

SUPREME COURT OF QUEENSLAND

CITATION: *LM Investment Management Ltd (receiver apptd) (in liq) v Drake & Ors (No. 2)* [2020] QSC 311

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

v

PETER CHARLES DRAKE & ORS
(first respondent)

and

LISA MAREE DARCY
(second respondent)

and

EGHARD VAN DER HOVEN
(third respondent)

and

FRANCENE MAREE MULDER
(fourth respondent)

and

SIMON JEREMY TICKNER
(fifth respondent)

FILE NO/S: BS No 1146 of 2020

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 7 October 2020

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Callaghan J

ORDER: **1. The costs of the application, of both the receiver and liquidator, be paid from the assets of the Fund on an indemnity basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – GENERALLY – OTHER MATTERS – where applicant made an application for judicial advice as to whether to proceed with appeal of trial judgment – where respondent submitted that the Court should decline to provide any advice – where Court subsequently declined to give advice – whether costs of the application of both parties should be paid from the assets of the Fund on an indemnity basis

COUNSEL: D O'Brien QC with M Jones for the applicant
JW Peden QC with D Clarry for the liquidator
No appearances by the respondents

SOLICITORS: Gadens Lawyers for the applicant
Russells for the liquidator
No appearances by the respondents

- [1] After delivering this decision on 28 August 2020, I invited written submissions on the question of costs.
- [2] Both the receiver and the liquidator, whose relationship was discussed in my decision,¹ filed in accordance with my directions. The receiver took no issue with the proposition that the costs of the liquidator should be paid from the assets of the fund on an indemnity basis, and sought the same order for himself.
- [3] At the same time, the liquidator filed an affidavit which exhibited copies of correspondence between him and the receiver. This exchange was enkindled by the liquidator with a tendentious letter sent at midday on Sunday, 30 August 2020. It challenged certain positions adopted by the receiver, and demanded explanations for decisions made in the course of the litigation before Jackson J.

¹ *LM Investment Management Ltd (receiver apptd) (in liq) v Drake & Ors* [2020] QSC 265 at [3].

[4] I was troubled to learn how anything in this letter or those that followed could ever have been thought relevant to the question of costs in this application. My concerns were compounded when I read the submissions which accompanied the affidavit. These said, simply:

- “1. The liquidator and receiver agree as to the order that, subject to the exercise of the Court’s discretion of course, the liquidator’s costs be calculated on the indemnity basis and paid from the LM First Mortgage Income Fund (Fund).*
- 2. As for the applicant’s costs, the Liquidator takes a neutral position.”*

[5] As is apparent, there was no need for such a submission to be supported by any affidavit material, still less by anything resembling that which was filed.

[6] Upon enquiry, I was informed that the affidavit was filed prior to the parties’ positions being reached. It is difficult to conjure any reason why the issues could not have been approached in a different order. An apology was extended for the “inconvenience”, but it required little thought, and only a hint of moderation, to reach the position as expressed in the submissions of counsel.

[7] In accordance with those submissions, I order that the costs of both the receiver and the liquidator in this application be paid from the assets of the Fund on an indemnity basis.

[8] It should be clear, however, that nothing in the application required the production of the affidavit of Stephen Charles Russell sworn 7 September 2020, nor of the correspondence exhibited thereto.