

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS3508 of 2015

First Applicant

JOHN RICHARD PARK AS LIQUIDATOR OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS 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 AND MANAGERS 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

AFFIDAVIT

I, **SAID JAHANI**, Registered Liquidator, of Level 17, 383 Kent Street, Sydney in the State of New South Wales, solemnly and sincerely affirm and declare:

A. Introduction

1. I am a liquidator registered with the Australian Securities and Investments Commission (**ASIC**). I am also a Partner and the Head of Financial Advisory - Sydney of Grant Thornton Australia.
2. Unless otherwise indicated, in this affidavit capitalised terms have the meaning given in the interlocutory application filed by the applicants in this proceeding on 10 October 2018 (the **Application**). Additionally, in this affidavit:

Deponent:

Taken by:

AFFIDAVIT

Filed on behalf of Said Jahani
Form 46, Version 1
Uniform Civil Procedure Rules 1999
Rule 431

HWL Ebsworth Lawyers
Level 19, 480 Queen Street
Brisbane QLD 4000
Tel: +61 7 3002 6700
Fax: 1300 368 717
Ref: DOF:KCP.ECS:683682

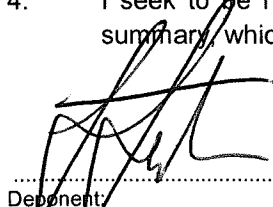
- (a) **Custom House** means Custom House Currency Exchange (Australia) Pty Ltd ACN 086 278 659;
- (b) **Liquidator or Liquidators** means:
 - (i) for the period up to 17 May 2017, John Richard Park and Ginette Dawn Muller in their capacities as the joint and several liquidators of LMIM;
 - (ii) for the period after 17 May 2017, John Richard Park as the sole liquidator of LMIM;
- (c) **LMIM (CPAIF)** means LMIM as RE of the CPAIF;
- (d) **LMIM (ICPAIF)** means LMIM as RE of the ICPAIF;
- (e) **Mr Whyte** means Mr David Whyte of BDO, the receiver of the FMIF and the person responsible for winding up the FMIF in accordance with its constitution;
- (f) **RE** means responsible entity;
- (g) **Trilogy** means Trilogy Funds Management Limited ACN 080 383 679 as RE of the WFMIF;
- (h) **Trust Company** means The Trust Company Limited ACN 004 027 749 as custodian of the property of the WFMIF; and
- (i) **WFMIF** means the LM Wholesale First Mortgage Income Fund.

3. This affidavit is made in response to the application filed by the Liquidator and LMIM (the **Applicants**) on 10 October 2018 seeking, among other things, directions pursuant to section 511(1) of the Old Act and section 601NF(2) of the Act or, alternatively section 90-15(1) of the Insolvency Schedule and section 601NF(2) of the Act that:

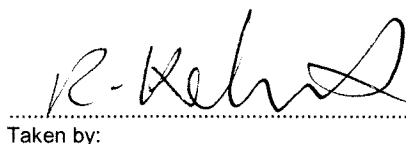
- (a) subject to certain payments being made, the Liquidator be directed to act as contradictor in respect of the Feeder Fund Proceeding (sub-paragraph 1(a)(ii) of the Application);
- (b) Mr Whyte's appointment to act as the person appointed to supervise the winding up of the FMIF is to continue only in respect of the conduct on behalf of the FMIF of three proceedings, including the Feeder Fund Proceeding (sub-paragraph 2(a)); and
- (c) the Liquidator be appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution, together with such ancillary orders as may be appropriate to give effect to this appointment (sub-paragraph 2(b) of the Application),

(the **Relevant Directions**).

4. I seek to be heard in respect of the Relevant Directions for the following reasons in summary, which I explain more fully below:



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Taken by:

- (a) in my capacity as the receiver and manager of LMIM (CPAIF) and LMIM (ICPAIF), I was appointed by order of the Court made on 13 June 2018 in the Feeder Fund Proceeding (**June 2018 Order**) to represent the interests of LMIM in the Feeder Fund Proceeding in that capacity;
- (b) since the making of the June 2018 Order, the parties to the Feeder Fund Proceeding have resolved the dispute by entry into a deed of settlement (**Deed of Settlement**) arising out of a three-day mediation. The Liquidator is not a party to the Deed of Settlement. The terms of the Deed of Settlement are subject to express confidentiality provisions and for that reason I will not refer to its terms in this affidavit;
- (c) preparation for, and participation in, the mediation required extensive work on the part of members of my staff and me, and my solicitors and counsel, at significant expense (the total expense is \$552,089.90), on the basis of my understanding that the person responsible for winding up the FMIF and in control of distributions from it is Mr Whyte;
- (d) it is my desire, and the desire of my secured creditor appointor, namely Custom House, that the Deed of Settlement be performed;
- (e) I am concerned that if the Liquidator replaces Mr Whyte as the person responsible for winding up the FMIF by way of the direction sought by one or both of sub-paragraph 2(a) and 2(b) of the Application:
 - (i) this will, or may, have the effect that the Deed of Settlement cannot be or is not performed in accordance with its terms;
 - (ii) the Feeder Fund Proceeding will or may then be re-enlivened, and the costs associated with the proceeding will further deplete the FMIF; and
 - (iii) the expense to which I refer at (c) will be wasted.

5. The remainder of this affidavit is organised as follows:

- (a) in **Part B**, I address the work done by my staff and me in preparation for the mediation, and the associated costs;
- (b) in **Part C**, I address the work done by my staff and me during the mediation and culminating in entry into the Deed of Settlement, and the associated costs; and
- (c) in **Part D**, I elaborate upon my concerns regarding the Relevant Directions sought by the Liquidator.

6. Where I refer below to communications with my solicitors and counsel, I seek to preserve, and do not intend to waive, legal professional privilege attaching to those communications.

7. Where I refer below to fees payable to me by Custom House for the work which I describe below, I do so on the basis that I consider the fees to be reasonable having regard to my experience as an insolvency practitioner, which has included acting in over numerous receiverships over 20 years, and to the complexity of the Feeder Fund Proceeding.

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B. Work done in preparation for the mediation

8. Exhibited hereto and marked **SJ-1** is a copy of the June 2018 Order.
9. The June 2018 Order relevantly provides that:
- (a) the interests of LMIM in its capacity as RE of the FMIF as plaintiff have been and continue to be represented in the proceeding by Mr Whyte, in his capacity as the court appointed receiver of the property of the FMIF and as the person appointed to be responsible for ensuring that the FMIF is wound up pursuant to the order of the Honourable Justice Dalton made in proceeding 3383/13 on 21 August 2013 (sub-paragraph 3(a));
 - (b) the interests of LMIM (CPAIF) as first defendant be represented in proceeding by me in my capacity as receiver and manager of LMIM (CPAIF) (sub-paragraph 3(b));
 - (c) the interests of LMIM (ICPAIF) as third defendant be represented in the proceeding by me in my capacity as receiver and manager of LMIM (ICPAIF) (sub-paragraph 3(c)); and
 - (d) the interests of LMIM in its own capacity as fourth defendant be represented in the proceeding by the Liquidator (sub-paragraph 3(d)).
10. Further, the June 2018 Order:
- (a) required the production of a selection of material relevant to the Feeder Fund Proceeding by both the Liquidator (paragraph 9) and Mr Whyte (paragraph 10 and 11);
 - (b) directed the parties, except for the fourth and fifth defendants (the fifth defendant being Trust Company), to attend, participate in, and act reasonably and genuinely in, a mediation on a date to be agreed by the participating parties and the mediator, to be completed by 28 September 2018 (paragraph 16), and that the parties exchange mediation position papers (sub-paragraph 18(e)); and
 - (c) that notice of the Feeder Fund Proceeding, and of the mediation, be given to the members of the CPAIF and the ICPAIF (paragraphs 12 to 15).
11. The directions for the mediation were subsequently varied by further order of the Court made by consent in the Feeder Fund Proceeding on 4 September 2018, deferring the mediation to 5 and 6 November 2018. Exhibited hereto and marked **SJ-2** is a copy of this order.
12. Since the June 2018 Order, I (along with employees of my firm acting under my supervision, namely Danielle Franjic and Kevin Yue) undertook extensive work in preparing for the mediation of the Feeder Fund Proceeding. I describe that work below.
13. The primary tasks which my staff and I undertook in preparing for the mediation are as follows:
- (a) participating in numerous conferences, and engaging in correspondence, with my solicitors (HWL Ebsworth) and counsel (Dominic O'Sullivan QC and David

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Turner), including for the purpose of explaining financial analysis relevant to the assessment of the legal position concerning the Feeder Fund Proceeding, provision of instructions as to factual matters relevant to the provision of legal advice, and receiving legal advice;

- (b) contributing to written requests for information from Mr Whyte prepared by my solicitors and counsel;
- (c) reviewing a further amended claim and statement of claim in the Feeder Fund Proceeding;
- (d) investigating the factual accuracy of the financial analysis advanced by the plaintiff in the Feeder Fund Proceeding, by reference to source materials;
- (e) reviewing and analysing the material provided by the Liquidator and Mr Whyte and in connection with the Feeder Fund Proceeding. Much of the analysis involved manual tasks, because most documentation was provided in PDF form, across multiple documents and for incomplete periods. This included:
 - (i) analysing redemptions for each of the Feeder Funds, including reviewing the Transaction Statement, cross referencing Redemption Forms and various ledgers, and calculating average redeemed unit value;
 - (ii) reviewing hardship redemption requests, cross referencing claims to ledgers and ASIC reporting, and calculating number of hardship unit redemptions based on claim value and unit pricing;
 - (iii) attempting to determine the application and use of redemption funds upon receipt, including reviewing incomplete ledger accounts provided, reviewing expense categories in Financial Statements and trial balances, and reviewing the Redemption Request Forms;
 - (iv) seeking to classify redemptions as cash or non-cash redemptions, including reviewing Redemption Request Forms, allocation of redemption to cash/asset account in accounting ledgers, and reviewing related party loan accounts;
 - (v) reconciling related party loan account ledgers from the FMIF to accounting treatment in Feeder Fund ledgers and reviewing expenses paid on behalf of the Feeder Funds to identify an intercompany loan position;
 - (vi) analysing cash flow based on financial statements (statement of cash flows), and comparing this to cash vs non-cash analysis from ledgers provided and expenses set out in the profit and loss statements;
 - (vii) preparing interest calculations on Custom House's debt, and collating costs to date and future cost estimates to assist in calculation of Custom House's debt;

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- (viii) assessing liquidity at various points in time based on the financial statements and details of the loan book, and collating a list of information required to further assess the liquidity position;
 - (ix) conducting research on loan portfolio sales to assist with liquidity analysis;
 - (f) conducting meetings with my staff to discuss the analysis referred to in subparagraph 13(e) above and strategy;
 - (g) reviewing and commenting on the draft position paper prepared by my counsel, checking and cross-referencing the figures contained in it, and assisting generally with providing instructions for the purpose of settling the position paper;
 - (h) reviewing the position papers provided by the other parties (i.e. Mr Whyte, Ernst & Young and Trilogy);
 - (i) consulting with an audit partner in my firm who specialises in the financial services industry, to discuss best accounting practice for managed investment schemes, including group structures, redemption practices and distributions, for the purpose of analysing the allegations of the plaintiff in the Feeder Fund Proceeding as to liquidity;
 - (j) preparing a high-level financial model to inform the settlement discussions at mediation and to test scenarios; and
 - (k) liaising with my solicitors as to general preparations for the mediation.
14. In connection with the above work, the accrued fees payable to me to Custom House are in the sum of \$77,220, comprising:
- (a) 28 hours of work by me, for which the fees charged were \$18,887.50;
 - (b) 98.1 hours of work by Danielle Franjic, for which the fees charged were \$56,407.50; and
 - (c) 7 hours of work by Kevin Yue, for which the fees charged were \$1,925.00.

C. Work done during the mediation

15. The mediation commenced on 5 November 2018, before the Honourable Richard Chesterman AO RFD QC, and continued on 6 November 2018.
16. I attended the mediation in person on each day with:
- (a) my colleague, Ms Franjic;
 - (b) my solicitors, David O'Farrell and Elizabeth Singleton of HWL Ebsworth; and
 - (c) my counsel, Dominic O'Sullivan QC and David Turner.

17. The mediation:

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- (a) commenced at 10:00 am on 5 November 2018;
 - (b) adjourned at or about 6:00 pm on 5 November 2018;
 - (c) recommenced at 10:00 am on 6 November 2018; and
 - (d) adjourned at or about 5:30 pm on 6 November 2018.
18. Prior to and during the mediation on 5 and 6 November 2018, I was engaged in a range of different work including the following, as well as travel to and from Brisbane:
- (a) attending a planning meeting with my solicitors prior to the mediation;
 - (b) attending the joint opening session of the mediation;
 - (c) participating in discussions with the Liquidator;
 - (d) participating in discussions with Mr Whyte and Trilogy;
 - (e) developing and reviewing financial models;
 - (f) reviewing and providing instructions on draft deeds of settlement; and
 - (g) updating Custom House about the progress of the mediation.
19. In connection with the above work, the fees payable to me by Custom House are in the sum of \$29,855.00, comprising:
- (a) 26 hours of work by me, for which the fees charged were \$17,550.00; and
 - (b) 21.4 hours of work by Ms Franjic, for which the fees were \$12,305.00.
20. The Feeder Fund Proceeding had not been resolved by the time of the conclusion of the mediation on 6 November 2018. With the consent of the mediator, the parties agreed to adjourn the mediation so that settlement discussions could continue between the parties. The mediation was initially adjourned to 13 November 2018, but the parties and the mediator subsequently agreed to adjourn it to 20 November 2018.
21. In the period between 6 November 2018 and 20 November 2018, Ms Franjic and I were engaged in work continuing to progress settlement discussions, which included:
- (a) reviewing various further iterations of draft deeds of settlement;
 - (b) participating in teleconferences with my solicitors regarding the draft deeds, the position of the parties with respect to the draft deeds, and a financial model;
 - (c) considering various financial models and scenarios; and
 - (d) participating in teleconferences with Mr Whyte.
22. In connection with the above work, the fees payable to me by Custom House are in the sum of \$17,987.50, comprising:
- (a) 15 hours of work by me, for which the fees charged were \$10,800.00; and

Deponent:

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- (b) 12.5 hours of work by Ms Franjic, for which the fees were \$7,187.50.
23. The mediation resumed on Tuesday 20 November 2018.
24. Each of Ms Franjic and I attended the mediation by telephone.
25. Attending in person on my behalf were:
- (a) Mr O'Farrell and Ms Singleton of HWL Ebsworth; and
- (b) Mr Turner of counsel.
26. The mediation lasted for a further full day, commencing at 10:00 am and concluding at or about 8:30 pm.
27. During day 3 of the mediation, I was engaged in the following work:
- (a) participating in telephone discussions and negotiations with Mr Whyte and other parties;
- (b) participating in discussions with my solicitors and counsel;
- (c) considering various financial models and scenarios;
- (d) reviewing, providing instructions on, and ultimately executing the Deed of Settlement; and
- (e) updating Custom House about the outcome of the mediation.
28. In connection with the above work, the fees payable to me by Custom House are in the sum of \$9,080, comprising:
- (a) 8 hours of work by me, for which the fees charged were \$5,400.00; and
- (b) 6.4 hours of work by Ms Franjic, for which the fees were \$3,680.00.
29. The mediation culminated in the Deed of Settlement, which was executed by the parties participating in day 3 of the mediation (namely Mr Whyte, Trilogy, and me) on 20 November 2018.
30. The Deed of Settlement was subsequently varied, but the variation of it is not material to the Application.
31. Between 20 November 2018 to 26 November 2018, I have continued to work towards the final resolution of the Feeder Fund Proceeding in accordance with the Deed of Settlement, including:
- (a) updating Custom House as developments occurred during the course of the mediation;
- (b) liaising with the Liquidator to provide an update on the outcome of the mediation; and

Deponent:

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Taken by:

- (c) providing instructions to my lawyers concerning the resolution of the Feeder Fund Proceeding and this Application.
32. In connection with the above work, the fees payable to me by Custom House are in the sum of \$2,987.50, comprising:
- (a) 4 hours of work by me, for which the fees charged were \$2,700.00; and
- (b) 0.5 hours of work by Ms Franjic, for which the fees were \$287.50.
33. The total of my and my staff's fees for the work set out above is \$137,130.00 (excluding GST), as summarised in the following table:

LM Investment Management Limited - Summary of Time and Costs

	Said Jahani		Danielle Franjic		Kevin Yue		Total	
	Hours	\$	Hours	\$	Hours	\$	Hours	\$
Pre Mediation	28.0	18,887.50	98.1	56,407.50	7.0	1,925.00	133.1	77,220.00
Day 1 & 2	26.0	17,550.00	21.4	12,305.00	-	-	47.4	29,855.00
Adjournment	16.0	10,800.00	12.5	7,187.50	-	-	28.5	17,987.50
Day 3	8.0	5,400.00	6.4	3,680.00	-	-	14.4	9,080.00
Post Day 3	4.0	2,700.00	0.5	287.50	-	-	4.5	2,987.50
Total Hours	82.0	55,337.50	138.9	79,867.50	7.0	1,925.00	227.9	137,130.00

34. In addition to the above fees, my firm also incurred:
- (a) disbursement expenses such as flights from Sydney to Brisbane, ground travel expenses and accommodation that has not yet been invoiced; and
- (b) legal fees. I am informed by David O'Farrell, and believe, that the legal fees incurred are in the total amount of \$414,959.90.

D. The Application

35. I undertook the work described in this affidavit in seeking to resolve the Feeder Fund Proceeding on the basis of my understanding that:
- (a) I was authorised by the June 2018 Order to settle the Feeder Fund Proceeding on behalf of LMIM (CPAIF) and LMIM (ICPAIF);
- (b) I was obliged by my duties to seek a resolution of the Feeder Fund Proceeding which involved me:
- (i) getting in and realising the assets of LMIM (CPAIF) and LMIM (ICPAIF) for the benefit of Custom House; and
- (ii) also not recklessly sacrificing the interests of LMIM (CPAIF) and LMIM (ICPAIF);
- (c) the Liquidator was not authorised by the June 2018 Order or otherwise to act in the Feeder Fund Proceeding on behalf of LMIM (CPAIF) and LMIM (ICPAIF), as the Liquidator was only authorised by the June 2018 Order to act in the Feeder Fund Proceeding on behalf of LMIM in its own capacity;

Deposant:
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Taken by:

- (d) Mr Whyte was authorised by the June 2018 Order to settle the Feeder Fund Proceeding on behalf of LMIM as RE of the FMIF; and
 - (e) Mr Whyte had, by reason of the orders made by Justice Dalton made in proceeding 3383/13 on 21 August 2013, control of the FMIF and was authorised to distribute the fund comprising the assets of the FMIF on terms which would allow its division amongst the FMIF's members (as the Deed of Settlement allows).
36. I wish for the Deed of Settlement to be fully performed if possible, because I believe that it provides for:
- (a) Custom House to realise its security;
 - (b) a provident resolution of the Feeder Fund Proceeding for the benefit of the members of the CPAIF and the ICPAIF; and
 - (c) the most efficient and cost-effective way to facilitate distributions to members of the FMIF, the CPAIF, and the ICPAIF, without the need to engage in complicated litigation to resolve the entitlements of the parties.
37. I have made enquiries with Mr Brendan Clegg, a Vice President and Senior Counsel of Custom House, about its attitude to the Deed of Settlement and the resolution of the Feeder Fund Proceeding.
38. I have been informed by Mr Clegg, and believe, that Custom House wishes for the Deed to be fully performed if possible.
39. I am concerned that if the Liquidator replaces Mr Whyte as the person responsible for winding up the FMIF by way of the direction sought by one or both of the directions in sub-paragraph 2(a) and 2(b) of the Application:
- (a) this will, or may, have the effect that the Deed of Settlement cannot be or is not performed in accordance with its terms;
 - (b) the Feeder Fund Proceeding will or may then be re-enlivened, and the costs associated with the proceeding will further deplete the FMIF; and
 - (c) the expense to which I refer above in connection with the resolution of the Feeder Fund Proceeding will have been wasted.

All the facts and circumstances herein 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 in this my affidavit.

AFFIRMED by **SAID JAHANI** on 7 December 2018 at Sydney in the presence of:

Roxanne Kekatos of
HWL Ebsworth & Lawyers
L14, 264 - 278 George Street, Sydney

Deponent

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Taken by:

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line across the middle.

Deponent

A handwritten signature in black ink, featuring a large, stylized 'S' and 'D'.

Taken by: Solicitor

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 3508/15

First Applicant

JOHN RICHARD PARK AS LIQUIDATOR OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS 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 AND MANAGERS 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

CERTIFICATE OF EXHIBITS

INDEX OF EXHIBITS

EXHIBITS SJ-1 to SJ-2 to the affidavit of SAID JAHANI sworn at Sydney on 7 December 2018

Deponent

Solicitor / Justice of the Peace
Commissioner for Declarations

Roxanne Kekatos

CERTIFICATE OF EXHIBIT

Filed on behalf of the First and Third Defendants

HWL Ebsworth Lawyers
Level 19, 480 Queen Street
Brisbane QLD 4000
Tel: (07) 3169 4700
Fax: 1300 368 717
Ref: DOF:ECS:683682

55-1

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 13534/16

Plaintiff:

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (RECEIVER APPOINTED)

AND

First Defendant:

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 (RECEIVER APPOINTED)

AND

Second Defendant:

TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679 AS RESPONSIBLE ENTITY OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511

AND

Third Defendant:

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868 (RECEIVER APPOINTED)

AND

Fourth Defendant:

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461

AND

Fifth Defendant:

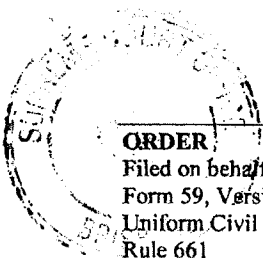
THE TRUST COMPANY LIMITED ACN 004 027 749 AS CUSTODIAN OF THE PROPERTY OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511

ORDER

Before: Justice Jackson

Date: 13 June 2018

Initiating document: Amended Application filed 18 May 2018 and Commercial List Application filed by email dated 24 April 2018



ORDER
Filed on behalf of the Plaintiff
Form 59, Version 1
Uniform Civil Procedure Rules 1999
Rule 661

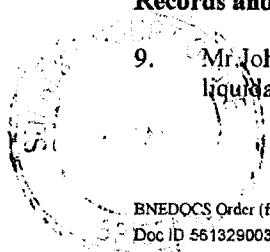
GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
JSO/SZC:201619858

THE ORDER OF THE COURT IS THAT:

1. The proceeding be placed on the Commercial List.
2. Pursuant to section 500(2) of the *Corporations Act* 2001 (Cth), the plaintiff has leave *nunc pro tunc* to commence and proceed with Supreme Court Proceeding numbered 13534 of 2016 against the first defendant, the third defendant and the fourth defendant, being LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461 (LMIM) in its capacity as responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875 (CPAIF), as responsible entity of the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (ICPAIF) and in its own right.
3. Pursuant to section 59 of the *Trusts Act* 1973 (Qld), directions that:
 - a. the interests of LMIM in its capacity as responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF) as plaintiff have been and continue to be represented in these proceedings by Mr David Whyte, in his capacity as the court appointed receiver of the property of the FMIF and as the person appointed to be responsible for ensuring that the FMIF is wound up pursuant to its constitution by the order of Dalton J made in proceedings numbered 3383/2013 on 21 August 2013;
 - b. the interests of LMIM in its capacity as responsible entity of the CPAIF as first defendant be represented in these proceedings by Mr Said Jahani of Grant Thornton in his capacity as receiver and manager of LMIM in its capacity as responsible entity of the CPAIF;
 - c. the interests of LMIM in its capacity as responsible entity of the ICPAIF as third defendant be represented in these proceedings by Mr Said Jahani of Grant Thornton in his capacity as receiver and manager of LMIM in its capacity as responsible entity of the ICPAIF;
 - d. the interests of LMIM in its own capacity as fourth defendant be represented in these proceedings by the liquidator of LMIM, Mr John Park.
4. The Trust Company Limited ACN 004 027 749 as custodian of the property of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 (WFMIF) is joined to the proceeding, as the fifth defendant.
5. The Plaintiff has leave to file and serve the Further Amended Claim, in the form exhibited to the affidavit of Jamie O'Regan sworn 28 May 2018, the amendments to take effect from the date of this order.
6. The Amended Application filed 18 May 2018 is otherwise dismissed.
7. The parties' costs of the Application filed 30 October 2017 and of the Amended Application filed 18 May 2018 are each party's costs in the proceeding.
8. The parties' costs of the plaintiff's Commercial List Application are each party's costs in the proceeding.

Records and documents relating to the CPAIF and the ICPAIF

9. Mr John Park, as the representative of the Fourth Defendant in these proceedings and the liquidator of LMIM, provide to Mr Said Jahani, as the representative of the First and Third



Defendants, and to Mr David Whyte, as the representative of the Plaintiff, the following documents and records by Friday, 22 June 2018:

- a. a complete and up to date copy of the registers of members maintained for the CPAIF, including all contact and other details for every current member recorded therein;
- b. a complete and up to date copy of the registers of members maintained for the ICPAIF, including all contact and other details for every current member recorded therein,

and the Plaintiff will pay Mr Park's reasonable costs of providing the documents and records referred to above.

10. The Plaintiff will provide to Mr Said Jahani, as the representative of the First and Third Defendants, the following further documents and records by Friday, 29 June 2018:

- a. a statement listing all transactions on the register of members maintained for the CPAIF between 11 May 2009 and 31 January 2013, including any redemptions;
- b. copies of all available bank account statements of the CPAIF for the period 11 May 2009 to 31 January 2013;
- c. copies of the ledger or ledgers of the CPAIF recording the payment of any redemptions to the members of the CPAIF for the period 11 May 2009 to 31 January 2013;
- d. copies of the ledger or ledgers of the CPAIF recording the accounting treatment of redemptions from the FMIF to the CPAIF for the period 11 May 2009 to 31 January 2013;
- e. copies of any audited accounts of the CPAIF relating to the period 11 May 2009 to 31 January 2013 and the last available management accounts for the financial year ended 30 June 2013;
- f. a statement listing all transactions on the register of members maintained for the ICPAIF between 11 May 2009 and 31 January 2013, including any redemptions;
- g. copies of all available bank account statements of the ICPAIF for the period 11 May 2009 to 31 January 2013;
- h. copies of the ledger or ledgers of the ICPAIF recording the payment of any redemptions to the members of the ICPAIF for the period 11 May 2009 to 31 January 2013;
- i. copies of the ledger or ledgers of the ICPAIF recording the accounting treatment of redemptions from the FMIF to the ICPAIF for the period 11 May 2009 to 31 January 2013; and
- j. copies of any audited accounts of the ICPAIF relating to the period 11 May 2009 to 31 January 2013 and the last available management accounts for the financial year ended 30 June 2013.

11. The Plaintiff will provide to the Second Defendant the following further documents and records by Friday, 29 June 2018:

- a. a statement listing all transactions on the register of members maintained for the WFMIF between 11 May 2009 and 31 January 2013, including any redemptions;
- b. copies of all available bank account statements of the WFMIF for the period 11 May 2009 to 31 January 2013;



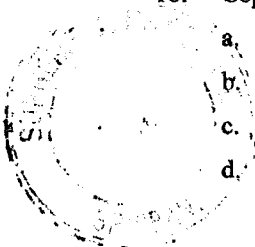
- c. copies of the ledger or ledgers of the WFMIF recording the payment of any redemptions to the members of the WFMIF for the period 11 May 2009 to 31 January 2013;
- d. copies of the ledger or ledgers of the WFMIF recording the accounting treatment of redemptions from the FMIF to the WFMIF for the period 11 May 2009 to 31 January 2013;
- e. copies of any audited accounts of the WFMIF relating to the period 11 May 2009 to 31 January 2013 and the last available management accounts for the financial year ended 30 June 2013.

Notification of the members of the CPAIF and the ICPAIF

- 12. The Plaintiff is to give notice to the members of the CPAIF and ICPAIF of this proceeding, the ordered mediation, the Further Amended Claim, the Second Further Amended Statement of Claim and this order, by the Plaintiff:-
 - a. causing, on or before Monday, 25 June 2018, each of the documents mentioned above and a copy of the notice in the form of Annexure A to this order ("the Notice") to be posted in a prominent place on the website www.lmfimf.com; and
 - b. sending, on or before 29 June 2018, a copy of the Notice to all members of the CPAIF and the ICPAIF by each member's preferred method of receipt or distribution of notices as recorded in the CPAIF and the ICPAIF register of members.
- 13. Mr John Park, as the representative of the Fourth Defendant in these proceedings and the liquidator of LMIM, give notice to the members of the CPAIF and the ICPAIF of this proceeding by causing, on or before 25 June 2018, the Notice and a link to the place on the website referred to in paragraph 12(a) above (to be advised by Mr Whyte on or before Monday, 25 June 2018) to be posted in a prominent place on the website www.lminvestmentadministration.com/cpaif___icpaif, and the Plaintiff will pay Mr Park's reasonable costs of giving notice in accordance with this paragraph.
- 14. Notice will be deemed to have been given to the members of the CPAIF and the ICPAIF of the documents mentioned in paragraph 12 above, ten days after the posting of those documents to the website in accordance with paragraph 12 above.
- 15. Notice is to be given to members of the CPAIF and the ICPAIF of further documents filed in these proceedings by the Plaintiff causing such documents to be posted to the website www.lmfimf.com.

Mediation

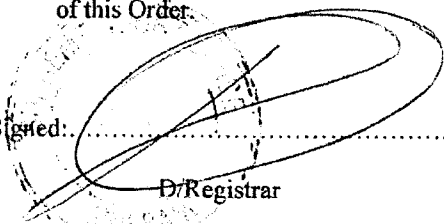
- 16. The parties, except for the fourth and fifth defendants, are directed to attend, participate in, and act reasonably and genuinely in, a mediation on a date to be agreed by the participating parties and the mediator, to be completed by 28 September 2018.
- 17. The mediator is to be selected by the parties by Friday, 22 June 2018.
- 18. Copies of the following documents are to be provided to the mediator:
 - a. The most recent originating process and pleadings filed by the plaintiff;
 - b. The affidavits of David Whyte sworn 31 October 2017 and 21 May 2018;
 - c. The affidavit of Jamie O'Regan sworn 28 May 2018;
 - d. The affidavit of Said Jahani sworn 24 November 2017;



- e. The position papers prepared by the parties, to be provided as follows:
 - i. The Plaintiff, on or before 21 days before the commencement of the mediation;
 - ii. The first, second and third defendants, on or before 7 days before the commencement of the mediation.
 - f. Any further document that any party to the mediation desires to provide to the mediator.
19. The period of the mediation is fixed at a maximum of two days and may extend beyond the period only with the authorisation of the parties.
20. The parties are to negotiate a fee with the mediator.
21. The parties are to pay the following percentages of costs of the mediator:
- a. The Plaintiff – 50%
 - b. The First Defendant– 16.6%
 - c. The Third Defendant– 16.6%
 - d. The Second Defendant – 16.6%
22. The parties must pay their respective percentages of the fee negotiated by the parties with the mediator to the mediator in accordance with the mediator's terms.
23. The mediator is to be informed of the appointment by the plaintiff.
24. The parties each have liberty to apply.

AND THE FURTHER ORDER OF THE COURT, NOTING THE CONSENT OF MR DAVID CLOUT, LIQUIDATOR OF LM ADMINISTRATION PTY LTD (IN LIQUIDATION) AND MR JARROD VILLANI, OF KORDA MENTHA PTY LTD IN ITS CAPACITY AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND, IS THAT:

25. For the purposes of the undertaking provided by David Whyte in the Supreme Court Proceedings No. 3383 of 2013 and the undertaking of any servant or agent of BDO signed in accordance with paragraph 3 of the undertaking of Mr Whyte, the Court hereby approves the interrogation, use and disclosure, solely for the purposes of this proceeding, of any Non-Fund information about or concerning the affairs of the CPAIF, the ICPAIF and the WFMI (save for any privileged Non-Fund information) stored on the server provided to the Plaintiff so as to enable the Plaintiff to provide the information and documents to Mr Said Jahani pursuant to paragraph 10 of this Order and to the Second Defendant pursuant to paragraph 11 of this Order.

Signed: 
D/Registrar

Annexure A - Form of Notice

TO THE MEMBERS OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 (RECEIVER APPOINTED) ("CPAIF") AND THE MEMEBERS OF THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868 (RECEIVER APPOINTED) ("ICPAIF")

TAKE NOTICE that David Whyte, the person appointed pursuant to section 601NF(1) of the *Corporations Act* 2001 (Cth) to take responsibility for ensuring that THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (Receivers and Managers Appointed) (Receiver Appointed) ("FMIF") is wound up in accordance with its constitution, has applied to the Supreme Court of Queensland including for declarations that:

- (a) would, depending on the amount ultimately available for distribution in the winding up of the FMIF, have the effect of reducing or eliminating any distribution to be paid to the CPAIF and the ICPAIF, to the extent of the value of redemptions that were allowed in favour of the Class B unitholders between 11 May 2009 and 31 January 2013 without power and in breach of trust, as adjusted for any overpayment or underpayment of capital distributions made in February and June 2013;
- (b) would adjust the number of units held by the CPAIF and the ICPAIF in the FMIF to reinstate those units, but also to cancel further units in the FMIF issued to the CPAIF and the ICPAIF between 1 July 2011 and 1 November 2012 without power and in breach of trust.

Following the hearing of an application in the above proceedings on 29 May 2018, certain orders were made including that, pursuant to section 59 of the *Trusts Act 1973 (Qld)*, the interests of LMIM in its capacity as responsible entity of the CPAIF as first defendant and of LMIM in its capacity as responsible entity of the ICPAIF as third defendant be represented in these proceedings by Mr Said Jahani of Grant Thornton in his capacity as receiver and manager of the property of the CPAIF and of the ICPAIF.

In addition, orders were made for the parties to the proceedings to engage in a mediation on a date to be agreed to be completed by 28 September 2018.

Copies of the Further Amended Claim and the Second Further Amended Statement of Claim and the Orders dated 13 June 2018 in respect of this proceeding are available on the website www.lmfimf.com and the website www.lminvestmentadministration.com.

Any member has a right to apply to the Court if they wish to be heard in the proceeding or to be represented in the mediation.

Any member who wishes to know more about the proceedings and the proposed mediation in the proceedings, including if the member wishes to request any material relating to the mediation, should contact the solicitors for the receiver of the CPAIF and the ICPAIF, Messrs. David O'Farrell of HWL Ebsworth, on +61 7 3169 4844.

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 13534/16

Plaintiff: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (RECEIVER APPOINTED)

AND

First Defendant: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 (RECEIVER APPOINTED)

AND

Second Defendant: TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679 AS RESPONSIBLE ENTITY OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511

AND

Third Defendant: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868 (RECEIVER APPOINTED)

AND

Fourth Defendant: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461

AND

Fifth Defendant: THE TRUST COMPANY LIMITED ACN 004 027 749 AS CUSTODIAN OF THE PROPERTY OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511

ORDER

Before: Justice Jackson

Date:

Initiating document: Amended Application filed 18 May 2018 and Commercial List Application filed by email dated 24 April 2018

ORDER

Filed on behalf of the Plaintiff
Form 59, Version 1
Uniform Civil Procedure Rules 1999
Rule 661

BNEDOC5 23896712_1.docx

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
JSO/SZC:201619858

THE ORDER OF THE COURT IS THAT:

1. Order 16 of his Honour Justice Jackson's Orders dated 13 June 2018 (**13 June 2018 Orders**) be amended to read:

"The parties, except for the fourth and fifth defendants, are directed to attend, participate in, and act reasonably and genuinely in, a mediation on 5 and 6 November 2018."

2. Notice of this Order be given to members of the CPAIF and the ICPAIF in accordance with Order 15 of the 13 June 2018 Orders.
3. That there be no order as to costs.

Signed: