

**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 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**

**JOHN RICHARD PARK** of 22 Market Street, Brisbane, Queensland, Official Liquidator and Chartered Accountant states on oath:-

1. I am an official liquidator and chartered accountant. The First Applicant, Ms Muller, and I are a Consultant and Senior Managing Director respectively at the

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Signed

  
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**AFFIDAVIT OF JOHN RICHARD PARK**

Filed on behalf of the Applicants

**Russells**  
Level 18  
300 Queen Street  
**BRISBANE 4000**  
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firm FTI Consulting. I am one of the liquidators of the Second Applicant ("LMIM"). I make this affidavit from my own knowledge and on my own behalf and also on behalf of my fellow liquidator, Ms Muller, who has authorised me to do so.

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

### **Overview**

3. LMIM is the responsible entity of a registered managed investment scheme known as the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF"). A copy of the constitution of the FMIF appears at [1] to [40].

4. On 26 August, 2013, Justice Dalton made a number of orders in respect of the FMIF. At [41] to [44] is a copy of the order made by Her Honour ("the Order") (erroneously stating that the order was made on 21 August, 2013)

5. Mr Whyte has contended (in a manner and in circumstances which I shall describe) that the roles, responsibilities and duties of LMIM and me and Ms Muller in the winding up of LMIM and FMIF are very limited.

6. By this application, Ms Muller and I seek this Honourable Court's directions as to our (and LMIM's) proper functions, duties and responsibilities in the winding up of both the FMIF and LMIM. We are concerned to ensure that all of our and LMIM's duties are being properly discharged and that the winding up of FMIF and LMIM is

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conducted as efficiently and cost-effectively as possible and in the interests of creditors and beneficiaries.

### **The Dispute**

7. My solicitors, Russells, have written to and received responses from Mr Whyte's solicitors. That correspondence is:-

- (a) a letter from Russells to Tucker and Cowen dated 19 September, 2014 (but sent on 25 September, 2014), a copy of which (along with its enclosures) appears at [45] to [93];
- (b) an email from Mr Stephen Russell to Mr David Schwarz of Tucker and Cowen on 13 November, 2014, a copy of which appears at [94] to [95];
- (c) a letter from Tucker and Cowen to Russells on 20 November, 2014, a copy of which (along with its enclosures) appears at [96] to [105];
- (d) a letter from Russells to Tucker and Cowen on 19 January, 2015, a copy of which (along with its enclosures, which includes an early draft of this application) appears at [106] to [114];
- (e) a further letter from Russells to Tucker and Cowen on 21 January, 2015, a copy of which (along with its enclosures) appears at [115] to [133];
- (f) a letter from Tucker and Cowen to Russells on 28 January, 2015, responding to Russells' letter of 19 January, 2015, a copy of which appears at [134] to [137];
- (g) a letter from Tucker and Cowen to Russells on 30 January, 2015, responding to Russells' letter of 21 January, 2015, a copy of which appears at [138] to [142]; and
- (h) a letter from Mr Whyte's other solicitors, Gadens, to Russells dated 2 April, 2015, a copy of which appears at [143] to [151].

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**Concerns**

8. Ms Muller and I are concerned that the impasse between the parties is having the effect of preventing us as liquidators from discharging our obligations in the winding up of LMIM; and also preventing LMIM from discharging its obligations under the constitution of the FMIF. Ms Muller and I have taken legal advice on the differing contentions in the correspondence just mentioned. Ms Muller and I entertain considerable uncertainty as to how LMIM should be wound up and how the FMIF should be wound up. We believe that, following the making of the Order, LMIM and we are obliged to discharge the functions, duties and obligations set out in Schedules 1 and 2 (respectively) to the Originating Application.

**Interim Distributions Frozen**

9. Ms Muller and I were appointed administrators of LMIM on 19 March, 2013. Progressively throughout June, 2013, Ms Muller and I caused LMIM to make interim distributions of capital to each investor in the FMIF of \$0.0079 per unit, amounting to a total of \$4,270,690.45.

10. During the administration of LMIM, Ms Muller and I, in consultation with Mr John Corbett, developed a detailed plan for the winding up of the FMIF. Now produced and shown to me and marked "JRP-2" is a copy of that document. Because much of the material contained therein is commercially sensitive, I will not exhibit JRP-2 to the version of this affidavit which is filed in Court. Instead, I will instruct my solicitors to have that exhibit handed up to a Judge of this Honourable Court and seek an order sealing the exhibit.

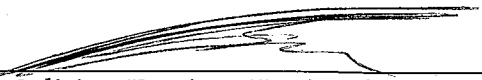
11. There are approximately 5,172 unit holders of the FMIF. According to an unaudited financial report for the FMIF for the financial year ended 30 June, 2014,

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prepared by Mr Whyte, the net assets attributable to unit holders had a value of \$59,336,610.

12. Mr Whyte maintains a website in relation the FMIF, [www.lmfmif.com](http://www.lmfmif.com). On that website, Mr Whyte periodically posts updates to investors. At [152] to [181] is a copy of Mr Whyte's eighth update to investors dated 30 January, 2015.

13. In respect of distributions, it states:-

*"Once the [secured creditor's] Receivers and Managers have retired and funds released to me, I will be required to retain certain funds to meet the liabilities of the Fund, including contingent claims... I may have to seek the directions of the Court before proceeding with the next distribution. I will update investors as to the expected timing of a distribution as these matters become clearer."*

14. With the exception of Mr Whyte's first two reports to investors which do not mention distributions, each of Mr Whyte's previous reports to investors contain a statement regarding distributions to investors to substantially the same effect.

15. Further, the letter from Gadens dated 2 April, 2015, states:-

*"...our client does not currently have an intention to distribute any funds to investors of the FMIF and that, when and if he does, he will consider whether additional amounts need to be held on trust for costs in the proceedings..."*

16. To the best of my knowledge, Mr Whyte has not made any distribution to investors during the course of his appointment. Ms Muller and I intend, in consultation with Mr Whyte, that LMIM will, as and when prudent, make one or more interim distributions to investors, in accordance with clauses 12 and 16 of the constitution of the FMIF, should we obtain the relief set out in the application.

**Financial Reports, Audit, Income Tax Returns, Business Activity Statements**

17. The following matters are also of concern to Ms Muller and me:-

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- (a) We have been unable to prepare financial statements, or to have them audited in accordance with clause 27 of the constitution and Part 2M.3 of the Act. I understand Mr Whyte has prepared some accounts, but they are not the financial statements of the FMIF, and do not appear to have been audited, and they are not prepared by the company.
- (b) Similarly, we have been unable to prepare the half-yearly financial statements and auditors' reports, required by Division III of Part 2M.3 of the Act.
- (c) We have been unable to prepare and lodge any business activity statements or income tax returns for the financial years ended 30 June, 2013 or 30 June, 2014 or to calculate or pay income tax or GST owing by LMIM as responsible entity for the FMIF. I believe that this is a statutory obligation of LMIM, under subsections 161 of the *Income Tax Assessment Act 1936* ("ITAA 1936") and section 31.5 of the *A New Tax System (Goods and Services Tax) Act 1999* ("the GST Act")
- (d) The trustee for the FMIF has an Australian Business Number ("ABN") and has been registered for GST since 1 July, 2000. At [182] is a copy of the results of a search of the Commonwealth government's 'Australian Business Register' I caused my solicitors to conduct. I believe that, pursuant to subsection 601FC(2) of the Act, Division 6 of Part III of the ITAA and section 184.1 of the GST Act, the responsible entity of the FMIF, that is, LMIM, is liable to pay income tax and GST.

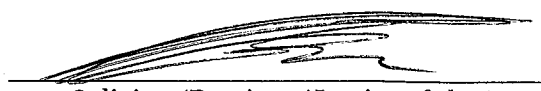
18. We are concerned that our inability to prepare, distribute to members, and lodge with ASIC these reports, and to have them audited, may have exposed LMIM (and perhaps us) to liability for contraventions of the various statutes which apply.

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## Management, ascertainment and payment of Creditors

19. We understand that we as liquidators of LMIM (and also LMIM as responsible entity, pursuant to, for example, clause 16.7(b) of the constitution) must ascertain the creditors of the company and FMIF, by calling for proofs of debt at the appropriate time and/or managing claims foreshadowed or perhaps commenced by litigation, against LMIM as responsible entity of (and responsible entity for) FMIF. While we are cognisant of the provisions of paragraph 7(b) of the Order, we are, equally, concerned, as liquidators of a responsible entity, to minimise costs and expenses in the winding up of the FMIF.

20. Mr Whyte has proceeded, without prior consultation with us, to obtain firstly, the authorisation of ASIC to be an "eligible applicant" and subsequently for orders that the directors of FMIF and others associated with the audit of FMIF be examined by him (Mr Whyte) under the provisions of sections 596A and 596B of the Act.

21. We became aware of the existence of Mr Whyte's application for an order for examination by way of the letter sent by facsimile to my firm's Gold Coast office on 17 November, 2014 at 4.20 pm. That correspondence did not immediately come to my attention. Neither liquidator usually works at my firm's Gold Coast office; and I did not give Mr Whyte notice that he could send me or Ms Muller notices at that address.

22. I did not receive a copy of the application and supporting affidavit material until 20 February, 2015 (after my solicitors noticed the matter in a law list).

23. The application was heard on 21 February, 2015. I instructed my solicitors to seek an adjournment in order to allow me to consider the material. Mr Whyte was, on that occasion, represented by a solicitor from the firm Gadens, who resisted the application for an adjournment. The adjournment was granted.

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24. Recently, Mr Whyte instituted proceedings in this honourable Court against LMIM, its directors and the trustees of another fund, of which LMIM was previously the trustee. I refer to the following documents at the following pages of my exhibits:-

- (a) Claim and Statement of Claim number 12317 of 2014 at [183] to [196];
- (b) Interlocutory Application filed by the Plaintiffs on 4 February, 2015 at [197] to [199];
- (c) Order of Mullins J made on 12 February, 2015 at [200] to [201].

25. Ms Muller and I are concerned that we were not consulted by Mr Whyte about those proceedings, particularly when other causes of action unique to the liquidators (for example, those available under Part 5.7B of the Act) were or may be available to secure the relief that he claims.

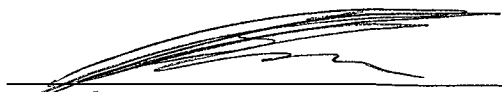
26. Because of the position that Mr Whyte has adopted, we have otherwise been unable to perform and discharge the functions and duties set out in schedules 1 and 2 to the application.

27. 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 **JOHN RICHARD PARK** on <sup>21<sup>st</sup></sup> April, 2015 at Brisbane in the presence of:



Deponent



Solicitor/Barrister/Justice of the Peace

SEAN CHARLES RUSSELL