

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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

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

AND

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

AND

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

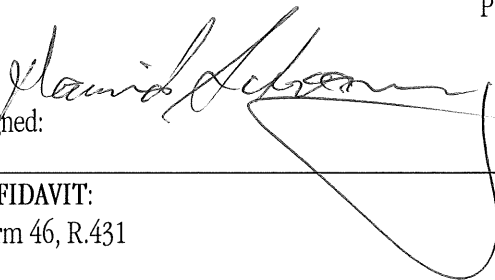
AFFIDAVIT OF DAVID HEINER SCHWARZ

I, DAVID HEINER SCHWARZ of Level 15, 15 Adelaide Street, Brisbane in the State of Queensland, solicitor,
state on oath:-

1. I am a solicitor of this Honourable Court and a Partner at Tucker & Cowen Solicitors, the
solicitors for the Respondent in this proceeding.

Page 1

Signed:



Witnessed by:



AFFIDAVIT:
Form 46, R.431

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

Filed on behalf of the Respondent

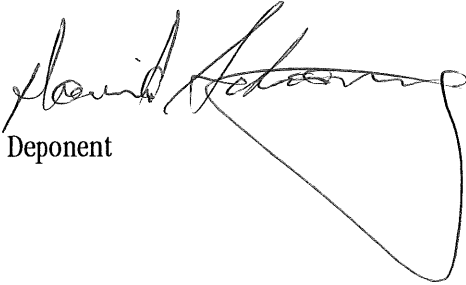
2. On 10 June 2015, I received from Mr Ashley Tiplady of Russells Lawyers an email attaching a copy of:-


- (a) a letter from Mr Tiplady of Russells to me dated 10 June 2015; and
- (b) an unsigned draft Amended Originating Application.

A copy of that email, and of the documents attached to it, is exhibited hereto and marked "DHS-1".

3. All the facts and circumstances above 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 **DAVID HEINER SCHWARZ** on the 29th day of June 2015 at Brisbane in the presence of:


Deponent


Solicitor/A Justice of the Peace

Marcelle Lee Webster
Solicitor

SUPREME COURT OF QUEENSLAND

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2001

CERTIFICATE OF EXHIBIT

Exhibit "DHS-1" to the Affidavit of DAVID HEINER SCHWARZ sworn this 29th day of June 2015


Deponent


Solicitor/A Justice of the Peace

Marcelle Lee Webster
Solicitor

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the Respondent

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

DHS-1

David Schwarz

From: Ashley Tiplady <atiplady@russellslaw.com.au>
Sent: Wednesday, 10 June 2015 12:54 PM
To: David Schwarz
Cc: Ashley Tiplady
Subject: LMIM - Liquidators Residual Powers Application
Attachments: AJT_20150297_031.pdf; Amended Originating Application.pdf

Dear Colleagues

Please refer to our attached correspondence dated 10 June, 2015, together with its enclosure.

Yours faithfully

RUSSELLS

Ashley Tiplady
Partner

Direct (07) 3004 8833
Mobile 0419 727 626
atiplady@russellslaw.com.au

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Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
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RUSSELLS

10 June, 2015

Our Ref: Mr Tiplady
Your Ref: Mr Schwarz

Mr David Schwarz
Partner
Tucker & Cowen Solicitors
BRISBANE

email: DSchwarz@tuckercowen.com.au

Dear Colleagues

LMIM - Liquidators Residual Powers Application

We refer to our Mr Tiplady's email correspondence to your Mr Schwarz of earlier this morning.

We enclose an Amended Originating Application (with appropriate strike throughs and underlining) which reflects the amendments outlined in Mr Tiplady's email.

With a view to obviating unnecessary time and expense, we intend to formally seek leave to amend the Originating Application on the morning of 20 July, 2015, so as to not unduly burden the Court and the members of the LM First Mortgage Income Fund. Please let us know whether your client objects to this course, and if so, on what basis.

Yours faithfully



Ashley Tiplady
Partner

Direct (07) 3004 8833
Mobile 0419 727 626
ATiplady@RussellsLaw.com.au

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d.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: of 2015

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

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

AND

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

AND

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

AMENDED ORIGINATING APPLICATION

A. DETAILS OF APPLICATION

This Application is made under Subsections 511(1) and 601NF(2) of the *Corporations Act* 2001 ("the Act").

On the facts stated in the supporting Affidavits, the Applicants seek:-

1. Directions as to how the LM First Mortgage Income Fund ("FMIF") is to be wound up in the circumstances of:-

AMENDED ORIGINATING APPLICATION

Filed on behalf of the Applicants

Form 2 (v.2) Rule 2.2

Russells
Solicitors
Level 18
300 Queen Street
BRISBANE
Phone: 07 3004 8888
Fax: 07 3004 8899

SCR_20130471_416.docx

-
- (a) the orders of Dalton J in proceeding number 3383 of 2013 in this Honourable Court made on 21 August, 2013 and the specific powers granted to the Respondent therein;
 - (b) the provisions of the *Corporations Act 2001*;
 - (c) the obligations of the Second Applicant ("the Trustee") as responsible entity of the FMIF; and
 - (d) the obligations of the First Applicants ("the Liquidators") as liquidators of the responsible entity of the FMIF.

2. Directions, pursuant to subsections 511(1) and 601NF(2) of the Act, as to whether the Liquidators are, in the winding up of the Trustee, and of the FMIF, responsible for and shall discharge the functions, duties and responsibilities set out in Schedule 1.

3. Directions, pursuant to subsections 511(1) and 601NF(2) of the Act, as to whether the Trustee is, in the winding up of the FMIF, responsible for and shall discharge the functions, duties and responsibilities set out in the Schedule 2.

4. An order that the Liquidators' remuneration, costs and expenses of discharging such functions, duties and responsibilities (including in respect this application) shall be paid from the Scheme Property of the FMIF.

5. Such order as to the Respondent's remuneration, costs and expenses as may be appropriate.

6. Such further or other order or relief as the Court thinks fit.

Date: ~~8 April, 2015~~ 10 June, 2015

Signed: Russells

Description: Solicitors for the Applicants

B. NOTICE TO RESPONDENTS

TO: David Whyte of BDO, Level 10, 12 Creek Street, Brisbane, Queensland
c/- Tucker and Cowen, Level 15, 15 Adelaide Street, Brisbane Qld 4000

This Application will be heard by the Court at the Law Courts Complex, George Street, Brisbane at a date to be fixed.

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 Applicants' address for service shown in this Application as soon as possible.

<p>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.</p>

C. FILING

Date of filing:

Registrar

This Amended Originating Application is filed by Russells, Solicitors for the Applicants.

D. SERVICE

The Applicants' address for service is Level 18, 300 Queen Street, Brisbane, Queensland, 4000, telephone 07 3004 8888, facsimile 07 3004 8899, email Mail@RussellsLaw.com.au.

It is intended to serve a copy of this Original Application on each Respondent and on any person listed below:-

David Whyte of BDO, Level 10, 12 Creek Street, Brisbane, Queensland
c/- Tucker and Cowen, Level 15, 15 Adelaide Street, Brisbane Qld 4000

SCHEDULE 1 – THE LIQUIDATORS

The following functions and duties set out in the following provisions of the Act and the constitution of the FMIF:-

- ~~1. — subject to the provisions of section 556 of the Act, to pay any class of creditors in full (including creditors for whose debts LMIM has a right of indemnity out of the Scheme Property of the FMIF), pursuant to section 477(1)(b) of the Act;~~
- ~~2. — to call for and adjudicate on proofs of debt and claims against LMIM (including those in respect of which LMIM has a right of indemnity out of the Scheme Property of the FMIF), pursuant to Division 6 of Part 5.6 of the Act and to compromise such debts or claims under subsections 477(1)(c) and (d) of the Act;~~
- ~~3. — to pay to third parties, in respect of whose claim monies are received under a contract of insurance, the sum necessary to discharge the liability to the third party, after deducting any expenses, pursuant to section 562 of the Act;~~
- ~~4. — to recover property of the FMIF pursuant to the provisions of Part 5.7B Division 2 of the Act; and~~
- ~~5. — to pay the debts of LMIM (including those in respect of which LMIM has a right of indemnity out of the Scheme Property of the FMIF), pursuant to section 506(3) of the Act.~~
1. to pay the expenses and liabilities, of LMIM as far as they relate to the FMIF as determined by proofs of debt and other authorised methods in

accordance with sections 477(1)(b), 477(1)(c), 477(1)(d), 506(3) and 562 of the Act and clauses 16.7(b) and 18.1 of the Constitution:

2. to recover those assets of the FMIF which are available only to the Liquidators because of part 5.7B of the Act;
3. to manage and deal with members, units and the capital of the FMIF as required by the Constitution, in particular, as required by clauses 3.6, 16.6, 16.7(c), 16.7(f), 16.7(g), 18.2 and 21.1, as well as parts 9, 10, 12, 22 and 28 of the Constitution; and
4. to determine and report upon the financial status of the FMIF as required by clauses 16.10, 27.1 and 27.4, as well as parts 11, 12 and 14 of the Constitution.

SCHEDULE 2 – THE TRUSTEE

The following functions and duties set out in the following clauses of the Constitution of the FMIF:-

1. ~~Clause 2.1~~ to act as trustee of the FMIF
2. ~~Clause 3.2~~ to manage the classes of units
3. ~~Clause 3.6~~ to consolidate or divide the capital of the FMIF
4. ~~Part 5~~ to issue units
5. ~~Part 9~~ to deal with the registration of any transfers
6. ~~Part 10~~ to maintain and effect transmissions of units where members die or become bankrupt
7. ~~Part 11~~ to determine the Income of the FMIF for each Financial Year
8. ~~Part 12~~ to calculate and distribute Distributable Income, and to distribute capital of the FMIF to the Members
9. ~~Part 14~~ to deal with complaints of Members
10. ~~Clause 16.6~~ to manage the FMIF until such time as all winding up procedures have been completed (subject to the functions expressly assigned to the Respondent in the order of Dalton J made on 26 August, 2013 (“the Order”))

-
11. ~~Subclause 16.7(b) — To pay the liabilities of the Trustee (in its capacity as trustee of the FMIF), including liabilities owed to any Member who is a creditor of the FMIF except where such liability is a “Unit Holder Liability”.~~
 12. ~~Subclause 16.7(c) — to distribute the net proceeds of realisation among members in the proportions specified in clause 12.4.~~
 13. ~~Subclause 16.7(f) — to retain for as long as it thinks fit any part of the Scheme Property which, in its opinion may be required to meet any actual or contingent liability of the FMIF, subject to the Respondent’s obligation to take possession of, and to sell, all of the Scheme Property.~~
 14. ~~Subclause 16.7(g) — to distribute among the members in accordance with clause 16.7 and anything retained under Subclause 16.7(f) which is subsequently not required for the winding up of the FMIF~~
 15. ~~Clause 16.10 — to arrange for an auditor to audit the final accounts of the FMIF after the FMIF is wound up~~
 16. ~~Part 17 — to obtain valuations of the Scheme Property as may be required~~
 17. ~~Clause 18.1 — to pay taxes (and to lodge income tax returns and Business Activity Statements of the FMIF)~~
 18. ~~Clause 18.2 — to set aside money from Scheme Property which, in the opinion of the First Applicants, is sufficient to meet any present or future obligation of the FMIF, subject to the Respondent’s obligation to take possession of, and to sell, all of the Scheme Property~~

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19. ~~Clause 21.1 to deal with the Custodian, as agent for LMIM, on the terms and conditions set out in the Custody Agreement, subject to the Respondent's obligation to take possession of, and to sell, all of the Scheme Property~~
20. ~~Part 22 to maintain the Register of Members and any other registers required by the law~~
21. ~~Clause 26.1 to amend the constitution if the First Applicants reasonably consider the change will not adversely affect members' rights, provided that no such amendment would purport to alter the operation of the Order~~
22. ~~Clause 27.1 to appoint auditors to audit the accounts~~
23. ~~Clause 27.4 to keep and prepare the accounts of the FMIF in accordance with applicable Accounting Standards and the Act, and to report to members concerning the affairs of the FMIF and their holdings as required by the Act~~
24. ~~Part 28 to call and convene meetings of Members~~

The following functions and duties set out in the following provisions of the Act:-

1. to prepare, for each financial year, a financial report for the FMIF, pursuant to Division 1 of Part 2M.3 of the Act
2. to have each such financial report audited in accordance with Division 3 of Part 2M.3 of the Act and to obtain an auditor's report pursuant to section 301 of the Act

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3. to report to members of the FMIF for each financial year in accordance with Division 4 of Part 2M.3 of the Act
 4. to lodge with ASIC the reports for each financial year, pursuant to Division 5 of Part 2M.3 of the Act
 5. to prepare, for each half-year, a financial report for the FMIF, pursuant to Division 2 of Part 2M.3 of the Act
 6. to have each such half-yearly financial report for the FMIF audited or reviewed in accordance with Division 3 of Part 2M.3 of the Act
 7. to lodge with ASIC such half-yearly financial reports and auditors' report, pursuant to Division 3 of Part 2M.3 of the Act
 8. to engage a registered company auditor, an audit firm or an authorised audit company to audit compliance with the FMIF's Compliance Plan in accordance with section 601HG of the Act