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TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BODDICE J

No 8792 of 2013

KORDAMENTHA PTY LTD and ANOTHER

Applicants

and

LM INVESTMENT MANAGEMENT LIMITED

Respondent

BRISBANE

10.52 AM, TUESDAY, 17 JUNE 2014

DAY 1

Any Rulings that may be included in this transcript may be extracted and subject to revision by the Presiding Judge.

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HIS HONOUR: Yes. I understand that this is re: LM Investment Management Limited.

MR J.K. BOND QC: Yes, it is, your Honour.

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HIS HONOUR: Yes. If I could have appearances, please?

MR BOND: Your Honour, my name is Bond, initials J.K., Queen's counsel. I appear with my learned friend, Mr Edward Goodwin of counsel for the applicants Kordamentha Proprietary Limited and Calibre Capital Limited in their capacity as trustees for the LM managed performance force, instructed by Minter Ellison Lawyers.

15 HIS HONOUR: Thank you.

MR K.A. BARLOW QC: May it please the court. K.A. Barlow of Queen's counsel. I appear with Mr Jay Peden, P-e-d-e-n, of counsel, instructed by Russells Lawyers for the respondent, LM Investment Management Limited.

20 HIS HONOUR: Thank you.

MR BOND: Before I read the material, can I tell you just a little bit about it, your Honour?

25 HIS HONOUR: Yes.

MR BOND: The applicants are the current trustees of a unit trust called the LM Management – sorry, managed performance fund, which we will refer to MPF. They replaced the respondent LMIM as a trustee of that fund on 12 April by order of the Chief Justice – 12 April 2013. The primary relief they seek today is a direction from the court pursuant to section 96 of the Trusts Act as to whether they would be justified in commencing – in prosecuting proceedings against LMIM seeking remedies founded on breaches of trust by LMIM when it was trustee of the MPF.

35 HIS HONOUR: Yes.

MR BOND: If the court directs that the applicants would be justified in prosecuting the proceedings, the applicant will seek an order under section 471 (b) giving them liberty to proceed against LMIM because LMIM is in liquidation.

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HIS HONOUR: Yes.

MR BOND: The applicants understand that LMIM is the only person who will oppose the orders and, indeed, the only person who will seek to be heard, but the matter should be called outside just in case. There is a great deal of material and I will give you a list, but the gist of the matter can be gleaned by the court reading a written outline which I have given to my learned friends, the proposed statement of

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claim which contains highlighted references to the evidence in mark-up. That's how you can get the gist of the case. A preliminary matter must be addressed. I would suggest that you do it, and I don't think there is any dispute after reading the written submissions and the marked-up statement of claim and, of course, our learned friend's submissions.

The preliminary matter is the return of the subpoena against one of the – a representative of one of the trustees of the applicants and an application that that witness be cross-examined. The question is as to the documents sought to be obtained by subpoena and, as I understand it, the issue upon which leave to cross-examine is sought is what he deposes as to the extent of the net cash assets of the applicants as trustee. We will suggest that the subpoena ought be set aside and there should be no cross-examination essentially because the nature of the section 96 jurisdiction and the cases dealing with it suggest it's not to be treated as inter partes litigation and you shouldn't embark upon that sort of process. But that's the preliminary issue that you have to grapple with once you have read into the matter.

As to the procedure which should be followed to address the argument proper once you have resolved the preliminary – that – what I have described as a preliminary matter, a particular difficulty arises because LMIM is the target of the litigation that we are seeking a direction about. Now, we don't oppose the notion that they be heard, but the cases also say that the right of appearance is, to an extent, necessary, and they don't have a right to all the material. So I also have, on the assumption that you will require it, a joint opinion of counsel addressing the prospects of the underlying claim and written submissions encapsulating that and making cross-reference to it.

HIS HONOUR: Yes.

MR BOND: And we would propose that after you have heard our learned friends, we will ask you to receive that material and to deal with it in the absence of our learned friends and, indeed, we would ask your Honour to close the court to receive that and to receive discussion of it.

HIS HONOUR: Yes.

MR BOND: It's a question of – I can hand that – as I have said, I have given our learned friends written submissions and the marked up statement of claim. As to the opinion and the submissions addressing the matters dealt with by the opinion, I haven't given that to our learned friends, and it's a - - -

HIS HONOUR: Well, isn't the course this? Mr Bond, you should read your – the material that they know about and the outline of submissions.

MR BOND: Yes.

HIS HONOUR: I will hear from Mr Barlow and see what material he has. I will then go and read that material because I don't see how I can decide the subpoena issue without having some idea of what this is all about.

5 MR BOND: Quite. And you don't need the other stuff to - - -

HIS HONOUR: No. And then you keep the other material, and if we get to that point, we can deal with it at that stage.

10 MR BOND: I am content with that, your Honour.

HIS HONOUR: All right.

15 MR BOND: Could I hand up, please, two copies of a list of material? Just stay there for a moment. I'll also hand up two copies of a document marked Applicant's Submissions on the Section 96 Application. That's the document our learned friends have – and two copies of a marked up draft statement of claim.

20 HIS HONOUR: Yes.

MR BOND: I should say that on the list of material, you will note that there are three items on the bottom, in respect of which leave is sought.

25 HIS HONOUR: All right. Mr Barlow, dealing first of all with the question of leave, what's the attitude to leave for those three items?

MR BARLOW: No objection.

30 HIS HONOUR: No objections. All right then. Well, then the applicant's material will be as per the list. The applicant has leave to read and file the second affidavit of David O'Brien, the submissions dated 17 June 2014 and the application to set aside the subpoena. Now, what's your material?

35 MR BARLOW: Your Honour, could I hand up two copies of the respondent's outline of submissions and I seek your Honour's leave to file and read an affidavit of John Richard Park, sworn today.

MR BOND: No objection to that, your Honour.

40 HIS HONOUR: All right. Well, I give you leave to read and file the affidavit of John Richard Park and I give you leave to read and file the outline of submissions. Now, would I benefit by reading the outlines first?

45 MR BARLOW: Yes. We agree with our learned friend as to procedure save one aspect, your Honour. Our learned friends referred to a preliminary point. There might be considered to be two preliminary points. As well as the issue of the subpoena, one of the reasons for which we submit – and your Honour will see briefly

5 in our outline that advice should not be given to the trustee applicants today – is that they have not served 4500 people roughly who have an interest in the proceeding and the section requires them to serve that unless the court thinks it otherwise expedient – or expedient not to do so and that issue might – if your Honour were persuaded that service of at least some of them, if not all, should be effected first, then your Honour might deal with that issue and adjourn the application - - -

HIS HONOUR: Yes.

10 MR BARLOW: - - - for service to take effect. So that's another, in a sense, preliminary point which we would seek to argue.

HIS HONOUR: And if there is cross-examination, how long will cross-examination - - -

15 MR BARLOW: We don't seek to cross-examine. I thought I'd said that to my learned friend this morning, your Honour.

HIS HONOUR: All right then. All right.

20 MR BARLOW: We no longer – but we do seek to call upon the subpoena.

HIS HONOUR: All right. Well, then - - -

25 MR BOND: Could I – I'm sorry.

HIS HONOUR: Yes.

30 MR BOND: Could I suggest the matter be called just in case there's someone else that wants to say something.

HIS HONOUR: Yes. Of course. Yes. If you could call re LM Investment Management Limited three times. Is there somebody else that should be called?

35 MR BOND: I think you should – just a moment. I think it would be better, your Honour, to name the applicants because if anyone's going to come – there's been some notice given to the 4500. They won't necessarily know LM Investment Management.

40 HIS HONOUR: All right. We'll call both the plaintiff - - -

MR BOND: Call both names.

45 HIS HONOUR: Call both the plaintiff and the defendant three times.

MR BOND: Thank you, your Honour. I'm sorry, your Honour. I should've handed up the original of the second affidavit of Mr O'Brien, sworn 16 June 2013.

HIS HONOUR: Thank you.

MR BOND: Could I do so – and the original of the application to set aside the subpoena. I hand the original and a copy of each of those documents.

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HIS HONOUR: Yes. Thank you. Well, as I've indicated, you have leave in respect of those. What was the form of notice given to these 4500 people?

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MR BOND: It's dealt with in the affidavit and the relevant paragraphs in the written submissions - - -

HIS HONOUR: Yeah.

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MR BOND: - - - appear – they gave – they were given a link to a website that contained the originating application, the affidavit of – the first large affidavit of Mr Vitulo and draft statement of claim. It's dealt with in the written submissions as paragraph 31 on page 6.

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HIS HONOUR: Thank you.

BAILIFF: No appearance from other parties, your Honour.

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HIS HONOUR: Thank you. And do you in your outline deal with why that's inadequate, Mr Barlow – or not effective notice?

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MR BARLOW: I think only in the sense that it's – there's a requirement that interested persons be served and there's been no real attempt to serve them and to explain that they have a right of hearing and – nor any application for substituted service, which might otherwise have been applied.

HIS HONOUR: Yes. But let's all be practical about this.

MR BARLOW: Yes.

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HIS HONOUR: The idea that the court's going to insist that every individual of the 4500 be personally served is unlikely if there is another useful and convenient way in which it can be done.

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MR BARLOW: Yes.

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HIS HONOUR: So that's why I asked why it's suggested that what has been done is inadequate. So normally, what you would expect is somebody to say, "Well, whilst we're not conceding that you don't have to do personal service, we would say at the very least what you should do is have notices in national newspapers, on these types of websites," and I take it there's nothing along those lines.

MR BARLOW: There's nothing along those lines, your Honour.

HIS HONOUR: No. All right. Well, I'll adjourn to read the material. I'll resume at 20 past 11.

5 **ADJOURNED** **[11.03 am]**

RESUMED **[11.29 am]**

10 HIS HONOUR: Mr Bond, I am a little worried about the adequacy of the notice that has been given to the 4500. I just want to have a look at this email.

15 MR BOND: It's in the second Vitulo affidavit.

HIS HONOUR: Yes.

MR BOND: And - - -

20 HIS HONOUR: Paragraph 17 refers to it.

MR BOND: 17. I'll just find the reference to the relevant page number.

25 MR BARLOW: Page 229 of the exhibit, your Honour.

HIS HONOUR: Thank you.

MR BOND: Thank you. 229 and 230. And you'll see at page 230 there's a reference to a link.

30 HIS HONOUR: You don't get to 239 on that one. You said 239, didn't you?

MR BOND: 229 is the exhibit, and 230 is the notice.

35 HIS HONOUR: Yes. Well, this only goes to 228 so there must be something.

MR BOND: There must be a second part of the exhibit.

40 HIS HONOUR: My concern, Mr Bond, is that there's no information about the nature of who these people are, what age they are. So what they received is they received an email communication which tells them, "Read the accompanying thing." And then the accompanying thing says, "Read this very large draft statement of claim."

45 MR BOND: Yes.

HIS HONOUR: How does that tell them what this is about? Particularly when it does seem to me there's a very good argument here about whether, in truth, this – these proceedings even if they succeed will recover any money and they will incur a lot of cost.

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MR BOND: Well, your Honour, as to the first proposition, there is no dispute that there's a fund in existence of 1.9 million plus accretions.

HIS HONOUR: Yes, but there's an argument about whose money that is.

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MR BOND: The argument is that it's held by a custodian – sorry. The facts of which there's no apparent dispute are it's held by a custodian trustee on behalf of LMIM as trustee for the AIF.

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HIS HONOUR: Yes.

MR BOND: And we say, "Well, we are entitled to a proprietary relief against that fund." And there's – the fund won't be distributed to anyone until our issue is dealt with. So if we're right, we get proprietary interest in that fund.

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HIS HONOUR: Yes. If you're wrong, there's nothing.

MR BOND: Well, undoubtedly so. On the evidence that we've now got from Mr Park these personal remedies aren't worth anything or there's no money in the liquidation. And the only – the only benefit to this whole – to this proceeding is the possibility [indistinct] against that fund.

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HIS HONOUR: So what we have a situation where you could spend \$400,000 pursuing nothing and the few people who have responded to date, two of whom raise questions about the utility of it. I'm not satisfied there's been proper notice to these 4500 people. It's not enough to simply say to them that the issues you're prosecuting are complex and they're explained in a draft statement of claim. That doesn't tell them anything.

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35 MR BOND: Well - - -

HIS HONOUR: How is – how is a person in their 60s to sit down and work out what that's all about?

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MR BOND: Your Honour, what we're talking about is a process we put in place as part of what we come before you to say. It's not expedient to order personal service. Personal – the – if personal service is required or fulfilled, which is plainly uneconomic, then no explanation would have to be given at all. You just serve them, "There you go." That's it. We've complied. So - - -

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HIS HONOUR: Yes, but you'd have to serve all the affidavit material as well.

MR BOND: Quite. It would be a ridiculous proposition to serve everything, with respect. But if we did that they get no explanation. They just get the material.

5 HIS HONOUR: But they get the affidavit material which does go some way. It's a bit different to a statement of claim. The affidavit material does go some way to explaining matters.

10 MR BOND: They do get the first affidavit material – affidavit of Mr Vitulo. I don't think I can say they have any other affidavit material by Mr Vitulo. So what they have is the material that was filed at the time of the notice, which is the originating application and the affidavit of Mr Vitulo. And I don't think I can tell you it's the solicitor's affidavit about the cost, so they wouldn't have that. It's just the first affidavit.

15 HIS HONOUR: And that's an important matter, isn't it? Isn't it an important matter for them to be informed of? Is that there – the proposal – proceeding is in respect of a breach of trust. It is alleged that a sum of, you know, \$1.9 million. So it's just a summary. \$1.9 million that ought to have come to this fund was, in fact, transferred to another fund. The proceedings, because they're complex, are likely to cost in the
20 order of \$400,000 to prosecute but, if successful, may result in \$1.5 million coming into the fund. Isn't that what they need to know?

MR BOND: Well, your Honour, I can understand why your Honour makes that observation to me. The – what we're presently addressing is whether I can persuade
25 you it's expedient not to require personal service. Then – and we're asking ourselves, "What's the intention of the statute?" The intention of the statute is that persons who might be interested get notice of the application, and these people have. I can accept, and I wouldn't try to argue you out of the view, that it would be nice if they perhaps got a little bit further explanation. But, in my respectful submission,
30 they've had sufficient notice, it's not expedient to require personal service, and that's all that's required. The position – and their interests as to the points that your Honour has raised in your question to me will be dealt with because your Honour will, no doubt, be asking yourself if you go on to consider the merits of the application - - -

35 HIS HONOUR: But there must be a purpose in why they say that these people should be notified, and that is because they are entitled to express a view. It might be that ultimately that view is too disparate to be able to get anything from it. But one of the reasons why a court would normally be satisfied that there isn't a need for
40 personal service is because there has been adequate notice given in another form. And on this I'm not satisfied adequate notice has been given. So your problem is convincing me in light of that that I should say there's no need for personal service. And I would be happily convinced – happily convinced that it would be inappropriate to require personal service of 4500 people if you can satisfy me that
45 another method had adequately brought to them the pros and cons of this litigation. It seems to me what's happened does not. It doesn't even explain the litigation.

MR BOND: Your Honour, I understand what you've just said. Can I just take some instructions, please?

HIS HONOUR: Yes.

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MR BOND: Do you mind if I just move to the back of court?

HIS HONOUR: Yes. No problems at all.

10 MR BOND: Thank you for that indulgence, your Honour.

HIS HONOUR: Yes, yes.

15 MR BOND: In light of the view your Honour has expressed, I seek an adjournment of the application to address the matters that you've raised.

HIS HONOUR: It seems to me that's what needs to happen. So that – because if the court was informed that the parties had been – the unit-holders had been – received some notice which explained that there was this proposed action that, if successful, it would recover this, but it could cost this amount – because that's really the big factor for them, is how much would be spent trying to get it – then I would have thought that Mr Barlow would have great difficulty in convincing the court that anything else is required and that the suggestion there should be personal service in those circumstances is unlikely to find favour with the court. Then we get to the situation of the question of the section 96 advice, and I understand that Mr Barlow's position there is it really not appropriate for the court to really do – to give that advice, because of various reasons, and then also to look at the actual circumstances of the proposed proceeding. But that, then, does require, probably, to look into the matters which are in the confidential material to have a better idea of understanding those things.

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MR BOND: I understand that, your Honour.

35 HIS HONOUR: And I'm happy for the matter to be adjourned to a date to be fixed – to be brought on the giving of, say, three business days written notice to the other party. And it would probably be appropriate for costs to be reserved.

MR BOND: Thank you, your Honour.

40 HIS HONOUR: What do you say, Mr Barlow?

MR BARLOW: Your Honour, could I say a couple of things. First of all, section 96 requires that this application be brought upon a written statement of facts. And the extract from the decision in Macedonian church which is in paragraph 6(b) of our affidavit – our outline – shows that really what that should include is a statement such as the nature of the case, the issues raised, the amounts involved including costs. And we would submit not just the legal costs but the trustee's administrative

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costs and their fees or anticipated fees of running this litigation and how proportionate they are to the – to the potential return, etcetera. None of that, in our respectful submission, was adequately dealt with in the material to date, and that's the sort of notice which should be given.

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HIS HONOUR: But that would be a reason why I'd exercise – if you're right about that.

MR BARLOW: Yes.

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HIS HONOUR: That would be a reason why I'd ultimately exercise my discretion, perhaps contrary to what Mr Bond wants.

MR BARLOW: Yes.

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HIS HONOUR: Mr Bond has been put on notice, and it would certainly seem to me that the issue of costs if, in fact, notice is given and it's only part of the costs and in truth it could be even if it's successful that only half the money would be available because of all the fees of the administrator. So that's a relevant factor for the court to take into account.

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MR BARLOW: Yes. I'm just putting – putting – formally putting the applicants on notice, effectively. Your Honour, as to the costs of today, in our respectful submission, the respondent's costs should be paid by the applicants, and they should not have a right of indemnity for the fund, because this is something that was so obvious – glaringly obvious – that the applicant should have been aware of it. They simply deposed to the fact that they gave notice by the – notice giving a link, and they have never served any of the further material even in the manner they did on the most interested persons being the beneficiaries of the MPF fund.

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HIS HONOUR: Well, Mr Barlow, I hear that, but I'd be – I'm sure any judge determining the application on costs would be better informed when the whole application is formed, and it's always wise to be after the event, so I propose to reserve the costs.

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MR BARLOW: Thank you. Your Honour pleases.

HIS HONOUR: So the application is adjourned to a date to be fixed, to be brought on the giving of three business days written notice to the other party, costs reserved. Thank you.

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MR BARLOW: Thank you, your Honour.

MR BOND: Thank you, your Honour.

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ADJOURNED

[11.43 am]

