SUPREME COURT OF QUEENSLAND

REGISTRY	Brisbane
NUMBER	8792 of 2013

Applicants **KORDAMENTHA PTY LTD (ACN 100 169 391) AND CALIBRE CAPITAL LTD (ACN 108 318 985) IN THEIR CAPACITY AS TRUSTEES FOR THE LM MANAGED PERFORMANCE FUND**

AND

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

APPLICANTS' SUBMISSIONS ON SECTION 96 APPLICATION

Synopsis

1. The applicants[1] are the current trustees of a unit trust called the LM Managed Performance Fund (the "MPF"), having replaced the respondent ("LMIM")[2] as trustee on 12 April 2013 by order of the Chief Justice.[3]

2. The primary relief sought on this origination application (CFI-1) is a direction pursuant to s. 96 of the *Trusts Act 1973* (Qld) ("Trusts Act") as to whether the applicants would be justified in prosecuting proceedings against LMIM for the relief set out in a draft statement of claim which is exhibit SMV-1 to the affidavit of Simon Vertullo (CFI-2-4) filed on 19 September 2013 ("First Vertullo Affidavit").

3. At all material times, LMIM, which was a professional trustee, was also the responsible entity for the LM Australian Income Fund (ARSN 133 497 917) (the "AIF"), a scheme registered under section 601EB of the Corporations Act.[4] Pursuant to section 601FC of the Corporations Act, LMIM held the scheme property of the AIF on trust for the scheme members. LMIM is still the responsible entitle for the AIF.

4. The business of both LMIM atf MPF and LMIM atf AIF was to use funds obtained from members by entering into property investment and structured loan transactions for the purchase and/or development of Australian real property for the eventual benefit of members.

5. The essence of the applicants' complaint is that at a time when LMIM atf MPF had already entered into a particular loan transaction on first mortgage security with a third party the outstanding balance of which was about $3.2m, LMIM engaged in a self dealing transaction in which it decided that LMIM atf AIF would also lend about $1.7m into that same transaction but on terms which entirely subordinated the lending which had already been made by LMIM atf MPF to the subsequent lending by LMIM atf AIF.

[1] Exhibits SMV5 and SMV6 to the First Vertullo Affidavit are company searches for each applicant.
[2] Exhibit SMV2 to the First Vertullo Affidavit is a company search for LMIM.
[3] The order and reasons of the Chief Justice are exhibit SMV46 to SMV47 of the affidavit of Simon Vertullo filed 13 June 2014
[4] Exhibit SMV7 to the First Vertullo Affidavit is a historical extract for the AIF.

6. The complaint of the applicants (as the new trustees of MPF) is that at the time of the self dealing it was neither in fact for the benefit of the members of the MPF nor could it reasonably have been thought to be for the benefit of the members of the MPF that LMIM atf AIF would participate in the particular loan transaction in terms which entirely subordinated the lending which had already been made by LMIM atf MPF to the subsequent lending by LMIM atf AIF. There was a breach of the core duty of LMIM as trustee of the MPF to perform the trust honestly and in good faith for the benefit of the members of the MPF.

7. By engaging in the self dealing (and as it well knew) LMIM also placed itself in a position where –

   (a) the duties which it owed to the members of the MPF conflicted with its interest in its capacity as the responsible entity for AIF; and further or alternatively

   (b) the duties which it owed to the members of the MPF conflicted with the duties which it owed to the members of the AIF.

8. Ultimately the borrower defaulted. LMIM exercised rights it had against the borrower under various securities, but there was a very significant shortfall in the return which was obtained.

   (a) In September 2013 a sum of $429,135.04 was received by the applicants in respect of the $3.2m lending which had been made by LMIM atf MPF but on the other hand a sum of $1,925,729.92 was received by LMIM atf AIF in respect of the $1.7m loan which had been made by LMIM atf AIF.

   (b) Because by the time the monies were received the applicants had complained of breaches of trust by LMIM when it was acting as trustee of the MPF, the monies received by LMIM atf AIF were paid into trust pending the resolution of the dispute concerning breaches of trust.

9. The principal relief proposed to be claimed in the proceeding in respect of which the applicants seek advice is –

   (a) a declaration that LMIM holds the proceeds which it received on about 10 September 2013 (i.e. $1,925,729.92) on constructive trust for the applicants; and

   (b) an order that LMIM pay to the applicants the amount of $1,925,729.92 together with any accretions which accrue thereto.

10. LMIM has notified the applicants that it opposes the relief sought today. As to this:

   (a) The solicitors for LMIM have been active in raising matters with the applicants' solicitors and they have been addressed in correspondence: exhibit DOB17 to the affidavit of David O'Brien sworn 16 June 2014 ("Second O'Brien Affidavit").

   (b) On 27 May 2014, by letter of that date, LMIM contended, inter alia, that the draft pleading in its current form was "fatally flawed" apparently because the relief claimed is "against the assets of the AIF, a non party and not of LMIM".[5]

   (c) On 6 June 2014, the applicants responded[6] to LMIM's comments on the form of the pleading by, mostly, rejecting them and explaining that –

      (i) AIF is not a legal entity;

      (ii) "LMIM atf AIF" is not a separate legal entity to "LMIM" or "LMIM atf MPF";

[5] Exhibit 17, page 38 to the Second O'Brien Affidavit.
[6] Exhibit 17, page 47 to the Second O'Brien Affidavit.

(iii) LMIM is named as the defendant without reference to its trust capacity as trustee of AIF because it is the entity personally liable for any breach of trust when it was trustee of the MPF and it presently holds the disputed fund; and

(iv) If LMIM wishes to contend that there are circumstances affecting the nature of the receipt of the disputed fund (including the nature and type of the obligations which it owed to other persons in respect of those funds) which mean that it should not be regarded as having obtained a benefit or which would make it inappropriate for the relief sought to be granted, then that is a matter for defence.

(d) LMIM has not yet contended that there is a substantive reason why proceedings would not be justified.

11. If the court directs that the applicants would be justified in prosecuting the proceedings, then the applicants will seek an order under section 471B of the *Corporations Act 2001* (Cth) ("Corporations Act") for leave to proceed against LMIM, which is in liquidation.

The jurisdiction conferred on the Court by s. 96 of the Trusts Act

12. Sections 96 and 97 of the Trusts Act provide as follows:

"**96 Right of trustee to apply to court for directions**

(1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.

(2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.

97 Protection of trustees while acting under directions of court

(1) Any trustee acting under any direction of the court shall be deemed, so far as regards the trustee's own responsibility to have discharge the trustee's duty as trustee in the subject matter of the direction, notwithstanding that the order giving the direction is subsequently invalidated, overruled, set aside or otherwise rendered of no effect, or varied.

(2) This section does not indemnify any trustee in respect of any action done in accordance with any directions of the court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the court making the order giving the direction."

13. The principles governing the exercise of jurisdiction pursuant to s. 96 are not in doubt.

14. The leading authority is *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66.

15. The jurisdiction has also been considered over recent years in:

(a) *Salmi v Sinivuori* [2008] QSC 321 per Lyons J;

(b) *Public Trustee of Queensland v MacPherson* [2011] QSC 169 per McMeekin J

(c) *Glassock v The Trust Company (Australia) Pty Ltd* [2012] QSC 15 per Boddice J;

(d) *Re Public Trustee of Queensland* [2012] QSC 281 per Applegarth J;

(e) *Klatt (as administrator of Estate of Coore, decd) v Coore* [2013] QSC 196 per Atkinson J.

16. The procedure has a summary and informal character to assist the court's administration of trusts by orders less extreme than a general administration order: *Macedonian* at [61] – [63]; *Klatt* at [10(4)].

17. There are two principal functions of the s. 96 procedure. First, to give personal protection to the trustee: *Macedonian* at [45], [64] – [66] and [71]; *MacPherson* at [19]; *Klatt* at [10(5)]. Second, to protect the interests of the trust: *Macedonian* at [71] - [72]; *Glassock* at [15].

18. The section provides for private judicial advice to the trustee and so operates as an exception to the Court's ordinary function of deciding disputes between competing litigants. The court is entitled to act on the facts stated by the trustee even if they are contested and controversial. The trustee loses the protection afforded by s 97(1) if the trustee "has been guilty of any fraud or willful concealment or misrepresentation" to the court. It is therefore not necessary or appropriate to determine a challenge to those facts as if it were adversarial litigation: *Macedonian* at [80] – [81], *Klatt* at [11(1)].

19. Indeed, in deciding an application for direction as to whether a trustee would be justified in commencing litigation, the court does not investigate the evidence and decide whether or not the applicant trustee will be successful on the proposed claim. Rather, the court determines whether or not the proceeding should be taken in the best interests of the trust estate: *Macedonian* at [105]; *Glassock* at [14]; *Re Public Trustee of Queensland* at [18], [25]; *Klatt* at [11(6)]. The question is a broad one and can involve the question whether it is practical and fair for trust assets to be used for the proposed purpose: *Klatt* at [11(2)].

20. Even if notice of the application for private advice is given to other persons, those persons are not strictly speaking "parties" to "proceedings", although they are able to participate in the proceedings to some extent. The s. 96 jurisdiction reflects a compromise between a procedure for affording private advice to trustees and the need for affected persons to be given a hearing in some cases: *Macedonian* at [66].

21. It is this private nature of the procedure which explains the fact that persons who are given notice of it are not entitled necessarily to all the material placed before the Court by the applicants, especially where those persons are parties to the litigation in relation to which the judicial advice is sought. It would be inappropriate to reveal to such persons the matters necessary to be put before the judge hearing the judicial advice application relating to, for example, the strength and weaknesses of the trustee's case and the course to be taken in it: *Macedonian Orthodox Community Church St Petka Inc v Petar* (2006) 66 NSWLR 112 at [20] and [63]. Such persons are able initially to attend the hearing and make submissions. However, they should withdraw once counsel for the applicant trustee begins to make submissions about the merits of the proceeding: *Salmi* at [15].

22. A particular issue concerns the question of the access to privileged material which might be provided to the court on a s. 96 application:

    (a) The legal opinion relied upon by the applicant trustee is often provided to the Court at the hearing (in the absence of the other parties) and placed in an envelope and marked "Not to be opened without an order of the court": see *Salmi* at [14] – [15] and the forms of order made in *Klatt* and *MacPherson*.

    (b) The legal professional privilege which would otherwise inhere in such opinions is not lost by their being provided to the Court: *Petar* [34] – [35], [63] and *Macedonian* at [168].

(c) There is authority which suggests that to ensure privilege over the legal opinion is preserved, the opinion should only be provided to the court after the court has indicated that providing the opinion is necessary before the court can be in a proper position to provide the judicial advice sought: at *Vickers, Re York Street Mezzanine Pty Ltd (in liq)* (2011) 196 FCR 479 at [48] per Gordon J. As far as the applicants can make out, none of the Queensland cases has considered whether this is essential.

(d) There is no error involved in not permitting other interested persons to have access to such material: *Macedonian* at [167] to [173];

<u>The matters which the Court should consider</u>

23. On an application under s. 96 regarding prospective litigation, the court should ordinarily be provided with the following:

(a) a written statement of facts: s. 96(1);

(b) proof of service upon "all persons interested in the application": s. 96(2);

(c) a costs estimate regarding the proposed litigation: *Salmi* at [14];

(d) material addressing regarding the value of the estate: *Salmi* at [14];

(e) material addressing the merits of the proceeding: *Glassock* at [14].

24. Each of these matters will be addressed in turn.

<u>A written statement of facts: section 96(1);</u>

25. Section 96(1) refers to a written statement of facts. The applicants have addressed this requirement in affidavit material and a draft pleading. A version of the draft pleading amended by insertion of references to the evidence of the pleaded breach case is provided with these submissions. The evidence references appear in shading and bold underlined font from paragraph 18 onwards.

26. The main relief sought by the applicants in the draft statement of claim is, in effect, the declaration of a constructive trust over the sum of $1,925,729.92 ("Disputed Fund") which came into existence through the "sale" of the mortgage securities over the Land and the debt owed by Peregian Beach to LMIM.[7].

27. The Disputed Fund is held, so the applicants believe, on trust by LMIM pending resolution of the dispute. A standstill agreement was entered into before the Disputed Fund was paid over pursuant to which the administrators of LMIM agreed to hold what would become the Disputed Fund on trust.[8] It is not clear presently whether LMIM has fulfilled that standstill agreement by directly holding the relevant monies, or holding them via a custodian trustee because it seems that the actual cheque by which the monies were received was made payable to The Trust Company (PTAL) Ltd ACF LM Australian Income Fund: exhibit SMV48 to the Third Vertullo Affidavit.

<u>Service of the originating application</u>

28. Section 96(2) requires that the application be served upon all persons interested in the application or such of them as the court thinks expedient.

29. This will usually include the beneficiaries of the trust (*Salmi* at [15]) and the target of the proposed litigation: *Glassock* at [27].

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[7] [42] of the First Vertullo Affidavit.

[8] Exhibit SMV35 to the First Vertullo Affidavit is a copy of the letter of agreement dated 26 August 2013 between LMIM and the applicants..

30. The question of service on the following groups of persons should be considered:

    (a) the members of the trust fund of which the applicants are trustees;

    (b) LMIM, its receivers and managers and its liquidators;

    (c) the members of the trust fund of which LMIM is still trustee;

    (d) Trust Company (PTAL) Ltd.

31. As to the members of the trust fund of which the applicants are trustees:

    (a) The MPF has in excess of 4,500 unit holders: [15] of Mr Vertullo's second affidavit (CFI-8-9) filed 13 November 2013 ("Second Vertullo Affidavit"). Mr Vertullo concluded that it would be uneconomical to serve the unit holders in the usual way: [16] of the Second Vertullo Affidavit.

    (b) As a consequence, all of the unit holders were sent an email on 12 November 2013 with a link to a website containing the material then filed in this matter: [17] of the Second Vertullo Affidavit.

    (c) On 12 June 2014, the unit holders were sent an email advising them about the new hearing date: exhibit SMV-44 to the affidavit of Simon Vertullo filed 12 June 2014 ("Third Vertullo Affidavit").

    (d) Between 25 September 2013 and 5 October 2013, the applicants received eight responses from members, copies of which appear at exhibit SMV41 to the Second Vertullo Affidavit. The responses range from approving the proposed application to expressing cynicism about the purpose of the application.

    (e) It is submitted that the Court should form the view that it is not expedient for there to be personal service of the 4,500 unit holders.

32. As to LMIM, its receivers and managers and its liquidators:

    (a) On 19 September 2014, the originating application and the First Affidavit were served on LMIM at its registered office: [19] of the affidavit of David O'Brien filed on 24 October 2013 (CFI-6) ("First O'Brien Affidavit").[9] The registered office of LMIM is the office of FTI Consulting, the firm at which the respondent's liquidator works.

    (b) The receivers and managers referred to in the court heading have not been appointed over the assets the subject of this dispute.[10] It was therefore not necessary to serve them.

33. As to the members of the trust fund of which LMIM is still trustee:

    (a) The applicants are already on notice that LMIM contends that the members of the AIF have an interest in respect of the monies which the applicants contend that LMIM should be regarded as holding on constructive trust for the applicants.

    (b) The applicants have taken the view that it is sufficient to have served LMIM because, *ex hypothesi*, it is the legal person with the obligation to protect whatever interest the members of the AIF have in relation to those monies.

34. As to Trust Company (PTAL) Ltd:

    (a) The court will see references in the documentation to a company called Trust Company (PTAL) Ltd ("PTAL"), which is a professional custodian company used by LMIM to hold assets for both the MPF and the AIF.

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[9] The documents were hand delivered by Nadia Braad: affidavit of Ms Braad filed 24 September 2013 2014 (CFI-5).

[10] [4] of the affidavit of David O'Brien sworn 16 June 2014.

(b) The proposed pleading asserts the PTAL agreed to act as custodian for both LMIM atf MPF (see paragraphs 27 to 29) and LMIM atf AIF (see paragraph 54). The custody agreement is exhibited to the material.[11]

(c) The custody agreement provides that PTAL must act on instructions given to it by LMIM in relation to assets which it holds, which is why it has not been made a party to the originating application.[12]

(d) It follows that it is not necessary that PTAL be served or be heard in relation to the present applicant.

(e) It is possible, however, that if the facts reveal that LMIM is holding the Disputed Fund via having PTAL hold them as custodian trustee for it, that PTAL should be made party to the substantive proceedings and the claim for relief modified accordingly. A decision on that question could be made once the true position becomes clear.

35. The result is that the Court should be satisfied that sufficient notice of the proceeding has been given to interested persons.

Costs estimate of the proposed litigation

36. Mr O'Brien, an experienced litigation partner, estimated that the proposed litigation is likely to cost about $391,000 in future fees and outlays: [22] of the First O'Brien Affidavit. Comparing this cost with the size of the fund in question (i.e. $1,925,729.92 plus accretions), strongly suggests the proceeding is worth bringing.

The estimated value of the MPF estate

37. The applicants estimate that the current net cash holdings of the MPF is approximately $5.2 million prior to future realisations and other recovery actions: [5] of the Third Vertullo Affidavit.

38. There are sufficient moneys to fund the claim if it proceeds and pay any adverse cost orders.

The merits of the proposed proceeding

39. As has been mentioned, the court does not investigate the evidence and decide whether or not the applicant trustee will be successful on the proposed claim. Rather, the court determines whether or not the proceeding should be taken in the best interests of the trust estate.

40. The applicants intend to provide these submissions to the representatives of LMIM. However otherwise (and as they have already notified LMIM) they intend to contend that the question of the merits of the proposed proceeding should be addressed by them in closed court in the absence of the representatives of LMIM for the reasons mentioned at [21] above.

41. On the assumption that for the reasons mentioned in [22] above the Court considers that providing the opinion is necessary before the court can be in a proper position to provide the judicial advice sought, if the Court accedes to the submission referred to in the preceding paragraph, the applicants would address the merits of the proceeding by –

(a) separate written submissions on the merits which cross refer to confidential legal advice obtained from counsel, in respect of which the applicants assert legal professional privilege; and

[11] The custody agreement is exhibit SMV18 to the First Vertullo Affidavit. Both of the funds are listed at Annexure A Schedule 2, page 378.
[12] Clause 4 of the custody agreement is at page 355.

(b) providing the opinion to the Court,

neither of which documents the applicants would propose to provide to the representatives of LMIM and each of which the applicants would ask the Court do deal with in the manner addressed at [22] above.

42. It may be appropriate to address some further submissions to the LMIM contention that the proposed proceeding is misconceived because it has no significant personal assets and the Disputed Fund is held on trust. The essential problem with this has been summarised in [10] above. The following further observations are made:

(a) The origin and still of the essence of a trust is an obligation owed by a person, the trustee, to exercise rights on behalf of another or for the accomplishment of some purpose, and where that obligation is in respect of property on behalf of another the beneficiary of that obligation has a right to enforce it against the trustee: *Suncorp Insurance and Finance v Commissioner Of Stamp Duties* [1998] 2 Qd. R 285 per Davies JA at 305.

(b) Where a person obtains legal ownership of property and holds that property on trust for another, it is not uncommon for lawyers to talk about legal and beneficial ownership as though the trustee's ownership has been split into two types of ownership and one of those types has passed to another person. This is imprecise and wrong.

(c) The key to understanding the error is to realise that an equitable interest is not carved out of a legal estate but impressed upon it: per Brennan J in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431.

(d) See the judgment of Hope JA in the New South Wales Court of Appeal decision in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1984] 1 Qd R 212 at 230.. Hope JA said at 518-9

> An unconditional legal estate in fee simple is the largest estate which a person may hold in land. Subject to qualifications arising under the general law, and to the manifold restrictions now imposed by or under statutes, the person seised of land for an estate in fee simple has full and direct rights to possession and use of the land and its profits, as well as full rights of disposition. An equitable estate in land, even where its owner is absolutely entitled and the trustee is a bare trustee, is significantly different. What is, perhaps, its essential character is to be traced to the origin of equitable estates in the enforcement by Chancellors of "uses" or "trusts" …
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> [A]lthough the equitable estate is an interest in property, its essential character still bears the stamp which its origin placed upon it. Where the trustee is the owner of the legal fee simple, the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligation which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons.
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> …
>
> In illustrating his famous aphorism that equity had come not to destroy the law, but to fulfil it, Maitland [in his Lectures on Equity] said of the relationship between legal and equitable estates in land: "Equity did not say that the cestui que trust was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the cestui que trust. There was no conflict here."

(e) In *O'Sullivan v Commissioner of Stamp Duties* [1984] 1 Qd R 212 GN Williams J said (at 229-230)

> It was asserted by the [trustees] that the transfers in question were transfers of the "bare legal estate" only. I cannot accept that proposition. By definition, a trust is an equitable obligation,

> binding the trustee to deal with property in respect of which he has either legal title or control, for the benefit of a beneficiary. The obligation is not only one in personam, but also one which is affixed to the property in question. Where there is a "bare trust", and the beneficiary is sui juris, the beneficiary may put an end to the trust by requiring the trustees to transfer the trust property to him. Against that background it is not unusual for lawyers to say that the equitable estate is vested in the beneficiary. But it must not be overlooked that at law the fee simple in land, being trust property, is vested in the trustee, and when the trustee conveys the property to the beneficiary, thereby putting an end to the trust, he conveys the fee simple to him. Particularly where the land is subject to the Real Property Act there can be no transfer of a bare legal interest as such …

(f) His Honour then cited with approval the passage from the judgment of Hope JA in the New South Wales Court of Appeal decision in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* set out above, describing it as "perhaps the best summation of the position": [1984] 1 Qd R 212 at 230.

(g) The analysis of Williams JA in this respect has been referred to with approval in the Court of Appeal: see per McPherson JA (with whom Williams JA agreed) in *Francis v NPD Property Development Pty Ltd* [2005] 1 Qd R 240 at [4].

(h) This analysis is not limited to land. The judgment of McClelland J in *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 McClelland J was analysing whether under the Companies (NSW) Code a receiver could be appointed of property held upon trust for other persons. His Honour observed at 311

> It is important to recognise the true nature and incidents of legal and equitable estates in property subject to a trust. They are clearly and succinctly described in the judgment of Hope JA in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 518-520. (His Honour's analysis is not affected by the decision of the High Court in that case — see 149 CLR 431.) I would not wish to detract from the value of Hope JA's exposition by trying to summarise it. But what is significant for present purposes is the imprecision of the notion that absolute ownership of property can properly be divided up into a legal estate and an equitable estate. An absolute owner holds only the legal estate, with all the rights and incidents that attach to that estate. Where a legal owner holds property on trust for another, he has at law all the rights of an absolute owner but the beneficiary has the right to compel him to hold and use those rights which the law gives him in accordance with the obligations which equity has imposed on him by virtue of the existence of the trust. Although this right of the beneficiary constitutes an equitable estate in the property, it is engrafted onto, not carved out of, the legal estate. Hope JA (at 519) illustrates the point by the following quotation from Maitland — Lectures on Equity 2nd ed (1949) at 17:
>
> "… Equity did not say that the cestui que trust was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the cestui que trust. There was no conflict here."

(i) So if LMIM made profits or received an advantage whilst acting as trustee for someone else, it still made those profits or received that advantage personally in the only relevant sense. When it received the Disputed Fund it became owner of that property in the sense to which reference has been made. Although it may be true that its ownership was the subject of having obligations to other persons engrafted on to it, it is still it would be wrong to say that it did not make the profits or receive the advantage personally.

<u>The orders which should be made</u>

43. The court is asked to make a direction under s. 96 of the Trusts Act that the applicants would be justified in commencing proceedings in the form of the draft statement of claim.

44. The additional orders sought are addressed below.

Costs of the application

45. The applicant trustee's costs of the application under s. 96 are ordinarily ordered to be paid out of the trust estate on the indemnity basis: see for example *Klatt*. This will usually be so even where the application is unsuccessful, so long as the applicant trustee's conduct has been honest and proper: *Public Trustee of Qld v Opus Capital Ltd* [2013] QSC 131 at [25].

46. The applicants are also entitled to an indemnity based upon clause 18.1(c) of the Constitution (as amended by the Deed Poll)[13] save in circumstances of negligence, fraud or breach of trust.

47. In the circumstances, it is appropriate for the court to order that the applicants' costs and expenses of and incidental to the present application be paid on the indemnity basis out of the assets of the MPF.

Subsequent conduct of the proceeding

48. The applicants seek separate orders that the draft statement of claim be filed in this proceeding within 7 days and that thereafter this proceeding continue as it commenced by claim.

49. Rule 14(2)(a) empowers the court to make the last order sought. It is appropriate to make the order as LMIM should be required to plead to the applicants' statement of claim and the usual regime in relation to disclosure should apply.

Section 471B of the Corporations Act

50. If the court considers that the applicants would be justified in commencing proceedings based upon the draft statement of claim, then the applicants seek leave under section 471B.

51. The court has a broad discretion: *Najjar v Alfayhaa Cheese Pty Ltd (In liq)* [2011] NSWSC 791 at [11]. The decision as to whether or not to grant leave often requires a consideration of the alternative mechanism to civil litigation, namely the lodging of a proof of debt: *Swaby v Lift Capital Partners Pty Ltd* (2009) 72 ACSR 627 at [22]- [33].

52. However, as a proprietary claim is outside the scope of the proof of debt system, leave to commence such a claim is likely to be granted: *Ong v Lottwo Pty Ltd (in liq)* (2013) 304 ALR 651 at [61] per Kourakis CJ with whom Stanley and Nicholson JJ agreed. In the same paragraph, Kourakis CJ listed the usual factors that may be relevant to exercising

53. The applicants making the following submissions about the discretionary considerations:

    (a) if the court directs that the applicants would be justified in commencing the proceedings it would be appropriate to grant leave as it suggests there is a serious question to be tried;

    (b) the applicants do not yet know the attitude of the liquidator of LMIM but asked on 16 June 2014;

    (c) the liquidator of LMIM appears to be well resourced and should not be overly distracted by this litigation;

    (d) disclosure would be beneficial in this case: *Swaby* at [29].

[13] SMV3 and SMV4 to the First Vertullo Affidavit.

Subsequent costs of the proceeding

54. The court also has the power to make an advance order about how the applicant trustee's costs of the main litigation are to be dealt with: *Macedonian* at page 97 [86]-[87]. If made, such a costs order should probably be made revokable in the future so that the ultimate trial judge can make a different order if appropriate: *Application of Macedonian Orthodox Community Church St Petka Inc (No 3), Re* [2006] NSWSC 1247 at [68] per Palmer J.[14] The High Court appeared to accept the power to do so at page 99 [96] of *Macedonian*.

55. There is an unresolved debate about whether such an order should only be made "in the most unusual circumstances": *Macedonian* at [87]. Assuming the more onerous test applies, it is submitted that the following factors support such as order:

    (a) it will provide certainty for the applicants and the members of the MPF subject to any application to revoke the order;

    (b) it reduces the risk of costs being used as a point of leverage by LMIM. LMIM has already threatened in their letter dated 27 May 2014 to try and deprive the applicants of their costs in relation to the section 96 application.

Conclusion

John Bond QC and Edward Goodwin

Counsel for the applicants

17 June 2014

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[14] A similar order but in relation to the defence of an action was made in *Re Jax Franchising Systems Pty Ltd (as trustee for the JF Unit Trust)* [2012] NSWSC 1115 without reference to revocation.