

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**

INTERLOCUTORY APPLICATION

A. DETAILS OF INTERLOCUTORY APPLICATION

This interlocutory application is made pursuant to Supreme Court of Queensland
Practice Direction 3 of 2002.

On the facts stated in the supporting Commercial List Statement, the Applicants apply
for:-

INTERLOCUTORY APPLICATION

Filed on behalf of the Applicant

Form 3 R 2.2, 15A.4, 15A.8 and 15A.9

RUSSELLS

Level 18

300 Queen Street

BRISBANE QLD

4000

Phone: 3004 8888

Fax: 3004 8899

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1. An order that this proceeding be listed on the Commercial List;

 2. Directions for the conduct of the proceeding as follows:-
 - (a) That the Respondent file and serve the affidavits on which he proposes to rely at the hearing by 8 May, 2015;
 - (b) That by 15 May, 2015 the Applicants file and serve:-
 - (i) any affidavits in reply;
 - (ii) their written outline of submissions;
 - (c) the Respondent shall file and serve his written outline of submissions by 22 May, 2015;
 - (d) the matter be set down for hearing on 25 May, 2015, or such other date as may be convenient to this Honourable Court and the parties.

 3. Such further or other orders or directions as may be appropriate; and

 4. An order that the costs of this application be the parties' costs in the proceeding.

Date: 29 April, 2015

Signed:


Russells

Description:

Solicitors for the Applicants

B. NOTICE TO RESPONDENT

TO: David Whyte

c/- Tucker & Cowen Solicitors

This Application will be heard by the Court at QEII Courts of Law, 415 George Street, Brisbane at a date and time 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 Applicant's address for service in this application as soon as possible.

<i>Note:</i> 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.
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C. FILING

This Interlocutory Application is filed by Russells for the Applicant.

D. SERVICE

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

It is not intended to serve a copy of this Interlocutory Application on any person.

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CORPORATIONS ACT 2001**

COMMERCIAL LIST STATEMENT

The Applicants make the following statement in support of an application to have the above proceeding listed on the Commercial List:-

1. The nature of the dispute is the determination of the Applicants' functions, duties and responsibilities as liquidators of LM Investment Management Limited (in liquidation)(receivers and managers appointed)("LMIM") in circumstances where:-
 - (a) LMIM remains the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF");

COMMERCIAL LIST STATEMENT

Filed on behalf of the Applicants

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

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- (b) The Respondent has, by an order of this Honourable Court made on 26 August, 2013, been appointed as a receiver, pursuant to section 601NF(1) of the *Corporations Act 2001* (C'th), in order to ensure that the FMIF is wound up in accordance with its constitution.
2. The issues which arise in the proceedings are:-
- (a) the interpretation of:-
- (i) section 601NF(1) of the *Corporations Act 2001* (C'th); and
- (ii) the orders of Dalton J made on 21 August, 2013 in *Bruce and Anor v LM Investment Management Limited (in liquidation)* (2013) 94 ACSR 684;
- (b) the application of various provisions of the *Corporations Act 2001*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *A New Tax System (Good and Services Tax) Act 2000* to the Applicants in respect of the winding up of LMIM and the FMIF; and
- (c) the application of various provisions of the Constitution of the FMIF to the Applicants in respect of the winding up of the FMIF.
3. The proceeding ought be included on the Commercial List for the following reasons:-
- (a) the estimated duration of the trial is fewer than ten days (one to two days);
- (b) the matter is a complex one;
- (c) the issues in dispute are of a general commercial character;
- (d) resolution of the dispute will involve the construction and operation of (amongst other things) a commercial instrument, namely the Constitution of the FMIF;
- (e) LMIM is a company, which was (and remains) the responsible entity of a number of registered managed investment schemes;
- (f) the scheme that is being wound up had assets of several hundred million dollars;
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- (g) there are approximately 5,172 unit holders in the FMIF;
 - (h) the matter concerns managed investment schemes, such as the FMIF, which account for a significant portion of invested funds in Australia¹ and the procedure and conduct of the winding up of such funds is important, bearing in mind that such funds account for a large part of the market for publicly invested funds;
 - (i) the law as to the respective roles, functions, duties and responsibilities of persons such as respondent and the responsible entities in respect of which they are appointed, in a winding up of a managed investment scheme, is not settled; and
 - (j) resolution of the application will require guidance as to the proper interpretation of section 601NF and, more broadly, Chapters 5.6 and 5C of the *Corporations Act 2001*.

4. The Respondent supports the listing of this proceeding on the Commercial List.

5. The contentions of the Applicants in relation to the proceeding are that:-
- (a) the Applicants' functions, duties and responsibilities are as set out in the schedules to the application; and
 - (b) in light of the Respondent's opposition to the Applicants' contentions as to their functions, duties and responsibilities, the Court should use its powers under subsections 511(1) and 601NF(2) of the *Corporations Act 2001* to resolve the dispute and to assist the efficient and effective winding up of LMIM and of the FMIF.

¹ According to the Commonwealth's Corporations and Markets Advisory Committee most recent report, *Managed Investment Schemes* (July, 2012), listed schemes with a capitalisation of over \$100 billion constitute about 8% of the total market capitalisation of securities listed on the ASX market. Some 80% of investment-grade commercial real estate, comprising office buildings, shopping centres and industrial facilities, are held in schemes.

6. There are no special directions sought by the Applicants in this proceeding.

It should be noted that:-

- (a) the Applicants have given notice of the proceeding to ASIC. (It may wish to seek leave to intervene under section 1330 of the *Corporations Act 2001*);
and
- (b) the Respondent contends for the addition of numerous other parties, an application for an order for which the Applicants would oppose.

7. The Applicants otherwise seek the directions in paragraph 2 of the Interlocutory Application filed herewith.

8. There are no particular circumstances of urgency in relation to the proceeding, save that the Applicants are subject to ongoing statutory obligations, the discharge of which is being frustrated by the Respondent.

Signed:



Description:

Solicitors for the Applicants

Dated:

29 April, 2015