

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS3508 of 2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS APPOINTED) ACN 077 208 461

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

APPLICATION

*Definitions*

Where the following terms appear in this Application, they have the following meaning:

**Act** means *Corporations Act 2001* (Cth)

**Conclusion** means the date not before the conclusion of all Proceedings and after the Receiver and the Liquidator file an affidavit in these proceedings stating that there is no impediment to the distribution of funds to members of all Funds, with such affidavit to include an estimate of the

APPLICATION  
Filed on behalf of the Applicants  
Form 9, Version 1  
Uniform Civil Procedure Rules 1999  
Rule 31

Russells  
Level 18, 300 Queen Street  
Brisbane, Qld, 4000  
Tel: 07 3004 8888  
Fax: 07 3004 8899  
Ref: JTW:20180543

amount to be distributed pending the making of orders in the Final remuneration and expenses determination.

**Budget(s)** means the estimates of the Liquidator and the Receiver respectively for their remuneration and expenses up to the Conclusion.

**Feeder funds** means CPAIF and ICPAIF.

**Final Distribution** means making a final distribution to members of FMIF at the Conclusion in the event that they were responsible for winding up the affairs of the FMIF

**Final remuneration and expenses determination** means any application for remuneration and expenses to be brought by either the Receiver or the Liquidator at the Conclusion

**Funds** means, together:

1. LM First Mortgage Income Fund ARSN 089 343 288 (“**FMIF**”);
2. LM Cash Performance Fund ARSN 087 304 032 (“**CPF**”);
3. LM Currency Protected Australian Income Fund ARSN 110 247 875 (“**CPAIF**”);
4. LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (“**ICPAIF**”);
5. LM Australian Income Fund ARSN 133 497 917 (“**AIF**”); and
6. LM Australian Structured Products Fund ARSN 149 875 669 (“**ASPF**”).

**Insolvency Schedule** means schedule 2 to the *Corporations Act 2001* (Cth).

**Interim Distribution** means an interim distribution to members of the FMIF, in the event that they were responsible for winding up the affairs of the FMIF

**Liquidator** means the First Applicant, Mr John Park

**LMIM** means LM Investment Management Limited (in liquidation) (receivers and managers appointed) ACN 077 208 461

**Old Act** of the *Corporations Act 2001* (Cth) as in force immediately before 1 March 2017.

**Proceedings** means, together:

1. Supreme Court of Queensland Proceeding number 11560 of 2016 (“**the Clear Accounts Proceeding**”);
2. Supreme Court Proceedings BS 2166/2015 (“**Ernst & Young Proceedings**”);
3. Supreme Court of Queensland Proceeding number 13534 of 2016 (“**the Feeder Fund Proceedings**”)

**Receiver** means the Respondent, Mr David Whyte

**21 August 2013 Order** means the Order of Dalton J dated 21 August 2013 in Supreme Court Proceedings BS3383/13

TAKE NOTICE that the Applicants are applying to the Court for the following orders:

*At the directions hearing on 19 November 2018:*

1. 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:
  - (a) that subject to the payment pursuant to paragraphs 2(i) and (j) of this application being made, the Liquidator be directed to act as contradictor in respect of:
    - (i) the Clear Accounts Proceeding; and
    - (ii) the Feeder Fund Proceeding;
  - (b) That by no later than 27 November 2018 the Liquidator and the Receiver file affidavits setting out a Budget up to and including the payment of the final distribution to the creditors of LMIM and final distribution to the members of each of the Funds;
  - (c) The Budget set out in the affidavits to be filed in accordance with paragraph 1(b) are to include:
    - (i) estimates of the monthly remuneration of the Liquidator and the Receiver respectively up to and including the Conclusion;
    - (ii) an estimate of the monthly expenses of the Liquidator and the Receiver up to the Conclusion;
    - (iii) an estimate by each of the Liquidator and the Receiver of the remuneration and expenses they would charge for making the Interim Distribution;
    - (iv) an estimate by each of the Liquidators and the Receivers of the remuneration and expenses they would charge for making the Final Distribution;
    - (v) an estimate of the total remuneration and expenses up to the Conclusion in the event that they were responsible for winding up the affairs of the FMIF (other than conduct of the Proceedings);
    - (vi) a description of the work to be carried out by the Liquidator and the Receiver in respect of their estimated remuneration (other than conduct of

the Proceedings) in the event that they were responsible for winding up the affairs of the FMIF;

- (vii) an estimate as to the expenses to be incurred by the Liquidator and the Receiver up to the Conclusion in the event that they were responsible for winding up the affairs of the FMIF (other than conduct of the Proceedings);
- (viii) a description of the expenses to be incurred by the Liquidator and the Receiver up to the Conclusion (other than conduct of the Proceedings) in the event that they were responsible for winding up the affairs of the FMIF;
- (ix) for any Proceeding of which either the Liquidator or Receiver has conduct of, a breakdown by each proceeding of the estimated costs of solicitors, experts and counsel to the conclusion of each proceeding (including any appeal to an intermediate Court of Appeal);
- (x) for any Proceeding of which either the Liquidator or Receiver has conduct of, an estimate of any costs exposure to each counterparty to such proceeding in the event of the proceeding being unsuccessful.

*On the further return of the Application, set down provisionally for 10 December 2018*

2. 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) The Receiver's appointment pursuant to the 21 August 2013 Order 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:
    - (i) the Clear Accounts Proceeding;
    - (ii) the Feeder Fund Proceeding; and
    - (iii) the EY Proceeding;
  - (b) From the date of this Order, the Liquidator is 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;
  - (c) the Liquidator, or the Receiver in the event of Order in paragraph 2(b) of this application is not made, will:

- (i) within three months of this order, file an affidavit describing any impediment that might exist to his knowledge as to why an interim distribution cannot be forthwith made to members of the FMIF; and
  - (ii) in the event of that the affidavit does not describe an impediment, make the Interim Distribution within a further three months;
- (d) approving the Budgets, in the amounts sought or as varied by the Court, as being reasonable estimates of the remuneration and expenses that may be incurred in the winding up of LMIM and the Funds;
- (e) the remuneration of the Liquidator for the period from the date of this order to the Conclusion:
- (i) be fixed or determined in the amount of 50% of the amount stated in the Budget for the Liquidator for that period, with the Liquidator reserving the right to seek a fixing or determination of the other 50% of the Budget and all other additional remuneration at the Final remuneration and expenses determination; or alternatively
  - (ii) be fixed or determined in the amount of 50% of the amount stated in the Budget for the Liquidator for that period with such amount being on account of an amount to be fixed determined at the Final remuneration and expenses determination at which the initial fixing or determination of 50% of the amount stated in the Budget for the Liquidator can be reduced, increased or stay the same;
- (f) the remuneration of the Receiver for the period from the date of this order to the Conclusion:
- (i) be fixed or determined in the amount of 50% of the amount stated in the Budget for the Receiver for that period, with the Receiver reserving the right to seek a fixing or determination of the other 50% of the Budget and all other additional remuneration at the Final remuneration and expenses determination; or alternatively
  - (ii) be fixed or determined in the amount of 50% of the amount stated in the Budget for the Liquidator for that period with such amount being on account of an amount to be fixed or determined at the Final remuneration and expenses determination at which the initial fixing or determination of 50% of the amount stated in the Budget for the Liquidator can be reduced, increased or stay the same

- (g) All of the remuneration of the Liquidator as fixed, or alternatively determined, pursuant to paragraph 2(e) be paid within 30 days from the date of this order from the respective scheme property of FMIF, AIF and ASPF in such proportions as may be just;
- (h) All of the remuneration of the Receiver fixed, or alternatively determined, pursuant to 2(f) be paid within 7 days after the payments in paragraph 2(g) above from the scheme property of FMIF.
- (i) The expenses of the Liquidator to the Conclusion be paid on an indemnity basis from the scheme property of the FMIF, AIF and ASPF in such proportions as may be just on the following basis:
  - (i) in an amount equal to 50% of the expenses stated in the Budget of the Liquidator be paid within 7 days after the end of each calendar month as set out in the Budget with the Liquidator reserving the right to seek an order for payment of the other 50% of the Budget and all other additional expenses as ordered to be paid at the Final remuneration and expenses determination; or alternatively
  - (ii) in an amount equal to 50% of the expenses stated in the Budget of the Liquidator be paid within 7 days after the end of each calendar month as set out in the Budget with such amount being on account of an amount to be paid at the Final remuneration and expenses determination at which the initial payment of 50% of the amount stated in the Budget for the Liquidator can be reduced, increased or stay the same;
- (j) The expenses of the Receiver to the Conclusion be paid on an indemnity basis from the scheme property of the FMIF on the following basis:
  - (i) in an amount equal to 50% of the expenses stated in the Budget of the Receiver be paid within 7 days after the payments in paragraph 2(i)(i) above with the Receiver reserving the right to seek an order for payment of the other 50% of the Budget and all other additional expenses at the Final remuneration and expenses determination; or alternatively
  - (ii) in an amount equal to 50% of the expenses stated in the Budget of the Receiver be paid within 7 days after the payments in paragraph 2(i)(ii) above with such amount being on account of an amount to be order to be paid at the Final remuneration and expenses determination at which time the initial payment of 50% of the amount stated in the Budget for the Receiver can be reduced, increased or stay the same

3. Costs of this Application be payable, and paid, on the indemnity basis from the respective scheme property of the FMIF, AIF and ASPF in such proportions as may be just.
4. Such further or other Order as the Court deems meet.

This application will be heard by the Court at QEII Courts of Law Complex, 415 George Street, Brisbane, Qld, 4000 on 19 November 2018 and provisionally for 10 December 2018.

Filed in the Brisbane Registry on 10 October 2018:

Registrar: .....



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.

On the review hearing of the Application the Applicants intend to rely on the following affidavits:

1. Affidavit of Kelly-Anne Lavina Trenfield to be sworn;
2. Affidavit of Renee Lobb to be sworn;

On the further hearing of the Application the Applicants intend to rely on the following affidavits:

3. Affidavit of John Richard Park to be sworn; and
4. Affidavit of Kelly-Anne Lavina Trenfield to be sworn.

THE APPLICANTS ESTIMATE THE FIRST HEARING SHOULD BE ALLOCATED TWO HOURS

Signed: .....

Description: Julian Walsh, Solicitor for the Applicants

Dated: 10 October 2018

This application is to be served on:

Respondent Name: **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**

Address: of BDO, Level 10, 12 Creek Street, Brisbane, Queensland, 4000, C/- Tucker & Cowen, Level 15, 15 Adelaide Street, Brisbane, Queensland, 4000

Notice fo this application is to be given in accordance with the 3 October 2018 Order of the Honourable Justice Jackson on:

Third Party Name: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Address: Level 20, 240 Queen Street, Brisbane Queensland, 4000