

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 1146/20

Applicant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461 AS
RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND ARSN 089 343 288**

AND

First Respondent: **PETER CHARLES DRAKE**

AND

Second Respondent: **LISA MAREE DARCY**

AND

Third Respondent: **EGHARD VAN DER HOVEN**

AND

Fourth Respondent: **FRANCENE MAREE MULDER**

AND

Fifth Respondent: **SIMON JEREMY TICKNER**

ORIGINATING APPLICATION

To the Respondents: TAKE NOTICE that the applicant is applying to the Court for the following orders:

At the First Court Hearing

1. Pursuant to Rule 116 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the **UCPR**), that service of this application on the members of the FMIF be effected as follows:
 - (a) by posting a notice substantially in the form of Annexure A to this Order (the **Notice**) to the website "lmfmif.com" (the **Website**);
 - (b) by 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

ORIGINATING APPLICATION
Filed on Behalf of the Applicant
Form 5, Version 1
Uniform Civil Procedure Rules 1999
Rule 26

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No: 07 3231 1666
Fax No: 07 3229 5850
Ref: 201401822

effected by sending the Notice by post addressed to the member "care of" the postal address of the financial advisor.

2. Pursuant to Rule 116(3) of the UCPR, that service of this application be deemed to have been effected on each of the members of the FMIF five (5) days after orders 1(a) to 1(d) above have been complied with.
3. Such further or other orders or directions as the Court sees fit.
4. That the Originating Application be adjourned to a date to be fixed.

At the Second Court Hearing

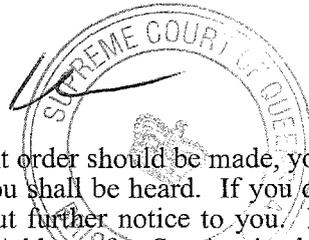
5. Pursuant to section 96 of the *Trusts Act 1973*, alternatively pursuant to section 601NF(2) of the *Corporations Act 2001*, alternatively pursuant to the inherent jurisdiction of the Court, an order that Mr Whyte is and was justified in making and pursuing the Notice of Appeal number 14258 of 2019 dated 20 December 2019 in respect of the Judgment of the Supreme Court of Queensland in *LM Investment Management Ltd (receiver appt) (in liq) v Drake & Ors* [2019] QSC 281 on behalf of the Applicant in this proceeding.
6. That Mr Whyte's costs of and incidental to this application be costs in the winding up of the FMIF, to be paid out of the assets of the FMIF.
7. Such further or other orders or directions as the Court sees fit.

This application will be heard by the Court at Brisbane on: 14/02/2020 at 10 am.

Filed in the Brisbane Registry on:

31 JAN 2020

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. In addition you may before the day for hearing file a Notice of Address for Service in this Registry. The Notice should be in Form 8 to the Uniform Civil Procedure Rules. You must serve a copy of it at the applicant's address for service shown in this application as soon as possible.

On the hearing of the application the Applicant intends to rely on the following affidavits:

1. Affidavit of David Whyte sworn 30th January 2020 (in relation to substituted service).
2. Affidavit of Scott Couper sworn 31st January 2020.
3. Affidavit of David Whyte to be sworn
4. Affidavit of Scott Couper to be sworn.

If you intend on the hearing to rely on any affidavits they must be filed and served at the applicant's address for service prior to the hearing date.

The application is brought by Mr Whyte in his representative capacity, namely as receiver appointed pursuant to the order of Justice Dalton made on 8 August 2013.

THE APPLICANT ESTIMATES THE HEARING ON THE FIRST COURT DATE SHOULD BE ALLOCATED 30 MINUTES

PARTICULARS OF THE APPLICANT:

Name: 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

Applicant's residential or business address: C/- Mr David Whyte, BDO, Level 10, 12 Eagle Street, Brisbane Qld 4000

Applicant's solicitors name: Mr Scott Couper
and firm name: Gadens Lawyers
Solicitor's business address: Level 11, 111 Eagle Street, Brisbane Qld 4000
Address for service: As above
Telephone: 07 3231 1666
Fax: 07 3229 5850

Signed: 
Description: Solicitor for the Applicant
Dated: 31/01/2020

This application is to be served on: Peter Charles Drake
C/- Bartley Cohen
Level 22, Riverside Centre
123 Eagle Street
Brisbane QLD 4000

And on: Lisa Maree Darcy
C/- Rodgers Barnes & Green
Level 10, 300 Adelaide Street
Brisbane QLD 4000

And on: Eghard Van Der Hoven
C/- James Conomos Lawyers
Level 12, 179 Turbot Street
Brisbane QLD 4000

And on: Francene Maree Mulder
C/- James Conomos Lawyers
Level 12, 179 Turbot Street
Brisbane QLD 4000

And on: Simon Jeremy Tickner
C/- HW Litigation
PO Box 1221
Southport QLD 4215

And on:

The members of the LM First Mortgage Income
Fund

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 Mr Whyte is and was justified in making and pursuing the Notice of Appeal number 14258 of 2019 dated 20 December 2019 in respect of the Judgment of the Supreme Court of Queensland in *LM Investment Management Ltd (receiver appt) (in liq) v Drake & Ors* [2019] QSC 281 (the **Director Proceedings Judgment**) on behalf of the Applicant in this proceeding”

The Director Proceedings Judgment concluded proceedings numbered 12317 of 2014 (the **Director Proceedings**) commenced by Mr Whyte in the name of LMIM as responsible entity of the FMIF seeking:

- (a) an order that the first to sixth defendants pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of certain legal proceedings together with interest;
- (b) further interest;
- (c) costs.

A trial was held in the Director Proceedings on 1 April 2019 to 9 April 2019.

The Director Proceedings Judgment was delivered by His Honour Justice Jackson on 22 November 2019.

His Honour Justice Jackson dismissed the Plaintiff's claim and the Plaintiff was ordered to pay the costs of the first, second, third, fourth and sixth defendants on a standard basis.

The Director Proceedings did not proceed as against the Fifth Defendant.

The Seventh Defendant was granted leave to withdraw from the proceedings by order dated 28 April 2016. A decision as to the costs of the Seventh Defendant is pending.

The claim as against the Eighth Defendant was settled prior to trial with no order as to costs.

Mr Whyte filed a Notice of Appeal of the decision on 20 December 2019 (proceedings 14258 of 2019). The Appeal timetable is currently on hold pending this application for directions.

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

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

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

Dated:

David Whyte - Court Appointed Receiver