

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)**

RESPONDENT'S OUTLINE OF SUBMISSIONS

17 JUNE 2014

Respondent's Material

- BY LEAVE, affidavit of John Park sworn 17 June 2014

Overview

1. As to the first aspect of the application, namely the s 96 directions, the respondent draws the following matters to the attention of the Court:
 - (a) The current financial position of the MPF is unclear, and there is no evidence of any cost-benefit analysis of the claim having been provided to the beneficiaries, at least two of whom have questioned the commercial utility of the action¹;
 - (b) There is no commercial advice to be provided to the Court, as only a legal advice as to the "matters pleaded in the draft statement of claim" is to be provided; and
 - (c) In circumstances where there is uncertainty as to the commercial benefit to the beneficiaries of the litigation, the beneficiaries of the trust, namely the members of the MPF, do not appear to have been served with the

¹ See Vertullo #2 filed 13 November 2013, being Court documents 8 & 9, at bundle pp. 232 & 233

application, as required by s. 96(2) of the *Trusts Act* 1973 (in conjunction with s. 39(1) of the *Acts Interpretation Act* 1954), other than by an informal email, without any application, or Order made, for substituted service.

2. As to the second aspect of the application, namely the leave to proceed under s 471B of the *Corporations Act* 2001 (Cth) (“Act”), the respondent opposes leave on the ground that there is no utility to be served by the foreshadowed proceedings, as the relief that is claimed is against the defendant company in its own capacity and not as trustee and would therefore be a claim which could be the subject of a proof of debt, without more;
3. The respondent accepts that if the proposed proceedings were directed to it as trustee for the LM Australian Income Fund Currency Protected Managed Investment Scheme (the “AIF”), then there might be some utility in the proceedings as they could determine the rights as between LMIM as trustee for the various funds. The applicants, despite notice from the respondent about this issue, persist with their proposed claim against the respondent in its own capacity, and not as trustee for the AIF. On the basis of that position, there is no utility in the litigation. It is to be noted in this regard that the authorised officer of the applicants swears to the legal advice received by him addressing only the matters in the draft statement of claim, and not any potential broader claim against LMIM as trustee for the AIF².

The s.96 Application

4. The respondents raise the three matters identified in paragraph 1 above for the consideration of the Court.
5. The relevant legal principles appear in *Macedonian Church v Eminence Petar* (2008) 237 CLR 66, and especially the eight general principles at [54] to [76].
6. Of some importance is the necessity for the Court to consider:

² See Vertullo #1 filed 19 September 2013, Court documents 2, 3 & 4, at paragraph 7

(a) Whether Counsel's opinion addresses the facts necessary to support the legal conclusions reached and demonstrates that the propositions of law are relied on are properly arguable³; and

(b) As a further matter (also at [162]):

Whether, in the light of Counsel's Opinion, there are '*sufficient prospects of success*' calls for another judgment, founded upon such considerations as:

- the nature of the case and the issues raised;
- the amounts involved, including likely costs
- whether the likely costs to be incurred by the trustee are proportionate to the issues and [the] significance of the case;
- the consequences of the litigation to the parties concerned;
- in the case of a charitable trust, any relevant public interest factors". (emphasis added)

7. This second issue does not appear to have been addressed by the applicants, either by provision of any information to the beneficiaries or to the Court by a commercial opinion of a solicitor.

8. Furthermore, such notification as was given to the beneficiaries was vague. The beneficiaries were informed that the issues were "explained" in the draft statement of claim⁴. With respect to the applicants, the issues are not explained in the draft statement of claim, as that document contains a complex series of allegations of fact. The beneficiaries were also referred to the "initiating documents", although it is unclear what they were. If they included the first affidavit of Mr Vertullo and the 614 pages of annexures, then it is submitted that not only does this document not constitute the "statement of facts" required by s. 96 of the *Trusts Act* 1974, but this document does not constitute a document that clearly explains the issues for beneficiaries to express a view as to whether the trustees ought to spend a substantial proportion of any remaining funds of the MPF on further litigation or the cost-benefit of doing so.

Relevant legal principles as to leave under s.471B

9. The relevant principles are set out in *Re Grant* [1983] 2 Qd R 314. At 317, the test is whether the applicant can demonstrate some good reason why a departure from the

³ *Macedonian* at [162], adopting a paragraph of Palmer J's judgment at first instance

⁴ Vertullo #2 filed 13 November 2013 at bundle p. 230

proof of debt procedure is justified in the particular claim in dispute. Even where the claim is a proprietary one, an applicant must demonstrate that the claim gives rise to a serious dispute and has a solid foundation: *Ong v Lottwo* (2013) 116 SASR 280 at [61].

No utility – an unsecured claim only as against the proposed defendant

10. In the particular circumstances identified in the draft claim and statement of claim (“DSOC”), there is no good reason to depart from the normal proof of debt procedure for the claim made, for the following reasons.
11. The applicants sue in their capacity as trustee of the MPF. The DSOC identifies the prospective defendant, LMIM, as the former trustee of the MPF. Several definitions are used in the DSOC include:
 - (a) LMIM, being LM Investment Management Ltd⁵;
 - (b) LMIM atf MPF, being LM Investment Management Ltd as trustee for the MPF⁶;
 - (c) LMIM atf AIF, being LM Investment Management Ltd as responsible entity for and trustee of the scheme property for the AIF⁷.
12. The applicants are nominated in the Court heading of the DSOC as suing in their capacity as trustees of the MPF. In contrast, LMIM is not named as defendant in any representative capacity, but solely in its own name. This is no doubt because the cause of action set out in the DSOC is for breach of its duties as former trustee for the MPF and not for anything it did as trustee for the AIF.
13. The DSOC pleads facts against LMIM in its capacity as trustee for the MPF⁸ and alleges the breaches of duty by LMIM as that trustee. This is no doubt because it owed duties, and any breaches of trust by it were, as trustee for the MPF, and not as

⁵ DSOC at paragraph 2

⁶ DSOC at paragraph 5

⁷ DSOC at paragraph 11

⁸ Including paragraphs 15 – 19, 27 – 29,

trustee for the AIF: see DSOC paragraphs 67 – 69. The DSOC goes on to allege that certain monies were received by LMIM atf AIF, but no causal link between the alleged wrongdoing atf MPF and any claim against LMIM atf AIF is pleaded, nor is any relief sought against LMIM atf AIF.

14. The claim against LMIM is therefore only against it in its own capacity for breach of its duties as former trustee for the MPF. The applicants can lodge a proof of debt. As recognized above, if the claim were against LMIM in its capacity as trustee of the AIF, and relief were sought against it on that basis and with a cause of action properly pleaded against it, so as to engage properly LMIM as trustee for the AIF, then it is accepted that a good reason might be shown. But the applicants, after having this issue squarely raised with them⁹, have stated that the claim they intend to pursue is that LMIM is personally liable for any breach of trust¹⁰.

Proper parties

15. The applicants propose to allege, at paragraph 73 of the DSOC, that the sum of \$1,925,729.92 was received by LMIM. Yet the applicants' own evidence, at bundle p. 40 to the third affidavit of Mr Vertullo, filed 13 June 2014, shows that the funds were received by The Trust Company (PTAL) Ltd ("PTAL") as custodian for the Australian Income Fund. If the applicants were to seek some form of constructive trust relief in respect of those funds, PTAL ought to be party to the proceedings. If the applicants were to seek the joinder of PTAL as defendant, it would highlight the flawed nature of the relief sought against LMIM in its own capacity. That is, the applicants would need to grapple with the proprietary nature of the relief sought by them against LMIM, in circumstances where it does not hold the legal title to the funds that the applicants claim.

K A Barlow QC and J Peden
Counsel for the respondent
17 June 2014

⁹ On 27 May 2014, by letter dated that date: see Affidavit of Mr O'Brien at bundle pp. 39-42
¹⁰ On 6 June 2014, by letter dated that date: see Affidavit of Mr O'Brien at bundle pp. 48-50

