

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**

APPLICANTS' OUTLINE OF SUBMISSIONS

17 DECEMBER 2015

Applicants' material

- Application filed 20 July 2015, being Court Document 20
- Reasons for judgment of Jackson J filed 15 October 2015, being Court document 27
- BY LEAVE further affidavit of correspondence of Sean Charles Russell to be filed

FROM BS8032/15

- Affidavit of David Whyte filed 28 October 2015, being Court document 15

Overview

1. There are four outstanding issues for determination in order to finalise the Orders arising from the reasons for judgment dated 15 October 2015 (“**Reasons**”). The parties have conferred on a without prejudice basis about a draft order, which the applicants have further refined in the form attached (“**Order**”),¹ which identifies the remaining issues as being:
 - (a) Paragraphs 9 & 10, concerning the process by which creditors may seek to challenge a decision by the receiver to reject a claim for indemnity (“**Creditors’ Indemnity Issue**”);
 - (b) Paragraph 12, concerning the obligations of LMIM under the FMIF constitution (“**LMIM’s Obligation Issue**”);
 - (c) Paragraph 15, concerning the financial reporting and auditing of the FMIF (“**Audit Issue**”); and
 - (d) Paragraph 18, concerning the payment of the liquidators’ costs and expenses of complying with their obligations under the Order to be made (“**LMIM’s Costs Issue**”).
2. Each of these issues is dealt with below.

Creditors’ Indemnity Issue

3. The receiver’s preferred position is in the first of the two numbered paragraphs 9 of the draft Order. The liquidators’ position is in the second numbered paragraph 9 and paragraph 10.
4. The essential difference between the parties concerns who is to conduct any review of any challenge to any determination by the receiver that he declines indemnity out of the FMIF fund. The receiver wants the liquidators to do it. The liquidators accept that they can do it, but consider that the creditor ought to be able to do it if the liquidators decline to do so. The liquidators’ preferred

¹ A version as discussed between the parties has previously been provided to the Court. The attached version incorporates some further amendments made by the Applicants to the shaded paragraphs in the previous draft provided to the Court

paragraphs provide for the Order to reflect a process by which a creditor can take steps itself to make and pursue the challenge, and allow the liquidator to step out of such a proceeding and not incur further costs.

5. The reasons for the liquidators' position is that the dispute is in essence one for a creditor to pursue if it so desires. Whilst the Order provides for the liquidator to put forward to the receiver the fact of, and documentation supporting, a claim, if the receiver rejects it, it is a matter in which the creditor has the commercial interest and can make a more informed decision than the liquidator as to the pursuit of a claim. It is submitted that it is far more appropriate, commercially, for the party with the economic interest in the outcome of the dispute, being the creditor, to pursue its claim than a liquidator who is without funding. Furthermore, the creditor can more easily compromise the claim, as opposed to a liquidator who may need Court or creditor approval.
6. In those circumstances, the liquidators urge the adoption of their alternative paragraph 9 and paragraph 10 of the attached Order.

LMIM's Obligation Issue

7. The receiver proposes the addition of paragraph 12 in the attached Order. Inclusion of that paragraph is opposed by the liquidators, because:
 - (a) it concerns a question that may never arise, and is unnecessary on the basis of the expressions of principle in paragraphs [96] and [111] of the Reasons; and
 - (b) it is potentially counter-intuitive to the express Orders to be made in the Order.

Audit Issue

8. As to the audit issue, the receiver proposes paragraphs 15 and 16 of the attached Order.
9. The liquidators' position is that:

- (a) as to subparagraph 15(a), the liquidators do not oppose, in principle, the Court making any Order directing the receiver to apply to the ASIC, noting however that it is a matter for the Court as to whether it ought to direct a party to do something that he himself wants to do;
 - (b) further as to subparagraph 15(a), the liquidators oppose any Order directing them to make application to the ASIC because:
 - (i) the liquidators are not in a position to know whether there is demonstrated need or benefit to the FMIF for relief from the audit and financial reporting obligations; and
 - (ii) substantively, there is a potential issue about unaccounted for funds of some \$65M, addressed further below;
 - (c) if no order in the form of subparagraph 15(a) is made, then the form of subparagraph 15(b), excepting the words in parentheses and adding audit responsibilities, reflects paragraph [151] of the Reasons.
10. Returning to the financial anomaly issue, the liquidators have recently become aware, by the delivery of affidavit material in the so-called KPG and Lifestyle matters² that there is an apparent anomaly, amounting to some \$66.5M, between the amount of money received by the receiver since his appointment and the amount of money now held by him. Specifically, Mr White deposed, in his affidavit filed 28 October 2015 as Court document 15 in BS8032/15, that the sum of \$124,250,401.00 has been realised by the receiver and the Deutsche Bank receivers, net of all selling expenses, into the bank account of the FMIF under the control of the receiver.³ From those realisations, the sum of \$57,700,000.00 remains in the bank accounts of the

² See *Kordamentha Pty Ltd v LM Investment Management Limited*, being BS8032 of 2014 and BS8034 of 2014 and BS5329/15, being the s 96 *Trusts Act* application by Kordamentha Pty

Ltd

³ See affidavit of Mr White at paragraph 29 and exhibit DW-8 at bundle pages 188 to 193 of that affidavit

FMIF.⁴ The solicitors for the liquidators have written to the receiver requesting an explanation of the apparent anomaly.⁵ The enquiry letter was sent only today and a response is awaited prior to the hearing on Thursday 17 December.

11. In the absence of a complete explanation, there is good reason for the need for proper financial reporting to date and for those financial reports to be audited sooner rather than later.
12. There is otherwise no good reason why the receiver would seek a deferral of proper financial reporting and an audit until the conclusion of the receivership.

LMIM's Costs Issue

13. The liquidators seek the inclusion in the Order of proposed paragraph 18 in the attached draft, so as to enable the costs and expenses of LMIM in discharging its responsibilities under the Order to be paid out of the assets of the FMIF, without undue further disputation. The liquidators' propose draft provides for the costs, expenses and remuneration of the liquidator to be paid out of the FMIF fund, with the remuneration to be fixed by the Court. It is submitted that that is an appropriate way to ensure that the liquidators are not delayed in being paid for the work that they are required to carry out under the Order.
14. It is unclear whether the receiver opposes this paragraph of the Order, or its form.

General

15. There is nothing in the proposed Order about the payment of creditors or distributions to members. Those tasks must await the determination as to what creditors are to be admitted by LMIM with claims for indemnity against the trust assets.

⁴ See affidavit of Mr White at paragraph 28

⁵ Letter dated 14 December 2015, to be exhibited to the affidavit of correspondence of the solicitors for the applicants

16. There is also no issue in the Order about the apportionment of costs between the various LM funds or the extent to which the general costs of the liquidation may be borne by the FMIF. Those are not questions raised for determination by the current application.

J W Peden
Counsel for the applicants

14 December 2015