

TO THE INVESTOR AS ADDRESSED

15 October 2013

**LM FIRST MORTGAGE INCOME FUND
(RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)
ARSN 089 343 288
(‘the Fund’ or ‘MIF’)**

I refer to my report dated 27 August 2013 and now provide my second update to investors in relation to the winding of up of the Fund, as follows.

1. Refinance of Secured Creditor

Since my last report, I have been trying to secure a refinancing of the secured creditor in order to reduce the ongoing interest costs and avoid any duplication of fees between McGrathNicol and BDO.

I have received an offer from BOQ for a facility of up to \$25M in this regard which would result in the interest rate and other costs of the facility reducing from 21% to 12% per annum.

This would result in the retirement of the Receivers and Managers appointed by the secured creditor which will save on any duplication of costs. That said, the Receivers and Managers from McGrathNicol and BDO have been working well together to ensure there was little overlap in this regard.

Based on the cashflows prepared by McGrathNicol from their knowledge of the assets and current status of disposal, and where the funding is forecast to be repaid in full by 31 January 2014, I have estimated that there will be a saving of approximately \$300,000 plus any saving in duplication of Receivers costs.

It should be noted however that this is after having to pay a negotiated reduced settlement amount to the secured creditor in respect of a make whole interest payment that had been agreed to by the then Administrators of the responsible entity, John Park and Ginette Muller of FTI on 2 April 2014.

The refinancing however is conditional on KordaMentha, who are trustees of the LM Managed Performance Fund, acknowledging that they will not seek to impugn the BOQ securities and bearing in mind they have put me on notice of a potential claim for breach of duties. KordaMentha have so far refused to provide the requested letter (although are reconsidering their position) and therefore the refinance may not now be able to proceed. I will confirm the position in my next report to investors.

2. Realisation of Assets

In order to avoid duplication of costs and to ensure strategies could be developed for all assets, including those where realisations were unlikely to be achieved during McGrathNicol's appointment, it was agreed between us that BDO would concentrate on seven "longer term" assets in the retirement village and aged care sectors and which represent in excess of 50% of the value of the Fund.

BDO has particular expertise in this sector and I have been assisted by our in house professionals in this respect. To date this has included site visits to the facilities in Victoria, Tasmania, South East Qld and Northern NSW as well as meetings with the management teams at the sites.

Valuations are in course for some of the assets and a review of the historical financial information and forecasts is being undertaken.

McGrathNicol has been progressing with the realisation of the other assets and I have discussed their strategies in relation to each asset so that the management of these matters can be transitioned smoothly.

3. Estimated Return to Investors

Several valuations are awaited on some of the assets in order to better determine the likely return to investors.

Prior to my appointment on 8 August 2013, and as advised in my first report to investors dated 27 August 2013, FTI had prepared a detailed analysis of the estimated cashflows from each asset and the estimated return to investors.

The full file in this respect has not been made available to me however I have received a summary that shows total net cashflows of approximately \$185M from the realisation of the assets.

After costs, FTI has estimated a return to investors of approximately 27 cents in the \$.

As further valuations are received and assets sold, I will update the estimated return and advise investors as the position changes.

As outlined above, I have not reviewed all of the assumptions used as I have not been in control of the Fund, and the estimate may materially change once I have updated the position.

4. Funds Held in Trust

There is approximately \$8M presently held in a solicitors trust account in relation to amounts paid by residents of the retirement villages/aged care facilities to enter into loan/lease arrangements at the centres.

These funds have not been able to be released because the Administrators and Receivers and Managers have been concerned about the ongoing potential personal liability to repay the loans when the resident leaves the centre.

With the agreement of McGrathNicol, I have therefore instructed my solicitors to take the appropriate steps so that I can execute the agreements without incurring personal liability and to allow the funds to be released.

I am hopeful that this may be able to occur within the next month.

5. Audited Accounts

I have been in discussions with FTI and ASIC in relation to whether or not there is a need to undertake an annual audit of the Fund during the course of the winding up.

FTI's initial view was that an audit was required.

There is case law however to support the proposition that an audit is only required upon completion of the winding up.

The cost of the audit for the 2012 financial year was approximately \$500,000 and therefore I am keen to ensure unnecessary costs are not incurred to the detriment of investors especially when it could take three or four years to complete the winding up. The saving for investors therefore could be well in excess of \$1M.

I am currently awaiting confirmation from the ASIC that they will take no action in relation to the non provision of the audited accounts.

During the course of the winding up I will report all receipts and payments to investors and regularly update the valuations of the assets and estimated return to investors.

6. Appeal Lodged by FTI

I attach correspondence received from Russells solicitors, acting on behalf of the Liquidators of LM Investment Management Ltd (In Liquidation) together with associated correspondence in respect of the Liquidators decision to appeal the court's decision that led to my appointment as Receiver of the fund's assets and person responsible to ensure it is wound up pursuant to its constitution. This also includes correspondence relating to the "make whole" provision agreed to by the Liquidators that was referred to in Russell's correspondence.

The Liquidators have sought for the appeal to be expedited and a hearing date of 28 November 2013 has been set down in this respect.

Investors will note that the notice of appeal at page 9, paragraph 7, has reference to me having a conflict in my duties as I was a liquidator of a debtor company at the time of my appointment.

Although I did not have a conflict of interest under the Corporations Act 2001, to remove any perception of a potential conflict I arranged, at BDO's cost, for a replacement liquidator to be appointed to two borrower entities in this respect.

The judge at paragraph 120 of her judgement dated 8 August 2013 (a copy is on the website www.lmfimif.com) noted that "It was faintly suggested that he had a conflict which would prevent him acting but I do not accept this is so".

7. Reporting to Investors

Reports will be distributed to investors, initially monthly, in accordance with the preferred method of correspondence recorded for each investor on the Fund's database. In order to assist in reducing distribution costs, it would be appreciated if as many investors as possible could provide an email address in this respect. Please use the details below to advise us in this regard.

8. Receiver's Remuneration and Expenses

I attach a summary of my current remuneration and outlays for the period from my appointment to 4 October 2013. My remuneration incurred during this period totals \$151,764.25 plus outlays of \$24,753.43 plus GST.

The fees have been incurred in respect of general matters pertaining to our appointment and key areas of the Fund, these being the retirement villages and the refinance of the secured creditor. The work undertaken to date includes;

- Attending the retirement villages/aged care facilities to view the facilities and meet with onsite management;
- Undertake a financial review of the retirement villages to assist in determining the strategy for achieving the optimum return for investors;
- Meetings and correspondence with McGrathNicol and LM staff in relation to the strategies for the realisation of the loan book and in respect of legal actions on foot;
- Negotiations with the secured creditor in relation to the refinancing of the facility;
- Review of facility and security documentation and negotiations and meetings with BOQ, our solicitors and Korda Mentha and their advisors in respect of the refinancing;
- Liaising with the secured creditor to obtain a reduction in their "make whole" provision.

Approval of my fees will be the subject of an application to court in due course. A copy of my application in this respect will be posted to the website www.lmfimf.com and investors will be notified when the application has been lodged.

9. Queries

Should unit holders require further information, please contact either Investor Relations or BDO on the details provided below.

Investor Relations

Phone: +61 7 5584 4500
Fax: +61 7 5592 2505
Email: mail@lmaustralia.com

BDO

GPO Box 457
Brisbane QLD 4001
Phone: +61 7 3237 5999
Fax: +61 7 3221 9227
Email: enquiries@lmfmif.com

Yours faithfully

A handwritten signature in blue ink, appearing to read 'David Whyte', is written over a horizontal line.

David Whyte
Receiver

8 August 2013 to 4 October 2013

Employee	Position	Rate	Total Units	Total \$	Administration		Assets		Creditors		Investigation		Trade On	
					Units	\$	Units	\$	Units	\$	Units	\$	Units	\$
Fielding, Andrew	Partner	560.00	0.80	448.00	0.60	336.00	0.00	0.00	0.20	112.00	0.00	0.00	0.00	0.00
Whyte, David	Partner	560.00	122.30	68,488.00	13.80	7,728.00	62.70	35,112.00	1.00	560.00	0.10	56.00	44.70	25,032.00
Beauchamp, Margaux	Executive Director	460.00	85.20	39,192.00	2.30	1,058.00	79.90	36,754.00	0.00	0.00	3.00	1,380.00	0.00	0.00
Somerville, John	Senior Manager	425.00	14.00	5,950.00	8.00	3,400.00	3.70	1,572.50	2.30	977.50	0.00	0.00	0.00	0.00
Kedney, Joanne	Manager	390.00	49.30	19,227.00	3.20	1,248.00	41.50	16,185.00	4.10	1,599.00	0.00	0.00	0.50	195.00
Wilson, James	Manager	390.00	1.40	546.00	0.30	117.00	0.20	78.00	0.90	351.00	0.00	0.00	0.00	0.00
Dharmaratne, Michael	Senior Accountant I	310.00	10.60	3,286.00	4.20	1,302.00	2.00	620.00	4.40	1,364.00	0.00	0.00	0.00	0.00
Tipman, Daniel	Senior Accountant I	310.00	0.40	124.00	0.00	0.00	0.00	0.00	0.40	124.00	0.00	0.00	0.00	0.00
Kennedy, Nicola	Accountant II	190.00	3.60	684.00	3.60	684.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Hattingh, Moira	Administration Assistant	75.00	0.30	22.50	0.30	22.50	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
TOTAL			287.90	137,967.50	36.30	15,895.50	190.00	90,321.50	13.30	5,087.50	3.10	1,436.00	45.20	25,227.00
GST				13,796.75			1,589.55			9,032.15			143.60	2,522.70
TOTAL INC GST				151,764.25			17,485.05			99,353.65			1,579.60	27,749.70
AVERAGE HOURLY RATE				479.22			437.89			475.38			463.23	558.12

8 August 2013 to 4 October 2013

TOTAL	\$ 24,753.43
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TOTAL INVOICE	\$ 176,517.68
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David Whyte

From: David Whyte
Sent: 14 October 2013 12:35 PM
To: 'Park, John'; Muller, Ginette
Cc: Joanne Kedney
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

John

I had delayed responding to you as I had wanted to confirm the refinancing had taken place. BOQ has approved the facility and the facility and security documentation was executed with settlement set for 4 October 2013. Unfortunately this has been delayed awaiting a requested letter from the trustees of the second mortgage fund, KordaMentha and we are awaiting confirmation as to whether or not this will be executed to allow the refinancing to proceed.

I (and my solicitors) disagree with your interpretation of the facility agreement and override deed which were disclosed in the proceedings leading to my appointment. I note however that the letter signed by you was not disclosed in the proceedings whereas it is this letter that gives rise to the additional \$3M obligation to the make whole interest provision in the event of a refinancing, not the facility letter or override deed. That is the reason I asked why you considered it was in the best interests of investors to sign the letter.

Regards

David

From: Park, John [mailto:John.Park@fticonsulting.com]
Sent: 25 September 2013 1:50 PM
To: David Whyte; Muller, Ginette
Cc: Joanne Kedney
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

Dear David

Thank you for your email.

I am surprised by what you have written, given the very clear terms of the Deutsche Bank facility, and the circumstances in which it was entered into. I would have expected, given your deep interest in the proceedings pursuant to which you secured your appointment, and your retainer of the solicitor who acted for Mr Shotton (in whose name your solicitor sought your appointment), that you would be intimately familiar with the terms of the facility.

To summarise:-

1. The administrators did not sign the facility letter by which the facility was put in place. The relevant document – the Override Deed - is exhibited to Ms Muller's affidavit sworn 27 June, 2013, marked GDM-15, at page 139 and following. I would have expected your solicitor to have provided this to you or you would have obtained a copy and reviewed this pivotal document following your appointment.
2. The Override Deed is dated and, I understand, was executed on 21 December, 2012. I refer you to the provisions of the Override Deed.
3. We were appointed on 19 March, 2013. We did not execute the Override Deed, or any of the underlying facility agreements.

4. We took legal advice on the terms of the facility and the override deed – no doubt you will take your own advice on the meaning and effect of this deed.
5. We concluded that LMIM is, regrettably, bound by the terms of the facility.
6. The letter you have attached to your email merely acknowledged the terms of the existing facility. It created no new obligations; and it altered no existing obligations. It did limit the recourse of the financier, as per the handwritten note. I expect that you will have had experience of financiers seeking such assurances from external administrators newly appointed to their borrowers. I believe the letter avoided the appointment of receivers and the associated additional costs and asset impairment, which would have ensued had the letter not been signed given our appointment created an event of default. (This was the unfortunate effect of the proceedings in any event.) We note that the facilities deal with receiver realisations and it is a matter for you to structure any proposed refinancing in the interests of investors.
7. The terms of this Deed were the subject of submissions by your solicitor, when he first came into the matter. These submissions were erroneous. I refer you to paragraphs 161 to 163 of LMIM's written submissions at the trial in the proceedings pursuant to which you secured your appointment. I am surprised that your solicitor has not informed you of these matters.
8. We also thoroughly investigated the possibility of refinancing this facility. We were unsuccessful. We would not have expected that you would have been able to do any better, but we would have been pleased for the investors if our expectation had been misplaced.
9. Finally, and while neither defending nor impugning the board's decision to take this facility in the first place, it was plainly open to the board to make the business judgment in the interests of the investors to avoid an external administration, with the possibility of consequent diminution in asset values.

LMIM is the Responsible Entity of the LM First Mortgage Income Fund. It holds the scheme property on trust for the members. We are its liquidators. The above pre-existing issues with the DB facility have been fully ventilated in the court, are readily discernible through enquiry and we trust you have not incurred additional costs for the fund in pursuing the refinancing.

Regards - John

John Park
Leader Australia
Corporate Finance / Restructuring

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We've joined FTI Consulting – click [here](#) to learn more

Liability limited by a scheme approved under Professional Standards Legislation

From: David Whyte [<mailto:David.Whyte@bdo.com.au>]
Sent: Wednesday, 25 September 2013 7:32 AM
To: Park, John; Muller, Ginette
Cc: Joanne Kedney
Subject: FW: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

John/Ginette

I refer to the below correspondence from Clayton Utz in relation to my request for a payout figure for the Deutsche Bank ("DB") facility and where I have received an offer of finance from BOQ to refinance the facility (at a significantly less interest rate than being paid to DB).

You will see from the payout figure that DB is seeking to impose a "make-whole interest" payment of approximately \$3M and is looking to rely on the attached letter executed by the Administrators in order to impose this amount under the facility terms. This is obviously giving us cause for concern and it would not be in the best interests of investors for me to payout the facility if this amount is indeed payable.

Could you please advise of the circumstances leading up to the signing of this letter and why you considered it in the best interests of investors to execute the letter? I am trying to negotiate a different arrangement with DB and therefore would appreciate your early comments in this respect. We are aiming to complete the refinancing on Monday, 30 September.

Regards

David

DAVID WHYTE

Partner

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Mobile: +61 413 491 490

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 Before you print think about the environment

We've moved! While I'm still located in our Eagle Street office our registered address has moved to Level 10, 12 Creek Street.

From: Bowden, Peter [<mailto:PBowden@claytonutz.com>]

Sent: 19 September 2013 12:56 PM

To: David Whyte

Cc: 'dtucker@tuckercowen.com.au'; Anthony Connelly (AConnelly@mcgrathnicol.com); jhayes@mcgrathnicol.com; Paul Sweeney (psweeney@mcgrathnicol.com); Ian Niccol (inicol@mcgrathnicol.com); Poole, Nicholas; LM 1 (FMIF) Activity Report (lm.1@list.db.com); Martin Thomas; Matthew Fruin (matthew.fruin@db.com); Bowden, Peter; Poole, Nicholas

Subject: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

Dear Sir

As you know, we act for Anthony Connelly and Joseph Hayes (the **Receivers**) in their capacity as receivers and managers of the property of LM Investment Management Limited ABN 68 077 208 461 (In Liquidation) (Receivers and Managers Appointed) (**LMIM**) in its capacity as responsibility entity of the LM First Mortgage Income Fund (**Fund**).

The Receivers were appointed by Deutsche Bank AG, Sydney Branch (**DB**).

We understand that you are seeking a payout figure from the Receivers so that DB's debt can be refinanced in full. On that basis, we have been instructed to provide you with a payout figure on the assumption that DB's debt is to be refinanced in full on 30 September 2013.

Accordingly, the relevant payout figure as at 30 September 2013 is **\$26,786,835.00** (the **Total Payout Figure**).

The Total Payout Figure comprises the following amounts:

1. DB's debt of \$26,096,493.15 (see below) (the **DB Amount**);

2. The Receivers costs of \$523,028.00; and
3. Clayton Utz's costs of \$167,313.85.

The DB Amount has been calculated as follows:

Start	30-Sep-13
End	30-Jun-14
Days	273
OPB	23,000,000.00
Interest rate	18%
Interest convention	365
make-whole interest	3,096,493.15
Total due to DB	\$26,096,493.15

For the avoidance of doubt, we confirm that the DB Amount is inclusive of the 'make-whole'. Pursuant to the finance documents between, amongst others, DB and LMIM in its capacity as responsibility entity of the Fund, DB is entitled to the make-whole. In this respect, we refer to the letter dated 28 March 2013 between DB and the administrators of LMIM (as they then were) (the **Letter** - see the **attached**) where it was confirmed that the make-whole was to apply in circumstances where there was an Event of Default / Potential Event of Default provided that the repayment wasn't from a cash sweep undertaken by DB or from proceeds from realisations of security by a receiver appointed by DB.

Any refinancing of DB's debt does not fall into either of the categories referred to above and would therefore attract the make-whole as per the Letter.

Please let us know if you have any questions in relation to the above. Otherwise, please feel free to pass on our details to the incoming financier (who we understand to be Bank of Queensland) in order to facilitate the refinance.

Kind regards

Peter

Peter Bowden, Senior Associate

Clayton Utz

333 Collins Street, Melbourne VIC 3000 Australia | D +61 3 9286 6506 | F +61 3 9629 8488 | M +61 423 822 480

pbowden@claytonutz.com

www.claytonutz.com



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Confidential

John Park and Ginette Muller
Joint and several administrators
LM Investment Management Limited
(Administrations Appointed)
C/- Level 4
RSL Centre
9 Beach Road
SURFERS PARADISE QLD 7000

Deutsche Bank AG
Australia & New Zealand
ABN 13 064 165 162
Deutsche Bank Place
Level 16
Cnr of Hunter & Phillip Streets
Sydney NSW 2000 Australia
GPO Box 7033 Sydney NSW 2001
Tel +61 2 8258 1234

28 March 2013

Dear Sir / Madam

LM Investment Management Limited ABN 68 077 208 461 (Administrators Appointed) (the Company)

We refer to the facility agreement dated 1 July 2010 between LM Investment Management Limited in its capacity as responsible entity of the LM First Mortgage Income Fund (LM) (as "Borrower") and Deutsche Bank AG, Sydney Branch (DB) (as "Financier") as varied, amended and supplemented from time to time including by the override deed dated 21 December 2012 (Override Deed) between LM and DB (as amended, the Facility Agreement).

We also refer to our previous correspondence and your conversation with representatives of DB today in relation to the administration of the Company in general.

As discussed during today's telephone conference (between DB, the administrators of the Company and representatives from LM), please confirm that the intention and agreement of the parties in respect of clause 4.2(i) of the Override Deed was that other than in respect of any repayments from proceeds of cash sweeps undertaken by DB pursuant to clause 4.2(g) and any proceeds from the realisation of secured assets by a receiver appointed by DB over the assets of the Company, the 'make-whole' obligation continues to apply despite the fact that an Event of Default or Potential Event of Default has occurred and is subsisting.

The 'make-whole' obligation requires LM to pay interest on the outstanding balance of any or all of the Facility (as that term is defined in the Facility Agreement) that is repaid prior to 30 June 2014 or, if the Option Term (as that term is defined in the Override Deed) is exercised, 30 June 2015, on the basis that the Facility (or that component of the Facility that is repaid) was drawn and outstanding for the full term of the Facility (that is, until 30 June 2014 or 30 June 2015, as applicable).

As you are aware, interest is currently accruing on the Facility at the default interest rate of 18% per annum.

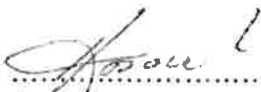


Please acknowledge the above by signing and returning to us the attached copy of this letter. By doing so, you agree to signing such further documents as may be deemed necessary to reflect the above agreed position.

As previously noted, we continue to expressly reserve all of our rights arising under, in relation to or in connection with the Facility Agreement and each Finance Document.

Yours faithfully

DEUTSCHE BANK AG, SYDNEY BRANCH


.....
Attorney

Name: KEVIN KOSOVICH


.....
Attorney

Name: David Maynard

We, John Richard Park and Ginette Muller, in our capacity as joint and several administrators of LM Investment Management Limited (Administrations Appointed) in its capacity as responsible entity of the LM First Mortgage Income Fund, acknowledge and agree to the above:

"on the basis that any liability is limited to the assets of the fund and no action will be taken against the administrators or LMIM in their personal capacities."
.....

John Richard Park

Joint and several administrator

LM Investment Management Limited ABN 68 077 208 461 (Administrators Appointed)

Date:

 2/9/13

David Whyte

From: David Whyte
Sent: 27 September 2013 1:58 PM
To: 'Stephen Russell'
Cc: Ilenna Copley
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

Steve

I note your comments.

Please note that the alleged conflict you refer to has been dealt with as Andrew Fielding and I have resigned as liquidators of two entities which had been all but wound up and a replacement liquidator appointed. There is nothing in the Act that says it was a conflict however to ensure no perceived conflict we have resigned with all costs associated with this being borne by BDO.

Regards

David

From: Stephen Russell [<mailto:srussell@russellslaw.com.au>]
Sent: 27 September 2013 1:44 PM
To: David Whyte
Cc: Ilenna Copley
Subject: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)
Importance: High

Dear David

Please see attached letter.

Sincerely

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
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RussellsLaw.com.au

From: David Whyte [<mailto:David.Whyte@bdo.com.au>]
Sent: Wednesday, 25 September 2013 7:32 AM
To: Park, John; Muller, Ginette

Cc: Joanne Kedney

Subject: FW: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)

John/Ginette

I refer to the below correspondence from Clayton Utz in relation to my request for a payout figure for the Deutsche Bank ("DB") facility and where I have received an offer of finance from BOQ to refinance the facility (at a significantly less interest rate than being paid to DB).

You will see from the payout figure that DB is seeking to impose a "make-whole interest" payment of approximately \$3M and is looking to rely on the attached letter executed by the Administrators in order to impose this amount under the facility terms. This is obviously giving us cause for concern and it would not be in the best interests of investors for me to payout the facility if this amount is indeed payable.

Could you please advise of the circumstances leading up to the signing of this letter and why you considered it in the best interests of investors to execute the letter? I am trying to negotiate a different arrangement with DB and therefore would appreciate your early comments in this respect. We are aiming to complete the refinancing on Monday, 30 September.

Regards

David

DAVID WHYTE

Partner

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Mobile: +61 413 491 490

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www.bdo.com.au

 Before you print think about the environment

We've moved! While I'm still located in our Eagle Street office our registered address has moved to Level 10, 12 Creek Street.

RUSSELLS

27 September, 2013

Our Ref: Mr Russell
Your Ref: Mr Whyte

EMAIL TRANSMISSION

Mr David Whyte
BDO (Qld)
BRISBANE

email: David.Whyte@bdo.com.au

Dear Mr Whyte

LM Investment Management Limited (in liquidation) (receivers and managers appointed) ("LMIM") as responsible entity of the LM First Mortgage Income Fund ("the Fund")

We act, as you know, for LMIM.

We hereby give you formal notice that on 23 September, 2013, our client instituted an appeal against the Orders pursuant to which you were appointed. A copy of the Notice of Appeal accompanies this letter.

We refer, in that context, to your email to the liquidators dated 25 September, 2013 (which also accompanies this letter).

In the event that you proceed with any re-financing of the Deutsche Bank facility, in the light of the subsistence of the appeal, LMIM suggests that you should do so only in its name.

Whilst you have power under paragraph 420(2)(d) of the Act (imported by paragraph 6 of the Orders made on 26 August, 2013), to borrow money and, therefore, to re-finance with you personally as the borrower, doing so would create practical difficulties (quite apart from the subsistence of the appeal).

No doubt any new financier will require first registered mortgage security over the properties currently held subject to Deutsche Bank's security. That will entail LMIM executing a guarantee and/or granting mortgages by way of guarantee (in the latter case, by a direction to the custodian in whose name the securities over the underlying assets are currently held).

Accordingly, if you can achieve a re-financing, the simplest way would be for LMIM to be the borrower and to grant direct to the new financier, first registered mortgage security, by direction to the custodian, as necessary.

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Brisbane / Sydney

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

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The second reason why, in our respectful submission, any re-financing should not be in your name personally is that if the appeal succeeds, there may be practical problems in unwinding the transaction, should you be un-seated. One can readily imagine that such problems may be substantial, particularly since securities will be registered, and you will cease to have any interest.

Thirdly, you will, as an officer of the court, naturally be anxious not to do anything to embarrass any proceedings in the court (i.e. the appeal) by, for example, seeking to entrench yourself in office, in the face of the appeal.

We are, for these reasons, instructed to ask you to confirm that any re-financing will not be undertaken by you personally and that it will be done in the name of LMIM, as direct borrower, obligor and mortgagor.

Of course, LMIM and the liquidators will co-operate in executing all and any documents in relation to any such re-financing as may be necessary.

We have sent this letter directly to you, because we have not received any notice that you have retained any solicitors. If you have retained solicitors, you might let us know who you have retained.

Yours faithfully



Stephen Russell
Managing Partner

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**COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

CA NUMBER: 8895 of 2013

APPELLANT:	LM INVESTMENTS MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND (FIRST RESPONDENT)
	AND
FIRST RESPONDENTS	RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE (APPLICANTS)
	AND
SECOND RESPONDENT	ROGER SHOTTON (THIRD RESPONDENT)
	AND
THIRD RESPONDENTS	DAVID NUNN AND ANITA JEAN BYRNES (FOURTH RESPONDENTS)
	AND
FOURTH RESPONDENT	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION (INTERVENER)

NOTICE OF APPEAL

TO: The Respondents

AND TO: The Registrar, Supreme Court of Queensland

TAKE NOTICE that the Appellant appeals to the Court of Appeal against the whole of the Order of the Supreme Court of Queensland

NOTICE OF APPEAL

Filed on behalf of the Appellant

Form 64 Rule 747(1)

Russells
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300 Queen Street
BRISBANE 4000
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1. THE DETAILS OF THE JUDGMENT APPEALED AGAINST ARE:-

Date of Judgment: 26 August, 2013

Description of Proceedings: BS3383 of 2013

Description of parties involved in the proceedings: Raymond Edward Bruce and Vicki Patricia Bruce (as Applicants)

and

LM Investments Management Limited (In Liquidation) (Receivers and Managers appointed) ACN 077 208 461, as responsible entity of the LM First Mortgage Income Fund (as First Respondent)

and

The Members Of The LM First Mortgage Income Fund ARSN 089 343 288 (as Second Respondents)

and

Roger Shotton (as Third Respondent)

and

David Nunn and Anita Jean Byrnes (as Fourth Respondents)

and

Australian Securities and Investments Commission (as Intervener)

Name of Primary Court Judge: Dalton J

Location of Primary Court: Brisbane

2. GROUNDS

1. The learned trial judge erred in finding at paragraph 117 of the judgment that:
 - (a) the administrators of the appellant had demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the Corporations Act;
 - (b) the administrators had preferred their own commercial interests to the interests of the LM First Mortgage Income Fund;

(c) the court could not be assured that the administrators would act properly in the interests of members of the LM First Mortgage Income Fund in identifying conflicts during the course of the winding up or in dealing with those conflicts; and

(d) the conduct of the administrators of the appellant made it necessary that the court appoint someone independent to have charge of the winding up of the LM First Mortgage Income Fund pursuant to s.601NF(1) of the Act,

(together, *the paragraph 117 findings*) because:

(e) The findings of misconduct in (a) and (b) were not put to either of the administrators in cross-examination;

(f) the paragraph 117 findings did not take account of:

(i) uncontradicted evidence that the administrators believed that it was in the best interests of the members of the LM First Mortgage Income Fund that the appellant remain the responsible entity;

(ii) uncontradicted evidence that the administrators believed that the appointment of Trilogy as responsible entity of the LM First Mortgage Income Fund was not in the best interests of members (a finding which was made by the learned trial judge in her judgment);

(iii) the existence of a reasonable basis for the beliefs in (i) and (ii) in that:

A. the trial judge found that it was not in the interests of the members of the Fund that Trilogy be appointed as temporary responsible entity (Paragraph [31]);

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- B. there was uncontradicted evidence of the time and costs incurred by staff of the appellant and the administrators in becoming familiar with the assets of the LM First Mortgage Income Fund and in developing strategies designed to sell those assets in the way which achieved the greatest return for members, over the shortest period of time, with periodic returns of capital;
- C. there was uncontradicted evidence of a sound working relationship between the administrators and the secured creditor of the LM First Mortgage Income Fund, Deutsche Bank AG ("Deutsche"); and
- D. there was uncontradicted evidence of a substantial risk that the proceedings would prompt Deutsche to appoint receivers, which it did shortly prior to the trial (Paragraph [7]);
- (g) the paragraph 117 findings were not the proper inferences to be drawn from the evidence.
2. The learned trial judge erred in making the paragraph 117 findings on the basis of the "conduct ... in relation to the 13 June 2013 meeting" because:
- (a) the learned trial judge's findings in relation to the 13 June 2013 meeting proceeded upon a basis, namely, as set out in paragraphs 51 and 86 of the judgment, that the administrators' purpose in calling a meeting of members of the LM First Mortgage Income Fund was to use the meeting as a strategy to defeat or damage Trilogy's prospects on its originating application, which was not the proper inference to be drawn from all of the evidence;
- (b) the learned trial judge's finding at paragraph 86 of the judgment that the appellant was pursuing its continuing control of the LM First Mortgage Income Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witness in
-

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- cross-examination and was not the proper inference to be drawn from all of the evidence;
- (c) the learned trial judge's finding at paragraph 86 of the judgment that the appellant's choice not to work with ASIC and not to hold a meeting at a time which allowed resolutions as to winding-up at the same time as resolutions as to the responsible entity meant that the appellant was pursuing its continuing control of the LM First Mortgage Income Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witness in cross-examination and was not the proper inference to be drawn from all of the evidence;
- (d) the learned trial judge's finding at paragraph 88 of the judgment that evidence of Ms Muller, one of the administrators of the appellant, as to there being "an appreciable chance" that Trilogy might be elected responsible entity at the 13 June 2013 meeting did not reflect Ms Muller's genuine belief was not the proper inference to be drawn from all of the evidence in circumstances where:
- (i) Ms Muller was not cross-examined on the facts about which she gave evidence as the basis for her belief; and
 - (ii) There was no evidence controverting those facts, which were not inherently unlikely;
- (e) the learned trial judge's finding in paragraph 88 of the judgment that the appellant's position in relation to the meeting of members demonstrated that the interests of members were not at the forefront of the thinking of those making the decisions (the administrators of the appellant) was not put to either of the administrators in cross-examination and was not the proper inference to be drawn from all of the evidence;
- (f) the learned trial judge's findings in relation to the 13 June 2013 meeting failed to have sufficient regard to the desirability of ascertaining the views
-

of the members of that LM First Mortgage Income Fund as to which entity they wished to act as responsible entity;

- (g) the learned trial judge erred in failing to have regard to the consideration that once a meeting was called the responsible entity had no power to cancel a meeting of members;
- (h) the learned trial judge failed to have regard to the active role of two firms of experienced solicitors in relation to issues concerning the 13 June meeting (compare paragraph [116]).

3. The learned trial judge erred in making the paragraph 117 findings on the basis of the appellant's (and its administrators') "dealings with ASIC" because:

- (a) the learned trial judge's finding at paragraph 61 of the judgment that on 29 April 2013, the appellant informed ASIC that it was not willing to enter into an enforceable undertaking was contrary to the evidence;
- (b) the learned trial judge's finding at paragraph 62 of the judgment that a statement in an affidavit of Ms Muller was not consonant with the reality of the appellant's interactions with ASIC was not put to Ms Muller in cross-examination, was not the proper inference to be drawn from of the evidence and was vitiated by the erroneous finding in paragraph [61];
- (c) the learned trial judge's findings in relation to the appellant's dealings with ASIC were dependent upon the findings in relation to the 13 June 2013 meeting which were affected by the errors identified in paragraph 1 above.

4. The learned trial judge erred in making the paragraph 117 findings on the basis of the appellant's "conduct of the litigation" because:

- (a) the learned trial judge's finding at paragraph 89 of the judgment that the appellant's conduct of the litigation was combative and partisan in a way which was reflective of the administrators acting in their own interests to keep control of the winding up of the LM First Mortgage Income Fund rather than acting in the interests of members was not put to either of the

administrators or any other witness in cross-examination, did not have regard to the matters in 1(h) above, and was not the proper inference to be drawn from the evidence;

- (b) the learned trial judge's finding at paragraph 93 of the judgment that there had been no argument that Trilogy had published false and misleading statements was incorrect in circumstances where:
 - (i) the appellant adduced evidence of such statements;
 - (ii) the appellant had made such submissions at trial;
- (c) the learned trial judge's finding at paragraph 93 of the judgment that part of an affidavit of Ms Muller was unprofessionally robust and partisan was not put to Ms Muller in cross-examination and was not the proper characterisation of Ms Muller's evidence;
- (d) the learned trial judge's finding at paragraph 94 of the judgment that an affidavit sworn by the solicitor for the appellant consisted of little more than combative and querulous commentary on the litigation was not put to the solicitor in cross-examination and was not the proper characterisation of the affidavit evidence in the light of the application in support of which it was sworn;
- (e) the learned trial judge's finding at paragraph 95 of the judgment that an affidavit sworn by Ms Muller contained sniping and argumentative passages was not put to Ms Muller in cross-examination, was not the proper characterisation of Ms Muller's evidence and was in any event irrelevant;
- (f) the learned trial judge's finding at paragraph 114 of the judgment that the appellant gave no notice of a proposal that the administrators would do all things necessary to secure the appointment of independent liquidators to the appellant and to LM Administration Pty Ltd was contrary to the

evidence and, in any event, the conclusion does not follow from the premise.

5. The learned trial judge erred in making the paragraph 117 findings on the basis that the administrators had sworn to matters which they conceded were wrong in cross-examination because:

- (a) the learned trial judge's finding at paragraph 104 of the judgment concerning an apparent concession by Mr Park, one of the administrators of the appellant, was incorrect because the matter on which Mr Park was cross-examined did not properly reflect the content of his affidavit evidence, and it was not put to him that he had contradicted his affidavit evidence;
- (b) the learned trial judge's finding at paragraph 106 of the judgment concerning an apparent concession by Mr Park was not the proper inference to be drawn from the evidence and the trial judge did not take into account his evidence in re-examination and the otherwise uncontradicted documentary evidence to which it referred.

6. The learned trial judge erred in making the paragraph 117 findings on the basis that the administrators had sworn to matters which they conceded were not consonant with reality because:

- (a) the learned trial judge's finding at paragraph 62 of the judgment was affected by the errors identified in paragraph 3(a) above;
- (b) the learned trial judge's finding at paragraph 88 of the judgment was affected by the errors identified in paragraph 2(c) and 2(d)(ii) above;
- (c) the learned trial judge's finding at paragraph 93 of the judgment was affected by the errors identified in paragraph 4(a) and 4(b)(ii) above;
- (d) the learned trial judge's finding at paragraph 116 of the judgment that a statement in an affidavit of Ms Muller about her current understanding as to the likelihood that conflicts existed or were likely to arise could not be

objectively held was not put to Ms Muller in cross-examination and ignored the balance of Ms Muller's evidence as to how the administrators intended to monitor the potential for conflicts (which they acknowledged) and to deal with conflicts in the event they arose;

- (e) the learned trial judge's finding at paragraph 116 of the judgment that the conduct of the 13 June 2013 meeting, the appellant's interactions with ASIC and the appellant's conduct of the litigation gave a basis for thinking that the administrators of the appellant would pursue their duties otherwise than independently, professionally and with due care was not put to either of the administrators in cross-examination, was not the proper inference to be drawn from all of the evidence and, in any event, the conclusion does not follow from the premise;
- (f) the learned trial judge's finding at paragraph 116 of the judgment that the court could not have confidence that the administrators would adequately identify and deal fairly with conflicts if they were to arise was not put to either of the administrators in cross-examination, was not the proper inference to be drawn from all of the evidence and, in any event, the conclusion does not follow from the premise.

7. The learned trial judge erred in appointing Mr Whyte to take control of the winding up of the LM First Mortgage Income Fund because the evidence established that Mr Whyte was a liquidator of a company which was a debtor of the Fund so that his appointment placed him immediately in a position where his duties were in conflict.

3. ORDERS SOUGHT

- (a) That the appeal be allowed;
- (b) That the orders made on 26 August, 2013 be set aside save for order 1, but deleting the words "subject to the orders below";

- (c) That the Respondents pay the Appellant's costs of and incidental to this appeal and to the proceedings below.

4. RECORD PREPARATION

We undertake to cause a record to be prepared and lodged, and to include all material required to be included in the record under the rules and Practice Directions and any Order or Direction in the proceedings.

PARTICULARS OF THE APPELLANT

Name:	LM Investments Management Limited (In Liquidation) (Receivers and Managers appointed) ACN 077 208 461, as responsible entity of the LM First Mortgage Income Fund
Appellant's Address:	C/- FTI Consulting (Australia) Pty Ltd, 22 Market Street, Brisbane, Queensland,
Solicitor's Name and firm name:	Stephen Charles Russell Russells
Solicitor's business address:	GPO Box 1402, Brisbane, Queensland, 4001
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PARTICULARS OF THE FIRST RESPONDENTS

Name:	Raymond Edward Bruce and Vicki Patricia Bruce as First Respondents
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Solicitor's name and firm name:	Amanda Banton Piper Alderman

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PARTICULARS OF THE SECOND RESPONDENT

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Tucker Cowen

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PARTICULARS OF THE THIRD RESPONDENTS

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~~Kogarah~~ 8 Masters Street
~~Sydney~~ Newstead
~~New South Wales~~ Brisbane, Queensland

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Solicitor's name Gregory John Litster
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PARTICULARS OF THE FOURTH RESPONDENT

Name: Australian Securities & Investments Commission as
Fourth Respondent.
Business Address Level 20, 240 Queen Street, Brisbane. Queensland
Solicitor's name Hugh Copley
and firm name: Australian Securities & Investments Commission
Solicitor's business address: Level 20, 240 Queen Street, Brisbane, Queensland
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Email: hugh.copley@asic.gov.au

Signed: 
Russells
Description: Solicitors for the Appellant
Dated: 23 September, 2013

This Notice of Appeal is to be served on:-

The First Respondents,

Raymond Edward Bruce and Vicki Patricia Bruce

c/- Their Solicitors, Piper Alderman

And on:

The Second Respondent,

Roger Shotton

c/- his Solicitors, Tucker Cowen

And on:

The Third Respondents,

David Nunn and Anita Jean Byrnes

c/- their solicitors Synkronos Legal

And on:

The Fourth Respondent,

Australian Securities & Investments Commission