

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicants: RAYMOND EDWARD BRUCE AND
VICKI PATRICIA BRUCE

AND

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

AND

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

Intervener: AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION

STEPHEN CHARLES RUSSELL of Level 21, 300 Queen Street, Brisbane in the State
of Queensland, solicitor, states on oath:

1. I am a solicitor of this Honourable Court and Managing Partner of Russells,
the Solicitors for the First Respondent ("LMIM"). This affidavit is sworn for the
purposes of a further review of this matter, to be convened following the late receipt
of a large amount of material over the weekend.

2. Now produced and shown to me and marked "SCR15" is an indexed and
paginated bundle of documents referred to in more detail in this Affidavit.

PAGE 1

Signed

Solicitor/Barrister/Justice of the Peace

AFFIDAVIT OF STEPHEN CHARLES RUSSELL

Filed on behalf of the First Respondent

Form 46 Rule 431

RUSSELLS
Level 21
300 Queen Street
BRISBANE 4000
Phone: 07 3004 8888
Fax: 07 3004 8899

Application by Applicants to amend their Originating Application

3. At 10.40am on Friday morning, 3 May, 2013, I received from Ms Banton the email at page 1 of my exhibits, together with what was described as "an Amended Originating Application that our clients to intend to have heard on 13 May, 2013". That draft document appears at pages 2 to 5 of my exhibits.

4. Neither in the proceedings before Justice Peter Lyons on 2 May, 2013, nor on any other occasion did the Applicants give my client any notice of this proposed amendment.

5. I sent, by email to Piper Alderman, a letter dated 3 May, 2013, which appears at pages 6 to 7 of my exhibits. The matters of fact set out in that letter are true. I have received no reply to that letter.


6. The Originating Application has not been amended. The Applicants have not filed any application for leave to amend the Originating Application.

7. I refer to paragraph 4C of the draft Amended Originating Application. Piper Alderman have not previously raised with my firm or my client any request for production of documents of the Scheme. Save that any contested application for an order for inspection of documents under section 247A of the *Corporations Act 2001* ("the Act") will lengthen the hearing, I am unable to say what material the First Respondent would wish to adduce in response to any such application, since I do not what documents the Applicants wish to inspect, or for what purpose.

PAGE 2



Signed



Solicitor/Barrister/Justice of the Peace

Purported "Interlocutory Application" by ASIC

8. Just prior to 5.00pm on Friday, 3 May, 2013, I received from ASIC:-

- (a) An email of that date which appears at page 8 of my exhibits;
- (b) A document entitled "Interlocutory Application", which appears at pages 9 to 12 of my exhibits; and
- (c) An Affidavit of Ms Gubbins, which appears at pages 13 to 14 of my exhibits.

9. For some reason, Ms Gubbins' Affidavit has been filed but the purported "Interlocutory Application" has not been filed.

10. There was no prior notice from ASIC of its intention to seek this relief – whether in the course of the proceedings before Justice Lyons or otherwise.

11. I was present at the meeting with officers of ASIC on 23 April, 2013, referred to in paragraph 12 of Ms Muller's Affidavit filed by leave on 2 May, 2013. I have had further dealings with officers of ASIC since then. In particular, I received from my client on 30 April, 2013, a notice purportedly under section 912C of the Act, requiring a response by 11.00am on the following day, 1 May, 2013. The covering letter and the purported notice appear at pages 15 to 23 of my exhibits.


12. The letter and notice were received at 5.00pm on 30 April, 2013.

13. I worked that evening and the following morning with Ms Muller of the Administrators and responded with a detailed letter on 1 May, 2013, sent just before noon. The letter appears at pages 24 to 30 of my exhibits.

PAGE 3



Signed



Solicitor/Barrister/Justice of the Peace

14. I am informed by Ms Muller and I believe that the matters of fact set out in that letter are true. Relevantly for present purposes, I communicated the following matters to ASIC on 1 May, 2013:-

- (a) That, as at 1 May, 2013, the administrators and LMIM had not yet been able to form a view as to whether the purpose of the FMI Fund can be accomplished or whether it should otherwise be wound up;
- (b) That they anticipated being in a position to decide whether to wind up the FMI Fund before the meeting on 30 May, 2013; and
- (c) As matters then stood, and out of "deference to the possibility that Trilogy might be elected as Responsible Entity, the Administrators thought it inappropriate to pre-empt its decision as to whether or not the Fund should be wound up, in case the members decide to elect it as Responsible Entity" at the meeting.

15. I received no request from ASIC for further information. ASIC did not make any objection to anything that the Administrators proposed to do, or to anything else in the letter. Indeed I have received no reply to that letter at all.


16. The "Interlocutory Application" says that it is made under, amongst other things, under section 1101B of the Act. Neither in Ms Gubbins' Affidavit, nor anywhere else has ASIC set out or referred to any of the facts on which it wishes to rely, or any evidence thereof, to establish any of the matters set out in subparagraphs (a) to (d) of subsection 1101B(1) of the Act. I therefore anticipate that ASIC intends to supplement the very brief Affidavit of Ms Gubbins received just prior to 5.00 pm on Friday afternoon.

17. I am informed by Mr Park and Ms Muller, and I believe, that:-

PAGE 4



Signed



Solicitor/Barrister/Justice of the Peace

- (a) in their opinion, any order for the appointment of receivers of any of the assets of the Fund, is likely to have a serious deleterious effect on the interest of members;
- (b) no officer of ASIC nor any of the clients of Piper Alderman (Mr and Mrs Bruce and Trilogy) has attempted to discuss with the Administrators the prospects of appointing receivers of the Fund.

18. I observe that neither the draft Amended Originating Application received from Piper Alderman last Friday, nor the "Interlocutory Application" received from ASIC last Friday, contains any note of any intention to serve either proceeding on Deutsche Bank AG, the secured creditor of the FMI Fund.

19. The First Respondent does not complain that Deutsche Bank AG should be served; for present purposes, its objection is more fundamental - it does not appear that either of the proposed applications has been the subject of any proper consideration; and Mr Park and Ms Muller informed me and I believe that, in their opinion, if either of the Applications proceeds any further, there is a serious risk that Deutsche Bank AG will appoint its own receivers and managers.

20. The Applicants' solicitors instructed Mr O'Donnell QC to make the following submissions to de Jersey CJ on their Application to have new trustees appointed to the LM Managed Performance Fund:-

The appointment of a receiver is not desirable. The Fund is solvent and there is no suggestion that its assets are in jeopardy. The evidence of Mr Park is that the Fund has assets for approximately \$395m with liabilities of \$6.5m. But there is no suggestion from Mr Park that the assets of the Funds are in immediately jeopardy. The replacement of the trustee would achieve everything that could be done by appointing a receiver. And

appointing a receiver to a solvent operating fund is undesirable. It would send a message to the market that the Fund was in some form of trouble.

21. I know of no basis why such concerns are not entertained by the Applicants in these matters. Indeed, if these matters proceed further, one issue will be whether Mr and Mrs Bruce in fact gave instructions to make an application to amend the Originating Application for the appointment of receivers. Piper Alderman have published material on the internet that indicates that they are, in effect, apologising for making such an application and that they are conscious of at least some of the potentially deleterious effect that such an appointment would have (and that is also insulting to the Court). The following material, published by Piper Aldermen, appears on the website

<http://www.aussiestockforums.com/forums/showthread.php?t=24697&page=35>:

LM First Mortgage Income Fund (LMFMIF)

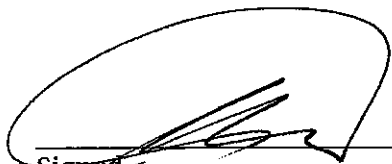
The application to seek a replacement RE for the LM First Mortgage Income Fund was listed yesterday. A number of parties intervened in those proceedings including ASIC and some members of the LMFMIF. The unit holders who appeared thought that a winding up application of the LMFMIF was appropriate and that LMIM should undertake that process with a supervisor.

Our clients opposed that application and pressed that the application to wind up the Fund be heard first before any application to wind up the LMFMIF was heard. Any application to wind up the LMFMIF with supervision will necessarily mean two sets of costs will be incurred.

Unfortunately, the Court was not minded to adopt an approach where the application to appoint a new RE was heard and stood the matter to wind down the LMFMIF over for hearing to 13 May, 2013.

It is only in the event that an application to change the RE is unsuccessful that our clients will seek that a receiver and manager be appointed to the LMFMIF.

PAGE 6


Signed _____


Solicitor/Barrister/Justice of the Peace

We have now also been served with another application by ASIC to wind up the LMFMIF, appoint a supervisor for the winding up and a receiver and manager over the LMFMIF.

It is our strong view that members will not be best served if two people are doing the job which can be best done by one. We do not understand, on present information, that the winding up order or the appointment of a receiver in any way diminishes the entitlements of the RE to its fees and expenses or would otherwise be in the interests of members.

We are disappointed that applications have been filed to wind up the LMFMIF and appoint receivers or supervisors. Our clients are only seeking orders in this regard if the application to replace the RE is unsuccessful ...
(underlining added)

22. If either of these proposed applications for the appointment of receivers is pursued, it would also add to the length of the hearing and to the work to be done to prepare for them. Although it is difficult to say what either the applicants or ASIC have in mind as the grounds for such appointment (as opposed to the routine winding up of the Fund pursuant to the provisions of Chapter 5C of the Act), I do apprehend that the following issues of fact will arise:-

- (a) Which of the grounds set out in paragraphs 1101B(1)(a) to (d) of the Act are relied on – and what are the facts and evidence to be relied on;
- (b) Whether the applications (perhaps more so in the case of the proposed application by the Applicants) are intended to be based on some kind of “corporate governance” concern; or whether, for example, those seeking the appointment of receivers really intend them to supplant the role of a responsible entity winding up the fund, another person taking responsibility for the same, or a liquidator winding up a company. In either case, this will give rise to considerations such as those dealt with in the *Bond Brewing Holdings* case; and

(c) In the case of the proposed application by the Applicants, whether they contend that receivers ought to be appointed with or without security, whether they are prepared to offer an undertaking as to damages, whether they are prepared to offer security for any such undertaking, and if not, the worth of any undertaking as to damages that they may be willing to give.

23. Leaving aside the factual issues mentioned above, the legal argument on such applications, should they be permitted, will lengthen the hearing.

24. Given the amount of work that is to be done in respect of these foreshadowed applications, I anticipate that the First Respondent will not be able to file its evidence by Wednesday afternoon; and, even all material in support of these proposed applications was to come in today, I strongly doubt that the First Respondent could adequately prepare for this aspect of the hearing on Monday, 13 May, 2013.

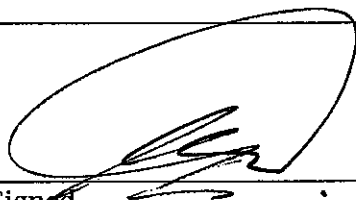
**No other compliance with the direction for material by 5.00pm on Friday,
3 May, 2013**

25. The only material that I received from any of the other parties, prior to 5.00pm on Friday, 3 May, 2013, was the "Interlocutory Application" from ASIC and Ms Gubbins' brief Affidavit.

Draft Affidavit and late Affidavits from the Applicants

26. As appears from paragraph 3 of, and the documents at pages 12 to 24 of my first Affidavit, filed by leave on 2 May, 2013, when these proceedings were last before Justice Peter Lyons, the Applicants' information to my firm as to the further material they proposed to file was simply an affidavit by Ms Banton which was said to be not substantial. Further, by her letter to me dated 24 April, 2013, Ms Banton offered to

PAGE 8


Signed


Solicitor/Barrister/Justice of the Peace

consent to a timetable whereby the applicants would have filed and served all of their further affidavit material by Friday, 26 April, 2013.

27. By a series of emails commencing at 7.05pm and concluding at 11.25pm on Friday night, 3 May, 2013, I received from Ms Banton:-


- (a) An Affidavit of Paul Alexander Russell, exhibiting a forensic expert accounting report by him - appearing at pages 31 to 63 of my exhibits;
- (b) An Affidavit of Nadine Bucher, which is essentially an affidavit of service;
- (c) A draft of an Affidavit by Michael James Baltins, a law graduate in the employ of Piper Alderman, the first three pages of which appear at pages 64 to 66 on my exhibits; and
- (d) A draft of an Affidavit of Mr Paul Wood, an officer of Trilogy, which appears at pages 67 to 80 of my exhibits.


28. The documents that are proposed to be exhibited to Mr Baltins' Affidavit comprise 201 pages.

29. The documents that are proposed to be exhibited to Mr Wood's Affidavit comprise 404 pages for exhibit "PW-1" and 202 pages for exhibit "PW-2".

30. The documents proposed to be exhibited to the Affidavit of Ms Bucher, comprise 184 pages.

31. At 7.30am on Saturday morning, 4 May, 2013, I sent an email to Ms Banton, asking her to confirm that the applicants had now provided all material on which they proposed to rely at the trial. My email to Ms Banton appears at page 81 to 82 of my exhibits. I have not had any response to that Affidavit and, given the


Signed


Solicitor/Barrister/Justice of the Peace

Applicants' solicitors' conduct of the proceedings to date, I fear there may be more to come.

Further material from the Respondent, Mr Shotton

32. Mr Tucker appeared for Mr Shotton in the proceedings before Justice Peter Lyons on 2 May, 2013. On that occasion, he handed up some written submissions, but did not provide a copy.

33. I eventually received a copy from Mr Tucker at 8.15pm on Saturday night, 4 May, 2013. They are at pages [83] to [102] of my exhibits.

Conferences on the weekend

34. I conferred with Ms Muller and various members of the staff of FTI Consulting over the weekend, on both Saturday and Sunday, in an effort to take instructions on the issues of fact and law that had arisen from this late received material. I also took advice from senior counsel over the weekend in relation to those matters.

35. As presently advised and even if none of the other parties provides any further material:-

- (a) I and my staff will not be able to prepare, file and serve the affidavits and expert evidence needed to respond to the material received on the weekend, prior to 5.00pm on Wednesday, 8 May, 2013, or even before the hearing currently scheduled for 13 May, 2013;
- (b) There is a real prospect that once my client files and serves the material that it can, there may be evidence in reply, particularly from Mr Shotton's Solicitor, Mr Tucker;

- (c) There may be evidence in reply from other parties as well; and
- (d) Assuming that all of these new issues of fact are contentious at the hearing, cross-examination will be necessary, but, even discounting cross-examination, the proceedings cannot be tried within a day. Subject to consultations with senior counsel, after he has had an opportunity to review the large amount of material that has come in over the weekend, our estimate of the length of the time for the hearing is two to three days.


36. I will, in paragraphs 42 to 1 to below, set out the reasons for that position. There has, however, been a further significant development this weekend.


LMIM will wind up the FMI Fund

37. I am instructed by Mr Park and Ms Muller and I believe they expect to resolve this afternoon to wind up the FMI Fund.

38. They inform me and I believe that:-

- (a) The question of whether or not they, as Administrators, should decide to wind up the FMI Fund has not been an easy one and they felt that they could not responsibly make such a decision based merely on the published financial statements and on the books and records of the FMI Fund that became available to them following their appointment a relatively short time ago on 19 March, 2013;
- (b) They felt it was necessary, firstly, to undertake an independent review of all of the assets and liabilities of the Fund, which has involved them and their staff visiting many of the sites, detailed consultations with asset managers employed by LM Administration Pty Ltd, negotiations with the secured lender, Deutsche Bank AG, gaining an understanding of the structure,


Signed


Solicitor/Barrister/Justice of the Peace

management and administration of the Fund and in particular, the financial systems in place;

- (c) This has been a highly labour-intensive job and which will be the subject of evidence in an affidavit by Ms Muller which will be filed and served (prior to 5.00 pm on Wednesday, 8 May, 2013);
- (d) Perhaps the most critical matters to consider were whether there is any substantial prospect of improving the return for members on their investments, by any one of numerous avenues including re-financing, re-capitalisation, merger, development of underlying assets and so on;
- (e) In their opinion, they were duty bound (as would be any new directing mind of the Responsible Entity, or any new Responsible Entity) to bring an independent consideration to those complex questions, as opposed to an uncritical acceptance of the position outlined in the FMI Fund's 2012 Financial Statements and the Fund's most recent Public Disclosure Statement; and
- (f) They and their staff expect to complete that task today and, unless something currently unanticipated emerges, to decide, later today, to wind up the FMI Fund.

39. Mr Park and Ms Muller also inform me and I believe that:-

- (a) one of the tasks as they have regarded it as necessary to undertake before they could responsibly make a decision to wind up the FMI Fund, was to review the assumptions underlying a whole of Fund cash flow budget that had been set in place with Deutsche Bank AG.
- (b) There is a complex Deutsche rolling cash flow for the whole of the funds.
- (c) However, since their appointment, they have critically examined all of the assets of the Fund and have developed detailed cash flow analyses for those

assets, so that they can decide whether the Fund should be wound up, or what other fate is in the best interests of the members of the Fund.

40. These summarised instructions will be more fully detailed in the Affidavit of Ms Muller.

41. I mention those detailed matters at this stage and for present purposes, however, because Mr Park and Ms Muller have instructed me that they have also decided that, although it would be possible for them to proceed to wind up the Fund without consulting members, they believe that it is proper and appropriate to give members an opportunity to consider their proposal for the winding up of the Fund, in a meeting; and that they intend to make arrangements for that meeting to be convened and held at the same time as the current meeting of members on Thursday, 30 May, 2013.

New factual issues

42. There are many new factual issues that have arisen from the material received over the weekend.

Affidavit and report of Paul Alexander Russell

43. Mr Russell's Affidavit and report go to the factual issue of what he describes as "the Net Tangible Asset ("NTA") position of LM Investment Management Limited". This is a new issue. I apprehend the following difficulties:-

- (a) Mr Russell has been instructed to make several assumptions, including that, in working out the NTA, the Cavill Avenue property is not to be included; and

- (b) The assets and liabilities of LMIM are (precisely) those listed in the speaking notes of Mr Park.

44. I therefore understand that the applicants will seek to make good each of those assumptions by other evidence. A draft Affidavit of Mr Wood contains what may be the foundation of this assumption – paragraphs 19 to 21.

45. The property at 38 Cavill Avenue, Surfers Paradise, has been included in the Balance Sheet of LMIM, which are part of its audited financial statements, for many years. Assuming there is some *bona fide* basis for doubting that LMIM does indeed own an interest in this property and that the property is rightly included in its Balance Sheet, I expect to be able to meet this evidence by Wednesday afternoon. I mention it, however, because it is an example of the way in which the Applicants are conducting their case. Upon my instructions:-

- (a) LMIM holds an interest in the property now described as lots 1-11 on SP123106 (38 Cavill Ave, Surfers Paradise);
- (b) LMIM holds this interest under a joint venture arrangement, entitling it to a 66.66% share of the property; and
- (c) The registered owner, Baronsand Pty Ltd holds the property as trustee pursuant to the joint venture agreement.

46. In both Queensland and New South Wales, it is common for persons to be registered as proprietors of interests in land that are held upon trust, while such interests are not noted on the register. Neither the Applicants, Trilogy, or their solicitors have enquired about this matter. Hence, it will be necessary to go into evidence explaining the matter, and to exhibit the relevant documents, given that this

issue has been raised. As I say, the First Respondent can deal with the question of ownership by Wednesday afternoon.

47. However, the First Respondent needs to obtain valuation evidence to rebut the contention to be made by the Applicants concerning its net tangible assets. My instructions received over the weekend, and which I believe to be true, are that the property at 38 Cavill Avenue is its principal asset and, based on the instructions that I received on Sunday, the property has the following features:-

- (a) It is a six level mixed use commercial/retail building in Cavill Avenue, Surfers Paradise, comprising 11 strata titles;
- (b) The other joint venture partner is an entity associated with the chartered accounting firm, PKF;
- (c) The ground level consists of a retail arcade of seven retail tenancies;
- (d) Each of the five upper levels comprises a single lot of 432 square metres with two common lifts for access;
- (e) The commercial tenants are LM Administration Pty Ltd, Val Eco Investment and Study Group Australia;
- (f) There are no current (or recent) market valuations available to LMIM that are suitable for present purposes;
- (g) A fresh market valuation is required for these proceedings, and I am advised that it is a substantial valuation job; and
- (h) In the limited time available since this issue came up on the weekend, the Administrators' inquiries are to the effect that it will be two to three weeks from the date of receipt of relevant tenancy information before a proper valuation of the property can be obtained.

48. I also wish to secure an expert report to respond to the balance of Mr Russell's report. Having read it, in my opinion, the contents of paragraphs 4.03.1, 4.03.2, 5.05, 6.06, 7.03 to 7.05 and 8.03 are controversial and will require both current financial information as to the assets and liabilities of LMIM a critique of Mr Russell's analysis of them, and also expert evidence also in relation to those matters.

49. At the time of swearing this Affidavit, I have been unable to retain any expert and I therefore doubt that the First Respondent would be in a position to meet this evidence by Wednesday afternoon.

50. There are also legal issues as to the application and effect of the Class Order, referred to in Mr Russell's report, which will lengthen the hearing. These too are new issues.

Draft affidavit of Mr Wood

51. None of this evidence was foreshadowed.

52. There are numerous documents referred to in the draft affidavit which are not exhibited to it. This will cause further delay. Examples are:-

- (a) Documents whereby LMIM changed (or purported to change) its Constitution in a period of time spanning almost eleven years – going back to 19 July, 2002. This part of the Affidavit makes it necessary to review the process whereby these alterations were accomplished. Because these matters have never been mentioned, I am unsure of the significance that the Applicants will submit attaches to the past conduct of those who controlled the FMI Fund;

- (b) At paragraph 43, he refers to various documents – Public Disclosure Documents - but intends to exhibit only one page of those documents;
- (c) At paragraph 48, Mr Wood intends to refer to financial reports of the FMI Fund going back to the year ended 30 June, 2003, whilst extracting only one page from each. Mr Wood evidently intends to advance a proposition that these “related party transactions ... conferred financial benefits on related parties”, that he has not been able to “locate any record of members’ approval of those transactions”; and
- (d) The same applies to the documents referred to at paragraphs 50 and 51 of the draft Affidavit.

53. As mentioned above, Mr Wood’s draft Affidavit is intended to have over 600 pages of exhibits. The production of the complete documents from which only extracts have been given will greatly increase the number of documents.

54. However, the issues that Mr Wood apparently intends to swear he wishes to investigate are not confined to the payment of management fees disclosed by LMIM in the various Public Disclosure Statements – which are, in any event, not to be exhibited to this Affidavit. As appears from paragraph 47, I understand he is seeking to say that apart from payment of management fees either to LMIM or its service company, LM Administration, there are other “related party transactions” to which he refers.

55. I simply cannot ascertain, from his Affidavit, what these other related party transactions might be.

56. The difficulty to which this mode of procedure gives rise (apart from the lack of clarity) is that he seeks to give the impression that management fees and other unidentified "related party transactions" may not have been the subject of "any record of members' approval of those transactions" (which Mr Wood says he has not been able to "locate"), whereas, if the transactions are confined only to management fees, it is my understanding that the Product Disclosure Statements and, indeed, the Constitution of the FMI Fund, all clearly set out the level of management fees that LMIM was entitled to charge. However, Mr Wood does not intend to exhibit the various Public Disclosure Statements – merely extracts referred to at paragraph 43 of his draft Affidavit, which extracts relate to a completely different topic (the alteration of the Constitution). This too is a new issue.

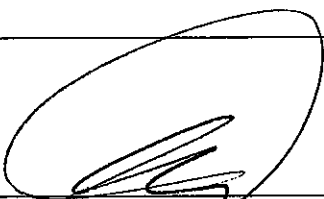
57. As presently advised, I do not believe that I will be able to obtain all relevant documents, obtain instructions from Mr Park and/or Ms Muller, and prepare appropriate Affidavit material in response to these new issues by Wednesday afternoon.

Draft Affidavit of Michael James Baltins

58. Despite having been foreshadowed, there is apparently to be no Affidavit by Ms Banton. Mr Baltins appears to be a Law Graduate and his draft Affidavit does not reveal what prompted the persons from whom he received, in a period from 23 April, 2013 to 2 May, 2013, the documents entitled "Indication of Support" to send them to him.

New material from ASIC

59. As mentioned above, despite the Administrators' communications with ASIC, no officer from ASIC has foreshadowed the Application the subject of the


Signed _____


Solicitor/Barrister/Justice of the Peace

"Interlocutory Application" that I received on Friday afternoon. I apprehend that if ASIC pursues its Application for that relief, substantial issues of fact and law will arise when and if it exposes the grounds and evidence upon which the Application is made.

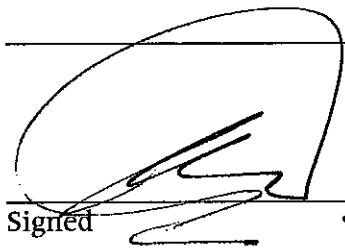
60. As presently advised, and without knowing what this material may constitute, I apprehend that it will be impossible for the First Respondent to respond to those matters of fact in its material, by Wednesday afternoon; and probably impossible for it to do so in any proper way prior to the hearing scheduled for Monday, 13 May, 2013.

Submissions on behalf of Mr Shotton


61. The submissions raise a number of factual issues that Mr Shotton's solicitors had not mentioned in any of their material. Some are without any factual foundation and appear to constitute allegations of serious professional misconduct against Mr Park and Ms Muller, both of whom are official liquidators and officers of this Honourable Court.

62. The submissions call into question both the wisdom and propriety of what is said to be the Administrators' decision to pay a capital distribution of approximately \$4 million to members of the FMI Fund. Although I anticipate that the Administrators will be able to adduce the relevant evidence in relation to this decision by Wednesday afternoon, I apprehend that, if this issue is pressed, the following two difficulties will arise:-

- (a) Mr Tucker may become a material witness in the case. This may arise if he denies that he was told, on Tuesday evening, 30 April, 2013, by Ms Muller, in the course of a telephone conversation, that the terms of the Deutsche Bank Facility were such that there was no interest saving to be had, by



Signed



Solicitor/Barrister/Justice of the Peace

applying the amount of the proposed distribution to a partial reduction of the Deutsche Bank principal, because it was on terms – not of course negotiated or agreed to by the Administrators - that interest was payable on the full amount of the facility whether or not partial reductions of principal were made; and

(b) It may also be necessary to cross-examine Mr Shotton.

63. On the other hand, if this evidence is not controverted, a great deal of time and money will have been wasted by an issue that Mr Shotton's solicitors knew was a false issue before they raised it.

64. A submission has also been made to the effect that Mr Whyte is preferable to Mr Park and Ms Muller because (unlike them) he would come to the appointment "without bias". The First Respondent's case will be that, as with the submission concerning the distribution of \$4 million, this submission is also one with absolutely no factual foundation and a scandalous and improper one, but one which, nonetheless, can be met by the Administrators by Wednesday afternoon.

No material change since May, 2013

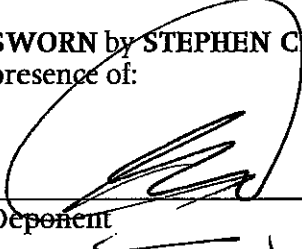
65. I am informed by Ms Muller and I believe that the position to which she deposed in paragraphs 22 to 26 of her Affidavit, sworn and filed by leave on 2 May, 2013, under the heading "Assets not in Jeopardy" has not changed.


66. However, a further meeting of members will now be convened, also to take place on 30 May, 2013, in which they will consider resolutions in respect of the winding up of the Fund. Other members, including Piper Alderman's client Trilogy,

are also perfectly entitled to propose any resolutions they may wish the members to consider at such a meeting -- even a resolution that the Fund not be wound up.

67. All the facts and circumstances 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 on the face of this my Affidavit.

SWORN by STEPHEN CHARLES RUSSELL on 6 May, 2013 at Brisbane in the presence of:


Deponent


Solicitor/Barrister/Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

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

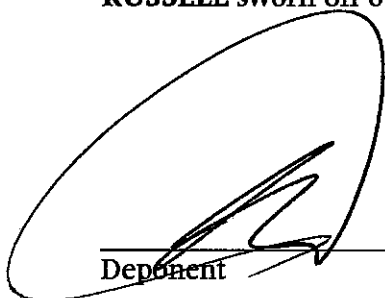
AND

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

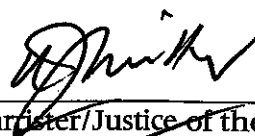
AND

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

**Bound and marked "SCR15" are the exhibits to the Affidavit of STEPHEN CHARLES
RUSSELL sworn on 6 May, 2013 at Brisbane in the presence of:-**



Dependent



Solicitor/Barrister/Justice of the Peace

CERTIFICATE OF EXHIBIT

Filed on behalf of the First Respondent

Form 47 Rule 435

RUSSELLS
Solicitors
Level 21
300 Queen Street
BRISBANE 4000
Phone: 3004 8888
Fax: 3004 8899

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 (ADMINISTRATORS APPOINTED)
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**

INDEX to "SCR15"

No	Document	Date	Page
1	Email correspondence from Amanda Banton of Piper Alderman to Russells	3 May, 2013	1
2	Draft Amended Originating Application	undated	2-5
3	Email correspondence from Russells to Piper Alderman	3 May, 2013	6-7
4	Email from Ms Gubbins of ASIC to Russells	3 May, 2013	8
5	Document entitled "Interlocutory Application"	undated	9-12
6	Affidavit of Ms Gubbins	3 May, 2013	13-14
7	Letter from ASIC enclosing Notice	30 April, 2013	15-23
8	Letter to ASIC from Russells	1 May, 2013	24-30
9	Affidavit of Paul Alexander Russell	3 May, 2013	31-63
10	Draft Affidavit of Michael James Baltins	undated	63-66
11	Draft Affidavit of Paul Wood	undated	67-80
12	Email to Ms Amanda Banton of Piper Alderman from Russells	4 May, 2013	81-82
13	Submissions of Mr Shotton	2 May, 2013	83-102

Stephen Russell

From: Davina Holland [DHolland@piperalderman.com.au] on behalf of Amanda Banton [ABanton@piperalderman.com.au]
Sent: Friday, 3 May 2013 10:39 AM
To: Ilenna Copley; Stephen Russell; Dallys Pyers; anne.gubbins@asic.gov.au; David Tucker
Cc: Amanda Banton; Anne Freeman; Davina Holland
Subject: LM Investment Management Pty Ltd (Administrators Appointed) and others -ats- Bruce & Anor - QLD Supreme Court Proceedings No. 3383 of 2013
Attachments: amended OA.PDF

We enclose a copy of an Amended Originating Application that our clients intend to have heard on 13 May 2013.

Kind regards

Amanda Banton
Partner | Piper Alderman



t +61 2 9253 9929 | m +61 424 156 859 | f +61 2 9253 9900
abanton@piperalderman.com.au | www.piperalderman.com.au

WARNING: This e-mail is from Piper Alderman.
The contents are confidential and may be protected by legal professional privilege. If you have received this e-mail in error, please reply to us immediately and delete the document.

This message has been scanned by SurfControl plc. www.surfcontrol.com

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 2013

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

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

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

AMENDED ORIGINATING APPLICATION

To the respondents, LM Investment Management Limited (Administrators Appointed) (LM) and the members of the LM First Mortgage Income Fund (the Income Fund),

TAKE NOTICE that the Applicants are applying to the Court for the following orders:

Leave to Proceed

1. An order pursuant to section 440D of the *Corporations Act (Cth) 2001* (the *Corporations Act*) that the Applicants be granted leave to bring these proceedings against the First Respondent, in its capacity as responsible entity of the Income Fund.

Replacement of LM as responsible entity of the Income Fund

2. An order pursuant to sections 601FN and 601FP of the *Corporations Act*, that Trilogy Funds Management Limited (or such other company as the court determines appropriate) is appointed temporary responsible entity of the Income Fund.
3. Further or in the alternative to order 2 hereof, an order pursuant to regulation 5C.2.02 of the *Corporations Regulations 2001 (Cth)* that Trilogy Funds Management Limited

Originating Application
Filed on behalf of the Applicants
Form 5 R.26

Piper Alderman
Level 23, Governor Macquarie Tower
1 Farrer Place
SYDMEY NSW 2000
Tel: +61 2 9253 9999
Fax: +61 2 9253 9900
Ref: AKB.SP.380287-0001

(or such other company as the court determines appropriate) is appointed temporary responsible entity of the Income Fund.

4. In the alternative to orders 2 and 3 hereof, an order pursuant to section 80 of the *Trusts Act (Qld) 1973*, that Trilogy Funds Management Limited (or such other company as the court determines appropriate) be appointed responsible entity/trustee of the Income Fund until further order of the court or an extraordinary resolution of the Income Fund's members providing for an alternative appointment.
- 4A. In the alternative to orders 1-4 hereof, an order pursuant to section 12 of the *Civil Proceeding Act (2011)(Old)* and Rule 272 of the Uniform Civil Procedure Rules, that David Whyte and Andrew Peter Fielding be appointed as joint and several receivers and managers (Receivers) to all of the assets of the Income Fund, until further order of the Court.
- 4B. An order that the Receivers appointed to the assets of the Income Fund have all the powers prescribed by section 420 of the *Corporations Act 2011 (Cth)* as if the Income Fund were a corporation.
- 4C. An order pursuant to section 247A of the *Corporations Act 2011 (Cth)* that the Applicants and Trilogy Funds Management Limited, as responsible entity for LM Wholesale First Mortgage Income Fund, be authorised to inspect and take copies of the books of the Income Fund.

Notification Procedures

5. An order that the Applicants shall serve the originating application and any supporting affidavit (s) filed in respect of the originating application on the Australian Securities and Investments Commission (ASIC).
6. An order that the Applicants shall serve the Second Respondents, the members of the Income Fund (the Members) with the originating application and any supporting affidavit (s) filed in respect of the originating application (the **Originating Documents**) by:-
 - 6.1 sending the Originating Documents by ordinary post to the Members at their last known address as contained on the Income Fund's register of members; and/or
 - 6.2 sending the Originating Documents by email to the Members where the Members have an email address known to the Applicants.
7. An order that the Originating Documents be made available in pdf. format on the websites of the:-
 - 7.1 First Respondent, being www.lmaustralia.com; and
 - 7.2 Applicants' solicitors, being www.piperalderman.com.au,within 3 working days of the date of order.

8. An order that service of any further Court documents on the Members, including any orders made in respect of the originating application be effected by those Court documents being made available in pdf. format on the websites of the:-

8.1 First Respondent, being www.lmaustralia.com; and

8.2 Applicants' solicitors, being www.piperalderman.com.au,

within 3 working days of the date of order.

This application will be heard by the Court at Brisbane

on: April 2013 at 10 am

Filed in the Brisbane Registry on 15 April 2013

Registrar:

If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you. In addition you may before the day for hearing file a Notice of Address for Service in this Registry. The Notice should be in Form 8 to the Uniform Civil Procedure Rules. You must serve a copy of it at the applicant's address for service shown in this application as soon as possible.

On the hearing of the application the Applicants intend to rely on the following affidavit:

1. Affidavit of Raymond Edward Bruce, sworn 14 April 2013.

If you intend on the hearing to rely on any affidavits they must be filed and served at the Applicants' address for service prior to the hearing date.

If you object that these proceedings have not been commenced in the correct district of the Court, you must apply to the Court for dismissal of the proceedings.

The First Respondent is sued in its capacity as responsible entity of the Income Fund.

THE APPLICANTS' ESTIMATE THE HEARING SHOULD BE ALLOCATED 2 HOURS.

PARTICULARS OF THE APPLICANTS:

Applicants' Names: Raymond Edward Bruce and Vicki Patricia Bruce

Applicants' residential or business address: 167 Foreshore Road, RD1, KAITAIA
0481 NEW ZEALAND

Applicants' solicitor's name and firm name:	Amanda Kim Banton Piper Alderman
Solicitor's business address:	Level 23, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000
Address for service:	Level 23, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000
DX:	10216 Sydney Stock Exchange
Telephone:	+61 2 9253 9999
Fax:	+61 2 9253 9900
E-mail address:	abanton@piperalderman.com.au

Signed:

Description: Solicitor for the Applicants

Dated: 15 April 2013

This application is to be served on:

LM Investment Management Limited
(Administrators Appointed)
of: Level 4, RSL Centre, 9 Beach Road, Surfers Paradise QLD 4217

and

John Richard Park and Ginette Dawn Muller in their capacity as administrators of LM
Investment Management Limited
FTI Consulting
Corporate Centre One
Level 9, 2 Corporate Court
Bundall Qld 4217

and

The members of the LM First Mortgage Income Fund, by post and/or email

and

Australian Securities and Investments Commission

Attention: Tim Walker
GPO Box 9827
Sydney NSW 2001

28092784v1

RUSSELLS

3 May, 2013

Our Ref: Mr Russell/Ms Copley
Your Ref: Ms Banton

EMAIL TRANSMISSION

Piper Alderman
Solicitors
SYDNEY NSW 2001

email: abanton@piperalderman.com.au

Dear Colleagues

**LM Investment Management Limited (Administrators Appointed) & Ors ats
Bruce & Anor**

We acknowledge receipt this morning of your email enclosing a copy of a draft of an Amended Originating Application that you say "[your] clients intend to have heard on 13 May, 2013".

The way in which your firm is conducting these proceedings, is deeply unsatisfactory.

You have deliberately held affidavits back and, despite the enormous cost and time devoted to the management of the proceedings yesterday, your clients' counsel said not a word about this proposed Amended Originating Application.

As you may be aware, UCPR 377 provides that your clients need leave of the court to amend the originating process.

Please advise us why the prospect of this amendment was not raised with His Honour yesterday.

We will, of course, take instructions on the proposed amended Originating Application and consider the implications of it with senior counsel. Subject to those matters, it may be the relief sought in proposed paragraphs 4A and 4B can be accommodated on 13 May, in the sense that if those applications were argued, it may not lengthen the proceedings. No decision, of course, can be made on that until we see the material that your clients have so far held back.

As to the relief to be claimed in proposed paragraph 4C, however, we would think that, if the amendment were allowed, there is no prospect that such an application could be dealt with on 13 May.

Liability limited by a scheme approved under professional standards legislation

Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 21, 300 Queen Street, Brisbane QLD 4000

Telephone (07) 3004 8888 / Facsimile (07) 3004 8899

RussellsLaw.com.au

dmf_20130471_130.docx

In any event, we think the application for an amendment to add proposed paragraph 4C, is unnecessary.

Your firm seems to have operated on the basis that the Administrators would not co-operate in relation to your investigations of your clients' claims. Despite the combative attitude that your client, Trilogy, has adopted, the Administrators are perfectly willing to deal with it and other members in relation to your firm's investigations. Our clients are dedicated to acting in the best interests of members and will be very happy to co-operate with and assist your firm in your enquiries and investigations.

Mr Park and Ms Muller have explicitly instructed us to make it clear to you that you are welcome at FTI at any time, and that our clients will be happy to work with you and your team in looking at these matters.

In that spirit of co-operation, we expect that it will be unnecessary for your clients to resort to such formal and expensive processes as the rather unwieldy procedures involved in court proceedings for orders for inspection of Scheme documents. Have you, for example, considered the rather restrictive provisions of section 247C of the Act?

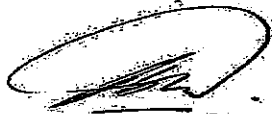
Nonetheless, in case your clients wish to proceed with a formal application for inspection of documents, would you please identify the members of the funds for whom you act and who wish to see the documents? Would you also please let us have a short statement of the purposes for which your clients wish to inspect documents?

Finally, would you please let us have a list of the documents or classes of documents which your clients wish to inspect?

We are instructed that, upon receipt of this information, we will take instructions from the Administrators and come back to you. Our general instructions are that our clients will co-operate in the production for inspection of any books and records that are relevant to matters in issue, that any members of the fund for whom you act wish to inspect, for a proper purpose.

Finally, the two broad avenues that we have mentioned above are not mutually exclusive – you are welcome to consult the Administrators at any time, whether or not you choose to seek formal production of documents under section 247A.

Yours faithfully



Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

Stephen Russell

From: Anne Gubbins [Anne.Gubbins@asic.gov.au]
Sent: Friday, 3 May 2013 4:42 PM
To: Stephen Russell; abanton@piperalderman.com.au;
dtucker@tuckerowen.com.au
Subject: Bruce v LM Investment Management Ltd (Administrators Appointed)
& Ors (Supreme Crt proceeding no. 3383/2013)
[SEC=UNCLASSIFIED]
Attachments: 20130503 - Application.pdf; 20130503 - Affidavit - Gubbins.pdf

Dear Mr Russell, Ms Banton & Mr Tucker,

I enclose by way of service, copies of the following documents filed today on behalf of ASIC in the above proceeding:

1. Interlocutory Application dated 3 May 2013;
2. Affidavit of Anne Elizabeth Gubbins affirmed 3 May 2013.

Regards,

Anne Gubbins | Senior Lawyer | Financial Services Enforcement | ASIC | ☎ +61 7 3867 4871 | 📠 +61 7 3867 4800 | ✉ Anne.Gubbins@asic.gov.au

Please consider the environment before printing this document

NOTICE

This e-mail and any attachments are intended for the addressee(s) only and may be confidential. They may contain legally privileged or copyright material. You should not read, copy, use or disclose them without authorisation. If you are not the intended recipient please contact the sender as soon as possible by return e-mail and then please delete both messages. This notice should not be removed.

SUPREME COURT OF QUEENSLAND

Registry: Brisbane
Number: BS3383/2013

Applicant: RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE

AND

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

AND

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

A. DETAILS OF INTERLOCUTORY APPLICATION

This interlocutory application is made under sections 601ND, 601NF and 1101B of the Corporations Act 2001 (Cth) (the Act).

On the facts stated in the supporting affidavit, the applicant, the Australian Securities and Investments Commission, applies for the following relief:

1. Pursuant to section 601ND(1)(a) of the Act, LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 be directed to wind up the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF).
2. Pursuant to section 601NF(1) of the Act, Derrick Vickers (Mr Vickers), Darryl Kirk (Mr Kirk) and Gregory Hall (Mr Hall) be appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution.
3. Pursuant to section 1101B(1) of the Act, Mr Vickers, Mr Kirk and Mr Hall be appointed as joint and several receivers of the property of the FMIF.
4. Pursuant to section 601NF(2) of the Act, Mr Vickers, Mr Kirk and Mr Hall be appointed as joint and several receivers of the property of the FMIF.

INTERLOCUTORY APPLICATION
Filed on behalf of the Australian Securities
and Investments Commission
Form 3 v.2

Australian Securities and Investments
Commission
Level 20, 240 Queen Street
BRISBANE, QLD, 4000
Phone No: (07) 3867 4700
Fax No: (07) 3867 4790
Ref: 13-40003

5. Pursuant to section 1101B(1) of the Act, Mr Vickers, Mr Kirk and Mr Hall have, in relation to the property for which they are appointed receivers pursuant to paragraph 3 above, the powers set out in section 420 of the Act in addition to the powers set out in section 1101B(8)(a) to (c) of the Act.
6. Pursuant to section 601NF(2) of the Act, Mr Vickers, Mr Kirk and Mr Hall have, in relation to the property for which they are appointed receivers pursuant to paragraph 4 above, the powers set out in section 420 of the Act and the powers set out in section 1101B(8)(a) to (c) of the Act.
7. Pursuant to section 1101B(1) of the Act, that Mr Vickers, Mr Kirk and Mr Hall in respect of the appointment made in paragraph 3 above:
 - (a) have access to the books and records of LM Investment Management Limited (Administrators Appointed) which concern the FMIF;
 - (b) be indemnified out of the assets of the FMIF in respect of any proper expenses or costs incurred in effecting the winding up of the FMIF; and
 - (c) be entitled to claim remuneration in respect of the time spent by Mr Vickers, Mr Kirk and Mr Hall and by any servants or agents of PricewaterhouseCoopers who perform work in the winding up of the FMIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the FMIF in respect of such remuneration.
8. Pursuant to section 601NF(2) of the Act, that Mr Vickers, Mr Kirk and Mr Hall in respect of the appointment made in paragraph 4 above:
 - (a) have access to the books and records of LM Investment Management Limited (Administrators Appointed) which concern the FMIF;
 - (b) be indemnified out of the assets of the FMIF in respect of any proper expenses or costs incurred in effecting the winding up of the FMIF; and
 - (c) be entitled to claim remuneration in respect of the time spent by Mr Vickers, Mr Kirk and Mr Hall and by any servants or agents of PricewaterhouseCoopers who perform work in the winding up of the FMIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the FMIF in respect of such remuneration.
9. That by 4:00pm, 14 May 2013, LM Investment Management Limited (Administrators Appointed) publish a copy of any order, in PDF form on the following websites, by way of notice to the members of the FMIF:
 - (a) the website of LM Investment Management Limited (Administrators Appointed) at www.lmaustralia.com; and
 - (b) the website created by the administrators of LM Investment Management Limited (Administrators Appointed) at www.lminvestmentadministration.com.
10. Such further directions as to the winding-up of the FMIF as the Court thinks necessary.

11. Such further or other orders as the Court considers appropriate.

Date: 3 May 2013


Signature of applicant making this application or
applicant's legal practitioner

B. NOTICE TO RESPONDENT(S)

TO: Raymond Edward Bruce & Vicki Patricia Bruce
LM Investment Management Limited (Administrators Appointed)
The members of the LM First Mortgage Income Fund ARSN 089 343 288
Roger Shotton

This application will be heard by the Court at 415 George Street, Brisbane Queensland at 10:00am on 13 May 2013.

If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you. In addition you must before the day for hearing file a notice of appearance in this Registry. The notice should be in Form 4. You must serve a copy of it at the applicant's address for service shown in this application as soon as possible.

Note: Unless the Court otherwise orders, a respondent that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

C. FILING

This interlocutory application is filed by the Australian Securities and Investments Commission.

D. SERVICE

The applicant's address for service is:

Name:	Australian Securities and Investments Commission
Applicant's address:	Level 20, 240 Queen St, Brisbane, Queensland, 4000
Applicant's solicitor's name:	Anne Gubbins
Telephone:	07 3867 4871
Fax:	07 3867 4793
Reference:	13-40003

It is intended to serve a copy of this interlocutory application on each respondent and on any person listed below:

Raymond Edward Bruce & Vicki Patricia Bruce
C/- Piper Alderman
Level 23, Governor Macquarie Tower
1 Farrer Place
Sydney, NSW

LM Investment Management Limited (Administrators Appointed)
C/- Ginette Muller and John Park
FTI Consulting
22 Market Street
Brisbane, Qld

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

Roger Shotton
c/- Tucker & Cowen
Level 15
15 Adelaide Street
Brisbane Qld

SUPREME COURT OF QUEENSLAND

**Registry: Brisbane
Number: BS3383/2013**

Applicant: RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE

AND

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

AND

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

AFFIDAVIT

**ANNE ELIZABETH GUBBINS of Level 20, 240 Queen Street, Brisbane, in the State of
Queensland, Solicitor, solemnly and sincerely affirms and declares:**

- 1. I hold the position of Senior Lawyer with the Australian Securities and Investments
Commission (ASIC).**
- 2. I am authorised to make this affidavit on behalf of ASIC. I do so from my own
knowledge, except where otherwise indicated.**
- 3. ASIC proposes that Derrick Vickers (Mr Vickers), Darryl Kirk (Mr Kirk) and
Gregory Hall (Mr Hall) of PricewaterhouseCoopers be appointed as joint and several
receivers of the LM First Mortgage Income Fund (FMIF). Mr Vickers has confirmed
that he, Mr Kirk and Mr Hall have no conflicts which prevent them from acting as
receivers for the FMIF and consent to act if so asked.**

Page 1


Deponent:


Witness:

AFFIDAVIT

Filed on behalf of the Australian Securities
and Investments Commission
Form 46, Version 1
Uniform Civil Procedure Rules 1999
Rule 431

Australian Securities and Investments
Commission
Level 20, 240 Queen Street
BRISBANE, QLD, 4000
Phone No: (07) 3867 4700
Fax No: (07) 3867 4790
Ref: 13-40003

4. I am in the process of obtaining a signed consent from Mr Vickers, Mr Kirk and Mr Hall which will be filed with the Court in due course.
5. All the facts and circumstances deposed to in this affidavit are within my own knowledge save and except those deposed to from information only and my means of knowledge and sources of information appear on the face of this my affidavit.

AFFIRMED by ANNE ELIZABETH GUBBINS

on 3 May 2013

at Brisbane

in the presence of:

A handwritten signature in dark ink, appearing to be 'Anne Elizabeth Gubbins', written over a horizontal dotted line.

Deponent

A handwritten signature in dark ink, appearing to be 'Anne Elizabeth Gubbins', written over a horizontal dotted line.

Legal Practitioner



ASIC

Australian Securities & Investments Commission

Our Ref: 13-40003

30 April 2013

Commonwealth Bank Building
240 Queen Street, Brisbane
GPO Box 9827 Brisbane QLD 4001
DX 322 Brisbane

Telephone: (07) 3867 4700
Facsimile: (07) 3867 4725

LM Investment Management Limited (Administrators Appointed)
c/- Ginette Muller and John Park
FTI Consulting (Australia) Pty Ltd
22 Market Street
Brisbane Qld 4000
Email: ginette.muller@fticonsulting.com & john.park@fticonsulting.com

Dear Ms Muller and Mr Park

Notice of Direction under s912C(1) of the Corporations Act 2001

I enclose a Notice of Direction (Direction) under section 912C(1) of the Corporations Act 2001 (the Act).

You should read the Direction carefully. You will see that it requires LM Investment Management Limited (Administrators Appointed) (the Licensee) to give to the Australian Securities & Investments Commission (ASIC) a written statement containing certain information by 11:00am on 1 May 2013. Details are set out in the Direction.

The Licensee may comply with the Direction by emailing the written statement to anne.gubbins@asic.gov.au.


The Licensee is entitled to consult with its legal adviser in relation to its obligations under the Direction.

I draw your attention to the note enclosed with the Direction which contains information relevant to the Direction, including some definitions of expressions which may be used, and some of the offence and penalty provisions relating to non-compliance with the Direction. It also deals with the application of legal professional privilege to the Direction.

The Direction should not be construed as an indication by ASIC that a contravention of the law has occurred, nor should it be considered a reflection upon any person or entity.

If you have any questions about the Direction, please contact me on (07) 3867 4871.

Yours sincerely



Anne Gubbins
Senior Lawyer



800691059

ASIC

Australian Securities & Investments Commission

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
SUBSECTION 912C(1) OF THE *CORPORATIONS ACT 2001***

NOTICE OF DIRECTION TO GIVE A WRITTEN STATEMENT

To: LM Investment Management Limited (Administrators Appointed)
c/- Ginette Muller and John Park
FTI Consulting (Australia) Pty Ltd
22 Market Street
Brisbane Qld 4000

Australian financial services licence number 220281

You are notified under section 912C(1) of the *Corporations Act 2001* (the Act) that you are directed to give:

to: Australian Securities & Investments Commission
at: Level 20, 240 Queen Street, Brisbane, Queensland
by: 1 May 2013
on: 11:00am

a written statement containing the information about the financial services provided by you or your representatives specified in the Schedule to this Direction.

Date: 30 April 2013

Signed:

Anne Gubbins

a delegate of the Australian Securities & Investments Commission.

SCHEDULE

This is the Schedule referred to in the section 912C Direction to LM Investment Management Limited (Administrators Appointed) dated 30 April 2013.

For the purpose of this Schedule:

"Administrators" means Ginette Muller and John Park of FTI Consulting (Australia) Pty Ltd as administrators of LM Investment Management Limited (Administrators Appointed)

"FMIF" means the LM First Mortgage Income Fund

"LM Funds" means the following registered managed investment schemes collectively:

- (a) The LM First Mortgage Income Fund;
- (b) The LM Currency Protected Australian Income Fund;
- (c) The LM Institutional Currency Protected Australian Income Fund;
- (d) The LM Cash Performance Fund;
- (e) The Australian Retirement Living Fund;
- (f) The LM Australian Income Fund; and
- (g) The LM Australian Structured Products Fund.

"LMIM" means LM Investment Management Limited (Administrators Appointed) ACN 077 208 461

LMIM is required to provide a written statement containing the following information about the financial services provided by it or its representatives:

1. In relation to each of the LM Funds:
 - a. Does LMIM consider that the purpose of the fund cannot be accomplished and/or should otherwise be wound up?
 - b. If LMIM cannot currently answer the question in subparagraph (a) above, provide an estimate as to when it will be in a position to make such a determination.
 - c. Does LMIM believe that a new, permanent, responsible entity (independent of the Administrators and LMIM) should be appointed to the fund?
 - d. If the answer to subparagraph (c) is yes, when does LMIM consider this should occur and explain the bases for this view?

- e. If the answer to subparagraph (c) is no, explain why not. Please also explain how this will not result in conflicts of interest between the responsible entity and the fund.
- 2. On 23 April 2013, at a meeting with ASIC representatives, Ms Muller advised that she considered she would be in a position to make a determination on whether the LM Funds should be wound up within two weeks of that date.
 - a. Has this position changed?
 - b. If so, please explain what has changed and why this has affected LMIM's ability to make such a determination?
- 3. Explain the basis for calling the meeting of unit holders of the FMIF scheduled to be held on 20 May 2013.
- 4. Explain why LMIM considers it to be in the best interests of unit holders of the FMIF not to include an alternate resolution for the winding up of the FMIF in the meeting of unit holders of the FMIF scheduled to be held on 20 May 2013.

INFORMATION ABOUT THE NOTICE OF DIRECTION

Relevant Statutory Provisions

[All section references are to the *Corporations Act 2001* (the Act) unless otherwise indicated]

Subsection 912C(1) provides that the Australian Securities & Investments Commission (ASIC) may, by giving written notice to a financial services licensee, direct the licensee to give to ASIC a written statement containing the specified information about:

- (a) the financial services provided by the licensee or its representatives; or
- (b) the financial services business carried on by the licensee.

Under s912C(3), the licensee must comply with a direction given under s912C:

- (a) within the time specified in the direction if that is a reasonable time; or
- (b) in any other case, within a reasonable time.

ASIC may extend the time within which the licensee must comply with the direction by giving written notice to the licensee: s912C(3).

ASIC may suspend or cancel a licence under s915C(1)(a) of the Act if the licensee has not complied with its obligations under s912A. Among the list of obligations under s912A, is the obligation to comply with the financial services laws: s912A(1)(c).

Non-compliance with a direction that ASIC gives under s912C(1), within the time set out in s912C(3), may constitute a failure to comply with a financial services law.

ASIC may only suspend or cancel a licence if it first gives the licensee an opportunity:

- (a) to appear or be represented at a hearing before ASIC. The hearing is conducted in private: s915C(4); and
- (b) to make submissions to ASIC on the matter: s915C(4).

Legal Professional Privilege

For the purposes of your obligations arising from the Direction, legal professional privilege is a reasonable excuse for not providing information pursuant to the Direction. Accordingly, you are not obliged to provide under the Direction information that is covered by a valid claim of legal professional privilege.

A person who claims legal professional privilege must establish that the privilege exists. If you claim that any information that you are required to provide is subject to legal professional privilege, you must provide ASIC with sufficient information to allow its officers to make an informed decision about whether the claim for privilege can be supported.

For that purpose, if the information over which you claim legal professional privilege was or is currently, comprised in the whole or part of a document, you should prepare a list, in writing, which specifies for each document or part thereof you claim is privileged:

- (a) the time, date, type, author, recipient and subject matter of that document or part thereof, and whether it is an original or copy;
- (b) if the original or a copy of the document or part thereof has been provided to any person who is not the privilege holder or a legal representative of the privilege holder, the identity of the persons to whom the original or a copy of the document or part thereof has been provided and the basis on which it was provided to those persons;
- (c) the grounds on which legal professional privilege is claimed;
- (d) the facts that are relied upon as giving rise to the claim of legal professional privilege. Those facts should include (but not be limited to) details of the dominant and any other purpose for which the information was brought into existence.

You will be requested to specify whether an in-house legal counsel was involved in the preparation of that document or part thereof and to provide sufficient details about that person's independence and the capacity in which they acted in relation to the preparation of that document or part thereof; and

- (e) the identity of the person in whose name the claim of legal professional privilege is made.

If the information over which you claim legal professional privilege was the subject of an oral communication, you should prepare a list, in writing, which specifies for each oral communication you claim is privileged:

- (i) the grounds on which legal professional privilege is claimed;
- (ii) the facts that are relied upon as giving rise to the claim of legal professional privilege. Those facts should include (but not be limited to) details of the dominant and any other purpose for which the communication was made.

You will be requested to specify whether an in-house legal counsel was involved in the communication and to provide sufficient details about that person's independence and the capacity in which they acted in relation to the communication;

- (iii) the identity of the person in whose name the claim of legal professional privilege is made;
- (iv) the date and time of, and parties to, the communication; and
- (v) the subject matter of, location at, and means by which, the communication took place.

Unless ASIC otherwise agrees, you should provide the list(s) relating to your privilege claims to ASIC on or before the due date of the Direction.

Definitions

"financial service" has the meaning given by Division 4 of Part 7.1: s761A. A person provides a financial service if they:

- (a) provide financial product advice (see section 766B); or
- (b) deal in a financial product (see section 766C); or
- (c) make a market for a financial product (see section 766D); or
- (d) operate a registered scheme; or
- (e) provide a custodial or depository service (see section 766E); or
- (f) engage in conduct of a kind prescribed by regulations made for the purpose of this paragraph.

[s766A(1)]

"financial services business" means a business providing financial services: s761A.

Note: The meaning of "carry on a financial services business" is affected by s761C of the Act.

"financial services licensee" means a person who holds an Australian financial services licence: s761A.

"representative" has the meaning given by s910A of the Act and includes:

- an authorised representative of the Licensee; or
- an employee or director of the Licensee; or
- an employee or director of a related body corporate of the Licensee; or
- any other person acting on behalf of the Licensee.

"financial services law" means:

- (a) a provision of Chapter 7 or of Chapter 5C, 6, 6A, 6B, 6C or 6D of the Corporations Act; or
- (b) a provision of Chapter 9 of the Corporations Act as it applies in relation to a provision referred to in paragraph (a); or
- (c) a provision of Division 2 of Part 2 of the ASIC Act; or
- (d) any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services.

[s761A]

Offences

A person who, in a document required by or for the purposes of the Corporations Act or lodged with or submitted to ASIC, makes or authorises the making of a statement that to the person's knowledge is false or misleading in a material particular, or omits or authorises the omission of any matter or thing without which the document is to the person's knowledge misleading in a material respect, is guilty of an offence: s1308(2).

A person who, in a document required by or for the purposes of the Corporations Act or lodged:

- (a) makes or authorises the making of a statement that is false or misleading in a material particular; or
- (b) omits or authorises the omission of any matter or thing without which the document is misleading in a material respect;

without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading, as the case may be, is guilty of an offence: s1308(4).

A person must not, without lawful excuse, obstruct or hinder ASIC, or any other person, in the performance or exercise of a function or power under the Corporations Act: s1310.

RUSSELLS

1 May, 2013

Our Ref: Mr Russell
Your Ref: Ms Gubbins

Ms Anne Gubbins
Senior Lawyer, Financial Services Enforcement
Australian Securities & Investments Commission
Commonwealth Bank Building
240 Queen Street
BRISBANE QLD 4000

Dear Ms Gubbins

**LM Investment Management Limited (Administrators Appointed) ("LMIM")
as Responsible Entity for the LM First Mortgage Income Fund ("the FMI
Fund")**

We are the solicitors for LMIM. Our client acknowledges receipt, yesterday evening, of a notice issued pursuant to section 912C of the *Corporations Act 2001* ("the Act").

LMIM responds to that notice by this letter.

In the light of time constraints, this response is confined to the FMI Fund. LMIM proposes to respond to the notice in relation to the other Funds by 4.00pm, Friday, 3 May, 2013 and, to the extent necessary, seeks an extension of time from ASIC pursuant to subsection 912C(3) of the Act, for that purpose.

Preliminary

Firstly, section 912C of the Act empowers ASIC to direct licensees to give a written statement containing the specified information about the matters set out in subsection (1). The notice at hand requires LMIM to provide a written statement about its opinions and beliefs. The Administrators do not consider that section 912C obliges LMIM to express such opinions.

Nonetheless, the Administrators are concerned to continue to co-operate with ASIC in every aspect of the administration of the affairs of LMIM and the LM Funds the subject of your notice. Hence, they are happy to respond.

Secondly, the information provided below is current as of today. The affairs of LMIM and of the LM Funds are fluid and circumstances are changing rapidly on a daily basis – mainly because of litigation. The Administrators will also continue to monitor all of these matters and to respond appropriately to changing circumstances. The Administrators will continue to liaise with ASIC in

Liability limited by a scheme approved under professional standards legislation

Brisbane / Sydney
Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 21, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899
RussellsLaw.com.au
SCR_20130471_081.docm

relation to the affairs of LMIM and each of the LM Funds and inform you, when and if there is any substantial change to their views and opinions recorded below.

Thirdly, the Administrators are conscious of issues concerning the external administration of responsible entities and registered managed investment schemes in general. Our clients are, in particular, conscious of the issues canvassed in a CAMAC Discussion Paper for Managed Investment Schemes issued in June, 2011, and of ASIC's Submission to CAMAC made in September, 2011, particularly as those submissions relate to enterprise schemes. The Administrators are aware that each of the LM Funds are enterprise schemes, in the sense used by ASIC in its Submission to CAMAC.

The Administrators are, in particular, aware of and dealing with the following factors in relation to the FMI Fund and all LM Funds:-

1. The need to examine related party arrangements;
2. The need to examine and, if appropriate, modify the fee structures that subsist in relation to the LM Funds;
3. LMIM's Australian Financial Services Licence has been (appropriately) modified by ASIC to meet the circumstances that arose from the appointment of Administrators to LMIM. The Administrators understand that ASIC expects that the financial services that LMIM will provide will be limited to preserving the assets of the LM Funds, and making necessary investigations, ultimately for the purpose of either appointing a new Responsible Entity, or winding up the LM Funds. The Administrators believe that the conditions of the ASFL are appropriate to the circumstances of LMIM and the LM Funds.
4. There can be tensions between various aspects of the external administrations of a Responsible Entity and the ongoing administration of an enterprise scheme. The Administrators are conscious of the need to manage those tensions and the need to react appropriately to them.
5. There can be tensions between the interests of secured creditors (often represented by receivers and managers appointed by such creditor) and those broader interests of other stakeholders in an external administration. No such appointments have been made to date in relation to any of the LM Funds and, as currently advised, none are expected.
6. One feature of the industry that has grown up around registered managed investment schemes is that, when Responsible Entities enter into external administration, various interested parties propose the substitution of either temporary or permanent Responsible Entities to replace the Responsible Entity under external administration. Because Scheme members are the beneficial owners of the underlying assets, and because both the constitutions and the Act provide for mechanisms for members to be consulted about the replacement of a Responsible Entity to manage their assets, the Administrators are of the view that, save in exceptional circumstances – which do not obtain here – it should be the members who decide whether a new Responsible Entity should be appointed and, if so, who that should be.

-
7. In deciding whether a new Responsible Entity should be appointed, one of the factors that is of considerable importance is that the candidate replacement Responsible Entity should hold an appropriate AFSL.

Specified Information in relation to the FMI Fund

LMIM responds to your notice, in relation to the FMI Fund, adopting the paragraph numbering in the Notice, as follows:-

1. In relation to the FMI Fund:-

- (a) **LMIM has not yet been able to form a view as to whether the purpose of the FMI Fund can be accomplished, or whether it should otherwise be wound up.**
- (b) **It is difficult for LMIM to say exactly when the Administrators will be able to decide those matters. A number of factors are relevant.**

When the Administrators were appointed, the auditors of the FMI Fund, Ernst & Young, had not completed their analysis of the impairment of the FMI Fund, in the process of auditing the Fund's financial statements for the year ended 30 June, 2012. On their appointment, the Administrators understood that the indicative value of the underlying assets of the FMI Fund was 55c per unit (on a subscription price of \$1.00 per unit).

Attached to this letter is a document entitled "Briefing: FMIF Summary", which contains a reasonably accurate summary of the underlying assets in the FMI Fund. As appears from the summary, the assets in the FMI Fund are dominated by real estate projects, to the owners of which the FMI Fund has advanced loan funds predominantly on first mortgage security. Some assets are completed and generating income while, at the other end of the spectrum, there are other projects in respect of which construction is yet to commence.

Each of these underlying projects must be analysed and understood. Fortunately, LMIM has the benefit of a service agreement with LM Administration Pty Ltd, in respect of which the Administrators have also been appointed. That company employs staff who have had ongoing dealings with and are at least reasonably familiar with the details of the various projects.

Not only had Ernst & Young not completed their assessment of the impairment of the assets in the FMI Fund, but the underlying assets are not the subject of current valuations.

The Administrators understand that LMIM provided a schedule of valuations to ASIC in May, 2012 – attached.

Since then, valuations of properties have been undertaken on an *ad hoc* basis, when needed.

We also refer to the Briefing Summary which comprises a schedule that sets out indicative impairments, prepared by staff of LM Administration Pty Ltd. It seems to be a reasonable working document.

The Administrators have not had an opportunity to commission any valuations of the underlying assets of the FMI Fund. The Administrators do not believe it is necessary that all such underlying assets need to be valued before LMIM can decide whether the purposes of the FMI Fund can be achieved or whether it should otherwise be wound up. However, they anticipate that valuations may be necessary before such a decision can responsibly be made – irrespective of who is the Responsible Entity.

Further, as ASIC is aware, two members of the FMI Fund have made an application to the Supreme Court for an order that Trilogy Funds Management Limited should replace LMIM, albeit only as temporary Responsible Entity. The Administrators took legal advice and consulted with ASIC, immediately that application was made. The Administrators decided, particularly in the light of the mechanisms in the constitutions and the Act, that it was appropriate that members be given an opportunity to consider whether they wish to have Trilogy has a permanent Responsible Entity, and accordingly, LMIM has convened a meeting of the members, to take place on 30 May, 2013, to consider and, if thought fit, to pass resolutions replacing LMIM with Trilogy as the Responsible Entity for the FMI Fund.

The Administrators hope and expect that they will be in a position to form a view as to whether the purposes of the Fund can be achieved, or whether it should otherwise be wound up prior to that meeting, although this is not certain. The Administrators appreciate that this is a topic on which reasonable minds might differ and, as presently advised, the Administrators do not propose to implement a decision to wind up the Fund, prior to the meeting of members on 30 May, 2013. If it is the view of the requisite body of members that Trilogy should be the Responsible Entity of the FMI Fund, then the responsibility will pass to it.

- (c) **LMIM has not yet decided whether, and so does not presently believe, that a new, permanent Responsible Entity, independent of the Administrators and LMIM, should be appointed to the Fund.**

The Administrators are presently of the view that there are two matters which will inform a decision that it is in the best interests of members that a new, permanent, Responsible Entity, independent of the Administrators and LMIM should be appointed to the Fund.

The first is whether the Fund is viable and should continue in operation, and not be wound up. The second is whether the Administrators or LMIM are subject to any conflicts of interest which render it undesirable, either that they or LMIM should continue in office as Administrators and Responsible Entity, respectively.

As you may be aware, various persons have made assertions to the effect that the appointment of the Administrators to LMIM has created conflicts of interest; and, inferentially, that such conflicts of interest are so acute that LMIM should not continue as Responsible Entity of the FMI Fund. However, we have not seen any evidence to support such assertions.

Our clients regard it as significant that de Jersey CJ removed LMIM as trustee of the LM Managed Performance Fund on 12 April, 2013. Accordingly, there is now no basis to suggest that there is any conflict of interest in relation to LMIM's status as Responsible Entity of the FMI Fund, in respect of its former status as trustee of the LM Managed Performance Fund.

recover from directors or associates of directors, the benefits of an unreasonable director-related transaction. We note that the property of LMIM is defined in section 9 of the Act as including any legal or equitable estate of interest in any property. So, *prima facie* property held by LMIM on trust would be caught by, for example, paragraph 588FDA(1)(a)(ii) of the Act.

Assuming – as our clients presently do – that there will be no proposal for a DOCA, it is likely that LMIM will be the subject of a creditors voluntary winding up. Again, if circumstances do give rise in the future to a conflict of interest, that may result in our clients forming the view that a new permanent Responsible Entity should be appointed and, when and if they do form that view, our clients will take appropriate action to consult the members.

2. **In our respectful view, Ms Muller did not make such an unqualified statement. We think you will agree that the discussion to which you refer had in the context of ASIC's proposal to seek from LMIM, through its Administrators, an Enforcement Undertaking, and that we were discussing minimum period the time within which the Administrators could respond to a requirement imposed by such an Enforceable Undertaking.**

At that time, the proceedings brought by Piper Alderman and Trilogy, through Mr and Mrs Bruce, had only recently been served. In particular, our clients had not, on 23 April, 2013, then decided the appropriate action to take in response to Trilogy's attempt have itself appointed temporary Responsible Entity of the FMI Fund.

As you know, our clients have now decided that it is in the best interests of members to have an opportunity to consider that proposal in a meeting, and our clients have convened such a meeting.

That decision followed two days of intensive consultation by our clients with their solicitors (our firm and Norton Rose) and other expert advisors.

Our clients are presently of the view that no action should be taken to wind up the Fund, until the meeting of members to consider replacing LMIM with Trilogy has been held.

Our clients also take the view that they should decide which, if any of the assets in the FMI Fund should be subject to a formal valuation or feasibility study, before they can decide, as Administrators, whether the FMI Fund should be wound up. Our clients presently expect to be able to form that view, and to obtain such valuations and undertake such feasibility studies, prior to 30 May, 2013 – the date of the meeting of members.

If our clients form the view, that the FMI Fund should be wound up, prior to the meeting on 30 May, 2013, they will inform ASIC. Our clients present intention is that they will not, however, take any action in that regard, pending the outcome of the meeting, since our clients do not wish to pre-empt the wishes of members in relation to whether Trilogy should be appointed as Responsible Entity in place of LMIM.

If Trilogy does not replace LMIM as Responsible Entity of the FMI Fund at the meeting of members on 30 May, 2013, and if our clients have decided that the FMI Fund should be wound up, our clients will promptly take steps either to convene a meeting, or to allow others to convene a meeting to consider and approve that decision.

-
3. **Our clients decided that LMIM should convene a meeting of the members of the FMI Fund for a number of reasons:-**
- (a) Our clients do not believe that the court's power to appoint a temporary Responsible Entity under section 601FN has been engaged. That is, our clients do not believe that LMIM does not meet the requirements of Section 601 FA of the Act;
 - (b) There are well understood provisions, both in the Constitution of the FMI Fund and in the Act for members of the Fund to control who is their Responsible Entity;
 - (c) ASIC decided, on 9 April, 2013, in effect to modify LMIM's AFSL, to put in place a process by which members would soon be consulted about the fate of their Fund. The Administrators believe that ASIC acted appropriately in that regard.
 - (d) Only two members of the Fund (obviously hand-picked by Trilogy and its lawyers) have made the application to the Court.
 - (e) Trilogy is a member of the FMI Fund. Accordingly, it will have an opportunity to attend the meeting;
 - (f) The Administrators have convened the meeting on a date which also gives Trilogy an opportunity to send to members such material as it regards appropriate, to advance its case for election, by vote of members to the office of Responsible Entity;
 - (g) The Administrators also decided to provide an up to date copy of the Register of Members to Trilogy for that purpose, and they did so on 30 April, 2013;
 - (h) In all of these circumstances, the Administrators have formed the view that it was appropriate to convene this meeting to give members an opportunity to consider, discuss Trilogy's proposal, and vote on it; that it is appropriate that this should occur prior to the court's consideration of the application by Mr and Mrs Bruce; and indeed that the meeting will assist the Court in deciding their application.
4. **The reasons why LMIM did not include an alternative resolution that the LMIM Fund be wound up are:-**
- (a) When LMIM convened the meeting, the Administrators had not decided that it was in the best interests of unit holders that the FMI Fund be wound up and they have still not made any such decision.
 - (b) In deference to the possibility that Trilogy might be elected as Responsible Entity, the Administrators thought it inappropriate to pre-empt its decision as to whether or not
-

the Fund should be wound up, in case the members decide to elect it as Responsible Entity.

- (c) It also remains possible (depending on how events transpire) that if LMIM decides that the FMI Fund should be wound up, that that might be accomplished without a meeting. Trilogy may decide to proceed in that way. The Administrators do not presently intend to proceed in that way, should they decide that the FMI Fund should be wound up.

We trust that this letter answers your inquiries. If, however, there is any aspect of these matters which you wish to discuss, or if you require any further information, as always, please do not hesitate to contact us or the Administrators direct.

Yours faithfully



Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383/2013

Applicants:

**RAYMOND EDWARD BRUCE AND
VICKI PATRICIA BRUCE
AND**

First Respondent:

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

AND

Second Respondent:

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

AFFIDAVIT

I, PAUL ALEXANDER RUSSELL of Forensic Advisory Services, Level 10, 45 Clarence Street, Sydney NSW 2000, say on oath:

1. I am a partner of Financial Advisory Services.
2. I am forensic accounting specialist and chartered accountant with over 30 years' experience in the accountancy profession. I am also a registered liquidator and an official liquidator and have been involved in numerous insolvency administrations and investigations.
3. For the purpose of this proceeding I have been engaged on behalf of the Applicants to prepare a report on the Net Tangible Asset position of LM Investment Management Limited.

Signed:



Taken:



**AFFIDAVIT OF PAUL
ALEXANDER RUSSELL**

Piper Alderman
Level 23, Governor Macquarie Tower, 1 Farrer
Place, SYDNEY 2000


Filed on Behalf of the Applicants

Ref: AB:SB:380287
Phone No: +61 2 9253 9999
Fax No: +61 2 9253 9900

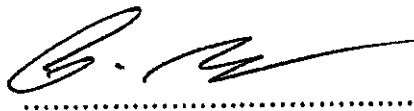
28094447v1

4. Exhibited to this affidavit and marked "PAR1" is a true copy of my report dated 3 May 2013, together with a copy of my curriculum vitae.
5. All facts and circumstances 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 on the face of this my affidavit.

SWORN by PAUL ALEXANDER RUSSELL on 3 May 2013 in Sydney in the Presence of:


.....

Deponent


.....

Witness

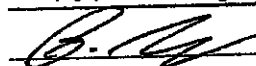
Name:

~~Solicitor/Justice of the Peace~~

I, Carla Syme, Solicitor, Prac Cert No 58074, certify the following matters concerning the making of this statutory declaration/ affidavit by the person who made it:

1. I saw the face of the person/ ~~I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering.~~
2. ~~I have known the person for at least 12 months/ I have not known the person for at least 12 months, but I have confirmed the person's identity using an identification document and the document I relied on was:~~

Driver Licence

 (sgd) Date: 3 / 5 / 20 13

2 Signed:

Taken By:

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383/2013

Applicants:

**RAYMOND EDWARD BRUCE AND
VICKI PATRICIA BRUCE
AND**

First Respondent:

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

Second Respondent:

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

EXHIBIT CERTIFICATE

This is the Exhibit marked "PAR" referred to in the affidavit of Paul Alexander Russell sworn 3 May 2013.

Before me:



.....
Solicitor/Justice of the Peace

I, Carla Slyney, Solicitor, Prac Cert No 58074, certify the following matters concerning the making of this statutory declaration/ affidavit by the person who made it:

1. I saw the face of the person/ I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering.
2. I have known the person for at least 12 months/ I have not known the person for at least 12 months, but I have confirmed the person's identity using an identification document and the document I relied on was:

Driver Licence

 (sgd) Date: 3/5/2013

CERTIFICATE OF EXHIBIT

Piper Alderman
Level 23, Governor Macquarie Tower, 1 Farrer Place,
SYDNEY 2000

Filed on Behalf of the Applicants

Ref: AB:LG:384396
Phone No: +61 2 9253 9999
Fax No: +61 2 9253 9900

28082274v1

Forensic Advisory Services Pty Ltd
ABN 24 068 615 869

Level 10, 45 Clarence Street, Sydney NSW 2000

Telephone +61 2 9251 2333
Facsimile +61 2 9251 1793
Website fas-au.com



**In the Supreme Court of Queensland
Proceedings 3383 of 2013**

Between:

**RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM INVESTMENT
MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)**

Applicants

v

THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Respondents

**Expert Accountant's Report
of
Paul Russell**

Dated: 3 May 2013

Specialist Field	:	Forensic Accounting
On behalf of	:	Applicants
Prepared for	:	Supreme Court of Queensland
On instruction of	:	Piper Alderman

Forensic Advisory Services
Level 10
45 Clarence Street
SYDNEY NSW 2000
Tel: +61 (0)2 9251 2333
Fax: +61 (0)2 9251 1793

**Paul Russell
Partner**

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated: 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

CONTENTS

SECTION	PAGE
1.00 SCOPE	3
2.00 INSTRUCTIONS	5
3.00 QUESTION 1.	9
4.00 QUESTION 2.	10
5.00 QUESTION 3.	12
6.00 QUESTION 4.	14
7.00 QUESTION 5.	16
8.00 QUESTION 6	18
9.00 EXPERT'S CONFIRMATION	19

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

APPENDICES

- A. Letter of instruction
- B. Curriculum Vitae
- C. List of Documents Relied Upon

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated: 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

1.00 SCOPE

- 1.01 I, Paul Russell, am instructed by Piper Alderman, Solicitors, to act as an expert witness in the matter of Raymond Edward Bruce & Vicki Patricia Bruce and L M Investment Management Limited (Administrators Appointed) v The Members of the LM First Mortgage Fund. (Supreme Court of Queensland Proceedings No. 3383 of 2013).
- 1.02 I have been instructed to answer 6 questions in relation to LM Investment Management Limited (Administrators Appointed) ("LMIM") on the basis of assumptions provided to me in my letter of instructions dated 2 May 2013 and the limited information provided to me with my instructions.
- 1.03 At **Appendix A** is a copy of the letter of instruction I received from Piper Alderman, Solicitors.
- 1.04 I am a Chartered Accountant and an Associate Member of the Institute of Certified Fraud Examiners. I am a Registered Liquidator and an Official Liquidator. I am a Partner at Forensic Advisory Services Pty Limited which changed its name from RGL Forensics in March 2012.
- 1.05 Prior to joining RGL Forensics in April 2010, I was employed by PPB. I commenced with the predecessor of PPB in October 1999 and was admitted as a Partner to PPB in 2005. Over the past 10 years, I have provided expert opinions and have been subject to cross examination in legal forums in various jurisdictions in Australia. At **Appendix B** is a copy of my curriculum vitae.
- 1.06 Other staff members of Forensic Advisory Services have assisted me in relation to the preparation of this report. Where this has occurred, I have reviewed the results of their work and take responsibility for and adopt any conclusions reached.
- 1.07 I have prepared this report on the basis of the documents provided to me by Piper Alderman Lawyers and listed at **Appendix C**. Should any other additional

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

material become available, I would like the opportunity to review it and, if necessary, amend this report.

- 1.08 I have conducted this engagement in accordance with the professional standards of the Institute of Chartered Accountants in Australia ('ICAA') and CPA Australia Limited ('CPA Australia') including Forensic Accounting Standard, APES 215 – Forensic Accounting Services.
- 1.09 I have read Chapter 11, Part 5 of the Uniform Civil Procedure Rules 1999 (QLD). I agree to be bound by the Rules.
- 1.10 I have not undertaken an audit or other independent examination of the documentation other than for the purpose of this report.
- 1.11 My review is confined to the financial aspects of the matter and is not concerned with liability.

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

2.00 INSTRUCTIONS

2.01 I have been instructed to answer the following 6 questions on the basis of the material provided to me and the Assumptions detailed at paragraph 2.09 to 2.17 below:

2.02 Question 1.

Making the Assumptions, what is 0.5% of the average value of scheme property of the Registered Schemes LMIM operates up to 5 million dollars?

2.03 Question 2.

Making the Assumptions, should the matters referred to in assumption 8 be excluded as assets from the calculation of the NTA?

2.04 Question 3.

Making the Assumptions, what are the assets of LMIM that are cash or cash equivalents?

2.05 Question 4.

Making the Assumptions, what are the adjusted assets of LMIM?

2.06 Question 5.

Making the Assumptions, what are the adjusted liabilities of LMIM?

2.07 Question 6.

Making the Assumptions, what is the NTA of LMIM?

2.08 The Assumptions that I have been asked to make are as follows:

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated: 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

2.09 Assumption 1.

ASIC Class Order (11/1140) (Class Order) applies to LMIM as responsible entity for the Fund.

2.10 Assumption 2.

By reason of the Class Order any responsible entity which has an external custodian is to have:

2.1 A minimum Net Tangible Assets (NTA) of the greater of:

(a) \$150,000 or

(b) 0.5% of the average value of scheme property of the Registered Schemes it operates up to 5 million dollars; or

(c) 10% of the average responsible entity revenue.

2.2 50% of the NTA requirement to be held in cash or cash equivalents as defined in the Class Order.

2.3 100% of the NTA requirement is to be held in liquid assets – meaning:

(a) Cash or cash equivalents;

(b) Assets that can be reasonably expected to realise for their market value within 6 months;

(c) That are free from encumbrances and, in the case of receivable, free from any right of set off.

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated: 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

2.11 Assumption 3.

LMIM is a responsible entity which has an external custodian.

2.12 Assumption 4.

LMIM's assets and liabilities are as listed in the Speaking Notes prepared by FTI (FTI Report) at page 8 namely:

4.1 \$7.8 million in assets with \$5.2 million of investments including those in overseas related entities and the Cavill Avenue property;

4.2 \$1.07 million in liabilities;

4.3 Management fee income in advance of \$13.7 million;

4.4 Fund creditors and advisor commission of \$9.9 million.

2.13 Assumption 5.

In working out the NTA, the Cavill Avenue property is not to be included.

2.14 Assumption 6.

According to the Circular to Creditors the funds under management in the Registered Schemes operated by LMIM (excluding the LM Managed Performance Fund because this is not a registered scheme) total \$352,654,700 as follows:

6.1 LM Australian Income Fund - \$36m

6.2 LM Australian Structured Fund - \$12m

6.3 LM Cash Performance Fund - \$654,700

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

6.4 LM First Mortgage Fund - \$304m

2.15 Assumption 7.

According to the Statement of Financial Position (SFP) of LMIM as at 30 June 2012, the net assets are \$6,320,896.

2.16 Assumption 8.

According to the SFP:

8.1 Investments in associates is \$4,631,927 (page 8);

8.2 Related party receivables are \$430,579 (page 28);

8.3 Deferred tax assets are \$129,557 (page 8).

2.17 I have assumed that the relevant date applicable to all of the questions is the date of the meeting of creditors of LMIM being 2 April 2013.

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated: 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

3.00 QUESTION 1.

3.01 *"Making the Assumptions, what is 0.5% of the average value of scheme property of the Registered Schemes LMIM operates up to 5 million dollars?"*

3.02 According to Assumption 6 the total funds under management in the Registered Schemes operated by LMIM was \$352,654,700.

3.03 0.5% of this amount is equal to \$1,763,274.

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
 INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
 V
 THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
 Dated: 3 May 2013
 Specialist Field: Forensic Accounting
 On behalf: Applicant

4.00 QUESTION 2.

4.01 *"Making the Assumptions, should the matters referred to in assumption 8 be excluded as assets from the calculation of the NTA?"*

4.02 Assumption 8 indicates that according to the Statement of Financial Position of LMIM as at 30 June 2012 the following amounts were included as assets of LMIM:

Asset	Amount
	\$
Investments in associates	4,631,927
Related party receivables	430,579
Deferred Tax Assets	129,557
Total	5,192,063

4.03 On the assumption that these balances remained in place and were continued to be regarded as the same class of asset at the date of the appointment of the Administrator to LMIM, and that administrators were also appointed to related parties of LMIM it is my opinion that these amounts should be excluded as assets from the calculation of the NTA as at the date of the administrators appointment. My reasoning for this is as follows:

4.03.1 The assets described as "Investments in Associates" and "Deferred Tax Assets" are classified as non current assets in the financial statements for LMIM for the 2012 financial which by definition means that they are not expected to be realised within a 12 month period. Furthermore, the balance sheet for LMIM as at 30 June 2012 indicates total assets of \$7,705,034 of which \$4,631,927 represents

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

an amount for "Investment in Associates". Note 10 to the 2012 Financial Report for LMIM indicates that this relates to a 66.67% interest in an asset described as "Cavill Avenue Joint Venture". Assumption 5 states that in determining the NTA, the Cavill Avenue property is not to be included.

- 4.03.2 The assets described as "related party receivables" are unlikely to be realised within a 6 month period if the related parties are also under external administration.

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
 INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
 v
 THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
 Dated 3 May 2013
 Specialist Field: Forensic Accounting
 On behalf: Applicant

5.00 QUESTION 3.

5.01 *"Making the Assumptions, what are the assets of LMIM that are cash or cash equivalents?"*

5.02 ASIC Class Order (11/1140) defines **cash or cash equivalents** to mean:

"(a) cash on hand, demand deposits and money deposited with an Australian ADI that is available for immediate withdrawal; and

(b) short-term, highly liquid investments that are readily convertible to known amounts of cash that are subject to an insignificant risk of changes in value; and

(c) the value of any eligible undertaking provided by an eligible provider; and

(d) a commitment to provide cash from an eligible provider that can be drawn down within 5 business days and has a maturity of at least 6 months."

5.03 The LMIM Financial Report for the year ended 30 June 2012 recorded the following amounts held as cash and cash equivalents:

Cash and Cash Equivalents		\$
Cash at bank		1,112,667
Cash at hand		1,622
Total Cash and Cash Equivalents		1,114,289

5.04 LMIM's cash or cash equivalents as at 30 June 2012 was \$1,114,289.

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

5.05 I am unable to determine the assets that meet the definition of "cash and cash equivalents" as at the date of the appointment of an administrator to LMIM from the information available to me.

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated: 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

6.00 QUESTION 4.

6.01 *"Making the Assumptions, what are the adjusted assets of LMIM?"*

6.02 ASIC Class Order (11/1140) defines **adjusted assets** to mean:

"the value of total assets as they would appear on a balance sheet at the time of calculation made up for lodgement as part of a financial report under Chapter 2M if the licensee were a reporting entity:

*(a) minus the value of **excluded assets** that would be included in the calculation; and*

(b) minus the value of any receivable that would be included in the calculation up to the amount that the licensee has excluded from adjusted liabilities on the basis that there is an enforceable right of set-off with that receivable; and

(c) minus the value of any assets that would be included in the calculation that are encumbered as a security against liability to a person that provides a security bond to ASIC up to the amount of the bond; and

(d) minus the value of any assets that would be included in the calculation that may be required to be applied to satisfy a liability under a credit facility that is made without recourse to the licensee up to the amount of that liability excluded from adjusted liabilities; and

(e) plus the amount of any eligible undertaking that is not an asset."

6.03 The definition of **excluded assets** is included in ASIC Class Order (11/1140) includes assets invested in an associate of the licensee.

6.04 Assumption 4.1 indicates that as at the date of the administrator's appointment LMIM had \$7.8 million in assets with \$5.2 million of investments including those in overseas related entities and the Cavill Avenue property.

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated: 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

- 6.05 Assumption 5 indicates that the Cavill Avenue property is not to be included in the calculation of NTA which is defined in ASIC Class Order (11/1140) as "*adjusted assets minus adjusted liabilities*".
- 6.06 The \$5.2 million in assets referred to in the Administrators' speaking notes as consisting of investments in overseas related entities and the Cavill Avenue property value are excluded assets and on this basis the adjusted assets of LMIM at the date of the administrator's appointment were \$2.6 million (i.e. \$7.8 million less \$5.2 million).

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated: 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

7.00 QUESTION 5.

7.01 "Making the Assumptions, what are the adjusted liabilities of LMIM?"

7.02 ASIC Class Order (11/1140) defines adjusted liabilities as:

"the amount of total liabilities as they would appear on a balance sheet at the time of calculation made up for lodgement as part of a financial report under Chapter 2M if the licensee were a reporting entity:

- a) minus the amount of any liability under any subordinated debt approved by ASIC that would be included in the calculation; and*
- b) minus the amount of any liability the subject of an enforceable right of set-off that would be included in the calculation, if the corresponding receivable is excluded from adjusted assets; and*
- c) minus the amount of any liability under a credit facility that would be included in the calculation, if it is made without recourse to the licensee; and*
- d) plus the value of any assets that are encumbered (other than assets that are encumbered merely to support a guarantee provided by the licensee) as a security against another person's liability where the licensee is not otherwise liable, but only up to the lower of:*
 - (i) the amount of that other person's liability; or*
 - (j) the value of the assets encumbered; and*
- e) plus the maximum potential liability of any guarantee provided by the licensee other than a:*
 - (i) guarantee limited to an amount of recoverable out of any scheme property (and in the case of a scheme which is not registered, out of any*

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
 INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
 v
 THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
 Dated: 3 May 2013
 Specialist Field: Forensic Accounting
 On behalf: Applicant

contributions, money, property or income that would be scheme property of the scheme were registered) of a managed investment scheme operated by the licensee; or

(ii) guarantee of the obligations of another member of a stapled group, except where the licensee is the responsible entity of a registered scheme that is not part of the stapled group.

7.03 Assumptions 4.2, 4.3 and 4.4 detail the following liabilities of LMIM as at the date of the administrator's appointment:

Description	Amount
	\$
Unspecified liabilities	1,070,000
Management Fee Income in advance	13,700,000
Fund Creditors and advisor commissions	9,900,000
Total Liabilities	24,670,000

7.04 I consider each of the amounts detailed above represent liabilities and therefore the total of \$24.67 million would be included as total liabilities in a balance sheet for LMIM as at the date of the administrator's appointment.

7.05 The limited information available to me does not enable me to determine whether any amounts included in the total liabilities totalling \$24.67 million would need to be excluded for the purposes of calculating LMIM's adjusted liabilities. Accordingly, I have assumed LMIM's adjusted liabilities total \$24.67 million.

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
 INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
 v
 THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
 Dated: 3 May 2013
 Specialist Field: Forensic Accounting
 On behalf: Applicant

8.00 QUESTION 6

8.01 *"Making the Assumptions, what is the NTA of LMIM?"*

8.02 ASIC Class Order (11/1140) defines NTA as *"adjusted assets minus adjusted liabilities"*.

8.03 In accordance with my findings in relation to questions 4 and 5, the NTA of LMIM is a deficit of \$22.07 million determined as follows:(i.e. \$2.60 million for adjusted assets less \$24.67 million for adjusted liabilities).

Details	\$
Adjusted Assets	2,600,000
Adjusted Liabilities	24,670,000
Deficiency of NTA	22,070,000

RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED)
v
THE MEMBERS OF THE LM FIRST MORTGAGE FUND

Report of: Paul Russell
Dated: 3 May 2013
Specialist Field: Forensic Accounting
On behalf: Applicant

9.00 EXPERT'S CONFIRMATION

9.01 I, Paul Russell, confirm that:

- a) insofar as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be true;
- b) I have made all enquires that I consider appropriate;
- c) the opinions I have expressed represent my true and complete professional opinion;
- d) I have endeavored to include in my report all matters which I consider significant;
- e) I understand my duty to the Court and that this duty overrides any obligation to the party by which I am engaged. I confirm that I have complied and will continue to comply with my duty.



Paul Russell
Partner,
Forensic Advisory Services

Appendix A



Piper Alderman

Our Ref: AKB.AEF.384396

Your Ref:

2 May 2013

By Email: paul.russell@fas-au.com
Original forwarded by Post

Forensic Advisory Services Pty Ltd
Level 10, 45 Clarence Street
SYDNEY NSW 2000

Attention: Mr Paul Russell

Dear Sir

**RAYMOND EDWARD BRUCE & VICKI PATRICIA BRUCE AND LM
INVESTMENT MANAGEMENT LIMITED (ADMINISTRATORS APPOINTED),
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND V THE MEMBERS OF THE LM FIRST
MORTGAGE FUND**

We act for the Applicants in proceedings number 3383 of 2013 in the Supreme
Court of Queensland (**Proceedings**).

Our clients are unit holders in the LM First Mortgage Income Fund (**Fund**). The
current responsible entity of the Fund is LM Investment Management Limited
(Administrators Appointed) (**LMIM**).

We seek your assistance to prepare a written opinion, based upon your
specialised training, study or experience as a forensic accountant, in answer to
the questions below.

Before proceeding, it is necessary for you to read and understand Chapter 11
Part 5 of the Uniform Civil Procedure Rules, 1999 (*Q/d*)(**Expert Rules**) which
are annexed to this letter and marked "A".

Your report will also need to include:

1. a statement as to your expertise, including your training, study and
experience in the above field;
2. the facts, matters and assumptions you have been asked to make (if
convenient, by attaching a copy of this letter of instruction to your
report) and on which you have based the opinions expressed in your
report;
3. details of the material (including literature, examinations, tests and
other investigations) relied on by you in the preparation of your report;
and
4. your reasons for each opinion you express.

Lawyers

Sydney • Melbourne
Brisbane • Adelaide

ABN 42 843 327 183

Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
Australia

DX 10216 Sydney Stock Exchange

t +61 2 9253 9999
f +61 2 9253 9900

www.piperalderman.com.au

Partner:

Amanda Banton
t +61 2 9253 9929
abanton@piperalderman.com.au

Contact:

Anne Freeman
Partner
t +61 2 9253 9934
a.freeman@piperalderman.com.au

To: Forensic Advisory Services Pty Ltd
Date: 2 May 2013
Our Ref: AKB AEF 384396
Page: 2

If you are prepared to proceed on that basis, we ask you to read and consider the materials which listed are below; make the assumptions that we set out; and provide us with a written report in accordance with the Expert Rules that answers the questions which are posed.

To avoid any doubt, the report must make clear the basis for your opinion and the reasoning process you have used when applying your specialist knowledge and experience to the assumptions you have been asked to make. If other assumptions are made by you in your reasoning process, please reveal those assumptions together with your reasoning process so the Court may understand the way you have reached your opinion by applying your specialised knowledge and experience to the assumed facts. If an assumption is a fact which you are able to prove from your direct observation, please identify that assumption and state the observations you have made which prove the fact.

Materials

The Materials we ask you to consider are contained in a folder marked "Material for Accounting Expert", which contains the documents listed in the annexure marked "B" to this letter. The Assumptions we ask you to make are as follows:

Assumptions

1. ASIC Class Order 11/1140 (**Class Order**) applies to LMIM as responsible entity for the Fund.
2. By reason of the Class Order any responsible entity which has an external custodian is to have:
 - 2.1 A minimum Net Tangible Assets (**NTA**) of the greater of:
 - (a) \$150,000 or
 - (b) 0.5% of the average value of scheme property of the Registered Schemes it operates up to 5 million dollars; or
 - (c) 10% of the average responsible entity revenue.
 - 2.2 50% of the NTA requirement to be held in cash and cash equivalents as defined in the Class Order.
 - 2.3 100% of the NTA requirement is to be held in liquid assets – meaning:
 - (a) Cash or cash equivalents;
 - (b) Assets that can be reasonably expected to realise for their market value within 6 months;
 - (c) That are free from encumbrances and, in the case of receivable, free from any right of set-off
3. LMIM is a responsible entity which has an external custodian.

To: Forensic Advisory Services Pty Ltd
Date: 2 May 2013
Our Ref: AKB.AEF.384386
Page: 3

4. LMIM's assets and liabilities are as listed in the Speaking Notes prepared by FTI (FTI Report) at page 8, namely:
 - 4.1 \$7.8 million in assets with \$5.2 million of investments including those in overseas related entities and the Cavill Avenue property;
 - 4.2 \$1.07 million in liabilities;
 - 4.3 Management fee income in advance of \$13.7 million
 - 4.4 Fund creditors and adviser commissions of \$9.9 million.
5. In working out the NTA, the Cavill Avenue property is not to be included
6. According to the Circular to Creditors the funds under management in the Registered Schemes operated by LMIM (excluding the LM Managed Performance Fund because this is not a registered scheme) total \$352,654,700 as follows:
 - 6.1 LM Australian Income Fund - \$36m
 - 6.2 LM Australian Structured Fund - \$12m
 - 6.3 LM Cash Performance Fund - \$654,700
 - 6.4 LM First Mortgage Fund - \$304m
7. According to the Statement of Financial Position (SFP) of LMIM as at 30 June 2012, the net assets are \$6,320,896.
8. According to the SFP:
 - 8.1 Investments in associates is \$4,631,927 (page 8);
 - 8.2 Related party receivables are \$430,579 (page 28);
 - 8.3 Deferred tax assets are \$129,557 (page 8).

Questions

1. Making the Assumptions, what is 0.5% of the average value of scheme property of the Registered Schemes LMIM operates up to 5 million dollars?
2. Making the Assumptions, should the matters referred to in Assumption 8 to be excluded as assets from the calculation of the NTA?
3. Making the Assumptions, what are the assets of LMIM that are cash or cash equivalents?
4. Making the Assumptions, what are the adjusted assets of LMIM?



To: Forensic Advisory Services Pty Ltd
Date: 2 May 2013
Our Ref: AKB AEF.384396
Page: 4

5. Making the Assumptions, what are the adjusted liabilities of LMIM?
6. Making the Assumptions, what is the NTA of LMIM?

If there are any other documents other those with which we have briefed you that you need to consider when forming your opinion, or have considered, in the process of making your report, please identify that document and ensure that it is listed in your report and a copy is provided. It is important that your report identify every document to which you have had reference in the preparation of your report.

As an independent expert witness, you have the following general duties:

- A paramount duty to the Court which overrides any duty to any party to the proceedings;
- An overriding duty to assist the Court on matters relevant to your area of expertise in an objective and unbiased manner;
- A duty not to be an advocate to any party in the proceedings;
- A duty to make it clear when a particular question or issue falls outside the area of your expertise.

If you have any difficulty understanding your obligations or this letter of instruction, please do not hesitate to draw that matter to our attention.

As discussed, we require your report by **4pm, Friday 3 May 2013**.

Yours faithfully
Piper Alderman

Per: 
Amanda Banton
Partner

Enc.

Forensic Advisory Services Pty Ltd
ABN 24 068 615 869

Level 10, 45 Clarence Street, Sydney NSW 2000

Telephone +61 2 9251 2333
Facsimile +61 2 9251 1793
Website fas-au.com



Forensic
ADVISORY SERVICES

Appendix B

CURRICULUM VITAE

Paul Russell, CA **Partner**

Professional Status

Associate of the Institute of Chartered Accountants in Australia
Associate of the Association of Certified Fraud Examiners
Registered Liquidator
Official Liquidator
Justice of the Peace

Professional history

Forensic Advisory Services Pty Limited, formerly	
RGL Forensics - Partner	2010 to Present
PPB - Partner	1999 to 2010
Jones Condon - Associate	1989 to 1999
Logic Group Pty Limited	1989 to 1989
Mulvaney Coulton Isaac	1988 to 1989
Nelson Wheeler	1981 to 1988

Academic history

Bachelor of Business	1987
----------------------	------

Mr Russell has over 29 years experience in the accounting profession and over 20 years experience in litigation support services, business consulting and corporate insolvency. He regularly acts as an expert witness in legal proceedings and has been involved in numerous complex insolvency administrations and investigations at the request of major banks, financiers and insurance companies.

Since 2000 Mr Russell has been regularly engaged by legal practitioners and other stakeholders to conduct the following:

- Valuations of business enterprises for the purposes of litigation and commercial negotiation; including family law matters, shareholder disputes and sale of partial interests.
- Complex insolvency administrations for major banks, financiers and insurance companies.
- Provision of Reports and expert opinion in relation to economic loss.
- Provision of Reports and expert opinion in relation to solvency.
- Review and analysis of suspected or fraudulent activity and provision of a report and expert opinion in relation to findings.
- Expert accounting reviews and provision of expert opinion.

Mr Russell has been instructed by both Plaintiffs and Defendants and as a Court appointed single Expert. He has appeared in numerous Australian Legal Forums as an Expert Witness including the Federal Court of Australia, Family Court of Australia, Supreme Court of NSW, Land and Environment Court of NSW, NSW District Court and Administrative Tribunals.

EXPERIENCE

Examples of Mr Russell's experience are set out below:

FRAUD INVESTIGATION

- Fraud investigation and completion of numerous detailed reports following the discovery of two concurrent fraudulent acts by Senior Management of a large registered club occurring over a lengthy period.
- Fraud investigation and interviews with numerous members of a large registered club in fiduciary roles engaged in systematic fraudulent acts. Completion of detailed report of findings and presentation to Board of Directors.
- Review of funds flow transactions following significant systematic credit card fraud at the request of a major Australian Trading Bank.
- Detailed accounting investigation of numerous bank accounts for a large Australian bank.
- Investigation of long term systematic fraud by the operator of a sub branch for a large Australian Retail bank.

BUSINESS VALUATION

- Regularly engaged by legal practitioners to conduct valuations of business enterprises for the purposes of litigation and commercial negotiation including analysis of accounting information and calculation of loss for a variety of businesses.
- Valuation of shareholder interests including a significant chain of fast food outlets in the Australian Eastern states and a group of specialty retail stores located at Australian airports.
- Valuation of a professional services firm and the effect various undisclosed executive services agreements had on the value of the business to a new shareholder.
- Valuation of a pig farming and small goods manufacturing business operating on land subject to compulsory acquisition.
- Valuation of a store in a significant retail chain occupying premises subject to resumption by the NSW government.

FAMILY LAW

- The analysis of accounting information to determine the nature and extent of a husband's financial interests following his inability to assist due to medical circumstances.
- The valuation of a professional services firm servicing the mining industry that relied heavily upon one key man.

Appendix B**SOLVENCY REVIEWS**

- Report and critical evaluation as to solvency position for a number of large companies in liquidation or threatened with liquidation including engagements by directors, creditors, banking institutions and other stakeholders.
- Review of the action of voluntary administrators and deed administrators of a large public company on behalf of a significant creditor owed in excess of \$50M.
- Review and analysis of a report by a liquidator as to the solvency of a company relied upon in pursuit of a preference claim.
- Review of the accounts of the subsidiary of a listed company in liquidation in relation to transactions occurring with the listed parent company immediately prior to liquidation, resulting in the recovery of substantial funds from the parent company in a settled litigation action for the benefit of creditors.
- Assessment of solvency of a company that operated a top ranking basketball team in the Australian National Basketball League.
- Assessment of solvency of a grain trading business dealing in forward contracts for the purchase of grain. The matter proceeded to hearing.
- Assessment of solvency for a significant paper product wholesaler involving eliminating the effects of a substantial debt factoring fraud from its financial results.
- Assessment of solvency of a retail distribution business focusing on its entitlement to rely on demonstrated funding from external sources. The matter proceeded to hearing.
- Assessment of solvency of a significant Australian gold mining operation in liquidation including a detailed review of its operation in the period preceding the appointment of a liquidator.
- Detailed review of the operation of a major Sydney entertainment venue at the request of the NSW state government.
- Assessment of solvency of a company that imported luxury motor vessels into the Australian Market

SPECIALIST ACCOUNTING REVIEWS

- Review of the actions of a firm of accountants at the request of an insurance company in relation to alleged acts of negligence.
- Preparation of a detailed operating budget for a major entertainment venue operated by the NSW government in the Sydney CBD following the resumption of the venue from its operator that was in liquidation.

ECONOMIC LOSS

- Regularly engaged by legal practitioners to analyse and calculate economic loss and financial effect arising under various scenarios involving corporate transactions.
- Critical evaluation of a claim for economic loss in respect of an action against a prominent listed building company and a trade union and the termination of a contract for demolition by the building company.
- Review of a significant volume of grouped banking accounts on behalf of a major trading bank to determine the effect of the inclusion of certain transactions on the overall group position at various times.
- Review of the operation of a significant medical practice owned by a listed public company and the effect on the business following the departure of a medical practitioner.
- Review of the operation of a significant dental practice owned by a listed public company and the effect on the business following the departure of a dental practitioner.
- Review of the effect on a retail distribution business following the exit of a specialty product division from the business.
- Review of the effect of the termination of a non-compete agreement between two multinational waste management businesses in different geographical sectors in the Australian market.
- Review of the effect of the termination of a lease on the operation of a health services business in the Sydney CBD.
- Review of the quantum of losses suffered by a property developer and the nexus of any losses incurred with professional advice received.
- Recalculation of the loss claimed to have been suffered by a clothing retailer following a fire and eliminating the effects of transactions with a related party to determine the actual replacement cost of trading stock.

INDUSTRY EXPERIENCE

Mr Russell's industry experience includes, but is not limited, to the following:

Agriculture/Livestock
Banking/Financial services
Business & Support services
Construction
Health Services
Hospitality, Leisure & Tourism
Manufacturing
Mining
Professional Services
Retail/Wholesale

EXPERT ADVICE AND EVIDENCE

Mr Russell has extensive experience in many areas of consultation and expert evidence including:

- He regularly acts as an expert witness in legal proceedings and is regularly engaged by legal practitioners to provide an expert opinion.
- Experienced in meeting with opposing experts to determine and define areas of agreement and disagreement for the benefit of the Court.
- Acting as a single court appointed expert.

SEMINARS

Mr Russell has participated in seminars in Australia to clients in relation to fraud related matters and forensic accounting matters.

Appendix C

**Raymond Edward Bruce & Vicki Patricia Bruce and LM Investment Management Limited
(Administrators Appointed)**

v

The Members of the LM First Mortgage Fund

LIST OF DOCUMENTS I HAVE REVIEWED

I have been provided with the following documents from my instructing solicitors:

1. ASIC Class Order (CO 11/1140) and Explanatory Statement
2. Speaking notes from the first meeting of creditors of LM Investment Management Limited (Administrators Appointed)
3. Circular to Creditors of LM Investment Management Limited (Administrators Appointed)
4. LM Investment Management Limited financial report for the year ended 30 June 2012

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383/2013

Applicants:

**RAYMOND EDWARD BRUCE AND
VICKI PATRICIA BRUCE
AND**

First Respondent:

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

AND

Second Respondent:

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

AFFIDAVIT

I, MICHAEL JAMES BALTINS of Level 23, Governor Macquarie Tower, 1 Farrer Place,
Sydney NSW 2000, affirm:

1. I am a law graduate employed by Piper Alderman, the solicitors for the Applicants in these proceedings.
2. I make this affidavit based on my own knowledge or from my review of the relevant documents referred to herein.
3. Exhibited to me at the time of swearing this affidavit is a bundle of documents marked "MJB-1" (the **Exhibit**). References in this affidavit to page numbers are references to page numbers of the Exhibit.

1 **Signed:**

Taken by:

**AFFIDAVIT OF MICHAEL
JAMES BALTINS**

Piper Alderman
Level 23, Governor Macquarie Tower, 1 Farrer
Place, SYDNEY 2000

Filed on Behalf of the Applicants

Ref: AB:SB:380287
Phone No: +61 2 9253 9999
Fax No: +61 2 9253 9900

28093268v1

4. Between 23 April 2013 and 2 May 2013 I received documents entitled "Indication of Support" from a number of the members of the LM First Mortgage Income Fund ARSN 089 343 288 (the **LM FMIF**) or the LM Currency Protected Australian Income Fund (LM CPIF) in relation to the orders sought in the Originating Application in these proceedings dated 15 April 2013 (the **Originating Application**). Copies of the Indications of Support (collectively, the **Indications of Support**) are contained at pages 1 to 100 of the Exhibit.
5. At pages 101 to 163 of the Exhibit is a schedule prepared by Piper Alderman containing information in respect of all of the members of the LM FMIF (the **LM FMIF Register**). Each time that I received an Indication of Support from, or on behalf of, a member of the LM FMIF, I caused an entry to be made in the LM FMIF Register in the column headed "Support Trilogy?". In that column I recorded whether that member supported the orders sought in the Originating Application.
6. Between 23 April 2013 and 2 May 2013 I also received telephone calls from a number of the members of the LM FMIF in relation to these proceedings. Each time that I received a telephone call from, or on behalf of, a member of the LM FMIF, I said words to the effect of:

"Do you support the application to appoint Trilogy as the temporary Responsible Entity of the LM First Mortgage Income Fund?"

7. In each case the member, or the person speaking on behalf of the member, replied in words to the effect of either "yes", "no" following which I caused a corresponding entry to be made in the LM FMIF Register in the column headed "Support Trilogy?".
8. At pages 164 to 204 of the Exhibit is a schedule prepared by Piper Alderman containing information in respect of all of the members of the LM CPIF (the **LM CPIF Register**). Each time that I received an Indication of Support from, or on behalf of, a member of the LM CPIF, I caused an entry to be made in the LM CPIF Register in the column headed "Support Trilogy?" recording whether that member supported the orders sought in the Originating Application.

9. At pages 205 of the Exhibit is a schedule prepared by Piper Alderman summarising the support of the members of the LM FMIF for the orders sought in the Originating Application, by number of units held directly or indirectly in the LM FMIF. For the purposes of the members of the LM CPIF, I have recorded the support as a proportion of the units held in the LM CPIF. By way of example, approximately 12.81% of the members of LM CPIF by value support the orders sought in the Originating Application. As the funds invested by the LM CPIF into the LM FMIF comprise approximately 23.42% of the total interests held in the LM FMIF, the support of the members of the LM CPIF equates in value to approximately 3.00% of the total interests held in the LM FMIF.

SWORN by MICHAEL JAMES BALTINS on ____ May 2013 in Sydney, Australia in the Presence of:

.....
Deponent

.....
Witness
Name:
Solicitor/Justice of the Peace

3 Signed:

Taken By:

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 /2013

Applicants:

**RAYMOND EDWARD BRUCE AND
VICKI PATRICIA BRUCE
AND**

First Respondent:

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

Second Respondent:

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

AFFIDAVIT

**I, PAUL WOOD of Level 10, 241 Adelaide Street, Brisbane, Queensland 4000, Lending
Manager, say on oath:**

- 1. I am the lending manager of Trilogy Funds Management Limited (Trilogy) and
am authorised to swear this affidavit on its behalf.**
- 2. Throughout this affidavit, I make references to various documents and page
numbers. Those documents are contained in a paginated bundle of documents
exhibited to this affidavit and marked "PW-1" (the Exhibit) and the page numbers
to which I refer are the page numbers within the Exhibit.**
- 3. I make this affidavit based on my own knowledge or from my review of the
relevant documents referred to herein, and from my knowledge obtained whilst
working at Trilogy as the lending manager. I have been responsible for making
enquiries on the loan book of the LM First Mortgage Income Fund (LMFMIF) as
Trilogy is the responsible entity of the Wholesale Fund (as set out at paragraph 6
below).**

AFFIDAVIT OF PHILIP RYAN

**Piper Alderman
Level 23, Governor Macquarie Tower, 1 Farrer Place, SYDNEY
2000**

Filed on Behalf of the Applicants

**Ref: AB:SB:380287
Phone No: +61 2 9253 9999
Fax No: +61 2 9253 9900**

Trilogy

4. Trilogy acts as responsible entity and manager for a number of mortgage funds, property syndicates and asset based investment trusts in Queensland, New South Wales and Victoria.
5. Trilogy is the responsible entity for 14 registered managed investment funds with mortgage and property assets spread from Cairns to Melbourne. Trilogy, in association with CYRE Funds Management Limited, took over management of a number of Austgrowth property funds in 2011 from Australian Property Growth Fund (APGF); and, in 2012 Trilogy became the responsible entity of a further two property funds, which were previously subject to management by APGF.
6. On 16 November 2012, Trilogy was appointed responsible entity of the LM Wholesale First Mortgage Income Fund, ARSN 099 857 511 (the **Wholesale Fund**), which is a registered managed investment scheme. At pages 1 to 6 of the Exhibit is a copy of a search of the records of the Australian Securities and Investment Commission (ASIC) that I caused to be conducted on 22 March 2013 for the Wholesale Fund.
7. At pages 7 to 45 of the Exhibit is a copy of the annual financial report of the Wholesale Fund for the year ended 30 June 2011. That financial report shows that:
 - (a) the Wholesale Fund holds units in the registered managed investment scheme known as the LM First Mortgage Income Fund, ARSN 089 343 288 (LMFMIF);
 - (b) the collective value of the Wholesale Fund's investment in the LMFMIF is approximately \$73.9 million;
 - (c) the Wholesale Fund is recorded in the register of the LMFMIF as the second largest investor in the LMFMIF. At Exhibit PW-2 is a copy of the

Signed:

Taken By:

Register for the LMFMIF, which shows at page 122 of the Exhibit PW-2 the entry for the Wholesale Fund; and

- (d) the Wholesale Fund's investment in the LMFMIF is the only investment of the Wholesale Fund.
8. Accordingly, the unit value of the Wholesale Fund (for which Trilogy is the responsible entity) is dependent upon the performance of the LMFMIF.
 9. Given these matters, Trilogy has agreed to indemnify the Applicants for the costs of these proceedings as it considers it to be in the best interests of the Wholesale Fund unit holders to have an alternative responsible entity appointed to investigate possible claims against LMIM in its capacity as responsible entity of the LMFMIF.
 10. A copy of Trilogy's Australian Financial Services Licence, being licence number 261425 and dated 18 March 2009 is at pages 46 to 69 of the Exhibit. Trilogy also has an agreement with Oakvale Treasury in relation to its currency hedging. A copy of the engagement letter dated 26 March 2013 is at pages 70 to 73 of the Exhibit. A copy of Oakvale Treasury's AFSL is at pages 73A to 73B of the Exhibit.
 11. At pages 74 to 108 of the Exhibit is a copy of the Financial Report for Trilogy for the year ended 30 June 2012.
 12. At pages 109 to 132 of the Exhibit is a copy of the Notice of Meeting and Explanatory Memorandum issued by Trilogy to members of the Wholesale Fund dated 28 September 2012. At page 8 of the Explanatory Memorandum (page 166 of the Exhibit), Trilogy's intention to seek to be appointed as responsible entity for the LMFMIF is set out. Section 7 of the Explanatory Memorandum (page 121 to 122 of the Exhibit) sets out Trilogy's strategy for the LMFMIF in the event that it is appointed as responsible entity. The matters stated therein are, to my knowledge, true.

Signed:

Taken By:

13. By email dated 15 January 2013, Trilogy wrote to the auditors of LMIM about the concerns held by Trilogy in relation to LMFMIF and the conduct of LMIM as responsible entity of LMFMIF. A true copy of Trilogy's email is at pages 133 to 135 of the Exhibit.
14. On 18 January 2013, Trilogy also wrote to members of the Compliance Committee of a number of the managed investments schemes for which LMIM is responsible entity, setting out the concerns held by Trilogy in relation to LMFMIF and the conduct of LMIM as responsible entity of LMFMIF. A true copy of Trilogy's letter is at pages 136 to 141 of the Exhibit.
15. At pages 142 to 143 of the Exhibit is a true copy of an email that Trilogy received from Francene Mulder, Executive Director - Distribution/Product, of LMIM on 13 February 2013 in response to my letter to the Compliance Committee members dated 18 January 2013. This response did not allay either Trilogy's or my own concerns (which are expressed in the email dated 15 January 2013 and the letter dated 18 January 2013) about LMIM's conduct as responsible entity of LMFMIF.

LMIM's Licence

16. As noted at paragraph 23 of the Bruce Affidavit, on 9 April 2013, ASIC suspended LMIM's Australian Financial Services Licence ("AFSL"). At pages 144 to 155 of the Exhibit is a copy of a search of the records of ASIC that I caused to be conducted on 11 April 2013 for LMIM's suspended AFSL. A copy of the suspension notice is at page 243 of the Bruce Affidavit. The AFSL of LMIM (as suspended) is limited to what is reasonably necessary for, or incidental to, the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of, LMIM. Trilogy's AFSL has not been suspended.
17. If this Court was to appoint Trilogy in place of LMIM as responsible entity of the LMFMIF, Trilogy as the new responsible entity would seek to:
 - (a) consider selling (as appropriate) assets of the LMFMIF; and

Signed:

Taken By:

- (b) obtain appropriate finance (either via external borrowings or the sale of assets) to enable the development of other assets of the LMFMIF to be completed (including upgrading the zoning of these developments) so that they can be sold for a greater price than they would otherwise sell for if sold in an incomplete state.

- 18. At pages 156 to 173 of the Exhibit is ASIC Class Order 11/1140 relating to financial requirements for responsible entities, which I caused to be obtained from the records of the ASIC.

Cavill Avenue

- 19. At pages 174 to 179 of the Exhibit is a title search that I caused to be made on 26 April 2013 of the records of the Queensland Land Titles Office for 38 Cavill Avenue, Surfers Paradise (Cavill Avenue). The registered owner of that property is Baronsand Pty Ltd (Baronsand).
- 20. At pages 180 to 184 of the Exhibit is a copy of a search that I caused to be conducted on 26 April 2013 of the records of the ASIC of Baronsand. The ASIC search records that the directors of Baronsand are Mr Scott McMurtrie and Mr Peter Drake. LMIM does not appear to be a shareholder in Baronsand.
- 21. Pages 185 to 200 of the Exhibit have intentionally been left blank on my instruction.

Concerns about the Conflict

- 22. At pages 201 to 209 of the Exhibit is a copy of a search that I caused to be conducted on 18 April 2013 of the records of the ASIC in relation to LM Administration Pty Ltd (ACN 055 691 426) (LMA). This records that:
 - (a) the Administrators of LMIM are also the Administrators of LMA; and

Signed:

Taken By:

(b) the sole shareholder of LMA is Mr Peter Drake, a director of LMIM.

23. I am aware from the Speaking Notes provided by the Administrators at the first meeting of creditors of LMIM on 2 April 2013 that LMA was formerly engaged by LMIM to provide management services to LMIM (I refer to page 235 of the Exhibit to the Bruce Affidavit, which exhibits those Speaking Notes).
24. As set out in paragraph 20 of the Bruce Affidavit, the Administrators of LMIM are considering the future of LMIM (as they are required to do), which necessarily means that they will consider whether it is appropriate for LMIM to enter into a compromise or arrangement with its creditors through a Deed of Company Arrangement (DOCA).
25. I am concerned that a number of claims may be available to unit holders in the LMFMIF (including the Wholesale Fund) against LMA and LMIM and its directors arising from alleged breaches of duty in respect of the LMFMIF. I have set out details of the claims that my investigations have shown that unit holders and/or the LMFMIF itself may have against LMIM at paragraphs 35 to 52 below.
26. At pages 209A to 209AA of the Exhibit is a copy of a search of the records of ASIC that I caused to be conducted on 24 April 2013 for LMIM's AFSL dated 7 September 2013. Paragraph 22 of LMIM's AFSL dated 7 September 2013 requires it to "maintain an insurance policy covering professional indemnity". Accordingly, the unit holders' potential claims against LMIM may be covered by LMIM's professional indemnity insurance (which LMIM is required to maintain for the purposes of its AFSL) and any directors' and officers' insurance that LMIM holds.
27. I refer to the "Attendance/Admission of Proxies" section of the Administrators' Speaking Notes from the first meeting of creditors of LMIM held on 2 April 2013, which appears at page 232 of the Bruce Affidavit. Paragraph 7 of that section records that at the first meeting of creditors of LMIM, the Administrators stated that unless investors could properly particularise claims for breach of trust or misleading and deceptive conduct against LMIM, and therefore also provide a just

Signed:

Taken By:

estimate of the loss/debt resulting from those claims, those investors' proofs of debt would be admitted for only \$1.

28. At paragraphs 35 to 52 below I have set out details of the claims (that my investigations have shown) that unit holders in the LMFMIF (such as the Wholesale Fund), or the LMFMIF itself, may have against LMIM.
29. Unit holders in the LMFMIF, including the Wholesale Fund and the Applicants, will not be able to properly particularise and quantify their claims against LMIM for the purpose of submitting proofs of debt in the Administration until such time as unit holders are given access to the books and records of LMIM and LMA (insofar as they relate to LMFMIF) or an investigation of these claims is undertaken on their behalf by the responsible entity.
30. In my view the interests of the Wholesale Fund, and the interests of the other unit holders of the LMFMIF, will potentially be prejudiced if a Deed of Company Arrangement (DOCA) is proposed for LMIM and entered into as:-
 - (a) unit holders will not be able to properly investigate and particularise claims that they may have against LMIM for the purpose of preparing a proof of debt, or prepare a just estimate of the loss or damage they may have suffered; and
 - (b) as a result, in light of the Administrators' stated intention set out in paragraph 27 above, unit holders may be deprived of the right to vote on the DOCA for any amount that properly reflects a just estimate of the loss or damage they may have suffered, notwithstanding that the DOCA may compromise their rights by releasing claims against LMIM.
31. At pages 210 to 211 of the Exhibit is a sealed copy of the order of Chief Justice de Jersey of the Supreme Court of Queensland made on 12 April 2013 ordering that the convening period for the meeting of creditors of LMIM be extended up to and including 25 July 2013.

Signed:

Taken By:

32. Any person (which could include the Wholesale Fund or other unit holders of the LMFMIF, or a new responsible entity of the LMFMIF) who may wish to lodge a proof of debt in relation to any claim they have against LMIM in its capacity as responsible entity of LMFMIF will need to have investigated their possible claims and provide a "just estimate" of the losses suffered by them before that time.
33. Given the complexity and magnitude of the investigations that need to be undertaken (as set out at paragraphs 35 to 52 below), in my view the investigation and preparation of any claim by the Wholesale Fund (and potentially other investors) needs to be commenced as a matter of urgency.
34. If Trilogy were appointed as responsible entity of the LMFMIF, I would cause urgent investigations to be undertaken as to possible claims against LMIM, obtain advice about those claims and whether proofs of debt should be lodged in relation to the same, or otherwise make notifications on LMIM's insurance policies.

Investigations to be undertaken by new responsible entity

Changes to Constitution

35. At pages 37 to 103 of the Exhibit to the Bruce Affidavit is a copy of the current constitution of the LMFMIF, being the replacement constitution of LMFMIF dated 11 April 2008 as amended by supplementary deeds dated 16 May 2012 and 26 October 2012 respectively.
36. At pages 212 to 329 of the Exhibit are copies of the following constitutions (and or modifications) of the LMFMIF, which I caused to be obtained from searches of the records of ASIC:
- (a) Constitution dated 24 August 1999 (at 212 to 245 of the Exhibit);
 - (b) Deed of Modification of Constitution dated 19 July 2002 (at 246 to 248 of the Exhibit);

Signed:

Taken By:

- (c) Replacement Constitution dated 6 June 2005 (at 249 to 285 of the Exhibit);
 - (d) Deed of Modification of Constitution dated 21 April 2006 (at 286 to 289 of the Exhibit); and
 - (e) Replacement Constitution dated 31 May 2007 (at 290 to 329 of the Exhibit).
37. In accordance with the LMFMIF's constitution and s601GC(1)(b) of the Corporations Act 2001 (Act), LMIM could only amend the constitution of the LMFMIF by a special resolution of the unit holders of the LMFMIF, or by making amendments itself if it reasonably considered that the changes would not adversely affect unit holders' rights.
38. The constitution dated 24 August 1999 shows that the LMFMIF was first constituted, by deed poll, on 24 August 1999. Since that date, the documents listed at paragraph 36 above record that LMIM has made various amendments to the constitution of LMFMIF, each without the approval of unit holders or judicial advice.
39. The Wholesale Fund, and potentially other unit holders, would wish to investigate whether the following amendments to the LMFMIF constitution (recorded in the documents listed at paragraph 36 above) could have been made with a reasonable belief that the change would not adversely affect unit holders' rights:
- (a) On 19 July 2002, LMIM increased the permitted loan-to-value-ratio (LVR) from 66.66% to 75%;
 - (b) On 6 June 2005:
 - (1) LMIM amended the meaning of 'distributable income'. Previously it was defined to mean: the income of the LMFMIF less expenses and provisions. LMIM's amendment meant distributable income was now "such amount as the RE determines";

Signed:

Taken By:

- (2) LMIM permitted itself to approve a LVR greater than 75% after a loan settled, where it considered that to be in the best interests of unit holders;
- (c) On 21 April 2006, LMIM again amended the LVR provisions such that a loan at settlement could be made with an LVR of 75% and could go up after settlement to 85% at the discretion of LMIM, and a loan in default could exceed 85% if LMIM perceived it to be in the interests of the unit holders;
- (d) On 31 May 2007, LMIM amended the Constitution to increase the management fees it was entitled to earn to 5.5%. Previously, the maximum allowable fee was 5%.

(collectively, the Amendments).

40. I caused a copy of ASIC's Regulatory Guide 45 (Guide 45) dated September 2008 to be obtained from the website maintained by ASIC. A copy of Guide 45 is at pages 330 to 386 of the Exhibit.
41. Paragraph RG45.56 of Guide 45, under the heading "Lending Principles – Loan to Valuation ratios", states that property development loans should not exceed an LVR of 70% of "as-if-complete" valuations, and for all other loans the maximum LVR should not exceed 80%. As set out above, by reason of the Amendments, LMFMIF was able to lend at an LVR in excess of the LVR limits in Guide 45.
42. Paragraph RG45.57 of Guide 45 details the policy considerations behind the LVR limits and the risk of exceeding the recommended LVR: an LVR higher than is recommended in Guide 45 may make a scheme more vulnerable to risk in that a change in the market conditions (e.g. a downturn in the property market) may mean it is unable to fully recover the money it has lent to borrowers. It also increases the risk that the security obtained from borrowers will be insufficient to cover the loan.

Signed:

Taken By:

43. In the events that occurred, the average LVR of the LMFMI's mortgage portfolio increased as follows:
- (a) from 63.89% as at 29 February 2008 (at page 387 of the Exhibit is a copy of the relevant page from LMFMI's Product Disclosure Statement dated 10 April 2008, which I caused to be obtained (over the course of time) from the website of LMIM);
 - (b) by 30 September 2009 it was 82.03% (at page 388 of the Exhibit is a copy of the relevant page from LMFMI's Product Disclosure Statement dated 10 April 2008, which I caused to be obtained (over the course of time) from the website of LMIM);
 - (c) by 31 January 2010 it was 83.59% (at page 389 of the Exhibit is a copy of the relevant page from the ASIC Benchmark Disclosure and Update for Investors dated 9 April 2010, which I caused to be obtained (over the course of time) from the website of LMIM);
 - (d) by 30 June 2010 it was 86.56% (at page 390 of the Exhibit is a copy of the relevant page from the ASIC Benchmark Disclosure dated 2 September 2010, which I caused to be obtained (over the course of time) from the website of LMIM);
 - (e) by 31 May 2011 it was 91.98% (at page 391 of the Exhibit is a copy of the relevant page from the ASIC Benchmark Disclosure and Update for Investors dated 24 August 2011, which I caused to be obtained (over the course of time) from the website of LMIM);
 - (f) by 31 October 2012 it was 100% (at page 392 of the Exhibit is a copy of the relevant page from ASIC Benchmark Disclosure dated 31 December 2012, which I caused to be obtained (over the course of time) from the website of LMIM);
44. At page 393 of the Exhibit is the relevant page of LMFMI's Financial Report for the year ended 30 June 2008, which I caused to be obtained (over the course of

Signed:

Taken By:

time) from searches of the records of ASIC. It shows that in the 12 months leading up to 30 June 2008, the net assets of the Fund decreased from \$783,324,637 to \$479,886,460, or approximately 39 per cent.

45. If Trilogy were to be appointed as responsible entity of the LMFMIF, I would cause investigations to be made into these changes to the constitution, and obtain legal advice as to whether those changes give rise to a cause of action against LMIM.

Related party transactions

46. I caused copies of LMFMIF's financial reports for each of the years from 2003 to 2012 to be obtained (over the course of time) from searches of the records of ASIC. At pages 394 to 403 of the Exhibit is a copy of the relevant page from each of these financial reports, showing that the LMFMIF entered into a number of related party transactions.
47. Pages 394 to 403 of the Exhibit record that LMIM entered into related party transactions and conferred financial benefits on related parties by making payments and loans to related parties, including LMA for prepayment of management fees. I have not been able to locate any record of members approval of those transactions. The Wholesale Fund, and potentially other unit holders, would wish to investigate whether these related party transactions were made on terms that would have been reasonable if LMIM had been dealing with those entities at arm's length.
48. Pages 394 to 403 of the Exhibit (being relevant pages extracted from each financial report of the LMFMIF for the years 2003 to 2012) record that between 2003 and 2012 these payments to related entities amounted to \$168,598,723, being:
- (a) 2003 - \$1,139,543;
 - (b) 2004 - \$1,935,881;
 - (c) 2005 - \$3,354,615;

Signed:

Taken By:

- (d) 2006 - \$5,559,587;
- (e) 2007 - \$5,313,556;
- (f) 2008 - \$19,597,053;
- (g) 2009 - \$55,514,948;
- (h) 2010 - \$47,474,178;
- (i) 2011 - \$16,212,213; and
- (j) 2012 - \$12,497,149.

49. If Trilogy were appointed as responsible entity of the LMFMIF, I would cause investigations to be made into the related party transactions and obtain legal advice as to whether those related party transactions were proper.

Loans conduct

50. I caused a copy of LMFMIF's ASIC Benchmark Disclosure dated 31 December 2012 to be obtained (over the course of time) from searches of the records of ASIC. At page 392 of the Exhibit is a copy of the relevant page from the Benchmark Disclosure and Update dated 31 December 2012. This records that LMIM made several loans accounting for more than 5% of the total value of the LMFMIF's loan book.
51. Pages 393 and 404 respectively of the Exhibit (being relevant pages extracted from each financial report of the LMFMIF for the years 2008 and 2009 which I caused to be obtained (over the course of time) from searches of the records of ASIC or from the LM website) record that:
- (a) in the 12 months leading up to 30 June 2008, the net assets of the Fund decreased from \$783,324,637 to \$479,886,460, or approximately 39 per cent; and

Signed:

Taken By:

(b) In the 12 months leading up to 30 June 2009 Net Default Loans increased from \$98,443,132 to \$328,806,714.

52. The Wholesale Fund wishes to investigate the matters sworn to in paragraphs 44 and 45. However, the Wholesale Fund can only be properly investigated these matters by gaining access to the books and records of LMIM and the LMFMIF. If Trilogy were to be appointed as responsible entity of the LMFMIF, I would cause investigations to be made into the conduct of LMIM in making loans and entering into transactions, and obtain legal advice as to whether that conduct may have been in breach of the Corporations Act or any other legislation, negligent or in breach of trust. I would also cause a proof of debt to be put into the Administration of LMIM if that was appropriate.

**SWORN by PAUL WOOD on ____ May
2013 in Brisbane Queensland in the
Presence of:**

Deponent

**Witness
Name:
Solicitor/Justice of the Peace**

Signed:

Taken By:

Stephen Russell

From: Stephen Russell
Sent: Saturday, 4 May 2013 7:30 AM
To: Amanda Banton; Ilenna Copley; Dallys Pyers; anne.gubbins@asic.gov.au; David Tucker; Sean Russell
Cc: Anne Freeman; Davina Holland; Steven Faulkner
Subject: RE: LM Investment Management Pty Ltd (Administrators Appointed) & Ors ats Bruce & Anor - QLD Supreme Court Proceedings No. 3383 of 2013

Importance: High

SaveToDatabase: -1

SentItem: -1

Amanda

Please confirm that your clients have now served all of the affidavits and material on which they propose to rely at the trial.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

Liability limited by a scheme approved under professional standards legislation

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 21, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: Davina Holland [<mailto:DHolland@piperalderman.com.au>] **On Behalf Of** Amanda Banton
Sent: Friday, 3 May 2013 10:58 PM
To: Ilenna Copley; Stephen Russell; Dallys Pyers; anne.gubbins@asic.gov.au; David Tucker; Sean Russell
Cc: Amanda Banton; Anne Freeman; Davina Holland; Steven Faulkner
Subject: LM Investment Management Pty Ltd (Administrators Appointed) & Ors ats Bruce & Anor - QLD Supreme Court Proceedings No. 3383 of 2013

We refer to our earlier email serving the unsworn Affidavit of Paul Wood and attach Exhibit "PW-2" (pages 101-202).

Kind regards

Amanda Banton
Partner | Piper Alderman

 **PiperAlderman**

WARNING: This e-mail is from Piper Alderman.
The contents are confidential and may be protected by legal
professional privilege. If you have received this e-mail in error,
please reply to us immediately and delete the document.

This message has been scanned by SurfControl plc. www.surfcontrol.com

ROGER SHOTTON

v.

LM INVESTMENTS MANAGEMENT LIMITED
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND

SUBMISSIONS OF THE APPLICANT

Nature of the Application

1. The application before the Court is for:
 - (a) an order pursuant to s601ND(1)(a) for the winding up of a managed investment fund, being the LM First Mortgage Income Fund ("Fund"), on just and equitable grounds; and
 - (b) an order pursuant to s601NF appointing an independent person to be responsible for ensuring that the Fund is wound up in accordance with its constitution.

Summary of Submissions

2. The circumstances strongly indicate that the Fund should be wound up and ought to be so wound up by a person who is independent of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 ("LM"), Trilogy Funds Management Limited ("Trilogy"), pursuant to sections 601FN and 601FP of the Corporations Act. Those circumstances are:
 - (a) All parties before the Court appear to be in agreement that the fund's purpose is at an end.
 - (b) The Fund is an "income fund" and stated purpose and intention of the Fund is to deliver "*a competitive income product designed to outperform cash* (a reference to the Australian cash rate)".¹ This 'competitive income' is produced through interest distributions and capital distributions. In their PDS issued on 10 April 2008, the Fund stated that since its inception the Fund has delivered "uninterrupted" interest

¹ See page 1 of the Fund's PDS as exhibited at p.106 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

distributions and maintained a unit price of \$1.00 (which is the purchase price of a unit for all investors in the Fund).²

(c) On 10 April 2008, to coincide with the issuance of the PDS, the Fund executed a Replacement Constitution for the Fund ("the Constitution"). The reference to "uninterrupted" interest distributions is made in the PDS because pursuant to clause 12 of the Constitution, each calendar month (for all Australia dollar investments) the responsible entity must distribute the "distributable income" (this is the income paid by the fund to unit holders and corresponds to the interest distribution described in the PDS).³ The return of capital distributions is calculated as a portion of unit held by the investor and can be by way of an increase in unit holdings or cash.

(d) The Fund no longer achieves its stated purpose of a 'competitive income' through interest distributions and capital distributions:

(i) The Fund has been moribund for some time:

(1) The Fund has been closed to new investors since 3 March 2009.⁴

(2) In or about November 2008 the responsible entity took out a line of credit for \$150 million with the Commonwealth Bank of Australia ("CBA") in order to manage the Fund's liquidity.⁵ Since 3 March 2009 the Fund has prioritised repayment of this loan over the withdrawal requests of investors in the Fund.

(3) On 30 October 2009, the responsible entity suspended the right of investors to withdraw investments from the Fund with the exception of those approved under hardship provisions.⁶

² *Ibid.*

³ See Clause 12.1 and 12.2 of the Replacement Constitution dated 10 April 2008 as exhibited at pp 57 - 58 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁴ See page 1 of the Fund's Supplementary PDS dated 3 March 2009 as exhibited at p.148 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁵ See page 7 of the Fund's Supplementary PDS dated 28 November 2008 as exhibited at p.146 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁶ See page 2 of the Fund's Supplementary PDS dated 30 October 2009 as exhibited at p.151 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

(4) As at 30 June 2012, the Fund held assets valued at \$343,976,757. The decrease in net assets (comprising losses and financing costs) in the Fund was in the year ending:⁷

1. 30 June 2011 - \$91,714,821;
2. 30 June 2012 - \$105,639,966.

(5) The responsible entity paid itself the following fees from the Funds assets in the last two financial years:⁸

- p. 5/157
1. 30 June 2011 - \$17,169,868;
 2. 30 June 2012 - \$13,989,805.

(ii) The fund suspended all distributions to investors on 1 January 2011. No monthly interest payments or capital distributions have been made to investors since that date.⁹ Since this date the responsible entity has paid itself \$31,159,673 from the Fund's assets to manage the fund.

(iii) Since 3 March 2009, the responsible entity's stated purpose in managing the fund has been to repay all loans and distribute capital back to investors.¹⁰ This management purpose is not the purpose of the fund: it is a function of winding up the Fund. Since 1 July 2010 the responsible entity has paid itself \$31,159,673 from the Fund's assets in management of the Fund toward achieving this purpose and has failed to wind up the Fund.

(e) On 19 March 2013 the board of directors passed a resolution to place LM Investment Management Limited into voluntary administration and to appoint partners of FTI Consulting to act in the role of voluntary administrator.

⁷ See page 5 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.156 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁸ *Ibid.*

⁹ See page 21 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.173 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

¹⁰ See page 3 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.155 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

- (f) Notwithstanding the fact that LM Investment Management Limited has been placed into voluntary administration, the voluntary administrator has continued to manage the Fund's assets as responsible entity for the Fund.
- (g) The responsible entity, despite the fact that the Fund has not traded since 3 March 2009, continues to be entitled to draw a management fee of up to 5.5% per annum (inclusive of GST) of the Net Fund Value.¹¹
- (h) Both the Fund and LM Currency Protected Australian Income Fund (a feeder fund to the Fund) and LM Institutional Currency Protected Income Fund (another feeder fund to the Fund) are closed.¹²
- (i) On 2 April 2013 the voluntary administrator stated that the Fund held \$550 million of investor funds comprised of 23 separate loan balances with a combined impaired value of \$295 million and all borrowers are in default. One of these loans being for an amount of roughly \$2 million is to the responsible entity and which remains unpaid and in arrears.¹³
- (j) Clause 16.3 of the Constitution provides that:

“(a) if the RE considers that the purpose of the scheme:

(1) has been accomplished; or

(2) cannot be accomplished,

it may take steps to wind up the scheme.”¹⁴

- (k) The Fund is unable to accomplish its purpose to deliver a competitive income product for investors due to the majority of its income base (comprising the 23 loans) being impaired and all loans to the Fund being in default.

¹¹ See Clause 18.3 of the Replacement Constitution dated 10 April 2008 as exhibited at p 64 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

¹² See page 3 of the FTI Consulting Circular to Members dated 21 March 2013 as exhibited at p.214 to the affidavit of Raymond Edward Bruce sworn 14 April 2013 and page 12 of the Speaking Notes of John Park of FTI Consulting at First Meeting of Creditors held 2 April 2013 as exhibited at p.241 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

¹³ See page 12 of the Speaking Notes of John Park of FTI Consulting at First Meeting of Creditors held 2 April 2013 as exhibited at p.241 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

¹⁴ See Clause 16.3 of the Replacement Constitution dated 10 April 2008 as exhibited at pp 62 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

- (l) LM Investment Management Limited has not exercised its power as responsible entity under clause 16.3 of the Constitution for the Fund and instead the voluntary administrator continues to draw management fees and other costs associated with management of the fund and its responsible entity despite the fact that this fund has ceased trading and is incapable of achieving the purpose for which it was established.
- (m) The Fund generates its income through returns on its assets; as its asset base and value fall, the ability of the Fund to produce an income falls correspondingly. Further exacerbating the Fund's income is the fact that in addition to the impaired income loss on assets in the year ending 30 June 2012 of \$145,256,463, the Fund held a further \$41,699,026 in loans in default which were more than 90 days past due (but not deemed to be impaired loans) and the responsible entity has suspended interest on loans in arrears, this lost interest for the financial year ending 30 June 2012 alone was \$119,557,492.¹⁵
- (n) Since 2009, the Fund has only been able to retain liquidity as an ongoing concern through the responsible entity entering into new loan facilities. In addition to the CBA line of credit, on 1 July 2010, the responsible entity took out a further loan with Deutsche bank for \$90 Million dollars (the total repayment of that facility becomes due and payable on 30 June this year). The Fund's management strategy of entering into new loan facilities while income for the Fund is dramatically falling has seen the Fund's expenses increase over the Fund's income in the past two financial years as follows:
- (i) Year ending 30 June 2011 - \$77,418,896;
 - (ii) Year ending 30 June 2012 - \$88,615,577.¹⁶
- (o) The Fund, for all intents and purposes, is insolvent, or likely to be insolvent, because:
- (i) As at 21 March 2013 the Fund held \$304 million in funds under management¹⁷ and on 30 June 2013 will be required to pay Deutsche Bank more than \$30 million in repayment of the remainder of that loan;¹⁸

¹⁵ See page 25 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.177 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

¹⁶ See page 8 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.160 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

¹⁷ See page 3 of the FTI Consulting Circular to Members dated 21 March 2013 as exhibited at p.214 to the affidavit of Raymond Edward Bruce sworn 14 April 2013

- (ii) As at 30 June 2012 the Fund had received redemption requests from investors totalling \$133,308,960 for which the Fund had not paid the redemption and an additional \$120,270,451 in redemptions for investments held in the feeder funds.¹⁹

66

Simply not true!

- (iii) The Fund has suspended redemptions, however, as at 30 June 2012, \$244,495,793 worth of investor funds in the Fund had matured and [were immediately due and payable] and in the period ending 30 June 2013, a further \$94,504,469 would mature and become immediately due and payable to investors;²⁰ as at 30 June 2013 the Fund will owe investors \$339,000,262 and have neither funds to pay this amount nor the income base to pay this amount in the future.

- (p) ASIC have suspended the Australia Financial Services License held by LM Investment Management Limited.²¹ The continuing effect of the license is that it is sufficient to "transfer to a new responsible entity, investigating, or preserving the assets and affairs of, or winding up of, ... LM First Mortgage Income Fund".

- (q) If the Fund were to have a new responsible entity appointed, that responsible entity would have to wind up the Fund. This would involve the new responsible entity exercising its power under clause 16.3(a) of the Constitution and wind up the scheme in accordance with clauses 16.3(b) and 16.4 of the Constitution. These processes under the Constitution for winding up the Fund correspond to section 601NC of the Corporations Act. The result of these processes is an application for the Court to wind up the Fund.

- (r) The appointment of a new responsible entity will only erode those remaining funds available for recovery by creditors and investors as it is an inefficient and costly means of winding up the Fund. The appointment of a new responsible entity represents a cost not only of fees associated with a responsible person to wind up the Fund but management fees to the new responsible entity of up to 5.5% per annum (inclusive of GST) of the Net Fund Value;²² this would be an additional cost to the Fund of up to \$17,935,651.75 per year.²³

¹⁸ See page 26 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.177 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

¹⁹ See page 39 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.191 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

²⁰ See page 40 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.192 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

²¹ See ASIC notice as exhibited at p.243 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

²² See Clause 18.3 of the Replacement Constitution dated 10 April 2008 as exhibited at p 64 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

3. The Fund cannot be left in the hands of LM Investment Management Limited for the purposes of winding up the Fund. It is not properly discharging its obligations: it has called no meeting to consider a winding up in the last 4 years. Further, the task of winding up will include the recovery of loans on which there has been default and taking any other action which is required for the purposes of recovering losses sustained by the fund. That would include taking action against any person who may have caused loss to the fund. One of the debtors to be pursued is LM Investment Management Limited itself.

4. The management of the Fund by the voluntary administrators for LM Investment Management Limited to date has not been in the best interests of the Fund, its members or its creditors because:

- (a) On 25 April 2013 the voluntary administrators for LM Investment Management Limited announced that they intended to make a capital distribution to members of \$4,270,690.45 comprising:²³

- (i) \$1,056,318.30 to investors in the LM Currency Protected Australian Income Fund;
- (ii) \$81,832.71 to investors in the LM Institutional Currency Protected Income Fund;
- (iii) \$844,695.05 to investors in the LM Wholesale First Mortgage Income Fund; and
- (iv) \$2,287,844.39 to 'other' investors in the Fund.

- (b) On 25 April 2013 the voluntary administrators for LM Investment Management Limited announced that the loan facility with Deutsche Bank was in place until 30 June 2014 with an option to extend until 30 June 2015.²⁵

- (c) The original loan facility with Deutsche Bank was established on 1 July 2010 for a period of two years ending on 30 June 2012 at 15% interest. LM Investment Management Limited sought an extension of this period until 30 June 2013 and the interest rate was increased accordingly to 18%.

²³ On 25 April 2013 FTI Consulting issued a 'Investor Update' stating that as at 24 January 2013 the book value for the Fund was \$326,102,759; see page 2 of the 'Investor Update' exhibited at page 10 the affidavit of David Robert Walter Tucker sworn 29 April 2013.

²⁴ See page 3 of the 'Investor Update' exhibited at page 11 the affidavit of David Robert Walter Tucker sworn 29 April 2013.

²⁵ *Ibid.*

- (d) The announcement by the voluntary administrators for LM Investment Management Limited that the loan facility will not be repaid by 30 June 2013 (as was anticipated in the Annual Report for the Fund for the year ending 30 June 2012).
- (e) It further appears from the statement at page 26 of the Fund's Annual Report for the year ended 30 June 2012, that if this loan were extended beyond 30 June 2013 (as the voluntary administrators have announced), interest would be increased by 3% for the first six months and 5% thereafter.²⁶
- (f) This would result in the Fund's recoverable assets being diminished by interest payments of more than \$397,500 per month from the date of the voluntary administrators for LM Investment Management Limited announcement in respect of the capital distribution until 30 June 2013.
- (g) Thereafter, for the period between 30 June 2013 and 30 December 2013 the Fund's recoverable assets being diminished by interest payments of more than \$463,750 per month, i.e. in the period between the date of the voluntary administrators for LM Investment Management Limited announcement in respect of the capital distribution until 30 December 2013 the Fund will pay more than \$3,577,500 in interest on the Deutsche Bank loan facility.
- (h) In the period between 30 December 2013 and 30 June 2013, the Fund's recoverable assets will be further diminished by interest payments of more than \$3,047,499.99.
- (i) As at 30 June 2014 the Fund's assets will have been diminished by interest payments of more than \$6,624,999.99 (\$3,047,499.99 + \$3,577,500) in interest payments since the date of the voluntary administrators for LM Investment Management Limited announcement in respect of the capital distribution. The voluntary administrators for LM Investment Management Limited intend to diminish the assets of the fund overall by \$6,624,999.99 so that \$4,270,690.45 in the Fund's assets can be distributed unevenly among members of the Fund. Further this course of action is inconsistent with winding up the Fund as the voluntary administrators are deliberately avoiding repaying a secured creditor in order to increase the level of debt held by the Fund without increasing the Fund's income.

²⁶ See page 26 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.178 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

- (i) If the responsible entity intended to wind up the Fund it has had ample opportunity. Since the insolvency of the responsible entity it has not taken steps to wind up the Fund and its announcements have been in respect of step which further increase the liabilities of the Fund and do not address the Fund's insolvency but rather exacerbate this position.
5. Finally, insolvency matters should not be left in the hands of the entity which made the bad loans in the first place. Moreover, it may be that actions should be commenced against those who caused the loans to be entered into being LM Investment Management Limited. It is not appropriate that the voluntary administrators are responsible for recoveries of loans as responsible entity for the trust in circumstances where one of those loans to be recovered from the company for which they have been appointed to act as voluntary administrators.
6. It is further inappropriate that, in view of the fact that the Fund is no longer trading, the Fund continue to be managed by a responsible entity in circumstances where the Fund should be wound up efficiently and expeditiously in order to protect those remaining assets and value held by the Fund in preservation and trust for its creditors. This purpose is best achieved by a professional independent liquidator.
7. The winding up ought to be placed in the hands of the person proposed by the Applicant.

The Legislative Framework

8. The LM First Mortgage Income Fund is a scheme within the scope of the regulatory provisions of the *Corporations Act*. It has been registered as such by LM Investment Management Limited.²⁷ LM Investment Management Limited is the Responsible Entity for the LM First Mortgage Income Fund as required by Chapter 5C of the Act.

The regulatory requirements

9. Chapter 5C of the Act imposes certain requirements in relation to registered Managed Investment Schemes which assist in their regulation:-
- (a) When applying to register a managed investment scheme, copies of the schemes constitution and compliance plan must be lodged with ASIC.²⁸

²⁷ See Company extract as exhibited at p.3 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

²⁸ See s.601EA(4) of the Act.

- (b) The constitution and compliance plans must comply with the Act.²⁹
 - (c) The responsible entity of a registered scheme must be a public company that holds an Australian Financial Services License authorising it to operate a managed investment scheme.³⁰
 - (d) The responsible entity of a registered scheme, its officers and employees are required to carry out certain prescribed duties.³¹
 - (e) ASIC may from time to time conduct surveillance checks to ascertain whether the responsible entity of a registered scheme is complying with the scheme's constitution, compliance plan and the Act³².
10. Pursuant to s601FN a member or ASIC may apply to the Court for the purposes of appointing a temporary Responsible Entity if a scheme does not have a responsible entity that meets the requirements of s 601FA. An instance may be if it does not hold an AFSL.

Winding up of the scheme

11. The *Corporations Act* provides a number of ways in which a scheme might be wound up.
12. Pursuant to s 601NC, if the Responsible Entity of a scheme considers that the purpose of the scheme cannot be accomplished the Responsible Entity may wind up the scheme in accordance with s601NB. The sub-sections require the delivery of a notice to the members explaining the proposed winding up and the manner in which the winding up may occur and giving the members 28 days in which to call a meeting about the proposal.
13. Pursuant to s 601ND(1), the Court may, on the application of a member or of ASIC, order the winding up if it considers that it is "just and equitable" to do so.
14. In addition, by s601NF(1), the Court may by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution.

²⁹ See ss. 601GA, 601GB and 601HA of the Act.

³⁰ See s.601FA of the Act. An application for an Australian financial services license is made pursuant to section 913A of the Act.

³¹ See ss. 601FC(1), 601FD(1) and 601FE(1) of the Act.

³² See s.601FF of the Act.

15. By s601NF(2) the Court may also make any order the Court thinks it necessary about how a registered scheme is to be wound up.

The just and equitable ground

16. The following principles apply in relation to the winding up of a scheme on just and equitable grounds:
- (a) The principles concerning the winding up of companies on the just and equitable grounds inform the operation of the grounds in s601ND.³³
 - (b) There is authority for the proposition that where a scheme is effectively insolvent, that is a sufficient ground for winding the scheme up upon the just and equitable ground.³⁴ That is, a registered scheme may be wound up on the "just and equitable" ground in s 601ND(1)(a) of the Act where the liabilities referable to the scheme cannot be satisfied as they fall due from its income or readily realisable assets.³⁵
 - (c) Similarly, where the original arrangement as identified in the prospectus and the administration of the scheme had broken down, grounds exist for the winding up of the scheme on the basis that it is just and equitable.³⁶ This is particularly so where the break down in the administration has occurred as a result of the lack of funds in the scheme to continue.
 - (d) The expression "just and equitable" is broad and designed to accommodate a multiplicity of situations and it is not capable of exhaustive definition. It does not depend on the existence of factual categories.³⁷
 - (e) The Court may wind up a managed investment scheme on the just and equitable ground if it is in the public interest to do so.³⁸

³³ *Capelli v Shepard* (2010) 77 ACSR 35, [104]; *Westfield Management Ltd v AMP Capital Nominees Ltd* [2011] NSWSC 1015 [124]; *Re PWL Ltd; Ex parte PWL Ltd (formerly Palandri Wines Ltd)* (No 2) [2008] WASC 232; [44].

³⁴ *Re Orchard Aginvest Ltd* [2008] QSC 2 per Fryberg J which was not disapproved of by the Court of Appeal (Vic) in *Capelli v Shepard* (2010) 77 ACSR 35, [80] – [82]. *Re PWL Ltd; Ex parte PWL Ltd (formerly Palandri Wines Ltd)* (No 2) [2008] WASC 232; [44] – [45].

³⁵ Per Davies J in *Re Traditional Values Management Ltd (in liq)* [2010] VSC 339, [8].

³⁶ *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339; [63]; *Capelli v Shepard* (2010) 77 ACSR 35; [86].

³⁷ *Re PWL Ltd; Ex parte PWL Ltd (formerly Palandri Wines Ltd)* (No 2) [2008] WASC 232; [43].

³⁸ *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339; *Rubicon Asset Management Ltd (admin apptd)* (2009) 77 NSWLR 96; [23].

- (f) In *Capelli v Shepard*³⁹ the Victorian Court of Appeal identified the width of the just and equitable ground for winding up of a scheme under s601ND(1)(a) in the following terms⁴⁰:

"[102] The winding up of schemes on the "just and equitable" ground in s 601ND(1)(a) of the Act is derived from a traditional ground for winding up in corporations law. Although the just and equitable ground in corporations law originally tended to be confined to categories established by precedent, the House of Lords' decision in *Ebrahimi v Westbourne Galleries Ltd* established its broad and ambulatory character. It confers a very wide discretionary power, which is applicable both in established and novel contexts. The situations which have characteristically invoked the application of the just and equitable ground in corporations law include, (relevantly to the present case) the breakdown of the parties' fundamental trust and confidence in a corporate quasi-partnership; the exercise of powers in a way entirely outside the parties' original contemplation; deadlock; and failure of the substratum of the enterprise, in the sense of conduct entirely outside the general intention and common understanding of the members when they became members."

Appointment of a person to take responsibility for the winding up

17. In this application, the applicant seeks an order under s601ND(1) that the responsible entity wind up the scheme in accordance with the Constitution and thereafter an order that an independent person undertake the winding up pursuant to s601NF(1). This was the methodology adopted in *In re Environinvest Ltd*⁴¹ (and on appeal in *Capelli v Shepard*⁴²). The method of proceeding did not draw criticism or concern from the Court.
18. It was also the method adopted by this Court in *Equititrust Ltd*, Re [2011] QSC 353.
19. The scope of the power of the Court to order that a person other than the Responsible Entity undertake the winding up is exercisable if the Court thinks that it is necessary to do so. The section provides:

"The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up)."

³⁹ (2010) 77 ACSR 35.

⁴⁰ (2010) 77 ACSR 35, 57; [102]

⁴¹ (2009) 69 ACSR 530; [3].

⁴² (2010) 77 ACSR 35. See also the orders made in *Rubicon Asset Management Ltd (admin apptd)* (2009) 77 NSWLR 96.

20. There is no limit as to the matters which the Court might take into account in determining whether or not to appoint a person other than the Responsible Entity to conduct the winding up other than that power must be exercised by reference to the subject matter, the scope and the purpose of the legislation which creates it. Factors to which the Court will have regard include:

- (a) The promotion of the interests of those who are to benefit from the winding up of the scheme; being the members and creditors of the scheme.
- (b) Whether or not the entity undertaking the winding up has or may have any conflict of interest in relation to the winding up of the affairs of a scheme.
- (c) Whether or not persons who are or might be involved in the winding up of the schemes have had any involvement in the operation of the scheme which might have caused losses to the scheme and are therefore potential sources of recovery in the winding up.
- (d) Whether it appears that the Responsible Entity carries any responsibility for the circumstances which necessitate the winding up of the scheme.

The LM First Mortgage Income Fund

The scheme

21. The LM First Mortgage Income Fund ("the Income Fund") is a scheme created by its Constitution.⁴³ The business of the scheme and the benefits to be obtained by the members of the scheme are identified in the prospectus / Product Disclosure Statement.⁴⁴ That latter document identifies that:

- (a) The scheme's stated goal is to maintain a unit price of \$1.00 per unit and deliver uninterrupted interest distributions monthly;
- (b) The Fund lends money and takes mortgage security for its repayment and otherwise holds cash investments.

⁴³ See the Replacement Constitution dated 10 April 2008 as exhibited at pp 38 - 77 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁴⁴ See the Fund's PDS as exhibited at p.104 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

- (c) The fund operates two broad types of fund⁴⁵:
- (i) an "income fund" into which investors could place Australia dollars in return for a unit holding in the Fund which in turn provided loans to the public in return for Australian registered first mortgages over "*commercial, residential, industrial, retail and vacant land, interest bearing cash investments and "at call" securities*"; and
 - (ii) a "hedged fund" into which investors could place non-Australia dollar investments with the investment amount being hedged against the Australian dollar (in the relevant investment currency).
- (d) The Australian dollar investment options and non-Australian dollar investment options allow redemptions as follows:
- (i) the Australian dollar investment options:
 - (1) a flexible investment account allowing investors redemption of funds within 30 days;
 - (2) a fixed term investment account for up to 4 years allowing for redemption 30 days after maturity;
 - (3) a savings plan allowing redemption within 30 days; and
 - (ii) the non-Australian dollar investments - a hedged fixed term investment for a term of not more than 12 months, redeemable 30 days after the 12 month investment period has accrued.
- (e) For all investments in the Fund, the manager has the entitlement to extend the time for redemption for many of the investments by 180 days (in the PDS the entitlement to withdraw money from the Fund may be extended by the manager for up to 365 days).
- (f) Where an investor invests for a period of 12 months the entitlement to redemption is to occur on the anniversary of the allotment of units after a request is made to redeem.⁴⁶ In the case of seven day

⁴⁵ See the Fund's PDS as exhibited at p.104 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁴⁶ Clause 11.1 of the Constitution.

investments the redemption is to occur within seven days.⁴⁷ The manager has the entitlement to extend the time for redemption by 180 days.

- (g) The manager also has the entitlement to suspend redemptions.⁴⁸
- (h) The mortgages are held by LM Investment Management Limited (the responsible entity) as trustee for the investors.
- (i) One of the key benefits of investing in the scheme was identified as the fund's 9 year management track record of "uninterrupted" income distributions.⁴⁹

22. The Constitution⁵⁰ provides, *inter alia*, that the Manager may wind up the Scheme or cause the Scheme to be wound up. This provision mirrors the mechanism provided for in s 601NC of the *Corporations Act*. That section provides in part:

601NC Winding up if scheme's purpose accomplished or cannot be accomplished

- (1) If the responsible entity of a registered scheme considers that the purpose of the scheme:
 - (a) has been accomplished; or
 - (b) cannot be accomplished;

it may, in accordance with this section, take steps to wind up the scheme.

23. Thereafter, the members / investors are to be given notice and the opportunity to pass an extraordinary resolution in relation to the proposed winding up.
24. The methodology of the winding up is set out in clause 16.7 being the conversion of the assets to money and, after meeting the relevant debts, paying the money to the investors in proportion to the amount of the Members' interests in the scheme.

⁴⁷ Clause 11.2 of the Constitution.

⁴⁸ Clause 11.4 of the Constitution.

⁴⁹ See page 1 of the Fund's PDS as exhibited at p.106 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁵⁰ Clause 16.3(b) and 16.4 of the Constitution.

Member of the Fund

25. Roger Shotton is an investor in FMF and he has US\$259,989.67 invested in the fund.

Cessation of repayment of investments by the Fund

26. On 30 October 2009, LM Investment Management Limited determined to suspend withdrawals from the Fund with the exception of those approved under hardship provisions and feeder fund payments for distributions and expenses.⁵¹
27. Since 1 January 2011, the Fund has stopped paying income distributions to investors.⁵²

Financial position of the Fund

28. LM Investment Management Limited has ceased raising income by way of receiving investment into the FMF fund from investors since 3 March 2009. Due to the effective insolvency of the Fund, LM Investment Management has entered into a credit facility for \$90,000,000, over a 2 year period with Deutsche Bank in order to maintain the fund as an ongoing concern.
29. The Fund generates its income through returns on its assets. Its asset base and value have consistently and dramatically fallen since 3 March 2009 and the ability of the Fund to produce income has fallen correspondingly. Further exacerbating the Fund's income is the fact that in addition to the impaired income loss on assets in the year ending 30 June 2012 of \$145,256,463, the Fund held a further \$41,699,026 in loans in default which were more than 90 days past due (but not deemed to be impaired loans) and the responsible entity has suspended interest on loans in arrears, this lost interest for the financial year ending 30 June 2012 alone was \$119,557,492.⁵³

⁵¹ See page 2 of the Fund's Supplementary PDS dated 30 October 2009 as exhibited at p.151 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁵² See page 21 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.173 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁵³ See page 25 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.177 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

30. As at 21 March 2013 the Fund held \$304 million in funds under management⁵⁴ and on 30 June 2013 will be required to pay Deutsche Bank more than 30 million in repayment of the remainder of the loan.⁵⁵
31. As at 30 June 2012 the Fund had received redemption requests from investors totalling \$133,308,960 for which the Fund had not paid the redemption and an additional \$120,270,451 in redemptions for investments held in the feeder funds.⁵⁶
32. The Fund has suspended redemptions, however as at 30 June 2012 \$244,495,793 worth of investor funds in the Fund had matured and were immediately due and payable and in the period ending 30 June 2013 a further \$94,504,469 would mature and become immediately due and payable to investors.⁵⁷
33. As at 30 June this year the Fund will owe investors \$339,000,262 and have neither funds to pay this amount nor the income base to pay this amount in the future.

Debts of the responsible entity

34. The responsible entity is insolvent and has had voluntary administrators appointed. The responsible entity is a debtor to the Fund and is responsible for an outstanding and impaired loan for roughly \$2 million dollars.

Issues

Winding up

Whether or not the fund should be wound up?

35. There does not now seem to be much doubt that the Fund should be wound up.

- (a) The Fund is insolvent.

⁵⁴ See page 3 of the FTI Consulting Circular to Members dated 21 March 2013 as exhibited at p.214 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁵⁵ See page 3 of the FTI Consulting Circular to Members dated 21 March 2013 as exhibited at p.214 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁵⁶ See page 26 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.177 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁵⁷ See page 39 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.191 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

⁵⁷ See page 40 of the Fund's Annual Report for the year ended 30 June 2012 as exhibited at p.192 to the affidavit of Raymond Edward Bruce sworn 14 April 2013.

(b) The Fund can't pay redemptions.

(c) The RE is conflicted in doing so.

Doubt as to whether or not the responsible entity intends to wind up the Fund

36. The voluntary administrators have not notified investors of an intention to wind up the Fund, despite the suspension of current responsible entities AFSL on 9 April 2013. They have however convened a meeting to consider the appointment of a replacement RE.
37. On 25 April 2013 the voluntary administrators for LM Investment Management Limited announced that the loan facility with Deutsche Bank which had already been extended to 30 June 2013 was now in place until 30 June 2014 with an option to extend until 30 June 2015.⁵⁸ The cost of extending this loan to 30 June 2014 has resulted in additional interest payments of more than \$6,624,999.99. This announcement coincided with an announcement by the voluntary administrators for LM Investment Management Limited that they intended to make a capital distribution to members of \$4,270,690.45. The total amount of the loan is \$26.5 million, in the absence of a capital distribution to members of \$4,270,690.45 the Fund could repay this loan immediately and not require an extension of the existing loan terms; if the voluntary administrators intended to wind up the Fund this would be the course of action they would have implemented as it preserves the remaining value of the Fund for investors while removing liabilities for the Fund's balance sheet.

The fund cannot achieve its purpose

38. It is apparent that the Fund cannot achieve its purposes under the Constitution or the PDS. The Fund is intended to be an income fund in which the members invest to receive income monthly by way of interest repayments (or in some cases yearly depending on the investment vehicle) and the capital will be returned on redemption.
39. The Fund has not achieved these purposes since 1 January 2011 and no longer retains the necessary financial solvency to achieve these purposes in the future.
40. The material shows that:

⁵⁸ Ibid.

44. The responsible entity claims to be entitled to a management fee of up to 5.5% of funds under management, which could be approximately \$15M per annum, thereby depleting the Fund substantially, and providing a disincentive to wind up the fund in a timely manner.
45. The announcement by the voluntary administrators for LM Investment Management Limited that they intended to make a capital distribution to members of \$4,270,690.45 while the loan facility with Deutsche Bank was be extended to 30 June 2014 with an option to extend until 30 June 2015⁶⁶ is evidence of this as the loan which is currently running at 18% interest is increased to between 21% and 23% of the next 12 months. The capital distribution is not being made equally to all investors but is weighted in favour of additional capital distributions to those investors who also hold units in the feeder funds – this strategy reduces the overall benefit to both investors (even those who receive capital distributions are unlikely to be able to get between 18% and 23% return on this money in the next 12 months) and creditors (for whom an insolvent Fund is being stripped of asset value while increasing its liability holdings and financing expenses by more than \$6,624,999.99 over a 14 month period).
46. The responsible entity is also responsible entity of several other LM funds.

The recovery of bad loans should not be done by those who made them

47. It is not appropriate to put the recovery of bad loans in the hands of the party who made them.
48. In circumstances where there were many loans where recovery is problematic, questions may arise as to the manner in which the loans were made and whether action should be taken against those who made the loans. Clearly, that excludes the possibility of the current responsible entity (which is itself in administration for poor financial lending choices) being involved in the winding up.
49. It is doubtful that the responsible entity would actually seek to wind up the Fund. The responsible entity has had adequate opportunity to wind up the Fund and is keenly aware of the Funds illiquidity. The voluntary administrators for the Fund have not taken any action beyond continuing to manage the Fund as responsible entity despite the fact that the suspension of the responsible entities' AFSL requires that they either appoint a new responsible entity or wind up the Fund; they have instead chosen to do neither and continue to seek to draw considerable management fees from the Fund.

⁶⁶ *Ibid.*

The identity of the responsible person

50. The identity of the independent responsible person is a matter for the exercise of the discretion of the Court. The applicant has put forward Mr. Whyte. Mr. Whyte is a registered liquidators and officer of the Court. Mr Whyte has no conflicts. Whyte is experienced at winding up managed funds, comes to the matter completely fresh and without bias.