

SUPREME COURT OF QUEENSLAND

CITATION: *KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund* [2021] QSC 54

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 2021

JUDGE: Williams J

ORDER:

1. Pursuant to s 101 of the *Trusts Act* 1973 (Qld) the applicant be authorised to pay out of the assets of the LM Managed Performance Fund the amount of \$280,129.30 inclusive of GST (being the sum of \$254,663.00 plus GST) as the applicant's remuneration for its services as trustee for the period from 2 September 2019 to 1 November 2020.
2. The applicant's costs of and incidental to the application dated 4 December 2020 be paid out of the assets of the Trust, on the indemnity basis.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES RIGHTS AND LIABILITIES OF TRUSTEES – REMUNERATION – ALLOWANCE BY THE COURT – PRINCIPLES AND GROUNDS FOR GRANT OR REFUSAL – where the applicant was ordered to wind up the LM Managed Performance Fund (the Trust) – where the applicant was appointed trustee of the Trust – where the applicant seeks orders pursuant to s 101 of the *Trusts Act* 1973 (Qld) authorising the payment of remuneration – whether and in what amount the applicant is entitled to remuneration

Trusts Act 1973 (Qld), s 101

Conlan v Adams (2008) 65 ASCR 521; [2008] WASCA 61, cited

Re Postle and Hodsdon's Application [1991] 1 Qd R 160, cited
Venetian Nominees Pty Ltd v Conlan (1998) 20 WAR 96, cited
Zeveering v Callaghan [2012] 1 Qd R 194; [2011] QCA 180, 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] By the application filed on 8 December 2020, the applicant seeks orders pursuant to s 101 of the *Trusts Act* 1973 (Qld) (the *Trusts Act*) that the applicant be authorised to pay out of the assets of the LM Managed Performance Fund (the Trust) the amount of \$280,129.30 inclusive of GST (being the sum of \$254,663 plus GST) as the applicant's remuneration for its services as trustee for the period from 2 September 2019 to 1 November 2020 (remuneration application).
- [2] The applicant further seeks its costs of and incidental to the application dated 4 December 2020 be paid out of the assets of the Trust, on the indemnity basis.

Service of the remuneration application

- [3] The Trust has approximately 4,500 members, the vast majority of whom are located overseas.
- [4] On 27 November 2015 and 17 December 2015, orders were made by the Supreme Court of Queensland for substituted service in respect of service of any further application the applicant may file for approval of its remuneration on the members of the Trust.
- [5] The effect of the orders was that service of any further applications the applicant may file for approval of its remuneration be deemed effected on the members of the Trust five days after the trustee:
 - (a) posts such documents in PDF format on the trustee's website; and
 - (b) either sends an email to the members at their last known addresses notifying them of the Court documents and their availability on the trustee's website, or when an undeliverable message is received, and a postal address is held for that member, sending a copy of the notice by prepaid post.
- [6] The affidavit of Stacey Clisby sworn 9 February 2021 outlines the steps taken in relation to service of the remuneration application in accordance with the orders for substituted service.
- [7] On 18 January 2021 a copy of the remuneration application, the sixth affidavit of Jarrod Villani sworn 4 December 2020, exhibit JV-17 to the affidavit of Jarrod Villani

sworn 4 December 2020 and the orders made by Applegarth J on 27 November 2015 were uploaded to the trustee's website.¹

- [8] On 22 January 2021 the applicant caused emails to be sent to the members of the Trust for whom the trustee holds valid email addresses in relation to the remuneration application. This included a summary of the members' unitholder details.²
- [9] A total of 1,655 automatic undeliverable responses were received from 197 unique email addresses associated with 1,473 unique unitholder accounts.
- [10] Two of those 197 email addresses were associated with 1,244 institutional investor accounts. On 1 February 2021, a copy of the email correspondence was sent to the two entities associated with the 1,244 institutional investor accounts by prepaid post.³
- [11] Further, on 28 January 2021 a further 228 members were notified by prepaid post where the trustee held a postal address for those members.
- [12] The trustee also identified 171 unitholder accounts which do not have an associated email address, or for which associated email addresses have returned an undeliverable response. The trustee holds postal addresses for 170 of these 171 unitholder accounts.
- [13] On 22 January 2021, a hard copy of the email correspondence was sent by prepaid post to the postal addresses for 170 of the 171 unitholder accounts.⁴
- [14] The trustee does not hold a postal address for one of the 171 unitholders.
- [15] The material relating to the remuneration application has been available for download by members on the website maintained for the Trust by the applicant since 18 January 2021. The website has consistently been the primary method used by the applicant to communicate information to members.⁵
- [16] This process, including all hard copy mailouts, was completed by 1 February 2021.⁶
- [17] As at 9 February 2021 the applicant had not received any emails referring to the remuneration application,⁷ nor has the applicant received any emails from members asking to appear at the hearing of the remuneration application, or indicating that they intended to appear at the hearing of the application.⁸
- [18] Notice of the application was also given to the liquidator appointed in respect of LM Investment Management Ltd (LMIM), the previous trustee of the Trust.⁹

¹ Affidavit of S Clisby at [10].

² Affidavit of S Clisby at [12]-[17].

³ Affidavit of S Clisby at [18]-[19].

⁴ Affidavit of S Clisby at [22]-[24].

⁵ Affidavit of S Clisby at [26].

⁶ Affidavit of S Clisby at [20]-[21].

⁷ An email response referring to the remuneration application in general terms was received on 5 March 2021, a copy is exhibited to the confidential affidavit of S Clisby dated 9 March 2021. The email raised issues of a general nature in respect of costs and does not affect the substantive matters addressed in the applicant's submissions.

⁸ Affidavit of S Clisby at [28]-[29].

⁹ Affidavit of S Clisby at [30]-[34].

- [19] Further, the liquidators of LMIM have previously identified five proofs of debt which mention the Trust. However, no potential creditors have made a claim for indemnity from the funds as at 9 February 2021.
- [20] Out of caution the applicant has identified contact details for four of the five identified potential creditors and on 4 February 2021, notification was given to them of the remuneration application.¹⁰
- [21] In accordance with the orders of Applegarth J, 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 relates to one of the identified unitholder accounts.
- [22] Accordingly, pursuant to the orders dated 27 November 2015 and 17 December 2015, service is deemed to have been effected on all of the members of the Trust by 6 February 2021, being five days after the mailout was completed on 1 February 2021.
- [23] In the circumstances, I am satisfied that service has been effected in accordance with the substituted service orders.

Application for remuneration

- [24] The applicant has made four previous applications for approval of its remuneration as trustee of the Trust as follows:
- (a) On 17 December 2015, Martin J ordered that the payment of \$733,174.20 be authorised from the assets of the Trust, as the applicant's remuneration for the period from 12 January 2015 to 31 October 2015.
 - (b) On 6 October 2016, Martin J ordered that the payment of \$479,227 be authorised from the assets of the Trust as the applicant's remuneration for the period from 1 November 2015 to 14 August 2016.
 - (c) On 7 August 2018, Douglas J ordered that:
 - (i) the payment of \$643,247.00 be authorised from the assets of the Trust as the applicant's remuneration for the period from 15 August 2016 to 27 May 2018;
 - (ii) the applicant be authorised to pay \$122,425.60 from the assets of the Trust and be authorised to retain the amount of \$66,000.00, as the applicant's remuneration for its services in relation to the sale of a property located at Lygon Street, Melbourne.
 - (d) On 28 October 2019, Boddice J ordered that the payment of \$501,260.10 be authorised from the assets of the Trust, as the applicant's remuneration for the period from 28 May 2018 to 1 September 2019.¹¹
- [25] In respect of each of the previous applications, an affidavit of Jarrod Villani was relied on in relation to the application.¹²

¹⁰ Affidavit of S Clisby at [35]-[37].

¹¹ All of these amounts are inclusive of GST.

¹² See Affidavit of J Villani filed 2 December 2015, 23 September 2016, 6 July 2018 and 27 September 2019.

- [26] A further affidavit of Jarrod Villani filed 8 December 2020 is relied on in relation to this current application. Mr Villani is a partner and authorised officer of KordaMentha Pty Ltd, the applicant/trustee, and he is duly authorised by Mr Korda and Mr Mentha, the directors of the trustee, to swear the affidavit on behalf of the trustee.

Background – The LM Managed Performance Fund

- [27] LMIM established the Trust, the Managed Performance Fund, in approximately 2001.
- [28] The Trust was an unregistered managed investment scheme and is described by the applicant as follows:

“It was designed to be offered to investors outside Australia, to global platform and portfolio investors and to institutional/wholesale investors, which was the basis upon which LMIM was not required to register the investment scheme as a managed investment scheme under the Corporations Act 2001.”¹³

- [29] The capital contributed by the members of the Trust was pooled to make investments, principally in the form of loans secured by mortgages over real property. At the date that the applicant was appointed Trustee, the trust accounts recorded total receivables exceeding \$450,000,000.

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

- [30] On 19 March 2013 voluntary administrators were appointed to LMIM. Clause 23.1(b) of the Constitution required LMIM to resign as trustee of the Trust when it became an externally administered corporation.¹⁴
- [31] On 12 April 2013 de Jersey CJ made orders removing LMIM as trustee of the Trust and appointing the applicant and Calibre Capital Ltd as new trustees of the Trust.
- [32] On 1 August 2013 the voluntary administrators were appointed liquidators of LMIM, by way of a creditor’s voluntary winding up.
- [33] On 10 February 2014 Martin J ordered that the applicant and Calibre Capital Ltd wind up the Trust, pursuant to clause 15.2(c) of its Constitution.¹⁵
- [34] Clause 15.6 of the Constitution required that when winding up the Trust, the trustee realise the assets of the Trust, pay all of its liabilities and distribute the net proceeds of realisation to the members.
- [35] On 5 January 2015 Calibre Capital Ltd retired as trustee of the Trust. The applicant has been the sole trustee of the Trust since that date.

¹³ Applicant’s Submissions at [5].

¹⁴ Applicant’s Submissions at [8]–[9].

¹⁵ Amended orders of Martin J dated 18 March 2014.

Application pursuant to s 101 of the Trusts Act

- [36] This application, pursuant to s 101 of the Trusts Act, seeks orders authorising the payment of remuneration.
- [37] Section 101 of the Trusts Act provides as follows:

“101 Remuneration of trustee

- (1) The court may, in any case in which the circumstances appear to it so to justify, authorise any person to charge such remuneration for the person’s services as trustee as the court may think fit.
- (2) In the absence of a direction to the contrary in the instrument creating the trust, a trustee, being a person engaged in any profession or business for whom no benefit or remuneration is provided in the instrument, is entitled to charge and be paid out of the trust property all usual professional or business charges for business transacted, time expended, and acts done by the person or the person’s firm in connection with the trust, including acts which a trustee not being in any profession or business could have done personally; and, on any application to the court for remuneration under subsection (1), the court may take into account any charges that have been paid out of the trust property under this subsection.
- (3) For the purpose of this section –
trustee includes a custodian trustee.

- [38] Section 101 was considered by the Court of Appeal in *Zeveering v Callaghan*.¹⁶ At [46] P Lyons J (with whom the other members of the Court of Appeal agreed) stated:

“The breadth of those terms is apparent from the only stated qualification, namely, that the circumstances appear to the Court to justify the payment of remuneration to a trustee.”

- [39] Further, the Court of Appeal in *Zeveering* held that the applicant in a proceeding of this nature is not required to demonstrate any “special” or “exceptional” circumstances as a prerequisite for the Court exercising its discretion.¹⁷
- [40] In *Re Postle and Hodsdon’s Application*¹⁸ Byrne J held that a trustee was entitled to remuneration, assessing the reasonableness of their remuneration claimed by reference to:

“... The degree of responsibility exercised, the amount of skill and knowledge required and applied by [the trustee] and the value to the beneficiaries of the work done ...”

¹⁶ [2012] 1 Qd R 194.

¹⁷ At [49].

¹⁸ [1991] 1 Qd R 160 at 163-164.

[41] The applicant submits that the Trust's business was pooling the capital contributed by the members of the Trust to make mortgage investments, thereby constituting a commercial enterprise.

[42] This factor was considered by P Lyons J in *Zevering* in re-exercising the discretion to award remuneration under s 101 of the Trusts Act. Relevantly, his Honour stated at [62]:

“The trust was established to carry out a commercial purpose, namely, to take over the mortgage and to realise the mortgaged property by bringing to completion its development and subdivision, and by selling the resulting lots. The purpose of the task was to enable the unit holders to recover funds they had invested in the scheme, itself a commercial exercise. It was agreed at an early stage that the trustees would be remunerated. At that time, it was unknown whether the project would enable the recovery by the unit holders of the funds they had invested.”

[43] The applicant also points to the Trust's Constitution which provides in clause 17.4(g) that the Trustee is entitled to fees in relation to the winding up of the Trust. However, it is noted that the Constitution does not specify the fees payable or how they are to be calculated. In this regard, the applicant submits that the general discretion of the Court under s 101 applies and there is no restriction on that discretion found in the terms of the Constitution.

[44] The applicant in its submissions also refers to the legislative provisions authorising the payment of liquidators' and receivers' remuneration. It is submitted that these provisions provide some guidance, by analogy, as to how the Court should determine the appropriate remuneration in the present case.

[45] Reference to the relevant authorities identifies that the overriding principle applied by the Court in respect of a liquidator or receiver is that the remuneration is fair and reasonable. Further, the case law also establishes that the Court must determine this question for itself irrespective of the absence of a contradictor.

[46] While the onus is on the applicant to establish an entitlement to remuneration, there must be some evidence before the Court to establish a prima facie case for the determination of the amounts claimed.¹⁹ It has been accepted that the rules of evidence need not be strictly observed.²⁰

[47] Consistent with the authorities, the material placed before the Court in relation to an application for remuneration pursuant to s 101 of the Trusts Act must show:

- (a) the work undertaken was appropriate or necessary.
- (b) the work done by particular persons, how long it took to do the work, their hourly rate and the reasonableness of the rate.
- (c) the level of detail is proportionate to the size of the estate and the volume of work done.

¹⁹ *Conlan v Adams* (2008) 65 ACSR 521 at 529 [28].

²⁰ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 102 per Kennedy, Ipp and Wallwork JJ.

- (d) whether it was reasonable for the applicant to perform the work and whether the amount claimed for it is reasonable.
- [48] Time-based costing has been accepted as an appropriate basis for determining remuneration.²¹
- [49] Previous authorities have accepted that work will not be reasonably undertaken where it is unnecessary, where it is performed by persons of inappropriate seniority and where it is undertaken at inappropriate hourly rates.²²
- [50] In determining an application under s 101 of the Trusts Act, the Court is not required to undertake an item-by-item assessment of the costs.
- [51] Mr Villani, in his most recent affidavit, deposes to the work undertaken by the applicant and the basis upon which remuneration is sought. An itemised breakdown of the work performed has been provided in the exhibits to the affidavit. This breakdown includes the identity of the person who performed the work, their level of experience and the amount charged for that work. The affidavit also sets out an explanation as to why the work was necessary or appropriate.
- [52] On the basis of the information contained in Mr Villani's affidavit sworn on 4 December 2020 I am satisfied, particularly in the circumstances of the size of the Trust and the volume and complexity of the work undertaken, that the work performed by the applicant was reasonable and appropriate and that the remuneration sought in respect of that work ought to be approved by the Court.
- [53] In the circumstances, it is appropriate that the orders sought by the applicant in paragraphs 1 and 3 of the application dated 4 December 2020 be made.
- [54] Accordingly, I order that:
1. Pursuant to s 101 of the *Trusts Act* 1973 (Qld) the applicant be authorised to pay out of the assets of the LM Managed Performance Fund the amount of \$280,129.30 inclusive of GST (being the sum of \$254,663 plus GST) as the applicant's remuneration for its services as trustee for the period from 2 September 2019 to 1 November 2020.
 2. The applicant's costs of and incidental to the application dated 4 December 2020 be paid out of the assets of the Trust, on the indemnity basis.

²¹ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 105-106, followed in *Conlan v Adams* (2008) 65 ACSR 521 at 531 [37]; *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* (2017) 93 NSWLR 459 at 470 [51] per Bathurst CJ, with whom the other members of the Court of Appeal agreed.

²² *Conlan v Adams* (2008) 65 ACSR 521 at 532 [44] per McLure JA (Buss JA and Newnes AJA agreeing).