

**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 PHILIP RYAN**

I, **PHILIP RYAN** of c/- Level 23, 10 Eagle Street Brisbane in the State of Queensland, managing director, state on oath:-

1. I am the Managing Director of Trilogy Funds Management Limited ("**Trilogy**"). I was a founding director of Trilogy in 1998 and have been a director of Trilogy since that time. I am authorised to swear this Affidavit on behalf of Trilogy.

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Signed: 

**AFFIDAVIT**  
Form 46, R.431

Filed on behalf of the Respondent

Witnessed by: 

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

2. I have been a solicitor for more than 30 years and was a Partner in a Brisbane law firm for 19 years.
3. I am a fellow of the Financial Services Institute of Australasia ("**FINSIA**"), and have qualifications at a post graduate level in mortgage lending and financial services (through FINSIA).
4. My experience in financial services dates back to 1986 in both financial planning and funds management.
5. Trilogy is or has been the responsible entity of various managed investment schemes. Trilogy operates managed investment trusts, direct real property and other assets on behalf of about 14,000 investors.
6. Trilogy is the Responsible Entity of the LM Wholesale First Mortgage Income Fund ("**WFMIF**").
7. The WFMIF holds approximately 21% of the units in the Class B Units in the LM First Mortgage Income Fund ("**FMIF**").
8. Trilogy previously indemnified two named applicants to bring an application to Court to remove LMIM as responsible entity of the FMIF and appoint Trilogy as temporary responsible entity. That application was dismissed by Her Honour Justice Dalton: *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.
9. Trilogy has retained Squire Patton Boggs ("**SPB**") to act for it in relation to Supreme Court of Queensland Proceeding 13534/16 ("**the Feeder Fund Proceeding**"), and in relation to certain matters relating to the winding up of the FMIF. I am informed by Susan Goodman solicitor at SPB and believe that Ms Goodman received a letter from Tucker & Cowen, the solicitors for Mr David Whyte, dated 16 November 2018 enclosing a copy of an application filed by Mr Park in this proceeding on 10 October 2018 ("**the Application**"), and inquiring as to Trilogy's attitude in relation to the Application.

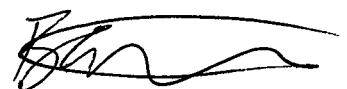
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Witnessed by:



10. On 16 November 2018, I received a copy of the Application from Ms Goodman.
11. I understand that the Application is listed for hearing on 10 December 2018. Whilst Trilogy does not wish to incur the costs of an appearance, it does wish to convey its position in relation to the Application to the Court.
12. I have reviewed: -
  - (a) The Application;
  - (b) The affidavit of Mr Park filed on 12 November 2018 and the Affidavit of Ms Trenfield filed on 28 November 2018 in support of the Application.
  - (c) The affidavit Mr Whyte filed on 3 December 2018, in response to the Application.
13. I have considered what is in the best interests of the unit holders in the WFMIF. I can inform the Court that Trilogy does not support the orders sought in the Application and supports the position taken by Mr Whyte in relation to the Application.
14. The reasons for Trilogy's position, are as follows:
  - (a) Mr Whyte has been keeping Trilogy informed of the progress of his receivership of the FMIF on a regular basis.
  - (b) In my opinion, Mr Park's appointment will in all likelihood lead to unnecessary duplication of costs in the winding up of the FMIF and consequently an erosion of the likely returns to unitholders in the WFMIF. That is because, Mr Whyte has undertaken most of the substantive tasks in the winding up of the FMIF such as asset realisations and legal proceedings to recover funds for FMIF members. Therefore, he is familiar with the issues in the winding up. As far as I am aware, Mr Park has not had the level of involvement in the winding up of the FMIF that Mr Whyte has had.

- (c) The work being conducted by Mr Whyte, such as the claim against the auditors (Supreme Court of Queensland Proceeding 2166/15) and the Bellpac claim (Supreme Court of Queensland Proceeding 12317/14) seem to me to have prospects of achieving significant recoveries for the FMIF and consequently the WFMIF. However, the alterations proposed by the Application carry a risk of impeding that work and those recoveries.
- (d) Mr Park would have conflicts of interest and duty in being appointed to wind up the FMIF. That is because LMIM in its own right has claims against LMIM as Responsible Entity of the FMIF (for which Mr Park claims indemnity out of the Fund). Further conflicts arise where LMIM is the Responsible Entity of FMIF as well as the Responsible Entity of two of the feeder funds, the LM Currency Protected Australian Income Fund and the LM Institutional Currency Protected Australian Income Fund.
- (e) A confidential settlement has been reached at a recent mediation in the Feeder Fund Proceeding. A deed of settlement has been executed by the parties to those proceedings, with the exception of LMIM in its own capacity. The settlement is subject to Court approvals being obtained of the settlement by various parties. Mr Park is not a party to this settlement. Trilogy is of the opinion that the settlement of the Feeder Fund Proceedings is in the best interest of the unitholders in the WFMIF. Trilogy is concerned that if Mr Park is directed to act as contradictor of the Feeder Fund Proceeding, as sought by the Application, the settlement may be derailed to the detriment of the unitholders in the WFMIF. That is because if the settlement does not go ahead then the parties to the Feeder Fund Proceeding will be required to participate in those proceedings, incurring costs of at least three and maybe four sets of lawyers which will ultimately reduce the returns to unit holders of the funds including the WFMIF.

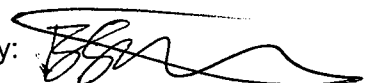
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Signed:



Witnessed by:



(f) In the interests of avoiding duplication and minimising costs to FMIF members (and consequently for the unitholder in the WFMIF) and conflicts of interest, Trilogy is supportive of an order being made appointing Mr Whyte as special purpose Liquidator of LMIM in relation to its role as responsible entity of the FMIF, should the Court consider that appropriate.

15. 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 **PHILIP RYAN** on the 7<sup>th</sup> day of December 2018 at Brisbane in the presence of:



**Deponent**



**Solicitor/A Justice of the Peace**

**Ben Steven Nearhos**  
**Solicitor**