

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS3508 of 18

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

AND

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

AND

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**

FURTHER SUPPLEMENTARY AFFIDAVIT

I, **JOHN RICHARD PARK** care of Level 20, Central Plaza One 345 Queen Street, Brisbane in the State of Queensland, Chartered Accountant, state on oath:

1. I am the First Applicant in this proceeding and the Liquidator of the Second Applicant ("LMIM").
2. I refer to the following affidavits sworn in support of the Application filed on 17 July 2018:
 - (a) my affidavit filed on 7 August 2018 being the court file index document number 139 and 140;

Page 1

Deponent 

Taken by 

AFFIDAVIT
Filed on behalf of the Applicants
Form 46, Version 1
Uniform Civil Procedure Rules 1999
Rule 431

Russells
Level 18, 300 Queen Street
Brisbane QLD 4000
Tel: (07) 3004 8888
Fax: (07) 3004 8899
Ref: JTW:20170799

- (b) my supplementary affidavit sworn on 10 August 2018 being the court file index document number 144;
 - (c) the affidavit of David Whyte sworn on 31 August 2018 being the court file index document number 150; and
 - (d) the affidavit of Kelly-Anne Lavina Trenfield sworn on 5 September 2018.
3. I also refer to my affidavit of 22 February 2016 in this proceeding being court index document number 44.

Corporate Remuneration already paid

- 4. By letter dated 30 August 2018 (exhibit DW-97 to the affidavit of Mr Whyte), Tucker & Cowen raised an issue about an apparent inconsistency in my affidavits concerning the prior payment of corporate remuneration, and in particular in the voluntary administration.
- 5. At paragraph 14 of my 7 August 2018 affidavit I stated that corporate remuneration had not previously been claimed or received in the Remuneration Application *or otherwise* (my emphasis added).
- 6. This statement is correct insofar as it refers to there having been no claim in the Remuneration Application, however it is incorrect insofar as I say “or otherwise”, because I have claimed and been paid some remuneration for general corporate work, namely part of the amount of \$535,332 plus GST, or \$588,865.20 including GST. Part of that sum is for corporate remuneration and part is for Category 2. As for the precise breakdown of the sums, I refer to the exhibits to the affidavit of Ms Trenfield sworn 5 September 2018 and the summary reconciliation and pivot table.
- 7. The use of the words “*or otherwise*” in paragraph 14 of my 7 August 2018 affidavit is therefore incorrect and I apologise to the Court for my mistake.

GST Treatment of remuneration in respect of LMIM

- 8. In Mr Whyte’s affidavit sworn on 31 August 2018, at paragraphs 10 to 37, he states his concerns in respect of the GST treatment of my remuneration.
- 9. In response to Mr Whyte’s concerns, I say that the procedure adopted by me in respect of previous claims for remuneration in the LM voluntary administration and liquidation has been to claim GST from the Fund that is ultimately to pay the remuneration. I have done this by claiming GST in my claims for remuneration from LMIM and then on-claiming the

remuneration plus GST against the various Funds. This course has meant that the GST position is neutral for LMIM. I cause the GST to be remitted to the Commissioner of Taxation on the basis of the supply by me of services to LMIM. I have followed this course in respect of all of the LM Funds.

10. In my experience as a liquidator, and specifically as someone who has been a liquidator of a corporate trustee, I have followed the above course. In my experience, this is the usual way for liquidators to claim remuneration that is for the benefit of a company in liquidation that is the trustee of a trust.
11. In respect of GST claims made in respect of the other funds, those funds have made claims for input tax credits in respect of remuneration and other amounts. The Commissioner for Taxation has previously allowed those claims.

Expenses Application

12. At paragraph 52 and 53 of my 10 August 2018 affidavit I referred to current liabilities in respect of LMIM in respect of the payment of legal expenses and also in respect of work in progress in respect of work being carried out by Russells.
13. I am informed by Mr Tiplady of Russells and verily believe that as of today's date the current liabilities to pay outstanding legal expenses and invoices that have not yet been paid total \$1,257,195.30. The work in progress of Russells is now in excess of \$350,000.00.
14. The decisions of *Park & Muller (Liquidators of LM Investment Management Ltd) v Whyte No 3* [2017] QSC 230 ("**the Indemnity Decision**") and *Park & Muller (Liquidators of LM Investment Management Ltd) v Whyte No 2* [2017] QSC 229 ("**the Remuneration Decision**") clarified my right to seek an indemnity from the First Mortgage Income Fund ("**FMIF**") and how my expenses ought to be apportioned. Prior to those decisions, expenses had been apportioned to the Funds in accordance with my earlier legal advice, namely on the basis of funds under management. In light of the Indemnity Decision, I consider that I ought to go back and review all expenses that have been claimed and re-allocate all of those expenses to the Funds on a *pari passu* basis and ascertain what adjusting payments may need to be made once expenses have been re-allocated.
15. I anticipate that that will be a time-consuming task, not least for the reason that each expense item will need to be considered and re-allocated. I am currently considering my position as to how it is best carried out. I may need to apply to the Court for directions as to the appropriate method to conduct this exercise.

16. In addition to the re-allocation task, I intend to make a further claim for approval of expenses incurred to date, including for orders that the expenses be paid from the trust assets.
17. All the facts and circumstances herein deposed to are within my own knowledge, save such as are deposed to from information only, and my means of knowledge and sources of information appear in this my affidavit.

Sworn by the Deponent on 5 September 2018 at Brisbane in the presence of:



.....
JOHN RICHARD PARK
Deponent



.....
Name:
~~Lawyer/Commissioner for Declarations/JP~~

Katie Hodson-Thomas JP 8387
Justice of the Peace