

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

First 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

AND

Second Respondent: SAID JAHANI IN HIS CAPACITY AS RECEIVER AND MANAGER OF THE ASSETS, UNDERTAKINGS, RIGHTS AND INTERESTS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS THE 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

AFFIDAVIT OF ALEXANDER PHILIP NASE

Page 1

Signed:



Witnessed by:



AFFIDAVIT:
Form 46, R.431

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

Filed on behalf of the First Respondent

I, ALEXANDER PHILIP NASE of C/- Level 15, 15 Adelaide Street, Brisbane in the State of Queensland, solicitor, state on oath:-

1. I am a solicitor employed by Tucker & Cowen Solicitors, the solicitors for the First Respondent. I have the day-to-day conduct of this matter under the supervision of Mr David Schwarz, principal of Tucker & Cowen.

Correspondence in Relation to Application

2. Exhibited hereto and marked "APN-8" is a copy of various correspondence between Tucker & Cowen, and Russells the solicitors for the Applicants, in relation to the Application filed on 1 February 2019 ("the Application").
3. Exhibited hereto and marked "APN-9" is a copy of an email from HWL Ebsworth, the solicitors for the Second Respondent, to Tucker & Cowen sent 5 February 2019 stating that they consider directions should not be sought to set the application down for hearing of orders 1 and 2 until they have been given a reasonable amount of time to consider the materials, obtain instructions and ascertain Counsels' availability to appear (if applicable).

Settlement of Feeder Fund Proceeding

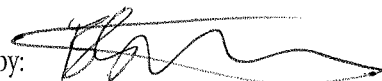
4. I am informed by Mr Whyte, and believe, that:
 - (a) an application seeking orders to the effect that he is justified in entering into and performing the terms of the Deed of Settlement and Release that has been entered into in respect of the Feeder Fund Proceeding (SC 13534 of 2016) has been filed;
 - (b) an application for substituted service orders in respect of that application is listed for hearing before Justice Mullins on 22 February 2019.
5. 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.

Page 2

Signed:




Witnessed by:



Sworn by ALEXANDER PHILIP NASE on the 6th day of February 2019 at Brisbane in the presence of:

Deponent



Solicitor/~~A Justice of the Peace~~

Ben Steven Nearhos
Solicitor

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Second Respondent: SAID JAHANI IN HIS CAPACITY AS RECEIVER AND MANAGER OF THE ASSETS, UNDERTAKINGS, RIGHTS AND INTERESTS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS THE 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

CERTIFICATE OF EXHIBIT

Exhibit "APN-8" to the Affidavit of ALEXANDER PHILIP NASE sworn this 6th day of February 2019



Deponent



Solicitor/A Justice of the Peace

Ben Steven Nearhos
Solicitor

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the First Respondent

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

Renee Maclean

From: Alex Nase
Sent: Friday, 1 February 2019 5:21 PM
To: 'Ashley Tiplady'; Julian Walsh; David O'Farrell; 'Elizabeth Singleton'
Cc: David Schwarz
Subject: FW: LMIM - Supreme Court of Queensland proceeding 3508 of 2015

Dear Colleagues,

We refer to the email from His Honour's Associate below.

Would you please let us know, by no later than midday on Monday, 4 February 2019, whether or not your clients intend to appear on the return date for the service orders and timetabling of the application, and if so, whether either or both of the times proposed in the email from His Honour's Associate are suitable for your client/s?

regards

From: Associate JacksonJ <Associate.JusticeJackson@courts.qld.gov.au>
Sent: Friday, 1 February 2019 4:37 PM
To: Alex Nase <anase@tuckerowen.com.au>
Cc: David Schwarz <dschwarz@tuckerowen.com.au>; David O'Farrell <dofarrell@hwle.com.au>; 'Ashley Tiplady' <atiplady@russellslaw.com.au>; 'Julian Walsh' <JWalsh@russellslaw.com.au>; Elizabeth Singleton <esingleton@hwle.com.au>; comcausemanager <comcausemanager@justice.qld.gov.au>
Subject: RE: LMIM - Supreme Court of Queensland proceeding 3508 of 2015

Good afternoon,

Please be advised that his Honour is available at 10:00AM on 6 February 2019.

Alternatively, if this time is not suitable, his Honour is also available at 9:30AM on 7 February 2019.

Please advise as to whether either of these dates are appropriate.

Kind regards,

Nicholas Traves
Associate to the Honourable Justice David Jackson
Supreme Court of Queensland
P: (07) 3008 8736
E: associate.justicejackson@courts.qld.gov.au



From: Alex Nase [<mailto:anase@tuckerowen.com.au>]
Sent: Friday, 1 February 2019 1:44 PM
To: Associate JacksonJ <Associate.JusticeJackson@courts.qld.gov.au>

Cc: David Schwarz <dschwarz@tuckercowen.com.au>; David O'Farrell <dofarrell@hwle.com.au>; 'Ashley Tiplady' <atiplady@russellslaw.com.au>; 'Julian Walsh' <JWalsh@russellslaw.com.au>; Elizabeth Singleton <esingleton@hwle.com.au>; comcausemanager <comcausemanager@justice.qld.gov.au>
Subject: RE: LMIM - Supreme Court of Queensland proceeding 3508 of 2015

Dear Associate

We act for Mr David Whyte, the First Respondent.

Our client intends to file an application for authority to make an interim distribution to FMIF investors, and for orders in relation to the membership records of the foreign investors in the FMIF. We attach a copy of the proposed application.

Our client is required to file this application today to satisfy a condition precedent to the deed of settlement of Supreme Court proceedings 13534 of 2016 (the Feeder Funds Proceeding).

The application includes orders for the substituted service of the application by our client on the members of the FMIF.

We write to enquire as to His Honour's availability in the course of the coming two weeks to consider the question of substituted service, and to make appropriate directions timetabling the balance of the application for hearing.

We have copied the solicitors for the other parties into this email.

regards

Alex Nase
Special Counsel

E: anase@tuckercowen.com.au
D: 07 3210 3503 | M: 0423 386 195 | T: 07 300 300 00 | F: 07 300 300 33
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001
TCS Solicitors Pty Ltd. | ACN 610 321 509

Tucker&CowenSolicitors.

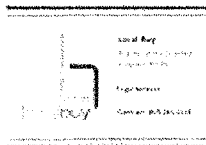
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Renee Maclean

From: Jessie Edge-Williams <jedge-williams@russellslaw.com.au> on behalf of Ashley Tiplady <atiplady@russellslaw.com.au>
Sent: Monday, 4 February 2019 10:48 AM
To: David Schwarz; Alex Nase
Cc: dofarrell@hwle.com.au; esingleton@hwle.com.au; philip.pan@au.kwm.com; Ashley Tiplady
Subject: LM Investment Management Limited (In Liquidation) (Receivers Appointed) - Supreme Court of Queensland Proceeding Number BS3508/2015 - Matter: 20170943
Attachments: 2581320 L - to Tucker & Cowen.pdf

Dear Colleagues

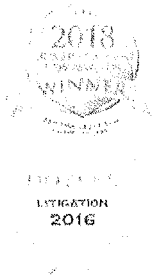
Please refer to our attached correspondence dated 4 February 2019.

Yours faithfully

RUSSELLS

Ashley Tiplady
Partner

Direct 07 3004 8833
Mobile 0419 727 626
ATiplady@RussellsLaw.com.au



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

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RUSSELLS

4 February 2019

Our Ref: AJT:JTW:20170943

Your Ref: Mr Schwarz

Tucker & Cowen
Level 15
15 Adelaide Street
BRISBANE QLD 4000

By Email: dschwarz@tuckercowen.com.au
anase@tuckercowen.com.au

Dear Colleagues

**LM Investment Management Limited (In Liquidation) (Receivers Appointed) ("LMIM")
Supreme Court of Queensland Proceeding Number BS3508/2015**

We refer to Mr Nase's email to the Associate to Justice Jackson on the afternoon of Friday, 2 February 2019 which attached an application dated 1 February 2019 seeking orders which would ultimately lead to the payment of an interim distribution from the property of FMIF of up to \$40M among the members of the FMIF ("**the Application**"). You have also sought to list an interlocutory application for "mechanical service orders" in respect of the Application for hearing later this week.

We understand that our respective clients have been in discussions since late last year in respect of the proofs of debt and claims which have been made by EY (represented by Mr Pan of King & Wood Mallesons, whom we have copied to this correspondence). Our client will continue dealing directly with Mr Whyte on the issues the subject of the correspondence which has recently passed between them.

It would seem uncontroversial that whilst the EY proofs of debt have not yet been adjudicated upon in circumstances where our client has sought further information from EY, the quantum of the one of the EY proofs (being for \$180M in round figures), would totally consume all assets of FMIF. Consequently, dealing with that claim directly impacts upon the appropriateness of any interim distribution being paid from FMIF (noting also the flow on effect in respect of the settlement of the "Feeder Fund Litigation"). This is particularly so in circumstances where there is litigation on foot between FMIF and EY on the very subject matter of the relevant EY proof of debt.

Mr Whyte has been notified that our client considers that the EY proofs will be the subject of an indemnity claim against the assets of the FMIF.

Given all of the above, our client's current view is that the pending court proceeding involving FMIF and EY is likely to provide the appropriate forum for determination of the claims which have been

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RussellsLaw.com.au

made by EY against LMIM (and hence FMIF) (and the proof of debt process is perhaps an inappropriate forum by which that is to occur).

Despite our client being particularly concerned to see money returned to FMIF members as soon as possible, Mr Park is concerned that any application made seeking approval for an interim distribution to be paid from FMIF may be premature pending the outcome of the EY court proceeding. Our client is also conscious of the potential impact upon the settlement of the "Feeder Fund Litigation".

In these circumstances, our client has instructed us to write to you to raise his concerns with a view to there not being further wasted monies spent on advancing an application for approval to pay an interim distribution from FMIF (or associated interlocutory orders) if the true position is as outlined above.

We have copied in all relevant parties so that they too may outline their views on this issue.

We await your prompt response.

Yours faithfully



Ashley Tiplady
Partner

Direct 07 3004 8833
Mobile 0419 727 626
ATiplady@RussellsLaw.com.au

CC: *HWL Ebsworth*
Mr David O'Farrell
dofarrell@hwle.com.au

Ms Elizabeth Singleton
esingleton@hwle.com.au

King & Wood Malletsons
Mr Philip Pan
Philip.Pan@au.kwm.com

20170943/2581320

Renee Maclean

From: Renee Maclean on behalf of Alex Nase
Sent: Monday, 4 February 2019 3:25 PM
To: 'atiplady@russellslaw.com.au'
Cc: 'jwalsh@russellslaw.com.au'; Alex Nase; David Schwarz
Subject: 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
Attachments: Letter to Russells Lawyers 4.02.19.pdf

Dear Colleagues

Please find **attached** correspondence.

Yours faithfully,

Sent on behalf of Alex Nase, Special Counsel

E: anase@tuckercowen.com.au | D: 07 3210 3503 | M: 0423 386 195

by:

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 February 2019

Your reference: Mr Tiplady / Mr Walsh

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

Consultant.
David Tucker.

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

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

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

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

Dear Colleagues

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
Application filed by Mr Whyte on 1 February 2019 for authority to make interim distribution ("the Application")

We refer to your letter dated 4 February 2019.

Our client does not consider that the proof of debt lodged by EY dated 20 December 2018 is a barrier to the making of an interim distribution because the amount claimed in that proof of debt is merely reflective of and is contingent upon, the claim made against EY in proceeding 13534/16 (Auditor's Proceeding) being successful. Even if the proof of debt is admitted and LMIM is entitled to claim indemnity from the FMIF with respect to the proof (which our client doubts), the maximum amount of the proof is limited to and is at best, a set-off against, any judgment against EY in the Auditor's Proceeding.

Accordingly, we are instructed by our client to proceed with the application filed on 1 February 2019 for authority to make an interim distribution to FMIF members ("the Application").

Would you please let us know, by close of business today, whether your client intends to appear at the return of the application for service orders, and if so, whether either or both of the dates proposed in the email from His Honour's Associate of 1 February 2019 are suitable?

Yours faithfully



Alex Nase
Tucker & Cowen

Direct Email: anase@tuckercowen.com.au
Direct Line: (07) 3210 3503

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Renee Maclean

From: Ashley Tiplady <atiplady@russellslaw.com.au>
Sent: Tuesday, 5 February 2019 8:56 AM
To: Alex Nase
Cc: Julian Walsh; David Schwarz; David O'Farrell; Elizabeth Singleton; Pan, Philip (AU)
Subject: 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

Importance: High

Dear Colleague

Your requests for urgent responses are simply unreasonable and impractical.

For example, we are yet to read in detail the material filed by Mr Whyte in respect of the applications which he has made to allow us to advise our client on any aspect/issue.

In any event, at this juncture we will not be appearing at the interlocutory service orders application regarding Mr Whyte's application for approval to pay an interim distribution.

My client is simply without funds to deal with such issues.

Yours faithfully

RUSSELLS

Ashley Tiplady
Partner

Direct 07 3004 8833
Mobile 0419 727 626
ATiplady@RussellsLaw.com.au

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

From: Alex Nase [mailto:anase@tuckerowen.com.au]
Sent: Tuesday, 5 February 2019 8:36 AM
To: Ashley Tiplady <atiplady@russellslaw.com.au>
Cc: Julian Walsh <JWalsh@russellslaw.com.au>; David Schwarz <dschwarz@tuckerowen.com.au>; David O'Farrell <dofarrell@hwle.com.au>; Elizabeth Singleton <esingleton@hwle.com.au>
Subject: 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

Dear Colleagues,

Would you please let us know whether your client intends to appear and if so whether the date proposed is suitable on an urgent basis?

Unless we hear from you by 9:30 am this morning, we intend to send the following email to His Honour's Associate:

Start of Draft Email

Dear Associate

We refer to your email of 1 February 2019.

We advise that 9:30 am on Thursday, 7 February 2019 is suitable for Mr Whyte.

We will leave it to the solicitors for the Liquidator to let you know whether their client intends to appear and if so whether the proposed date is suitable.

End of Draft Email

regards

Alex Nase
Special Counsel

E: anase@tuckercowen.com.au
D: 07 3210 3503 | M: 0423 386 195 | T: 07 300 300 00 | F: 07 300 300 33
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001
TCS Solicitors Pty Ltd. | ACN 610 321 509

Tucker&CowenSolicitors.

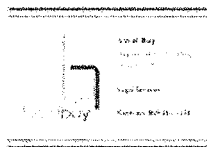
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2019

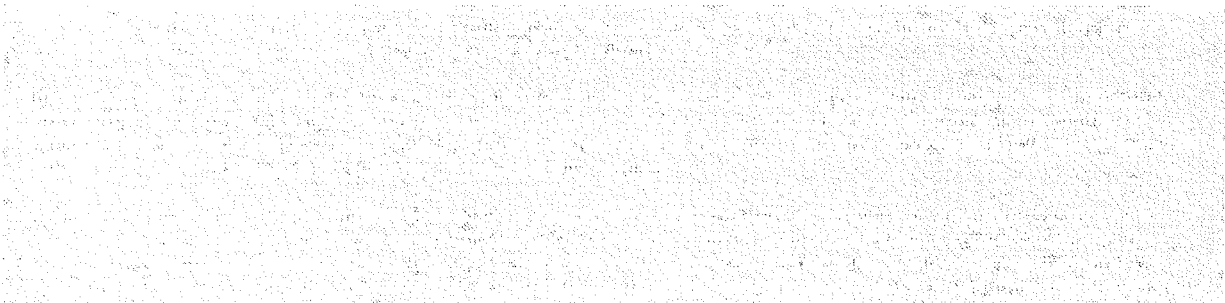
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From: Renee Maclean **On Behalf Of** Alex Nase
Sent: Monday, 4 February 2019 3:25 PM
To: atiplady@russellslaw.com.au
Cc: jwalsh@russellslaw.com.au; Alex Nase <anase@tuckercowen.com.au>; David Schwarz <dschwarz@tuckercowen.com.au>

Subject: 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

Dear Colleagues

Please find **attached** correspondence.

Yours faithfully,

Sent on behalf of **Alex Nase**, Special Counsel

E: anase@tuckercowen.com.au | D: 07 3210 3503 | M: 0423 386 195

by:

Renee Maclean
Personal Assistant

E: RMaclean@tuckercowen.com.au

T: 07 300 300 00 | F: 07 300 300 33

Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001

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Tucker&CowenSolicitors.

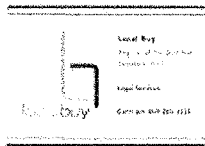
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CERTIFICATE OF EXHIBIT

Exhibit "APN-9" to the Affidavit of ALEXANDER PHILIP NASE sworn this 6th day of February 2019


Deponent


Solicitor/A Justice of the Peace

Ben Steven Nearhos
Solicitor

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the First Respondent

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

Renee Maclean

From: Elizabeth Singleton <esingleton@hwle.com.au>
Sent: Tuesday, 5 February 2019 9:37 AM
To: Alex Nase
Cc: jwalsh@russellslaw.com.au; David Schwarz; David O'Farrell; 'Ashley Tiplady'
Subject: FW: 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 [HWLE-Matter.C076980.683682]
Importance: High

Dear Alex

We are instructed that our client will not appear at the first return date of your client's application filed 1 February 2019 (**Application**). We have not, however, had an opportunity to properly consider the issues that arise from the materials filed by your client, nor have we been served with any affidavit material in support of the Application.

Accordingly, we do not have instructions about whether our client will appear at the substantive hearing and we consider directions should not be sought to have the matter set down for the hearing of orders 1 and 2 until we have been given a reasonable amount of time to consider the materials, obtain instructions and to ascertain Counsels' availability to appear (if applicable).

Kind regards

Elizabeth Singleton
Solicitor



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esingleton@hwle.com.au | www.hwlebsworth.com.au

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From: Ashley Tiplady [mailto:atiplady@russellslaw.com.au]
Sent: Tuesday, 5 February 2019 8:56 AM
To: Alex Nase
Cc: Julian Walsh; David Schwarz; David O'Farrell; Elizabeth Singleton; Pan, Philip (AU)
Subject: 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
Importance: High

Dear Colleague

Your requests for urgent responses are simply unreasonable and impractical.

For example, we are yet to read in detail the material filed by Mr Whyte in respect of the applications which he has made to allow us to advise our client on any aspect/issue.

In any event, at this juncture we will not be appearing at the interlocutory service orders application regarding Mr Whyte's application for approval to pay an interim distribution.