

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

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

AFFIDAVIT OF DAVID WHYTE

I, DAVID WHYTE of Level 6, 10 Eagle Street, Brisbane in the State of Queensland, Official Liquidator, state on oath:-

1. I am an Official Liquidator and a Partner of the firm BDO. I am an affiliate member of the Institute of Chartered Accountants of Australia and an associate member of the Australian

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Signed: 

Witnessed by: 

AFFIDAVIT:
Form 46, R.431

TUCKER & COWEN
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Level 15
15 Adelaide Street
Brisbane, Qld, 4000.
Tele: (07) 300 300 00
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Filed on behalf of the Applicant, Mr David Whyte

Restructuring, Insolvency and Turnaround Association (ARITA) (formerly known as the Insolvency Practitioners Association of Australia).

2. By Orders of this Honourable Court made in this proceeding on 8 August 2013 (the "Orders") I was appointed:
 - (a) pursuant to section 601NF(1) of the *Corporations Act 2001* (Cth) (the Act) to take responsibility for ensuring that the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") is wound up in accordance with its Constitution; and
 - (b) pursuant to section 601NF(2) of the Act, as the receiver of the property of the FMIF.
3. I intend to make an application for the approval of my remuneration for acting as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution for the period 8 August 2013 to 31 March 2014.
4. In the performance of my duties as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution, I have had and continue to have access to certain books and records of the FMIF. The statements made by me concerning the FMIF in this affidavit concern matters known to me on the basis of my inspection and knowledge of those books and records.
5. I am seeking orders from the Court that *inter alia*:

"1. That service on the members of the FMIF of the application filed on May 2014 for approval of Mr Whyte's remuneration ("the Application") and the supporting affidavit of Mr Whyte sworn on 2 May 2014 ("the Affidavit") be effected by:

- (a) posting in a prominent place on the website "lmfmif.com" ("the Website"):
 - (i) a notice substantially in the form of Annexure A to this application ("the Notice");

(ii) *the Application and the Affidavit; and*

(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.*

...

3. *That service of the Application and the Affidavit be deemed effected on each of the members of the FMIF five (5) days after those documents are posted in a prominent place on the Website;*

4. *That service on the members of the FMIF of any further affidavits filed in the Court on Mr Whyte's behalf in support of the Application be effected by the method in subparagraph 1(a) above.*

5. *That service of any affidavits referred to in paragraph 4 above be deemed effected on each of the members of the FMIF five (5) days after those documents are posted in a prominent place on the Website;*

...

7. *That all further applications for approval of the remuneration of Mr Whyte be served in accordance with these orders."*

The FMIF

6. The FMIF was registered as a managed investment scheme on 28 September 1999.

7. LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461 ("LMIM") is and has been the responsible entity of the FMIF since its inception.

8. In about 2003 LMIM entered into a General Services Agreement with LM Administration Pty Ltd (In Liquidation) ("LMA"), pursuant to which LMA agreed to provide certain services to LMIM.

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Witnessed by:



These services included the employment of staff to manage the business, the provision of equipment and management and administration to meet the needs of the business. In addition to the General Services Agreement, LMIM entered into management agreements with LMA for a number of loans including those in respect of which the FMIF holds security. Under these agreements, LMA provided services relating to the general management and administration of each loan, as well as in relation to property development and construction and sales and marketing services.

9. The members of the FMIF subscribed capital for investment purposes. FMIF's investment activities consisted of advancing funds to borrowers under loan agreements on the security of first registered mortgages over real property situated in Queensland and other states and territories. The assets of the FMIF consist of its rights against borrowers under these loan agreements and mortgages.
10. All of the loans are in default and were in default at the date of my appointment.
11. The FMIF has over 4,500 members. Of these, about 700 are located in Queensland, about 3000 are located in various other locations across Australia, and about 800 are located outside Australia.

Communications with FMIF Investors

12. I am informed by Simon Tickner, a consultant for LMA, and believe, that, prior to my appointment:
 - (a) LMIM maintained a website www.lmaustralia.com (the "LMIM website");
 - (b) LMIM used the LMIM website to provide members with information and updates regarding the various funds that it managed, including the FMIF; and
 - (c) the information posted on the LMIM website included general news, disclosure statements and financial reports regarding the FMIF.

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Witnessed by:



13. The LMIM website is currently controlled by Mr John Park and Ms Ginette Muller, the liquidators of LMIM. However, it displays very limited information on the FMIF.
14. According to the books and records of the FMIF, prior to my appointment LMA (by the liquidators of LMIM) maintained a website, www.lminvestmentadministration.com, although it displays very limited current information.
15. Shortly after my appointment, I set up a third website www.lmfimf.com (the "FMIF website") to enable me to provide members of the FMIF with information and updates as to the winding up of the FMIF. I have posted various documents on the FMIF website including the Orders, the reasons for judgment of the Honourable Justice Dalton delivered in this proceeding on 8 August 2013, and reports to the members of the FMIF as to the winding up of the FMIF.
16. The LMIM website contains a link to the FMIF website and has contained such a link since shortly after the date of establishment of the FMIF website.
17. Since my appointment, I have provided reports to the members of the FMIF dated 27 August 2013, 15 October 2013, 4 December 2013, and 19 February 2014.
18. I do not hold the register of members for the FMIF. The register of members is held by the investor relations staff of LMA. In accordance with the order of this Court pursuant to which I was appointed, I am permitted access to information concerning the members of FMIF. The investor relations staff of LMA are cooperative, and have provided me with the name and contact details, including the preferred method for distribution of notices for each member of the FMIF as noted on the register of members.
19. I have distributed my reports to all of the members of the FMIF in accordance with the preferred method for distribution of notices recorded for each member on the register of members. About 25% of members have nominated an email address as their preferred method for distribution of notices, and about 75% of members have nominated a street or postal address as their preferred method of distribution of notices.

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Witnessed by:



20. In my report to members dated 27 August 2013, I advised that updated reports along with other information with respect to the winding up of the FMIF would be posted on the FMIF website.
21. In my reports to members dated 15 October 2013, 4 December 2013, and 19 February 2014, I provided a summary of my remuneration; advised that approval of my fees would be subject to an application to the Court in due course; that a copy of the application would be posted on the FMIF website; and that members would be notified when the application had been filed.

Costs of service of application and supporting material

22. In order to serve my application for approval of my remuneration and supporting affidavit on each of the approximately 4,500 members of the FMIF, I would need to outsource the task of printing and compiling all of the relevant material given the size of the material and the number of members.
23. I estimate that the cost of outsourcing the printing of the application and supporting affidavit (including exhibits), and of serving the application and supporting affidavit to be about \$45,000.00.
24. Given that there are approximately 4,500 members of the FMIF, it would in my assessment be impracticable, costly and time consuming to effect ordinary service of the application and supporting affidavit on each member of the FMIF in accordance with the manner of ordinary service prescribed by the *Uniform Civil Procedure Rules 1999 (Qld)*.

Service

25. Given that:
- (a) a notice of the application for approval of my remuneration will be sent to each member of the FMIF in accordance with the preferred method of distribution of notices for that member as recorded in the FMIF's register of members;
 - (b) I have used the FMIF website during the course of my appointment to communicate with and make information available to the members of the FMIF;

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Witnessed by:



- (c) I have advised the members of the FMIF in my reports dated 15 October 2013, 4 December 2013, and 19 February 2014 that a copy of the application will be posted on the FMIF website,


I verily believe that by notifying the members of the FMIF of the application and serving the application and supporting affidavit in the manner sought in this application, the fact of the application for approval of my remuneration will come to the attention of the members of the FMIF.

26. 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 2nd day of May 2014 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

Alexander Philip Nase
Solicitor