

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: 27 May 2024
Initiating document: Application filed 12 April 2024



ORDER
Form 59 R.661

Filed on behalf of Mr David Whyte

338313(3)

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THE ORDER OF THE COURT IS THAT:-

1. That Mr David Whyte (**Mr Whyte**) be authorised and empowered to exercise the powers of, and is responsible for the obligations of, LMIM as the responsible entity of the FMIF:
 - (a) as set out in clause 16.7(c) of the constitution of the FMIF, to make a further and final distribution of the property of the FMIF, as soon as reasonably practicable after the making of these orders by this Honourable Court;
 - (b) as set out in clause 16.8 of the constitution of the FMIF and as required by section 601NG of the Act, to pay or transfer any unclaimed or undistributed money or other property that was part of the scheme property, including any returned payments from members of the FMIF for whom Mr Whyte does not have up to date payment details, to ASIC to be dealt with pursuant to Part 9.7 of the Act.

2. That Mr Whyte be authorised:
 - (a) to withhold the amounts identified in paragraph 14 below, and such other amounts ordered by this Honourable Court including in relation to Mr Park's remuneration and expenses application in BS 3508 of 2015, insofar as those amounts have not yet been paid, from the final distribution to the members of the FMIF made in accordance with paragraph 1(a) above;
 - (b) otherwise not to withhold any other amount from the final distribution made to the members of the FMIF in accordance with paragraph 1(a) above, on any account whatsoever.

3. That LMIM is not required to prepare or have audited, under clause 16.10 of the constitution of the FMIF, final accounts of the FMIF, other than as required under ASIC Instrument 24-0114.

4. That LMIM as RE of the FMIF is not liable in the winding up of the FMIF to pay any liability not notified to Mr Whyte under the orders made on 17 December 2015 by 27 May 2024, or as provided for by these orders.

5. Upon making the final distribution referred to in paragraph 1(a) above, that:
 - (a) Mr Whyte be discharged as the receiver of the property of the FMIF; and
 - (b) Mr Whyte, BDO, its partners, employees and agents forthwith be discharged and released forthwith from any and all claims whatsoever and howsoever arising in connection with Mr Whyte's appointments under section 601NF of the Act in respect of the FMIF.

6. That Mr Whyte be discharged from his appointment as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution and the orders of the Court under section 601NF(2) of the Act, upon the completion of the following steps:
 - (a) making the final distribution referred to in paragraph 1(a) above;
 - (b) paying any unclaimed or undistributed money or other property, including any returned payments, referred to in paragraph 1(b) above, to ASIC; and
 - (c) publishing unaudited final accounts as required by ASIC Instrument 24-0114.

7. That Mr Whyte notify the Court once the winding up of the FMIF has been completed, by filing an affidavit deposing to the taking of the steps required by orders 6(a) to (c), and annexing the unaudited final accounts of the FMIF.

Judicial Advice

8. That Mr Whyte is justified causing LMIM as RE of the FMIF to discontinue Supreme Court of Queensland Proceeding 11560/16.

9. As to the amounts recorded in the Distributions Payable (20400) ledger of the accounts of the FMIF, that Mr Whyte is justified:
 - (a) seeking to pay the amounts that represent the income distributions payable in cash for the November 2010 and December 2010 distribution periods to the members or former members identified in the ledger as entitled to the distribution;

- (b) seeking to pay the amounts that represent other unpaid income distributions payable to the members or former members identified by BDO from the ledger, and referred to in paragraphs 155 to 159 of the affidavit of David Whyte sworn 9 April 2024;
 - (c) otherwise, having sent a notice on 26 April 2024 to all current members of the FMIF requesting any member who believes that they are entitled to a distribution to come forward and provide relevant supporting documentation by 24 May 2024:
 - (i) in respect of all claims received from members by 24 May 2024, assessing those claims and paying those which he determines to be valid;
 - (ii) in the event of a dispute, applying to relist the matter for directions as to the resolution of the claim prior to the final distribution being made; and
 - (iii) paying the remaining balance of the ledger to ASIC as unclaimed or undistributed money to be dealt with pursuant to Part 9.7 of the Act.
10. As to the amounts recorded in the Investor Funds Payable (Redemptions) (20401) ledger of the FMIF, that Mr Whyte is justified:
- (a) seeking to pay the amounts that represent unpaid hardship or other redemption entitlements payable to the members or former members identified by BDO from the ledger, and referred to in paragraphs 177 to 180 of the affidavit of David Whyte sworn 9 April 2024;
 - (b) otherwise, having sent a notice on 26 April 2024 to all current members of the FMIF requesting any member who believes that they are entitled to a distribution to come forward and provide relevant supporting documentation by 24 May 2024:
 - (i) in respect of all claims received from members by 24 May 2024, assessing those claims and paying those which he determines to be valid;

- (ii) in the event of a dispute, applying to relist the matter for directions as to the resolution of the claim prior to the final distribution being made; and
 - (iii) paying the remaining balance of the ledger to ASIC as unclaimed or undistributed money to be dealt with pursuant to Part 9.7 of the Act.
- 11. As to the amounts recorded in the Returned Investor Payments (20003) ledger of the FMIF, that Mr Whyte is justified:
 - (a) seeking to pay the amounts that represent returned redemption payments or other amounts payable to the members or former members identified by BDO from the ledger, and referred to in paragraphs 181 to 184 of the affidavit of David Whyte sworn 9 April 2024;
 - (b) otherwise, having sent a notice on 26 April 2024 to all current members of the FMIF requesting any member who believes that they are entitled to a distribution to come forward and provide relevant supporting documentation by 24 May 2024:
 - (i) in respect of all claims received from members by 24 May 2024, assessing those claims and paying those which he determines to be valid;
 - (ii) in the event of a dispute, applying to relist the matter for directions as to the resolution of the claim prior to the final distribution being made; and
 - (iii) paying the remaining balance of the ledger to ASIC as unclaimed or undistributed money to be dealt with pursuant to Part 9.7 of the Act.
- 12. That Mr Whyte is justified in not taking any further steps in relation to, and in not paying, the amounts recorded in the following ledgers of the FMIF:
 - (a) Trade – Settlements Payable / Receivable (20040); and
 - (b) Other payables (20001).

Approval of Mr Whyte's Remuneration

13. That Mr Whyte's remuneration from 1 May 2022 to 29 February 2024, be approved and fixed in the amount of \$1,181,293.30.
14. As to Mr Whyte's remuneration (including future remuneration) for the period from 1 March 2024:
 - (a) that Mr Whyte be authorised to draw up to \$511,500 for remuneration for time spent by him and by employees of BDO performing work in carrying out Mr Whyte's appointments under section 601NF of the *Corporations Act*, up to the payment of the final distribution; and
 - (b) that Mr Whyte be authorised to withhold an amount from the final distribution on account of work to be done in relation to his appointments under section 601NF of the *Corporations Act* after making the final distribution, fixed in the sum of \$82,500.
15. That Mr Whyte have liberty to apply.

Confidential Affidavit of David Whyte

16. The Affidavit of David Whyte sworn 21 May 2024 (filed by leave on the date of this Order) be placed in a sealed envelope and marked "Confidential – not to be opened or made available to any person for inspection or copying without an order of the Court".

Costs of Application

17. The parties 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 on an indemnity basis.

Signed: _____

Deputy Registrar

