

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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 MANAGER 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 OF DAVID WHYTE

I, DAVID WHYTE of c/- BDO, Level 10, 12 Creek Street, Brisbane, in the State of Queensland, Registered liquidator, state on oath:-

1. I am a Registered liquidator and partner of the firm BDO.
2. Now produced and shown to me and marked "DW-127" is an indexed paginated bundle of the documents referred to in this Affidavit ("the Bundle").
3. Terms defined in my Affidavit filed 3 December 2018 have the same meaning in this Affidavit.

Page 1

Signed: 

Witnessed by: 

AFFIDAVIT:
Form 46, R.431

Filed on behalf of the Respondent
Mr David Whyte

TUCKER & COWEN
Solicitors
Level 15, 15 Adelaide Street
Brisbane, Qld, 4000.
Tel: (07) 300 300 00
Fax: (07) 300 300 33

Settlement of Feeder Fund Proceeding

4. A Deed of Settlement and Release (“the Deed”) of the Feeder Fund Proceeding has been signed. The last party to sign and exchange final version the Deed, and exchange certain variations to the Deed did so on 7 December 2018. At pages 1 - 5 of the Bundle is a copy of pages of the Deed of Settlement showing the parties thereto, clause 3.1 (Conditions Precedent) and clause 3.2 (Time for fulfilment of the Conditions Precedent) of the Deed. I have not exhibited the entire Deed because it contains a confidentiality clause.
5. I note that under the terms of the Deed, the conditions precedent include that:-
- (a) myself, Mr Jahani, Trilogy Funds Management Limited (“Trilogy”) and the Trust Company Limited each apply for, and obtain judicial advice to the effect that the relevant party making the application is justified in entering into and performing the Deed (clauses 3.1(b),(d) and (f)). We are each obliged to apply for such judicial advice by 1 February 2019 and use best endeavours to have the application heard by 15 March 2019;
 - (b) orders are made by the Supreme Court of Queensland giving authority for an interim distribution to be made to FMIF members in the amount of at least \$30 million (clause 3.1(g)). I am obliged by the Deed to make this application by 1 February 2019 and use my best endeavours to have the application heard by 15 March 2019. I may waive this condition precedent;
 - (c) the interim distribution, if approved is made. The time for satisfaction, non-fulfillment or waiver of this condition precedent, which is for the benefit of all parties, is three weeks after the Court delivers judgment with respect to the application for approval to make the interim distribution.
6. I also note that, under the terms of the Deed:
- (a) certain amounts are to be retained by LMIM as responsible entity of the FMIF, or any other person administering the FMIF, from future distributions to be made to the Feeder

Signed:

Witnessed by:

Funds. There is agreement that the amounts to be withheld are to be phased over multiple distributions with funds still flowing to the Feeder Funds from each such distribution;

- (b) the deed contains certain covenants not to sue by the parties;
- (c) I am under an obligation to use reasonable endeavours to obtain a release from certain third parties (I do not propose to disclose the names of those third parties, as that is commercially sensitive information) for the benefit of the Feeder Funds;
- (d) there is a clause to the effect that the parties agree not to seek to take any further steps or steps in the Feeder Fund Proceeding, other than in accordance with the terms of the Deed or as required by order or direction of the Court, until 1 May 2019. This clause is not subject to satisfaction of any conditions precedent.

Further correspondence

- 7. On 4 December 2018, I instructed my solicitors, Tucker & Cowen, to send a letter to Russells requesting confirmation that Mr Park will adjudicate on proofs of debt in the liquidation of LMIM by 11 January 2019 and notify me of any Creditor Indemnity Claims pursuant to the December Orders on or before 25 January 2019 ("proof of debt process"). At pages 6 - 7 of the Bundle is a copy of that letter.
- 8. I am informed by Mr Schwarz of Tucker & Cowen, and believe, that on 5 December 2018 he received an email from Mr Hugh Copley, Litigation Counsel Queensland, Chief Legal Officer of ASIC, which stated that:-
 - (a) Ms Hu of ASIC's Insolvency Practitioners stakeholder team informed him that Mr Julian Walsh of Russells had informed her that the purpose of Mr Park's application under s 90-15 of Schedule 2 of the *Corporations Act* 2001 is to defer my remuneration;
 - (b) ASIC will not be seeking to be heard in relation to the Application;

Page 3

Signed:

Witnessed by:

- (c) Having reviewed the material provided in respect of the Application, ASIC does not seek to take a position which supports or opposes the relief being sought by Mr Park, save for the following:
- (i) It is concerning if Mr Park's motivation for filing the Application is to prevent Mr Whyte from seeking such remuneration as might properly be incurred by him in his capacity as the person charged with the responsibility for winding up the FMIF;
 - (ii) having reviewed my recent application to Court for approval of remuneration and the material filed in support of that application, ASIC has no objection to the relief being sought by me, consistent with ASIC's position in respect of each of my previous applications for approval of remuneration (my remuneration application was in fact approved by Justice Mullins on 29 November 2018).

At pages 8 - 11 of the Bundle is a copy of that email.

9. On 5 December 2018, I instructed Tucker & Cowen to send a letter to Russells in reply to a letter from Russells dated 29 November 2018 raising certain queries in relation to my position in relation to Mr Park's costs of the proof of debt process (which is at page 282 and 283 of the exhibits to my Affidavit filed on 3 December 2018) and setting out my understanding of paragraph 18 of the December Orders, and the variations to those orders made on 18 July 2018. At pages 12 – 13 of the Bundle is a copy of that letter.

Estimate of BDO's remuneration in relation to completion of audit at conclusion of winding up of FMIF

10. In my Affidavit filed 3 December 2018, I did not include an estimate of my remuneration in relation to the final audit of the FMIF, if that function was transferred to me. I estimate that my remuneration in respect of the final audit of the FMIF, including providing all necessary instructions and documents to and responding to queries from the auditors, would be about \$15,000 to \$20,000 excluding GST.

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Signed:

Witnessed by:

DB Receivers

11. At pages 14 - 17 of the Bundle is a copy of an email I received from Jonathan Henry of McGrath Nicol on 5 December 2018 informing me that the DB Receivers have received consent from DB to retire and are coordinating execution of the retirement deed, which has been agreed.
12. All the facts and circumstances above 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 on the face of this my affidavit.

Sworn by DAVID WHYTE on the 7th day of December 2018 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

Alexander Philip Nase
Solicitor

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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 MANAGER 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 EXHIBIT

Exhibit "DW-127" to the Affidavit of DAVID WHYTE sworn this 7th day of December 2018



Deponent



Solicitor/A Justice of the Peace

Alexander Philip Nase
Solicitor

CERTIFICATE OF EXHIBIT:

Form 47, R.435

Filed on behalf of the Respondent
Mr David Whyte

TUCKER & COWEN

Solicitors

Level 15, 15 Adelaide Street

Brisbane, Qld, 4000

Tel: (07) 300 300 00

Fax: (07) 300 300 33

SUPREME COURT OF QUEENSLAND

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INDEX OF EXHIBITS

No.	Index to "DW-127"	Date	Page No.
1.	Pages from Deed of Settlement in Feeder Fund Proceeding	Undated	1 - 5
2.	Letter from Tucker & Cowen to Russells	04.12.2018	6 - 7
3.	Email from Mr Hugh Copley of ASIC to Tucker & Cowen	05.12.2018	8 - 11
4.	Letter from Tucker & Cowen to Russells	05.12.2018	12 - 13
5.	Email from Jonathan Henry of McGrath Nicol	5.12.2018	14

Deed of Settlement and Release

Date

Details

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)

of C-/ Gadens Lawyers, Level 11, 111 Eagle Street, Brisbane,
Queensland 4000

Email: scott.couper@gadens.com

and

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

of C-/ HWL Ebsworth Lawyers, Level 19, 480 Queen Street, Brisbane,
Queensland 4000

Email: dofarrell@hwle.com.au

esingleton@hwle.com.au

and

Trilogy Funds Management Limited ACN 080 383 679 as Responsible Entity of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511

of C-/ Squire Patton Boggs, Level 17, 88 Phillip Street, Sydney, New
South Wales, 2000

Email: susan.goodman@squirepb.com

and

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

of C-/ HWL Ebsworth Lawyers, Level 19, 480 Queen Street, Brisbane,
Queensland 4000

Email: dofarrell@hwle.com.au

esingleton@hwle.com.au

and

**David Whyte as court appointed receiver of the assets of the LM
First Mortgage Income Fund ARSN 089 343 288 (receiver appointed)**

of C-/ Gadens Lawyers, Level 11, 111 Eagle Street, Brisbane,
Queensland 4000

Email: scott.couper@gadens.com

and

**Said Jahani as receiver and manager of the assets of LM
Investment Management Limited (receivers and managers
appointed) (in liquidation) as Responsible Entity of the LM Currency
Protected Australian Income Fund ARSN 110 247 875 and the LM
Institutional Currency Protected Australian Income Fund ARSN 122
052 868**

of C-/ HWL Ebsworth Lawyers, Level 19, 480 Queen Street, Brisbane,
Queensland 4000

Email: dofarrell@hwle.com.au and

esingleton@hwle.com.au

and

**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**

of C-/ Squire Patton Boggs, Level 17, 88 Phillip Street, Sydney, New
South Wales, 2000

Email: susan.goodman@squirepb.com

(collectively, the Parties)

Background

- A. LMIM is the RE of the FMIF, which is a unit trust registered as a managed investment scheme under Chapter 5C.2 of the *Corporations Act 2001* (Cth).
- B. Whyte is the person appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution and as receiver of the property of the FMIF, pursuant to the

- (f) a month means a calendar month;
- (g) if the date for the performance of any act or thing falls on a Saturday, Sunday or public holiday in Brisbane, then the date for performance will be the next business day following that date;
- (h) a reference to a Party, part, clause, annexure or schedule is a reference to a Party, part, clause, annexure or schedule to this Deed as modified or varied from time to time;
- (i) references to any Party to this Deed include its executors, administrators, substitutes, nominees, agents, successors and permitted assigns;
- (j) a reference to writing includes a facsimile or e-mail transmission and any means of reproducing words in a tangible and permanently visible form;
- (k) if any term of this Deed is legally unenforceable or made inapplicable, it will be severed or read down but so as to maintain, as far as possible, all other terms of this Deed. This shall apply unless doing so would change the underlying principal commercial purpose of this Deed; and
- (l) no rule of construction will apply to a provision of this Deed to the disadvantage of a Party merely because that Party put forward the provision or would otherwise benefit from it.

2. Effective Date

This Deed is effective on the Effective Date.

3. Conditions Precedent to this Deed coming into effect

3.1 Conditions Precedent

Each of the following is a condition precedent to this Deed coming into effect:

- (a) Whyte receives written advice from his Counsel to the effect that the terms of this Deed are satisfactory. This condition precedent is for the benefit of Whyte only;
- (b) orders are made by the Supreme Court of Queensland to the following effect, or to substantially the same effect as acceptable to Whyte:

That David Whyte as the person appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution and as receiver of the property of the FMIF, pursuant to the orders of the Supreme Court of Queensland made on 21 August 2013 and 17 December 2015, and any further orders which may be made under section 601NF of the Corporations Act 2001 (Cth) in due course concerning the winding up of the FMIF, is justified in settling the

Proceeding on the terms set out in this Deed, and in causing LMIM as RE of the FMIF to enter into and perform this Deed.

This condition precedent is for the benefit of Whyte only.

- (c) Jahani receives written advice from his Counsel to the effect that the terms of this Deed are satisfactory. This condition precedent is for the benefit of Jahani only;

- (d) orders are made by the Supreme Court of Queensland to the following effect, or to substantially the same effect as acceptable to Jahani:

Pursuant to s 424 of the Corporations Act 2001 (Cth), Said Jahani in his capacity as receiver and manager of the assets of LMIM as RE of the CPAIF and the ICPAIF is justified in entering into and performing, and in procuring that the First Defendant and Third Defendant enter into and perform, the Deed.

This condition precedent is for the benefit of Jahani only.

- (e) Trilogy as RE of the WFMIF and Trust Company receive written advice from their Counsel to the effect that the terms of this Deed are satisfactory. This condition precedent is for the benefit of Trilogy as RE of the WFMIF and Trust Company only;

- (f) orders are made by the Supreme Court of Queensland to the following effect, or to substantially the same effect as acceptable to Trilogy as RE of the WFMIF and Trust Company:

Pursuant to s.96 of the Trusts Act 1973 (Qld), the second and fifth defendants are justified in entering into and performing the Deed.

This condition precedent is for the benefit of Trilogy as RE of the WFMIF and Trust Company only;

- (g) orders are made by the Supreme Court of Queensland giving authority for the Interim Distribution to be made from the FMIF Fund in an amount of at least 30 million dollars. This condition precedent is for the benefit of Whyte only; and

- (h) the Interim Distribution is made from the FMIF Fund in an amount of at least 30 million dollars. This condition precedent is for the several benefit of the Relevant Defendants.

3.2 Time for fulfilment of the Conditions Precedent

- (a) The Conditions Precedent in clauses 3.1(a), 3.1(c) and 3.1(e) of this Deed must be fulfilled, or waived, by 14 December 2018. Each of:
- (i) Whyte (as to clause 3.1(a));
- (ii) Jahani (as to clause 3.1(c)); and

- (iii) Trilogy as RE of the WFMIF and Trust Company (as to clause 3.1(e)),
must provide notice in accordance with clause 8.6 of this Deed to each of the other Parties of the fulfilment, non-fulfilment, or waiver, of these conditions precedent by 14 December 2018.
- (b) Whyte must file applications to seek the orders referred to in clauses 3.1(b) and 3.1(g) above, or provide notice in accordance with clause 8.6 of this Deed to each of the other Parties of the waiver of that Condition Precedent, by 1 February 2019.
- (c) Jahani, and Trilogy and Trust Company, must, respectively, file applications to seek the orders referred to in clauses 3.1(d) and 3.1(f), or provide notice in accordance with clause 8.6 of this Deed to each of the other Parties of the waiver of those Conditions Precedent, by 1 February 2019.
- (d) The Parties must utilise their best endeavours to ensure that the applications for the orders referred to in clauses 3.1(b), (d), (f) and (g) are heard by 15 March 2019.
- (e) Each of:
 - (i) Whyte (as to clause 3.1(b) and (g));
 - (ii) Jahani (as to clause 3.1(d)); and
 - (iii) Trilogy as RE of the WFMIF and Trust Company (as to clause 3.1(f)),must within 7 days after the date on which the Court delivers its judgment(s) in respect of the applications referred to in clauses 3.1(b), (d), (f) and (g) provide notice in accordance with clause 8.6 of this Deed to each of the other Parties of the fulfilment, non-fulfilment, or waiver, of these Conditions Precedent.
- (f) The time for the fulfilment or waiver of the Condition Precedent in clause 3.1(h) of this Deed expires 3 weeks after the date on which the Court delivers its judgment in respect of the application referred to in clause 3.1(g). Each of the Relevant Defendants must provide notice in accordance with clause 8.6 of this Deed to each of the other Parties of the fulfilment, non-fulfilment, or waiver, of this Condition Precedent.

3.3 Notification of the applications referred to in clause 3.1(b), (d) and (f)

Whyte, Jahani, Trilogy and Trust Company must promptly notify each other, EY and the liquidator of LMIM of their respective applications for the orders referred to in clauses 3.1(b), (d) and (f) of this Deed.

Tucker & Cowen Solicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase

4 December 2018

Your reference: Mr Tiplady / Mr Walsh

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

Email: atiplady@russellslaw.com.au
jwalsh@russellslaw.com.au

Principals.
Richard Cowen.
David Schwarz.
Justin Marschke.
Daniel Davey.

Consultant.
David Tucker.

Special Counsel.
Geoff Hancock.
Alex Nase.
Brent Weston.
Marcelle Webster.

Dear Colleagues

Associates.
Emily Anderson.
James Morgan.
Scott Hornsey.
Robert Tooth.
Paul Armit.
Wesley Hill.

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015

We refer to your letter dated 29 November 2018.

In this letter "proof of debt process" means the process under the 17 December 2015 Orders ("December Orders"), of your client calling for and adjudicating upon proofs of debt in the liquidation of LMIM, and notifying our client of any Creditor Indemnity Claims (within the meaning of that term in the December Orders).

It is important that the proof of debt process is completed in a timely manner so that an application to Court can be made for approval of an interim distribution to FMIF members.

Your letter said that the MPF Trustees had confirmed that they would not be pressing any indemnity claim against the FMIF; are we and our client to understand from that, that your client has determined that the Liquidator and LMIM will not make any Creditor Indemnity Claim with respect to the proofs of debt lodged by KordaMentha Pty Ltd as trustee of the LM Managed Performance Fund ("MPF Proofs")? Please confirm if that is the case, as soon as possible by return.

As to the remaining proofs, your letter then says that "we have requested additional information to determine those claims where sufficient information did not exist to either confirm the claim against FMIF or the quantum of any such claim." If we understand your letter correctly, it appears that the requests for information have been made by you, and we therefore assume they are not formal requests for further evidence within the meaning of Regulation 5.6.53(3) of the Corporations Regulations 2001. However, if we are mistaken in that assumption, and your client (the liquidator of LMIM) has, in fact, required further evidence for the purposes of regulation 5.6.53, please let us know.

We have assumed, from the context of your letter, that the requests for additional information relate to proofs of debt lodged by creditors other than the MPF Trustees, but please let us know if the MPF Trustees have been requested to provide additional information.

Your letter informs us that the due date for the requests for information to be responded to is on or before 14 December 2018.

In circumstances where your client has issued requests for information, and has specified a due date of 14 December 2018 for responses, it would be reasonable to expect that your client could adjudicate on proofs of debt within the 28 day period

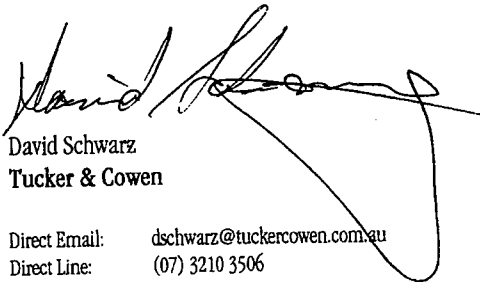
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provided by Regulation 5.6.53 of the *Corporations Regulations* 2001, notwithstanding that formal request by a creditor may not have been made.

In all the circumstances, would you please confirm that your client will adjudicate on the proofs of debt by 11 January 2019 and will notify our client of any Creditor Indemnity Claims on or before 25 January 2019 in accordance with paragraph 6(a) of the December Orders?

In the absence of such confirmation (or other sufficient comfort that the proof of debt process will be completed in a timely manner), we hold instructions to seek appropriate directions from His Honour at the hearing on 10 December 2018 to ensure that the proof of debt process is completed in a timely manner.

Yours faithfully



David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

Individual liability limited by a scheme approved under Professional Standards Legislation.

David Schwarz

From: Hugh Copley <Hugh.Copley@asic.gov.au>
Sent: Wednesday, 5 December 2018 12:37 PM
To: Julian Walsh; Ashley Tiplady; David Schwarz
Cc: Patricia Hu; Carl Sibilica
Subject: RE: In the Matter of LM Investment Management Limited (in Liquidation) (Receivers Appointed) [BS3508/2015] [SEC=UNCLASSIFIED]

Dear Sirs,

I refer to the above matter and acknowledge receipt of the further affidavit material filed on behalf of Mr Park, as well as the affidavit of Mr Whyte.

I note that Mr Walsh, of Russells, contacted ASIC yesterday afternoon – leaving a phone message for the writer before speaking to Ms Hu of ASIC's Insolvency Practitioners stakeholder team.

Ms Hu has advised me that Mr Walsh informed her that:

1. the purpose of Mr Park's application under section 90-15 of Schedule 2 of the *Corporations Act 2001* is to defer Mr David Whyte's remuneration;
2. Mr Whyte has received remuneration in excess of \$11 million, and has made a further application (last week) for approval of approximately \$1.9 million for the last six months;
3. Mr Park had engaged counsel in relation to his application; and
4. counsel had asked that ASIC be contacted to provide support for Mr Park's application.

For the avoidance of doubt, ASIC's position – in respect of Mr Park's application (**Application**) and Mr Whyte's latest remuneration application (**remuneration application**) – is as follows:

- A. As foreshadowed in my earlier correspondence, copied to the parties, ASIC will not be seeking to be heard on the Application.
- B. ASIC raised two queries of Mr Park's solicitors, in respect of the Application, which were answered by Mr Walsh's letter dated 18 November 2018; which effectively restated the matters set out in the correspondence exhibited to Mr Park's affidavit.
- C. Having reviewed the material filed in respect of the Application (by Mr Park and Mr Whyte), ASIC does not seek to take a position which supports or opposes the relief being sought by Mr Park, save for the following observations:
 - i. it is concerning if Mr Park's motivation – for filing the Application – is to prevent Mr Whyte from seeking such remuneration as might properly be incurred by him in his capacity as the person charged with the responsibility of winding up the FMIF; and
 - ii. ASIC's principle concern, bearing in mind that the parties to the proceeding have a prima facie right of indemnity for their fees and expenses, is that the assets of the FMIF be maximised for the benefit of unitholders and that what remains of those assets be returned to unitholders in a timely way, with as little duplication of work and expense as is reasonably possible.
- D. Having reviewed the remuneration application and the material filed in support of that application, ASIC will not be seeking to be heard on the remuneration application. That is to say, ASIC has no objection to the relief being sought by Mr Whyte in the remuneration application. This is consistent with ASIC's position in respect of each of the previous applications for remuneration filed by Mr Whyte.

Yours sincerely,

Hugh Copley
Litigation Counsel Qld, Chief Legal Office

Australian Securities and Investments Commission

Level 20, 240 Queen Street, Brisbane, 4000
Tel: +61 7 3867 4892
Mobile: 0434 565 199
hugh.copley@asic.gov.au



From: Julian Walsh <JWalsh@russellslaw.com.au>
Sent: Sunday, 18 November 2018 5:01 PM
To: Hugh Copley <Hugh.Copley@asic.gov.au>; Ashley Tiplady <atiplady@russellslaw.com.au>;
dschwarz@tuckercowen.com.au
Cc: Patricia Hu <Patricia.Hu@asic.gov.au>; Carl Sibilila <Carl.Sibilila@asic.gov.au>
Subject: RE: In the Matter of LM Investment Management Limited (in Liquidation) (Receivers Appointed)
[BS3508/2015] [SEC=UNCLASSIFIED]

Dear Colleagues

Attached is our 18 November 2018 letter.

Yours faithfully

RUSSELLS

Julian Walsh
Special Counsel

Direct 07 3004 8836
Mobile 0449 922 233
JWalsh@RussellsLaw.com.au



Liability limited by a scheme approved under professional standards legislation

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Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: Hugh Copley <Hugh.Copley@asic.gov.au>
Sent: Friday, 16 November 2018 1:13 PM
To: Julian Walsh <JWalsh@russellslaw.com.au>; Ashley Tiplady <atiplady@russellslaw.com.au>;
dschwarz@tuckercowen.com.au
Cc: Patricia Hu <Patricia.Hu@asic.gov.au>; Carl Sibilila <Carl.Sibilila@asic.gov.au>
Subject: In the Matter of LM Investment Management Limited (in Liquidation) (Receivers Appointed)
[BS3508/2015] [SEC=UNCLASSIFIED]

Dear Sirs,

I refer to the application in the above proceeding, which I note is returnable (for directions) on 19 November 2018 (**the Application**). I refer also to the affidavit of Mr Park (sworn 10 November) which was served upon ASIC on 12 November.

I am instructed to advise that ASIC will not be appearing at the hearing on 19 November, nor are there any particular directions that ASIC might ask be made at that hearing. Can the parties please provide ASIC with any orders arising from the 19 November hearing and any further material sought to be relied upon?

As to the final determination of the Application, I am instructed that ASIC does not wish – unless required by the Court – to take a formal role in the Application. These instructions are motivated by the finite resources at ASIC's disposal and by ASIC's desire (consistent with ASIC's position taken in the Dalton proceeding and subsequent appeal) not to further erode the likely return to the unitholders of the FMIF and/or the creditors of the LM Group of companies, by seeking the costs associated with any such involvement.

With these instructions in mind, ASIC is anxious to understand what, if any, assistance it might be able to provide to the Court on the Application. In this regard, can Russells please respond to the following matters, which spring to mind having reviewed the Application and Mr Park's affidavit?

First, why does Mr Park assert that Justice Dalton's orders – appointing Mr Whyte to take responsibility for winding up the FMIF – should be revisited and/or be limited in the manner contemplated by the Application? Is it simply that "the potential conflicts identified by Dalton J ... no longer exists", which appears to be the thrust of paragraphs 1 and 6(a) of the Finalisation Strategy identified in the Russells letter of 3 October 2018?

Second, the Russells letter of 3 October does not appear to traverse Mr Whyte's 'proposal' contained in the Tucker & Cowen letter of 27 September, save by enunciating the Finalisation Strategy which appears to be the subject of the Application. What is Mr Park's position in respect of Mr Whyte's proposal?

Yours sincerely,

Hugh Copley

Litigation Counsel Qld, Chief Legal Office

Australian Securities and Investments Commission

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hugh.copley@asic.gov.au



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Tucker & Cowen Solicitors.

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Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase

5 December 2018

Your reference: Mr Tiplady / Mr Walsh

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Justin Marschke.
Daniel Davey.

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Associates.
Emily Anderson.
James Morgan.
Scott Hornsey.
Paul Armit.
Wesley Hill.

**Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015**

We refer to your letter dated 29 November 2018, which referred to our letter to you of 26 November 2018.

In this letter "proof of debt process" means the process under the 17 December 2015 Orders ("December Orders"), of your client calling for and adjudicating upon proofs of debt in the liquidation of LMIM, and notifying our client of any Creditor Indemnity Claims (within the meaning of that term in the December Orders).

Your letter suggests that there is some lack of clarity in relation to the costs of the proof of debt process. While we and our client do not think the December Orders or our client's position are lacking in clarity, for the avoidance of doubt, we are instructed to write to you as follows.

Matters of principle

1. Your client (the liquidator) is plainly entitled to be indemnified from the property of the FMIF (upon approval of the Court) for both remuneration and expenses for work relating to the proof of debt process in connection with the FMIF; as to that:-
 - (a) Paragraph 18 of the December Orders is very clear that your client is entitled to be paid, from the property of the FMIF, his appropriate remuneration for attending to the work required by the December Orders in connection with the FMIF, as approved by the Court from time to time; and
 - (b) Consent orders were made on 18 July 2018 to the effect that (in addition to their remuneration under paragraph 18 of the December Orders) your clients are entitled to claim their reasonable costs and expenses of carrying out the work they or LMIM are required to do under the December Orders in connection with the FMIF (not being the subject of a claim already made under the December Orders), in such amounts as are approved by the Court from time to time.
2. His Honour plainly intended that the Liquidators are entitled to claim remuneration and reasonable costs and expenses for their work in undertaking the proof of debt process, in so far as that work concerns the FMIF, from the property of the FMIF. His Honour has made that clear, and our client has made it equally clear that his understanding of the December Orders.

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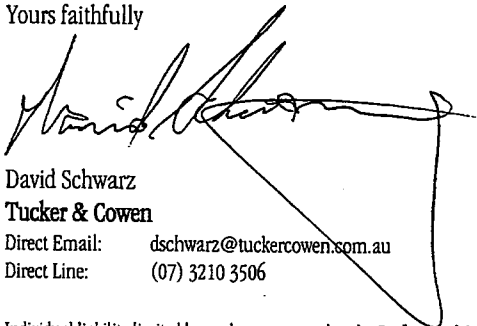
3. Our respective clients have each acknowledged (and the December Orders and Order made on 18 July 2018 are clear) that the fixing of the remuneration of your clients in connection with undertaking the proof of debt process, and the payment of their expenses from the property of the FMIF in connection with that process, are each matters that require the approval of the Court. It is therefore not appropriate for Mr Whyte (as Court-appointed receiver of the property of the FMIF) to commit himself now to any fixed position regarding the payment of particular amounts to your clients from the property of the FMIF, in advance of that work being done and an application being made.
4. That said, as you know, it is our client's preliminary view that, as a matter of principle:-
 - (a) Where legal advice is sought by your client, it is likely that it will concern a particular fund, in which case the costs of that advice would presumably be in connection with that fund and should be allocated and claimed accordingly; and
 - (b) Your client's costs and remuneration in respect of the proof of debt process generally (but excluding legal costs allocated as mentioned in paragraph (a) above) could be claimed from the property of the "funded funds" (that is, those funds that have or are likely to have property from which indemnity might be sought), including the FMIF, on a *pari passu* basis. While our client notes that this apportionment is not necessarily apt to other claims for indemnity from fund assets, it appears appropriate for the purposes of the 'general' costs of the proof of debt process. We are not sure that the "funded funds" are limited to the FMIF, AIF and ASPF, and might include the Feeder Funds, but that is not something that needs to be immediately resolved.

Quantum of remuneration & expenses of proof of debt process

5. Your client has estimated that the total "general" remuneration and costs of the proof of debt process are unlikely to exceed \$50,000 (excluding GST); that estimate was recorded in the Terms of Agreement, and our client has not been informed of any change to that estimate. If the estimate has changed, please tell us.
6. Assuming that the costs and remuneration sought by your clients are in line with that estimate, and subject of course to your client's application being made and supported by appropriate material, we are instructed that Mr Whyte does not expect to oppose or participate in any such application by your client for their remuneration and expenses.

We trust that our client's position is clear. Please do not hesitate to contact us if you have any questions.

Yours faithfully



David Schwarz
Tucker & Cowen
Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

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Michelle Voser

From: Jonathan Henry <jhenry@mcgrathnicol.com>
Sent: Wednesday, 5 December 2018 4:54 PM
To: David Whyte; Calypso Lowrey; Ainsley Watt
Cc: Grace Chessman
Subject: RE: LM Term Deposit

Noted David.

We have received consent from DB to retire and we are coordinating execution of the retirement deed (which has been agreed).

Regards,

Jonathan Henry

Partner



Level 12, 20 Martin Place, Sydney NSW 2000 Australia

T +61 2 9338 2643 M +61 437 092 393

McGrathNicol jhenry@mcgrathnicol.com



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From: David Whyte <David.Whyte@bdo.com.au>
Sent: Wednesday, 5 December 2018 5:44 PM
To: Calypso Lowrey <clowrey@mcgrathnicol.com>; Ainsley Watt <Ainsley.Watt@bdo.com.au>
Cc: Jonathan Henry <jhenry@mcgrathnicol.com>; Grace Chessman <gchessman@mcgrathnicol.com>; Jonathan Henry <jhenry@mcgrathnicol.com>
Subject: RE: LM Term Deposit


Please don't break the deposit. We will wait until the 16th.

Regards

David

DAVID WHYTE
Partner
Direct: +61 7 3237 5887
Mobile: +61 413 491 490
David.Whyte@bdo.com.au

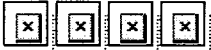
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From: Calypso Lowrey <clowrey@mcgrathnicol.com>

Sent: Wednesday, 05 December 2018 4:41 PM

To: Ainsley Watt <Ainsley.Watt@bdo.com.au>

Cc: Jonathan Henry <jhenry@mcgrathnicol.com>; Grace Chessman <gchessman@mcgrathnicol.com>; David Whyte <David.Whyte@bdo.com.au>; Jonathan Henry <jhenry@mcgrathnicol.com>

Subject: RE: LM Term Deposit

Hi Ainsley

Trust advised that if the term deposit was to be broken **today**, LM would receive \$67,039,729.45 and the breakage cost would be \$30,023.97.

Please contact me if you have any further queries or wish to discuss.

Kind regards

Calypso

Calypso Lowrey

Senior Accountant



Level 12, 20 Martin Place, Sydney NSW 2000 Australia

T +61 2 9338 2619

McGrathNicol clowrey@mcgrathnicol.com



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From: Calypso Lowrey

Sent: Tuesday, 4 December 2018 4:44 PM

To: 'Ainsley Watt' <Ainsley.Watt@bdo.com.au>

Cc: Jonathan Henry <jhenry@mcgrathnicol.com>; Grace Chessman <gchessman@mcgrathnicol.com>; David Whyte <David.Whyte@bdo.com.au>; Jonathan Henry <jhenry@mcgrathnicol.com>

Subject: RE: LM Term Deposit

Thank you Ainsley – I understand and will keep you updated.

Trust have advised that they contacted Suncorp this morning, and are awaiting a response.

Kind regards

Calypso

Calypso Lowrey

Senior Accountant



Level 12, 20 Martin Place, Sydney NSW 2000 Australia

T +61 2 9338 2619

McGrathNicol clowrey@mcgrathnicol.com



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From: Ainsley Watt <Ainsley.Watt@bdo.com.au>

Sent: Monday, 3 December 2018 5:34 PM

To: Calypso Lowrey <clowrey@mcgrathnicol.com>

Cc: Jonathan Henry <jhenry@mcgrathnicol.com>; Grace Chessman <gchessman@mcgrathnicol.com>; David Whyte <David.Whyte@bdo.com.au>

Subject: LM Term Deposit

Hi Calypso,

We require \$2m for payments, plus an additional \$1m depending on a future judgement, so we would be reinvesting \$64m for one month. I note that would still leave \$800k in the restricted account for other payments.

Please note David does not want to take the money out unless there would be no cost to investors. Please advise before taking any action.

Regards

Ainsley

AINSLEY WATT

Senior Accountant

Direct: +61 7 3173 5564

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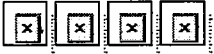
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