

SUPREME COURT OF QUEENSLAND

CITATION: *KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund (No 2)* [2021] QSC 55

PARTIES: **KORDAMENTHA PTY LTD (ACN 100 169 391) AS TRUSTEE FOR THE LM MANAGED PERFORMANCE FUND**
(applicant)
v
THE MEMBERS OF THE LM MANAGED PERFORMANCE FUND
(respondent)

FILE NO/S: BS No 11917 of 2015

DIVISION: Trial Division

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 19 March 2021

DELIVERED AT: Brisbane

HEARING DATE: 9 February and 9 March 2021

JUDGE: Williams J

ORDER: **THE COURT DIRECTS THAT:**

1. The applicant is justified in:

- (a) The appropriate register: adopting the unitholder transaction register titled "Register 1.xlsx" identified in paragraph 66 of the affidavit of Mr Jarrod Villani filed 8 December 2020 (court document 42, hereafter the Villani affidavit) as the unitholder register of the MPF, for the purposes of making a distribution to members and finalising the winding up of the LM Managed Performance Fund (the Fund);**
- (b) Account 20003 (Returned Investment Payments): taking no further steps concerning the transactions recorded in Account 20003 that occurred prior to 1 July 2012, as identified in paragraphs 132 and 137 of the Villani affidavit;**
- (c) Account 20200 (Funds Awaiting Investment): returning the amounts identified in paragraphs 144 and 145 of the Villani affidavit to the prospective investors who made the payments, or if the funds cannot be so returned, paying the**

balance to the Australian Securities and Investments Commission;

- (d) **Account 20400 (Distributions Payable):** having sent a notice to all members of the first respondent, requesting any unitholder who believes they have not received a distribution for the period prior to 1 July 2012 to come forward and provide relevant supporting documentation, taking no further steps concerning the transactions recorded in Account 20400 that occurred prior to 1 July 2012, as identified in paragraph 148 of the affidavit of Villani, apart from assessing claims received from members of the first respondent in response to the applicant's notice;
- (e) **Account 20401 (Investor Funds Payable (Redemptions)):** in paying the amounts identified in paragraph 156.3 of the Villani affidavit to the members identified in the Trustee Redemption Schedule;
- (f) **Account 20402 (Accrued Interest (Distributions)):**
 - (i) making the payment identified in paragraph 169 of the Villani affidavit;
 - (ii) otherwise taking no further steps concerning the transactions recorded in Account 20402;
- (g) **Unitholdings past maturity:** not taking any steps in relation to members of the Fund whose investments expired prior to the closure of the Fund on 19 March 2013, but whose units in the Fund were not redeemed, as identified in paragraph 177.3 of the Villani affidavit;
- (h) **Nominal unitholdings:** not taking any steps in relation to those members of the Fund who have a unit balance of less than 40 units, as identified in paragraph 181 of the Villani affidavit;
- (i) **Refunded withholding tax:** including the Returned Withholding Tax in the funds available for distribution to current members of the Fund; and
- (j) **Foreign currency investors:** calculating distributions to be made to members of the Fund who invested via currencies other than Australian dollars as follows:
 - (i) by taking the value of each member's unitholding, based on the Australian dollar value for that unitholding recorded in

Register 1, as at 19 March 2013 (AUD Value of Investment);

- (ii) by calculating the amount available for distribution by dividing each member's AUD Value of Investment against the Australian dollar value of all accounts recorded in Register 1, as at 19 March 2013.**

THE COURT ORDERS THAT:

- 2. The applicant's costs of and incidental to the application filed 8 December 2020 be paid out of the assets of the Fund, on the indemnity basis.**

CATCHWORDS:

EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – GENERALLY – where the applicant trustee applies for directions under s 96 of the *Trusts Act* 1973 (Qld) regarding finalising the winding up the LM Managed Performance Fund (the Fund) and making a final distribution to members – where the trustee sought a direction regarding the appropriate unitholder register to adopt – where the trustee sought directions as to whether its proposed treatment of transactions recorded in certain liability accounts is justified – where the trustee sought a direction that the applicant is justified in not taking any steps in relation to members of the Fund whose investments expired prior to the closure of the Fund, but whose units in the Fund were not redeemed – where the trustee sought a direction that the applicant is justified in not taking any steps in relation to those members of the Fund who have a unit balance of less than 40 units – a direction that the applicant is justified in including an amount of Returned Withholding Tax in the funds available for distribution to current members of the Fund – where the trustee sought a direction regarding calculating distributions to be made to members of the Fund who invested via currencies other than Australian dollars – whether the applicant is justified in taking certain steps in relation to the winding up of the Fund

EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – GENERALLY – where the applicant trustee applies for an order that service of the application under s 96(2) *Trusts Act* 1973 (Qld) is deemed effected on each of the members of the Fund – where the applicant sought an order for substituted service on the respondent – where an order was made that substituted service could be effected by a copy of the application and any orders made in respect of the application which are not required to be served personally being posted on a specified website of the applicant and notification being given to members – whether

the requirement of service under s 96(2) of the *Trusts Act* 1973 (Qld) has been met

Trusts Act 1973 (Qld), s 96

Australian Securities and Investments Commission (ASIC) v Piggott Wood & Baker (a firm) (No 6) [2019] FCA 672, cited *Australian Securities and Investments Commission (ASIC) v Tasman Investment Management Ltd* (2006) 59 ASCR 113; [2006] NSWSC 943, cited

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66; (2008) 82 ALJR 1425, cited

Marley v Mutual Security Merchant Bank and Trust Co Ltd [1991] 3 All ER 198, cited

Re G B Nathan and Co Pty Ltd (in liq) (1991) 24 NSWLR 674, cited

Re Spedley Securities Ltd (in liq) (1992) 9 ACSR 83, cited

COUNSEL: A Crowe QC, with P Ahern, for the applicant
No appearance for the respondent

SOLICITORS: Banton Group for the applicant
No appearance for the respondent

- [1] The applicant by an application filed 8 December 2020 applies to the Court for directions pursuant to s 96 of the *Trusts Act* 1973 (Qld) (the *Trusts Act*) as to whether it is justified in taking certain steps in relation to the winding up of the LM Managed Performance Fund (the Fund) (s 96 application).
- [2] By an order of the Supreme Court of Queensland on 12 April 2013 KordaMentha Pty Ltd (the Trustee) was appointed the Trustee of the Fund. Further, by an order dated 10 February 2014, the Supreme Court of Queensland ordered that the Trustee wind up the Fund pursuant to its Constitution.
- [3] The directions sought by the Trustee are to enable it to finalise the winding up of the Fund, including a final distribution to the members.¹

Background – appointment of the applicant as Trustee of the Trust and winding up of the Trust

- [4] On 19 March 2013 voluntary administrators were appointed to LM Investment Management Ltd (in liquidation) (LMIM). Clause 23.1(b) of the Constitution required LMIM to resign as trustee of the Fund when it became an externally administered corporation.²

¹ I adopt the term used in the applicant's submissions and will refer to the beneficiaries as members in these reasons.

² Statement of Facts at [11]-[12].

- [5] On 12 April 2013 de Jersey CJ made orders removing LMIM as trustee of the Fund and appointing the applicant and Calibre Capital Ltd as new trustees of the Fund.³
- [6] On 1 August 2013 the voluntary administrators were appointed liquidators of LMIM, by way of a creditor's voluntary winding up.⁴
- [7] On 10 February 2014 Martin J ordered that the applicant and Calibre Capital Ltd wind up the Fund, pursuant to clause 15.2(c) of its Constitution.⁵
- [8] Clause 15.6 of the Constitution required that when winding up the Fund, the trustee realise the assets of the Fund, pay all of its liabilities and distribute the net proceeds of realisation to the members.⁶
- [9] On 5 January 2015 Calibre Capital Ltd retired as trustee of the Fund. The applicant has been the sole trustee of the Fund since that date.⁷

Jurisdiction pursuant to s 96 of the Trusts Act

- [10] The application is brought pursuant to s 96 of the Trusts Act which states 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.”
- [11] There are approximately 4,500 members of the Fund located in 77 countries. The majority of the members are located overseas, with only 54 members located in Australia.⁸

Service

- [12] To effect service of the s 96 application, the applicant sought an order of this Court for substituted service on the respondent.
- [13] On 18 December 2020 I ordered that substituted service could be effected by a copy of the application filed 8 December 2020⁹ and any orders made in respect of the application, which are not required to be served personally, being posted on a specified website of the applicant and notification being given to members. The

³ Statement of Facts at [14].

⁴ Statement of Facts at [15].

⁵ Amended orders of Martin J dated 18 March 2014; Statement of Facts at [16].

⁶ Statement of Facts at [18].

⁷ Statement of Facts at [17].

⁸ Villani affidavit at [102]-[103].

⁹ And any court documents filed by the applicant in respect of that application, which the applicant seeks to serve on the respondent.

notification was to be given either by an email sent to each of the members at their last known email addresses or, if the applicant received a response that the email had not been received and the applicant has a postal address for that member, sending a notice by prepaid post to that member notifying them of the general nature of the Court documents and the documents having been posted on the website.

- [14] The effect of the order for substituted service was that the applicant was not required to take further steps to serve members whose email addresses returned an undeliverable receipt and for whom the applicant does not have a postal address.
- [15] Service was deemed to have been effected on each of the respondents five days after these steps were undertaken.
- [16] The applicant relies on an affidavit of Ms Stacey Clisby sworn 9 February 2021 which outlines the steps that were taken in relation to service.
- [17] The relevant documents were posted to the website on 18 January 2021.
- [18] On 22 January 2021 emails were sent to all members of the Fund, for whom the applicant holds a valid email address, with the notification information. The emails included summaries of the member's unitholder details and notified members of the general nature of the court documents and that the documents had been posted on the website.
- [19] Ms Clisby outlines in her affidavit that a total of 1,655 automatic undeliverable responses were received from 197 unique email addresses, which were associated with 1,473 unique unitholder accounts.
- [20] However, two of these email addresses were associated with 1,244 institutional investor accounts. On 1 February 2021, a hard copy of the email was posted to the two entities associated with these 1,244 institutional investor accounts.
- [21] Further, the applicant holds postal addresses for a further 228 members contained in the 1,655 automatic undeliverable responses referred to above. Hard copies were also posted to those members on 1 February 2021.
- [22] There are 171 unitholder accounts which do not have an associated email address, or for which all associated email addresses have previously returned an undeliverable response. Postal addresses were held for 170 of those 171 accounts and a notification was sent by post to those members on 22 January 2021.
- [23] Pursuant to the terms of the order dated 18 December 2020, the applicant is not required to take further steps to serve members whose email addresses returned undeliverable messages and for whom the applicant has not been able to identify a postal address. This applies in respect of one identified unitholder account.
- [24] In accordance with the terms of the order dated 18 December 2020, service on the respondent is deemed to have been effected on all members of the Fund by 6 February 2021, being five days after the mailout was completed on 1 February 2021.
- [25] Out of an abundance of caution the applicant has also taken steps to notify the liquidator appointed to LMIM, the former trustee of the Fund.

- [26] Further, the applicant has also taken steps to give identified creditors notice of the application. Five proofs of debt have been identified as mentioning the Fund, although none have made a claim for indemnity from the assets of the Fund.
- [27] The applicant has been able to identify an address, or other contact details, for four of the five identified creditors. In relation to one potential creditor, the applicant has been unable to identify or locate an address or other contact details.
- [28] On 4 February 2021 a notice was sent by prepaid post to the four identified potential creditors notifying them of the current application and directing them to the court documents posted on the website.
- [29] In these circumstances, I am satisfied that the requirement of service under s 96(2) of the Trusts Act has been met.

Hearing and service of supplementary material

- [30] The hearing commenced before me on 9 February 2021. The application was adjourned to 10.00 am on 9 March 2021 to enable further submissions to be provided in respect of responses received from members of the Fund.
- [31] To facilitate the further steps, the following orders were made on 9 February 2021:

“THE COURT DIRECTS THAT:

1. The applicant file and serve:
 - (a) any written submissions addressing the responses received from members of the respondent, exhibited to the affidavit of Stacey Clisby sworn 9 February 2021; and
 - (b) any further affidavit evidence addressing the responses received from members of the respondent, exhibited to the affidavit of Stacey Clisby sworn 9 February 2021;
 by 4pm on Friday 12 February 2021.
2. Any member of the respondent file and serve any written submissions that member wishes to make concerning that member’s response, and/or the written submissions served by the applicant, by 4pm on Monday 22 February 2021.
3. The applicant file and serve any written submissions in reply by 4pm on Friday 26 February 2021.
4. The application be adjourned to 9 March 2021 and listed for two hours before Williams J in the Applications List.

THE COURT ORDERS THAT:

5. Service of this order, any submissions by the applicant and any affidavit material referred to in paragraph 1(b) hereof, be deemed effected on each of the members of the respondent three days after the applicant:

- (a) posts the relevant document in PDF form on the website '<http://www.kordamentha.com/creditors/lm-managed-performance-fund>', and
 - (b) sends an email to each of the members of the respondent for whom the applicant holds a last known email address, notifying them of the general nature of the document and that the document has been posted on that website."
- [32] At the resumed hearing on 9 March 2021 the applicant filed a further affidavit of Ms Clisby concerning service of the supplementary material.
- [33] The affidavit of Ms Clisby deposes to:
 - (a) a copy of the order dated 9 February 2021 and the supplementary submissions were uploaded to the website on 15 February 2021 and the members of the Fund were emailed with the necessary notification also on 15 February 2021.
 - (b) a copy of the supplementary submissions in reply were uploaded to the website on 1 March 2021 and the members of the Fund were emailed with the necessary notification also on 1 March 2021.
- [34] Pursuant to paragraph 5 of the orders dated 9 February 2021 service was deemed effective three days after the date the documents were posted on the website and the email notification sent, therefore, 18 February 2021 and 4 March 2021 in respect of the supplementary submissions and the supplementary submissions in reply.
- [35] It became apparent that page 2 of the supplementary submissions in reply had been inadvertently omitted from the document uploaded to the website. On 8 March 2021 a full copy of the supplementary submissions in reply (including page 2) was posted on the website.
- [36] Further, an email was sent on 8 March 2021 to the members of the Fund notifying of the previous omission of page 2 and attaching a copy of the full supplementary submissions in reply.
- [37] In respect of the supplementary submissions in reply, the full document was uploaded and the email notification sent on 8 March 2021. Therefore, service would not be deemed effective until 11 March 2021.
- [38] At the hearing on 9 March 2021 this issue was identified by Counsel for the applicant. It was submitted that the contents of page 2 of the supplementary submissions in reply were relevant in respect of the issues raised by an individual member, MAB. MAB provided submissions in response to the replacement document on 8 March 2021. Accordingly, there is no identifiable prejudice in relation to the service of page 2 of the supplementary submissions in reply.
- [39] In all of these circumstances, I am satisfied that service has been effected and in relation to page 2 of the supplementary submissions in reply, MAB has been provided with an opportunity to respond to that material.

Material provided by MAB

- [40] An individual member of the Fund, MAB, provided an affidavit sworn 25 January 2021, submissions dated 16 February 2021, supplementary submissions dated 3 March 2021 and third submissions dated 8 March 2021.
- [41] MAB did not appear at the hearing but requested that the material be considered by the applicant and the Court.
- [42] The documents were marked as Exhibits 1 – 4 at the hearing on 9 March 2021. The applicant considered this material and addressed the issues raised in the submissions to the Court. The issues will be discussed at a relevant place in these reasons.

Is the application properly brought under s 96 of the Trusts Act rather than the Corporations Act 2001 (Cth)?

- [43] A further threshold issue needs to be considered in respect of the s 96 application.
- [44] The applicant submits that s 96 of the Trusts Act is engaged as:
 - (a) it is a trustee of the Fund as it was appointed by the orders of de Jersey CJ dated 12 April 2013; and
 - (b) the Fund was established pursuant to a trust deed being the MPF Constitution, and it was otherwise constituted as a trust.
- [45] However, the applicant has also considered the issue as to whether the Fund is a lawfully unregistered managed investment scheme.
- [46] The Fund is within paragraph (a) of the definition of “managed investment scheme” in s 9 of the *Corporations Act 2001 (Cth)* (*Corporations Act*).
- [47] The Fund was unregistered. The applicant has undertaken investigations and concluded that the Fund was not required to be registered as a managed investment scheme under the *Corporations Act* as the Fund fell within the exception set out in s 601ED(2) of the *Corporations Act*.
- [48] The affidavit of Mr Villani filed 8 December 2020 outlines the relevant considerations in more detail. However, for current purposes, it is sufficient to note that:
 - (a) under s 601ED(2) of the *Corporations Act*, a managed investment scheme is not required to be registered if all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made.
 - (b) the Fund was designed to be offered to investors outside of Australia, to global platform and portfolio investors and to institutional/wholesale investors. Accordingly, the provisions in relation to investors located outside the jurisdiction and non-retail clients operated such that the exemption in s 601ED(2) would have applied.

- [49] In the circumstances, the applicant contends that the Fund is a lawfully unregistered managed investment scheme.
- [50] The relevant consequence of this is that parts of the Corporations Act in relation to registered managed investment schemes do not apply to the Fund. If it had, the Court could have had an alternative power to give directions about the winding up of a registered scheme pursuant to s 601NF(2). However, as that part of the Corporations Act does not apply to the Fund, the application proceeds pursuant to s 96 of the Trusts Act.

What principles are to be applied in an application for judicial advice?

- [51] Whilst the members of the Fund have been served, no member has appeared in respect of the application. Some responses have been provided to the applicant (exhibited to a confidential affidavit) in response to the notification to the members about the application. The responses by the members are likely to be in respect of the individual positions of specific members.
- [52] At the conclusion of the first day of the hearing on 9 February 2021, the application was adjourned so that consideration could be given to the various responses and further submissions made by the applicant, if appropriate.
- [53] The applicant has considered these responses from members of the Fund, and also further responses received after 9 February 2021. Several further confidential affidavits have been filed which exhibit the further responses. These responses from members are addressed in the applicant's supplementary submissions and supplementary submissions in reply.
- [54] The responses from members of the Fund have been considered, as relevant, as part of the applicant's considerations in respect of the directions sought. The submissions address the issues raised in responses relevant to the specific directions sought.
- [55] In these circumstances, the applicant's application is without a true contradictor. Appropriately, the applicant has made detailed submissions in respect of the general principles to be applied in respect of an application seeking judicial advice.
- [56] The applicant has taken the Court to the statement of principle in *Marley v Mutual Security Merchant Bank and Trust Co Ltd*¹⁰ where Lord Oliver of Aylmerton stated at page 201:

"A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court.

...

[I]n exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining

¹⁰ [1991] 3 All ER 198.

what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties.”

[57] Further, the applicant relies on the High Court decision in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand*¹¹ in respect of the general principles in applications for directions such as the current application, including:

- (a) An important purpose of directions is the protection of the interests of the trust.¹²
- (b) There is no implied limitation on the power to give advice.¹³
- (c) There are no implied limitations on discretionary factors, including the adversarial nature of the proceedings about which the advice is sought.¹⁴
- (d) The procedure is summary in nature.¹⁵
- (e) The function of the advice is to give personal protection to the trustee. It operates as an exception to the Court’s ordinary function of deciding disputes between litigants.¹⁶
- (f) Judicial advice resolves doubt as to the propriety of the trustee’s actions, when the trustee acts in accordance with the advice given by the Court.

[58] Further, it is not ordinarily appropriate on an application under s 96 of the Trusts Act for the Court to determine controversies between parties to a trust.¹⁷

[59] However, there is also recognition that it is important for beneficiaries to be engaged in a “dialogue” with the trustee. From a practical perspective, it has been recognised that:

“... the ability of the court to provide well measured advice may be affected to the extent that it is not given the benefit of a full appreciation of what competing interests might say.”¹⁸

[60] The express terms of s 96 of the Trusts Act requires a written statement of facts. A statement of facts has been prepared by the applicant and is marked “A” of Exhibit JV-19 to the affidavit of Mr Villani.

[61] It has also been recognised that affidavits, as a matter of practice, have been filed verifying the statement of facts.¹⁹ That has also been done in this matter where the detailed affidavit of Mr Villani is relied upon by the applicant.

¹¹ (2008) 237 CLR 66.

¹² At [72].

¹³ At [56].

¹⁴ At [59].

¹⁵ At [61].

¹⁶ At [64].

¹⁷ *Togito Pty Ltd v Pioneer Investments (Aust) Pty Ltd* [2011] QCA 167 at [57]-[58] per Chesterman JA with whom the other members of the Court of Appeal agreed.

¹⁸ *Re Estate Late Chow Cho-Poon* [2013] NSWSC 844 at [199].

¹⁹ *Corbiere & Anor v Dulley & Ors* [2016] QSC 134 at [29] per Burns J.

- [62] The Court is entitled to act on the facts stated by the trustee, even if they are contested or controversial.²⁰
- [63] The applicant also refers to authorities dealing with applications for directions in respect of registered and unlawfully unregistered managed investment schemes under the Corporations Act. The applicant submits that these authorities are of some assistance to the current application given the breadth of the powers concerned and the factual overlap between registered and unregistered managed investment schemes.
- [64] Austin J in *Australian Securities and Investments Commission (ASIC) v Tasman Investment Management Ltd*²¹ recognised that the Court's power to give directions is broad and stated as follows:
- “[19] Although the winding up of a managed investment scheme proceeds within the appropriate general law framework, the statutory provisions governing the winding up of schemes give the court a great deal of flexibility. Subject to the provisions of the scheme's constitution in the case of a registered scheme, the court may use its statutory powers ... and its general statutory and inherent powers, to make appropriate orders for the winding up of the scheme ...
- [20] ... The court may use its statutory and inherent powers to make orders and give directions in the course of the winding up of the scheme. For example, it may give directions in the nature of judicial advice, analogous to directions under s 479(3) ... or make orders approving a compromise, analogous to orders under s 477(2A) ...”
- [65] The effect of making directions was considered by McLelland J in *Re G B Nathan and Co Pty Ltd (in liq)*²² as follows:
- “... the only binding effect of, or arising from, a direction given in pursuance of such an application ... is that the liquidator, if he has made full and fair disclosure to the court of the material facts, will be protected from liability for any alleged breach of duty as liquidator to a creditor or contributory or to the company in respect of anything done by him in accordance with the direction.”
- [66] Recognising that the application is to proceed by way of a relatively informal procedure, Austin J in *Australian Securities and Investments Commission v Tasman Investment Management Ltd*²³ summarised the approach as follows:
- “[32] ... The question is whether, on the facts presented to me, I should direct [the liquidator of the managed investment scheme] that he is justified in [paying the net funds of the scheme to the investors in a certain manner]. The answer to this

²⁰ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [80]-[81].

²¹ (2006) 59 ACSR 113 at 118-119.

²² (1991) 24 NSWLR 674 at 679.

²³ (2006) 59 ACSR 113 at 121.

question does not depend upon in [sic] the court determining the rights of the investors to the scheme assets. It depends upon whether there is a reasonable basis for [the liquidator's] proposal, sufficient to persuade the court that it is proper to exonerate him from liability for implementing the proposal; or conversely, whether there is any good reason why the liquidator should not proceed as proposed ..."

- [67] Specifically, in respect of a liquidator's application for directions, it has been recognised that in such cases, the Court does not:

"[R]ubber [stamp] whatever is put forward by the liquidator but ... the court is necessarily confined in attempting to second guess the liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error in law or principle, or real and substantial grounds for doubting the prudence of the liquidator's conduct."²⁴

- [68] The applicant also points to a statement of Kerr J in *Australian Securities and Investments Commission (ASIC) v Piggott Wood & Baker (a firm) (No 6)*²⁵ at [25]:

"It is implicit that there may be contestable issues of fact or law yet such a direction nonetheless should be made: if it were otherwise, such a direction would be unnecessary."

- [69] In the current application, the statement of facts contains 72 paragraphs and is 14 pages in length. The statement of facts sets out in a degree of detail the relevant facts.

- [70] Further, the supporting affidavit of Mr Villani has substantive exhibits which also sets out in detail relevant facts, but goes further to explain the logic and reasoning behind the applicant's approach. It is submitted that this approach has been taken to demonstrate that:

- (a) each of the applicant's proposals has a reasonable basis; and
- (b) the directions sought by the applicant are its best attempts to resolve the various issues raised in the winding up of the Fund.

Directions sought

- [71] The application seeks 10 separate directions. One relates to the unitholder transaction register, five relate to specific accounts, three relate to specific categories of members and one relates to how a refund from the Australian Taxation Office in relation to withholding tax should be dealt with.

- [72] It is necessary to consider each of these directions separately by reference to the facts set out in the statement of facts, as supplemented by the affidavit of Mr Villani and other affidavit material.

- [73] Paragraphs one to 19 of the statement of facts sets out relevant background facts in respect of the Fund and the winding up of the Fund. I do not repeat those facts here

²⁴ *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 at 85.

²⁵ [2019] FCA 672.

but have had regard to them for the purposes of the consideration of the directions sought.

Paragraph 1(a) – the appropriate unitholder register to adopt

- [74] In paragraph 1(a) of the application the applicant seeks a direction that it is justified in adopting the unitholder register titled “Register 1.xlsx” as the unitholder register of the Fund, for the purposes of making a distribution to members and finalising the winding up of the Fund.
- [75] Five versions of the unitholder register for the Fund were provided to the applicant between April and October 2013. The applicant has reviewed the five versions and undertaken analysis of the unitholder registers and sought to reconcile the differences between them.
- [76] Following this analysis, the applicant has formed the view that Register 1 is the most accurate and complete unitholder register for the Fund.
- [77] Paragraph 22 of the statement of facts sets out the reasons upon which the applicant has formed this view. This includes consideration of the account IDs included in the registers, an investigation of discrepancies and a consideration of the unit quantities identified in the various versions of the register.
- [78] Paragraph 23 of the statement of facts provides that the applicant has updated Register 1 to incorporate updated email addresses of unitholders. It is proposed that the applicant make distributions to unitholders based on the updated version of Register 1.
- [79] The affidavit of Mr Villani sets out further details in respect of the analysis that has been undertaken and the conclusion reached.
- [80] I am satisfied on the facts set out in the statement of facts, and supplemented by the affidavit of Mr Villani, that the applicant has established a reasonable basis for the applicant’s proposal to adopt Register 1 as the unitholder register of the Fund. Based on the material before the Court and the explanation of the investigations undertaken by the applicant, Register 1 appears to be the most complete, accurate and up-to-date record.
- [81] In the circumstances I am satisfied that it is appropriate to make a direction as sought in paragraph 1(a) of the application.

Paragraphs 1(b) to 1(f) – proposed treatment of transactions in certain liability accounts

- [82] The applicant seeks directions as to whether its proposed steps in respect of funds in, and transactions relevant to, certain liability accounts are justified.
- [83] As set out in paragraph 24 of the statement of facts, the liability accounts were recorded in the trial balance of the Fund that was provided to the applicant upon its appointment as Trustee.
- [84] The liability accounts are identified in paragraph 25 in the statement of facts (including balances as at 12 April 2013) as follows:

- “(a) Account 20003, ‘returned investment payments’: (\$10,874.16).
- (b) Account 20200, ‘funds awaiting investment’: \$1,327,937.43.
- (c) Account 20400, ‘distributions payable’: \$179,512.39.
- (d) Account 20401, ‘investor funds payable (redemptions)’: \$851,375.73.
- (e) Account 20402, ‘accrued interest (distributions)’: \$1,578,257.96.”

[85] It is necessary to consider each of the accounts separately as they are distinct in respect of their nature and different issues arise for consideration.

Account 20003: Returned investment payments

[86] Paragraph 26 of the statement of facts identifies that LMIM used this account to record incidences where funds paid to unitholders were returned: for example, due to banking errors.

[87] In paragraph 1(b) of the application the applicant seeks a direction that it is justified in taking no further steps concerning the transactions recorded in Account 20003 that occurred prior to 1 July 2012, as identified in paragraphs 131 and 136 of the Villani affidavit.

[88] The applicant has undertaken a review of the transactions recorded in Account 20003.

[89] Paragraph 27 of the statement of facts provides that the applicant has determined that all transactions dated on and from 1 July 2012 were cleared from the account. Further, paragraph 28 of the statement of facts states that the applicant believes that the balance (\$10,874.16) in this account relates to transactions prior to 1 July 2012.

[90] In circumstances where there is a negative value for this account and that costs would be associated with undertaking a detailed analysis of the account prior to 1 July 2012, the applicant seeks a direction that it is justified in not taking any further steps in relation to this account.

[91] On consideration of the statement of facts and the supplementary explanation provided in the affidavit of Mr Villani, the applicant has established a reasonable basis for the course proposed by the applicant.

[92] As identified in *Australian Securities and Investments Commission (ASIC) v Tasman Investment Management Ltd*²⁶ the Court may give a direction to the effect that a trustee is justified in taking no further steps or making no further investigations.

[93] In circumstances, where investigations have already been undertaken by Mr Villani as outlined in his affidavit, I am satisfied that there is a reasonable basis for the applicant taking no further steps in relation to investigating the account prior to 1 July 2012.

²⁶ (2006) 59 ACSR 113 at 127-128 [63]-[66].

- [94] In the circumstances I am satisfied that it is appropriate to make a direction as sought in paragraph 1(b) of the application.

Account 20200: Funds awaiting investment

- [95] Paragraph 30 of the statement of facts identifies that LMIM used this account to record the receipt of investors' funds prior to units being issued in the Fund.
- [96] In paragraph 1(c) of the application, the applicant seeks a direction that it is justified in:
- (a) Taking no further steps concerning the transactions identified in paragraph 143 of the Villani affidavit;
 - (b) Returning the amounts identified in paragraph 144 of the Villani affidavit to the prospective investors who made the payments or, if the funds cannot be so returned, paying the balance to the Australian Securities and Investments Commission.
- [97] Following investigations by the applicant into this account from 1 July 2012, 26 credit transactions have been identified that were not reversed by the issue of units, or by other means. The 26 credit transactions exceed the balance in the account as at 12 April 2013 as the account was not reconciled for the period prior to 1 July 2012.²⁷
- [98] The applicant has further investigated these 26 credit transactions with the results as follows:
- (a) 18 of the credit transactions, totalling \$1,320,717 have been identified as "quarantined funds", as a result of the funds being received from investors after the Fund was closed to investment on 19 March 2013. Funds have been returned to 12 investors and attempts are being made to communicate with the remaining six investors. If the six investors cannot be contacted, the applicant intends to pay the balance to the Australian Securities and Investments Commission (ASIC).
 - (b) In respect of the five transactions identified in paragraph 143 of the Villani affidavit (totalling \$8,157.96) the applicant does not propose to take any further steps in relation to these five transactions as investigations revealed that:
 - (i) Three relate to a reversal of agent's commission, which has been recorded in a separate account;
 - (ii) One has a value of \$0.95 and no further analysis has been undertaken as it is not material; and
 - (iii) One relates to the receipt of funds in Turkish lira, which refers to a separate account.
 - (c) In respect of the three transactions identified in paragraphs 144 and 145 of the Villani affidavit, the applicant proposes to pay the identified amounts to the (former) unitholder or prospective investors as investigations have established that:

²⁷ Statement of Facts at [31]-[32].

- (i) One relates to a redemption payment that was returned in circumstances where the unitholder register records the redemption of all units held by the account.
- (ii) Two relate to payments received in the amounts in respect of which no units were issued.²⁸

[99] At the hearing on 9 March 2021 the applicant was invited to clarify the wording of the direction sought to reflect the proposed course of action.

[100] On 11 March 2021 a revised direction was proposed by the applicant, namely:

“Account 20200 (Funds Awaiting Investment): returning the amounts identified in paragraphs 144 and 145 of the Villani affidavit to the prospective investors who made the payments, or if the funds cannot be so returned, paying the balance to the Australian Securities and Investment[s] Commission.”

[101] This revised wording addresses the clarification raised at the hearing in respect of the proposed steps and reflects the proposal to return the monies as identified and any remaining funds to be paid to ASIC.

[102] On the facts set out in the statement of facts and supplemented by the affidavit of Mr Villani, the applicant has established a reasonable basis for the course proposed by the applicant.

[103] In the circumstances I am satisfied that it is appropriate to make a direction as sought in paragraph 1(c) of the application, with the revisions in accordance with the draft provided on 11 March 2021.

Account 20400: Distributions payable

[104] Paragraph 34 of the statement of facts identifies that LMIM used this account to record distributions payable to unitholders.

[105] Paragraph 1(d) of the application seeks a direction that the applicant is justified in:

- (a) Sending a notice to all members of the Fund, requesting that any unitholder who believes that they have not received a distribution for the period prior to 1 July 2012 come forward and provide relevant supporting documentation; and
- (b) Taking no further steps concerning the transactions recorded in account 20400 that occurred prior to 1 July 2012, as identified in paragraph 147 of the Villani affidavit, apart from assessing claims received from members of the Fund in response to the applicant’s notice.

[106] The language used in paragraph 42 of the statement of facts is that the applicant “proposes to send a notice to unitholders”. However, the supplementary affidavit of Mr Villani identifies that a notice has been sent to members requesting any unitholder who believes they have not received a distribution prior to 1 July 2012 to come forward and provide the relevant supporting documentation.

²⁸ Statement of Facts at [33].

- [107] Paragraph 151 of the Villani affidavit identifies that the notice was to be provided to the unitholders as part of the substituted service application ascertained at the same time as service of the documents in relation to the s 96 application. This has already been done.
- [108] As set out above in the consideration of the issue of service, the affidavit of Stacey Clisby sworn 9 February 2021 includes copies of the notifications which have been provided to unitholders. The sample letter provided at page 10 of the exhibit included a reference to paragraph 151 of the affidavit of Mr Villani and requests any unitholder who believes they are entitled to, but have not received a distribution prior to 1 July 2012 to come forward and provide the relevant supporting documentation proving their entitlement to a distribution.
- [109] At the hearing, it was submitted that given the notice had been given, the applicant proposes it will assess claims received and seeks a direction that it is justified taking no further steps apart from assessing such claims.
- [110] Paragraphs 35 to 41 of the statement of facts sets out the basis upon which the applicant proposes that this is a reasonable course of action. The applicant has reviewed the transactions from 1 July 2012 and determined that all transactions recorded after 1 July 2012 have a corresponding reinvestment or payment transaction. It is in these circumstances that the applicant believes that the balance in the account relates to unreconciled transactions prior to 1 July 2012.
- [111] A full analysis of the account prior to 1 July 2012 has not been undertaken given the costs that would be involved in undertaking that task.
- [112] However, some preliminary analysis has been undertaken including a sample review of transactions. These initial investigations have established that a manual review would be required in relation to the account. Consequently, the applicant does not propose to undertake any further review of the account given the time and costs associated with a manual review.
- [113] It is in these circumstances that the applicant proposed and sent a notice to unitholders requesting any unitholder who believes they have not received a distribution for a period prior to 1 July 2012 to come forward and provide the relevant supporting documentation.
- [114] The applicant received 13 emails in the responses which relate to this issue and concern missed payments or distributions.²⁹
- [115] The applicant has considered these responses and there is nothing in the responses which alters the view of the applicant as to how this issue should be dealt with.
- [116] The direction sought by the applicant does not concern the correctness of any assessment the applicant may make in respect of any claim. Rather, it seeks a direction that it take no further steps concerning transactions recorded prior to 1 July 2012 apart from assessing claims received from members in response to the notice.

²⁹ Twelve emails referred to in the supplementary submissions and one email referred to in the supplementary submissions in reply.

- [117] The applicant has indicated that it is of the view that the correspondence received to date does not establish an entitlement by any person to support a distribution of income in respect of the period prior to 1 July 2012.³⁰ The applicant intends to proceed to finalise its assessment of the claims it receives including claims that may yet be received. It is not the task of the Court on this application to evaluate any assessment of claims.
- [118] On the basis of the statement of facts and the supplementary material contained in the affidavit of Mr Villani and the further affidavits, I am satisfied that the applicant has established a reasonable basis for the course proposed by the applicant.
- [119] In the circumstances, I am satisfied that it is appropriate to make the direction contained in paragraph 1(d) of the application, as modified to take account of the fact that notice has already been provided to members.

Account 20401: Investor funds payable (redemptions)

- [120] Paragraph 43 of the statement of facts identifies that LMIM used this account as a clearing account to process redemptions prior to payment.
- [121] Paragraph 1(e) of the application seeks a direction that the applicant is justified in paying the amounts identified in paragraph 156 of the Villani affidavit to the members identified in the Trustee Redemption Schedule. At the hearing on 9 March 2021 the reference to the affidavit of Mr Villani was corrected to paragraph 156.3.
- [122] The statement of facts at [44] to [45] and supplemental affidavit of Mr Villani set out the investigations undertaken by the applicant in relation to this account.
- [123] It has been identified that 435 redemption transactions were recorded to this account in respect of which unit holdings were reduced, but no payment was made by LMIM.
- [124] Consideration has also been given to two Redemption Schedules provided to the applicant by the administrators appointed to LMIM and by Mr Hannan. A similar number of redemption transactions are recorded in these two Redemption Schedules: namely, 435 and 432.
- [125] Further analysis has also established that approximately 96 percent of these transactions occurred on or after 16 February 2013 which was approximately one month prior to the closure of the Fund.
- [126] The applicant received four emails in the responses which are relevant to this issue.³¹ The four emails related to members where unitholdings had been reduced by the former trustee but to whom no payment had been made.
- [127] On analysis by the applicant, these four members are listed on the trustee Redemption Schedule proposed by LMIM.
- [128] Accordingly, these members are already proposed to be dealt with in accordance with the proposed direction sought by the applicant.

³⁰ Affidavit of S Clisby filed 9 February 2021 at [15]; Affidavit of D Johnstone at [14].

³¹ Three emails referred to in the supplementary submissions and one email referred to in the supplementary submissions in reply.

- [129] In the circumstances, the applicant proposes to pay the redemption amounts to members where their unitholdings were reduced but no payment was made by LMIM before the closure of the Fund.
- [130] On the basis of the statement of facts and the supplementary material contained in the affidavit of Mr Villani and the further affidavits, I am satisfied that the applicant has established a reasonable basis for the course proposed by the applicant.
- [131] In the circumstances I am satisfied that it is appropriate to make the direction contained in paragraph 1(e) of the application, with the corrected reference to paragraph 156.3 of the Villani affidavit.

Account 20402: Accrued interest (distributions)

- [132] Paragraph 47 of the statement of facts identifies that LMIM used this account to record accrued distribution entitlements prior to distributions being formally processed.
- [133] Paragraph 1(f) of the application seeks a direction that the applicant is justified in:
- (a) Making the payment identified in paragraph 169 of the Villani affidavit; and
 - (b) Otherwise taking no further steps concerning the transactions recorded in Account 20402.
- [134] The investigations undertaken by the applicant reveal that once a distribution was made, it was recorded by clearing the relevant balance in liability in Account 20402 and recording a liability in Account 20400.
- [135] As a result of this, the applicant believes that this account contains accrued distributions which LMIM had not processed as of the date of the appointment of the new trustees.
- [136] As stated in paragraph 50 of the statement of facts, the investigations reveal one transaction where a single holder remains a Class A account. It appears that this unitholder selected a distribution rule of “reinvest yearly” and the last reinvestment transaction occurred on 7 May 2012.
- [137] In the particular circumstances of this transaction, the applicant proposes to pay the unpaid distribution to this unitholder, as accrued but unpaid distributions are not reflected in the unit price for Class A units. The unitholder has otherwise been deprived of the distribution that accrued between 8 May 2012 and the closure of the Fund on 19 May 2013.
- [138] In relation to the other transactions identified in respect of this account, the applicant does not consider it necessary to take any steps in respect of these transactions. This is on the basis of the unit prices of the classes of units issued reflect accrued but unpaid distributions.
- [139] On the basis of the material set out in the statement of facts and supplemented by the affidavit of Mr Villani, the applicant has established a reasonable basis for the course proposed by the applicant.

- [140] In the circumstances, it is appropriate to make a direction in accordance with paragraph 1(f) of the application.

Unitholdings past maturity

- [141] Paragraph 51 of the statement of facts identifies that investments in the Fund ordinarily remain for a fixed term of between one and five years, with investors able to elect to automatically roll over their investment to a new term upon maturity, or to redeem their investment.
- [142] Paragraph 1(g) of the application seeks a direction that the applicant is justified in not taking any steps in relation to members of the Fund whose investments expired prior to the closure of the Fund on 19 March 2013, but whose units in the Fund were not redeemed, as identified in paragraph 176.4 of the Villani affidavit.
- [143] The investigations by the applicant have identified one investor described as “the Matured Investor”, who submitted an application form on 27 July 2010 providing for a two year investment with the investment being paid out on maturity. In August 2012, some of the units were redeemed and again some further units were redeemed in February 2013. However, at the time of the closure of the Fund on 19 March 2013 the Matured Investor still held units in the Fund.
- [144] The investigations by the applicant do not reveal why LMIM did not cause the balance of the Matured Investor’s unitholding to be redeemed in August 2012.
- [145] The investigations by the applicant also looked into whether there are any other unitholders where the terms of investment had expired. The investigations identified 600 accounts where the term of the investment appears to have expired prior to the closure of the Fund where the units were not redeemed.
- [146] However, from the analysis and investigations undertaken, LMIM did not process redemptions of these units and they remained unitholders when the Fund was closed on 19 March 2013 and when the new trustees were appointed on 12 April 2013.
- [147] It is in these circumstances that the applicant seeks a direction that it is justified in not taking any steps in respect of these unitholders.
- [148] The affidavit of Mr Villani sets out further details in relation to the investigations undertaken and the consideration of this issue.
- [149] The investigations undertaken included a review of a sample of the 600 accounts identified. In some cases, redemption documentation was on file, but no redemption was ever processed or paid. In some cases, no redemption documentation was located. Further, in some cases rollover instructions appear to have been provided but are not reflected in the unitholder register.³²
- [150] The affidavit of Mr Villani also contains an estimate of the costs that would be incurred in undertaking a review of the documentation held for each of the 600 accounts concerned. The Trustee estimates costs of approximately \$40,000 to \$60,000 would be incurred to undertake a full review.

³² Villani affidavit at [176.7].

- [151] Further, the applicant also considered clause 7.3(d) of the Constitution. Pursuant to this clause, even if the term of a member's investment was to expire, a member who wished to withdraw was required to provide a Withdrawal Notice to the trustee, before the expiry of their fixed investment term. If this was not done, the member would be deemed to have elected to renew their investment.
- [152] Further, pursuant to clause 7.4(b)(ii) of the Constitution, even if a member made a withdrawal request, the manager (being LMIM at the time) had a broad discretion to refuse to agree to withdrawal requests. Clause 7.4(b)(ii) is expressed as being in the absolute discretion as "... the Manager considers in its absolute discretion may be detrimental to the interests of Members in the Scheme".
- [153] In circumstances where LMIM did not process any redemptions of the identified units, this may have occurred as a result of either the members not making a withdrawal request within time and the investments automatically renewed or LMIM exercised its discretion not to agree to the withdrawal request having regard to the position of the Fund at the time any such request was made.
- [154] In the circumstances where there are considerable costs involved in undertaking the review of the documentation and those further investigations may not conclusively determine the position under clauses 7.3(e) and 7.4(b) of the Constitution, the applicant seeks a direction that is justified in not taking any steps in respect of the unitholders identified.
- [155] The applicant received in excess of 16 emails in the responses from members which relate to this issue. The affidavit and submissions of MAB, referred to earlier in these reasons, are also relevant to this issue. There is also correspondence included in these responses from the Matured Investor which is also specifically considered in relation to this issue.
- [156] The applicant's supplementary submissions and supplementary submissions in reply further develop the applicant's position.
- [157] Generally, the responses from members indicate that they made a request prior to the closure of the Fund, which the former trustee never acted upon.
- [158] As a consequence, the applicant's position is that "Past Maturity Members" are in a different category to the "Redemption members" discussed above in respect of the relief claimed in paragraph 1(e) of the application.
- [159] Based on the investigations undertaken by the applicant, it has reached the view that LMIM did not accept the Past Maturity Members' redemption requests as evidenced by it not taking any steps to process the redemption as their unitholdings were not reduced and no amounts were paid to the clearing account, 20401. Based on these circumstances, the applicant has reached the conclusion that:
- (a) LMIM must have determined that withdrawal requests had not been made within time and consequently, the members were deemed to have elected to renew their investments pursuant to clause 7.3(e) of the Constitution; or
 - (b) LMIM must have exercised its discretion not to agree to the withdrawal requests, having regard to the position of the Fund at the time any such request was made, pursuant to clause 7.4(b)(iii) of the Constitution.

- [160] It is helpful to consider the different position in respect of the Redemption Members. In respect of those members, the investigations show a reduction in the unitholdings of the Redemption Members but not payments out of account 20401, which was used as a clearing account to process redemption prior to payment.
- [161] It appears from the steps taken in respect of the Redemption Members that LMIM accepted the redemption requests and was processing the redemption transactions by:
- (a) reducing the unitholdings;
 - (b) paying the redemption payments into account 20401; and
 - (c) recording details of the units reduced and amounts payable in the Trustee Redemption Schedule. The only outstanding action was payment of these amounts that did not occur prior to the closure of the Fund.
- [162] The steps at (a), (b) and (c) above are absent in respect of the Past Maturity Members.
- [163] This supports the reasonableness of the different approach proposed by the applicant.
- [164] MAB and the Matured Investor are addressed specifically in the applicant's submissions but are generally in the same category as the Past Maturity Members.
- [165] In respect of the Matured Investor, the investigations reveal that a small number of units were redeemed on 20 August 2012 and 20 February 2013.³³ However, at the closure of the Fund on 19 March 2013 the Matured Investor still held 3,672.96 units in the Fund.³⁴
- [166] In respect of MAB, there are extensive submissions by the applicant and MAB dealing specifically with MAB's circumstances. It is not the role of the Court on an application under s 96 of the Trusts Act to make findings of fact or to resolve disputes between parties.
- [167] The approach is to consider whether there is:
- (a) a reasonable basis for the proposal sufficient to persuade the Court that it is proper to exonerate the trustee from liability for implementing the proposal; or
 - (b) whether there is any good reason why the liquidator should not proceed as proposed.
- [168] Based on the investigations undertaken by the applicant, MAB does not have a redemption recorded in the unitholder ledger and has not had his unitholding reduced.³⁵ The three steps at [161] (a), (b) and (c) identified above are absent in respect of MAB (similar to the Past Maturity Members).
- [169] The applicant proposes that the approach with respect to MAB should be consistent to that taken in respect of the Past Maturity Members.
- [170] The applicant has also taken the step of analysing the contemporary correspondence between MAB and LMIM. The applicant has reached the view that the

³³ Villani affidavit at [172.4]-[172.5].

³⁴ Villani affidavit at [172.6].

³⁵ Affidavit of S Clisby sworn 26 February 2021 at [21]; Exhibit SC-12.

correspondence supports a conclusion that LMIM exercised its discretion not to agree to MAB's redemption request. The applicant accepts that the request was made but as no steps were taken, and taking into account the correspondence, the applicant has reached this view.

- [171] MAB in his submissions makes a number of arguments in support of his position that his redemption request should be paid out in priority. These include a "deemed acceptance" of his redemption request and the imposition of a time period within which requests are to be paid.
- [172] The applicant has considered these arguments and submits that given the very broad discretion on the trustee under the Constitution, these arguments are inconsistent and cannot be maintained.
- [173] The applicant has also considered the document referred to by MAB which was produced by the voluntary administrators.³⁶ The applicant has reached the view that this document shows that LMIM had not scheduled MAB's unitholding for repayment. It does show two distributions for payment on 19 May 2013 but that was after the closure of the Fund.³⁷
- [174] As a consequence of those further investigations, the applicant maintains its position in respect of MAB: that is, he is in the same category as the Past Maturity Members identified by the applicant.
- [175] On the material set out in the statement of facts and as supplemented by the affidavit of Mr Villani and further affidavits, the applicant has established a reasonable basis for the course proposed by the applicant.
- [176] In the circumstances, I am satisfied that it is appropriate to make a direction in accordance with paragraph 1(g) of the application.

Nominal unitholdings

- [177] Paragraph 56 of the statement of facts identifies three unitholders having a unit balance of less than 40 units. Further, none of these unitholders have a value of more than \$AUD50.00 and any distribution to these unitholders would be nominal.
- [178] Paragraph 1(h) of the application seeks a direction that the applicant is justified in not taking any steps in relation to those members of the Fund who have a unit balance of less than 40 units, as identified in paragraph 180 of the Villani affidavit.
- [179] The affidavit of Mr Villani outlines that the costs associated with contacting these members, administering the process of updating the unitholder register and making distributions would not justify the steps being undertaken in circumstances where the sums that would be available to the members are very small.
- [180] On the basis of the material set out in the statement of facts and supplemented by the affidavit of Mr Villani, the applicant has established a reasonable basis for the course proposed by the applicant.

³⁶ Affidavit of S Clisby sworn 26 February 2021 at [24]-[27]; Exhibit SC-12.

³⁷ Affidavit of S Clisby sworn 26 February 2021 at [32]-[33]; Exhibit SC-12.

- [181] In the circumstances, I am satisfied that it is appropriate to make a direction in accordance with paragraph 1(h) of the application.

Returned withholding tax

- [182] Paragraph 1(i) of the application seeks a direction that the applicant is justified in including an amount of Returned Withholding Tax in the funds available for distribution to current members of the Fund.

- [183] Paragraph 62 of the statement of facts identifies that the Australian Taxation Office (ATO) refunded an amount with respect to withholding tax, being an amount of approximately \$6.5 million dollars (after fees and disbursements in respect of the recovery).

- [184] The relevant facts in relation to the Returned Withholding Tax are set out in paragraphs 58 to 62 of the statement of facts. These relevantly include:

- (a) During 2008 to 2013, the financial statements of the Fund recorded a profit. On this basis, LMIM paid distributions to unitholders and remitted withholding tax to the ATO on behalf of the unitholders.
- (b) Approximately \$7.9 million dollars of withholding tax was remitted to the ATO in respect of the Fund in the 2008 to 2013 financial years.
- (c) The applicant reinstated the trust fund financial accounts for the 2008 to 2013 financial years.
- (d) As a result of this reinstatement, the applicant sought the recovery of the Returned Withholding Tax on the basis that at the relevant time the Fund had insufficient income to permit or enable a distribution to unitholders.
- (e) The ATO refunded the Returned Withholding Tax on this basis.

- [185] As identified in paragraph 63 of the statement of facts, the applicant proposes to include the Returned Withholding Tax in the funds available for distribution to the current unitholders of the Fund, instead of attempting to pay the Returned Withholding Tax to those current and former unitholders on whose behalf the withholding tax was paid.

- [186] The applicant relies on the affidavit of Mr Villani which sets out supplementary facts as well as a consideration of the relevant issues and an explanation for the proposed approach.

- [187] Relevantly:

- (a) The amount that individual members will receive is relatively small given the large number of members and units on issue in the Fund. The applicant estimates that if the refund was to be divided evenly between the members, they would each receive approximately \$1,760.
- (b) The applicant sought the refund on the basis the tax payer in fact had a nil income for tax purposes for those years, and consequently no liability to pay withholding tax arose.

- (c) The applicant has taken reasonable steps to investigate possible bases for paying out the refund amount and has also obtained confidential legal advice in respect of potential claims, including in respect of potential claims by members.³⁸
- (d) The applicant has taken steps to notify members it proposes to include the Returned Withholding Tax in the funds available for distribution to current members.

[188] Paragraph 64 of the statement of facts addresses the consequences of returning the Returned Withholding Tax to the unitholders on whose behalf it was paid. This would result in a windfall benefit – unitholders received the distribution they should not have been paid and would also get a refund for tax on that distribution which should not have been paid.

[189] The affidavit of Mr Villani also sets out the basis upon which the applicant considers it is a reasonable approach to proceed by way of making the funds available for distribution to current members. These include:

- (a) As during the 2008 to 2013 financial years, the Fund did not receive income sufficient to permit distributions to be paid, no distributions should have been paid to those members who received distributions.
- (b) If the Returned Withholding Tax was returned to those members who had already received distributions, they would receive a windfall benefit. That is, they had the distribution which should not have been paid and would also get the Withholding Tax Refund, that was also refunded as the distribution, should not have been paid.
- (c) Members of the Fund were not entitled to receive distribution payments, and also amounts of withholding tax payable in respect of such payments.³⁹

[190] Paragraphs 64 of the statement of facts summarises this reasoning as follows:

“If the Returned Withholding Tax was to be returned to the unitholders on whose behalf it was paid, they would receive a windfall benefit. Those unitholders have already been paid the distribution (which they should never have been paid) and they would receive a refund of the Returned Withholding Tax for a distribution payment that should never have been paid.”

[191] On the material set out in the statement of facts and supplemented by the affidavit of Mr Villani, the applicant has established a reasonable basis for the course proposed by the applicant.

[192] In the circumstances I am satisfied that it is appropriate to make the direction in accordance with paragraph 1(i) of the application.

³⁸ The confidential legal advice has been provided to the Court as part of the evidence in support of the application.

³⁹ Villani affidavit at [190].

Foreign currency investors

- [193] Paragraph 1(j) of the application seeks a direction that the applicant is justified in calculating distributions to be made to members of the Fund who invested via currencies other than Australian dollars as follows:
- (a) By taking the value of each member's unitholding, based on the Australian dollar value for that unitholding recorded in Register 1, as at 19 March 2013 (AUD value of investment);
 - (b) By calculating the amount available for distribution by dividing each member's AUD value of investment against the Australian dollar value of all accounts recorded in Register 1, as at 19 March 2013.
- [194] As set out in paragraphs 66 to 68 of the statement of facts, clause 15.6 of the Constitution provides that subject to any special rights or restrictions attached to any unit, the Manager must distribute the net proceeds of realisation among the members in the same proportion specified in clause 11.4. However, the reference to clause 11.4 appears to be a typographical error and the correct reference is likely to be to clause 11.5 of the Constitution.
- [195] Clause 11.5 of the Constitution provides that a member is entitled to that proportion of the capital to be distributed as is equal to the number of units held by that Member on a date determined by the Manager divided by the number of units on the Register on that date.
- [196] During the course of the applicant's investigation, the applicant has identified that LMIM dealt with foreign currency investors in a different way to the methodology set out in clause 11.5 of the Constitution.
- [197] As set out in paragraph 69 of the statement of facts, LMIM dealt with the foreign currency investors as follows:
- “(a) LMIM set different unit prices for each foreign currency;
 - (b) when prospective unitholders made investments in foreign currency, LMIM calculated the units to be allotted using the applicable unit price for each currency;
 - (c) this had the effect of giving foreign currency investors more, or fewer, units than they would have received if they had invested in the equivalent amount of AUD;
 - (d) when foreign currency investments were redeemed, LMIM calculated the redemption amount using the unit price it had set for each foreign currency.”
- [198] Register 1, which is the unitholder register proposed to be adopted by the Trustee, recorded the AUD value of the unitholdings in the Trust as at 19 March 2013. Paragraph 70 of the statement of facts provides that the AUD value of the unitholdings is calculated by reference to the number of units held, the relevant unit price and exchange rate between the holding currency and AUD as at 19 March 2013.

- [199] The applicant seeks a direction that it is justified in calculating distributions to be made to unitholders who invested via currencies other than Australian dollars as proposed. This is particularly so in the circumstances where it is the view of the applicant that if foreign currency investor's distributions were paid in accordance with the distribution methodology in the Constitution, certain currency holders would receive significantly higher distributions than others.
- [200] The example given in the affidavit of Mr Villani is that if investments were made via Japanese yen and Singapore dollars, they would receive a higher distribution than those invested in British pounds.
- [201] The applicant submits that in an application for directions pursuant to s 96 of the Trusts Act, the Court does not determine substantive rights or entitlements such as the rights of investors to the scheme assets. The relevant question for the Court is whether there is a reasonable basis for the applicant's proposal, sufficient to persuade the Court that the trustee should be exonerated from liability for implementing it, or conversely, whether there is any good reason why the trustee should not proceed as proposed.⁴⁰
- [202] Further, the applicant refers to the comments by Robson J in *Re Timbercorp Securities Ltd (in liq) (No 3)*⁴¹ as providing some guidance as to the principles to be applied:
- “... [T]here are well recognised legal principles for determining the rights of several property owners whose property is lost or converted into a common fund. The fund, if it is created, is not to be allocated between the property owners on the basis of bargaining power. The fund is not to be allocated on arbitrary measures that may appear to be a fair and reasonable division of the fund. Rather, as the authorities establish, the fund is to be divided ‘by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an interest in the fund’.”
- [203] The applicant's proposal is in accordance with this principle. The proposal is consistent with the methodology adopted by LMIM to ascertain each member's “proportionate share of the fund” for the purpose of dividing the net proceeds of realisation. The adoption of the AUD value of investment is consistent with the methodology in place when the investments were made.
- [204] The applicant is of the view that the AUD value of investment provides a reasonable basis upon which to determine the proportionate share of the Fund attributable to each member.
- [205] While broad considerations of fairness may not be relevant to the determination of this issue, it is consistent with the practice that was adopted prior to the Fund being closed.

⁴⁰ *Australian Securities and Investments Commission v Tasman Investment Management Ltd* (2006) 59 ACSR 113 at 121 [32].

⁴¹ (2009) 74 ACSR 626 at [80].

[206] On the material set out in the statement of facts and the supplementary explanation provided in the affidavit of Mr Villani, the applicant has established a reasonable basis for the course proposed by the applicant.

[207] In the circumstances, it is appropriate to make the direction in accordance with paragraph 1(j) of the application.

Other matters

[208] The applicant's supplementary submissions deal with a number of other matters which the applicant has addressed which arise out of the responses from members. These are not directly relevant to the directions sought but are part of the matters considered by the applicant as to the overall appropriateness and reasonableness of its proposed approach.

[209] The applicant has considered these matters and reached the view that no adjustment or amendment to its proposed approach is required.

[210] Some of the responses were general enquiries regarding unitholdings or the timing of any distribution.

[211] Other responses include more substantive enquiries such as:

- (a) Switch discrepancies. Some of the responses show some uncertainty as to the effect of a "switch" in A class units to B class units, with distributions of income thereafter being redemptions. The applicant provided further information to those investors explaining the effect and provided further supporting information.
- (b) Global platform investors or beneficiaries. The applicant referred these enquiries to the global platform holder, as they are the members of the Fund.
- (c) Proposed treatment of AUD investors. There is no direction sought in respect of AUD investors but the applicant has addressed this issue in the confidential affidavit of Ms Clisby sworn 9 March 2021. This is addressed as it was raised in the responses from members and also for completeness. The contents of the affidavit are noted.

[212] It is not necessary to deal with these other matters in detail as they do not directly effect the relief sought and have been addressed in the applicant's submissions to the extent necessary. These matters do not alter the directions sought by the applicant or my considerations outlined in these reasons.

Costs

[213] The applicant seeks costs to be paid out of the Fund, on an indemnity basis. In the circumstances, I am satisfied that the proposed order in respect of costs is appropriate.

Orders

[214] Accordingly, I direct that:

THE COURT DIRECTS THAT:

1. The applicant is justified in:

- (a) The appropriate register: adopting the unitholder transaction register titled "Register 1.xlsx" identified in paragraph 66 of the affidavit of Mr Jarrod Villani filed 8 December 2020 (court document 42, hereafter the Villani affidavit) as the unitholder register of the MPF, for the purposes of making a distribution to members and finalising the winding up of the LM Managed Performance Fund (the Fund);
- (b) Account 20003 (Returned Investment Payments): taking no further steps concerning the transactions recorded in Account 20003 that occurred prior to 1 July 2012, as identified in paragraphs 132 and 137 of the Villani affidavit;
- (c) Account 20200 (Funds Awaiting Investment): returning the amounts identified in paragraphs 144 and 145 of the Villani affidavit to the prospective investors who made the payments, or if the funds cannot be so returned, paying the balance to the Australian Securities and Investments Commission;
- (d) Account 20400 (Distributions Payable): having sent a notice to all members of the first respondent, requesting any unitholder who believes they have not received a distribution for the period prior to 1 July 2012 to come forward and provide relevant supporting documentation, taking no further steps concerning the transactions recorded in Account 20400 that occurred prior to 1 July 2012, as identified in paragraph 148 of the affidavit of Villani, apart from assessing claims received from members of the first respondent in response to the applicant's notice;
- (e) Account 20401 (Investor Funds Payable (Redemptions)): in paying the amounts identified in paragraph 156.3 of the Villani affidavit to the members identified in the Trustee Redemption Schedule;
- (f) Account 20402 (Accrued Interest (Distributions)):
 - (i) making the payment identified in paragraph 169 of the Villani affidavit;
 - (ii) otherwise taking no further steps concerning the transactions recorded in Account 20402;
- (g) Unitholdings past maturity: not taking any steps in relation to members of the Fund whose investments expired prior to the closure of the Fund on 19 March 2013, but whose units in the Fund were not redeemed, as identified in paragraph 177.3 of the Villani affidavit;
- (h) Nominal unitholdings: not taking any steps in relation to those members of the Fund who have a unit balance of less than 40 units, as identified in paragraph 181 of the Villani affidavit;
- (i) Refunded withholding tax: including the Returned Withholding Tax in the funds available for distribution to current members of the Fund; and
- (j) Foreign currency investors: calculating distributions to be made to members of the Fund who invested via currencies other than Australian dollars as follows:

- (i) by taking the value of each member's unitholding, based on the Australian dollar value for that unitholding recorded in Register 1, as at 19 March 2013 (AUD Value of Investment);
- (ii) by calculating the amount available for distribution by dividing each member's AUD Value of Investment against the Australian dollar value of all accounts recorded in Register 1, as at 19 March 2013.

[215] Further, I order that:

THE COURT ORDERS THAT:

2. The applicant's costs of and incidental to the application filed 8 December 2020 be paid out of the assets of the Fund, on the indemnity basis.

