbane, Queensland give the following undertaking to the Supreme Court of Queensland:

1. Not to interrogate the Server or the hard copy LM Group Books and Records mentioned in paragraphs 2 and 5 respectively of the Order of the Supreme Court of Queensland of 29 January, 2015 in proceeding no. BS. 3383 of 2013 for any purpose other than to obtain information about or concerning the affairs of:

   (a) the LM First Mortgage Income Fund, and

   (b) LM Investment Management Limited (in liquidation) as responsible entity for that fund,

   (collectively, "**Fund Information**".)

2. In the event that any interrogation of the information mentioned in paragraph 1 above by me produces a response which contains, in addition to Fund Information, information about or concerning another fund or entity (collectively, "**Non-Fund Information**"), not to:

   (a) make use of any such Non-Fund Information in any way whatsoever, save for considering, with any other person who has given an undertaking to the Supreme Court in this form, whether approval for the use of the Non-Fund Information should be sought in one of the ways set out below; and

   (b) provide a copy of, or otherwise disclose, such Non-Fund Information to any other person,

   without:

(i) the approval of the Supreme Court of Queensland upon notice given to the person(s) or entity responsible for the administration of the particular fund to which the Non-Fund information relates; or

(ii) the approval of the person(s) or entity responsible for the administration of the particular fund to which the Non-Fund Information relates.

3. To ensure that no servant or agent of BDO will interrogate the above-mentioned Server or hard copy LM Group Books and Records unless that person has first signed an undertaking in the same form as this undertaking (save for this paragraph 3).

4. To pay my agreed share of the costs of Grace Records Management for the storage of, and access to, the hard copy LM Group Books and Records pending further order of the Supreme Court of Queensland.

5. Not to alter or destroy the hard copy LM Group Books and Records.

Signed: 

Dated: 5 February, 2015

RUSSELLS

5 November 2018

Our Ref: AJT:JTW:20180543
Your Ref: Mr Schwarz and Mr Nase

Mr David Schwarz and Mr Alex Nase
Tucker & Cowen
Level 15
15 Adelaide Street
BRISBANE QLD 4001

By Email: dschwarz@tuckercowen.com.au
anase@tuckercowen.com.au

Dear Colleagues

Application for directions as to the future conduct of the winding up of LMIM and the LM Funds Supreme Court of Queensland Proceeding number 3508 of 2015

We refer to your 16 October 2018 letter in respect of paragraph 1(a) of our client's 10 October 2018 Application.

You have sought an explanation regarding paragraph 1(a) of the Application being a direction that the liquidator act as contradictor in respect of the Clear Accounts Proceeding and the Feeder Fund Proceeding.

Feeder Fund Proceeding

The reason for seeking the contradictor order in respect of the Feeder Fund Proceeding is that our client is the appropriate person to represent the interests of the members of the Feeder Funds. The order made on 13 June 2018 was that the interests of LMIM as responsible entity of the Feeder Funds be represented by Mr Jahani of Grant Thornton. It was not ordered that Mr Jahani specifically represent the interests of members of those Feeder Funds. Mr Jahani is representing a secured creditor and he was appointed pursuant to section 59 of the *Trusts Act 1973* (Qld) being in respect of a trustee suing himself or herself in a different capacity. Mr Jahani is therefore not representing the members of the Feeder Funds. Subject to our client having sufficient funding he is best placed to represent the interests of the members of the Feeder Funds in the Feeder Fund Proceeding.

You have asked whether our client is seeking to be indemnified out of FMIF scheme property for his costs including claims made in the Feeder Fund Proceeding and the Clear Accounts Proceeding. If directions are made that our client act as contradictor for the benefit of the class B unit holders it is appropriate that funds in respect of those members held in the FMIF be used to meet our client's remuneration and expenses in respect of the Feeder Fund Proceeding.

The Feeder Fund Proceeding is in respect of class B unit holders in the FMIF who hold approximately 47% of the total number of issued units in the FMIF. Our client is concerned about a possible conflict of interest regarding the use of funds from the FMIF in respect of the Feeder Fund Proceeding as it is highly likely that your client is using class B unit holders funds to meet remuneration and expenses in respect of the Feeder Fund Proceeding. If this is the case, then the funds of the class B unit holders are being used to pay for litigation against them.

It is therefore appropriate that all of the costs of representing members of the FMIF are paid from property of the FMIF rather than just the costs of your client.

Clear Accounts Proceeding

As previously stated, LMIM is in its own right is without funds and has not in the past been in a position to act as a contradictor in respect of the Clear Accounts Proceeding. If orders are made in accordance with the 10 October 2018 Application, then our client will be able to act as contradictor on any further hearings in respect of the Clear Accounts Proceeding and also attempt to resolve that proceeding in negotiations with your client.

Our client needs to act as contradictor in respect of the Clear Accounts Proceeding as the proceeding directly affects LMIM's right of indemnity in respect of the assets of the FMIF. In *Park & Muller (Liquidators of LM Investment Management Limited) v Whyte No 3* [2017] QSC 230 the Honourable Justice Jackson held that the Clear Accounts Rule operated to "suspend" LMIM's claimed right for payment from the assets of the FMIF until the resolution of that claim and that, in effect, the claim should not be finally resolved until the claim in the Clear Accounts Proceeding is finalised.

Although the Clear Accounts Proceeding has been stayed, there is a clear need for that proceeding to be resolved so that the liquidation of LMIM can be concluded.

Please tell us as soon as possible whether your client objects to our client acting as contradictor in respect of the Feeder Fund Proceeding and the Clear Accounts Proceeding in accordance with the orders sought in the Application and, if so, on what basis.

Might we please have your response by 4:00pm (Qld time) on Monday, 12 November 2018.

Yours faithfully

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15 November 2018

Mr Ashley Tiplady
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Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*"); Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte Supreme Court of Queensland Proceeding No. 3508/2015

We refer to our letter of 16 October 2018, and to your letter in response dated 5 November 2018, in relation to the directions sought at paragraph 1(a) of the application by Mr Park filed 10 October 2018 ("**the Application**"), that your client, Mr Park, be appointed to act as a contradictor in the Feeder Fund Proceeding and the Clear Accounts Proceeding.

In our letter of 16 October 2018, we relevantly noted that:-

- Orders had been made in the Feeder Fund Proceeding to the effect that the interests of LMIM as RE of the CPAIF and ICPAIF be represented by Mr Jahani of Grant Thornton, and that the interests of LMIM in its own capacity be represented by Mr Park; and
- Orders had been made in the Clear Accounts Proceeding to the effect that Mr Park represent the interests of LMIM in its capacity as Defendant.

In the light of those orders, which were made on notice to your client and with your client's express consent, we then enquired as to what was meant by paragraph 1(a) of the Application.

Feeder Fund Proceeding

Your letter of 5 November 2018 suggests that, in respect of the Feeder Fund Proceeding, your client seeks an order that he be appointed to represent the interests of the members of the Feeder Funds in the Feeder Fund Proceeding, and that his costs of doing so be paid from the property of the FMIF. Your letter does not refer to any rule of law or statute that would justify such an order, and we invite you to explain to us the legal foundation upon which your client relies.

First, as to the question of costs, our client's present view is that, even if the Court does consider it to be appropriate for there to be an additional contradictor to the Feeder Fund Proceedings, then having regarding to the principles identified in cases such as *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte* [2015] QSC 287, there is no proper basis for your client's costs of acting as contradictor to be paid out of the FMIF.

That is because it does not seem to our client that the work to be done by such an additional contradictor would be for the benefit of the members of the FMIF.

Second, as to the basis for your client's application, we acknowledge that a copy of an affidavit of Mr Park in support of the Application was delivered to our office late on 12 November 2018. Our client, and we, are still considering what is said in that affidavit.

We observe, however, that the affidavit does not appear to go into any great detail as to the grounds relied upon by your client in seeking orders that your client act as contradictor to the Feeder Fund Proceeding and the Clear Accounts Proceeding, but we are nonetheless giving further consideration to that affidavit.

That said, our client's initial inclination is that such directions are not necessary or appropriate.

It seems to our client that the interests of LMIM as RE of the CPAIF and of the ICPAIF are more than adequately represented by Mr Jahani. We do not understand you to suggest otherwise.

Insofar as the members of the Feeder Funds themselves have separate interests to be protected in the Feeder Fund Proceedings, neither we nor our client are aware of any member of the CPAIF or the ICPAIF approaching the Court, or the legal representatives of Mr Jahani, to express any concern about the adequacy of their representation in the Feeder Fund Proceedings.[1] Mr Park's affidavit does not refer to his knowledge of the existence of any such concerns by any of the members.

In addition, we note that the interests of the Defendants generally in the Feeder Fund Proceedings are also represented by the responsible entity of the WFMIF, and their legal representatives.

For all these reasons, it seems to our client that the effect of the directions sought by your client in paragraph 1(a) of the Application would be to add a *third* contradictor into the Feeder Fund Proceedings in the absence of any apparent need justifying the cost of such an additional layer of representation.

It would not be to save costs to members of the FMIF but, rather, to promote further litigation between our respective clients, at the expense of FMIF members.

Third, we are instructed that there are ongoing settlement negotiations in relation to the Feeder Fund Proceeding.

The parties were represented at mediation in accordance with the representation Orders made on 13 June 2018, and the parties continue to rely upon those orders.

The continuing negotiations of the Feeder Fund Proceeding are at a sensitive stage and the timing of your client's application is regrettable, having the real potential to adversely affect those negotiations.

Clear Accounts Proceeding

As regards the Clear Accounts Proceeding, it is said that your client "*needs to act as contradictor in respect of the Clear Accounts Proceeding as the proceeding directly affects LMIM's right of indemnity in respect of the assets of the FMIF.*"

However, your client, Mr Park, is already the person appointed to represent the interests of LMIM in its own right, as the defendant in the proceeding, pursuant to the orders made on 25 July 2018.

Your letter is then silent as to whether your client intends to seek indemnity out of the FMIF with respect to his costs of defending the claims made in the Clear Accounts Proceeding.

[1] As you know, the members of the CPAIF and the ICPAIF were notified of the Feeder Fund Proceeding, and given an opportunity to approach the Court for leave to participate in the mediation that commenced on 5 November 2018, or to be joined.

As you know, the claims made in the Clear Accounts Proceeding are presently stayed, and the extent to which it is necessary for our client to proceed with the claims made in that proceeding will not be known until after the proof of debt process has been completed.

Once the proof of debt process has been completed, and any potential indemnity claims against the FMIF identified to our client, the Court will be in position to determine how the Clear Accounts Proceeding ought to be resolved.

At that stage, it seems to our client that the natural person or persons to fund the defence of the Clear Accounts Proceedings would be the person or persons who are to benefit, namely the creditors who have lodged proofs of debt that require that the Clear Accounts Proceeding to be determined. It does not seem to our client that it would be appropriate for those costs to be borne pre-emptively by the FMIF, consistently with the decision in *Frost v Bovaird* (2014) 223 FCR 275.

In any event, any further direction or order lifting the stay of the Clear Accounts Proceeding, including any direction as to the role of your client in that proceeding, is currently premature and potentially without utility.

Directions hearing on 19 November 2018

The Application was contemplated by the Order of Jackson J made in this proceeding on 3 October 2018. Paragraph 1 of that Order provides for the Application to be returnable for directions at 9.30am on 19 November 2018.

The Application, however, seeks substantive relief by paragraph 1(a), and we note that paragraph 1 is prefaced by the words, "*At the directions hearing on 19 November 2018*."

We do not think it was intended by the Order made on 3 October 2018, that your client would seek any substantive relief on Monday, 19 November 2018, and we are not aware of any particular urgency that would require your client to seek orders in terms of paragraph 1(a) at the directions hearing on Monday, rather than at the hearing presently proposed to take place on 10 December 2018.

Given that the balance of the directions sought by paragraph 1 contemplate (for example) directions as to the filing of affidavit material in preparation for a hearing of the application, we query whether your client intends to seek orders in terms of paragraph 1(a), at the directions hearing.

Please tell us as soon as possible by return whether your client does intend to seek the relief identified in paragraph 1(a) as to the appointment of your client as contradictor, at the hearing on 19 November 2018.

Yours faithfully

Tucker & Cowen

David Schwarz
Tucker & Cowen

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HWL EBSWORTH
LAWYERS

Our Ref: DOF:ECS:683682

16 November 2018

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Dear Colleagues

LMIM as responsible entity of the LM First Mortgage Income Fund (FMIF)
LMIM as responsible entity of the LM Currency Protected Australian Income Fund (Receiver and Manager Appointed) (CPAIF)
LMIM as responsible entity of the LM Institutional Currency Protected Australian Income Fund (Receiver and Manager Appointed) (ICPAIF)
Supreme Court of Queensland Proceeding Number 13534 of 2016 (Proceeding)

We refer to Supreme Court of Queensland proceeding BS3508 of 2015, in which an application by your client is returnable before the Court on Monday, 19 November 2018 (**Liquidator's Proceeding**).

1. Application in Liquidator's Proceeding

1.1 By his application in the Liquidator's Proceeding, your client seeks a range of directions, including, by sub-paragraph 1(a), a direction that subject to certain costs orders sought in his favour, your client "*be directed to act as contradictor*" in respect of (relevantly) Supreme Court of Queensland proceeding 13534 of 2016 (**Feeder Funds Proceeding**).

1.2 The purpose of this letter is to notify you that our client considers that your client ought undertake not to press for the direction referred to at paragraph 2 above at the hearing on 19 November 2018, as it is an application properly to be made in the Feeder Funds Proceeding and not the Liquidator's Proceeding, and any application in the Feeder Funds Proceeding ought be filed and served on the parties in that proceeding in an orderly manner in accordance with the UCPR.

2. Background

2.1 On 13 June 2018, the Court made representation orders in the Feeder Funds Proceeding. We **enclose** a copy of the orders. The Court relevantly directed that:

(a) the interests of LMIM in its capacity as responsible entity of the Feeder Funds as first defendant and third defendant be represented in the Feeder Funds Proceeding by our client in his capacity as receiver and manager of LMIM in its capacity as responsible entity of the Feeder Funds (sub-paragraph 3(b) and (c)); and

(b) the interests of LMIM in its own capacity as fourth defendant be represented by your client in his capacity as the liquidator of LMIM (sub-paragraph 3(d)).

2.2 Your client was served with the application giving rise to these orders, and consented to the order at (b) above.

2.3 The orders made on 13 June 2018 further provide for the production of documents in aid of a mediation (paragraphs 9 to 11); for notifications to be given to the members of the Feeder Funds (paragraphs 12 to 15); and for a mediation to be completed by 28 September 2018 (paragraphs 16 to 23). The date of the mediation was varied by subsequent order of the Court providing for the mediation to be held on 5 and 6 November 2018.

2.4 The mediation was held on 5 and 6 November 2018. The dispute was not resolved by the end of the mediation. With the consent of the mediator, the parties agreed to adjourn the mediation while settlement discussions continued. The mediation has been adjourned to Tuesday, 20 November 2018, being the day after your client's application is to be heard in the Liquidator's Proceeding.

2.5 In the meantime, on 10 October 2018, your client filed his application in the Liquidator's Proceeding.

2.6 The first notice we received of it was by your letter dated 6 November 2018 (being the second day of the mediation). Our client was not served with it. We recently downloaded it from the Queensland Courts website, together with the supporting affidavit of your client sworn on 12 November 2018.

3. The Feeder Funds Proceeding

3.1 The directions sought by your client in the Liquidator's Proceeding referred to at paragraph 1.1 above appear to be directed at displacing or modifying the representation orders in the Feeder Funds Proceeding referred to at paragraph 5 above. That said, we are unsure of the intended legal and practical effect of a direction that your client "*be directed to act as contradictor*" in respect of the Feeder Funds Proceeding, in the context of the existing representation orders. The affidavit of your client sworn on 12 November 2018 does not assist to elucidate the intended legal and practical effect of the direction. We would be grateful if you could explain it to us.

3.2 As you know, since 13 June 2018, our client has proceeded to prepare for and attend a mediation and participate in settlement discussions in respect of the Feeder Funds Proceeding, at significant expense to his appointor, on the basis of the representation

orders made on 13 June 2018 with your client's consent. Our client intends to continue to pursue those discussions on the basis of the representation orders, in accordance with what he considers to be his duty to do so.

3.3 We would be grateful if you could also explain to us why your client:

(a) seeks the orders the subject of the application in the Liquidator's Proceeding, given he consented to the orders of 13 June 2018 and as a result of which significant expense has been incurred; and

(b) why your client filed his application on 10 October 2018 but did not notify our client of it until your letter dated 6 November 2018.

3.4 Please let us know whether your client will undertake not to press for the relief referred to at paragraph 2 above at the hearing of his application in the Liquidator's Proceeding on 19 November 2018.

Yours sincerely

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Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady / Mr Walsh

27 September 2018

Mr Ashley Tiplady
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Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015

1. Your client has foreshadowed an application for directions or orders concerning the future conduct of the winding up of the FMIF, having regard to the dual appointments of our respective clients.

2. We refer to our letter of 18 September 2018, and to your letter of 21 September 2018, received that evening, on this issue.

3. This letter responds to your letter's request that our client provide his views as to the current regime, and whether he considers it to be working optimally.

4. We note that we have not yet received any draft proposed application, nor been informed of the orders to be sought by the foreshadowed application, and this letter therefore assumes that any application to be made by your client will be in terms reflecting what was said by your client's Queen's Counsel in Court on 6 September 2018, as recited in our letter of 18 September 2018.

Mr Whyte's approach

5. It is appropriate to begin by identifying the way in which our client intends to approach your client's foreshadowed application.

6. Mr Whyte does not consider it to be his role, as a Court-appointed receiver and 'responsible person' of the FMIF, to 'enter the fray' in seeking either to preserve the *status quo*, or to seek some significantly altered regime.

7. He considers that his role is to provide such assistance to the Court in connection with your client's foreshadowed application as is reasonably necessary to enable the Court to make a fully informed decision as to the most optimal way to conduct the balance of the winding up of the FMIF, in terms of attempting to minimise duplication of work and any scope for controversy as to the allocation of responsibilities.

8. We note in this regard that his Honour clearly indicated in the recent hearing that our client, and we, should give consideration to the way in which the 'dual appointments' in the winding up of the FMIF might be better streamlined.

9. Our client's participation in without prejudice discussions to date have been on that basis and pursuant to that invitation, as is this letter.

10. In short, Mr Whyte considers that he has no relevant personal interest in the outcome of the foreshadowed application by your client, however he will do what he considers appropriate to best assist the Court to consider and determine how the winding up of the FMIF may most appropriately be concluded.

Assessment of the current regime

11. Your letter frames your client's foreshadowed application as one for orders as to possible solutions to "problems currently being experienced" in relation to the dual appointments of your client and ours.

12. Your letter does not identify with any specificity what your client considers those problems to be. We would have thought that your client could articulate those clearly, given that this foreshadowed application has been your client's initiative.

13. Nonetheless, as we stated in our letter of 18 September 2018, our client is open to the idea that some variation to the current regime may be appropriate.

14. It may be accepted, we think, that there will inevitably be some level of additional cost involved in the existence of multiple layers of insolvency practitioner appointments.

15. That additional cost was found to be justified by Justice Dalton and the Court of Appeal, for the reasons set out in their respective judgments.

16. Presently, those layers comprise:

    (a) your client's appointment as the liquidator of LMIM;

    (b) our client's appointment as receiver of the scheme property of the FMIF and as the person responsible for ensuring the winding up of the FMIF in accordance with its Constitution; and

    (c) the appointment by Deutsche Bank AG ("DB") pursuant to its security of McGrathNicol as receivers and managers ("DB Receivers") of the FMIF property.

17. While that is a necessary consequence of the regime ordered by the Court in August 2013, our client has endeavoured to keep the level of any additional costs resulting from these layered appointments to a minimum.

18. In relation to the DB Receivers, our client agrees that their appointment no longer serves any useful purpose.

19. To that end, we are instructed that our client has been negotiating for some time with DB and the DB Receivers to procure their retirement as receivers and managers, and that they have informed our client that their retirement as receivers and managers is imminent.

20. Once that retirement occurs, that will, to some extent, streamline the processes involved in the winding up of the FMIF.

21. As to the relationship between our respective clients, his Honour's judgment in [2015] QSC 283 (the "Residual Power's Judgment") and the Orders of 17 December 2015 ("December Orders") have provided considerable clarity

and guidance as to each of their roles and responsibilities, and has minimised overlap in the carrying out of the substantive tasks required in the conduct of the winding up.

22. Looking forward, and without purporting to be completely comprehensive, our client considers that the following significant tasks remain in the winding up of the FMIF:

(a) Completing the proof of debt process, pursuant to the December Orders.

We understand that your client has already called for proofs, and that the process envisaged by the December Orders is already well under way.

(b) Progressing litigation which Mr Whyte has caused to be brought in the name of LMIM as responsible entity of the FMIF.

Substantial work continues to be ongoing in this category, including (not exclusively) in connection with Supreme Court proceeding 12317/14 commenced against LMIM, the former directors of LMIM and KordaMentha as trustee for the MPF (the "**Bellpac proceeding**"), which it is anticipated will be heard in 2019, and Supreme Court proceeding 2166/15, commenced against the former auditors of the FMIF, Ernst & Young (the "**EY Proceedings**").

Mr Whyte intends to continue to explore all reasonable opportunities for settlement of these proceedings, but is cautious not to do so prematurely at the cost of a more profitable settlement or determination in due course.

(c) Distributing funds to the members of the FMIF.

Our client considers it to be desirable that there be a distribution to members, even an interim distribution, as soon as it is possible to do so.

Following the discontinuance of significant litigation against the FMIF earlier this year, making an interim distribution is now a reasonable possibility, subject to resolving the following three matters:

(i) *First*, the register of the members of the FMIF needs to be rectified, to correct errors in the records of the number of units held by foreign currency investors.

Those errors occurred in 2010 when the register was transferred to a new database.

The process of identifying those errors is already underway, and Mr Whyte will cause an appropriate application for rectification to be brought once that process has been completed.

(ii) *Second*, the proceedings which Mr Whyte has caused to be commenced against the Feeder Funds, being Supreme Court proceeding 13534/16 (the "**Feeder Fund Proceedings**"), needs to be resolved before any distributions can be made to the Feeder Funds, i.e. to LMIM as responsible entity of the CPAIF and the ICPAIF and Trilogy Funds Management Limited as the responsible entities of the WFMIF.

A mediation of the Feeder Fund Proceedings is scheduled to occur in early November 2018.

It may be possible to make an interim distribution to the other members of the FMIF, subject to resolution of the Feeder Fund Proceedings. This is something that our client is considering.

(iii) *Third*, the Court must approve the making of any distribution, because Mr Whyte is directed by the December Orders not to make a distribution to the members without the authority of an order of the Court.

We anticipate that the Court would expect to be informed of what the liabilities of the FMIF are, prior to authorising an interim distribution from surplus funds. This would require completion of the process under the 17 December 2015 orders with respect your clients calling for and adjudicating upon proofs of debt in the liquidation of LMIM and notifying our client of any claims for indemnity from the FMIF with respect to such debts or claims, and for our client to adjudicate upon any such claims for indemnity from the FMIF. Our client considers that this process should be completed as soon as possible and that it ought not take long to complete.

(d) Compliance with any financial reporting and audit obligations, and seeking the extension of the current ASIC exemptions obtained on the application of our client, should the current exemptions expire before the winding up is at the stage where the final audit should be undertaken.

Our client understands that the effect of the Residual Powers Judgment and the December Orders is that the audit is your client's responsibility if ASIC does not confer an exemption, and that he would assist your client as required. As you know, our client has been attending to the preparation of financial reports and provision of information to members of the FMIF in accordance with the ASIC exemptions (most recently pursuant to ASIC Instrument 18-0166).

(e) Maintaining LMIM's Australian Financial Services Licence.

Our client understands this to be your client's responsibility, although our client expects that the costs incurred in discharging that responsibility would not be substantial.

(f) Dealing with any claims for remuneration, costs or expenses of your client sought to be paid from the FMIF.

Our client has taken a position in relation to each such claim on behalf of and in the interests of the members of the FMIF, in circumstances where there would not otherwise have been a contradictor.

The additional costs associated with this process have, in our client's view, been necessitated by the positions taken by your client in relation to certain aspects of those claims.

They do not properly reflect a cost of the existence of multiple layers of insolvency practitioners. They are the cost of an independent contradictor maintaining reasonable and valuable positions on behalf of and for the benefit of the members of the FMIF.

Indeed, in relation to your client's application for indemnity heard in May 2017, our client sought and obtained judicial advice before continuing to the final hearing.

23. As is apparent from the above, Mr Whyte continues to be engaged in substantial and valuable work for the benefit of the members of the FMIF.

24. Certain responsibilities also remain with your client, including as set out above, and as further considered in the Residual Powers Judgment.

Our client's proposal

25. In the circumstances, our client considers that there may be merit in his being appointed as a special purpose Liquidator of LMIM, with responsibility for winding up the FMIF pursuant to its Constitution.

26. The orders appointing our client as special purpose Liquidator would need to clearly specify the things he is required or authorised to do (to the exclusion of your client) which would be limited to performing any functions, complying with any obligations, , or exercising any powers, as Liquidator of LMIM, in the name of or on behalf of LMIM in its capacity as responsible entity of the FMIF, or under the Constitution of the FMIF.

27. This would include, for the avoidance of doubt, attending to complying with the financial reporting and audit requirements on behalf of LMIM as responsible entity of the FMIF (when the ASIC exemption expires), and attending to distribution of FMIF property at the conclusion of the winding up.

28. However, our client's view is that this should explicitly exclude any work relating to the proof of debt process pursuant to paragraphs 4 to 7 and 9 of the December Orders, as that process is already underway by your client, and is governed by the December Orders in such a way as to minimise the potential for conflicts of interest.

29. In our client's view, this arrangement would preserve the substantial and valuable work in progress by Mr Whyte, and would allocate further responsibilities to Mr Whyte as the insolvency practitioner with the greater detailed knowledge of the affairs of the FMIF through the conduct of its winding up to date.

30. In relation to the principal points of contention between our respective clients in the winding up of the FMIF to date, relating to your client's claims for remuneration and expenses from property of the FMIF, our client also considers that there is scope to minimise such disputation in the future.

31. Our client suggests that one means by which this may be achieved is for the Court to approve the payment of an amount of your client's future remuneration directly from the FMIF in a fixed periodic sum, without the need for any application to the Court for approval.

32. Our client suggests that an appropriate sum might be $5,000 per month, however he is open to your client's views on the matter. This would reflect the work that your client is required to undertake into the future to maintain LMIM's AFSL which (once the other funds under your client's control have been wound up) would be largely for the benefit of the FMIF. As noted above, our client does not anticipate that the costs involved in that work would be significant.

33. If the amount of remuneration sought by your client from the FMIF were to exceed that threshold, your client would, of course, be at liberty to bring any application to Court to seek approval for the payment of a higher amount of remuneration from the FMIF.

34. If this proposal is to be presented to the Court, its terms would need to be set out in more detail, in draft orders in due course.

35. We would be grateful if you would provide us with any comments that your clients may have, in relation to this proposal.

Response to questions in letter dated 21 September 2018

36. Your letter asks about our client's remuneration and legal costs, in relation to litigation conducted by Mr Whyte on behalf of the members of the FMIF.[1]

37. However, we understand that the purpose of your client's foreshadowed application is to reconsider the structure of the dual appointments of our respective clients.

38. As far as we and our client are able to discern, Mr Whyte's remuneration claims and expenses in the past, and any estimates of future remuneration and expenses, are simply not relevant to that issue.

39. That is particularly where it is not suggested, as we understand it, that any of the litigation conducted by Mr Whyte ought not to be conducted, or that it would be more efficiently conducted by someone else; no such suggestion has been made to us or to our client, and we would be surprised if it were to be suggested.

40. Our client will of course consider your questions again, if he receives a satisfactory explanation for how the information you have asked for is relevant to a problem perceived by your client in the conduct of the winding up of the FMIF by a dual administration.

41. We note, however, that insofar as your letter is directed to any aspect of the reasonableness of our client's remuneration for undertaking work in connection with the litigation in which he has been engaged in his capacity as receiver of the FMIF:-

    (a) Mr Whyte has provided substantial detail in relation to the work he has undertaken, in the affidavits that have been filed in support of his nine applications to date for approval and payment of remuneration;

    (b) Your client (by your firm) has been served with those applications and supporting affidavits on each application (but we would be pleased to provide further copies should you wish); and

    (c) On each application, Mr Whyte's claim for remuneration has been considered by the Court and, on each occasion, the Court has found Mr Whyte's remuneration to be reasonable and appropriate in all the circumstances; there has been no appeal from any of those Orders of the Court.

42. Otherwise, as to Mr Whyte's expenses to date, we observe that Mr Whyte has caused to be prepared half-yearly management accounts for the FMIF.

43. Beyond this material, which is all publicly available, our client does not consider that it is incumbent on him to respond to your questions, which appear to him to bear no relation to the application foreshadowed by your client.

Conclusion

[1] You have asked about the legal costs incurred by Mr Whyte, specifically with our firm. Of course, you will be aware that Mr Whyte has retained Gadens Lawyers, as well as this firm, to provide legal advice in respect of various matters and to act for him.

44. We look forward to hearing from you in relation to the proposal outlined above and, in due course, to receiving any proposed application for our consideration.

45. We also ask that you give further consideration to the identification of the issues or problems that your client considers require the Court's further intervention, so that (if problems are identified beyond the broad issues outlined above) our client and we may give consideration to them. When deciding whether to bring such an application, your client ought to weigh up the costs of bringing such an application as against the costs savings expected to be achieved if the application is successful.

46. Please do not hesitate to contact us if you have any questions.

Yours faithfully

Alex Nase
Tucker & Cowen

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RUSSELLS

21 January, 2015

Our Ref: Mr Russell
Your Ref: Mr Schwarz

EMAIL TRANSMISSION

Tucker & Cowen
Solicitors
BRISBANE

email: dschwarz@tuckercowen.com.au

Dear Colleagues

LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ("LMIM") – Role of LMIM in the winding up of the LM First Mortgage Income Fund ("FMIF")
Role of Mr Whyte under the order of Dalton J made on 26 August, 2013.

We refer to our latter dated 19 September, 2014, and to your letter in reply dated 20 November, 2014.

You have foreshadowed a further detailed reply. We have received no further correspondence from you.

In our letter of 19 September, we explained the bases of our clients' contentions as to the role of the company, LMIM.

It is appropriate that we mention, for the sake of completeness, that our clients also take the view that they are, as liquidators, charged with the following functions and duties, as set out in the following provisions of the *Corporations Act 2001* ("the Act").

Dalton J made the order of 26 August, 2013 after full argument and in the knowledge that the company had become insolvent, that our clients had become its liquidators, that LMIM would remain the responsible entity of the FMIF, and that LMIM was to wind up the FMIF, subject to the particular tasks assigned to Mr Whyte, with the powers conferred on him for that purpose.

There are five particular matters that arise.

1. As you will, we hope, accept, the liquidators may, subject to the provisions of section 556 of the Act, pay any class of creditors in full (including creditors for whose debts LMIM has a right of

indemnity out of the Scheme Property of the FMIF), pursuant to section 477(1)(b) of the Act.

This function meshes with the proof of debt regime (see paragraph 2 below) and it is only the liquidators who may do this.

2. The liquidators must call for and adjudicate on proofs of debt and claims against LMIM (including those in respect of which LMIM has a right of indemnity out of the Scheme Property of the FMIF), pursuant to Division 6 of Part 5.6 of the Act and to compromise such debts or claims under subsections 477(1)(c) and (d) of the Act. The FMIF is not a legal entity, and creditors must of course make their claims (for debts and other claims) against the company.

Given that LMIM is in liquidation, this must be done by the proof of debt process, save for the (hopefully rare) case in which leave is granted under section 500 of the Act for a third party to bring proceedings against LMIM.

Again, it is only the liquidators who may deal with proofs of debt; and they are obliged by the Act to do so.

3. We refer next to the matter of LMIM's insurance. In our clients' view, they must pay to third parties, in respect of whose claims monies are received under a contract of insurance, the sum necessary to discharge the liability to the third party, after deducting any expenses, pursuant to section 562 of the Act.

Again, this is a statutory function which the liquidators must discharge.

This issue is topical because your client has issued proceedings (no 12317 of 2014 in the Supreme Court of Queensland) in the name of LMIM as responsible entity of the FMIF, against LMIM, surprisingly without seeking leave under section 500 of the Act.

4. We have also informed you that, in our clients' view, they may recover property of the FMIF pursuant to the provisions of Part 5.7B Division 2 of the Act. The provisions of Part 5.7B Division 2 of the Act are plainly available to the liquidators of LMIM to recover property of the Fund: the definition of "property" in section9 of the Act extends to legally as well as beneficially owned property. (The provisions of Part 5.7B, Division 6 are confined to insolvent trading receipts (Divisions 3 and 4)).

Again, this is topical. The proceedings that Mr Whyte has instituted (BS12317 of 2014) are founded on allegations of breach by the directors of LMIM of their duties under sections 180, 181 and 182 of the Act. It is alleged, in short, that the Deed Poll of 21 June, 2011, for the division of the settlement proceeds, was a bad deal, and that the payment of $15.5 million ("the Settlement Payment") was also bad.

Assuming those allegations to be true, it follows that the liquidators could and should challenge the Deed Poll and the Settlement Payment as Uncommercial Transactions and as an Unreasonable Director-Related Transaction under sections 588FB, 588FDA, 588FE and 588FF of the Act.

Recovering Uncommercial Transactions and Unreasonable Director-Related Transactions is easier than proof of the breaches that have been alleged; causation is not a necessary element; and the range of relief is substantially wider than that which is sought in these proceedings.

It is trite that only liquidators may institute such proceedings. It follows that our clients may – and should - investigate whether any such proceedings are available. Your client should, in our clients' view, cooperate with them in such investigations and in any such proceedings (possibly including the new proceedings we have mentioned).

5. Finally, and consistently with the proof of debt regime that applies to the winding-up of LMIM and the FMIF, it is the liquidators who are charged with the duty of paying the debts of LMIM (including those in respect of which LMIM has a right of indemnity out of the Scheme Property of the FMIF), pursuant to section 506(3) of the Act.

   In our clients' view, the Act charges them, and only them, with this duty.

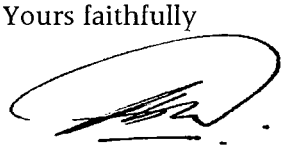
We record that Mr Whyte made no attempt to discuss the newly instituted proceedings with the liquidators before instituting them, and he seems to have given no consideration to the use of the provisions of Division 2 of Part 5.7B. He seems, consistently with the oppositional attitude exhibited in your letter of 20 November, 2014, to have firmly set his face against any cooperation with the liquidators, whom he quite wrongly regards as completely shorn of any role in the winding-up of the FMIF.

In the case of these new proceedings, there is a risk that the proceedings may fail, or may yield less than they should yield, because the provisions of Division 2 of Part 5.7B have not been invoked. Further, it may be that an insurance policy would respond to claims under Part 5.7B Division 2 of the Act, but not to the claims for compensation or damages for breach of duty that have been advanced.

There is a consequent risk that the interests of creditors and members will be prejudiced as a result of Mr Whyte's erroneous and uncooperative attitude.

We ask that you take Mr Whyte's instructions and let us know whether he differs with the propositions set out above and, if so, please provide reasons. Given the long delay since our letter dated 19 September, 2014, the opposition exhibited in your general reply dated 20 November, 2014, your failure to provide the foreshadowed detailed reply, and the importance of the work that the liquidators must do, we have been instructed to seek your reply within seven days.

Yours faithfully



Stephen Russell
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MR McKENNA: - - - just put that to one side for the moment and trying to look forward. So whether anything is resolved through these proceedings or not, putting that to one side, the next step, in our respectful submission, is to identify the creditors who might potentially have a claim upon this company, take steps to evaluate their claims as claims and see what can be done to resolve. Now, the obstacle that seems to be to that step is concerns about – well, the liquidator has to do it – concerns about getting appropriate remuneration and expense for that. My instructions are that there is no obstacle on our side to that being done either by direct order of the court or in some other way. It's the appropriate next step to be taken to call for proofs and for Mr Whyte - - -

HIS HONOUR: Well, that's what I thought I'd provided for in my December order in 2015. That was the mechanism that was set down by that order.

MR McKENNA: And without going into why or why it hasn't been done, there's no obstacle from our side to that happening and we think that is the next step to happen.

HIS HONOUR: That order makes provision, as I remember it – I haven't looked it recently – that order makes provision for the liquidators costs of that exercise to be paid.

MR McKENNA: And that's been our position, I believe, along – if there's some obstacle, there's no objection on our side, I'm instructed, to whatever clarification is required to make that - - -

HIS HONOUR: But whether you object to it or not, the fact is the order makes provision for the liquidators costs - - -

MR McKENNA: Thank you.

HIS HONOUR: - - - of that process to be paid, as I remember it. Is there a copy of it in any of the documents?

MR McKENNA: It'll be in the core bundle.

HIS HONOUR: Yes, right.

MR McKENNA: Core bundle, tab 4.

HIS HONOUR: Because I – I can't remember the details of what I said in the reasons but I certainly had in mind that it was a process that had to be gone through in order to be able to wind up the fund and that it didn't seem to me properly construed that the statute operated [indistinct] your client the right to do - - -

MR McKENNA: No.

RUSSELLS

22 June, 2017

Our Ref: Mr Tiplady
Your Ref: Mr Schwarz/Mr Nase

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Dear Colleagues

LM Investment Management Limited (In Liquidation) (Receivers Appointed) ("LMIM")
Park and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v Mr David Whyte - Indemnity Claim

During the hearing of our client's Application before His Honour Justice Jackson on Tuesday, 20 June, 2017, Mr Whyte, through his counsel, Mr McKenna QC, informed His Honour to the effect that:

1. the calling for proofs of debt in the liquidation of LMIM was now critical to his ability to finalise the winding up of the FMIF; and

2. Mr Whyte would ensure that there was funding available from the FMIF for the remuneration of the liquidators to undertake that task (as provided for in the regime contained within the 17 December, 2015 order ("the Order")).

What was not, however, addressed and remains a live issue, is the operation of paragraph 17 of the Order regarding the liquidator's expenses (i.e. legal costs and other outlays) associated with the proof of debt process.

As discussed between Mr Tiplady and Mr Schwarz on Tuesday, Mr Park is concerned to ensure that where those expenses are an Administration Indemnity Claim (pursuant to the Order), that funding is available to meet those costs. It would seem to us that in circumstances where Mr Whyte has now raised the "clear accounts" rule (and other factors) to attempt to avoid payment of such expenses, there is some doubt whether funding will be made available from the FMIF in respect of such costs.

In these circumstances, we ask that you take instructions from Mr Whyte and confirm that:

1. Mr Whyte will pay the liquidator's reasonable remuneration (as contemplated by paragraph 18 of the Order) in respect of those tasks outlined in the Order; and

2. Mr Whyte will also pay the liquidator's reasonable expenses (including legal costs on the indemnity basis) associated with undertaking those tasks (being the costs and expenses outlined in paragraph 17 of the Order).

To clarify our client's position on these items, insofar as the remuneration and expenses are to be payable from the FMIF, our client takes the view that:

a) if a proof of debt is directly referable to an indemnity claim being made against the FMIF (and similarly with claims referable to the other LM funds), those costs should be met by the FMIF (or the appropriate fund); and

b) with respect to "general creditor claims" (i.e. those where the creditor is that of LMIM itself (i.e. corporate creditors without any recourse to any of the assets of the LM trusts)), the FMIF should share those costs and expenses in accordance with the apportionment determination (between all the LM funds) which will be handed down as part of our client's remuneration approval application.

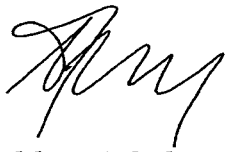
Would you please confirm Mr Whyte's position on these matters by 4:00pm on Friday, 23 June, 2016.

If need be, our client will apply to Justice Jackson to vary the Order such that their expenses (as contemplated by paragraph 17 of the Order) are payable on the basis outlined above. That being said, our client hopes that such an application is not required (as the parties are able to agree on a sensible practical framework) and hence members of the FMIF are not burdened with further unnecessary costs.

Our client is desirous of moving forward and calling for proofs of debt as soon as possible and requires the clarification sought in this letter so that he may commence this task.

We look forward to hearing from you.

Yours faithfully



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Our reference: Mr Schwarz / Ms Malloy

Your reference: Mr Tiplady / Ms Fitzpatrick

27 June 2017

Mr Ashley Tiplady
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rfitzpatrick@russellslaw.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) (*"LMIM"*); Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund (*"FMIF"*) v David Whyte Supreme Court of Queensland Proceeding No. 3508/2015 – Indemnity claim

We refer to your second letter of 22 June 2017, concerning the process of calling for Proofs of Debt and the matter of payment to your clients for the work to be undertaken by them in dealing with Proofs of Debt in connection with the FMIF.

Your letter refers to comments by Mr McKenna QC (for Mr Whyte) during the hearing of the Indemnity Application on Tuesday, 20 June 2017, in the course of an exchange between Mr McKenna and Justice Jackson. While the recitation in your letter is not entirely accurate, it is true to say that Mr McKenna informed His Honour to the effect that:-

1. the next step (broadly speaking) in the winding up of the FMIF is the identification of creditors of LMIM in respect of whose claims a right of indemnity from the property of the FMIF may be asserted, and dealing with those claims through the proof of debt process and the indemnity regime established by Justice Jackson; and

2. Mr Whyte accepts (and has always accepted) that your clients (the liquidators of LMIM) are entitled to be paid, from the property of the FMIF, their appropriate remuneration and expenses for attending to that work in connection with the FMIF.

As to the second of those points, you will recall that His Honour observed (in the course of an exchange with Mr McKenna) to the effect that, in His Honour's view, the Order provided for such payment of remuneration and expenses.

We pause to note that, although your letter refers to payment of remuneration and expenses being made by Mr Whyte of the remuneration and expenses, we presume it was intended to refer to payment being made from the property of the FMIF of the liquidators' reasonable remuneration and reasonable expenses associated with undertaking the tasks contemplated by paragraphs 17 and 18 of the Order of 17 December 2015 ("**Order**").

Your letter raises two issues concerning the payment of your clients' expenses associated with the Proof of Debt process, namely:-

1. First, the mechanism for dealing with claims for payment of those expenses; you have identified in your letter that paragraph 17 of the Order contemplates that the liquidators' reasonable expenses associated with undertaking the tasks contemplated by the Order, are to be submitted as an Administration Indemnity Claim. You have raised a

concern on behalf of your clients as to the potential operation of the "clear accounts rule" in respect of such a claim; and

2. Second, the way in which your clients' reasonable expenses associated with the Proof of Debt process, is to be ascertained. You have proposed that your clients' reasonable costs and expenses directly referable to an indemnity claim being made against the FMIF, as well as a proportion of the costs of dealing with the "corporate creditors" of LMIM itself (for which no indemnity is claimed from any trust) would be paid from the FMIF.

As to the proposed allocation of LMIM corporate costs, our client does not consider that he is in a position to say whether such an allocation would be appropriate; we do note that the ascertainment of LMIM's creditors is something that the LMIM liquidators would presumably need to attend to in any event, and at first blush there does not seem to be a compelling reason why costs unconnected with the FMIF would be paid from the FMIF. However, our client is prepared to consider any explanation or suggestions your client may have about that.

That said, we note that paragraph 18 of the Order provides (in effect) that the reasonable remuneration of the liquidators of LMIM for attending to the tasks they are directed to undertake under the Order, is to be fixed by the Court and paid from the FMIF. It occurs to our client that a similar regime may also be appropriate to deal with your client's expenses; that is, that your clients apply at the same time for approval of both their remuneration and their expenses in dealing with the proofs of debt in connection with the FMIF. Assuming it is framed as a claim for indemnity by the liquidators personally (rather than depending upon LMIM's indemnity), this would also address the concern relating to the "clear accounts" rule, since His Honour has made it plain that the costs of ascertaining the creditors having a claim against the FMIF property, is intended to be paid from the property of the FMIF.

Please let us know your client's view in relation to this proposal. Should your client agree, then we suggest that the terms of an appropriate variation to the Order be worked out between us and documented, and that there be a joint approach to his Honour seeking that variation.

Our client would also be prepared to discuss it further, should your client wish to do so. We look forward to hearing from you.

Yours faithfully

David Schwarz
Tucker & Cowen

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Emily Anderson.
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Our reference: Mr Schwarz / Ms Malloy

Your reference: Mr Tiplady / Mr T Russell

26 September 2017

Mr Ashley Tiplady
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Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*"); Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte Supreme Court of Queensland Proceeding No. 3508/2015 - Indemnity Claim

We refer to the Order of Jackson J made on 17 December 2015 ("**the December Order**"). We also refer to the exchanges of correspondence between us since the hearing of the Indemnity Application on 20 June 2017 regarding your clients' expenses in connection with ascertaining the liabilities for which LMIM might intend to claim indemnity from the assets of the FMIF.

In our letter of 27 June 2017, we proposed that the regime established by paragraph 17 of the December Order be varied so that your clients would be entitled to apply to the Court at the same time for approval of both their remuneration and their expenses in dealing with the Proofs of Debt in connection with the FMIF. We, and our client, consider that there may be some efficiencies in doing that, since your clients are required to apply to the Court for approval of their remuneration under paragraph 18 of the December Order, in any event.

We enclose a draft form of Order to give effect to that proposal. If your clients agree, we propose that it be sent to the Associate to Justice Jackson with an email requesting that his Honour make the Order by consent, briefly explaining the reason for the request and inquiring as to whether his Honour requires an appearance by the parties.

We would be grateful if you could let us know your clients' views in relation to the proposed draft form of Order.

Yours faithfully

David Schwarz
Tucker & Cowen

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Direct Line: (07) 3210 3506

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

IN THE MATTER OF **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)**
ACN 077 208 461

First Applicant:	**JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 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 THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**
	AND
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**

ORDER

Before: Justice Jackson

Date:

Initiating document: Email to the Associate to Justice Jackson dated [ ] September 2017.

BY CONSENT THE ORDER OF THE COURT IS THAT:

1. The Court directs pursuant to section 601NF(2) of the *Corporations Act* 2001 (Cth) (**"the Act"**) that:

   (a) any further claim by the Liquidators for an indemnity from the FMIF for their reasonable costs or expenses of carrying out the work they or LMIM are required to do by and under the Order of Justice Jackson dated 17 December 2015 (**"the December Orders"**) in connection with the FMIF (not being the subject of a claim already made under the December Orders) be submitted

first to the Court for approval under paragraph 2 of this order, and not to Mr Whyte under paragraph 6 of the December Orders; and

(b) paragraph 17 of the December Orders ceases to have effect on and from the date of this order, except as to any claims already notified thereunder.

2. The Liquidators are entitled to claim their further reasonable costs and expenses of carrying out the work they or LMIM are required to do by and under the December Orders in connection with the FMIF, not being the subject of a claim already made under the December Orders, and to be indemnified therefor out of the assets of the FMIF, in such amounts as are approved by the Court from time to time.

3. The Court directs the Liquidators to notify Mr Whyte of any application to the Court for approval of:-

(a) reasonable remuneration under paragraph 18 of the December Orders; or

(b) costs or expenses under paragraph 2 of this order,

at least 14 days in advance of the hearing of that application.

4. Each party shall bear their own costs of and incidental to the making of this order.

Signed:

RUSSELLS

25 January, 2018

Our Ref: Mr Tiplady/Mr Walsh
Your Ref: Mr Schwarz

Tucker & Cowen Solicitors
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email: dschwarz@tuckercowen.com.au

Dear Colleagues

LM Investment Management Ltd (In Liquidation) (Receivers and Managers Appointed) ("LMIM")
Application for Indemnity out of First Mortgage Income Fund ("FMIF") scheme property

We refer to your letter of 26 September, 2017 in respect of the proof of debt process and to recent correspondence our client has received from your client in respect of that issue.

Your client has enquired why it is that Mr Park has not yet called for proofs of debt. As has been set out in correspondence over the last 12 months, our client wishes to (in the interests of cost efficiency and logistics) call for proofs of debt only once in the liquidation of LMIM (rather than separately calling for proofs of debt which might be specifically referable to the FMIF and/or other funds). Before that can take place, our client requires certainty as to payment of his remuneration and necessary costs and expenses of that process.

As both Mr Whyte and you are aware, our client refrained from commencing the proof of debt process earlier given the likely implications of the 17 October, 2017 judgments of Justice Jackson. Our Mr Tiplady and your Mr Schwarz discussed this issue in June, 2017 as those judgments clearly had the potential to impact upon the proof of debt process; particularly given your client's desire to have the Court determine the existence and effect of any application of the clear accounts rule on LMIM's right of indemnity against the scheme assets of the FMIF. Such an issue is plainly relevant to proofs of debt with a connection to the FMIF. For all these reasons, it was discussed between our clients (and solicitors) and agreed that calling for proofs of debt would be put on hold pending the clarification of those points; that clarification having only occurred late last year. Does Mr Whyte now wish to suggest otherwise?

Now that we have the benefit of both the Remuneration Judgment and the Indemnity Judgment and of the orders made on 22 November, 2017, we are able to respond in respect of the proof of debt remuneration, costs and expenses

and regarding the amendments your client has proposed in respect of the 17 December, 2015 Order ("the December Order").

Remuneration, costs and expenses in respect of FMIF investor proof of debt process

As was also discussed between Mr Schwarz and Mr Tiplady, there is a need to amend paragraph 18 of the December Order to provide for a direct payment pathway for the expenses associated with calling for and adjudicating on the proofs of debt in respect of FMIF. As paragraph 18 of the December Order currently stands it is arguable that the clear accounts rule may impact upon those expenses and suspend payment.

We therefore enclose an amended version of the draft order that you provided on 26 September, 2017. It is proposed that there is an amendment to the December Order to provide for a mechanism for direct payment from the FMIF (subject to Court approval) of the expenses associated with the proofs of debt process directly associated with the FMIF.

We have included a costs order to the effect that both parties' costs of the making of the order are to be paid on an indemnity basis from the scheme assets of the FMIF.

Remuneration, costs and expenses in respect of corporate proof of debt process

In light of the reasons of Justice Jackson in both the Remuneration Judgment and the Indemnity Judgment, our client holds the view that any costs associated with calling for LMIM's "corporate" proofs of debt ought be met on a *pari passu* basis from the FMIF, the AIF, the ASPF and the CPF. In this regard, we refer to paragraphs 251 to 258 of the Remuneration Judgment in respect of the "method 2" apportionment method. The remuneration (and expenses) for that process would of course need to be approved by the Court.

Our client also intends to apply at the appropriate time to the Supreme Court of Queensland to have any expenses in respect of the "corporate" proofs of debt paid out of the FMIF, the AIF, the ASPF and the CPF on a *pari passu* basis. This is consistent with the *ratio decidendi* of Justice Jackson's reasons in both the remuneration application and the indemnity application in respect of the *Berkely Applegate* principle. As a *pari passu* payment from the assets of the non-feeder funds would affect the scheme property of each of those funds (to the extent that they hold scheme property), members of each of those funds will need to be on notice before orders to that effect could be made. Our client will, of course, follow the required pathway in this regard come the time to seek Court approval for such remuneration and expenses.

We are writing to you at this time to place your client on notice of our client's intended course of action and to enquire of Mr Whyte's position regarding orders being sought in due course to the effect that the FMIF pay 25% of our client's costs and expenses in respect of the "corporate" proof of debt process. Our client will have sufficient assurance should your client provide his agreement to the course (of course, subject to Court approval) to commence the proof of debt process. Please let us know Mr Whyte's position in this regard.

Letter to Justice Jackson's Associate

If you agree with the terms of the attached draft order, we propose that the parties agree upon a joint email to be sent to the Associate to Justice Jackson enquiring whether or not his Honour would be willing to make the orders in

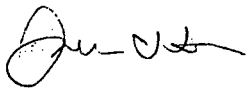
chambers without the need for a further hearing. To that end, below is a draft text of a letter:-

> *"Dear Associate*
>
> *His Honour Justice Jackson made orders on 17 December, 2015 which provided for, in part, a process for the calling for and adjudication of the proofs of debt in the liquidation of LM Investment Management Ltd (Receivers and Managers appointed) (in liquidation) ("LMIM"). The orders also provided for payment of the associated remuneration and expenses of the liquidators in so doing (see paragraphs 17 and 18 of the attached order).*
>
> *However, paragraph 18 of those orders did not provide for a direct payment pathway for expenses. The parties have conferred and believe that given the reasons for decision of his Honour in Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2 [2017] QSC 229 and Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 3 [2017] QSC 230, paragraph 18 of the orders made on 17 December, 2015 should be varied to provide certainty for the liquidator in being able to incur expenses and, where appropriate, those expenses be paid from the assets of the FMIF (subject to Court approval).*
>
> *We therefore enclose a Draft Order which has been agreed between the parties to effect this change. Would you please bring this correspondence and the attached order to his Honour's attention and enquire whether or not his Honour might be minded to make the orders in chambers without the need for a hearing.*
>
> *This correspondence is sent with the consent of the solicitors for Mr Whyte."*

Once those orders are made, our client will immediately commence the process of calling for proofs of debt in the liquidation of LMIM.

Would you please raise the issues detailed above with Mr Whyte and revert to us at your earliest convenience.

Yours faithfully



Julian Walsh
Special Counsel

Direct (07) 3004 8836
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Australian Securities & Investments Commission

Electronic Lodgement

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Form 524
Corporations Act 2001
539(1), 411(9)(a), 432(1A), 438E, 445J

Presentation of accounts and statement

Liquidator details

Registered liquidator number

196558

Registered liquidator name

JOHN RICHARD PARK

Company details

Company name

LM Investment Management Limited

ACN/ABN

077 208 461

1 Details of appointment

Date of commencement

01-08-2013

Type of appointment

Liquidator of creditors' voluntary liquidation

Are the accounts final?

No

Accounts and statements made up from

01-02-2018

To

31-07-2018

Details of the appointee(s)

Date of appointment

01-08-2013

Firm name

FTI Consulting

Name

PARK JOHN RICHARD

Address

'FTI CONSULTING' LEVEL 20 345 QUEEN STREET BRISBANE QLD 4000 AUSTRALIA

Liquidator number

196558

Creditors' meeting or report

Date report lodged with ASIC

31-10-2017

2 Dividend

Your estimate of total creditors in this administration at the date of this account

Category	Estimated number of creditors	Estimated value $
Priority	2	32,193.00
Secured	0	0.00
Unsecured	605	66,955,263.00
Deferred	0	0.00

Dividends paid since your appointment and to the date of this account

No dividend has been paid to the date of this account

3 Secured lenders

Not applicable for this type of appointment

4 Summary of professional fees and completion dates

Professional fees and outlays

Remuneration paid to you during the period for which this account is made up (inclusive of GST)

$171,009.37

Remuneration paid to you from the date of your appointment to the date to which this account is made up (inclusive of GST)

$4,803,028.12

Amount received by you in respect of expenses during the period for which this account is made up (inclusive of GST)

$397.00

Amount received by you in respect of expenses from the date of your appointment to the date to which this account is made up (inclusive of GST)

$143,494.65

Estimated completion date

Month and year by which you expect this appointment will be completed

12/2019

At the date of this account how long have you been appointed?

4 years 11 months

Details of causes which may delay the termination of your appointment

Ongoing role as Responsible Entity for various managed investment schemes (the Funds).

5 Account of receipts and payments

Receipts

Total amounts received by you before the period for which this account has been made up	$9,558,632.93
Total amounts received by you during the period for which this account has been made up	$823,126.52
Total receipts	**$10,381,759.45**

Payments

Total payments made by you before the period for which this account has been made up	$9,448,076.23
Payments made by you during the period for which this account has been made up	$716,233.25
Total payments	**$10,164,309.48**

Reconciliation of money held

Cash in hand		$0.00
Cash at bank - Credit as per bank statement	$217,449.97	
Cash at bank - Less: unpresented cheques	$0.00	
Cash at bank - Add: outstanding deposits	$0.00	
		$217,449.97
Amounts invested and not converted to cash		$0.00
Total balance of money held		**$217,449.97**

6 Estimated outcome

Do you expect that a dividend will be paid to any class of creditor?

No

Form 524 - Presentation of accounts and statement
LM Investment Management Limited - 077 208 461

Account of receipts and payments for the period

Receipts

Date	Receipts from	Explanation	Amount $
01-02-2018	Commonwealth Bank	Interest Income	4.53
14-02-2018	ATO - Deputy Commissioner of Taxation	GST Control: GST Paid (Received)	154,816.00
14-02-2018	ATO - Deputy Commissioner of Taxation	Interest Income	7.30
21-02-2018	LM Australian Income Fund	Operating Cost Income	34,549.67
23-02-2018	LM Australian Structured Products Fund	Operating Cost Income	34,549.67
01-03-2018	Commonwealth Bank	Interest Income	3.71
01-04-2018	Commonwealth Bank	Interest Income	8.79
13-04-2018	Deputy Commissioner of Taxation	Contribution received from fund	158.00
13-04-2018	Deputy Commissioner of Taxation	Contribution received from fund	231.00
13-04-2018	Deputy Commissioner of Taxation	Contribution received from fund	369.00
13-04-2018	Deputy Commissioner of Taxation	Contribution received from fund	83.00
13-04-2018	Deputy Commissioner of Taxation	Contribution received from fund	35.00
13-04-2018	Deputy Commissioner of Taxation	Contribution received from fund	116.00
13-04-2018	Deputy Commissioner of Taxation	Contribution received from fund	645.00
13-04-2018	Deputy Commissioner of Taxation	Contribution received from fund	28.00
13-04-2018	Deputy Commissioner of Taxation	Contribution received from fund	339.00
13-04-2018	Deputy Commissioner of Taxation	Contribution received from fund	1,650.00
13-04-2018	ATO - Deputy Commissioner of Taxation	Contribution received from fund	259.00
13-04-2018	ATO - Deputy Commissioner of Taxation	Contribution received from fund	413.00
13-04-2018	ATO - Deputy Commissioner of Taxation	Contribution received from fund	497.00
13-04-2018	ATO - Deputy Commissioner of Taxation	Contribution received from fund	609.00
13-04-2018	ATO - Deputy Commissioner of Taxation	Contribution received from fund	165.00
13-04-2018	ATO - Deputy Commissioner of Taxation	Contribution received from fund	61.00
13-04-2018	ATO - Deputy Commissioner of Taxation	Contribution received from fund	143.00
13-04-2018	ATO - Deputy Commissioner of Taxation	Contribution received from fund	29.00
13-04-2018	ATO - Deputy Commissioner of Taxation	Contribution received from fund	2,398.00
13-04-2018	ATO - Deputy Commissioner of Taxation	Contribution received from fund	193.00
01-05-2018	Commonwealth Bank	Interest Income	7.89
15-05-2018	Deputy Commissioner of Taxation	GST Control: GST Paid (Received)	315.47
18-05-2018	ATO - Deputy Commissioner of Taxation	GST Control: GST Paid (Received)	5,492.00
18-05-2018	ATO - Deputy Commissioner of Taxation	Interest Income	1.07
01-06-2018	Commonwealth Bank of Australia	Interest Income	8.22
14-06-2018	LM Australian Income Fund	Contribution received from fund	319,871.20
14-06-2018	ASPF 6	Contribution received from fund	305.76
14-06-2018	ASPF 7	Contribution received from fund	4,322.62
14-06-2018	ASPF1	Contribution received from fund	50,837.98
14-06-2018	ASPF 2	Contribution received from fund	10,221.54
14-06-2018	ASPF 3	Contribution received from fund	7,088.69
14-06-2018	ASPF 8	Contribution received from fund	4,454.80
14-06-2018	ASPF 5	Contribution received from fund	1,865.59
14-06-2018	ASPF 4	Contribution received from fund	8,809.64

Form 524 - Presentation of accounts and statement
LM Investment Management Limited - 077 208 461

14-06-2018	ASPF 12	Contribution received from fund	15,250.72
14-06-2018	ASPF 9	Contribution received from fund	5,238.85
01-07-2018	Commonwealth Bank of Australia	Interest Income	7.96
16-07-2018	BDO (Qld) Pty Ltd	Controllership Invoices	156,665.85
		Total receipts	**$823,126.52**

Payments

Date	Payments to	Explanation	Amount $
01-02-2018	Commonwealth Bank	Bank Charges	5.00
02-02-2018	Grace Records Management (QLD) Pty Ltd	Storage Costs	325.72
06-02-2018	Cloud Plus Pty Ltd	IT Costs	5,460.84
08-02-2018	Clayton UTZ	Legal Fees	4,098.05
21-02-2018	Clayton Utz	Legal Fees	10,028.15
21-02-2018	Clayton Utz	Legal Fees	7,403.00
21-02-2018	Clayton Utz	Legal Fees	811.80
21-02-2018	Clayton Utz	Legal Fees	2,048.75
21-02-2018	Clayton Utz	Legal Fees	737.55
21-02-2018	Clayton Utz	Legal Fees	7,949.70
21-02-2018	Clayton Utz	Legal Fees	466.20
21-02-2018	Clayton Utz	Legal Fees	1,657.70
21-02-2018	Clayton Utz	Legal Fees	693.55
21-02-2018	Clayton Utz	Legal Fees	480.15
21-02-2018	Clayton Utz	Legal Fees	1,579.60
01-03-2018	Commonwealth Bank	Bank Charges	5.00
01-03-2018	Commonwealth Bank	Bank Charges	0.45
02-03-2018	GRACE RECORDS M/MENT (AUST)PL	Storage Costs	325.72
05-03-2018	Cloud Plus Pty Ltd	IT Costs	5,460.84
09-03-2018	FTI Consulting	Fees: Appointee Fees	7,875.52
23-03-2018	J W Peden	Counsel Fees	65,991.23
31-03-2018	Grace Records Management (Australia) Pty Ltd	Storage Costs	325.72
01-04-2018	Cloud Plus Pty Ltd	IT Costs	5,460.84
01-04-2018	Commonwealth Bank	Bank Charges	5.00
09-04-2018	FTI Consulting Technology (Sydney) Pty Ltd	Appointee Disbursements	397.00
09-04-2018	FTI Consulting Technology (Sydney) Pty Ltd	Fees: Appointee Fees	5,120.50
09-04-2018	WMS Chartered Accountants	Accounting Fees	2,420.00
12-04-2018	FTI Consulting Technology (Sydney) Pty Ltd	Fees: Appointee Fees	1,347.50
26-04-2018	Pilot Partners	Accounting Fees	988.35
01-05-2018	Commonwealth Bank of Australia	Bank Charges	5.00
01-05-2018	Commonwealth Bank of Australia	Bank Charges	3.00
03-05-2018	Grace Records Management (Australia) Pty Ltd	Storage Costs	325.72
03-05-2018	Cloud Plus Pty Ltd	IT Costs	5,460.84
01-06-2018	Commonwealth Bank of Australia	Bank Charges	0.30
01-06-2018	Commonwealth Bank of Australia	Bank Charges	5.00
05-06-2018	Grace Records Management (Australia) Pty Ltd	Storage Costs	325.72
05-06-2018	Cloud Plus Pty Ltd	IT Costs	5,460.84
13-06-2018	Ernst & Young	Accounting Fees	9,177.86
27-06-2018	Clayton Utz	Legal Fees	22,490.25
27-06-2018	Clayton Utz	Legal Fees	520.85
01-07-2018	Commonwealth Bank of Australia	Bank Charges	5.00
01-07-2018	Commonwealth Bank of Australia	Bank Charges	1.65
05-07-2018	Grace Records Management (Australia) Pty Ltd	Storage Costs	325.72
05-07-2018	FTI Consulting (Australia) Pty Ltd	Fees: Appointee Fees	156,665.85
06-07-2018	Clayton Utz	Legal Fees	1,162.70
09-07-2018	Cloud Plus Pty Ltd	IT Costs	5,460.84
16-07-2018	BDO (Qld) Pty Ltd	Accounting Fees	369,366.68

Form 524 - Presentation of accounts and statement
LM Investment Management Limited - 077 208 461

Total payments	**$716,233.25**

7 Your verification of this account and statement

Statement :

The information given in the statement is true to the best of my knowledge and belief at the date of lodging

Receipts & payments :

The attached account of receipts and payments contains a full and true account of my receipts and payments in this period and I have not, nor has any other person by my order or for my use during that period, received or paid any money on account of the company/pooled group other than and except the items mentioned and specified in that account.

Authentication

This form has been authenticated by
Name JOHN RICHARD PARK

This form has been submitted by
Name Rebecca Leigh FELSMAN
Date 28-08-2018

For more help or information

Web	www.asic.gov.au
Ask a question?	www.asic.gov.au/question
Telephone	1300 300 630

David Schwarz

From: David Whyte <David.Whyte@bdo.com.au>
Sent: Monday, 18 December 2017 7:13 PM
To: 'Park, John'
Cc: Eric Leeuwendal; 'Trenfield, Kelly'
Subject: RE: LMIM Voluntary Administrators' and Liquidator's Remuneration

John

As previously advised, McGrathNicol, without my knowledge, placed the funds on deposit for an extended period. A copy of the 17 October 2017 court order was provided to McGrathNicol's solicitors on 19 October 2017. A delay has been encountered in releasing the funds as the bank's board had to approve a request to waive the break fee. The break fee has been negotiated down from in excess of $100K to $11K. This was approved late last week and the documentation relating to the partial release of deposit and renewal of the balance has been provided to the bank. We are awaiting confirmation from McGrathNicol as to the precise timing for the payments to be made and will advise you as soon as we hear further.

Pending further clarification from yourselves/your solicitors about the GST position, we may have to approach the court for directions on whether the payment is be made gross or net of GST. Your solicitors have failed to satisfactorily address the queries we have raised regarding the GST issue. As we have stated, I sought the advice of one of BDO's indirect tax specialists about the matter and based on those discussions we proposed an appropriate way forward. This follows what has occurred with the payment of your solicitors costs, being on a GST exclusive basis. I note this was also agreed by you in respect of indemnity costs per your solicitors letter dated 28 February 2017 when it was said you would not "double dip". As an officer of LMIM and acting in the best interests of the FMIF investors and in accordance with the Corporations Act, I fail to see why you wouldn't concur with our proposal. There has been no supply under the GST Act to me. The supply is from FTI to LMIM and accordingly the FMIF should only have to pay the GST exclusive amount.

Can you please advise if you have referred the matter to an indirect tax specialist and explain why you consider the invoices should be addressed to me (I do not have an ABN) and why it is in the best interests of investors to invoice that way and have no recourse to a GST refund?

As stated above, if we are unable to agree, we should approach the court about the GST position. I would also like to approach Justice Jackson about the controllership costs that were denied by his Honour and where you have invoiced PTAL to pay the same costs. My solicitors will write to your solicitors on that issue shortly. To save costs, it would seem appropriate for both matters to be heard together.

Regards

David

From: Park, John [mailto:John.Park@fticonsulting.com]
Sent: Monday, 18 December 2017 1:14 PM
To: David Whyte <David.Whyte@bdo.com.au>
Cc: Eric Leeuwendal <Eric.Leeuwendal@bdo.com.au>; Trenfield, Kelly <Kelly.Trenfield@fticonsulting.com>
Subject: LMIM Voluntary Administrators' and Liquidator's Remuneration

David,

As you are aware Orders were made on 22 November, 2017 as to the payment of my remuneration and expenses from FMIF and payment of those amounts has still not been made. This is despite the fact that you've known since 17 October 2017 that remuneration and expenses had to be paid from FMIF. You have failed to adequately substantiate why it has taken so long to release funds held on term deposit and the amount of any break costs.

The attached letter from Tucker & Cowen does nothing other than seek to further complicate the issue, delay payment and again increase costs.

On Friday 15 December 2017 invoices were sent to your solicitors totalling $2,054,084,39, being the payments to be made from FMIF under the Orders. This was done as your solicitor claimed that the invoices issued on 27 November 2017 in respect of the Orders were incorrect. It was not necessary for me to issue further invoices, however I did this to avoid further delays on your part in making payment.

Invoices for the amounts to be paid from FMIF under the Orders need to be issued as those orders clearly state those amounts are to be paid plus GST. The invoices were therefore issued in accordance with the Orders and the applicable rate of GST (an issue for FTI/LMIM as the service provider irrespective of the position of FMIF as the recipient of the invoice). Given the Orders you cannot simply pay a net amount to FTI Consulting without an invoice.

Given your delay in attending to payment you have left me with no choice but to apply to the Supreme Court of Queensland seeking a date for payment being this Friday 22 December 2017. I also put you on notice that I will be seeking interest on the amounts to be paid to me under those Orders.

Regards - John

John Park
Leader Australia, Corporate Finance & Restructuring

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SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

IN THE MATTER OF **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)**
ACN 077 208 461

First Applicant: **JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 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 THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

AND

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**

SUPREME COURT OFFICE BRISBANE

Consent **ORDER**

Before: D/ Registrar

Date: 27 June , 2018

Initiating document: Consent to Order of Registrar filed 25 June 2018

THE ORDER OF THE COURT BY CONSENT IS THAT:

1. The amount of the costs payable to the First Applicants from scheme property of the LM First Mortgage Income Fund ARSN 089 343 288 under paragraph 7 of the Orders dated 22 November 2017 (Doc. No. 116) is fixed in the sum of $230,889.50.

Signed:

SUPREME COURT OFFICE BRISBANE

ORDER
Form 59 R.661

Filed on behalf of the Respondent

TUCKER & COWEN
Solicitors
Level 15, 15 Adelaide Street
Brisbane, Qld, 4000.
Tel: (07) 300 300 00
Fax: (07) 300 300 33

Tucker&CowenSolicitors.
TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15. 15 Adelaide St. Brisbane. Qld. 4000 / GPO Box 345. Brisbane. Qld. 4001.
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Principals.
David Tucker.
Richard Cowen.
David Schwarz.
Justin Marschke.
Daniel Davey.

Special Counsel.
Geoff Hancock.
Alex Nase.
Brent Weston.

Associates.
Marcelle Webster.
Emily Anderson.
Olivia Roberts.
James Morgan.

Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady

16 May 2017

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

Email: atiplady@russellslaw.com.au
rfitzpatrick@russellslaw.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Application filed 20 May 2016 ("*Indemnity Application*")

We refer to your letter of 11 May 2017 and to your client's Points of Defence dated 11 May 2017 (filed on 12 May 2017).

There are a number of issues raised by your correspondence and by the Points of Defence. Of particular significance, it appears that your clients intend to advance indemnity claims by the First Applicants (Mr Park and Ms Muller) personally, either in addition to, or in the alternative to, a claim for indemnity by LMIM as responsible entity of the FMIF. That constitutes a significant change to the basis upon which the indemnity application is made, such that it is clear that further directions will be required in order for the application to progress expeditiously toward a hearing on 19 and 20 June 2017.

We address these issues below.

The nature of the Indemnity Application

1. Your letter refers to claims "*by the liquidators*" for indemnity, and asserts that the "clear accounts rule" has no application as against the liquidators. However, there is no claim by the First Applicants for indemnity from the FMIF presently before the Court.

2. The application filed on 20 May 2016 ("**the Indemnity Application**") arises out of the Order of 17 December 2015, by which Jackson J provided for a regime by which the First Applicants was directed to identify claims by LMIM for indemnity from the property of the FMIF, and our client was directed to respond to those claims. Relevantly, your clients made certain claims which our client rejected ("**the Disputed Claims**"), in light of which the Indemnity Application seeks:-

   (a) By paragraph 1, a declaration that certain items are "Eligible Claims" within the meaning of paragraph 8(b) of the Order of 17 December 2015, "*for which LMIM has a right to be indemnified from the property of the...Fund*"; and

(b) By paragraph 2, an order for payment of such sum, "*as is declared to be an Administration Indemnity Claim or Recoupment Indemnity Claim for which LMIM has a right to be indemnified from the property of the Fund...*".

3. The Indemnity Application does not seek any orders concerning any claim for indemnity by the First Applicants, Mr Park and Ms Muller (the liquidators and former administrators of LMIM), nor does it refer to an indemnity in favour of the First Applicants.

4. The correspondence between our respective firms since the filing of the Indemnity Application has proceeded on that footing. For example (by no means exhaustively):-

(a) Your letter of 25 May 2016, which enclosed the Indemnity Application begins, "*Please find enclosed, by way of service and pursuant to paragraph 9(a) of the Order an application regarding your client's rejection of certain claims for indemnity out of the assets of the FMIF.*";

(b) Our letter of 23 November 2016 referred to the "clear accounts rule" and its application to "*LMIM's indemnity from the FMIF*" and, earlier, "*indemnity claims by LMIM*"; and

(c) In our letter of 3 February 2017, we explained at length our client's understanding, and ours, of the Indemnity Application; in that letter, we said:-

"*... As we understand the Indemnity Application, however, the application concerns only LMIM's right of indemnity, and does not in its terms purport to seek any directions or orders at all concerning any indemnity in favour of Mr Park and Ms Muller personally.*

We pause at this point to note that, while the Indemnity Application seeks declarations as to LMIM's right of indemnity for certain amounts (being amounts that Mr Whyte rejected) under paragraphs 4 and 5 of the Order of the Honourable Justice Jackson dated 17 December 2015 ("the December Order"), your clients' Indemnity Application is (as we understand it) in fact for directions as contemplated by paragraph 9 of the December Order.

If our understanding is incorrect, please tell us."

5. As a result, our client's Points of Claim in respect of the grounds of objection based upon the 'clear accounts' rule was prepared on the basis that the Indemnity Application seeks orders concerning an indemnity claimed only by the Second Applicant, LMIM.

6. Nonetheless, it appears, from the Points of Defence filed on 12 May 2017, that your clients now intend to seek an indemnity directly in favour of the First Applicants. So much is clear from the various references to a claim for indemnity in favour of the First Applicants, throughout the Points of Defence; for example at paragraphs 10(d) and (e), 24, 25(c) and (e), 26(i) and 27. In particular by paragraphs 27(a) and (h) it is said that:-

"*(a) the First Applicants, as liquidators, may claim their costs and expenses the subject of the Applicants' Application filed 20 May 2016 ("Application") by direct recourse against the trust funds of the FMIF in accordance with the principles set out in Re Owen and Others (2014) 225 FCR 541 at pages 549 to 552.*"

"*(h) There is no scope for the application of the clear accounts rule as against the First Applicants and the Respondent's uncertainty about the state of account between LMIM and the FMIF, as expressed in paragraph 23 of the Points of Claim, is irrelevant to the First Applicants' claims.*"

7. Those allegations bring into stark focus the significance of the difference between the Indemnity Application as it currently stands, and the approach which your clients now appear to seek to take to recover the expenses the subject of the Disputed Claims.

8. If, further or in the alternative to the claim by LMIM to an indemnity from the scheme property of the FMIF, your clients now intend to seek an exercise of the Court's inherent jurisdiction to permit a direct indemnity in favour of the First Applicants personally for expenses or liabilities which they have personally incurred, then your clients ought to seek to amend their application, and they should do so promptly.

9. Consequential directions will also be required in order that appropriate evidence is put before the Court as to the basis for any indemnity sought by the First Applicants personally, and in order that our client is afforded an appropriate opportunity to respond to such an application.

10. We return to this issue further below.

Grounds of our client's opposition to the Indemnity Application

11. Your letter appears to assume that our client, Mr Whyte, resists your client's Indemnity Application only on grounds based upon the "clear accounts" rule.

12. That is not, however, the case. There are two bases upon which Mr Whyte opposes the Indemnity Application, namely:-

    (a) first, because Mr Whyte does not consider that the claims the subject of the Indemnity Application are properly to be regarded as expenses for which LMIM is entitled to an indemnity from the assets of the FMIF; the reasons for that were given by Mr Whyte in his notice of rejection of the relevant claims; and

    (b) second, Mr Whyte relies upon the "clear accounts" rule, as pleaded in the Points of Claim filed on 24 April 2017.

13. Mr Whyte has never resiled from his view that the expenses claimed by the Indemnity Application are not expenses for which LMIM is entitled to an indemnity from the assets of the FMIF. Accordingly, even setting to one side the application of the clear accounts rule, Mr Whyte would not be in a position to accede to your request that the claimed amounts be paid out of the assets of the FMIF.

Other issues

Distinction between administrators and liquidators

14. Your letter notes that no allegation of impropriety is made against your clients (Mr Park and Ms Muller, the First Applicants) personally in their capacity as liquidators of LMIM, and then asserts that, "*In these circumstances, there can be no application of the 'clear accounts rule' as against the liquidators.*"

15. Your letter refers elsewhere (for example, at the foot of page 2) to "*The only payments which have been identified predate the appointment of the liquidators*".

16. It thus appears to be suggested that Mr Whyte is not in a position to raise the clear accounts rule in respect of payments made from the property of the FMIF during the period of the appointment of Mr Park and Ms Muller as administrators of LMIM, in answer to claims made at the instigation of Mr Park and Ms Muller as liquidators of LMIM.

17. We do not see why that would be the case. If there is some principle of law or equity upon which you rely in that respect, please let us know.

Alleged inconsistency in Mr Whyte's position

18. Your letter further seems to assert that the position taken by Mr Whyte previously was to the effect that he would only raise acts of Mr Park and Ms Muller personally in their capacity as liquidators of LMIM (as distinct from in their capacity as administrators of LMIM) as grounds for opposition to your clients' claim for indemnity, based upon the clear accounts rule.

19. That is not the case, and never has been.

20. Your letter refers to the transcript of the hearing before Justice Jackson on 14 March 2016, and suggests the exchange between Ms Brown QC (as Her Honour then was) and His Honour was to the effect that Mr Whyte's position was that the "clear accounts rule" is only pressed in respect of the acts of the liquidators (in their capacity as liquidators). As to that:-

(a) First, the exchange between Ms Brown QC and His Honour must necessarily be taken in context. For example, at the foot of T1-60, where Ms Brown said, "*The only matter that has been raised has been identified in his affidavit, which is in relation to the loan management fees and that has been the subject of correspondence by Gadens to Russells.*" Those loan management fees are the same fees as are identified in the Points of Claim.

(b) At T-1-61, line12, Ms Brown QC referred to "*pre-administration conduct*" during the exchange.

(c) Mr Whyte's position was further explained in our letter of 3 February 2017, in which the following was said (on page 7 of that letter):-

> "*Mr Whyte therefore considers that it would be reasonable and appropriate that a distinction be drawn between liabilities incurred before the appointment of your clients, the liquidators, to LMIM and those incurred after; and that, in respect of claims for indemnity by your clients in connection with liabilities by them incurred after their appointment, only liabilities 'to the FMIF' arising from transactions, acts or omissions of your clients after the appointment of the liquidators (first as administrators) should be set off against the indemnity claim.*"

It is therefore perfectly clear that, in referring to Mr Park and Ms Muller as "the liquidators", we intended that the reference encompass your clients' roles both as liquidators and, formerly, as the administrators of LMIM.

(d) Finally, it was acknowledged both in the exchange with His Honour and in our letter of 3 February 2017, that if the claim for indemnity is made by LMIM as responsible entity, then that would necessarily be a claim subject to "*the rules about indemnities*" (as His Honour referred to them) and, for that reason, Mr Whyte's position is "*a matter about which our client considers that judicial guidance is likely required.*" (as was said in our letter of 3 February 2017, on page 7).

21. Furthermore, as we explained in our letter of 3 February 2017, although our client's view as to what would be a reasonable and appropriate position is as we have repeated above, nonetheless we noted that "Jackson J appeared to

express some doubt as to whether Mr Whyte could adopt such a position" and, consequently, that the general position "may be wider than Mr Whyte intends".

22. There should not be any confusion as to the position of Mr Whyte. To be clear, the grounds upon which Mr Whyte relies as giving rise to an objection to the indemnity by reason of the clear accounts rule, are stated in the Points of Claim.

Relevance of payments made to LMA, not LMIM

23. Both your letter and the Points of Defence refer to the second and third payments mentioned in your letter as having been paid "*for the benefit of LM Administration Pty Ltd (administrators appointed* (sic))." Your letter asserts that "*Any setoff is with respect to different parties and cannot operate as a basis for Mr Whyte seeking to withhold payment of the liquidator's claims.*"

24. A similar point appears to be made in paragraph 27(f) of the Points of Defence, where it is alleged that the Post Administration Appointment Payments were paid "*to or for the benefit of LMA and not LMIM*".

25. We do not understand the point. The payments were made from the property of the FMIF, and were effected by LMIM as the responsible entity. That being the case, if it be established that the payments were not properly made (in the relevant sense) or were made in breach of trust, then we fail to see why a claim would not lie as against LMIM in respect of the loss caused to the FMIF arising from the making of those payments.

26. We invite you to explain the relevance of payments having been made to LMA, rather than to LMIM, to the question of whether a claim lies as against LMIM for breach of trust with respect to those payments.

Further conduct of the Indemnity Application

27. In regards then to your clients' apparent intention to change the footing upon which the Indemnity Application is made, we ask that you confirm to us, as a matter of urgency, the following:-

(a) Whether your clients intend to seek orders for an indemnity directly in favour of the First Applicants from the assets of the FMIF, in respect of the amounts claimed by the Indemnity Application; and

(b) If so, whether your clients intend that the Second Applicant, LMIM, maintains a claim for indemnity from the assets of the FMIF in addition to, or as an alternative to, any claim for indemnity by the First Applicants.

28. In other words, is the application to be treated now as an application for indemnity only by the First Applicants, or as an application for indemnity by either or both of the First Applicants and the Second Applicant?

29. This is an issue requiring prompt resolution. It will necessarily affect the way in which our client prepares for the hearing of the Indemnity Application, and the steps that are required to be taken by all parties to prepare for that application.

Request for proposed directions

30. In the circumstances, it is appropriate that further directions be made for the conduct of the Indemnity application.

31. It is highly desirable to have all issues concerning the claims for indemnity, the subject of the Indemnity Application, determined expeditiously, and with a minimum of expense. While there is a relatively short time remaining until the hearing of the Indemnity Application, our client considers that if your clients' position is clearly stated now, and if steps are taken promptly to ensure that all relevant evidence is before the Court to enable all of the real issues in dispute to be identified, considered and determined by the Court, then the hearing dates in June may yet be retained.

32. As a first step, your clients must necessarily clarify the basis or bases on which they seek an indemnity and, if necessary, seek leave to make appropriate amendments to the Indemnity Application.

33. Thereafter, and if your clients do intend to seek an indemnity directly in favour of the First Applicants, directions will be required for further evidence to be filed and served by your clients, evidence in response to be filed and served by our client, and for our client to be afforded an opportunity to amend his Points of Claim. No doubt your clients will then desire an opportunity to make any necessary amendments to the Points of Defence in order to respond to any fresh allegations made in the Further Amended Points of Claim.

34. It will be evident, of course, that the current directions (requiring our client to file affidavit material by Friday this week, 19 May 2017) ought to be vacated.

35. Could you please let us know as a matter of urgency what your clients propose as regards further directions, assuming that your clients do intend to amend their application to seek an indemnity directly in favour of the First Applicants.

36. Finally, we also note that the clarification of your clients' position, and the amendment of the Indemnity Application, is a necessary precursor to our client seeking judicial advice from the Court as to whether he is justified in raising grounds of objection based upon the clear accounts rule in response to your clients' application.

Conclusion

Please let us have your response to the issues raised above as soon as possible.

In particular, please respond to the questions asked at paragraphs 27 and 28 above, and let us know what directions your clients propose, by **5pm tomorrow, 17 May 2017.**

Please do not hesitate to contact us if you have any questions.

Yours faithfully

David Schwarz
Tucker & Cowen

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Direct Line: (07) 3210 3506

RUSSELLS

22 May, 2017

Our Ref: Mr Tiplady
Your Ref: Mr Schwarz/Mr Nase

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Dear Colleagues

LM Investment Management Limited (In Liquidation)(Receivers Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v Mr David Whyte - Indemnity Claim

Thank you for your letter of 19 May, 2017.

In response to the last paragraph in your letter, our clients' position is that the claimed right of indemnity is being pressed by LMIM and also the liquidators. Your client should proceed on that basis. So much was made clear in our correspondence to you of 17 May, 2017 (copy enclosed).

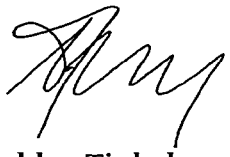
In that letter, we also queried the jurisdictional basis upon which your client has sought the directions in the application which is now listed for hearing on 30 May, 2017.

Would you please let us know on what basis you say that the Court has the power to make the orders which your client has sought. If the jurisdictional basis relied upon by Mr Whyte is the directions power set out in the order of Jackson J of 17 December, 2015, then our clients are properly parties.

That being said, we are not suggesting that our clients will necessarily appear at the hearing, as Jackson J has made it very clear that there should not be a duplication of contested hearings. Rather, we raise this issue now to avoid any future delays if your client decides at the hearing on 30 May, 2017 that they wish to proceed *ex parte*, but in reliance on a direction, power or order to which our clients are parties.

We look forward to hearing from you in this regarding by 4:00pm on Tuesday, 23 May, 2017.

Yours faithfully



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Geoff Hancock.
Alex Nase.
Brent Weston.

Associates.
Marcelle Webster.
Emily Anderson.
Olivia Roberts.
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Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady

24 May 2017

Mr Ashley Tiplady
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rfitzpatrick@russellslaw.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*"); Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte Supreme Court of Queensland Proceeding No. 3508/2015 Application filed 20 May 2016 ("*Indemnity Application*")

We refer to your letter of 22 May 2017, received by email at approximately 4:32 p.m.

Nature of the Application

You have said in your letter that, "*the claimed right of indemnity is being pressed by LMIM and also the liquidators.*"

We pointed out in our letter of 16 May 2017 that the Indemnity Application itself is plainly concerned with LMIM's own indemnity from the FMIF, and not with any claim for indemnity by the liquidators personally. Your recent correspondence may assert otherwise, but the Indemnity Application itself is the application to be heard by the Court on 19 and 20 June 2017, and the application that our client is preparing to meet.

If your clients intend to press a claim for indemnity in favour of the liquidators personally, then we reiterate what was said at paragraphs 8 and 9, and 29 to 36 of our letter of 16 May 2017.

As noted above, our client is preparing to meet the Indemnity Application as filed, being the application filed 20 May 2016.

Jurisdictional basis for the Application for directions filed 9 March 2017 ("Directions Application")

By the Directions Application our client, Mr Whyte, is seeking judicial advice and direction from the Court, in the Court's inherent jurisdiction to give such advice to its appointed receiver.

You will recall that this is the jurisdiction that was relied upon by Mr Whyte on the hearing of his Application filed 4 September 2014, before Justice Jackson on 15 September 2014. You will recall that His Honour gave reasons for making the Order on that day, which included that:-

> "*In any event, there's little doubt that a Court appointed receiver has the entitlement to apply to the Court for directions as to the exercise of powers on the footing that he is an officer of the Court, and the authorities referred*

to in the outline of argument or submissions which have been filed on Mr Whyte's behalf demonstrate that well enough."

While the Directions Application refers to paragraph 10 of the Order of Jackson J made 17 December 2015, and to paragraph 7 of the Order of Jackson J made 16 February 2017, the jurisdictional footing of the Application is as explained above.

We think, too, that it was clear from the exchanges between His Honour and Counsel for each of the parties (at various times) when the matter was reviewed by His Honour both on 16 February 2017 and on 7 April 2017, that it was contemplated that it is the Court's inherent jurisdiction to give advice to a Court-appointed receiver that would be invoked upon the hearing of the Directions Application.

In that respect, we had not understood the fact that those orders confer liberty to our client to apply for directions in connection with his response to the Application, to require that such an application for directions join your clients as respondents, rather than (as has been done) our client giving notice of the Application to your clients as interested parties (but not joining them as respondents or formally serving them).

In order to avoid any potential ambiguity about that, we are instructed to amend the Directions Application by removing reference to the Orders of 17 December 2015 and 16 February 2017. An amended application will be filed at or before the hearing on 30 May 2017.

Yours faithfully

David Schwarz
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Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady / Ms Fitzpatrick

13 June 2017

Mr Ashley Tiplady
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rfitzpatrick@russellslaw.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Application filed 20 May 2016 ("*Indemnity Application*")

We refer to your letter and proposed Amended Application received by email at approximately 5:35 p.m. yesterday.

Amended Application

The proposed Amended Application appears to seek orders, by paragraph 2(a), in terms of a direct indemnity to the First Applicants as liquidators from the property of the Fund.

As you know, the matter of a potential claim by the First Applicants to a direct indemnity from the property of the FMIF has been the subject of previous correspondence, including our letters of 16 and 24 May 2017. As we said in that correspondence, our client has been preparing to meet an application in terms of the Application that was filed on 20 May 2016.

Contrary to what is said in your letter, the proposed amendments are not matters of mere formality. By seeking orders for a direct indemnity in favour of the First Applicants as liquidators of LMIM, your clients seek to invoke the jurisdiction of the Court to make orders for such a direct indemnity in exercise of the Court's discretion. Consequently, your clients will, presumably, be required to establish special circumstances justifying the exercise of the Court's discretion to confer such a direct indemnity upon the First Applicants.

We note, for example, that in *Re: Owen & Ors.*,[1] Justice Greenwood referred[2] to an exercise of the Court's discretion in allowing a liquidator remuneration and expenses out of the Trust Fund, and later,[3] His Honour referred to certain circumstances which were said in that case by the liquidators to justify direct recourse to the assets of the Trust (as a result of which His Honour made the order sought).

So far as we are aware, there is nothing in the Affidavits of Mr Park filed on 18 October 2016 and 8 March 2017 that goes to special circumstances that might be argued to justify the exercise of the Court's discretion.

[1] (2014) 225 FCR 541 (to which your clients' Points of Defence refers at paragraph 27(a))
[2] at paragraph [60], page 550
[3] at paragraphs [65] to [69]

Could you therefore please let us know, as a matter of urgency, what evidence as to special circumstances your clients intend to rely upon at the hearing on 19 and 20 June 2017 as justifying an exercise of the Court's discretion to make orders in terms of a direct indemnity in favour of the First Applicants.

Our client's present intention is to do the best that he can to meet the application by your clients at the hearing on 19 and 20 June 2017. Our client considers that, if it is possible, it would be in the best interests of members for the real issues in dispute as between our respective clients, arising on the Indemnity Application, to be heard and determined by the Court on 19 and 20 June 2017, rather than for the Application to be adjourned.

However, until such time as our client (and we) is aware of the material upon which your clients intend to rely, and thus whether, and to what extent, it is appropriate that our client adduce evidence in response, our client must necessarily reserve his position in that regard.

Applicants' material

Your letter refers to subpoenas being issued this week, and to summaries of the anticipated evidence to be given by the recipients of those subpoenas being provided to us.

Please let us know as a matter of urgency to whom your clients propose to issue subpoenas.

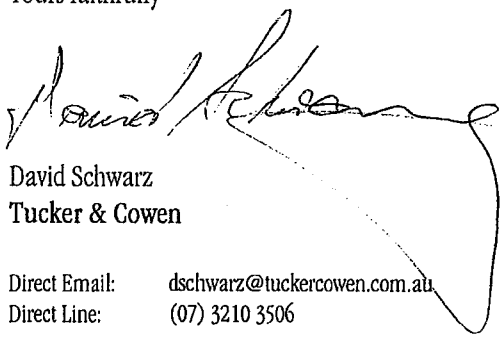
We, and our clients, presently find it difficult to contemplate what evidence might be appropriate to be led from witnesses under subpoena at the hearing of the Indemnity Application. Please let us know, as a matter of urgency, at least the identity of those to whom it is intended that a subpoena be issued and, by no later than Thursday 15 June 2017, provide summaries of the anticipated evidence to be given by those witnesses.

Your letter also refers to the prospect that your clients may also rely upon three Affidavits of Mr Park filed in 2015 and January 2016. The Affidavit of Mr Park filed 22 April 2015 runs to hundreds of pages, and the Affidavit filed 11 June 2015 comprises in excess of 1,000 pages (including exhibits). Could you please identify, by return, the parts of those Affidavits upon which your clients intend, possibly, to rely.

Conclusion

We look forward to receiving your prompt response to the requests made above.

Yours faithfully



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Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

IN THE MATTER OF **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)**
ACN 077 208 461

First Applicant: **JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 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 THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

AND

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**

SUPREME COURT OFFICE BRISBANE

Consent **ORDER**

Before: D/ Registrar

Date: 27 June , 2018

Initiating document: Consent to Order of Registrar filed 25 June 2018

THE ORDER OF THE COURT BY CONSENT IS THAT:

1. The amount of the costs payable to the First Applicants out of the LM First Mortgage Income Fund ARSN 089 343 288 under paragraph 2 of the Orders dated 22 November 2017 (Court Doc. No. 117) is fixed in the sum of $220,859.31.

Signed:

SUPREME COURT OFFICE BRISBANE

ORDER
Form 59 R.661

Filed on behalf of the Respondent

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Solicitors
Level 15, 15 Adelaide Street
Brisbane, Qld, 4000.
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Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady / Mr Walsh

26 October 2018

Mr Ashley Tiplady
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Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015;
Application by Park & Muller as Liquidators of LMIM filed 20 May 2017 and Amended Application filed 13 June 2017 (together, "*Indemnity Application*")

We refer to your letter dated 12 October 2018 and to your email of 24 October 2018.

Your letter of 12 October 2018 referred to an issue of an invoice to your firm from Mr Peden QC for work performed in a period to 20 June 2017 in connection with the Indemnity Application, which was heard on 19 and 20 June 2017, and which was determined by His Honour's Judgment delivered on 17 October 2017 and Orders made on 22 November 2017 ("Indemnity Orders").

In your letter of 12 October 2018, you say that you will raise the issue of Mr Peden QC's invoice at the directions hearing on 19 November 2018. We fail to see the relevance of Mr Peden's invoice to the directions hearing, which does not concern the Indemnity Application or the Indemnity Orders.

It is relevant to briefly recite the relevant background to this issue:-

1. The Indemnity Orders were made on 22 November 2017; paragraph 2 of those Orders provided for your clients (the First Applicants, Mr Park and Ms Muller) to be paid 90% of their costs of the Indemnity Application out of the FMIF on an indemnity basis;

2. Our respective clients negotiated an agreement as to the quantum of those costs, following an exchange in which your client provided details of the costs claimed; our respective clients also negotiated agreement as to a number of other matters, which agreement was then recorded in the Terms of Agreement 18 June 2018 between David Whyte, LMIM, and Mr Park and Ms Muller as liquidators of LMIM ("Terms of Agreement");

3. Pursuant to the Terms of Agreement our client, and your clients, agreed to consent to orders fixing the quantum of costs payable to your client out of property of the FMIF under paragraph 2 of the Indemnity Orders in the sum of $220,859.31;

4. On 27 June 2018, consent Orders were made by the Deputy Registrar in those terms (fixing the quantum of your client's costs in the sum of $220,859.31);

5. On 5 July 2018 you confirmed that payment had been received by you from the FMIF of the amount fixed by the consent order of 27 June 2018;

6. On 6 July 2018, the matter of Mr Peden's invoice for work done in connection with the Indemnity Application was first raised by you in a telephone call;

7. On 11 July 2018, you wrote to us attaching an invoice from Mr Peden QC for the Indemnity Application in the sum of $56,595 including GST, informed us that due to an oversight on your part Mr Peden's invoice had not been included in the costs claimed by your client with respect to the Indemnity Application and asked that we bring this to Mr Whyte's attention with a view to both the Terms of Agreement and the Consent Order made on 27 June 2018 being varied to incorporate a further amount of $55,270 for Mr Peden QC's invoice (after reduction for certain entries which related to the Remuneration Application). A copy of that letter is enclosed;

8. On 31 July 2018, we wrote to you to inform you, in effect, that:-

   (a) given that the Indemnity Orders provided for 90% of your clients' indemnity costs to be paid from the FMIF, and that your clients (being entitled to themselves claim the input tax credits in respect of the GST component of the invoice) would be entitled only to the GST-exclusive amount, we calculated the relevant amount of Mr Peden QC's invoice to be $45,225, and

   (b) our client was prepared to agree to a variation to the Terms of Agreement as well as to the Consent Order made on 27 June 2018 to allow for payment of an additional amount of $45,225 to your client on the basis that your clients do not later claim further costs from the FMIF concerning Mr Peden's invoice and attending to those variations (because those additional costs arose as a result of an oversight on your part).

   A copy of that letter is enclosed.

9. In other words, despite the Terms of Agreement having been entered into between our respective clients, consent orders having been made to fix your clients' costs of the Indemnity Application, and payment of that fixed amount having been promptly made to your clients, our client has been prepared to agree to pay the entirety of the proper additional amount claimed by your client in respect of Mr Peden's invoice.

10. Various drafts of a supplementary deed have been exchanged between us.

11. We had not, until very recently, understood there to be any controversy at all following our letter of 31 July 2018 as to the quantum to be paid from the FMIF in respect of the additional amount claimed.

On 21 September 2018, you wrote to us to ask "*is there any reason why that invoice [Mr Peden QC's invoice] cannot now be paid from the FMIF, in full, notwithstanding that it was mistakenly left off the list of costs provided to you in February 2018?*".

We responded to that query, again, on 3 October 2018.

In your letter of 12 October 2018, you say that it remains unclear what our client considers to be a "suitable" variation to the Terms of Agreement.

The variations that our client considers suitable, are those set out in the enclosed draft Supplementary Deed (which you have previously seen).

To be clear, we address again some of the points sought to be made in your letter:-

1. Reduction for non-related work

   The reduction for non-related work, reflected in the amount stated in our letter of 31 July 2018 and in the draft Supplementary Deed, is the same reduction your firm proposed in your letter of 11 July 2018.

2. "Commercial negotiated reduction" of 10%

   The Indemnity Orders provide for payment to your clients of 90% of their costs of the Indemnity Application out of the FMIF on an indemnity basis.

   It is the Indemnity Orders of 22 November 2017, not any "commercial negotiation", that mandates a 10% reduction in the amount to be paid from the FMIF. Your clients have already been paid, in full, the amount fixed by Order of the Court for their costs under the Indemnity Orders.

3. GST-exclusive amount

   Your clients are entitled to input tax credits in respect of the GST component of invoices for legal services supplied to them. The supply of those legal services was plainly to your clients, not to our client or to the FMIF. That is not controversial.

   Therefore, in accordance with GSTR 2001/4 and other authority[1], your clients are entitled to be indemnified only for the GST-exclusive amount of their costs, in accordance with the 'indemnity principle'. Again, this should not be controversial.

   This is, of course, a very different scenario to the claim for remuneration to be paid directly from the FMIF, which was the subject of submissions before His Honour on the hearing of your clients' application, on 6 September and 3 October 2018.

   The GST issue in respect of which submissions were made to His Honour on 3 October 2018 was a different issue; this is confirmed by the exchange between His Honour and Mr Ananian-Cooper at page 54 of the transcript, at line 30, to page 54 line 12. That issue was resolved, in so far as your client's second remuneration application is concerned at least, in a pragmatic way by our client agreeing to accept an undertaking belatedly offered by your client to provide a tax invoice addressed to the FMIF to enable the FMIF to claim a reduced input tax credit, without the need for His Honour to decide the issue.

[1] such as *Hennessey Glass and Aluminium Pty Ltd v Watpac Australia Pty Ltd* [2007] QDC 057 per McGill DCJ at *[127], The Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina Ltd and Ors* [2009] QSC 84 at [114] per Martin J

4. Necessity of Variation to Terms of Agreement and Consent Order

You say in your letter that an amendment to the Terms of Agreement and the Consent Order is not necessary. That is a marked change of position from that expressed in your letter of 11 July 2018, in which you proposed variations to both the Terms of Agreement and the Consent Order.

Our client considers that variations to both the Terms of Agreement and Consent Order are necessary in order for our client to be in a position to properly pay to your clients an additional amount now sought by your clients. Indeed, were our client to now cause additional amounts to be paid to your clients from the property of the FMIF in respect of their costs of the Indemnity Application, without a variation to the Consent Order having been made, it is possible that our client would be regarded as acting beyond his authority. Plainly, that is unacceptable.

5. Clause 1.3(d) of proposed Deed of Variation

You then express the view that clause 1.3(d) of the proposed Deed of Variation might be construed to cover claims beyond Mr Peden's fees. The reference to "this Deed" in the draft clause 1.3(d) is clearly a reference to the Supplementary Deed, not a reference to the Terms of Agreement. That is reflective of what was said in our letter of 31 July 2018.

That said, our client would have no issue with the term "this Deed of Variation" being used in clause 1.3(d), instead of "this Deed", but there is no real doubt about the intended meaning of the clause.

As to the point of principle, our client considers it fair and reasonable, given the need for your client to seek the variations to the Terms of Agreement has been occasioned by an oversight on the part of you or your client, that the FMIF members ought not bear the costs of any further claim by your client for indemnity from the FMIF with respect to the costs associated with the Supplementary Deed.

6. Costs of GST Payment dispute

You say that your clients do intend to claim the amounts totaling some $29,749 (excluding counsel's fees) in relation to the GST payment dispute.

This dispute was the subject of the "Payment Application" filed by your clients on 19 December 2017.

We point out that your clients have agreed by clause 2.7 of the Terms of Agreement that your clients have agreed to bear their own costs of the Payment Application and not to seek any indemnity from the property of the FMIF.

7. Mr Whyte's costs in addressing issue of Mr Peden's invoice / variation to Terms of Agreement

We note that you and your client do not provide a running commentary as to your client's costs relating to various issues and our client does not propose to incur the cost of doing so either.

8. Threatened application

Your email of 24 October 2018 threatens to bring an application. We are unaware of what the basis of such an application would be, and note that such an application would be wholly unnecessary and serve only to increase costs for FMIF members.

In any event, as pointed out above, our client, without being under any obligation to do so, has offered to enter into a Supplementary Deed which would allow for payment of a further amount to your client from the FMIF for Mr Peden's invoice, over and above the agreed quantum of costs provided in the Terms of Agreement and the Consent Order.

We look forward to receiving your response to the enclosed draft Supplementary Deed.

Yours faithfully

David Schwarz
Tucker & Cowen

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RUSSELLS

11 July 2018

Our Ref: AJT:JTW:20131259

Your Ref: Mr Schwarz

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By Email: dschwarz@tuckercowen.com.au

Dear Colleagues

LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation)
Cost Order made in Supreme Court of Queensland Proceeding number 3508 of 2015

Further to your Mr Schwarz's telephone conversation with our Mr Tiplady of last Friday, 6 July 2018, attached is an invoice dated 21 June 2017 from Mr Peden in respect of his costs of preparing for and appearing at the hearing before Justice Jackson on 19 and 20 June 2017 (being the FMIF indemnity and expenses application).

As discussed, this invoice had not been delivered to Russells prior to our reconciliation of the payments to be made from the funds received last week from the LM First Mortgage Income Fund. As such, it was not billed to LM Investment Management Limited (Receivers and Managers Appointed) (in Liquidation) as part of what should have been our invoice number B29948 dated 28 July 2017 (copy enclosed). Accordingly, this invoice was not part of the amount claimed and which was included in clause 3.3 of the Heads of Agreement dated 18 June 2018.

This was plainly due to an oversight. To this end, we enclose a copy of Mr Peden's email to the writer of Thursday, 5 July 2018 which details the situation. In these circumstances we wish to raise this issue with you and ask that you bring it to Mr Whyte's attention with a view to both the Heads of Agreement as well as the Consent Order made on 27 June 2017 being varied to incorporate a further amount of $55,257.00 (i.e. the amount of the enclosed tax invoice minus the first four time entries, which relate to the remuneration application).

We apologise for this situation and any inconvenience which may be caused but it is plain that the invoice from Mr Peden ought to have been included in the amount sought and paid pursuant to the costs order made by His Honour Justice Jackson on 22 November 2017.

The work was plainly undertaken and the amount charged by Mr Peden is, in our view, reasonable.

Naturally, we will prepare all necessary documentation to affect the variations to the Heads of Agreement and the Consent Order should Mr Whyte be so agreeable.

We look forward to hearing from you and thank you (and your client) for your understanding in the circumstances at hand.

Yours faithfully

Ashley Tiplady
Partner

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Mobile 0419 727 626
ATiplady@RussellsLaw.com.au

20131259/2486436

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Marcelle Webster.

Associates.
Emily Anderson.
James Morgan.
Scott Hornsey.
Robert Tooth.
Paul Armit.
Wesley Hill.

Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady / Mr Walsh

31 July 2018

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

Email: atiplady@russellslaw.com.au
jwalsh@russellslaw.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*"); Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte Supreme Court of Queensland Proceeding No. 3508/2015; Indemnity Application by Park & Muller as Liquidators of LMIM filed 20 May 2017 - Orders of Jackson J, 22 November 2017

We refer to your letter of 11 July 2018, which was received with your email of 11 July 2018 and which enclosed a number of other documents, including a fee note to your firm from Mr John Peden dated 21 June 2017.

Relevantly, you have said that, due to an oversight, the invoice from Mr Peden had not been received by your firm when the amount of the costs to which your clients were entitled pursuant to the Orders of Jackson J made on 22 November 2017, in respect of the "Indemnity Application", was being negotiated. As a consequence, the amount of those costs was fixed by agreement (and by Consent Order) and subsequently paid without that fee note having been taken into account.

We note that the failure appears to have been due, at least in part, to an issue on the part of Counsel's invoicing system, and you have provided to us a copy of an email from Mr Peden to you dated 5 July 2018, providing an explanation of the circumstances.

We, and our client, have given consideration to your clients' request that both the Terms of Agreement, as well as the Consent Order made on 27 June 2017, be varied to incorporate a further amount in respect of the invoice to you from Mr Peden.

Your letter has requested payment of a further amount of $55,257 in respect of Mr Peden's invoice. However, it appears that the calculation of that amount has not taken account of the following:-

1. The agreement between the respective parties was that the amount of costs would be calculated and paid on a GST-exclusive basis, in keeping with the 'indemnity principle', given that your clients have been able to claim the input tax credits on the amounts of your tax invoices (that agreement having been reflected in the amounts the subject of the Terms of Agreement); and

2. The costs Order in the Indemnity Application provides for payment to your clients of 90% (rather than 100%) of your clients' costs, to be paid out of the FMIF.

Having regard to those matters, and the exclusion of the first four items in Mr Peden's invoice (which your letter acknowledges relate to another proceeding), we calculate the relevant amount of Mr Peden's invoice to be $45,225.

We understand that your clients do not seek any additional payment in respect of the costs of the Remuneration Application; if they do, please tell us as soon as possible.

We are instructed that our client is prepared to agree to a variation to the Terms of Agreement, as well as to the Consent Order made on 27 June 2018 in the Indemnity Proceeding, to allow for payment of an additional amount of $45,225 to your clients, on the basis that:-

1. Your clients do not later claim further costs from the FMIF in respect of the correspondence concerning Mr Peden's invoice and attending to those variations (we say this for the sake of completeness, but we expect that it goes without saying); and

2. Naturally, no interest would run on that varied Order; having already procured prompt payment to you of the amount fixed by the Order of 27 June 2018 (and by the Terms of Agreement), our client will again use his best endeavours to procure prompt payment of the additional amount once both the Terms of Agreement and the Consent Order have been varied, but we reiterate that the FMIF bank accounts are not under his exclusive control.

Naturally, formal documentation (to attend to both the variation to the Terms of Agreement, and the variation to the Consent Order) will be required; we are instructed that there should be no binding agreement until such time as at least the formal documentation recording the variation to the Terms of Agreement has been signed by all parties to those Terms of Agreement.

You might kindly let us know by return correspondence whether your clients are agreeable to the above proposal.

Yours faithfully

David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

RUSSELLS

SUPPLEMENTARY DEED TO TERMS OF AGREEMENT

DAVID WHYTE IN HIS CAPACITY AS RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND (ARSN 089 343 288) AND AS THE PERSON RESPONSIBLE FOR ENSURING THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND IN ACCORDANCE WITH ITS CONSTITUTION

and

LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461

and

JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461

Russells Contact: Julian Walsh
Telephone: 07 3004 8836
Email: JWalsh@RussellsLaw.com.au
Reference: 20131259

SUPPLEMENTARY DEED TO TERMS OF AGREEMENT

Dated

BETWEEN **DAVID WHYTE IN HIS CAPACITY AS RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND (ARSN 089 343 288) AND AS THE PERSON RESPONSIBLE FOR ENSURING THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND IN ACCORDANCE WITH ITS CONSTITUTION**

AND **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461**

AND **JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461**

RECITALS

A. The Parties entered into a Terms of Agreement on 18 June 2018 (**the Terms of Agreement**).

B. On 27 June 2018, the Deputy Registrar made an Order ("**the Costs Order**") fixing the costs payable to the Liquidators under paragraph 2 of the Indemnity Order in the sum of $220,859.31, pursuant to clause 3.3 of the Terms of Agreement.

C. On or about 3 July 2018, the sum of $220,859.31 was paid to the Liquidators in payment of the costs payable under the Costs Order.

D. The Parties wish to vary the Terms of Agreement on the terms set out in this Deed.

1. VARIATIONS TO THE TERMS OF AGREEMENT

1.1 Definitions

(a) Terms defined in the Terms of Agreement have the same meaning in this Deed.

(b) The terms "**Varied Costs Order**" and "**Additional Amount**" have the meanings set out in, respectively, clauses 1.2(a) and 1.2(b)(ii) of this Deed.

(c) Clause 1.1 be varied by inserting as follows:

*"**Deed of Variation*** *means the Deed of Variation varying this agreement"*

1.2 Costs Orders – Indemnity Application

(a) The Parties hereby agree to seek by consent, a variation to the Costs Order, to increase the amount stated in the Costs Order from $220,859.31 to $266,084.31 ("**Varied Costs Order**").

(b) The Parties agree to use their best endeavours to procure that:-

(i) Consent Orders varying the Costs Order in accordance with clause (a) are filed within 7 days after the date of this Deed and are made as soon as reasonably practicable thereafter;

(ii) payment is made to the Liquidators of the additional amount of $45,225 ("**the Additional Amount**") as soon as reasonably practicable after the Varied Costs Order is made, in full and final payment of the costs payable under the Varied Costs Order.

1.3 Further conditions

(a) The variations to the Terms of Agreement contained herein take effect once this Deed is executed by all Parties and exchanged.

(b) The Liquidators and LMIM acknowledge and agree that, other than the Additional Amount, neither the Liquidators nor LMIM are entitled to be paid any further or additional amounts , whether for GST or otherwise, from the property of the FMIF under or pursuant to paragraph 2 of the Indemnity Order or the Varied Costs Order.

(c) Except as otherwise expressly provided in this document, each party will bear and pay its own fees and expenses of and incidental to the negotiation, preparation and execution of this Deed.

(d) The Liquidators and LMIM agree not to claim or seek from the FMIF any indemnity or payment in respect of any remuneration, costs or expenses (including legal fees or outlays) whatsoever of or incidental to this Deed, the negotiations preceding the Parties entry into this Deed, or the carrying out of the steps required by this Deed.

(e) No interest is payable on the Varied Costs Order.

(f) The parties hereby acknowledge and affirm all of the terms and conditions contained in the Terms of Agreement (as varied by this Deed).

(g) This Deed may be executed in two or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

EXECUTED as a deed

SIGNED SEALED AND DELIVERED by **JOHN RICHARD PARK** in the presence of:

Witness Signature	**Signature**
Print Name	**Print Name**

SIGNED SEALED AND DELIVERED by **GINETTE DAWN MULLER** in the presence of:

Witness Signature	**Signature**
Print Name	**Print Name**

EXECUTED by **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461** by its duly appointed liquidator **John Richard Park**:

Witness	**Signature of John Richard Park**
Print Name	

SIGNED SEALED AND DELIVERED by **DAVID WHYTE** in the presence of:

Witness Signature	**Signature**
Print Name	**Print Name**

Tucker&CowenSolicitors.
TCS Solicitors Pty. Ltd. / ACN 610 321 509

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Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady / Mr Walsh

26 October 2018

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

Email: atiplady@russellslaw.com.au
jwalsh@russellslaw.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Application filed by Mr Park and LMIM on 17 July 2018 seeking payment of further remuneration ("*the July Application*")

We refer to your letter of 9 October 2018 with respect to the July Application.

Your letter suggests, in effect, that the parties agree now, before His Honour delivers judgment:-

1. the terms of the costs orders to be made, as between our respective clients, in respect of the July Application; and

2. a process (other than assessment) as to the fixing of those costs.

Although your client's Counsel, Mr Peden QC, sought orders on 3 October 2018 in terms of paragraphs 10 and 11 of a draft Order we received from you that morning just before the hearing, your letter under reply addresses only the costs of the July Application and does not purport to address matters in similar terms to paragraph 11 of that draft Order, which concerned an apportionment of all legal costs to be claimed out of the FMIF.

Proposal as to costs orders

As to the first of those suggestions, the usual course would be for the parties to receive judgment in respect of the July Application and, having the benefit of His Honour's findings in respect of the various aspects of that application, to either make submissions to His Honour as to the appropriate orders to be made as to costs or to reach agreement as to those orders such that orders may be made by consent without the need for submissions.

You will recall that, following delivery of the judgments on 17 October 2017 and with the benefit of those judgments, our respective clients did reach agreement with respect to the appropriate orders to be made as to the costs of both:-

1. the Indemnity Application (the application filed on 20 May 2016 and amended application filed on 13 June 2017), which was heard on 19 and 20 June 2017; and

2. the Remuneration Application (the Further Amended Originating Application filed on 16 December 2015), which was heard on 22 and 26 February and 14 March 2016.

Orders were then made on 22 November 2017 in the terms that had been agreed, although the orders were not, strictly speaking, made by consent.

Our client considers that it is necessary to have regard to the terms of His Honour's judgment before attempting to fashion appropriate orders as to the costs of the July Application. You will recall that his Honour observed that a "*point or two of some importance in principle*" had been identified in the course of the application.

In the circumstances, our client considers that it is appropriate to await delivery of his Honour's judgment in the July Application and, with the benefit of His Honour's judgment, to address matters of costs orders.

Our client is hopeful that, having the benefit of his Honour's judgment, the parties will be able again to reach a consensus as to appropriate orders to be made as to the costs of the July Application. Our client does, however, reserve his right to make submissions to His Honour as to appropriate costs orders, having regard to His Honour's judgment on the July Application.

Proposal as to summary assessment / fixing of costs

At the hearing on 3 October 2018, the following exchange took place between His Honour and Mr Peden QC:

> "*MR PEDEN: Okay. Ten and 11 are directed at something slightly different, and that is for the costs of this remuneration application that your Honour's just heard, in order – both parties in the past have sought orders that the costs be paid out of the FMIF on an indemnity basis. Now, from our side that's proved to be a very – well, less than satisfactory process. And what we had hoped, your Honour, is that by the time that your Honour comes to handing down a judgment on the remuneration, we will be able to have an agreed – hopefully agreed position in relation to the costs of both sides. That is, in a transparent manner, the costs of both sides are before your Honour and able to be fixed. The alternative, your Honour, in the – as I've said, the issue we've had in the past is - - -*
>
> *HIS HONOUR: Well, it's the normal litigant's problem about assessment of costs?*
>
> *MR PEDEN: Yes.*
>
> *HIS HONOUR: Yes, it's not – nothing special about this case, is there?*
>
> *MR PEDEN: It's nothing special, other than it's proving – it's proved to be one of the issues between the parties that is an ongoing problem* (page 25 of transcript)."

The substance of that submission by Mr Peden to His Honour was that there has been some considerable difficulty or expense involved in fixing the costs ordered to be paid to your client from the property of the FMIF. Your letter also suggests that the course of dealings between our respective clients in respect of costs recovery has been "somewhat unsatisfactory."

We have assumed that Mr Peden, and you, were not referring to the process of making the costs orders themselves, since (as mentioned above) those orders were promptly agreed between our respective clients (albeit not strictly made by consent).

That said, we, and our client, remain puzzled at the suggestion that the process of fixing the quantum of costs was "*an ongoing problem*" or in some other way unsatisfactory.

Contrary to Mr Peden QC's submission, and your letter, we note that orders have been made by the Registrar in this proceeding, fixing your client's costs by consent on no fewer than three occasions without the need for any assessment process at all to be commenced.

In respect of both the Remuneration Application and the Indemnity Application, consent orders were made following relatively limited exchanges of "without prejudice" correspondence concerning the quantum of costs.

Our client did not require that your client's costs be assessed, and the costs of an assessment were not incurred. Our client does not accept that your client was forced to accept (or did accept) any unjustified reduction in the quantum of costs sought. Rather, our client took the commercial view (in the interests of ultimately saving costs for the members of the FMIF) not to challenge claims for costs that might otherwise have been challenged on assessment.

In the result, our respective clients reached agreement as to costs after a process that closely resembled that which is now proposed by your client as to the process to be adopted for ascertaining the quantum of costs to be ordered (following judgment on the July Application) to be paid to your client from the FMIF.

Due to the desire on the part of our respective clients to resolve a number of different issues as part of the one overarching agreement (recorded in the Terms of Agreement dated 18 June 2018), the consent orders were made in respect of the costs of the Indemnity Application and the Remuneration Application some time after the quantum of those costs had already been agreed.

Having regard to that history of orders having been made by consent fixing the quantum of costs, our client and we do not know what Mr Peden was referring to in his submission to His Honour, in the exchange mentioned above.

Turning, then, to the proposal in your letter; our client agrees as a matter of principle that it would be desirable for the parties to agree upon a summary process to agree the quantum of your client's costs to the extent that they are ordered to be paid out of the FMIF. Our client has no objection in principle to a summary process along the lines of that adopted previously, namely:

1. Your client (via your firm) provides a spreadsheet summarising the overall costs incurred with respect to the application, including counsel fees and outlays;

2. You will also provide on an open basis the itemisation of the work performed (by way of invoice itemisations or work in progress ledgers, in either case showing the work done, time taken, cost and person who performed the work) in respect of the relevant matter, together with copies of all invoices for all third-party outlays, including counsel fees and the like, and any relevant costs agreement specifying the rates (as would be necessary in any event for an assessment);

3. You will have reviewed the material provided to ensure that any incorrect entries not claimed, will have been removed and identify any reduction or write-offs, as you have suggested;

4. Our client (via our firm) will then notify you within 21 days of receipt of such information as to whether there is any objection to the quantum of those costs, and if so, briefly outlining those objections, either as to entries or work claimed or as to matters of principle; and

5. Thereafter, your client can either accept or dispute the objections and respond to matters of principle. It would be hoped that the parties could thereby reach agreement.

In the event that the parties cannot reach agreement following this process, then either your client or ours may consider it necessary to require an assessment to be undertaken. However, we do not presently anticipate that our client would require an assessment of the quantum of the costs, given that our client has not previously required any such assessment and the parties have agreed the quantum of your client's costs by consent.

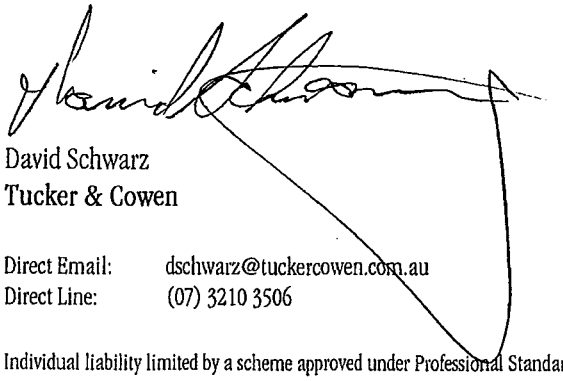
If you consider that process to be unsuitable in some way, please let us know.

This process assumes that orders would be made for your client's costs, or a proportion of those costs, to be paid from the property of the FMIF on the indemnity basis, having regard to the rates charged pursuant to a costs agreement with your client. It may also be appropriate to adopt this process to seek to quantify costs ordered to be paid on the standard basis, although there is of course greater scope for disagreement as to the proportion that such costs would have to the 'indemnity' costs, in that event.

It would not, in our client's view, serve any benefit to require any such process to be unduly rigid, and our client therefore does not consider it necessary or appropriate to make that process the subject of an Order of the Court.

You have expressed the hope that adopting such a process would lead to the parties being able to agree upon a quantum of costs in a timely fashion. Our client shares that hope and has every confidence that it will.

Yours faithfully



David Schwarz
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TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No 3383 of 2013

RAYMOND EDWARD BRUCE **Applicants**
and ANOTHER

and

LM INVESTMENT MANAGEMENT LIMITED **Respondents**
and ANOTHER

BRISBANE

10.17 AM, THURSDAY, 27 NOVEMBER 2014

JUDGMENT

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: I make an order in terms of the draft initialled by me and placed with the file. This is primarily an application by the Court appointed receiver pursuant to section 601NF(2) for an order approving the remuneration for his work done during the period of the receivership from 1 April 2014 to 30 September 2014.

He was appointed in connection with a registered management investment scheme operated by LM Investment Management Limited (receivers and managers appointed)(in liquidation) to ensure it is wound up in accordance with its constitution and also appointed by the Court as the receiver of the property of the scheme for the purpose of aiding the orderly winding up of the scheme.

The administration is complex. The extensive written submissions of Ms Brown of Queen's Counsel and Mr de Jersey of counsel outline the nature of the administration, the work that has been undertaken and the basis of the remuneration that is sought. When the matter was called, there were no appearances. There is a schedule which is exhibit 1 which indicates the parties who have been served with the notice of the application and the manner in which they have been informed of the application.

All members of the relevant fund have the opportunity to check the website that is being conducted by the receiver for keeping them informed of developments in relation to the receivership. The remuneration is for a significant amount, just over $1 million inclusive of GST, but the work that has been required to be undertaken in respect of a fund of considerable value has resulted in the fees of this magnitude, which Ms Brown informs me is less than what was anticipated for the budget for the period.

The material appears to be in order. Although this application results in the approval of a significant amount of remuneration, that is what is required to be paid in order to have a receiver of the qualifications of Mr Whyte undertake the significant task that has been entrusted to him by the orders of this court. That is why I made the order, which also includes an order in relation to fees for Mr Whyte and Mr Fielding as agents of The Trust Company (PTAL) Limited in relation to another appointment should be made. Thank you.

MS BROWN: Thank you, your Honour.

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TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JACKSON J

No 3383 of 2013

RAYMOND EDWARD BRUCE and ANOTHER **Applicants**

and

LM INVESTMENT MANAGEMENT LIMITED and ANOTHER **Respondents**

BRISBANE

2.42 PM, TUESDAY, 23 JUNE 2015

JUDGMENT

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: The application before me is for approval of remuneration of the receiver, Mr Whyte. I have examined the affidavits which have been relied upon over the last couple of hours in chambers, as well as the time that has been spent in the hearing of the application in Court.

There are two categories of remuneration: first, remuneration for ensuring the winding up of the First Mortgage Income Fund pursuant to an order of Justice Dalton made in 2013; second, remuneration for acting as the agent of the custodian of the fund in respects of the securities held by the custodian as trustee for the fund members.

The period of remuneration is of seven months between 1 October 2014 and 30 April 2015. The amounts of the relevant remuneration are large. For the first category of remuneration the amount is $1,761,911.25, that is, the remuneration as receiver ensuring the winding up of the fund. For the second category the amount is $442,214.30, that is, as agent of the custodian for the securities.

The amounts sought to be approved are supported by affidavits of Mr Whyte. His most recent affidavit in substance includes a detailed schedule of what work was done. The amounts sought to be approved are based on rates applied to the work that was done that are increased from earlier rates for similar work that has been approved by the Court by relatively small amounts in the order of five per cent. They don't materially differ from the rates previously approved for the kinds of work involved.

There is not a great deal of information in the material as to how effective or valuable the work which has been carried out has been, but included in the affidavit are copies of reports that have been sent to investors for the calendar year ending on 31 December 2014, and there are in earlier affidavits earlier reports of a similar kind.

From them a picture of the administration can be gleaned up until December 2014. As well, Mr Whyte's affidavit recently filed, shows the progress that has been achieved in realisation of the assets and, in particular, of approximately half a dozen nursing homes or similar forms of property. The receiver has been able to achieve the sale of four or, perhaps, five. A number of those sales settled in the last couple of months. Another is due to settle soon. As well, one can see from the reports as at December 2014 that the assets of the fund appear to have swelled over the period of 12 months up until 31 December 2014 by an amount in excess of $13 million.

I've also noticed as a matter of context the historical fees which have been charged to the fund by managers prior to Mr Whyte far outweigh the level of the fees which he has charged, even though the amounts in question today are very significant.

In the reasons for judgment given by Justice Mullins on 27 November 2014 in approving Mr Whyte's fees for the receivership from 1 April 2014 to 30 September 2014, and for a relatively short period of time for the fees relating to appointment as agent of the custodian, her Honour described the administration as complex and commented that although the amount on the application before her was also

significant, that is what is required to be paid in order to have a receiver with the qualifications of Mr Whyte undertake the complex and significant task that has been entrusted to him by the orders of the Court.

Having looked with some care through the affidavit material, I concur in that expression of opinion. There is, quite clearly, a significant degree of expense which has been incurred in ensuring that a number of complex relationships and questions that were required to be considered were properly dealt with.

A second factor which I have considered is that the descriptive material in Mr Whyte's most recent affidavit in some respects is similar to events reported to investors in December 2014 and for the purposes of the application that was made to Justice Mullins for approval of the remuneration for the prior period.

It is important that the description of the work done relates to the period of the remuneration claimed, however, it seems to me that a reasonable appreciation of the difference appears when the affidavits and the background material is looked at collectively.

No member of the fund or other interested party appeared to oppose the application.

Mr Whyte swears that the work was necessary and that the amounts claimed are reasonable. That those amounts are relatively high is not a reason to reject his evidence. The basis of the amounts claimed compares to those approved on 27 November 2014 by Justice Mullins for the period from 1 April 2014 to 30 September 2014. Taking those matters into account, in my opinion, since the work was done, since the work was necessary, and the rates themselves appear reasonable, there is nothing else in the circumstances that I can see which would act against or militate against the orders for which Mr Whyte applies.

Lastly, I mention that a further order was sought relating to the hearing of the application today because there were 61 members of the fund, who were referred to in paragraph 14 of the affidavit of Murray Daniels sworn on 23 June 2015, to whom the notice provisions in accordance with the order of Justice Peter Lyons for notice to members of the fund did not work because the addresses for those members are inactive. I am quite satisfied having regard to the affidavit of Mr Daniels that reasonable attempts have been made since it was appreciated that those 61 members will not have received effective notice to bring the application and the hearing today to their attention.

Accordingly, it seems to me that it is appropriate to make a further order which has the effect of abridging the time which elapsed between the further efforts and today as a period sufficient for the hearing of the application. It should be observed that the 61 members in question are 61 out of approximately 4500 and that any further delay in the hearing and further service of information or notice of the delayed hearing to the members would be a matter of significant cost which is to be balanced

against the unlikely event that any of the 61 members would be in some way disadvantaged because they might wish to appear in opposition to the application.

For those reasons, I propose to make an order in terms of the draft which has been handed to me abridging the relevant time for the notice of the application approving the remuneration of Mr Whyte as the person responsible for ensuring that the fund is wound up in accordance with its constitution, approving the remuneration of Mr Whyte and Mr Fielding as the persons appointed as agents for the custodian in respect of the securities and making an order that Mr Whyte's costs of and incidental to the application, including the cost of appearances before this Court which are nominated in the draft, should be costs in the winding up of the fund and paid out of the assets of the fund.

I'll sign the draft, Mr de Jersey. Is there anything else?

MR DE JERSEY: No, thank you, your Honour.

HIS HONOUR: Thanks, gentlemen. Adjourn the court, please.

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TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MARTIN J

No 3383 of 2013

RAYMOND EDWARD BRUCE and ANOTHER **Applicants**

and

LM INVESTMENT MANAGEMENT LIMITED and OTHERS **Respondents**

BRISBANE

10.32 AM, FRIDAY, 11 DECEMBER 2015

JUDGMENT

Any Rulings that may be included in this transcript may be extracted and subject to revision by the Presiding Judge.

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HIS HONOUR: This is an application for an order approving the remuneration for work done by the applicant for the period 1 May 2015 to 31 October 2015. At first sight it appears, because it is, a large sum, approximately $2.5 million. I'm satisfied, though, that the relevant tests have been passed by the applicant in establishing that this is an appropriate matter for approval, and I also bear in mind that no interested party has sought to oppose or appear on the application. The arguments advanced in the outline of submissions are arguments I accept and form the basis of my decision.

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TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DOUGLAS J

No 3383 of 2013

RAYMOND EDWARD BRUCE and ANOTHER **Applicants**

and

LM INVESTMENT MANAGEMENT LIMITED and OTHERS **Respondents**

BRISBANE

11.37 AM, TUESDAY, 28 JUNE 2016

JUDGMENT

Any Rulings that may be included in this transcript may be extracted and subject to revision by the Presiding Judge.

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HIS HONOUR: This is an application in respect of the remuneration of the applicants as receivers and as agents of a company called A Trust Company Pty Ltd in lieu of LM Investment Management Limited (receivers and managers appointed in liquidation) in respect of certain securities set out in the application and draft order. The application needed to be served on some 4500 members of the company in receivership, along with other people, and there has been short service of 48 of them but I am satisfied that the approximate six days' notice that has been given to them is sufficient for present purposes to allow me to deem proper service to have been effected by abridging the time required pursuant to paragraph 3 of the order of the Court made on the 1st of June 2015.

The remuneration sought in respect of the receivership is large – in excess of $1.4 million – while that, for the applicants acting as agents, is significantly less – 36,500 dollars odd. It is quite apparent from the material, however, that this has been an extensive and complex receivership dealing with large sums of money and many issues, some of which have required or continue to require litigation to resolve.

The affidavit of Mr Whyte, one of the receivers, points out the number of members of the First Mortgage Income Fund, of which he was appointed as receiver. The assets held by it consisted largely of retirement villages, which were heavily regulated and required specialised knowledge in their realisation and day to day management. The winding up was also made difficult, on his evidence, by a complex interrelationship between associated companies in the receivership.

Public examinations of four weeks have been conducted during this period, for which remuneration is sought. An action has been commenced against the erstwhile auditors, where the claim may be in the vicinity of $100 million. Settlement of the last remaining retirement home was delayed due to issues with the purchaser and there were protracted negotiations with the purchaser and mortgagor of two of the retirement villages in relation to the terms of sale and associated contractual arrangements and a large number of litigious matters were heard during the immediately previous period for which the remuneration was claimed, much of which litigation continued into the period in respect of which remuneration is sought.

The receiver has detailed clearly the amount of work done by him and his staff have provided detailed schedules of the work done and the rates charged for it. He has deposed to work having been done and that it was required for the purposes of the winding up of the fund, together with a full explanation as to the relevance of the tasks set out in the schedules attached to this affidavit. The assets involved are, as I said, significant and it seems clear to me that the work required in realising them is also significant.

Having regard to the evidence, which is unchallenged as no person appeared to resist the application, and also having regard to the fact that the Australian Securities and Investment Commission has been served and does not oppose the making of the orders sought, it seems to me appropriate to make an order in the terms sought. I shall initial the draft and place it with the file.

Thanks for your help, Mr - - -

MR DERRINGTON: Excuse me, your Honour. I fear my written submissions might have slightly misled your Honour. In relation to the relevant period, the public examinations occurred immediately before this relevant period.

HIS HONOUR: Right.

MR DERRINGTON: It as the analysis of that - - -

HIS HONOUR: It's led to the action against the - - -

MR DERRINGTON: Indeed. I'm sorry, your Honour. It's probably my fault, that.

HIS HONOUR: No. That's probably mine. But the critical thing is that it's a long, complex receivership. Thank you.

MR DERRINGTON: Thank you, your Honour.

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TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DAUBNEY J

No 3383 of 2013

RAYMOND EDWARD BRUCE and ANOTHER **Applicants**

and

LM INVESTMENT MANAGEMENT LIMITED and OTHERS **Respondents**

BRISBANE

10.25 AM, FRIDAY, 2 DECEMBER 2016

JUDGMENT

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

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HIS HONOUR: This is an application by Mr Whyte, who was appointed, relevantly, as a court-appointed receiver, and also appointed pursuant to s 601NF of the *Corporations Act*, to ensure that the fund known as the First Mortgage Income Fund is wound up in accordance with its constitution. He also seeks remuneration in his capacity as agent of the trust company in lieu of LMIM in respect of certain securities held for the fund.

The material before me amply demonstrates the significant work which Mr Whyte and his staff have undertaken in the progress of this very complicated receivership and associated matters of external administration. He is, for example, necessarily engaged in numerous pieces of very complex litigation in which the numbers involved are very large indeed.

I am more than satisfied that Mr Whyte has performed a lot of work in properly conducting the administration during the period of time with respect of which he now seeks remuneration, namely 1 May 2016 to 31 October 2016. I am also satisfied as to the reasonableness of the rates at which his fees are sought to be levied.

On its face, the amount sought by him for remuneration is large. It reflects, however, as I have already said, a very large amount of work undertaken by Mr Whyte and his staff. It is also, I note in passing, a lesser amount than amounts which have been approved for him by way of remuneration during prior 6 monthly periods of his administration. That reflects the practical consequence of the progress of the external administration and the fact that tasks which it was previously necessary for him to undertake have now been attended to.

All of that being said, I am satisfied that it is appropriate for Mr Whyte's remuneration for this period to be approved in the terms sought. There will be an order in terms of the draft that I now initial and place with the papers.

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TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No 3383 of 2013

RAYMOND EDWARD BRUCE and ANOTHER — **Applicants**

and

LM INVESTMENT MANAGEMENT LIMITED and OTHERS — **Respondents**

BRISBANE

11.16 AM, FRIDAY, 30 JUNE 2017

JUDGMENT

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: This is an application for remuneration by Mr Whyte who has been appointed as a Court appointed receiver, and he has also been appointed to ensure that the LM First Mortgage Income Fund is wound up in accordance with its constitution. He seeks remuneration for work done in the period of the receivership from 1 November 2016 to 30 April 2017.

Application is also made for remuneration as agent of the trust company in lieu of LM Investment Management Limited in respect of certain securities held for the fund. There is extensive material to show that notice of the application has been given to all parties who have an interest in opposing the remuneration. No person appeared when the matter was called.

Mr Whyte has provided the Court with copies of all emails received in response to the application. It goes without saying that many ordinary investors are unhappy about the drain on the funds in respect of the costs. The material relied on by Mr Whyte shows the work that has been undertaken in the period of six months that is the subject of the remuneration claim.

The matter has reached the stage now where the primary work of the receiver is in relation to litigation in this Court. At least from the investors' point of view currently the fees that are sought are showing a reducing pattern, although the fees are still substantial. Mr Whyte is cognisant of the approach of the Court to approval of remuneration and the need for proportionality in respect of the claim.

I am satisfied I should exercise the discretion to make the order that is sought. That is why I make an order in terms of the draft initialled by me and placed with the file. Thank you.

MR DE JERSEY: Thank you.

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TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

APPLEGARTH J

No 3383 of 2013

RAYMOND EDWARD BRUCE and ANOTHER **Applicants**

and

LM INVESTMENT MANAGEMENT LIMITED and OTHERS **Respondents**

BRISBANE

10.13 AM, THURSDAY, 30 NOVEMBER 2017

DAY 1

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HIS HONOUR: Yes. Bruce v LM Investments. It's good to see you doing some weight lifting, Mr De Jersey.

MR DE JERSEY: Thank you, your Honour.

HIS HONOUR: My Associate was going to do some weight lifting when the registry threatened her with the prospect of bringing all 18 or 19 boxes up, but I said that she perhaps might only bring the last one or two.

MR DE JERSEY: That's all that's needed, your Honour. And if your Honour needs to refer to anything else, we've got working copies here, so we can easily provide them.

HIS HONOUR: Thank you.

MR DE JERSEY: It looks worse than it is, in short.

HIS HONOUR: Thank you. Yes. You appear for the applicant, Mr Whyte?

MR DE JERSEY: I appear for Mr David Whyte, who is the person appointed, pursuant to section 601NF(1) of the Corporations Act.

HIS HONOUR: Thank you.

MR DE JERSEY: He's a court-appointed receiver, and I appear instructed by Tucker & Cowen.

HIS HONOUR: I thought – I might have appointed him some – appointed Mr Whyte as something, a long time ago – no, I didn't; that was a different one.

MR DE JERSEY: This was the Justice Dalton - - -

HIS HONOUR: No. I – no, I can't take the credit or the blame for this one.

MR DE JERSEY: This is the Justice - - -

HIS HONOUR: I remember Mr Whyte – I put a Mr Whyte to another complicated insolvency. Not this one. Thank you.

MR DE JERSEY: Your Honour, as your Honour, as your Honour might expect, there's a – service is a little bit complicated, and it's to be done pursuant to some orders made by Justice Peter Lyons, who substituted the service order. What I have, your Honour, to assist, is three affidavits, to be filed by leave, regarding the service, together with our schedule, that explains how it all works.

HIS HONOUR: Thank you.

MR DE JERSEY: So in short, the parties to the proceeding had been served, and all of the members had been notified of the application in conformity with Justice Peter Lyons's orders.

HIS HONOUR: Thank you.

MR DE JERSEY: Directions.

HIS HONOUR: I'll give you leave to file these affidavits of service. Thank you.

MR DE JERSEY: Did I provide your Honour with an outline of submissions?

HIS HONOUR: Thank you.

MR DE JERSEY: And I have a list of [indistinct] as agreed.

HIS HONOUR: Thank you. Just while that's coming up, I see the matter of Giannos, in the back of the court. You can just come forward and just tell me what the status of it is.

UNIDENTIFIED SPEAKER: It's a – it will be a contested adjournment, so I say around 15 minutes.

HIS HONOUR: Thank you. Okay, I thank your Honour. I'll deal with it, next.

UNIDENTIFIED SPEAKER: Thanks.

HIS HONOUR: Yes, Mr De Jersey.

MR DE JERSEY: Thank you, your Honour. Can I be bold and provide your Honour with a draft order?

HIS HONOUR: Thank you. I'll read your outline if that's - - -

MR DE JERSEY: Thank you, your Honour.

HIS HONOUR: - - - easiest. Who's taken Mr Derrington's mantle?

MR DE JERSEY: I can't remember.

HIS HONOUR: Just idle curiosity.

MR DE JERSEY: No, I knew, but I've forgotten, your Honour. I'm sorry.

HIS HONOUR: No, don't – you don't need to - - -

MR DE JERSEY: Yeah. It'll come to me.

HIS HONOUR: You don't need to know.

MR DE JERSEY: No.

HIS HONOUR: But you haven't got the crown.

MR DE JERSEY: What's that, sorry?

HIS HONOUR: You haven't inherited the crown.

MR DE JERSEY: No, thank goodness. I'm not worthy of it, your Honour.

HIS HONOUR: Mr Derrington might be quantifying his opportunity loss as we speak. But anyway.

MR DE JERSEY: Justice Brown was previously in this matter as well.

HIS HONOUR: Sounds like the curse: you take this brief on, and you get appointed as a judge. I say that with complete humour injected into it, less the transcript suggested otherwise.

MR DE JERSEY: Your Honour's face shows that it's humorous.

HIS HONOUR: Maybe I should recast it, and say this is a qualifying test, that if you're able to take on leading counsel role in this case, you're good enough to be a judge. That was probably what my colleagues would wish me to say. I have been greatly assisted by your submissions, both on the facts and on the principles. I mean, it's such a vexed area, that one has the statutory principles and the discussions that have occurred in the full federal court by Justice Brereton and others, and I'm not looking to re-plough the field that they have ploughed.

MR DE JERSEY: No.

HIS HONOUR: One always tries to think by way of analogy, and analogies are always flawed. And, I suppose, in the legal profession, we think – when we're talking about remuneration, we think about costs agreements and scales of costs, and when people are ordered to pay costs on the standard basis or on indemnity basis, and I suppose the thing that interests me – it doesn't particularly trouble me – is that I suspect, if we had the time, but it would come at a great cost to either a court or someone else, if someone had the enormous amount of time to run, not necessarily a fine-toothed comb, but some appropriately-spaced comb over all that Mr Whyte and his subordinates in the tax group and the finance group, and that, had done, they might say, well, on a broad-brushed basis, it's been done very well, but there were some things here that seemed to take too long or you had too many people, or there was duplication or something like that. And you would, as a result of that process that would come at a great cost, of someone being the contradictor, find that there was some – I won't say excessive work, but that, perhaps a close scrutiny of it would

pare down the remuneration. I'm not, today, particularly saying that one adopts some rule of thumb that whatever the receiver says is reasonable remuneration, or whatever, the kind of analysis that I can undertake on an application like this, you then apply a 92.7 per cent rule or something like that, but how do I address the inevitable inability, unless one appointed someone to - - -

MR DE JERSEY: Tax - - -

HIS HONOUR: - - - comb over things; to not necessarily perform a taxation, but to give it a higher degree of scrutiny than I can, that you would infer that if you did that scrutiny, there would be some hours spent or tasks undertaken that you say, well, I don't think it's reasonable to be remunerated to the extent that you asked for that task, because you took too long or something like that.

MR DE JERSEY: What your Honour can – your Honour can have some confidence in the figures that you've got, for these reasons.

HIS HONOUR: Yes.

MR DE JERSEY: First of all, the most sort of, perhaps, superficial answer to your Honour's question is found in paragraph 62 of my submission. Mr Wright actually wrote off - - -

HIS HONOUR: Yep.

MR DE JERSEY: Mr Whyte, sorry, 21,000.

HIS HONOUR: Yeah, but that's petty cash.

MR DE JERSEY: Chicken feed in a – yeah. But what your Honour also sees from the outline is that this is one of a number of remuneration applications, and from then, your Honour can see a general downward trend, this being the exception, for the reasons that are explained.

HIS HONOUR: Yeah.

MR DE JERSEY: But a number of judges of this court have, to varying degrees, looked at the material and the costs expended and being confident that it's reasonably proportionate, to use the Templeton words.

HIS HONOUR: Yep.

MR DE JERSEY: One other matter I should just draw your Honour's attention to, in relation to this question, is the receivership has reached the point where the assets have been sold, and it's - - -

HIS HONOUR: Yeah, and so the complexity to work – well, I shouldn't be so presumptuous, but I sense, from reading the affidavit and your submissions, that it, having moved more to the litigation phase, there's just a different profile of work, and it - - -

MR DE JERSEY: Exactly.

HIS HONOUR: - - - comes with its complexities.

MR DE JERSEY: Exactly, your Honour. And just in terms of answering your Honour's question in Templeton v ASIC [2015] FCAFC 137, the majority said – the court said, sorry:

> *More generally, considering the question of proportionality, one has to bear in mind two other points that may be overlooked: first, in performing some work, it may not be entirely clear, ex ante, what the precise benefit might be.*

So in terms of assessing what the benefit of this work is - - -

HIS HONOUR: Yeah.

MR DE JERSEY: - - - and whether it's valuable; whether it's producing results; whether it's excessive - - -

HIS HONOUR: Yeah.

MR DE JERSEY: - - - we're at the litigation stage; it's not easy to do so.

HIS HONOUR: And, I suppose, without being seen to endorse time costing, with its problems, just as with a system of time costing, if you ran the ruler over it, and you say, "Well, my goodness, these couple of senior assistants spent 14 hours doing something that they could easily have done in 10", there must be some element of swings and roundabouts, and a reasonableness calculation, because – or a reasonableness assessment, because just as one could, if you looked at it hard enough, find inefficiencies, you'd also find efficiencies that, boy, they managed to do in seven hours what most people take 10 to do. So I imagine there's that aspect to it, as well.

MR DE JERSEY: There's just one other matter, your Honour – two other matters. The first is that, as I think your Honour noted, in order to identity these efficiencies, it would cost money to do a taxation, and no one – none of the cases - - -

HIS HONOUR: Yeah. Exactly. And we don't have echoes in taxing costs.

MR DE JERSEY: No. We don't have the luxury of being able to do that.

HIS HONOUR: Yes.

MR DE JERSEY: But what your Honour has is a receiver who is one of the most senior in this state; in this country.

HIS HONOUR: Yes.

MR DE JERSEY: And your Honour can, in my submission, have confidence that, given that he is the appointed person responsible, and because of his seniority, and because he's not challenged, and because he's seen fit to write some of the fees off - - -

HIS HONOUR: Yes.

MR DE JERSEY: - - - that there is proportionality here. But just one other thing, your Honour: in terms of where this is going, in paragraph 37 of the outline, I refer to the claims.

HIS HONOUR: Yes.

MR DE JERSEY: So for example, the 2002-1-66 of '15 is a $200 million claim; 13534 is a 55 - - -

HIS HONOUR: So it's quite different to the other case, in terms of proportionality.

MR DE JERSEY: Exactly.

HIS HONOUR: And, I mean, you haven't won that case, but in terms of a return on investment, if you were – it's just like any litigation: the fact that it's a $200 million claim, as you can see, a $20 million claim doesn't mean the cost should be 10 times more, but, at a certain point, one would understand an appropriate investment of time and effort in pursuing a claim for 200 million.

MR DE JERSEY: Yes. And a good example of that is the claim against the [indistinct]

HIS HONOUR: Yes.

MR DE JERSEY: It's been hard-fought in terms of quantification, and a lot of the costs here had been incurred in - - -

HIS HONOUR: Yes.

MR DE JERSEY: - - - in producing a quantification which will survive strike-outs and challenges from the various defendants to that claim. So that's – because of the size of that claim, your Honour would understand it's subject to some challenge - - -

HIS HONOUR: Yes.

MR DE JERSEY: - - - which is expensive to meet.

HIS HONOUR: Okay.

MR DE JERSEY: But the other thing I needed to bring to your Honour's attention is that Mr Llewinville's affidavit refers to receiving – that his office received – BDO's receiving six communications from various members of the funds.

HIS HONOUR: Yes.

MR DE JERSEY: They expressed disappointment in the size of the fees.

HIS HONOUR: Yes.

MR DE JERSEY: But they don't – they don't go so far as to, in my submission, articulate a challenge which is - - -

HIS HONOUR: Okay.

MR DE JERSEY: - - - with respect, rational or which your Honour should be troubled with.

HIS HONOUR: Okay. Well, yes. Thank you for drawing my attention to that. If I go to those emails or texts, or whatever - - -

MR DE JERSEY: They're not exhibited to the affidavit, but I have copies if your Honour wants to read them.

HIS HONOUR: No, I don't particularly. But you are satisfied that he's faithfully captured or summarised the points that they're making?

MR DE JERSEY: He hasn't set out the substance in his affidavit; he said he received them.

HIS HONOUR: Yes. Okay.

MR DE JERSEY: I've read them, and they consist generally of one line, when's this going to end, sort of observations, so - - -

HIS HONOUR: Yes. And, well, one understands that - - -

MR DE JERSEY: The frustration.

HIS HONOUR: - - - response from members, and that's - - -

MR DE JERSEY: And, your Honour, in making the submission I did, I didn't mean in any way to downplay the – no doubt, the feelings that they feel.

HIS HONOUR: No, I – no. I understand. I suppose the other thing is that, although one doesn't ask ASIC to be a costs assessor, or to represent the interests of members – they can speak for themselves – if ASIC had a major concern about this, they'd appear and be directing my attention to some particular matters. So I'll take into account the dissatisfaction expressed by the members you noted, but it seems to me, for the reasons that you – given your submissions, I ought make the order which you seek. Anything else?

MR DE JERSEY: No, thank you, your Honour.

HIS HONOUR: Thank you. So as I said earlier, the affidavits that came in; leave to file those. I make the schedule of parties served. I make that exhibit 1.

EXHIBIT #1 ADMITTED AND MARKED

HIS HONOUR: The list of material – I don't think we need to put that on – they can just be put on the file. Doesn't need to be a court document. And your submissions have leave to file, as well. So order as per draft.

MR DE JERSEY: Thank you, your Honour.

HIS HONOUR: Thank you for all of your assistance.

ADJOURNED **[10.51 am]**

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TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BODDICE J

No 3383 of 2013

RAYMOND EDWARD BRUCE
and ANOTHER — **Applicants**

and

LM INVESTMENT MANAGEMENT
LIMITED and OTHERS — **Respondents**

BRISBANE

11.58 AM, THURSDAY, 21 JUNE 2018

JUDGMENT

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: David White makes application for an order approving remuneration for work he has undertaken pursuant to his appointment by the Court as receiver of a fund known as the LM First Mortgage Income Fund. The application is made in circumstances where there have been numerous orders in the past approving remuneration for that receiver. Those previous orders have approved remuneration in the order of $10 million.

Mr Maddrill, who appears as executor for the estate of the late Robert Arthur Coggle Maddrill, opposes the order for remuneration being made on the basis that the order should be deferred until the completion of remaining Court proceedings. Essentially, Mr Maddrill contends there is little incentive for those proceedings to be resolved in a timely way if the receiver continues to be able to be paid remuneration without any timeline being required in respect of the completion of those proceedings.

The receivership is a very complex receivership. It involves multiple entities in relation to various assets that were held. The primary assets were aged-care facilities in various locations. In addition, there are a number of legal proceedings which have been instituted in order to recover funds, which will be, ultimately, for the benefit of members of that fund should those proceedings be successful. It is in that context that the significant remuneration payments have been made in the past and approval is sought for further remuneration today.

It is a matter of concern that the receivership has now been going for a number of years. However, consideration must be given to the context of the receivership. Importantly, the receivership is now at the point where, essentially, all of the real assets have been realised. The remaining work, essentially, relates to outstanding legal proceedings.

If those legal proceedings are successful, there will be substantial funds that potentially will be recovered for the benefit of members of the fund. There have also been proceedings brought against the fund. The receiver is resolving those proceedings. One has recently been resolved, which will be for the benefit of members of the fund.

The receiver has set out the basis upon which the remuneration is claimed. It is correct the remuneration claimed is less than has been the case for corresponding periods in the past. That would be consistent with a reduction in the nature and extent of work required as assets have been realised in respect of the receivership.

Mr Maddrill's concern, however, is a real and genuine concern, namely, that there is no timeline for the completion of the ongoing litigation. It is a matter that needs to be given consideration by the receiver in order to ensure there is some finite timeline, accepting, of course, that the receiver is but one party in that litigation.

On future applications for remuneration, it would be expected there would be a timeline in relation to those proceedings, particularly as they represent the remaining focus of the receiver's work.

Notwithstanding the concerns expressed by Mr Maddrill, I am satisfied it is appropriate to fix the remuneration for the work that has been undertaken by the receiver for the period 1 November 2017 to 30 April 2018. The receivership is occurring in the context of a professional undertaking significant work which, to date, has been for the benefit of members of the fund. It would be unfair to deny that professional remuneration at this time on the basis it should be deferred pending conclusion of those outstanding proceedings.

It may not, of course, be the course the Court would take in the future if there is no timeline provided in relation to those proceedings which indicate a realistic resolution of those matters.

The material sets out the work that was undertaken. I am satisfied that is work that was required to be undertaken. Whilst it involved different teams undertaking different work, that must be viewed in the context of the complexity of the nature of the receivership and, in particular, the number and nature of the legal proceedings.

The remuneration is sought, essentially, on a time-costing basis, I am satisfied that it is appropriate, particularly having regard to the remuneration in the past, which has been the subject of approval by various judges of this Court.

I am satisfied the remuneration claimed is for work that was undertaken in relation to the receivership. I am satisfied it was work that was undertaken on a reasonable basis and undertaken by persons of the required magnitude. I accept there has been no unreasonable misuse of funds in relation to the work that was undertaken in order to achieve that remuneration.

I make orders in terms of the draft, which I initial and place with the papers. I have changed the name of the judge on the front of it to reflect the fact that I have heard it rather than Justice Atkinson.