

**SUPREME COURT OF QUEENSLAND**

REGISTRY: Brisbane

NUMBER: S3383 of 2013

**IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) IN  
ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME  
FUND ARSN 089 343 288**

**ACN: 077 208 461**

Applicants: **RAYMOND EDWARD BRUCE AND VICKI PATRICIA  
BRUCE**  
**AND**

First Respondent: **LM INVESTMENT MANAGEMENT LIMITED (IN  
LIQUIDATION) ACN 077 208 461 IN ITS CAPACITY AS  
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE  
INCOME FUND**  
**AND**

Second Respondent: **THE MEMBERS OF THE LM FIRST MORTGAGE INCOME  
FUND ARSN 089 343 288**  
**AND**

Third Respondent: **ROGER SHOTTON**  
**AND**

Intervener: **AUSTRALIAN SECURITIES & INVESTMENTS  
COMMISSION**

**ORDER**

Before: Mullins J  
Date: 22 February 2019  
Initiating document: Interlocutory Application filed 1 February 2019

THE ORDER OF THE COURT IS THAT:

- Under rule 116 and/or rule 1.8 of Schedule 1A of the *Uniform Civil Procedure Rules* 1999 (Qld) ("**UCPR**"), service of this application on the members of the FMIF be effected by:
  - posting a notice substantially in the form of Annexure A to this Order (the Notice) to the website "lmfmif.com" (**the Website**);

**Order**

Form 59 R.661

Filed on behalf of David Whyte

**Gadens Lawyers**

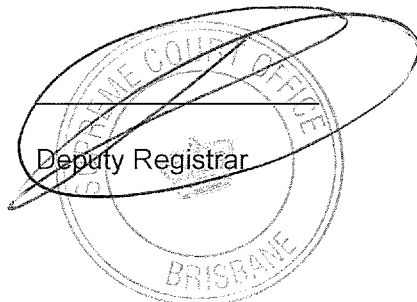
Level 11, 111 Eagle Street

Brisbane QLD 4000

Phone No: 07 3231 1666

- (b) sending a copy of the Notice to all members of the FMIF by each member's preferred method for distribution of notices recorded on the FMIF's register of members, maintained by BDO on behalf of Mr Whyte;
  - (c) in relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the email address of a financial advisor, service is to be effected by sending the Notice to the financial advisor by email and identifying in the email the member to whom the Notice is directed;
  - (d) in relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the postal address of a financial advisor, service is to be effected by sending the Notice by post addressed to the member "care of" the postal address of the financial advisor.
2. Under rule 116(3) and/or rule 1.8 of Schedule 1A of the UCPR, service of this application be deemed to have been effected on each of the members of the FMIF ten (10) days after orders 2(a) to 2(d) above have been complied with.
3. Under rule 116 and/or rule 1.8 of Schedule 1A of the UCPR:
  - (a) except for service of this application under paragraph 1 of this order, service by Mr Whyte of documents to be served on the members of the FMIF in relation to this application (including any affidavits or submissions) be effected by Mr Whyte causing such documents to be posted to a password-protected section of the Website;
  - (b) the password to access the password-protected section of the Website be disclosed to the members of the FMIF by the Notice, in the place provided for that disclosure on the form of notice at Annexure A to this Order.
4. Under rule 116(3) and/or rule 1.8 of Schedule 1A of the UCPR, service of any documents referred to in paragraph 4 above be deemed effected on each of the members of the FMIF five (5) day after the documents are posted to the Website pursuant to order 4 above.
5. The application filed 1 February 2019 be listed for hearing before Mullins J on the civil list on 2 May 2019.
6. Any party or member of the FMIF has liberty to apply on two days' notice in writing.
7. Costs reserved.

Signed:



## ANNEXURE A

### TO THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (RECEIVER APPOINTED) ("FMIF")

TAKE NOTICE that David Whyte, as the person appointed pursuant to section 601NF of the *Corporations Act 2001* (Cth) 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 (**Mr Whyte**), has applied to the Supreme Court of Queensland for directions as to whether he is justified:-

1. in settling Supreme Court of Queensland Proceedings 13534 of 2016 ("**the Feeder Fund Proceedings**") on the terms set out in a Deed of Settlement and Release as varied by a Deed of Variation ("**the Deed of Settlement**");
2. in causing LM Investment Management Limited (in liquidation) (**LMIM**) as responsible entity of the FMIF (receiver appointed) to enter into and perform the Deed of Settlement.

The Feeder Fund Proceedings are proceedings that were commenced by Mr Whyte in the name of LMIM as responsible entity of the FMIF, seeking relief which:

- (a) would permit Mr Whyte and/or LMIM to withhold further distributions to the LM Currency Protected Australian Income Fund ARSN 110 247 875 (**CPAIF**), the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 (**WFMIF**) and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (**ICPAIF**) to the extent of the value of redemptions that were allowed in their favour at a time when redemptions were suspended other than in circumstances of hardship, namely between 11 May 2009 and 31 January 2013. Mr Whyte alleges that these redemptions had been allowed by LMIM without power under the constitution and/or in breach of trust. Relief is also sought to authorise Mr Whyte to reinstate those redeemed units to the CPAIF, the ICPAIF and the WFMIF;
- (b) would authorise Mr Whyte to cancel the further units issued to each of the CPAIF, the WFMIF and the ICPAIF between 1 July 2011 and 1 November 2012 as the purported reinvestment of income distributions, at a time when there was no Distributable Income of the FMIF. Mr Whyte alleges that these distributions were without power and in breach of trust;
- (c) would provide for adjustments for consequential overpayment or underpayment of capital distributions made in February and June 2013.

The Feeder Fund Proceedings are defended by Trilogy Funds Management Limited as responsible entity of the WFMIF (**Trilogy**), and by Mr Said Jahani as the receiver and manager of the assets and undertakings of the CPAIF and the ICPAIF (**Mr Jahani**). Each of them disputes that LMIM as RE of the FMIF is entitled to any of the relief sought in the Feeder Fund Proceedings.

On 4, 5 and 20 November 2018, Mr Whyte participated in a mediation of the Feeder Fund Proceedings that was also attended by representatives of Trilogy and by Mr Jahani.

The mediation was successful, and Mr Whyte, Mr Jahani and Trilogy have agreed terms of settlement that are documented in the Deed of Settlement. Those terms are subject to a number of conditions precedent, including that the Court make the directions sought by this application.

**This application is set down to be heard by the Supreme Court of Queensland at Brisbane on [date] at [time].**

On 22 February 2019, the Supreme Court of Queensland ordered that service of this application may be made by giving the members of the FMIF this notice in accordance with the requirements of the order. The Court ordered that service of other documents may be made by causing them to be posted to the FMIF's website [www.lmfimif.com](http://www.lmfimif.com).

Copies of the court documents in respect of the application, including a copy of the Deed of Settlement, will be made available on the website. Court documents will be made available progressively, as and when they are filed with the Court.

The password to access the material on the website is [\_\_\_\_\_].

Any member who reasonably requires a hard copy of the application and supporting material should call BDO on +61 7 3237 5999.

Dated: [date]

David Whyte

Court Appointed Receiver