

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: Brisbane**  
**NUMBER: 3508 of 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 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 089 342 288**

AND

Respondent:

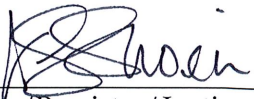
**DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001**

**SEAN CHARLES RUSSELL** of Level 18, 300 Queen Street, Brisbane, Solicitor states on oath:-

---

**PAGE 1**

  
Signed

  
Solicitor/Barrister/Justice of the Peace

**AFFIDAVIT OF SEAN CHARLES RUSSELL**

Filed on behalf of the Applicants

Form 46 Rule 431

**Russells**

Level 18

300 Queen Street

**BRISBANE 4000**

Phone: 07 3004 8888

Fax: 07 3004 8899

---

1. I am a solicitor in the employ of Russells, solicitors for the Applicants. I have the day to day carriage of this matter under the supervision of Mr Ashley Tiplady, a partner of Russells.

2. Now produced and shown to me and marked "**SCPR-1**" is an indexed, paginated bundle of documents to which I shall refer in this affidavit. References to numbers in [ ] are references to the page numbers of SCPR-1.

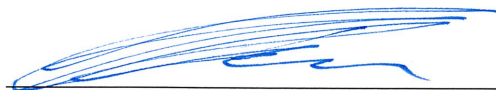
3. On 6 May, 2015, I received an email from Mr Hugh Copley, Litigation Counsel at the Australian Securities and Investments Commission. A copy of that email appears at [1] to [2].

4. I am informed by Mr John Park, the first named First Applicant, and I believe, that:-

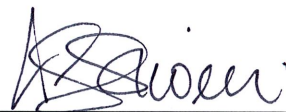
- (a) Deutsche Bank AG, a secured creditor of the LM First Mortgage Income Fund ("**FMIF**"), has been repaid the full amount owing to it, which liability was secured by the assets of the FMIF;
- (b) the receivers appointed by Deutsche Bank, Mr Joseph Hayes and Mr Anthony Connelly of McGrath Nichol ("**DB Receivers**"), have not retired;
- (c) the DB Receivers have not retired because KordaMentha Pty Ltd, who is the trustee of the LM Managed Performance Fund ("**MPF**") (an unregistered managed investment scheme of which Second Applicant was the trustee prior to the appointment of KordaMentha Pty Ltd), has stated that it may have claims against the assets of the FMIF, on behalf of members of the MPF;

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**PAGE 2**



Signed



Solicitor/Barrister/Justice of the Peace

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(d) he was copied into some correspondence passing between the Respondent's solicitors and KordaMentha Pty Ltd's solicitors, copies of which appear at [3] to [7].

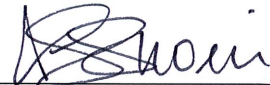
5. I have received correspondence from Clayton Utz, acting for the DB Receivers, relating to this application, copies of which appear at [8] to [12]

6. 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 **SEAN CHARLES RUSSELL** on 7 May, 2015 at Brisbane in the presence of:



Deponent



~~Solicitor/Barrister/Justice of the Peace~~

AMANDA JANE SKOIEJ.  
RUSSELLS, SOLICITOR

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: Brisbane**  
**NUMBER: 3508 of 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 APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**


AND

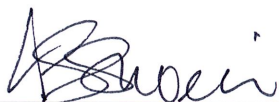
Second Applicant: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)(RECEIVERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 342 288**

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**

Exhibit SCPR-1 to the Affidavit of **SEAN CHARLES RUSSELL** sworn 7 May, 2015:

  
\_\_\_\_\_  
Deponent

  
\_\_\_\_\_  
Solicitor/Barrister/Justice of the Peace

---

**CERTIFICATE OF EXHIBIT**

Filed on behalf of the Applicants

Form 47 Rule 435

**Russells**  
Level 18  
300 Queen Street  
**BRISBANE 4000**  
Phone: 07 3004 8888  
Fax: 07 3004 8899

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: Brisbane  
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**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 APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**

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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 089 342 288**

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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**

**INDEX TO EXHIBIT SCPR-1**

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## Sean Russell

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**From:** Hugh Copley [Hugh.Copley@asic.gov.au]  
**Sent:** Wednesday, 6 May 2015 3:12 PM  
**To:** Sean Russell  
**Cc:** David Whyte; David Schwarz; Marc Robinson  
**Subject:** In the matter of LM Investment Management Ltd (In Liquidation) (Receivers Appointed) [BS3508/2015] [SEC=UNCLASSIFIED]

**Saved:** 0

Dear Mr Russell,

I refer to your letter of 29 April 2015, under cover of which you delivered (inter alia) an Originating Application filed on 8 April 2015 (OA), an Interlocutory Application (IA) and a Commercial List Statement (both dated 29 April 2015).

I note that your letter confirmed that ASIC was not being served, but merely being given notice of the matter and that you would inform ASIC of the date for the hearing of the IA (seeking to have the OA placed on the Commercial List) once known.

Mr Whyte yesterday informed ASIC that the IA had been listed before Justice Jackson, for hearing, on 7 May at 9.30 am.

Given that OA and IA have not been served upon ASIC and given that ASIC is not named as a Respondent to the OA, ASIC will not be appearing at the hearing of the IA on Thursday.

Having said this, ASIC would be interested to learn the outcome of Thursday's hearing and would appreciate either your firm (or Tucker & Cowen, who I understand act for Mr Whyte in the proceeding and who I have copied into this email) advising ASIC, in due course, as to the outcome of that hearing.

Not wishing to pre-empt the outcome of Thursday's hearing or the matters the subject of the OA, the following observations might be of some assistance to your clients and to Mr Whyte:

1. Given the relief the subject of the OA, has any consideration been given to having the OA listed and heard by Justice Dalton, who appointed Mr Whyte to take responsibility for the winding up of the FMIF?
2. As the material filed in support of OA confirms, ASIC had previously sought to have a 'prophylactic' order made, concerning your clients future involvement with the winding up of the FMIF, on the basis of ASIC's view that the appointment of Mr Whyte by Justice Dalton meant your clients had no substantive role to play in the winding up of the FMIF. Justice Dalton declined to make such an order, preferring that the issue be revisited if and when a dispute arose (between your clients and Mr Whyte) as to their respective roles. If it assists, ASIC maintains the view expressed before Justice Dalton when the Orders were made, on 21 August 2013, as to the scope of your clients' ongoing involvement in the winding-up of the FMIF.
3. Despite the material listing the various obligations of the RE of the FMIF, which your clients seem to assert they should be meeting, it is unclear on the material what the "dispute" actually is - as between your clients and Mr Whyte - in this regard.
4. I am informed that on 25 August 2014, ASIC issued Consultation Paper CP223 - concerning the redraft of RG174 (Financial Reporting Obligations of Externally Administered Companies and Schemes). I am further informed that a revised RG174 will shortly be issued. As a consequence, I understand that your clients (and/or Mr Whyte) will largely be exempted from the current financial reporting obligations prescribed under Part 2M.3 of the *Corporations Act 2001*(Cth).

Yours sincerely

**Hugh Copley** | Litigation Counsel, QLD | Chief Legal Office| **ASIC** | Level 20, 240 Queen Street, Brisbane  
QLD 4000 | ☎ +61 7 3867 4892 | ☎ +61 7 3867 4790 | ✉ [hugh.copley@asic.gov.au](mailto:hugh.copley@asic.gov.au)

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Our reference: Mr Schwarz / Mr Hancock

4 March 2015

Your reference: Mr O'Brien / Mr Vickery

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David Schwarz.  
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[michael.vickery@minterellison.com](mailto:michael.vickery@minterellison.com)

Dear Colleagues

**LM Investment Management Ltd (In Liquidation) (Receivers & Managers Appointed) ("LMIM") as Responsible Entity for the LM First Mortgage Income Fund (Receiver Appointed) ("FMIF")  
KordaMentha Pty Ltd & Calibre Capital Ltd ("Trustees") as Trustees of the LM Managed Performance Fund ("MPF")**

We refer to our letter of 28 July 2014 and to the email from your Mr Vickery of 7 August 2014. As you know, we act for Mr David Whyte, the person appointed by Order dated 21 August 2013 as the person responsible for ensuring the winding up of the FMIF and as receiver of the FMIF.

In your email, you advised that the Trustees were investigating two matters concerning potential claims against the assets of the FMIF, and that you expected that actions would be commenced "*this month*" (that is, in August 2014). Your email also suggested that you were investigating other potential claims as against the FMIF, although those investigations had not advanced to the same extent.

No proceedings have yet been commenced by the Trustees concerning claims against the assets of the FMIF.

Your email of 7 August 2014 also mentioned difficulties in obtaining access to some of the books of the MPF. Any such difficulties have been remedied by the Orders made by Daubney J in December 2014 and in January 2015 in proceedings in which the Trustees participated.

Your clients have not identified or asserted any claims that might affect either Deutsche Bank AG ("DB") or the receivers and managers appointed by DB. Our client has previously conveyed to your clients the effect that the delay in your clients' investigations is having upon the proper conduct of the winding up of the FMIF, having regard to the position of DB and the receivers and managers. An assurance was given by Mr Vertullo (for the Trustees) to our client in April 2014, that your clients would make the investigation of the potential for any possible claims against, or implicating, DB a priority.

Your clients have not, since then, identified any claims affecting DB or the receivers appointed by DB.

Some 18 months have elapsed since KordaMentha Pty Ltd wrote to those then responsible for the affairs of the FMIF and set out perceived potential claims against the FMIF's assets and officers formerly responsible for the management of that fund. Obstacles which may have once inhibited your clients' inquiries have long since been removed. Yet still there is no announcement about the progress of your clients' investigation.



In the circumstances, your clients have had more than ample time within which to conduct their investigations and to either make any claim concerning the assets of the FMIF, or to inform our client that no claim will be made. At the least, your clients ought to now be in a position to say whether any claim will be made that concerns DB or the receivers appointed by it to the FMIF.

We are instructed to ask that you let us know by return correspondence:-

1. whether the ongoing analysis of documents received from LMIM's liquidators (and from the liquidator of LMA) has disclosed any action that could affect Deutsche Bank AG?
2. whether your clients are now in a position to identify what claims of the type mentioned in earlier correspondence they intend to commence and, if so, when such proceedings will be commenced?

As has previously been mentioned, our client understands that the refusal by DB to terminate the appointment of Messrs Hayes and Connelly as receivers and managers of the assets of the FMIF (despite the bank's facility having been repaid in full) is due entirely to your clients' having announced, as long ago as August, 2013, the prospect of claims involving the assets of the FMIF.

Our client has worked with the DB receivers to minimise, so far as possible, the additional burden of fees charged to the FMIF as a result of the appointment of the DB receivers as well as the appointment of our client. While our client and the DB receivers have attended to the management and sale of FMIF assets with the minimisation of any duplication of tasks in mind, the continued presence of the bank's receivers has, nonetheless, increased the burden of fees borne by the FMIF beyond what would have been the case had the responsibility for dealing with the assets of the FMIF been left solely with Mr Whyte.

We are also instructed that the winding up of the FMIF has progressed to the point where it may be appropriate for our client to consider seeking approval for an interim distribution to investors in the FMIF. As your clients will be aware, the collapse of the LM funds has resulted in significant hardship to many of the investors in those funds, and a distribution is, for them, desirable at the earliest opportunity. Naturally, it is difficult for our client to make such a distribution while your clients maintain the position taken by them to date in respect of the potential claims by the Trustees against assets of the FMIF.

In circumstances where:-

1. your clients' investigation of potential claims has occupied at least 18 months;
2. Mr Vertullo advised Mr Whyte in April, 2014 that the ascertainment of potential claims against DB would be made a priority;
3. you have advised that some 38,000 documents inspected by early August, 2014 are said not to have disclosed any action against the bank; and
4. claims involving the assets of the FMIF which your clients expected to commence in August, 2014 have not yet been commenced,

your clients have had a reasonable time to ascertain whether there is a basis for any claim.

Accordingly, our client again calls on your clients to advise him promptly about these matters:

1. Is a claim to be made against Deutsche Bank AG and, if so, what is the nature of that claim?

2. If your clients are as yet undecided about the existence or soundness of such a claim, by what date do they expect to be in a position to make a decision one way or the other, and what investigation and analysis remains to be undertaken for that purpose?
3. Have your clients decided to commence proceedings on behalf of the MPF seeking relief of any sort against any of the assets of the FMIF? And, if no such decision has yet been reached, what work is yet to be undertaken in order to arrive at a decision, and by when might that decision be made?

Should there be ongoing delay by your clients in conveying a settled position regarding these issues, our client reserves the right to claim from the Trustees any additional costs resulting from your clients' delay, and to seek from them the costs of any necessary application for directions to advance the proper winding up of the FMIF.

We look forward to receiving your reply within the next seven days.

Yours faithfully



David Schwarz  
Tucker & Cowen

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

Liability limited by a scheme approved under Professional Standards Legislation.

# MinterEllison

1 April 2015

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RECEIVED

02 APR 2015

BY:.....

Mr David Schwarz  
Partner  
Tucker & Cowen Solicitors  
GPO Box 345  
BRISBANE QLD 4000

Dear Mr Schwarz

**KordaMentha Pty Ltd and Calibre Capital Ltd (Trustees) as trustees of the LM Managed Performance Fund ('MPF') LM Investment Management Ltd (ACN 077 208 461) (In Liquidation) ('LMIM') as responsible entity for the LM First Mortgage Income Fund**

We refer to your letter dated 4 March 2015.

Your comments in relation to access to books and records and our client's progress in relation to investigation of claims are misguided.

In relation to the books and records, we advise that our client was only provided full access to the MPF's books and records at around the same time we received your letter. Those books and records comprise approximately 16 terabytes of data and literally millions of separate documents.


As you can appreciate, a review of these documents will take some time, and our client cannot complete its consideration of potential claims until that review is complete.

We confirm that our client has investigated and continues to investigate claims against LMIM and the FMIF. In that regard, our client has in fact already commenced two proceedings, which have not yet been served on your client. One further matter is presently with Queen's Counsel for advice.

In relation to the two proceedings already commenced, our client filed those proceedings in the absence of full books and records, as a consequence of potential issues concerning limitation periods. Our client will make a decision in due course as to whether (and when) they serve these proceedings on your client.

Yours faithfully

**MINTER ELLISON**

  
Contact: Michael Vickery Direct phone: +61 7 3119 6185 Direct fax: +61 7 3119 1185  
Email: michael.vickery@minterellison.com  
Partner responsible: David O'Brien Direct phone: +61 7 3119 6159  
Our reference: MJV DOB 40-7735740  
Your reference: Mr Schwarz

**MINTER ELLISON GROUP AND ASSOCIATED OFFICES**

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Associates.  
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Marcelle Webster.  
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Emily Anderson.  
Daniel Davey.  
Nicole Withers.  
Dugald Hamilton.  
Olivia Roberts.  
Ashley Moore.

Our reference: Mr Schwarz / Mr Hancock

5 May 2015

Your reference: Mr O'Brien / Mr Vickery –  
MJV DOB 40-7735740

Minter Ellison  
Lawyers  
PO Box 7844  
Waterfront Place QLD 4001

Email:  
[michael.vickery@minterellison.com](mailto:michael.vickery@minterellison.com)

Dear Mr Vickery

**LM First Mortgage Income Fund**  
**KordaMentha Pty Ltd & Calibre Capital Ltd as Trustees of the LM Managed Performance Fund**

Thank you for your letter of 1 April 2015 and for your subsequently sending us copies of the two claims mentioned in that letter.

In our letter of 4 March, 2015, we also asked what your clients' position was in relation to possible claims against Deutsche Bank AG.

That question was not addressed in your letter of 1 April, 2015. The bank is not mentioned in either of the two claims. The deeds of assignment which are criticised in each claim were, on the pleadings, entered into and approved well before security agreements were made with Deutsche Bank AG. Your letter does not indicate that the further matter which is with counsel for advice implicates the bank.

It remains a matter of serious interest to our client to know whether your clients intend to make a claim to which the bank (or its appointed receivers) will be a party, and when your clients will be able to say that such a claim is or is not to be made.

Accordingly, we repeat questions 1 and 2 which appear at the end of our letter of 4 March, 2015.

Yours faithfully



Geoff Hancock  
**Tucker & Cowen**   
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## Sean Russell

---

**From:** Byrnes, James [jbyrnes@claytonutz.com]  
**Sent:** Tuesday, 5 May 2015 2:00 PM  
**To:** Sean Russell; 'GHancock@tuckercowen.com.au'  
**Cc:** Ashley Tiplady; 'dschwarz@tuckercowen.com.au'; Sharry, Scott  
**Subject:** LM Investment Management Limited (In Liquidation)(Receivers & Managers Appointed) - LM First Mortgage Income Fund  
**Attachments:** Letter to Russells Lawyers and Tucker & Cowen - 5 May 2015.pdf  
**Saved:** 0

Dear Sirs

Please refer to the **attached** letter.


Regards

James

**James Byrnes, Senior Associate**

**Clayton Utz**

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Email

5 May 2015

Mr Sean Russell  
Russells Lawyers  
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BRISBANE QLD 4001

Mr Geoff Hancock  
Tucker & Cowen  
Level 15, 15 Adelaide Street  
Brisbane QLD 4000

SeanRussell@russellslaw.com.au

GHancock@tuckercowen.com.au

Dear Messrs Russell and Hancock

**LM Investment Management Limited (In Liquidation)(Receivers & Managers Appointed)("LMIM")-  
LM First Mortgage Income Fund (Receivers & Managers Appointed)("FMIF")**

1. We refer to our letter dated 3 February 2015 and the reply from Russells Lawyers dated 6 February 2015.
2. We confirm that we act for Messrs Anthony Connelly and Joseph Hayes of McGrathNicol in their capacity as joint and several receivers and managers of the property of LMIM in its capacity as responsible entity of the FMIF (DB Receivers) and Deutsche Bank AG (DB).
3. Mr Whyte's solicitors have passed on to us:
  - (a) the originating application filed on 8 April 2015 seeking directions as to the responsibilities of the liquidators in connection with the winding up of the FMIF as a consequence of the orders of Justice Dalton delivered on 8 August 2013;
  - (b) the interlocutory application filed on 10 April 2015 seeking to have that proceeding placed on the commercial list, together with the commercial list statement; and
  - (c) the affidavits of Mr Stephen Russell dated 20 March 2015 and Mr Park dated 21 April 2015 in support of the originating application.
4. The orders of Justice Dalton (the topic of the originating application) expressly provide that nothing in those orders prejudices the rights of DB pursuant to any securities it holds over LMIM or the FMIF or the rights of the DB Receivers. Notwithstanding this, the directions sought by the liquidators may affect the interests of DB and the DB Receivers and it appears to us that DB and the DB Receivers are necessary parties to the proceeding.
5. DB and the DB Receivers wish to protect their position but only wish to be involved to the extent it is necessary to achieve this purpose. As a result, we consider that DB and the DB Receivers should be parties to the proceeding. DB and the DB Receivers do not intend to cause unnecessary costs to be incurred by the parties and they do not intend to make submissions beyond what is needed to protect their interests.
6. We understand that the matter is scheduled to be mentioned before Justice Jackson at 9.30 am on Thursday, 7 May 2015. Could each of you please let us know as soon as possible (and by no later than 2.00 pm tomorrow, 6 May 2015) if your clients agree to the amendment of the originating application to join DB and the DB Receivers as parties or if you oppose a joinder of those parties to the proceeding. If the joinder is opposed, please let us know the basis for that position.

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Brisbane QLD 4000

GPO Box 9806  
Brisbane QLD 4001

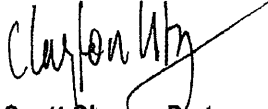
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L\315543906.1

Mr Sean Russell, Russells Lawyers; Mr Geoff Hancock, Tucker & Cowen

5 May 2015

Yours sincerely



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**James Byrnes, Senior Associate**  
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## Sean Russell

---

**From:** Byrnes, James [jbyrnes@claytonutz.com]  
**Sent:** Wednesday, 6 May 2015 6:29 PM  
**To:** Sean Russell; 'GHancock@tuckercowen.com.au'  
**Cc:** Ashley Tiplady; 'dschwarz@tuckercowen.com.au'; Sharry, Scott  
**Subject:** LM Investment Management Limited (In Liquidation)(Receivers & Managers Appointed) - LM First Mortgage Income Fund  
**Attachments:** Letter to Russells and Tucker & Cowen - 6 May 2015.pdf  
**Saved:** 0

Dear Sirs

Please refer to the **attached** letter.


Regards

James

**James Byrnes, Senior Associate**

**Clayton Utz**

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## Email

6 May 2015

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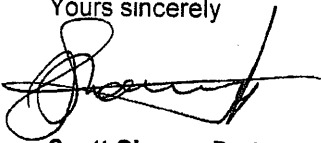
GHancock@tuckercowen.com.au

Dear Messrs Russell and Hancock

**LM Investment Management Limited (In Liquidation)(Receivers & Managers Appointed)("LMIM")-  
LM First Mortgage Income Fund (Receivers & Managers Appointed)("FMIF")**

1. We refer to our letter dated 5 May 2015 to which we have not received a response.
2. We have received the letter from Mr Whyte's solicitors earlier today and note that paragraph 6 of the proposed directions relevantly provides that on or before 15 May 2015 the applicants:
  - (a) amend the application so as to add Deutsche Bank AG and Joseph Hayes and Anthony Connelly as respondents to the application; and
  - (b) serve each of the new parties with copies of the order, application and all other affidavits and documents filed on behalf of the applicants in the proceeding to date.
3. This proposed directions accord with our clients' position as set out in our letter of 5 May 2015 and we are instructed that our clients support the making of these orders. We would appreciate if you could please bring our letters to the attention of the Court.
4. In the event that the above order is not made, we reserve our clients' right to apply to be joined as parties to the proceeding.

Yours sincerely



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