

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
(ADMINISTRATORS APPOINTED)
ACN 077 208 461 IN ITS CAPACITY AS
RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND**

AND

Second Respondents: **THE MEMBERS OF THE LM FIRST
MORTGAGE INCOME FUND
ARSN 089 343 288**

Third Respondent: **ROGER SHOTTON**


Intervener: **AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION**

GINETTE DAWN MULLER, Chartered Accountant and Official Liquidator, care of FTI Consulting (Australia) Pty Ltd, 22 Market Street, Brisbane in the State of Queensland, states on oath:

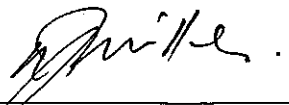
1. Now produced and shown to me and marked "GDM-16" is an indexed paginated bundle of documents to which I shall refer in more detail in this affidavit.

Correction of error in my affidavit of 27 June, 2013

PAGE 1



Signed



Solicitor/Barrister/Justice of the Peace

SECOND AFFIDAVIT OF GINETTE DAWN MULLER

Filed on behalf of the First Respondent
Form 46 Rule 431

Russells
Level 21
300 Queen Street
BRISBANE 4000
Phone: 07 3004 8888
Fax: 07 3004 8899

2. I wish to correct an error in paragraph 53 of my affidavit sworn

27 June, 2013. I should have said:

53. *In the result, my understanding of the terms of the Deutsche Facility was, when I spoke to Mr Tucker, and remains, that, despite LMIM's obligations to reduce the principal to \$28 million after execution of the Override Deed in December, 2012, and then by monthly payments of \$500,000, and despite its entitlement to make partial voluntary repayments of the principal under the Facility, interest is payable on the amounts voluntarily prepaid before 30 June, 2014, ~~unless~~ even if the entire Facility is prepaid before 30 June, 2014.*

3. The error came about principally by oversight. Subclause 4.2(i)(ii) does provide an alternative to the situation in 4.2(i)(i), but the beginning of the clause makes it clear that there is no discount or rebate for interest for early repayments, even if the entire principal is prepaid.

4. That has always been my understanding of the terms of the facility, as I said in paragraph 55 of that affidavit, and as I said to Mr Tucker in our conversation on the evening of 30 April, 2013.

Deutsche Bank AG has appointed receivers

5. Over the last week or more, McGrathNicol have been making inquiries of me and my staff on behalf of their client, Deutsche Bank AG. McGrathNicol has offices throughout Australia and New Zealand and has a substantial secured creditor insolvency practice.

6. On Wednesday, 10 July, 2013, I received information from one of my staff that one of the staff of McGrathNicol had informed him that Deutsche Bank intended to appoint a receiver either that day or the following day.

PAGE 2



Signed

Solicitor/Barrister/Justice of the Peace

7. I immediately instructed our solicitors to write to the other parties which they did by a letter of 10 July, 2013. The letter is at pages 1 to 2 of my exhibits. There was no substantive response to that letter.

8. By a letter dated 11 July, 2013, from Deutsche Bank's solicitors, Clayton Utz to me, Deutsche Bank gave notice that on that day it appointed Mr Hayes and Connelly of McGrathNicol as receivers and managers of the property of the LM First Mortgage Income Fund. We immediately gave notice of that appointment to all of the parties.

9. I anticipate that the appointment of receivers by Deutsche Bank will delay, complicate and render more expensive the administration of the Fund and its winding-up (which I believe is inevitable).

ASIC's Submissions and Affidavits

10. On Friday evening, 12 July, 2013, I received written submissions on behalf of ASIC, and an affidavit of Ms Gubbins and Ms Hayden. That was the first occasion on which I had notice that ASIC would advance the following grounds in support of its claims in these proceedings:-

- (a) The nature of LMIM's response to the application by the Applicants;
- (b) That LMIM has "rejected" an opportunity to wind up LMIM by not entering into an Enforceable Undertaking as proposed by ASIC.

11. Nothing to that effect was stated in the document filed by ASIC, pursuant to the order of 7 May, 2013, entitled "Statement of Grounds of Interlocutory Application" dated 11 June, 2013 (court document 69).

Conduct in resisting the Bruce's Application

12. While this litigation and the numerous claims and counter-claims by the Applicants, Mr Shotton and ASIC, have been distracting, they have not interfered at all with the administration and operation of the Fund or with our duties as administrators of LMIM. There was no action that was either delayed or not taken because of this litigation.

13. The same applies to the meeting of members convened for 30 May, 2013, and adjourned to 13 June, 2013.

Failure to give the Enforceable Undertaking

14. I refer to Ms Hayden's affidavit sworn and served on Friday evening, 12 July, 2013.

15. In the meeting on 23 April, 2013, I do not recall that any suggestion that an Enforceable Undertaking should be given prior to the first return date of the Application by Mr and Mrs Bruce. Had Ms Hayden or Ms Gubbins imposed that requirement, I would have ensured that I complied with it. Following receipt on the evening of 24 April, 2013 of the draft undertaking, we endeavoured to discuss the terms of the undertaking with Mr Copley and Ms Gubbins on the following day (which was Thursday, 25 April, 2013, the Anzac Day Holiday).

16. Since Mr Copley and Ms Gubbins were unavailable on 25 April, I and my advisors concentrated on the drafting of the Notice of Meeting. I telephoned Ms Gubbins on Friday, 26 April, 2013, to ensure that she was comfortable with the administrators dispatching a notice of meeting of members, as we had discussed on Tuesday, 23 April. I do not recall her raising the draft Enforceable Undertaking on

that occasion. She certainly did not say that ASIC required it prior to the return date either on 29 April or the adjourned return date, 2 May, 2013.

17. On Friday afternoon, 26 April, 2013, I was informed by Mr Russell that he had just spoken to Ms Gubbins, that he had discussed some concerns about the terms of undertaking with Ms Gubbins; that ASIC was supporting the Administrators and our proposal that a meeting of members should be held before the application by Mr and Mrs Bruce was considered. I subsequently received an email from him, confirming this agreement, which is at page 10 of my exhibits.

18. Following receipt of Mr Russell's email of Friday afternoon, 26 April, 2013, my understanding was as follows:-

- (a) the court proceedings had somehow been moved from 29 April, to 2 May;
- (b) ASIC was content that a meeting of members had been convened;
- (c) ASIC had, through Ms Gubbins' conversation with Mr Russell that afternoon, confirmed that it was intervening in the proceedings, that it would support LMIM's application for the proceedings to be adjourned until after the meeting of members and there was no urgency in responding to ASIC in respect of the draft Enforceable Undertaking;
- (d) Given that the applicants had not served the proceedings on the members of the Fund, and they were seeking directions in that regard, there would be no substantive hearing on 2 May, 2013.

19. I refer to paragraph 31 of Ms Hayden's affidavit. I have never given instructions to Mr Russell either that Mr Park and I were unwilling to sign any Enforceable Undertaking, or the draft Enforceable Undertaking received on 24 April, 2013; and I have never given him any instructions to make any such communication to ASIC.

20. On the contrary, we continued to work on the undertaking. I received an email from Mr Russell on Sunday, 28 April, 2013. It is at page 11 to 12 of my exhibits.

21. As he recorded, Mr Park and I had not yet decided whether to wind up the Fund, or whether to appoint a new responsible entity.

22. By this stage, Mr Shotton had entered the field and the proceedings had become more complicated. Also, we were expecting further material from the Applicants. I was anticipating, particularly in light of Mr Copley's email on the Public Holiday, that there would be a further meeting or discussion with ASIC in relation to the draft Enforceable Undertaking.

23. In the event, the matter was not mentioned on 29 April, 2013 but on Thursday, 2 May, 2013 and the proceedings were set down for hearing on 13 May, 2013 – before the meeting of the members.

24. After His Honour rose, Mr Russell and I had a short discussion with Ms Gubbins about the Enforceable Undertaking and the state of this matter in general, given that the proceedings would be heard and determined before the meeting of members would take place. I said words to the effect "What do we need to do about the Enforceable Undertaking? Is there any point?" I do not recall whether it was me, Ms Gubbins or Mr Russell who said that the Enforceable Undertaking had become academic or fallen by the wayside, but that was the substance of what was said. Ms Gubbins did not say that ASIC required or insisted on the undertaking; there was no disagreement.



Signed



Solicitor/Barrister/Justice of the Peace

25. I left that meeting with the clear understanding that ASIC no longer required any Enforceable Undertaking from us.

26. Had the position been otherwise, and had I thought that ASIC required the undertaking, I would have proceeded to discuss the draft with ASIC, and to negotiate it to finality as soon as possible.


27. I was still working away at the decision whether to wind up the Fund. Also, these proceedings had been sent down for trial on 13 May, and the parties were now working towards that.


28. It was on or about 20 May, 2013 that I became aware that Ms Hayden wished to have the undertaking. At that point, Mr Russell was overseas; I spoke to him. I was preparing for a meeting with ASIC to communicate the progress that we had made and to seek to get a better understanding of ASIC's position. I instructed Mr Russell to include with our Discussion Paper the draft amendments of the Enforceable Undertaking that had been discussed some weeks earlier, but then put aside, following our discussion with Ms Gubbins on 2 May, 2013.

29. We incorporated in the Paper an explanation of the circumstances in relation to the draft Enforceable Undertaking, and we also tendered a revised draft of the undertaking for ASIC's consideration.

30. I am unsure of the status of the Discussion Paper and I therefore do not exhibit the whole document - it was marked without prejudice. However, I have extracted the record of our dealings with ASIC in relation to the document, which is at pages 13 to 14 of my exhibits. That record accords with my understanding of our dealings and is in every respect true and correct.

PAGE 7


Signed


Solicitor/Barrister/Justice of the Peace

31. Since delivering that Discussion Paper and draft Enforceable Undertaking to ASIC on 21 May, 2013:-

- (a) Neither Ms Hayden nor Ms Gubbins has objected that our record of our dealings with ASIC was in anyway inaccurate;
- (b) ASIC has not responded to the revised draft of the Enforceable Undertaking.

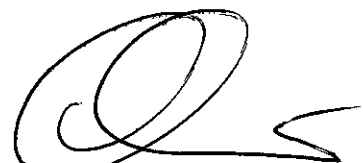
32. The Administrators remain perfectly prepared to provide whatever Enforceable Undertaking ASIC might reasonably require. However, the meeting of members of the Fund has been held many weeks ago; and on 6 May, 2013 – within the 14 days that Ms Hayden stipulated on 23 April, 2013, Mr Park and I, after making all investigations that we felt were appropriate – decided that the Fund should be wound up. I referred to the detailed cashflow budgets, valuations and strategy paper behind that decision in my earlier affidavit. The solicitors for the Applicant have sought their production, which we have offered, subject to appropriate undertakings as to confidentiality, which they have not yet given.

Conduct of these Proceedings

33. I have relied entirely on our solicitors for the proper conduct of these proceedings. I have not instructed them to increase costs, complicate the proceedings, delay the proceedings, or to conduct the proceedings other than perfectly properly.

34. For ease of reference, I have included at page 15 of my exhibits, the document admitted and marked Exhibit 2 on 7 May, 2013. I confirm that that document is true and correct in every respect. It remains the case that:-

- (a) The Administrators have not applied for any remuneration;



Signed



Solicitor/Barrister/Justice of the Peace

- (b) We have not paid any of the legal costs associated with this proceeding either from the Fund or from LMIM;
- (c) We took legal advice on those matters soon after the proceedings were commenced.

35. All the facts and circumstances 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 GINETTE DAWN MULLER on 15 July, 2013 at Brisbane in the presence of:

Deponent

Solicitor/Barrister/Justice of the Peace

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
(ADMINISTRATORS APPOINTED)
ACN 077 208 461 IN ITS CAPACITY AS
RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND

AND

Second Respondents: THE MEMBERS OF THE LM FIRST
MORTGAGE INCOME FUND
ARSN 089 343 288

Third Respondent: ROGER SHOTTON


Intervener: AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION

INDEX TO EXHIBIT GDM-16

Bound and marked GDM-16 are the exhibits to the Affidavit of GINETTE DAWN
MULLER sworn 15 July, 2013.



Deponent



Solicitor/Barrister/Justice of the Peace

CERTIFICATE OF EXHIBIT

Filed on behalf of the First Respondent

Form 47 Rule 435

Russells
Level 21
300 Queen Street
BRISBANE 4000
Phone: 07 3004 8888
Fax: 07 3004 8899

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

**Applicants: RAYMOND EDWARD BRUCE AND
VICKI PATRICIA BRUCE**

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**First Respondent: LM INVESTMENT MANAGEMENT LIMITED
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INDEX TO EXHIBIT GDM-16

Filed on behalf of the First Respondent

Form 47 Rule 435

Russells
Level 21
300 Queen Street
BRISBANE 4000
Phone: 07 3004 8888
Fax: 07 3004 8899

RUSSELLS

10 July, 2013

Our Ref: Mr Russell/Ms Copley
Your Ref: Ms Banton/Mr Tucker/Ms Gubbins/Mr Roberts

EMAIL TRANSMISSION

MOST URGENT

Piper Alderman
Solicitors
SYDNEY

email: abanton@piperalderman.com.au

Tucker & Cowen
Solicitors
BRISBANE

email: dtucker@tuckercowen.com.au

Ms Anne Gubbins
Senior Lawyer, Financial
Services Enforcement
ASIC
BRISBANE

email: Anne.Gubbins@asic.gov.au

Dear Colleagues

**LM Investment Management Limited (Administrators Appointed) & Ors ats
Bruce & Anor**

We are instructed to advise that on 9 July, 2013, Deutsche Bank AG appointed McGrathNicol to undertake enquiries and report to Deutsche Bank in relation to the LM First Mortgage Income Fund.

We and Counsel who have appeared for LMIM have, on several occasions and in various *fora*, foreshadowed the risk that your various clients' persistence in these proceedings would prompt Deutsche Bank to appoint receivers.

We are also instructed to advise that our clients now understand that Deutsche Bank will appoint McGrathNicol receivers and managers of the assets of the Fund either today or tomorrow.

This is no more than one would expect from a secured creditor in the position, and with the exposure, of Deutsche Bank, in the light of the relief sought.

Assuming that all of the parties to these proceedings have in mind solely the best interests of the members, we are instructed to ask all parties forthwith to confirm that, for the purpose of avoiding such an appointment and of

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Brisbane / Sydney

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Telephone (07) 3004 8888 / Facsimile (07) 3004 8899

RussellsLaw.com.au
scr_20130471_269.docx

persuading Deusch Bank not to make such an appointment, your respective clients are willing to withdraw all claims for relief in the proceedings.

We and our clients have considered the question of costs. We are instructed to advise that in light of the gravity of the situation and the urgent need to avoid what may be a substantial and irreversible diminution in the value of the assets of the Fund, and the current circumstances in general, should your clients be willing to withdraw their respective applications, LMIM will consent to an order that there be no order as to costs of and incidental to the proceedings, as between LMIM and the withdrawing party.

The administrators understand that one or more of your clients may wish to make such an agreement conditional on the other parties so agreeing. Although our clients do not encourage such a course, they would not oppose it, provided it is done in good faith, and immediately.

However, if any party wishes to withdraw on the basis that there is no order as to costs as between that party and LMIM, with no other party affected, that would be welcome too.

Whilst we and the administrators expect you all to accept what we and they say at face value, you are of course free to make whatever enquiries you wish to verify Deutsche Bank's intention. Indeed, our clients implore all of you, in the interests of the members of the Fund, to act immediately to obtain all instructions necessary to withdraw the claims of your respective clients.

In the event that any of your clients do not take up this offer, LMIM expressly reserves its and the Fund's rights of action against your various clients, should Deutsche Bank proceed with its appointment. All parties had more than ample warning that this may happen. The parties are aware that LMIM contends that these proceedings were instituted and are being prosecuted by the Applicants for collateral and ulterior purposes. Accordingly those rights are reserved not only against the Applicants but also against those who are behind the proceedings.

The same applies to LMIM's and the Fund's rights against Mr Shotton.

LMIM and the administrators do not contend that ASIC is so liable, although, our clients maintain their contention that ASIC's application is misconceived.

We look forward to hearing from you as a matter of urgency.

Yours faithfully



Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

cc: Mr Shane Roberts
Holman Webb
Solicitors
BRISBANE

email: Shane.Roberts@holmanwebb.com.au

Our Ref: Mr Russell/Ms Copley Page 2 of 2
Your Ref: Ms Banton/Mr Tucker
Ms Gubbins/Mr Roberts

CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

Confidential

11 July 2013

By email

John Park and Ginette Muller
Joint and several administrators
LM Investment Management Limited
(Administrations Appointed) (Receivers
and Managers Appointed)
C/- Level 4
RSL Centre
9 Beach Road
SURFERS PARADISE QLD 7000

john.park@fticonsulting.com

ginette.muller@fticonsulting.com

Our ref 17306/18128/80107994

Dear Sir and Madam

**LM Investment Management Limited ABN 68 077 208 461
(Administrators Appointed) (Receivers and Managers Appointed) (the Company)**

As you know, we act for Deutsche Bank AG, Sydney Branch (**DB**).

We refer to the Facility Agreement dated 1 July 2010 between the Company in its capacity as responsible entity of the LM First Mortgage Income Fund (as "Borrower") and DB (as "Financier") as varied, amended and supplemented from time to time including by the override deed dated 21 December 2012 between the Borrower and DB (**Facility Agreement**).

Unless otherwise defined in this letter, capitalised terms used in this letter have the meaning as defined in the Facility Agreement.

We refer to:

- (a) the Events of Default that are currently subsisting with respect to the Facility Agreement and the Charge, including the appointment of administrators to the Company, which is an Event of Default under clause 17.1(f) of the Facility Agreement;
- (b) the previous reservations of rights by DB including as set out in our letter to you dated 29 May 2013; and
- (c) the consent issued by you pursuant to s 440B of the *Corporations Act 2001* (Cth) dated 20 March 2013.

Please be advised that, as a result of the Events of Default that are subsisting, in accordance with its right under clause 7.1(a) of the Charge, DB has today exercised its rights under the Facility Agreement and the

Level 18, 333 Collins Street, Melbourne VIC 3000, Australia
DX 38451, 333 Collins VIC

T +61 3 9286 6000, F +61 3 9629 8488

Legal\310416483.2

CLAYTON UTZ


Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

**John Park and Ginette Muller, LM Investments Management Limited
(Administrations Appointed) (Receivers and Managers Appointed)**

11 July 2013

Charge by appointing Joseph David Hayes and Anthony Norman Connelly (of McGrathNicol) as receivers and managers of the property of the LM First Mortgage Income Fund.

Yours faithfully


Nicholas Poole, Partner
+61 3 9286 6185
npool@claytonutz.com

Peter Bowden, Senior Associate
+61 3 9286 6506
pbowden@claytonutz.com

Stephen Russell

From: Muller, Ginette [Ginette.Muller@fticonsulting.com]
Sent: Sunday, 14 July 2013 2:50 PM
To: Stephen Russell
Subject: FW: LM [SEC=UNCLASSIFIED]

From: Anne Gubbins [mailto:Anne.Gubbins@asic.gov.au]
Sent: Tuesday, 23 April 2013 9:27 AM
To: Muller, Ginette
Subject: Re: LM [SEC=UNCLASSIFIED]

Thanks Ginette. 3:30pm suits us.

Would it be possible for you to give me a call sometime this morning? Or alternatively, I can call either Peter or Stephen if you would prefer. We have a proposed plan for responding to Monday's application and I think it would be more efficient if you had an opportunity to discuss it with your legal advisors before the meeting so that we could have a detailed discussion when we meet.

I also just wanted to check what issues you wished to discuss with Mr Russell and Mr Schmidt attending. I only ask as I would prefer to keep this afternoon's meeting confined to the topic of Monday's application if possible and postpone any broader issues for a subsequent meeting.

Regards,

Anne Gubbins | Senior Lawyer | Financial Services Enforcement | ASIC | ☎ +61 7 3867 4871 | 📠 +61 7 3867 4800 | ✉ Anne.Gubbins@asic.gov.au

From: "Muller, Ginette" <Ginette.Muller@fticonsulting.com>
To: "Anne Gubbins (Anne.Gubbins@asic.gov.au)" <Anne.Gubbins@asic.gov.au>
Cc: "philip.pan@au.kwm.com" <philip.pan@au.kwm.com>, "Schmidt, Peter (peter.schmidt@nortonrose.com)" <peter.schmidt@nortonrose.com>, "peter.schmidt@nortonrose.com" <peter.schmidt@nortonrose.com>, "Stephen Russell (srussell@russellslaw.com.au)" <srussell@russellslaw.com.au>
Date: 22/04/2013 06:28 PM
Subject: LM

This email message has been processed by MIMESweeper

Dear Anne

Further to your email to Philip Pan, I confirm that I am available to meet with you and your team tomorrow. Philip will not attend this time, but I will be accompanied by Stephen Russell and Peter Schmidt as each is handling a different matter that may require discussion tomorrow.

Would 3:30pm suit?

Regards

Ginette Muller
Senior Managing Director
Corporate Finance/Restructuring
F T I Consulting
22 Market Street
Brisbane QLD 4000
Australia

+61.7.3225.4903 direct
+61.(0) 419 682 113
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Ginette.Muller@fticonsulting.com
We've joined FTI Consulting – click [here](#) to learn more

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Stephen Russell

From: Stephen Russell
Sent: Wednesday, 24 April 2013 10:20 AM
To: 'Anne.Gubbins@asic.gov.au'
Cc: 'Georgina.Hayden@asic.gov.au'; 'Anthony.Ham@asic.gov.au';
'Muller, Ginette'; Dunn, Joanne; 'Park, John'; Ienna Copley; Derek
Finch
Subject: LM First Mortgage Income Fund
Importance: High

Dear Ms Gubbins

I am writing to advise that Trilogy's solicitor has advised that it intends now not to seek any directions for service etc on Monday. Ms Banton claims she has already served members – although we are not conscious that this has in fact been done.

In the circumstances, we look forward to receipt of ASIC's draft Enforceable Undertaking as soon as convenient.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

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Mobile 0418 392 015
SRussell@RussellsLaw.com.au

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Stephen Russell

From: Stephen Russell
Sent: Saturday, 13 July 2013 2:12 PM
To: Stephen Russell
Subject: FW: LM Investment Management Limited (Administrators Appointed) [SEC=UNCLASSIFIED] - Computershare Update

Saved: 0

From: Hugh Copley [mailto:Hugh.Copley@asic.gov.au]
Sent: Thursday, 25 April 2013 11:14 AM
To: Stephen Russell; Anne Gubbins; Georgina Hayden
Cc: Muller, Ginette; Park, John; Ilenna Copley
Subject: Re: LMIM [SEC=UNCLASSIFIED]

Classification: Unclassified/Public Domain

No Steve.

It will have to be tomorrow.

Feel free to mark up any changes you are instructed to request and send them through, so we have something to consider prior to any discussion.

Thanks, Hugh.

From: Stephen Russell [srussell@russellslaw.com.au]
Sent: 25/04/2013 12:54 AM GMT
To: Anne Gubbins; Hugh Copley
Cc: "Muller, Ginette" <Ginette.Muller@fticonsulting.com>; "Park, John" <John.Park@fticonsulting.com>; Ilenna Copley <icopley@russellslaw.com.au>
Subject: LMIM

This email message has been processed by MIMESweeper

Anne and Hugh

Are you on deck today to discuss the EU?

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

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RussellsLaw.com.au

Stephen Russell

From: Stephen Russell
Sent: Saturday, 13 July 2013 2:28 PM
To: Stephen Russell
Subject: FW: LM Investment Management Limited (Administrators Appointed) [SEC=UNCLASSIFIED] - Computershare Update

Saved: 0

From: Stephen Russell
Sent: Friday, 26 April 2013 3:49 PM
To: lfkelly@qldbar.asn.au; 'Ginette.Muller@fticonsulting.com'; 'John.Park@fticonsulting.com'; 'David Chesterman'
Cc: 'Schmidt, Peter'; 'Damian.Bender@fticonsulting.com'; Ilenna Copley; Derek Finch; 'David Cooper'; 'Kelly, Jack'; 'Ben Parsons'; 'Warren Tuttiett'; 'Moutsopoulos, John'; Ashley Tiplady; Sean Russell
Subject: LM Investment Management Limited (Administrators Appointed) [SEC=UNCLASSIFIED] - Computershare Update

All

I have just been advised by Anne Gubbins that ASIC has filed a Notice of Intervention this afternoon. (They will support the administrators and the notion that a meeting should be held; and that 601FA is not engaged.)

Also, she is happy that we now have another day or so to discuss and agree the terms of the EU – working on that now.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

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Stephen Russell

From: Stephen Russell
Sent: Sunday, 28 April 2013 12:00 PM
To: Muller, Ginette; Park, John
Cc: 'Bender, Damian'; Trenfield, Kelly-Anne; 'Dunn, Joanne'; Ilenna Copley; Derek Finch; 'David Chesterman'
Subject: ASIC's likely position
Attachments: ASIC Submission to CAMAC re MIS.pdf

All

In determining our response to the EU (draft email coming shortly), you should pay attention to ASIC's recent (September, 2011) submission to CAMAC on the current review of the law relating to MISs.

See attached. See especially Part B (commencing at page 29) and paras 118 to 120, where ASIC sets out its views as to the main points of tension in relation to conflicts.

I will incorporate these concerns into:-

- Our email to ASIC regarding the terms of the EU;
- Ginette's affidavit (Parky – you're excused as a deponent for the moment)
- Our submissions when and if the matter is heard.

David, apart from the meeting of members now convened for 30 May, two more reasons for a long adjournment are:-

1. If the administrators decide that there should be a new RE (i.e. the scheme is viable), it will take some time to find one with an appropriate licence. Trilogy seems not to have the necessary licence (I will get details of this to prove it without debate).
2. Another reason is that, while Piper Alderman and Trilogy had notice of the application to extend the convening period, they sat by (literally, they were at the bar table) and voiced no objection. On that very day, they filed an application in the Federal Court, seeking to have Trilogy appointed as new RE of the FMIF, while at the same time contending that the same administrators can't act for the MPF and the FMIF, because of conflicts between the MPF (a trust) and the FMIF (a registered scheme). But it is, apparently, OK for the new trustees of the MPF and the new RE of the FMIF to have the same solicitors (and not disclose this to the Chief).

Yours faithfully

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**EXTRACT FROM DISCUSSION PAPER
DELIVERED BY LMIM TO ASIC ON 21 MAY, 2013**

43. At the meeting attended by ASIC and representatives of the administrators on 23 April, 2013:-
- (a) Mr Russell expressed the administrators' intention to call a meeting to consider the appointment of a new RE of the fund and "to have the notice in the streets this week", aiming for a meeting on 30 May, 2013.
 - (b) At that stage, the replacement of LMIM as the responsible entity was the focus of the discussions.
 - (c) ASIC was pressing for a decision to be made whether the fund would be wound up, and referred to the terms of the suspended licence.
 - (d) ASIC suggested that it intended to invite LMIM (or the administrators) to enter into an Enforceable Undertaking ("EU").
 - (e) One of the suggested terms of the EU was that the administrator will promptly convene a meeting of members of the fund for the purpose of appointing a new RE. The new RE could then decide whether to wind up the fund. Ms Hayden from ASIC said that ASIC did not want the matter to go on for a long time, because that allowed more of an opportunity for more complex issues to arise.
 - (f) Ms Hayden said ASIC wished to keep the process moving and it was not presuming anyone had done anything wrong.
 - (g) During the meeting ASIC also suggested that the EU would make provision for an undertaking that a meeting of members would be called to consider whether a new RE should be appointed.
 - (h) ASIC also proposed allowing two weeks for a decision to be made as to whether the fund should be wound up and that an undertaking to that effect would be included in the draft EU.

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- (i) Ms Muller explained that a lot was involved in such a decision, and said that the administrators would do their best. She suggested that the administrators would focus first on the Fund, and, when they had decided whether to wind up the Fund (or appoint another RE), they would then move to the other Funds.
44. The meeting concluded on the basis that ASIC would provide a draft EU as soon as possible.
45. The draft was received on Wednesday evening, 24 April, 2013. On 25 April, 2013, Mr Copley advised that no-one from ASIC was available to deal with the document on that day. Hence, on 24 and 25 April, 2013, the administrators, believing that ASIC favoured a meeting at which the Members of the Fund could consider the election of Trilogy in lieu of LMIM, worked with their lawyers (Norton Rose) and other advisors to prepare a Notice of Meeting. This was the priority, given that this was the only relief sought by Trilogy – there was no suggestion of any other legal action or other relief from any person.
46. On Friday, 26 April, 2013:-
- (a) The proceedings listed for 29 April were adjourned to 2 May, 2013;
- (b) Ms Muller called Ms Gubbins to give advance notice of the convening of the meeting of members of the Fund (one of the key requirements of the EU);
- (c) ASIC, not having received any response from Piper Alderman, intervened in the proceedings; and
- (d) Mr Russell and Ms Gubbins spoke about the terms of the draft EU; Mr Russell articulated some of the administrators' initial views; Ms Gubbins informed Mr Russell that in light of the adjournment of the court proceedings, some more time could be taken with the EU, and that ASIC's position was that, in light of the terms of the licence, as modified on 9 April, s 601FA was not engaged.
47. Thereafter, an application was received from Mr Shotton, seeking an order winding-up the Fund.
48. On 2 May, 2013, both Ms Muller and Mr Russell spoke to Ms Gubbins. The administrators understood that ASIC was of the view that, in light of the events which had occurred (the meeting of members had been convened, and there was an application for an order for winding up), the EU was no longer pressed.
49. If this is not so, the draft EU is attached, with suggested modifications.
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INSTRUCTIONS BY THE ADMINISTRATORS BY SENIOR COUNSEL

7 MAY, 2013

1. The Administrators have, since their appointment on 19 March, 2013, received no remuneration for their work as Administrators.
2. The Administrators have not yet sought approval from the creditors or from the Court.
3. The Administrators have not paid any sum for legal costs in relation to the present proceedings.
4. The Administrators have not yet considered whether the legal fees that they have incurred in these proceedings are properly payable out of the funds of the members. A submission, made to the contrary by Senior Counsel for ASIC, is incorrect.
5. The Administrators fully accept that, at the conclusion of the proceedings, an order for costs may be made against them personally.
6. The Administrators fully accept that it would be open to ASIC or any of the members to make a submission to the effect that the costs of and incidental to the proceedings incurred by LMIM (should that in fact eventuate) ought not be the subject of the usual right of indemnity.
7. In the event that the Administrators have made any payments from the Fund on account of legal fees, when these proceedings are determined (and they have not yet decided to do so), John Richard Park and Ginette Dawn Muller hereby undertake to the court personally to repay any such sum to the LM First Mortgage Income Fund, should such a determination or order be made.