

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE  
NUMBER: 2000/16

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

**AFFIDAVIT**

Philip Ryan of Level 23, 10 Eagle Street, Brisbane, Queensland states on oath:

1. I am the Managing Director of Trilogy Funds Management Limited ACN 080 383 679 as Responsible Entity of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511) (**Trilogy**), the Second Defendant in Proceeding 13534/16 (the Feeder Fund Proceedings).
2. I am authorised to make this affidavit on behalf of the Applicants.
3. I make this affidavit in support of the Applicants' application for judicial advice pursuant to section 96 of the *Trusts Act 1973 (Qld)* filed on 1 February 2019 (**Application**).
4. I refer to my affidavit sworn 1 February 2019 and filed in this Proceeding (my First Affidavit), in support of the Application.
5. Shown to me at the time of swearing this affidavit is a bundle of documents marked "**Exhibit PR-3**". Where I refer to documents and page numbers throughout this affidavit, I am referring to the documents and page numbers in the Exhibit PR-3.
6. I intend to swear two further affidavits which contain confidential information (the **Confidential Affidavit PR-1**) and which exhibits a bundle of confidential

AFFIDAVIT  
Filed on Behalf of the Second and Fifth Defendants

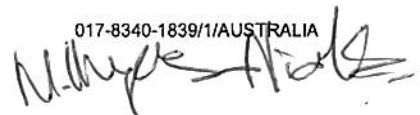
Form 46, Version 1  
Uniform Civil Procedure Rules 1999  
Rule 431



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

Phone No: (02) 8248 7888  
Fax No: (02) 8248 7899  
Email: [Amanda.banton@squirepb.com](mailto:Amanda.banton@squirepb.com)/  
[susan.goodman@squirepb.com](mailto:susan.goodman@squirepb.com)

017-8340-1839/1/AUSTRALIA



documents marked "Confidential Exhibit PR-1" (**Confidential PR-1**) and (the **Confidential Affidavit PR-2**) and which exhibits a bundle of confidential documents marked "Confidential Exhibit PR-2" (**Confidential PR-2**). I propose to ask the Court to make a suppression order over the Confidential Affidavit PR-1 and Confidential Exhibit PR-1 and Confidential Affidavit PR-2 and Confidential Exhibit PR-2.

### **Service of Notice**

7. On 22 February 2019, Justice Mullins made orders (**Service Orders**) in relation to the service of the Applicants' Application on members of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 (**WFMIF**).
8. On 22 March 2019, in accordance with the Service Orders, I caused a copy of the Notice (as defined in the Service Orders) to be posted to the website "<https://www.trilogyfunds.com.au/lm-wholesale-first-mortgage-income-fund/>" (**Website**). At pages 1 to 2 of Exhibit PR-3 is a copy of the Notice posted on the Website.
9. On or about 22 March 2019, in accordance with the Service Orders, I also caused copies of the Notice to be sent to each of the unitholders in the WFMIF by each unitholder's preferred method for distribution of notices as recorded on the register of unitholders, maintained by the Second Defendant.
10. At the time of swearing this affidavit, to the best of my knowledge, none of the unitholders of WFMIF have responded or requested copies of any material in relation to the Application, including the copies of the confidential affidavits available to unitholders, or hard copies of the application and non-confidential affidavits, as identified in the Notice.

### **Financial Position of WFMIF**

11. Since about 16 November 2012, Trilogy has been the responsible entity of the WFMIF, a feeder fund in a unit trust known as the LM First Mortgage Income Fund (**FMIF**). I refer to paragraph 11 of my First Affidavit and confirm the only assets of the WFMIF are its units in the FMIF.
12. Because the WFMIF has no assets other than the units held in the FMIF, it is without funds. Therefore, all expenses of the WFMIF (including the legal costs being incurred in the Feeder Fund Proceedings) are being paid by Trilogy.

Signed:



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Taken by:



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## Settlement

13. The parties to Supreme Court of Queensland proceeding 13534 of 2016 (**Feeder Fund Proceedings**) other than the Fourth Defendant have agreed to settle the dispute in those proceedings on the terms set out in the Settlement Deed, a copy of which is exhibited at 105 to 136 of the Confidential Exhibit PR-1.
14. The settlement of the Feeder Fund Proceedings will obviate the need for the Applicants to incur further legal costs associated with defending the Feeder Fund Proceedings, including the costs of a trial.
15. In my experience, litigation is unpredictable and there is a risk that the Applicants' defence of the claims against them will be unsuccessful.
16. As set out at paragraph 23 of my First Affidavit, SPB have estimated that the Applicants' costs of defending the Feeder Fund Proceedings to trial will be in the order of \$1.3m exclusive of GST. For that reason, I am of the opinion that it is appropriate for the Feeder Fund Proceedings to be settled on the terms set out in the Settlement Agreement.
17. I am also of the view that the settlement is appropriate because it will lead to the Interim Distribution being made within a short timeframe, instead of members of the FMIF having to wait until after the conclusion of the trial of the Feeder Fund Proceedings. If the Applicants do not successfully defend the Feeder Fund Proceedings, the WFMIF may not receive any distribution at all, or may receive a smaller distribution than it would do if the proposed settlement proceeds.
18. I have also received advice from my counsel and retained solicitors in relation to the Applicants' prospects of success in the Feeder Fund Proceedings, and consider that the settlement is consistent with that advice. That advice is subject to legal professional privilege and I do not waive that legal professional privilege over it. A copy of that advice is exhibited at pages 35 to 37 of the Confidential Exhibit PR-2.

Signed:



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Taken by:



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Sworn by Philip Ryan on 30 April 2019 at Brisbane in the presence

Signed:

Deponent



Signed:



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Taken by:

  
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**CERTIFICATE OF EXHIBIT**

Exhibit PR-3 to the affidavit of Philip Ryan sworn/affirm 30 April 2019:



*(Deponent to sign)*

Deponent



*(Person taking affidavit to sign)*

*Solicitor*  
*(Description of person taking affidavit)*

AFFIDAVIT  
Filed on Behalf of the Second and Fifth Defendants

Form 46, Version 1  
Uniform Civil Procedure Rules 1999  
Rule 431

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

Phone No: (02) 8248 7888  
Fax No: (02) 8248 7899  
Email: [Amanda.banton@squirepb.com](mailto:Amanda.banton@squirepb.com)/  
[susan.goodman@squirepb.com](mailto:susan.goodman@squirepb.com)

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**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 2 May 2019 at 9.30am.**

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.

Certain other affidavits that Trilogy and Trust Company will rely upon are confidential, and therefore will not be posted on the website. Any unitholder who wishes to receive copies of the confidential affidavits available to unitholders, or who reasonably requires a hard copy of the application and non-confidential affidavits, should call Trilogy on +61 7 3039 2828

Dated: 22 March 2019

Trilogy Funds Management Limited