

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER:

Applicant

**KORDAMENTHA PTY LTD (ACN 100 169 391) AS
TRUSTEE FOR THE LM MANAGED
PERFORMANCE FUND**

AND

Respondent

**THE MEMBERS OF THE LM MANAGED
PERFORMANCE FUND**

SECOND AFFIDAVIT OF JARROD VILLANI

I, **JARROD VILLANI** of Level 14, 12 Creek Street, Brisbane in the State of Queensland, chartered accountant, say on oath:

- 1 I am a Partner and authorised officer of KordaMentha, the accounting firm representing KordaMentha Pty Ltd (the **Trustee**), the trustee of the LM Managed Performance Fund (the **MPF**).
- 2 I am duly authorised by Mr Korda and Mr Mentha, the directors of the Trustee, to swear this affidavit on behalf of the Trustee.
- 3 Except where otherwise indicated, I depose to the matters in this affidavit from my own personal knowledge of the facts and circumstances. Where I depose to matters from information and belief, I believe those matters to be true.

AFFIDAVIT OF JARROD VILLANI
Filed on Behalf of the Applicant



Uniform Civil Procedure Rules 1999
Form 47, Rule 435

Squire Patton Boggs
Address: 1 Macquarie Place,
Sydney NSW 2000

Phone No: (02) 8248 7850
Fax No: (02) 8248 7899

- 4 This affidavit is sworn in support of an application by the Trustee pursuant to section 101 of the Trusts Act 1973 (Qld) (**Trusts Act**) seeking court approval of its remuneration for services it provided as trustee of the MPF for the period between 12 January 2015 and 31 October 2015 (**Application**). As a preliminary step, the Trustee seeks orders for substituted service of the Application and any other material required to be served in relation to it. This affidavit is sworn in support of the application for substituted service orders.
- 5 Throughout this affidavit, I make reference to various documents that are contained in a paginated bundle of documents exhibited to this affidavit and marked "**JV-10**" (**Exhibit JV-10**).

Background

- 6 The MPF was established in 2001 as an Australian income fund designed to be offered to investors outside Australia, global platform and portfolio investors and institutional/wholesale investors. .
- 7 There are approximately 4525 unit holders on the register of the MPF (**members**), the overwhelming majority of whom reside overseas. This includes members represented by financial advisors, who have been authorised to receive communications on behalf of those members.
- 8 The Trustee was appointed as trustee of the MPF jointly and severally with Calibre Capital Ltd (**Calibre**) by order of the Court on 12 April 2013.
- 9 On 5 January 2015 Calibre retired as co-trustee, leaving the Trustee as the sole trustee of the MPF.

Proposed method of substituted service

- 10 The Trustee holds an email mailing list containing email addresses for the members of the MPF (which in some cases is the email address for the member's financial advisor, rather than the member's personal email address).
- 11 The liquidators of LM Investment Management Limited (in liquidation) originally provided the email mailing list to the Trustee, in or about April 2013 (that is, shortly

- 2 -

Sworn:



Taken by:



017-8089-8269

after KordaMentha's appointment as Trustee). The Trustee has added to and amended the list over time, as we have become aware of new email addresses for members of the fund (or advisors), or as we have become aware that email addresses are out-dated.

- 12 Until about May 2015, I believed that the email mailing list held by the Trustee contained an email address for each member. I recently discovered, while preparing for another court application, that the mailing list did not contain email addresses for 10 members. I subsequently obtained and now have email addresses for each of these 10 members. These email addresses have been added to the mailing list for future updates, including notice of the substituted service application that this affidavit is intended to support.
- 13 Accordingly, the Trustee believes that it now holds email addresses for all members of the MPF. As noted above, in some cases that email address is the email address for the member's financial advisor.
- 14 I am seeking orders from the Court that:

(a) service of:

- (i) the Application;
- (ii) the First Affidavit of Jarrod Villani in support of the application for remuneration to be sworn;
- (iii) this affidavit;
- (iv) any further court documents to be filed by the Trustee in these proceedings; and
- (v) any orders made in respect of the Application and not required to be served personally,

be deemed effected on the respondents five days after the Trustee:

Sworn:



- 3 -

Taken by:



- (vi) posts such documents in PDF format on the KordaMentha website on the page dedicated to the MPF with the URL <http://www.kordamentha.com/creditor-information/australia/109> (the Website); and
- (vii) sends an email to all members of the MPF at their last known email addresses, notifying them of the general nature of the Court documents and that the documents have been posted on the Website; and
- (b) where the Trustee receives a response to an email, such as an undeliverable message, that indicates the email was not received, and the Trustee has a postal address for that MPF member, the applicant is to send a notice by pre-paid post notifying the member of the general nature of the Court documents and the fact that the documents have been posted on the Website.

Impracticality of service of the application personally or by post

- 15 In my opinion it would be exceedingly difficult, time-consuming and expensive to serve each of the circa 4,500 members personally, given the large number of them who are located overseas.
- 16 For the 4,525 unique investor IDs that the Trustee holds, we have mailing addresses for 4,473 of these members. However, only 71 of these addresses are Australian addresses, meaning the overwhelming majority of members are located overseas.
- 17 In order to effect personal service on the members of the MPF, the Trustee would need to locate process servers in each of the countries in which the members reside, send copies of the Application and supporting affidavit to each of the process servers, and cause the process servers to serve each of the members of the MPF personally. This process would be particularly time consuming and expensive.
- 18 In order to serve each of the members by pre-paid post, the Trustee would need to outsource the task of printing and compiling all the relevant material (being the Application and the supporting affidavits and exhibits).
- 19 I have obtained a quote from Law in Order in Sydney for the costs of printing and collating the current application, as well as the First Affidavit of Jarrod Villani in

- 4 -

Sworn:



Taken by:



017-8089-8269 AUSTRALIA

support of the application for remuneration and its accompanying exhibit, the cost of which is estimated to be at least \$160,230.50. A copy of the quotation from Law in Order is at pages 1 to 14 of Exhibit JV-10.

- 20 In addition, I estimate the cost of sending the application and supporting affidavit to members by pre-paid post at anywhere between \$95,000 to \$205,000 as per the rates advertised by Australia Post, depending on the international parcel zones to which the material is being posted. A copy of the Australia Post International Post Charges Easy Guide, showing the cost of postage by airmail (based on the weight of the parcel and the international parcel zone to which the package is being delivered) is at pages 15 to 18 of Exhibit JV-10.
- 21 In my view the cost and administrative burden of carrying out service in this way make it impractical to serve the application and supporting documents on each member personally or by post.

The utility of the mode of service proposed in this Application

- 22 During the Trustee's term as trustee of the MPF since April 2013, I have prepared at least 14 updates to investors, as well as additional supplementary information memoranda for the MPF. I have provided those documents to the members of the MPF by emailing them to each of the members' last known email addresses, and by posting the documents on the Website.
- 23 I therefore consider that posting material to the Website is an effective and appropriate way of making it available to the members, particularly in conjunction with an email to be sent to each member drawing their attention to the material on the Website.
- 24 In a number of other proceedings concerning the MPF, the Court has made orders that originating processes and supporting court documents (including affidavits and exhibits) be served on the members of the MPF in similar manner to that proposed in this Application that is, by emailing a notice to the members of the MPF and posting copies of the materials on the Website.
- 25 The orders previously made by this Court permitting service in this way include:

Sworn:



- 5 -

Taken by:



017-8089-8269/1/AUSTRALIA

- (a) order of Justice Lyons in proceeding 3691/2013 on 14 November 2013;
- (b) order of Justice Mullins in proceeding 11593/203 on 17 December 2013;
- (c) order of Justice Lyons in proceeding 12317/2014 on 18 February 2015;
- (d) order of Justice Lyons in proceeding 5329/2015 on 29 May 2015;
- (e) order of Justice Jackson in proceeding 8792/2013 on 5 November 2015.

Copies of these orders are at pages 19 to 31 of Exhibit JV-10.

26 Pursuant to the orders referred to in paragraph 25, members of the MPF have been served with the following types of documents via the Website:

- (a) affidavits and supporting exhibits;
- (b) originating applications
- (c) Claims and Statements of Claim;
- (d) statements of facts, prepared pursuant to s.96 of the Trusts Act;;
- (e) outlines of written submissions; and
- (f) orders and directions.

27 In my view, in light of these orders referred to in paragraph 25 over the past two years, the members of the MPF are accustomed to being served with court documents in the manner proposed by this Application.

Concluding remarks

28 On the basis of the Trustee's historical conduct in communicating with investors and serving court documents, as set out above at paragraphs 22 to 26, I believe that the method of service proposed in this Application will bring the fact of the Application to the attention of the members and allow them to access the relevant materials.

All the facts and circumstances deposed to above are within my own knowledge save for matters deposed to from information only, in which cases my sources of information appear on the face of this Affidavit.

Sworn:



- 6 -

Taken by:



SWORN by JARROD VILLANI
at Brisbane, Queensland
On 25 November 2015



Deponent

in the presence of:



Solicitor/Commissions for Declarations/
Justice of the Peace



- 7 -

Sworn:



Taken by:

