

**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**

**AFFIDAVIT OF DAVID WHYTE  
SWORN ON 21 MAY 2024**

I, **DAVID WHYTE** of Level 10, 12 Creek Street, Brisbane in the State of Queensland,  
Registered Liquidator, state on oath:-

1. I am a Registered Liquidator and a Consultant in the employ of the firm BDO. I am an affiliate member of the Chartered Accountants Australia and New Zealand.
2. I refer to my affidavit sworn 9 April 2024 and filed 12 April 2024 with Exhibit Bundle DW-128 ("**Finalisation Affidavit**"), my affidavit sworn 9 April 2024 and filed on 29



Signed: \_\_\_\_\_

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Witnessed by: \_\_\_\_\_

**AFFIDAVIT:**  
Form 46, R.431

Filed on behalf of the Applicant

**Cowen Schwarz Marschke Lawyers**  
Level 8, 300 George Street  
Brisbane, Qld, 4000  
Tel: (07) 300 300 00  
Fax: (07) 300 300 33  
Email: dschwarz@csmlawyers.com.au

April 2024 with Exhibit Bundle DW-129 ("**Remuneration Affidavit**"), and my affidavit sworn on 28 April 2024 and filed on 29 April 2024 ("**Supplementary Remuneration Affidavit**") in support of an application by me for authority to make a final distribution to FMIF members and other orders to finalise the winding up of the LM First Mortgage Income Fund ("**FMIF**"), ("**Finalisation Application**").

3. Throughout this Affidavit, I use definitions set out in paragraph 7 of my Remuneration Affidavit.

#### **Responses to application**

4. On 18 April 2024, Justice Kelly ordered that any party who wishes to be heard at the hearing of the Finalisation Application, including Mr Park and LMIM, shall 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.
5. As at the date and time of swearing this Affidavit, I am informed by David Schwarz, of Cowen Schwarz Marschke Lawyers (**CSM**) and believe, that no short summary of grounds of opposition to the Finalisation Application has been received.
6. As at the day and time of swearing this affidavit, I have not received notice from any member, LMIM or ASIC of any opposition to the Finalisation Application.
7. On 10 May 2024, ASIC sent an email to CSM, stating that ASIC does not propose to intervene in the Finalisation Application and that this should not be taken as expressing support for, or opposition to, the orders sought in the Finalisation Application.
8. Now produced and shown to me and marked "**DW-131**" is a copy of this email.

#### **Claims by members for historical entitlements**

9. In my letter and notice to investors dated 26 April 2024, which is at pages 1 to 6 of Exhibit Bundle DW-130 exhibited to my Supplementary Affidavit, I invited investors to submit claims for historical entitlements (other than the right to share in the final distribution) together with supporting documentation by 24 May 2024.
10. To date, I have received eight claims in response to this notice. I am currently reviewing these claims.


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Witnessed by:



11. In respect of some of those claims, it appears to me from a preliminary review that:
- (a) they appear to relate to claimed returned payments made through Western Union, and appear to assert an interest in the capital of the FMIF;
  - (b) they do not appear to be reflected in the liability ledgers referred to in paragraph 153 of the Finalisation Affidavit;
  - (c) they are not for material amounts in the context of the winding up of the FMIF (being for less than \$5,000); and
12. If I determine following my review of those claims, that they ought to be paid from the property of the FMIF, I intend (subject to any direction or order of this Honourable Court) to cause those claims to be paid from the property of the FMIF.

**Accounts of FMIF**

13. As is deposed to at paragraph 128 of the Finalisation Affidavit and paragraph 136 to 137 of the Remuneration Affidavit, during the course of the winding up of the FMIF, I have prepared and made available to members accounts for the FMIF for each financial year or half-year.
14. I have not been notified by any member or any other party of any complaint as to the accuracy of the accounts which have been prepared.

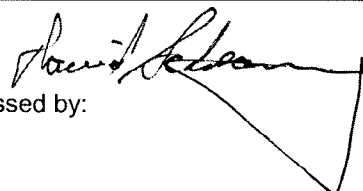
**Activities of FMIF and costs of operating FMIF**

15. The FMIF is no longer operating a funds management business, is not seeking or accepting any new investments, and has not been doing so throughout the period of my appointment.
16. The primary income of the FMIF during my appointment has been from asset realisations and the proceeds of litigation, and, to a lesser degree, amounts received from borrowers and guarantors including insolvency dividends.
17. Since the last of the real property assets were sold in December 2017 by McGrath Nicol (who had been appointed by a secured creditor of LMIM), the FMIF has not had to pay any holding costs or other expenses relating to the real property assets. Since then, the costs of the winding up have primarily comprised my and the liquidator of

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LMIM's remuneration, as approved by the Court, and legal costs and disbursements related to various the court proceedings relating to the affairs of the FMIF.

**No unresolved Claims**

18. As at the time of swearing this affidavit, to the best of my knowledge and belief, there are no unresolved court proceedings, claims or demands against myself personally, against BDO, or against the FMIF, other than:
- (a) my final remuneration claim;
  - (b) legal expenses, document storage costs and other operating costs or expenses which I intend to pay in the ordinary course prior to making the final distribution;
  - (c) the application filed by LMIM and Mr Park on 17 April 2024 for payment of remuneration and expenses of the FMIF;
  - (d) further claims for legal costs by LMIM and Mr Park – including with respect to the costs of the Finalisation Application and the application filed on 17 April 2024; and
  - (e) the amounts in the liability account ledgers referred to in paragraphs 153 to 193 of the Finalisation Affidavit;
  - (f) (to the extent they are not comprised in those ledgers) the claims mentioned in paragraph 11 above.


**November and December 2010 Income Distribution**

19. In paragraphs 167 to 168 of the Finalisation Affidavit, I refer to and exhibit an extract of a report from Mr Brian Morris of Morris Forensics which concluded among other things that the expenses of the FMIF (including the impairment expense, correctly calculated) in fact exceeded the income of the FMIF in each six-month period ended from 31 December 2008 to 30 June 2012.
20. Mr Morris' evidence on this issue included his detailed analysis of 23 loans advanced by the FMIF in over 2000 pages of his reports dated 26 March 2021 and 23 July 2021, that was also supported by 52 retrospective valuation reports from 13 different

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Witnessed by:



property valuers who valued 27 distinct underlying real property assets securing the 23 loans made by the FMIF.

21. In the EY Proceedings, EY denied that the financial statements which EY had audited were in error, and they contested the report of Mr Morris. However, by the time that the EY Proceeding settled, EY had not yet filed any accounting evidence.
22. As at the date and time of swearing this affidavit, no member of the FMIF has come forward to advance a claim that the November 2010 or December 2010 income distributions should not be paid nor that the re-investment of those distribution to members who elected to reinvest their distributions should be reversed.

**Estimate of costs if final audit of accounts was required**

23. As to the costs of an audit of the accounts of the FMIF across the entire period of my appointment, I am informed by Mr Craig Jenkins and believe that the costs would be as followed, broken down by 6 month period:
  - (a) Up to about 2015, an auditor's fees would be \$50,000 for each financial year and \$35,000 for each financial half-year up to December 2015;
  - (b) From about 2015, an auditor's fees would be \$12,500 to \$20,000 for each financial year and between 50% to 70% of that for each financial half-year (after all real property assets had been realised reducing the number of transactions);
  - (c) By about 2024/2025 due to an increase in staff and overhead costs, and compliance costs, an auditor's fees would be about \$30,000 for an annual audit and \$20,000 for a half year review.
24. Mr Craig Jenkins is a BDO audit partner who has experience auditing several managed investment schemes, and is the audit partner who reviewed the financial statements of the FMIF that I have published during my appointment.
25. Based on my experience and my knowledge of the number of transactions during the period of my appointment, I estimate that an independent audit would take approximately six months to complete, and that the fund administration/operating costs during that time would continue to be approximately \$40,000 per month.

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- 26. On this basis, I estimate that the total additional costs which would be incurred if the FMIF's financial reporting and audit obligations had to be complied with for each financial year and half-year from commencement of the winding up, excluding remuneration claims, would be approximately \$627,500 to \$757,000.
- 27. There would also be additional costs of conducting such an audit, in particular remuneration for my and BDO's time to brief and respond to queries from the auditor, as well as further remuneration to Mr Park if issues arise that require his input and/or if he is responsible for arranging the audit. It is difficult to estimate these costs in advance, without knowing the issues which may be raised by the auditor, however I believe that the work required would be very substantial given the complexity of the winding up and the 10 year period over which it continued.
- 28. I believe that these costs would be substantially reduced if I am responsible for arranging the audit and briefing the auditor. That is because, in most cases, I would be the person required to answer any queries from the auditor, as I am the person who was primarily responsible for the winding up since the date of my appointment.

**The contents of this affidavit are true, except where they are stated on the basis of information and belief, in which case they are true to the best of my knowledge.**

**I understand that a person who provides a false matter in an affidavit commits an offence.**

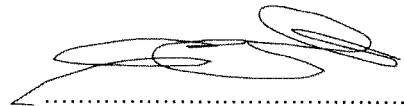
I state that:

- A. This affidavit was made in the form of an electronic document;
- B. This affidavit was electronically signed;
- C. This affidavit was made, signed and witnessed under part 6A of the *Oaths Act 1867*.

**SWORN by DAVID WHYTE**

at Brisbane, Queensland

)  
)  
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)  
)  
)



21 May 2024

Signed:




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Witnessed by:



BEFORE ME: )  
)  
)  
**David Heiner Schwarz** )  
[name of witness] )  
**Australian legal practitioner** )  
Cowen Schwarz Marschke Lawyers )  
Special witness under the Oaths Act 1867 )

  
-----  
21 May 2024

**SPECIAL WITNESS to complete – tick as applicable**

- I am a **special witness** under the *Oaths Act 1867*.  
(see section 12 of the *Oaths Act 1867*)
- This affidavit was made in the form of an electronic document.
- I electronically signed this affidavit.
- This affidavit was made, signed and witnessed under part 6A of the *Oaths Act 1867* – I understand the requirements for witnessing a document by audio visual link and have complied with those requirements.

**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  
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INCOME FUND**

AND

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

AND

**Third Respondent:** **ROGER SHOTTON**

AND

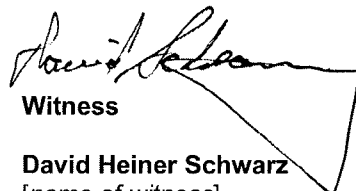
**Intervener:** **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**

**CERTIFICATE OF EXHIBIT**

Exhibit "**DW-131**" to the Affidavit of **DAVID WHYTE** sworn this 21 day of May 2024



**Deponent**



**Witness**

**David Heiner Schwarz**  
[name of witness]  
Australian legal practitioner  
Cowen Schwarz Marschke Lawyers  
Special witness under *Oaths Act 1867*

**CERTIFICATE OF EXHIBIT:**  
Form 47, R.435

Filed on behalf of the Applicant

02491253-012

**Cowen Schwarz Marschke Lawyers**  
Level 8, 300 George Street  
Brisbane, Qld, 4000  
Tel: (07) 300 300 00  
Fax: (07) 300 300 33  
Email: dschwarz@csmlawyers.com.au



## "DW-131"

**From:** [Anne Gubbins](#)  
**To:** [Kim Nguyen](#)  
**Cc:** [David Schwarz](#); [Alex Nase](#); [Legal.Document.Service](#)  
**Subject:** RE: Bruce and Anor -v- LM Investment Management Limited and Ors QLD Supreme Court Proceeding No. BS3383/2013 [SEC=OFFICIAL]  
**Date:** Friday, 10 May 2024 4:03:46 PM  
**Attachments:** [image001.gif](#)  
[image002.jpg](#)

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Dear Ms Nguyen,

I refer to your client's application filed on 12 April 2024.

ASIC considers that this is a matter properly left for the determination of the Court and confirms that it does not propose to intervene in the application.

ASIC has not formed the view that any aspect of the application requires regulatory intervention or warrants the making of submissions before the Court by ASIC.

This email should not be taken as an expression of support for, or opposition to, the orders sought in the application.

Regards,

**Anne Gubbins**  
Senior Specialist - Civil Litigation  
Legal Services

### **Australian Securities and Investments Commission**

Level 20, 240 Queen Street, Brisbane, 4000  
Tel: 07 3867 4871 | Mobile: 0434 793 652  
[anne.gubbins@asic.gov.au](mailto:anne.gubbins@asic.gov.au)

ASIC logo



**Please note:** I do not work on Tuesdays

Image of Doojoort Moort, artwork by Peter Farmer



ASIC acknowledges the Traditional Owners of the lands and waters on which we live and work.

We pay respect to Elders past and present as the custodians of the world's oldest continuing cultures.

**From:** Kim Nguyen <KNguyen@csmlawyers.com.au>  
**Sent:** Monday, April 29, 2024 3:17 PM  
**To:** Anne Gubbins <Anne.Gubbins@asic.gov.au>  
**Cc:** David Schwarz <dschwarz@csmlawyers.com.au>; Alex Nase <anase@csmlawyers.com.au>; Legal.Document.Service <Legal.Document.Service@asic.gov.au>  
**Subject:** Bruce and Anor -v- LM Investment Management Limited and Ors QLD Supreme Court Proceeding No. BS3383/2013

**EXTERNAL EMAIL: Do not click any links or open any attachments unless you trust the sender and know the content is safe.**

Dear Anne,

We refer to the above proceeding and the orders made by his Honour Justice Kelly on 18 April 2024.

Please find **enclosed**, by way of service, the following affidavits filed today in proceeding BS3383/2013:-

1. Affidavit of David Whyte with Exhibit DW-129 sworn on 9 April 2024; and
2. Affidavit of David Whyte with Exhibit DW-130 sworn on 28 April 2024.

The documents can be downloaded from the below ShareFile link:

<https://csmlawyers.sharefile.com/public/share/web-s3a92757c2817414ea861486a4dbaf310>

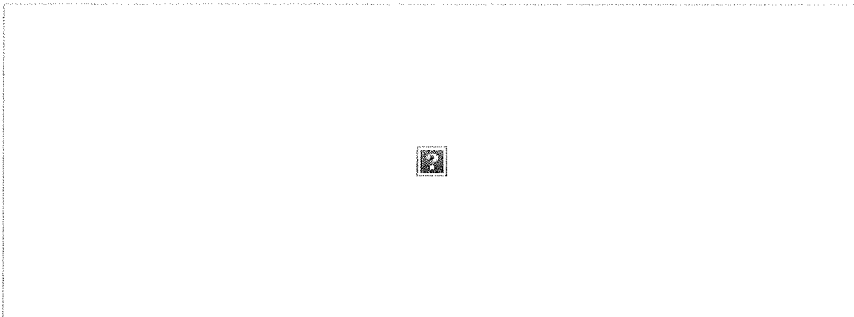
We will email the password to you separately.

Kind regards,

**Kim Nguyen**  
Solicitor

E [KNguyen@csmlawyers.com.au](mailto:KNguyen@csmlawyers.com.au)

D +61 (0)7 3210 3540



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