SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3508 of 2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT (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 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***

OUTLINE OF SUBMISSIONS

1. Mr Whyte does not oppose the matter being commercially listed.

2. There are three points of disagreement:

   (a) the joinder of parties;

   (b) the notice that should be issued to investors;

   (c) the directions that should be made.

3. In terms of joinder, the Order appointing Mr Whyte was made in the context of a contested hearing before Dalton J. Parties to that hearing were the liquidators of LMIM, the members of the LM First Mortgage Income Fund, Mr Shotton and ASIC.

Mr & Mrs Bruce were the original applicants. The originating application sought the appointment of Trilogy as temporary responsible entity of the FMIF. Her Honour considered she did not have power to make such an appointment, and further, as matter of discretion would not have made such an appointment.[1] Her Honour considered as a matter of discretion, that she would not appoint Trilogy and considered to the extent that the application was based on the idea that someone independent of the first respondent and its administrators ought to be appointed to control the FMIF that would be achieved by the orders which her Honour proposed to make.[2]

4. There was an application by Mr Shotton and ASIC to appoint liquidators to take responsibility for insuring that the Fund was wound up but ultimately at the end of the hearing Mr Shotton and ASIC joined in proposing that receivers be appointed as proposed by ASIC.[3]

5. Mr Whyte was subsequently appointed by her Honour identifying, inter alia, conflicts between the first respondent's duties as responsible entity of the FMIF and as responsible entity of the feeder Funds and potential claims by the RE from the FMIF.[4]

6. At [121] her Honour recognised that the provision at s.601ND which allows a court to direct that the responsible entity winds up a scheme and the provision a s.601NF(1) which allows a court to appoint a person to take responsibility for insuring a registered scheme is wound up in accordance with the constitution do not sit happily together. In particular they give distinct potential for two separate sets of insolvency practitioners to charge a distressed Fund. Her view was that Mr Whyte should in substance and effect conduct the winding up of the Fund. In this regard she adopted the orders made by Justice Applegarth in *Equitirust* constituting the person charged with winding the scheme up as receiver to give the person the necessary powers. That led to her Honour's orders of August 2013 being made. As

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1 At [19]
2 At [27]
3 At [33] [2013] QSC 192
4 At [103], [105] and [106]. The judgment from her Honour was appealed and upheld save for some findings made against the Applicants and their solicitor which were set aside : [2014] QCA 136

is evidenced by the affidavit of Mr Russell some further orders were sought but not made by her Honour.

7. In so far as the liquidators are seeking directions pursuant to s.601NF(2) in paragraphs 2 and 3 and further seek an order that the liquidators' remuneration costs and expenses discharging functions, duties and responsibilities shall be paid from the scheme property of the FMIF, it is contended that ASIC should be joined as a party to this proceeding given it was the proponent of the order appointing him. As he is in the position of a court appointee there are potentially limitations on his ability to act as a contradictor, depending on the matters raised. ASIC has noted in the correspondence to Russells of 6 May 2015 that it has not been joined in the proceedings, but merely been given notice of the matter. ASIC has also indicated that it maintains its view expressed before Justice Dalton when Orders were made on 21 August as to the scope of FTI's ongoing involvement in the winding up of the FTI.

8. The other party which Mr Whyte has raised with the applicants as a party who should be joined is Deutsche Bank is a secured creditor and appointed receivers who remain appointed. Justice Dalton provided in the Orders appointing Mr Whyte that nothing in the Order prejudices the rights of Deutsche Bank pursuant to any securities or the receivers and managers appointed by Deutsche Bank in paragraph 4. One of the matters that appears to be contended for, although it is not clearly articulated in the application, is that the liquidators appear to hold the view that they should control the Funds obtained in the process of winding up. This is evident from paragraphs 1, 2 and 5 of the application and also appears to arise from the Order sought in relation to paragraphs 8, 12, 13, 14, 17 and 18 of the Schedule 2 matters.

9. If such an Order was to be made, it would need to have approval of the receivers of Deutsche Bank. The receivers of Deutsche Bank have indicated in correspondence of 5 May 2015 that they would support the making of the Orders to join them as parties.

10. The concern is to the extent that these matters are being ventilated that the correct parties should be before your Honour. If the Orders being sought by the applicants are wider than those provided for by Justice Dalton rather than just being a matter of clarification of the correct construction, it is appropriate that ASIC be joined as a relevant party and the investors be given notice. Further, in terms of Deutsche Bank and its receivers, it is appropriate that they be joined since they are carrying out a number of functions as receivers, which include matters of which Mr Park complains he is being prevented from carrying out, such as for example, the filing of tax returns.

11. In terms of the investors, Mr Whyte proposed to the applicants that notice be given to the investors and that it be given in a similar form to which he provides notice to the investors when he applies for remuneration to be approved by the court. The applicants have agreed to that.

12. The point of disagreement is the applicants have sought to amend the proposed notice proffered by Mr Whyte does not accurately state the position given the generality of its terms.

13. The notice that Mr Whyte proposed is in neutral terms. The notice which is being provided that is proposed by the applicants states that it is:

    (a) A dispute, for instance, a dispute as to whether the liquidators and LMIM are to carry out their statutory and corporate functions despite the Order. That is far too broad in terms of the dispute.

    (b) It further states Mr Whyte's position is that there is no obligation on the liquidators to discharge particular statutory and constitutional obligation. That is not accurate.

    (c) It states that the liquidators have applied to the Supreme Court for directions as to the course to be adopted. That does not encompass the fact that they seek direct Orders for payment for their remuneration out of the Fund which is a matter which would directly affect the investors.

14. In our submission the proper notice is the one which we propose whereby the application and the affidavit material will be available to the investors to review themselves and determine whether they wish to appear to not. A proposed notice to members by the applicants does not provide for the actual material to be placed on the website. We note that Exhibit JRP-2 is said by the applicants to be confidential. As such, we would not propose that that be included on the website, although we note no orders have been sought by the Applicants in that regard.

15. Finally, there is the issue about the directions to be made. Mr Whyte has proposed that the submissions of the applicants be provided prior to any evidence being put on by him. The reason for that is that the applicants state that this matter is a matter of construction and interpretation of Justice Dalton's Orders, however Mr Park's affidavit does not clarify the fact that a number of the powers that are identified are necessary for them to be carrying out or the context in which they would be carrying them out given there has been an Order that the Fund be wound up. This is of some significance given that Mr Whyte of course has a dual role, not only as receiver, but also to ensure the winding up of the Fund in accordance with FMIF's constitution. It is unclear why some matters are being raised at all. For instance, one of the functions raised is the power in Part 5 to issue units. Under the constitution clause 16.5 of the constitution says that the RE cannot accept applications to issue units once winding up commences.

16. At the level the matters being raised a number of matters are hypothetical rather than being some apparent cause of genuine dispute. It is in the context of an order as to the winding up of the fund that the powers proposed by the RE to be exercised need to be considered. Providing the submissions of the Applicants early will serve to properly identify and hopefully narrow the issues in dispute and also give clarity to which party may be the proper contradictor. It will also indicate whether it is necessary for Mr Whyte to file any evidence.

17. Mr Whyte's proposal has been opposed by the applicants who propose now that all evidence be given on one day and that submissions be exchanged on the one day. Given the broad terms of the application by the applicants, it is appropriate that they

set out their contentions in terms of the relevant construction of s.601NF1 and the Orders of Justice Dalton, the various provisions of the *Corporations Act* and the application of various provisions of the constitution which they identify in paragraph 2.

18. To the extent that this Honourable Court does not agree that that the Applicants' submissions should be provided prior to evidence being due, the Order should at least provide for the provision of the Applicants' submissions prior to any other party filing their submissions, so they may be responsive to the issues