

Duplicate

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**

ORDER

Before: Kelly J
Date: 18 April 2024
Initiating document: Application filed 12 April 2024

THE ORDER OF THE COURT IS THAT:-

1. Service of the Application filed 12 April 2024 in this proceeding (the **Application**) on the members of the FMIF (including the Applicant and the Third Respondent) be effected by:

- (a) posting a notice (the **Notice**) to the website "lmfmif.com" (the **Website**) substantially in the form contained in Annexure A to these Orders;



ORDER
Form 59 R.661

Filed on behalf of Mr David Whyte

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COWEN SCHWARZ MARSCHKE
Lawyers
Level 8, 300 George Street
Brisbane, Qld, 4000.
Tele: (07) 300 300 00
Fax: (07) 300 300 33

- (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 Register.
2. Service of the Application be deemed to have been effected on each of the members of the FMIF five (5) days after orders 1(a) to (b) has been complied with.
3. Service on members of the FMIF of any documents (including any affidavits or submissions) in relation to the Application be effected as follows:
 - (a) For any documents relied upon by Mr Whyte, by Mr Whyte causing such documents to be uploaded and posted to the Website; and
 - (b) For any documents relied upon by Mr Park, by Mr Park serving those documents on Mr Whyte and Mr Whyte uploading and posting such documents to the Website.
4. Service of any documents referred to in paragraph 3 above be deemed effected on each of the members of the FMIF five (5) days after all the documents are uploaded and posted to the Website pursuant to order 3 above.
5. Any person wishing to be heard in relation to the orders sought by the Application is to file and serve a Form 4 Notice of Appearance on Mr Whyte by no later than 13 May 2024.

THE COURT DIRECTS THAT:-

6. By no later than 29 April 2024, Mr Whyte file and serve any further affidavit(s):
 - (a) identifying and supporting his claim for approval of his remuneration under paragraph 3(c) of the orders of Dalton J made on 21 August 2013, from 1 May 2022 to 29 February 2024;
 - (b) providing and supporting his estimate of his remuneration (including future remuneration), identifying the tasks required to be performed and the estimated remuneration for such tasks, from 1 March 2024 to the conclusion of his appointments under section 601NF of the Act;

- (c) providing and supporting his estimate of his anticipated expenses or liabilities, identified the anticipated expenses and their estimated amount, that will arise after payment of the final distribution to the members of the FMIF.
7. By no later than 13 May 2024, any party who wishes to be heard at the hearing of the Application, including Mr Park and LMIM, file and serve any further affidavit material on which they intend to rely at the hearing of the Application, as well as a short statement summarising the grounds, if any, on which they oppose the relief sought by the Application.
 8. By no later than 20 May 2024, Mr Whyte file and serve a written outline of submissions in support of the relief sought by the Application at the second return date.
 9. By no later than 23 May 2024, Mr Park and LMIM file and serve any written outline of submissions in relation to the relief sought by the Application at the second return date.
 10. Paragraphs 3 to 9 of the orders of Justice Callaghan dated 15 October 2020 do not apply to the Application.
 11. The orders of P Lyons J made on 1 June 2015 (as amended by orders of Mullins J made on 17 December 2019) do not apply to Mr Whyte's remuneration application.
 12. The Application be listed for a further hearing of paragraphs 14 to 30 of the Application, to be heard together with Mr Park's remuneration and expenses application filed in BS3508 of 2015, on 27 May 2024.

Signed:


Deputy Registrar



Annexure A

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

This is an important notice. You should read it carefully and in full.

This document gives notice of two applications:

1. An application in Supreme Court of Queensland Proceeding No. 3383 of 2013 for directions to finalise the winding up of the FMIF, brought by Mr David Whyte as the receiver of the property of the FMIF and the person appointed pursuant to section 601NF(1) of the *Corporations Act 2001* (Cth) to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution (the **finalisation application**); and
2. An application in Supreme Court of Queensland Proceeding No. 3508 of 2015 by Mr John Richard Park, the liquidator of LM Investment Management Limited (in liquidation) (receivers and managers appointed) ACN 077 208 461 (“**LMIM**”), for determination of his remuneration and approval of his expenses to be paid from the property of the FMIF (the **liquidator remuneration application**).

The finalisation application and the liquidator remuneration application will both be heard by the Supreme Court in Brisbane on **27 May 2024** at 10.00am. Further details regarding your rights to appear at and participate in the hearing are set out at the end of this Notice.

Mr Whyte’s application for authority to make a final distribution to members of the FMIF

Mr Whyte is seeking orders granting him authority to make a further and final distribution of all of the remaining property of the FMIF to members. Mr Whyte will be permitted to withhold from that distribution only an amount, to be determined by the Court at the hearing of the finalisation application, necessary to meet unpaid or anticipated final expenses of the FMIF.

To ensure prompt receipt of their entitlement to the final distribution, all members should ensure that their contact details and bank account details are current.

Any payments that are unclaimed or undistributed, or that are returned in circumstances where Mr Whyte does not have up to date payment details, will not be retained by Mr Whyte, but will instead be remitted to ASIC as unclaimed monies.

It will remain possible for members to apply to ASIC to recover any unclaimed monies to which they were entitled, however, the consideration and determination of any claim to recover unclaimed monies from ASIC will be ASIC’s sole responsibility. Mr Whyte will have no further involvement or responsibility in that process.

Mr Whyte’s application for approval of his remuneration to be paid from the FMIF

The orders sought in the finalisation application also include orders relating to Mr Whyte’s further remuneration from 1 May 2022 through to the conclusion of the winding up of the FMIF.

Mr Park's application for approval of his remuneration and expenses to be paid from the FMIF

Mr Park, as the liquidator of LMIM, the responsible entity of the FMIF, has applied to the Supreme Court of Queensland for:

1. the determination of his remuneration as liquidator of the Second Applicant:-
 - (a) for the period from 1 December 2021 to 31 January 2024, in the sum of \$132,482.90 (including GST); and
 - (b) for the period 1 February 2024 to the date for finalisation of the winding up of the FMIF, in the sum or sums up to the amount of \$55,000 (including GST);
2. an order permitting him to be paid that remuneration of \$132,482.90 (including GST) and a sum or sums up to the amount of \$55,000 (including GST) from the scheme property of the FMIF;
3. an order that pursuant to the orders of Justice Jackson made on 17 December 2015, as varied on 18 July 2018, the Court approve the claim by Mr Park for payment of the sum of \$451,342.18 from the property of the FMIF being for legal costs and interest charges and expenses the Liquidator has incurred in connection with LMIM acting as responsible entity for the FMIF;
4. an order that Mr Whyte shall pay the sum of \$451,342.18 from the property of the FMIF to the applicants (or as they may direct in writing);
5. an order that the applicants' costs of this Application, as agreed by the applicants and Mr Whyte or otherwise assessed, be paid on the indemnity basis from the property of the FMIF;
6. such further or other orders as this Honourable Court deems fit.

Mr Whyte's application for discharge and release from claims

Mr Whyte is seeking orders granting him, BDO, its partners, employees and agents a discharge and release from any and all claims against him whatsoever and howsoever arising in connection with his appointments under section 601NF of the Act in respect of the FMIF.

If this release and discharge is granted by the Court, it will take effect immediately upon payment of the final distribution. The effect will be that no member of the FMIF, or any other party, will be permitted to bring a claim against Mr Whyte for his work under his appointments in relation to the winding up of the FMIF.

Other orders sought by Mr Whyte in the finalisation application

The further orders sought in the finalisation application include the following:

1. That LMIM is not required to prepare or have audited final accounts of the FMIF, other than as required under ASIC Instrument 24-0114, issued on 1 March 2024. In the alternative, that such an audit be limited to the period from the start of the financial year in which the winding up is concluded, to the conclusion of the winding up.
2. That Mr Whyte is justified in causing LMIM to discontinue Supreme Court proceedings 11560/16, which claimed damages against LMIM, in circumstances where LMIM has no remaining assets, and where there is no longer any need to rely on the clear accounts rule as a defence to a claim by LMIM against the FMIF.

3. That Mr Whyte is justified in paying cash income distributions recorded in the “*Distributions Payable*” (20400) ledger of the FMIF for the November and December 2010 distribution periods, to the members entitled to those distributions.
4. That Mr Whyte is justified in seeking to pay other outstanding amounts recorded in the “*Distributions Payable*” (20400), the “*Investor Funds Payable (Redemptions)*” (20401) and the “*Returned Investor Payments*” (20003) liability ledgers of the FMIF, but otherwise taking no further steps in relation to those liabilities apart from assessing claims received from members, and paying claims which are determined to be valid.
5. That Mr Whyte is justified in taking no further steps in relation to the amounts recorded in the “*Trade – Settlements Payable / Receivable*” (20040) and “*Other Payables*” (20001) liability ledgers of the FMIF.

Procedural matters

The finalisation application and the liquidator remuneration application (the **Applications**) will both be heard by the Court on **27 May 2024** at 10.00am.

Directions have already been made for the conduct of both applications by the Court on 18 April 2024.

In relation to the finalisation application:

1. Any member of the FMIF is entitled to appear and be heard on the finalisation application, if they wish. If you wish to do so, you must file a Notice of Appearance in Form 4 to the Rules for Proceedings under the *Corporations Act 2001* which are in Schedule 1A of the *Uniform Civil Procedure Rules 1999*; and serve a copy of that notice on Cowen Schwarz Marschke, the solicitors for Mr Whyte, at their office at Level 8, 300 George Street, Brisbane, QLD 4000, or by email to dschwarz@csmlawyers.com.au and anase@csmlawyers.com.au.
2. Copies of all court documents, including the directions made by the Court on 18 April 2024 and any further affidavit or submission filed in the finalisation application, will be available on the website www.lmfimf.com.
3. Any member who reasonably requires a hard copy of any of the Applications and supporting material should call BDO on +61 7 3237 5999.
4. Members will not be sent any further email or correspondence notifying them of either of the Applications.

In relation to the liquidator remuneration application:

1. If you intend to appear at the hearing of the liquidator remuneration application, you will need to file and serve your Notice of Appearance, any material on which you intend to rely at the hearing, and a short statement summarising any grounds on which you oppose the relief sought in any of the Applications, by 13 May 2024.
2. The members of the FMIF are not respondents to the application but any member is entitled to be heard in the application if they wish. Any member who wishes to appear and to make submissions at the hearing of the application must file a Notice of Appearance in Form 4 to the Rules for Proceedings under the *Corporations Act 2001* which are in Chapter 23 of the *Uniform Civil Procedure Rules 1999*; and serve a copy of that notice on Russells, the

solicitors for John Richard Park as liquidator of LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ACN 007 208 461 the Responsible Entity of the LM First Mortgage Income Fund ARSN 089 343 288, at their office at Level 18, 300 Queen Street, Brisbane, QLD 4000. Tel. +61 7 3004 8888 Fax +61 1 3004 8899 E-mail: service@russells.au.

3. Copies of the application and other court documents filed in the relation to the liquidator remuneration application will be available on the website www.lminvestmentadministration.com.
4. Any member who reasonably requires a hardcopy of the application and other court documents should call Russells Lawyers on +61 7 3004 8888.

This notice is given pursuant to an order of the Supreme Court of Queensland made on 18 April 2024, which will constitute service on you of the finalisation application and the liquidator remuneration application.

David Whyte
Court appointed Receiver of FMIF

John Park
Liquidator of LMIM

Dated: 18 April 2024