

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 13534/16

Plaintiff: **LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (RECEIVER APPOINTED)**

AND

First Defendant: **LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 (RECEIVER APPOINTED)**

AND

Second Defendant: **TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679 AS RESPONSIBLE ENTITY OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511**

AND

Third Defendant: **LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868 (RECEIVER APPOINTED)**

AND

Fourth Defendant: **LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461**

AND

Fifth Defendant: **THE TRUST COMPANY LIMITED ACN 004 027 749 AS CUSTODIAN OF THE PROPERTY OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511**

INTERLOCUTORY APPLICATION

TAKE NOTICE that the Second and Fifth Defendant are applying to the Court for the following orders:

A. DETAILS OF INTERLOCUTORY APPLICATION

On the facts stated in the supporting affidavit of Philip Ryan dated 1 February 2019 and the confidential affidavit of Philip Ryan dated 1 February 2019 (**Confidential Affidavit**), the

APPLICATION
Filed on Behalf of the Second and Fifth Respondent

Name: Squire Patton Boggs
Address: Level 17, 88 Phillip Street,
SYDNEY NSW 2000

Phone No: (02) 8248 7888

Managing Director of the Second Defendant, the Second and Fifth Defendants apply for the following orders:

Application for judicial advice

1. Pursuant to s.96 of the *Trusts Act 1973 (QLD)*, that the Second and Fifth Defendants are justified in settling Supreme Court proceedings 13534 of 2016 on the terms set out in the Deed of Settlement and Release as varied by the Variation to the Deed of Settlement and Release (**Deed of Settlement**) and in causing Trilogy as responsible entity of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 (**WFMIF**) and the Trust Company as Custodian of the property of the WFMIF to enter into and perform the Deed of Settlement.

Application for substituted service

2. Under rule 116 and/or rule 1.8 of Schedule 1A of the *Uniform Civil Procedure Rules 1999 (Qld)* (**UCPR**), that service on the members of the WFMIF of this application be effected by:
 - a. posting a notice substantially in the form of Annexure A to this Order (the **Notice**) to the website "<https://www.trilogyfunds.com.au/lm-wholesale-first-mortgage-income-fund/>" (the **Website**);
 - b. sending a copy of the Notice to all unitholders of the WFMIF by each unitholder's preferred method for distribution of notices recorded on the WFMIF's register of unitholders, maintained by Trilogy;
 - c. in relation to any unitholder of the WFMIF whose preferred method of distribution is by forwarding it to the email address of a financial advisor, service is to be effected by sending the Notice to the financial advisor by email and identifying in the email the member to whom the Notice is directed;
 - d. in relation to any unitholder of the WFMIF whose preferred method of distribution is by forwarding it to the postal address of a financial advisor, service is to be effected by sending the Notice by post addressed to the member "care of" the postal address of the financial advisor.
3. Under rule 116(3) and/or rule 1.8 of Schedule 1A of the UCPR, that service of this application be deemed to have been effected on each of the unitholder of the WFMIF five (5) days after orders 2(a) to 2(d) above have been complied with.
4. Under rule 1.8 of Schedule 1A of the UCPR that service by Trilogy and Trust Company of non-confidential documents to be served on the unitholder of the WFMIF in relation to this application (including any affidavits or submissions) be effected by Trilogy causing such non-confidential documents to be posted to the Website;
5. Under rule 1.8 of Schedule 1A of the UCPR, that service of any documents referred to in paragraph 4 above be deemed effected on each of the unitholder of the WFMIF five (5) day after all notices are sent pursuant to order 3 above.
6. That Trilogy's and Trust Company's costs of and incidental to this application be paid out of the property of the WFMIF.
7. Such further or other order as this Honourable Court deems appropriate.

The application for substituted service will be heard by the Court at Brisbane on **22 February 2019 at 9:30am**.

Filed in the Brisbane Registry on 1 February 2019.



Registrar:

If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application the applicant intends to rely on the following affidavits:

1. Affidavit of Philip Ryan sworn February 2019;
2. Confidential Affidavit of Philip Ryan sworn 1 February 2019.

THE APPLICANT ESTIMATES THE HEARING FOR SUBSTITUTED SERVICE SHOULD BE ALLOCATED 15 MINUTES

Signed:

Description: Squire Patton Boggs solicitors for Trilogy and Trust Company

Dated: 1 February 2019

This application is to be served on:

The Plaintiff
C/- Gadens Lawyers
Level 11, 111 Eagle Street
Brisbane QLD 4000

The First Defendant and the Third Defendant
C/- HWL Ebsworth Lawyers
Level 14, Australia Square
268 – 278 George Street
SYDNEY NSW 2000

The Fourth Defendant
C/- Russells
Level 18, 300 Queen Street
Brisbane QLD 4000

The Australian Securities and Investments Commission
Level 20
240 Queen Street
BRISBANE QLD 4000

Orders 2 to 5 of this application will be heard by the Supreme Court of Queensland, Brisbane Registry at QEII Courts of Law Complex at **9:30am on 22 February 2019.**

Trilogy and Trust Company estimate that the hearing of orders 2 to 5 should be allocated 15 minutes.

Orders 1 and 6 of this application will be heard by the Supreme Court of Queensland at QEII Courts of Law Complex, 415 George Street, Brisbane on a date to be fixed.

Trilogy and Trust Company estimate that the hearing of order 1 should be allocated half a day.

If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you. In addition you must before the day for hearing file a notice of appearance in this Registry.

Note: Unless the Court otherwise orders, a respondent that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

C. FILING

This interlocutory application is filed by Squire Patton Boggs for the Second and Fifth Defendants.

D. SERVICE

Trilogy and Trust Company's address for service is c/- Squire Patton Boggs, Level 17, 88 Phillip Street, Sydney NSW 2000.

Phone: (02) 8248 7888

Fax: (02) 8248 7899

Email: Amanda.banton@squirepb.com / susan.goodman@squirepb.com

It is intended to serve a copy of this application on each of the Plaintiff and each Respondent as listed below:

The Plaintiff
C/- Gadens Lawyers
Level 11, 111 Eagle Street
Brisbane QLD 4000

The First Defendant and the Third Defendant
C/- HWL Ebsworth Lawyers
Level 14, Australia Square
268 – 278 George Street
SYDNEY NSW 2000

The Fourth Defendant
C/- Russells
Level 18, 300 Queen Street
Brisbane QLD 4000

The Australian Securities and Investments Commission
Level 20
240 Queen Street
BRISBANE QLD 4000

ANNEXURE A

TO THE MEMBERS OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511 (WFMIF)

TAKE NOTICE that Trilogy, as the Responsible Entity of the WFMIF, and Trust Company as the Custodian of the property of the WFMIF, have applied to the Supreme Court of Queensland for directions as to whether they are justified:-

1. in settling Supreme Court of Queensland Proceedings 13534 of 2016 (**the Feeder Fund Proceedings**) on the terms set out in a Deed of Settlement and Release as varied by a Deed of Variation (**Deed of Settlement**);
2. in causing Trilogy as responsible entity of the WFMIF and Trust Company as Custodian of the property of the WFMIF to enter into and perform the Deed of Settlement.

The Feeder Fund Proceedings are proceedings that were commenced by Mr Whyte, the person appointed pursuant to section 601NF of the *Corporations Act 2001* (Cth) to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and as receiver of the property of the FMIF (**Mr Whyte**), in the name of LMIM as responsible entity of the FMIF, seeking relief which:

- (a) would permit Mr Whyte and/or LMIM to withhold further distributions to the LM Currency Protected Australian Income Fund ARSN 110 247 875 (**CPAIF**), WFMIF and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (**ICPAIF**) to the extent of the value of redemptions that were allowed in their favour at a time when redemptions were suspended other than in circumstances of hardship, namely between 11 May 2009 and 31 January 2013. Mr Whyte alleges that these redemptions had been allowed by LMIM without power under the constitution and/or in breach of trust. Relief is also sought to authorise Mr Whyte to reinstate those redeemed units to the CPAIF, the ICPAIF and the WFMIF;
- (b) would authorise Mr Whyte to cancel the further units issued to each of the CPAIF, the WFMIF and the ICPAIF between 1 July 2011 and 1 November 2012 as the purported reinvestment of income distributions, at a time when there was no Distributable Income. Mr Whyte alleges that these distributions were without power and in breach of trust;
- (c) would provide for adjustments for consequential overpayment or underpayment of capital distributions made in February and June 2013.

The Feeder Fund Proceedings are defended by Trilogy as responsible entity of the WFMIF and Trust Company as Custodian of the property of the WFMIF and by Mr Said Jahani as the receiver of the assets of the CPAIF and the ICPAIF (**Mr Jahani**). Each of them disputes that LMIM is entitled to any of the relief sought in the Feeder Fund Proceedings.

On 4, 5 and 20 November 2018, Trilogy and Trust Company participated in a mediation of the Feeder Fund Proceedings that was also attended by representatives of Mr Whyte and by Mr Jahani.

The mediation was successful, and Mr Whyte, Mr Jahani, Trilogy and Trust Company have agreed terms of settlement that are documented in the Deed of Settlement. Those terms are subject to a number of conditions precedent, including that the Court make the directions sought by this application.

This application is set down to be heard by the Supreme Court of Queensland at Brisbane on [date] at [time].

Copies of the non-confidential court documents in respect of the application will be made available on the website <https://www.trilogyfunds.com.au/lm-wholesale-first-mortgage-income-fund/>. Non-confidential court documents will be made available progressively, as and when they are filed with the Court.

Any unitholder who reasonably requires a hard copy of the application and supporting material or the confidential affidavit should call Trilogy on +61 7 3039 2828

Dated: [date]

Trilogy