

SUPREME COURT OF QUEENSLAND

REGISTRY BRISBANE
NUMBER BS3508/15

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 089 343 288**

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 ON BEHALF OF THE RESPONDENT

Summary

1. The parties prepared a draft order which identifies the four areas in relation to which they seek determination from the Court. Otherwise the draft orders are agreed save for one amendment which Mr Whyte suggests should be made to paragraph 16 which is referred to below. The draft order with the one further proposed amendment to paragraph 16 is attached.
2. As the applicants' submissions note, four outstanding issues remain and they are:
 - (a) paragraphs 9 and 10 which are described by the applicants as relating to the Creditors' Indemnity Issue;
 - (b) paragraph 12 which are described by the applicants as relating to the LMIM Obligation Issue;

- (c) paragraph 15 which are described by the applicants as relating to the Audit Issue;
 - (d) paragraph 18 which are described by the applicants as relating to the LMIM Costs Issue.
3. For ease of reference these submissions adopt the headings used in the applicants' submissions.

Creditors' Indemnity Issue: paragraphs 9 and 10

4. The issue which remains to be resolved regarding the two proposed variations of order is what involvement creditors should have in the review of a decision by the respondent to reject a claim for indemnity.
5. The reasons address the issue to which these proposed directions relate in paragraphs 69 to 79. At paragraph 79 the parties were directed to produce draft orders which empower the respondent as receiver to admit or reject claimed rights against the assets of the FMIF and further that "[i]f necessary, either party should be able to apply for the Court's approval of the outcome or determination of any dispute."
6. The applicants' proposed orders are opposed for the following reasons:
- (a) paragraph 79 of the reasons provide that the parties identify a process by which the first applicant identifies debts and claims for which it claims that LMIM is entitled to an indemnity. That is addressed in paragraphs 4 to 7 of the draft Order. In the case of a debt incurred by LMIM as trustee of the FMIF specific provision is made for the identification of a "Creditor Indemnity Claim" in paragraph 4(c). The subject of the Order is, as is relevant in the present context, LMIM's indemnity in respect of that claim, not the specific debt which will already have been adjudicated upon by LMIM as contemplated by paragraph 4(b) of the Order. Consistent with the Court's reasons at paragraph 79 which contemplated a mechanism whereby "If necessary either party should be able to apply for the Court's approval of the outcome or determination of any disputes" and the fact the assessment is for the claim for indemnity by LMIM in respect of the creditor's claim, the respondent's proposed order provides for a review in terms of paragraph 9 between the applicants and the respondent;
 - (b) they could produce the undesirable result of a multiplicity of proceedings regarding claims for indemnity, where that would be avoided if the review

were pursued under the respondent's proposed order by the applicants (funded, if necessary, by the relevant creditor or creditors). Further any rejection of the indemnity in respect of the creditor's indemnity claim may relate not only to the particular debt but to any matter which may disentitle LMIM from claiming an indemnity. That is a matter properly raised against LMIM if relevant;

- (c) under the proposed regime LMIM will have undertaken an exercise to determine whether it considers LMIM has a claim for indemnity from the property of the FMIF in respect of any creditor's claim pursuant to paragraph 4(c) of the draft Order. As such it is in a position to pursue any matter of review;
- (d) the Liquidators pursuant to paragraph 4(b) of the Order will have adjudicated upon the debt. The question of the indemnity relates ultimately to whether trust assets may be available in respect of any payment of that debt, in relation to which provision has been made for the respondent to seek directions under paragraph 11 of the Order. The right of indemnity is being claimed by LMIM. In the circumstances, although s 511 is acknowledged as a broad provision, it does not appear to be a matter which relates to a question in respect of the winding up of LMIM which could be relevantly raised by a creditor.

LMIM's Obligation Issue: paragraph 12

7. The respondent proposes draft order 12 but the applicants oppose the order on the basis that it concerns a question that may never arise and further it is said to be counter-intuitive to the balance of the order.
8. Draft order 12 is proposed by the respondent in order to give clarity to other parties regarding responsibility for management of the FMIF during the period of the respondent's appointment and responsibility for discharging the functions, duties and responsibilities set out in clauses 16.7(c), 16.7(f), 16.7(g) and 18.2 of the constitution of the FMIF.
9. Given the reasons of the Court (paragraphs 99 and 100) the order as drafted does not appear to address issues which are hypothetical. It was drafted so as to avoid inconsistency with the balance of the proposed orders and the respondent contends there is no inconsistency with the balance of the proposed orders. It is however a matter for the Court whether it considers that it is appropriate for such an order be made.

Audit Issue: paragraph 15

10. The applicants oppose order 15(a) on the grounds that they are not in a position to know whether there is a demonstrated need or benefit to the FMIF of relief being granted from the audit and financial reporting obligations and further because, inter alia, they claim that there is a potential anomaly regarding funds received by the respondent since his appointment.
11. The respondent is not averse to continuing to make representations to ASIC for relief in respect of the financial reporting obligations, but he is of the view that this is something best addressed cooperatively between the applicants and the respondent. The respondent's proposed order thus proposes that the parties seek the relief. If the Court considers it can only provide direction to Mr Whyte, he will make the necessary application to ASIC.
12. The concern of the respondent is one of cost in order to avoid two sets of insolvency practitioners preparing accounts and the further expense of an audit. If ASIC does not consider it is appropriate to provide relief from the provisions of the Corporations Act (which also relate to the obligations of the RE under the Constitution) Mr Whyte will of course provide any information reasonably requested to the Applicants to allow them to prepare six monthly accounts and have them audited.
13. The applicants seek to introduce fresh evidence by reference to an affidavit sworn by Mr Whyte in the Kordamentha proceedings (affidavit of Mr Whyte filed 28 October 2015, Court document number 15 in BS 8032/15). That should be rejected.
14. The allegations regarding a suggested anomaly in the funds received by the respondent since his appointment were made very late (on 14 December 2015). They relate to an affidavit which the applicants have had since October 2015 and there is no explanation why they were not made earlier than two days before the hearing. Further Mr Whyte is presently away and cannot respond.
15. Even if the Court were to have regard to the affidavit, the apparent "anomaly" is not borne out by its terms. While there is obviously a considerable difference in the amount in the schedule of the realised assets and the amount referred to as now being held in the FMIF bank accounts, the exercise in the affidavit does not purport to represent a reconciliation between the realised assets and the balance of the bank accounts. Mr Whyte has posted 6 monthly accounts on the LMFIMF website which would be the proper source for any such examination. They were annexed to Mr

Whyte's affidavit for the period until 31 December 2014 (exhibit 12 pages 272-344 to the affidavit of Mr Whyte filed 12 June 2016 doc 11). No issue was raised by the applicants in terms of this application in relation to those accounts.

16. The respondent proposes the words "in respect of the period to 31 December 2015" be inserted after "Act" in order 16, so as to define the period for relief from any contraventions. That will provide time for an application to be made for relief from the provisions of the Corporations Act and a determination by ASIC prior to the period for the next six monthly financial report.
17. The orders regarding this issue otherwise are not controversial except that given the applicants are to prepare the financial accounts required by Pt 2M.3 to be prepared by the responsible entity, the Order should provide that they should be provided with the information they reasonably require for that purpose given it is those accounts which will be presumably be the subject of the audit (as the applicants indicated on 15 December 2015 that proposed order 16 is now consented to). Mr Whyte would still be required to maintain accounts of his dealings as receiver of the FMIF property. The alternative course may be that if this Honourable Court considered it appropriate an order could be made under s 601NF(2) that Mr Whyte be responsible for the preparation of the accounts of the FMIF as required by the Corporations Act and that the Applicants appoint independent auditors to audit those accounts, rather than separately preparing them.

Costs Issue: paragraph 18

18. Paragraph 4 of the Amended Originating Application filed 20 July 2015 seeks:

An order that the Liquidators' remuneration, costs and expenses of discharging such functions, duties and responsibilities (including in respect [of] this application) shall be paid from the Scheme Property of the FMIF.

19. Order 1 made on 12 November 2015 (Court document number 28) provides:

By no later than 20 November, 2015, the Applicants are to file, in these proceedings, an Amended Originating Application and any further applications ("a Further Application") for orders pursuant to sections 447D or 511 of the Corporations Act 2001 (C'th) or section 96 of the Trusts Act 1973 (Qld) relating to:-

- (a) *the approval of the First Applicants' remuneration as liquidators and administrators;*
 - (b) *the costs and expenses of the First or Second Applicants;*
 - (c) *the extent to which such remuneration, costs or expenses are claimable out of the property of any of the funds or trusts of which the Second Applicant is the responsible entity or trustee ("the Funds");*
 - (d) *to the extent which such remuneration, costs or expenses are claimable out of more than one Fund, the proportion in which such remuneration, costs or expenses are borne by the various Funds.*
20. The time for that Order was extended until 14 December 2014 by the Order of the Court made on 2 December 2015. Further the order 3 made on 2 December 2015 (Court document number 30) provides:
- Paragraph 4 of the Amended Originating Application filed 20 July 2015, insofar as it seeks orders concerning the Liquidators' remuneration, is adjourned to a date to be fixed.*
21. The applicants propose draft order 12 in a form that covers costs, expenses and also their remuneration.
22. The respondent opposes the inclusion of order 12 because:
- (a) proposed orders 3-8 already make provision for the applicants' entitlement to claim an indemnity against the property of the FMIF in respect of any expense or liability that constitutes an Administration Indemnity Claim or Recoupment Indemnity Claim, which includes an expense or liability incurred or paid by the First Applicants as liquidators incurred in connection with LMIM in acting as Responsible Entity of the FMIF;
 - (b) paragraph 4 of the Originating Application was adjourned until a date to be fixed so all matters in relation to the applicants' remuneration as liquidators can be dealt with at the one time. Directions as to the application contemplated by paragraph 1 of the Order are to be made today.

S.E. Brown QC

D. de Jersey

Counsel for the respondent

16 December 2015