

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicant: RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE

AND

First Respondent: LM INVESTMENT MANAGEMENT LIMITED
(ADMINISTRATORS APPOINTED), 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

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:-
 - (a) A registered and official liquidator; and
 - (b) A partner in the firm of BDO.

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Signed: 

Witnessed by: 

AFFIDAVIT:
Form 46, R.431

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

Filed on behalf of the Respondent

2. On or about 29 April 2013, I was asked to consent to be appointed by the Court to take responsibility for ensuring that the LM First Income Mortgage Fund ASRN 089 343 288 (“the Fund”), is wound up in accordance with its constitution. I have sworn a consent to do so.
3. I have no prior involvement with the Fund, its responsible entity or its related entities.
4. I swear this affidavit in response to the affidavit of Mr. Paul Wood.
5. On 21 November 2011, I was appointed by this Court as the responsible person to wind up another registered managed investment scheme, the Equititrust Income Fund (“EIF”). Prior to my appointment, Equititrust Limited was the responsible entity for EIF and the manager of a separate unregulated fund called the Equititrust Premium Fund (“EPF”).
6. In brief summary:
 - (a) Equititrust limited acted as responsible entity of the EIF.
 - (b) Equititrust held an AFSL;
 - (c) Equititrust Limited acted as manager of the EPF, an unregulated wholesale fund (and I was not appointed to the EPF);
 - (d) The EIF made loans secured mostly by first mortgages;
 - (e) The EPF made loans, secured mostly by second mortgages;
 - (f) Often the EIF and EPF held a first and second mortgage position respectively;
 - (g) Equititrust Limited in its own right also made loans, often in conjunction with either the EIF, EPF or both;
 - (h) EIF and EPF operated by making loans which were secured respectively by first and second mortgage positions over properties in South Australia, New South Wales and Queensland;

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- (i) Equititrust Limited maintained professional indemnity and Directors & Officers insurance, as a condition of its AFSL;
- (j) Mr. Albarran and Mr. Pleash of Hall Chadwick are liquidators of Equititrust Limited, whilst Ferrier Hodgson are its receivers (appointed by NAB);
- (k) I am appointed to conduct the winding up of EIF, which I have been doing since 21 November 2011;
- (l) Mr. Peldan and Mr. Cook of Worrells are the appointed receivers of the EPF (appointed by a secured creditor);
- (m) The EIF loan portfolio consisted of 24 loans with a written down value on my appointment of about \$120 million (having been written down prior to my appointment from a value of about \$300 million), for which the secured properties were in Queensland, NSW and South Australia;
- (n) The NAB was the secured lender to the EIF fund and were paid out in full from asset sales, although still retain some security for bank guarantees;
- (o) The winding up is well advanced with the sale of only a few assets remaining, and seven legal actions against valuers, borrowers and guarantors to be resolved;
- (p) I issue reports to investors regularly by posting them on a website (some of which are exhibited to Mr. Wood's affidavit); and
- (q) My fees are approved by this Honourable Court from time to time.

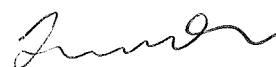
7. The projected return to unit holders in the EIF has been greatly reduced as a consequence of, in general terms, bad loans having been made, and thereafter poor loan management. In many instances, the valuations relied upon were not reliable, or should have not been accepted. In other cases, when loan terms expired, loans were extended without proper consideration being given to whether the loan was performing. In many cases, interest was not being paid, but capitalized, and

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Witnessed by:



property outgoings such as rates and land tax, were unpaid. In most cases, current valuations were not maintained. In my experience, it is not as simple as blaming the global financial crisis.

8. In EIF, I have reimbursed the RE for certain expenses incurred by it, as it was entitled under its constitution. Those expenses were in two categories, being expenses incurred by the RE prior to my appointment and expenses incurred post my appointment. The pre appointment expenses reimbursed by me from the EIF were principally for legal fees associated with recovery of money owed to the EIF or winding up of the Fund, and wages and consultants fees. The post appointment expenses reimbursed by me from the EIF were principally for wages, consultants fees, premises and equipment costs associated with winding up the EIF. None of the reimbursements from EIF were for administrators or liquidators fees or outlays of Hall Chadwick.

Possible Conflicts

9. I have had the opportunity to read the material filed in this matter by the parties and posted on the www.lminvestmentadministration.com website by the administrators for the RE of the Fund ("FTI").
10. I have been asked by the Applicant's solicitors, having regard to my experience with EIF, to describe possible conflicts of interests that may arise between:
- (a) LM Investment Management Limited ("LM") and the Fund; and
 - (b) The Fund and other managed investment funds for which LM acts as responsible entity of.
11. It appears to me that the LM funds are similar in nature to the Equititrust funds and on this basis I expect similar conflicts may arise between the LM and the Fund and the Fund and other LM funds. In the case of the Equititrust funds, this has resulted in litigation as between the funds.
12. I consider that the possible conflicts that may arise to be:
- (a) Conflicts between the RE, the Fund and the other LM funds over:

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Witnessed by:



- (i) joint lending or loan participation where the actions in the best interests of the first mortgagor will not accord with those in the best interests of the second or third mortgagor;
 - (ii) priorities and entitlements to security realisations;
 - (iii) prior transactions that may have treated unit holders differently;
 - (iv) admission or rejection of proofs of debt by the Funds by LM.
- (b) Conflicts with LM over its right to indemnity out of the Fund, prior claims and payments for indemnity from the Fund, and any set offs that may exist;
- (c) Conflicts with LM over the management fees claimed or paid, or to be claimed, from the Fund.
13. I expect there may be joint lending, or loan participation, between various LM funds and the RE itself, such that, for example, the Fund holds a first mortgage position and the LM Managed Performance Fund (“MPF”) (or other funds) holds a second mortgage. Invariably, they will fall into conflict as it is often the case that the second mortgage fund will have no value unless a property is developed out whilst it is in the best interests of the first mortgage fund to sell now and recoup its loan. I appreciate that MPF is now controlled by Korda Mentha after FTI were removed but there are 7 LM managed funds.
14. It has also been my experience that in these situations, the funds may fall into dispute about the priority of payments and entitlements from the proceeds of property sales (as has been the case in a few instances with EIF even with the benefit of a deed of priority).
15. It has also been my experience that where managed investment schemes become insolvent there may be a dispute between the fund and the RE over the RE’s right to indemnity from the fund for expenses incurred. This has occurred with EIF, and is presently the subject of proceedings in this Court (although not pressed by the RE).



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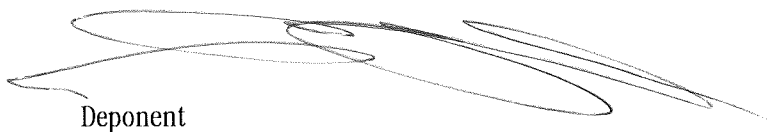


16. My experience has been that, once the winding up of the Fund begins, the responsible entity has no effective functions, tasks or activities to perform in relation to the Fund such that upon appointment of a responsible person by a Court there should be no further claim of indemnity (or very limited one) from the Fund. That has been the case in EIF since the appointment of the administrators (now liquidators) of the RE on 15 February 2012. I have not paid any money from the EIF to its RE since the administrators appointment, either for management fees or pursuant to the right of indemnity. In fact, soon after the administrators appointment, I sought and obtained orders from this Court (with the consent of the RE and other interested parties) to ensure that there was no duplication of responsibilities or costs. Exhibited hereto and marked "DW2" to this affidavit is a copy of the Order of this Honourable Court made 29 February 2012. Since then, I have proceeded to wind up the EIF without reference to the RE.
17. The prospect of LM (or any other RE) claiming a management fee gives rise to a possible conflict as between LM and the Fund.
18. If appointed, I would investigate the prior payment of approximately \$30 million in management fees, loan management fees and receiver's fees paid over the 2011 and 2012 financial years from the Fund, particularly to ascertain if there are any rights of action or recoveries as against LM, related companies or its directors in making or approving these payments.

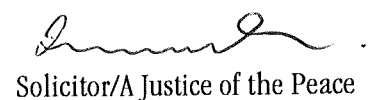
Costs

19. If appointed, I would seek to utilise as much of the existing FTI work product and knowledge as possible, including, current loan realisation strategies and valuations, so as to avoid wasting costs.
20. 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 10th day of July 2013 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicant: RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE

AND

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(ADMINISTRATORS APPOINTED), 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

CERTIFICATE OF EXHIBIT

Exhibit "DW-2" to the Affidavit of DAVID WHYTE sworn this 10th day of July 2013



Deponent



Solicitor/A Justice of the Peace

in DW2

duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: BS 10478 OF 2011

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

Applicant: EQUITITRUST LIMITED ACN 061 383 944

AND

Respondents: THE MEMBERS OF THE EQUITITRUST INCOME FUND ARSN
089 079 854 AND THE MEMBERS OF THE EQUITITRUST
PRIORITY CLASS INCOME FUND ARSN 089 079 729

ORDER

Before: Justice Dalton

Date: 29 February 2012

Initiating document: Application filed 24 February 2012

In this order, "Receiver" means Mr David Whyte, in his capacity as receiver of the property of the Equititrust Income Fund ARSN 089 079 854 (EIF) and as the person responsible for ensuring the EIF is wound up in accordance with its constitution pursuant to the Orders of Justice Applegarth of 21 November 2011 and 23 November 2011 in these proceedings (Orders),

THE COURT DIRECTS THAT:

1. Without derogating in any way from the Receiver's appointment or the Receiver's powers pursuant to the Orders, the Receiver is authorised to:
 - (a) take all steps necessary to ensure the realisation of property of EIF held by Equititrust Limited as Responsible Entity of the EIF (EL as RE of the EIF) by exercising any legal right of EL as RE of the EIF in relation to the property, including but not limited to:
 - (i) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate and/or finalise the sale of the property;
 - (ii) providing a response as appropriate to matters raised by receivers of property of EL as RE of the EIF to which receivers have been appointed;
 - (iii) dealing with any creditors with security over the property of the EIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property;



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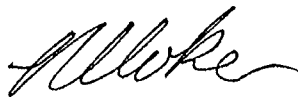
GADENS LAWYERS
Level 25, 240 Queen Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
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- (iv) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
- (v) executing contracts, transfers, releases, or any such other documents as are required to carry out any of the above;
- (b) bring, defend or maintain any proceedings on behalf of EIF in the name of EL as is necessary for the winding up of the EIF in accordance with clause 9 of its constitution, including the execution of any documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions;
- (c) take all steps necessary to effect the implementation of a NAB bank guarantee facility and the replacement of the existing CBA bank guarantee facilities including:
 - (i) providing instructions to solicitors as are necessary to negotiate and finalise the facilities and/or the security documentation required for a replacement bank guarantee facility from the NAB and the repayment of the CBA facilities and the release of any security held by the CBA;
 - (ii) dealing with NAB and CBA direct to provide for the replacement of the bank guarantees and finalise the documentation in relation to same; and
 - (iii) executing any and all facility and/or security documentation on behalf of EL as RE of the EIF or all such other legal documents as are necessary to ensure the security documentation is finalised and the CBA bank guarantee facilities replaced by the NAB bank guarantee facility.

THE ORDER OF THE COURT IS THAT:

2. That the parties appearing on this application, save for ASIC, the National Australia Bank and the receivers Messrs Colwell and Moloney, be paid their costs of and incidental to this Application, to be assessed on the standard basis, out of the EIF.

Signed:



DEPUTY REGISTRAR