

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 5329/15

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

AFFIDAVIT

DAVID THOMAS O'BRIEN of MinterEllison, Level 22, Waterfront Place, 1 Eagle Street
Brisbane in the State of Queensland, solicitor, states on oath:

1. I am a member of the firm MinterEllison, the solicitors for KordaMentha Pty Ltd (ACN 100 169 391) in its capacity as trustee for the LM Managed Performance Fund ("**Trustee**"). I have the conduct of this proceeding and, relevantly, proceedings BS8032/14 and BS8034/14 on behalf of the Trustee, and I am duly authorised to swear this affidavit on its behalf.
2. Proceedings BS8032/14 and BS8034/14, both of which were commenced in this Honourable Court on 27 August 2014, were placed on the Commercial List by order of the Honour Justice Jackson made on 30 September 2015, after the Honourable Justice Daubney directed on 26 August 2015, that the Trustee would be justified in prosecuting these proceedings. On 16 August 2016, the Honourable Justice Jackson adjourned both proceedings to allow the parties to continue to negotiate a multi-action settlement that would have involved both proceedings.
3. On 1 May 2018, I sent an email to the solicitors for the first defendant in proceedings BS8032/14 and BS8034/14 namely, Russells, and the solicitors for the second defendant namely, Tucker & Cowen, informing them that the litigation funding of proceedings BS8032/14 BS8034/14 had been terminated with effect

Page 1

Signed:



Taken by:



AFFIDAVIT OF DAVID THOMAS
O'BRIEN
Filed on behalf of the applicant

MINTER ELLISON
Waterfront Place, 1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email david.obrien@minterellison.com
Reference NYB DOB 407747729

from 1 May 2018, and that, subject to this Honourable Court's direction, the Trustee therefore proposes to discontinue both proceedings. Exhibit **DOB-1** is a true copy of my email dated 1 May 2018, to Russells and Tucker & Cowen.

4. On 3 May 2018, I received by email from Tucker & Cowen a letter a true copy of which is exhibit **DOB-2**, questioning why the Trustee is seeking this Honourable Court's direction to discontinue the proceedings rather than just discontinuing them.
5. On 4 May 2018, I sent by email to Tucker & Cowen and Russells, a letter responding to Tucker & Cowen's letter dated 3 May 2018. My letter also enclosed copies of applications for substituted service and directions under section 96 of the *Trusts Act* 1973 (Qld) filed in this proceeding on 4 May 2018. Exhibit **DOB-3** is a copy of my email dated 4 May 2018 to Tucker & Cowen and Russells, together with each attachment.
6. On 8 May 2018, I sent an email to the Honourable Justice Jackson's Associate, informing his Honour that the plaintiff is applying in the Application List for a direction to discontinue proceedings BS8032/14 and BS8034/14. Exhibit **DOB-4** is a true copy of my email (excluding attachments) dated 8 May 2018 to the Honourable Justice Jackson's Associate.
7. On 8 May 2018, I received an email from the Honourable Justice Jackson's Associate in response to my email which is exhibit **DOB-4**. Exhibit **DOB-5** is a true copy of the Honourable Justice Jackson's Associate's email of 8 May 2018 to me.
8. All the facts and circumstances deposed to in this affidavit are within my own knowledge except where they have been deposed to from information only and my means of knowledge and sources of information appear in my affidavit.

SWORN by DAVID THOMAS O'BRIEN on 8 May 2018

at Brisbane



Deponent

in the presence of:



Solicitor/Commissioner for

Declarations/Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 5329/14

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

CERTIFICATE OF EXHIBIT

Exhibit **DOB-1** to exhibit **DOB-5** the affidavit of DAVID THOMAS O'BRIEN sworn 8
May 2018.



Deponent



Solicitor/Commissioner for

Declarations/Justice of the Peace

CERTIFICATE OF EXHIBIT

Filed on behalf of the Applicant

Form 47 Rule 435

MINTER ELLISON

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BRISBANE QLD 4000

DX 102 BRISBANE

Telephone (07) 3119 6000

Facsimile (07) 3119 1000

Email david.obrien@minterellison.com

Reference NVB DOB 407747737

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 5329/15

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

LIST OF EXHIBITS

Exhibit	Document	Pages
DOB-1	Email dated 1 May 2018 from MinterEllison to Tucker & Cowen and Russells	1-2
DOB-2	Email dated 3 May 2018 from Tucker & Cowen to MinterEllison	3-6
DOB-3	Email dated 4 May 2018 from MinterEllison to Tucker & Cowen and Russells	7-19
DOB-4	Email dated 8 May 2018 from MinterEllison to the Honourable Justice Jackson's Associate	20-26
DOB-5	Email dated 8 May 2018 from the Honourable Justice Jackson's Associate to MinterEllison	27-28

CERTIFICATE OF EXHIBIT

Filed on behalf of the applicant

Form 47 Rule 435

MINTER ELLISON

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Email david.obrien@minterellison.com

Reference NYB DOB 407747729

David O'Brien

From: David O'Brien
Sent: Tuesday 1 May 2018 10:05 am
To: David Schwarz; atiplady@russellslaw.com.au
Cc: Nadia Braad; Alex Nase
Subject: RE: KordaMentha Pty Ltd (ACN 100 169 391) as trustee for the LM Managed Performance Fund: Supreme Court of Queensland Proceeding No. 5329/15 [ME-ME.FID2299214]
Attachments: 2018.05.01 Letter to Tucker & Cowen and Russells.PDF

Dear Colleagues,

Please see **attached** correspondence.

Regards

David O'Brien
Partner
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david.obrien@minterellison.com
MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000
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MinterEllison

1 May 2018

BY EMAIL

Mr David Schwarz
Tucker & Cowen
Level 15, 15 Adelaide Street
Brisbane QLD 4000

Mr Ashley Tiplady
Russells
Level 18, 300 Queen Street
Brisbane QLD 4000

Dear Colleagues

RE: KordaMentha Pty Ltd (ACN 100 169 391) as trustee for the LM Managed Performance Fund:
Supreme Court of Queensland Proceeding No. 5329/15

KordaMentha Pty Ltd atf the LM Managed Performance Fund ("MPF") v LM Investment
Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") & David Whyte in
his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund
("FMIF"): Supreme Court of Queensland Proceeding No. 8032/14

KordaMentha Pty Ltd atf the LM Managed Performance Fund ("MPF") v LM Investment
Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") & David Whyte in
his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund
("FMIF"): Supreme Court of Queensland Proceeding No. 8034/14

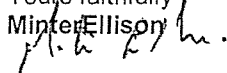
We refer to paragraph 2 of the Order made by the Honourable Justice Daubney in proceeding BS5329/15
on 26 August 2015.

We hereby give you notice that IMF Bentham Limited has terminated its agreement to fund proceedings
BS8032/14 and BS8034/14, with effect from today.

In consequence, our client intends to discontinue both proceedings BS8032/14 and BS8034/14, if so
advised by the Supreme Court of Queensland acting pursuant to section 96 of the *Trusts Act* 1973 (Qld).

Our client will provide you with copies of the material it intends to rely upon in support of its section s96
application, other than Counsel's confidential memorandum of advice in support of the application, but
does not intend to formally serve your clients.

As you are aware, the logistics associated with our client informing in excess of 4,500 unitholders of its
view that the actions ought be discontinued, will mean that it may take two or more months before the
Court's final direction can be obtained. In the meantime, please do not continue to incur costs in respect
of the actions. Our client reserves its rights in this regard

Yours faithfully
MinterEllison


Contact: David O'Brien T: +61 7 3119 6159
F: +61 7 3119 1159 david.obrien@minterellison.com
Partner: David O'Brien T: +61 7 3119 6159
OUR REF: DOB 407747729

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ME_146918089_1



David O'Brien

From: Michelle Voser <mvoser@tuckercowen.com.au> on behalf of Alex Nase <anase@tuckercowen.com.au>
Sent: Thursday 3 May 2018 04:53 pm
To: David O'Brien; Nadia Braad
Cc: Alex Nase; David Schwarz
Subject: KordaMentha Pty Ltd atf the LM Managed Performance Fund v LM Investment Management Ltd (Receivers and Managers Appointed) (In Liq.) & Anor - Supreme Court of Qld Proceedings No. 8032/14 and 8034/14
Attachments: Letter to Minter Ellison Lawyers (TCS01512985).PDF

Dear Colleagues,

Please find **attached** correspondence.

Yours faithfully,

Sent on behalf of **Alex Nase**, Special Counsel

E: anase@tuckercowen.com.au | D: 07 3210 3503 | M: 0423 386 195

by:

Michelle Voser
Personal Assistant

E: mvoser@tuckercowen.com.au
D: 07 3210 3517 | T: 07 300 300 00 | F: 07 300 300 33
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001
TCS Solicitors Pty Ltd. | ACN 610 321 509

Tucker&CowenSolicitors.

Leading Litigation & Dispute Resolution and Insolvency & Reconstruction Lawyers 2012 to 2017, First Tier for Insolvency 2017 - Doyle's Guide

Best Lawyers® International 2013 -2019 - Justin Marschke for Litigation and Regulatory 2019

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Tucker & Cowen Solicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase
Your reference: Mr O'Brien / Mrs Braad

3 May 2018

Minter Ellison
Lawyers
Level 22 Waterfront Place
1 Eagle Street
Brisbane Qld 4000

Email: david.obrien@minterellison.com
nadia.braad@minterellison.com

Principals.
Richard Cowen.
David Schwarz.
Justin Marschke.
Daniel Davey.

Consultant.
David Tucker.

Special Counsel.
Geoff Hancock.
Alex Nase.
Brent Weston.

Associates.
Marcelle Webster.
Emily Anderson.
James Morgan.
Scott Hornsey.
Robert Tooth.

Dear Colleagues

Re KordaMentha Pty Ltd as trustee for the LM Managed Performance Funding – Supreme Court of QLD Proceeding 5329/15
KordaMentha Pty Ltd atf the LM Managed Performance Fund (“MPF”) v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) (“LMIM”) & Anor. – Supreme Court of Queensland Proceedings 8032/14 & 8034/14

We refer to your letter dated 1 May 2018.

Thank you for advising that your client intends to seek directions under s 96 of the Trusts Act 1973 (Qld) that your client would be justified discontinuing proceedings 8032/14 and 8034/14.

As you would recall, it was clear from Daubney J's reasons for judgment on the previous s 96 application brought by your client in proceeding 5329/15 that His Honour regarded the evidence that there was a litigation funding agreement in place, on satisfactory terms, as a very significant matter and that, without such a funding agreement in place, His Honour would not have directed that your client was justified in prosecuting the proceedings: see in particular p 8 lines 7 to 27 of transcript of reasons for judgment.

Indeed, His Honour made the directions given that your client was justified prosecuting the proceedings conditional upon deed polls being filed in the Court pursuant to which the litigation funder guarantees the payment of adverse costs orders.

Now that the litigation funding agreements have been terminated, it would seem to follow from His Honour's reasoning that your clients are no longer justified prosecuting the proceedings and thus, that the proceedings ought to be discontinued.

Our client would therefore query whether a further s 96 application is in fact necessary.

However, in the event that your client is intent upon bringing a further s 96 application prior to discontinuing the proceedings, our client is of the firm view that, given the lengthy delays in the proceeding to date, the application for directions ought to be brought, and the proceedings discontinued, promptly. This is particularly so given that these proceedings, whilst they continue to be on foot, are holding up the retirement of the Receivers appointed by Deutsche Bank AG, and are an impediment to our client applying to Court for approval to make an interim distribution to FMIF members.

It is not apparent to our client why it may take “two months or more” for the application and supporting material to be filed and served on unitholders (notwithstanding that there are 4,500 unit holders), and for directions to be obtained from the Court.

Our client would have thought that four to six weeks would be ample time for your client to obtain directions from the Court.

Given the above matters, our client has instructed us to request that:

1. if your client maintains that a further s 96 application is necessary, please explain why, and confirm that the application and supporting material will be filed and served promptly and let us know when we may expect to receive same; or
2. in the absence of an explanation, that your client discontinue the proceedings forthwith.

Kindly reply to this letter within seven days.

If you wish to discuss the matter, please do not hesitate to contact us.

Yours faithfully



Alex Nase
Tucker & Cowen

Direct Email: anase@tuckercowen.com.au
Direct Line: (07) 3210 3503

Individual liability limited by a scheme approved under Professional Standards Legislation.

David O'Brien

From: David O'Brien
Sent: Friday 4 May 2018 12:43 pm
To: David Schwarz; atiplady@russellslaw.com.au
Cc: Alex Nase; Nadia Braad
Subject: Lifestyle and Barley Wood : s96 applications [ME-ME.FID2395599]
Attachments: 2018.05.04 Letter to Tucker & Cowen .pdf; KordaMentha Pty Ltd atf the LM Managed Performance Fund v LM Investment Management Ltd (Receivers and Managers Appointed) (In Liq.) & Anor - Supreme Court of Qld Proceedings No. 8032/14 and 8034/14

Der Colleagues,

Please see attached correspondence.

For Russells' benefit, we also attach Tucker & Cowen's letter of 3 May 2018, to which are letter of today responds.

Regards

David O'Brien
Partner
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david.obrien@minterellison.com
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minterellison.com Follow us on **LinkedIn** and **Twitter**



MinterEllison

4 May 2018

BY EMAIL

Mr David Schwarz
Tucker & Cowen
Level 15, 15 Adelaide Street
Brisbane QLD 4000

Dear Colleagues

RE: KordaMentha Pty Ltd (ACN 100 169 391) as trustee for the LM Managed Performance Fund:
Supreme Court of Queensland Proceeding No. 5329/15

KordaMentha Pty Ltd atf the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") & David Whyte in his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund ("FMIF"): Supreme Court of Queensland Proceeding No. 8032/14

KordaMentha Pty Ltd atf the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") & David Whyte in his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund ("FMIF"): Supreme Court of Queensland Proceeding No. 8034/14

We refer to your letter dated 3 May 2018.

A trustee may seek the Court's direction about ending valuable proceedings (see e.g. *Coore v Coore* [2013] QSC 196). Further, in this case the Honourable Justice Daubney in directing that our client would be justified in prosecuting the proceedings, stated in *Re KordaMentha Pty Ltd* [2015] QSC 376 at [17]:

"In reaching my conclusion with respect to the appropriateness of making directions under s 96, I expressly do so on the basis that litigation funding will be provided on terms which are identical to those put before me in the confidential information. Should that situation change, and it be the case that the litigation funder will only provide funding on terms different from those put before me, then I consider that this would be a circumstance which would require the legal advisers for the Trustee, in proper discharge of their obligations as officers of the Court, to bring these matters back before the Court for further consideration." (underlining added)

The termination of the funding agreement is a change in situation that should be brought to the attention of the Court.

Further, our client is entitled to seek the protection afforded it by section 97 of the *Trusts Act 1973* (Qld) by making such an application in any event.

We enclose by way of notice, but not by way of service, two applications that we have filed today. You will see that the application for section 96 directions is to be heard on 7 June 2018. Of course, if events arise that occasion the need for an adjournment of that hearing, as they did on the hearing of the originating application, the final hearing of the present application could be delayed. Presently, we do not anticipate any such adjournment being required.

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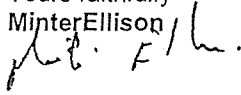
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If it is of any importance to the present s 96 application, we note that the "delay" which you mention in the prosecution of BS8032/14 and BS8034/14 occurred with your client's knowledge and consent in circumstances where our respective clients were attempting to negotiate a multi-party and multi-action settlement. We appreciate you may not know this because Gadens represented your client in those negotiations until he terminated them on 16 April 2018.

Yours faithfully

MinterEllison



Contact: David O'Brien T: +61 7 3119 6159
F: +61 7 3119 1159 david.obrien@minterellison.com
Partner: David O'Brien T: +61 7 3119 6159
OUR REF: DOB 407735740

cc Mr Ashley Tiplady, Russells

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 5329/15

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

APPLICATION

TAKE NOTICE that KordaMentha Pty Ltd (ACN 100 169 391) as trustee of the LM Managed Performance Fund ("applicant") is applying to the Court for the following orders:

1. In respect of the application filed on 4 May 2018 for directions under section 96 of the *Trusts Act* 1973 (Qld), the applicant serve by email all unitholders of the Managed Performance Fund ("MPF") for whom the applicant has an email address.
2. Where the applicant receives a response to an email that indicates the email was not received and the applicant has a postal address for that MPF unitholder, the applicant is to post the email to the postal address of the MPF unitholder.
3. By 4.00pm on 17 May 2018, the applicant is to email to the MPF unitholders a notice informing them that the applicant has applied ("S 96 Application") to this Honourable Court for directions under section 96 of the *Trusts Act* 1973 (Qld) to discontinue Supreme Court Proceedings S8032/14 and S8034/14 against LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) (ACN 077 208 461), and Mr David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund, and that they may view all substantive Court documents upon which the applicant



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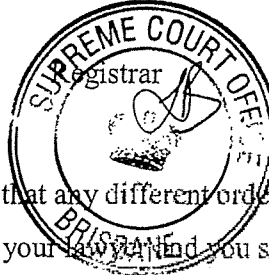
MINTER ELLISON
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email: qlit@minterellison.com
Reference NYB DOB 407747737

intends to rely in support of its S 96 Application on the web-site whose address is:
<http://www.kordamentha.com/creditor-information/australia/109> ("Website").

4. By 4.00pm on 17 May 2018, the applicant is to upload to the Website, copies of:
 - (a) the S 96 Application;
 - (b) this application for directions about service;
 - (c) the affidavit of Jarrod Villani to be filed in support of the application for directions about service;
 - (d) the service order;
 - (e) the Statement or Statements of Facts drawn pursuant to section 96 (1) of the *Trusts Act* 1973 (Qld); and
 - (f) the substantive affidavits (including all the exhibits) that the applicant intends to rely upon in support of its S 96 Application.
5. Service in accordance with paragraph 4 of this order be deemed to be effective on each of the MPF unitholders as of 24 May 2018.
6. For all other emails by way of service on the MPF unitholders:
 - (a) the email shall, where appropriate, notify the unitholder of the further document or documents that has been uploaded to the Website;
 - (b) service shall be deemed to have been effected two business days after the day on which the email was sent.
7. The applicant is not required to take further steps to serve MPF unitholders whose email addresses return permanent undeliverable receipts and for which the Trustee does not have a postal address.
8. The applicant's cost and expenses of and incidental to its application for this order be paid on the indemnity basis out of the MPF.
9. The applicant is to serve a copy of this order on LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) (ACN 077 208 461) and Mr David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund.

This application will be heard by the Court at Brisbane
on: Wednesday, 9 May 2018 at 10.00 am.

Filed on 4 May 2018



If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application the applicant intends to rely on the following affidavits and documents:

1. Affidavit of Jarrod Villani to be sworn and filed.

THE APPLICANT ESTIMATES THE HEARING SHOULD BE ALLOCATED 30
Minutes

Signed:

M. T. Ellison

Description:

MINTER ELLISON
Solicitors for the Applicant

Dated:

4 May 2018

This application is not intended to be served on any person.

Notice of this application will be given to:

The first defendant in Supreme Court of Queensland proceedings numbered 8032/14 and 8034/14, LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 077 208 461)

AND TO

The second defendant, in Supreme Court of Queensland proceedings numbered 8032/14 and 8034/14 Mr David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 5329/15

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

APPLICATION

TAKE NOTICE that KordaMentha Pty Ltd (ACN 100 169 391) as trustee of the LM Managed Performance Fund ("applicant") is applying to the Court for the following orders:

1. Directions pursuant to section 96 of the *Trusts Act* 1973 (Qld), as to whether the applicant would be justified in discontinuing proceedings against the defendants to the relief claimed in the Claim and Statement of Claim filed in Supreme Court of Queensland proceeding number 8032/14; and
2. Directions pursuant to section 96 of the *Trusts Act* 1973 (Qld), as to whether the applicant would be justified in discontinuing proceedings against the defendants to the relief claimed in the Claim and Statement of Claim filed in Supreme Court of Queensland proceeding number 8034/14; and
3. The applicant's costs and expenses of and incidental to this application be paid on the indemnity basis out of the LM Managed Performance Fund.
4. Such further and other orders or directions as this Honourable Court deems appropriate.

This application for directions will be heard by the Court at Brisbane



Form 5 Rules Rule 26

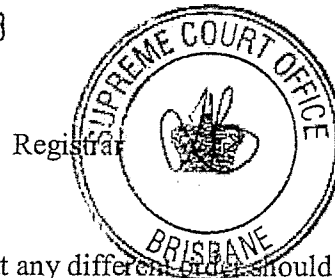
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MINTER ELLISON
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email: qlit@minterellison.com
Reference: NYB DOB 407747737

on: Thursday, 7 June 2018 at 10.00am.

Filed on 4 May 2018

4 MAY 2018



If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application for directions the Applicant intends to rely on the following affidavits:

1. Affidavit of Jarrod Villani to be filed;
2. Affidavit of Nadia Suzanne Braad to be filed;
3. Statement of Facts pursuant to section 96(1) of the *Trusts Act 1973* (Qld) to be filed.

If you intend on the hearing to rely on any affidavits they must be filed and served at the applicant's address for service prior to the hearing date.

If you object that these proceedings have not been commenced in the correct district of the Court, you must apply to the Court for dismissal of the proceedings.

THE APPLICANT ESTIMATES THE HEARING OF THE APPLICATION FOR DIRECTIONS SHOULD BE ALLOCATED 1.5 HOURS

Applicant:	KORDAMENTHA PTY LTD (ACN 100 169 391) AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND
Applicant's residential or business address:	Level 14, 12 Creek Street, Brisbane, Qld 4000
Applicant's solicitors name:	David Thomas O'Brien
and firm name:	Minter Ellison

Solicitor's business address: Lvl 22 Waterfront Pl, 1 Eagle St, Brisbane Qld
 Address for service: Lvl 22 Waterfront Pl, 1 Eagle St, Brisbane Qld
 4000

Dx if any

Telephone: 07 3119 6000

Fax: 07 3119 10000

E-mail address if any david.obrien@minterellison.com

Signed:

M.T. Ellison

Description: MINTER ELLISON
 Solicitors for the Applicant

Dated: 4 May 2018

This application is not intended to be served on any person.

Notice of this application will be given to:

The first defendant in Supreme Court of Queensland proceedings numbered 8032/14 and 8034/14, LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 077 208 461)

AND TO

The second defendant, in Supreme Court of Queensland proceedings numbered 8032/14 and 8034/14 Mr David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund

David O'Brien

From: Michelle Voser <mvoser@tuckercowen.com.au> on behalf of Alex Nase
<anase@tuckercowen.com.au>
Sent: Thursday 3 May 2018 04:53 pm
To: David O'Brien; Nadia Braad
Cc: Alex Nase; David Schwarz
Subject: KordaMentha Pty Ltd atf the LM Managed Performance Fund v LM Investment Management Ltd (Receivers and Managers Appointed) (In Liq.) & Anor - Supreme Court of Qld Proceedings No. 8032/14 and 8034/14
Attachments: Letter to Minter Ellison Lawyers (TCS01512985).PDF

Dear Colleagues,

Please find attached correspondence.

Yours faithfully,

Sent on behalf of **Alex Nase**, Special Counsel

E: anase@tuckercowen.com.au | D: 07 3210 3503 | M: 0423 386 195

by:

Michelle Voser
Personal Assistant

E: mvoser@tuckercowen.com.au
D: 07 3210 3517 | T: 07 300 300 00 | F: 07 300 300 33
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001
TCS Solicitors Pty Ltd. | ACN 610 321 509

Tucker&CowenSolicitors.

Leading Litigation & Dispute Resolution and Insolvency & Reconstruction Lawyers 2012 to 2017, First Tier for Insolvency 2017 - Doyle's Guide

Best Lawyers® International 2013 -2019 - Justin Marschke for Litigation and Regulatory 2019

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Tucker & Cowen Solicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase
Your reference: Mr O'Brien / Mrs Braad

3 May 2018

Minter Ellison
Lawyers
Level 22 Waterfront Place
1 Eagle Street
Brisbane Qld 4000

Email: david.obrien@minterellison.com
nadia.braad@minterellison.com

Principals.
Richard Cowen.
David Schwarz.
Justin Marschke.
Daniel Davey.

Consultant.
David Tucker.

Special Counsel.
Geoff Hancock.
Alex Nase.
Brent Weston.

Associates.
Marcelle Webster.
Emily Anderson.
James Morgan.
Scott Hornsey.
Robert Tooth.

Dear Colleagues

Re KordaMentha Pty Ltd as trustee for the LM Managed Performance Funding – Supreme Court of QLD Proceeding 5329/15
KordaMentha Pty Ltd atf the LM Managed Performance Fund (“MPF”) v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) (“LMIM”) & Anor. – Supreme Court of Queensland Proceedings 8032/14 & 8034/14

We refer to your letter dated 1 May 2018.

Thank you for advising that your client intends to seek directions under s 96 of the Trusts Act 1973 (Qld) that your client would be justified discontinuing proceedings 8032/14 and 8034/14.

As you would recall, it was clear from Daubney J's reasons for judgment on the previous s 96 application brought by your client in proceeding 5329/15 that His Honour regarded the evidence that there was a litigation funding agreement in place, on satisfactory terms, as a very significant matter and that, without such a funding agreement in place, His Honour would not have directed that your client was justified in prosecuting the proceedings: see in particular p 8 lines 7 to 27 of transcript of reasons for judgment.

Indeed, His Honour made the directions given that your client was justified prosecuting the proceedings conditional upon deed polls being filed in the Court pursuant to which the litigation funder guarantees the payment of adverse costs orders.

Now that the litigation funding agreements have been terminated, it would seem to follow from His Honour's reasoning that your clients are no longer justified prosecuting the proceedings and thus, that the proceedings ought to be discontinued.

Our client would therefore query whether a further s 96 application is in fact necessary.

However, in the event that your client is intent upon bringing a further s 96 application prior to discontinuing the proceedings, our client is of the firm view that, given the lengthy delays in the proceeding to date, the application for directions ought to be brought, and the proceedings discontinued, promptly. This is particularly so given that these proceedings, whilst they continue to be on foot, are holding up the retirement of the Receivers appointed by Deutsche Bank AG, and are an impediment to our client applying to Court for approval to make an interim distribution to FMIF members.

It is not apparent to our client why it may take “two months or more” for the application and supporting material to be filed and served on unitholders (notwithstanding that there are 4,500 unit holders), and for directions to be obtained from the Court.

Our client would have thought that four to six weeks would be ample time for your client to obtain directions from the Court.

Given the above matters, our client has instructed us to request that:

1. if your client maintains that a further s 96 application is necessary, please explain why, and confirm that the application and supporting material will be filed and served promptly and let us know when we may expect to receive same; or
2. in the absence of an explanation, that your client discontinue the proceedings forthwith.

Kindly reply to this letter within seven days.

If you wish to discuss the matter, please do not hesitate to contact us.

Yours faithfully



Alex Nase
Tucker & Cowen

Direct Email: anase@tuckercowen.com.au
Direct Line: (07) 3210 3503

Individual liability limited by a scheme approved under Professional Standards Legislation.

David O'Brien

From: David O'Brien
Sent: Tuesday 8 May 2018 09:18 am
To: Associate JacksonJ
Cc: David Schwarz; atiplady@russellslaw.com.au; Alex Nase; Nadia Braad
Subject: KM(MPF) v LMIM & anor : BS 8032/14 and BS 8034/14
Attachments: Application for sub service new 03.05.18.PDF; Initiating Application.PDF

Dear Associate,

We act for the plaintiff in Queensland Supreme Court proceedings BS8032/14 and BS 8034/14, both of which are listed on the Commercial List before his Honour.

On 16 December 2016, his Honour adjourned both proceedings to enable the parties to participate in settlement negotiations.

With effect from 1 May 2018, the plaintiff's litigation funding of each action was terminated. This has led the Trustee to decide, subject to the Court's direction, to discontinue both actions.

The purpose of this email is to inform his Honour as a matter of courtesy that the plaintiff has applied in the Applications List for direction pursuant to section 96 of the *Trusts Act 1973 (Qld)* to discontinue both actions. Copies of the two applications by which direction is sought are attached for your information.

We will, of course, inform his Honour if and when the proceedings are discontinued.

We have copied this email to the solicitors for each of the other parties to the abovementioned proceedings.

Yours faithfully

David O'Brien

Partner

T +61 7 3119 6159 M +61 401 148 939

david.obrien@minterellison.com

MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000

minterellison.com Follow us on **LinkedIn** and **Twitter**



SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

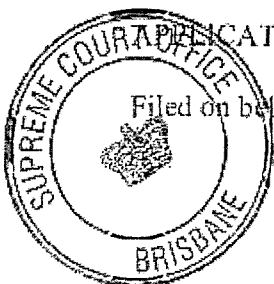
NUMBER: 5329/15

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

APPLICATION

TAKE NOTICE that KordaMentha Pty Ltd (ACN 100 169 391) as trustee of the LM Managed Performance Fund ("applicant") is applying to the Court for the following orders:

1. In respect of the application filed on 4 May 2018 for directions under section 96 of the *Trusts Act* 1973 (Qld), the applicant serve by email all unitholders of the Managed Performance Fund ("MPF") for whom the applicant has an email address.
2. Where the applicant receives a response to an email that indicates the email was not received and the applicant has a postal address for that MPF unitholder, the applicant is to post the email to the postal address of the MPF unitholder.
3. By 4.00pm on 17 May 2018, the applicant is to email to the MPF unitholders a notice informing them that the applicant has applied ("**S 96 Application**") to this Honourable Court for directions under section 96 of the *Trusts Act* 1973 (Qld) to discontinue Supreme Court Proceedings S8032/14 and S8034/14 against LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) (ACN 077 208 461), and Mr David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund, and that they may view all substantive Court documents upon which the applicant



Form 9 Rules 31

ME_147050298_1

MINTER ELLISON
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email: qlit@minterellison.com
Reference NYB DOB 407747737

intends to rely in support of its S 96 Application on the web-site whose address is:
<http://www.kordamentha.com/creditor-information/australia/109> ("Website").

4. By 4.00pm on 17 May 2018, the applicant is to upload to the Website, copies of:
 - (a) the S 96 Application;
 - (b) this application for directions about service;
 - (c) the affidavit of Jarrod Villani to be filed in support of the application for directions about service;
 - (d) the service order;
 - (e) the Statement or Statements of Facts drawn pursuant to section 96 (1) of the *Trusts Act* 1973 (Qld); and
 - (f) the substantive affidavits (including all the exhibits) that the applicant intends to reply upon in support of its S 96 Application.
5. Service in accordance with paragraph 4 of this order be deemed to be effective on each of the MPF unitholders as of 24 May 2018.
6. For all other emails by way of service on the MPF unitholders:
 - (a) the email shall, where appropriate, notify the unitholder of the further document or documents that has been uploaded to the Website;
 - (b) service shall be deemed to have been effected two business days after the day on which the email was sent.
7. The applicant is not required to take further steps to serve MPF unitholders whose email addresses return permanent undeliverable receipts and for which the Trustee does not have a postal address.
8. The applicant's cost and expenses of and incidental to its application for this order be paid on the indemnity basis out of the MPF.
9. The applicant is to serve a copy of this order on LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) (ACN 077 208 461) and Mr David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund.

This application will be heard by the Court at Brisbane
on: Wednesday, 9 May 2018 at 10.00 am.

Filed on 4 May 2018



If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application the applicant intends to rely on the following affidavits and documents:

1. Affidavit of Jarrod Villani to be sworn and filed.

THE APPLICANT ESTIMATES THE HEARING SHOULD BE ALLOCATED 30
Minutes

Signed:

M. T. Ellison

Description: MINTER ELLISON
Solicitors for the Applicant

Dated: 4 May 2018

This application is not intended to be served on any person.

Notice of this application will be given to:

The first defendant in Supreme Court of Queensland proceedings numbered 8032/14 and 8034/14, LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 077 208 461)

AND TO

The second defendant, in Supreme Court of Queensland proceedings numbered 8032/14 and 8034/14 Mr David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 5329/15

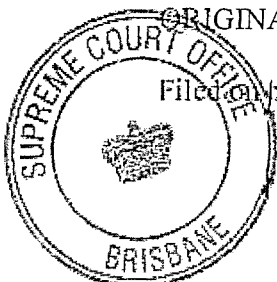
Applicant: **KORDAMENTHA PTY LTD (ACN 100 169 391) AS
TRUSTEE OF THE LM MANAGED PERFORMANCE
FUND**

APPLICATION

TAKE NOTICE that KordaMentha Pty Ltd (ACN 100 169 391) as trustee of the LM Managed Performance Fund ("applicant") is applying to the Court for the following orders:

1. Directions pursuant to section 96 of the *Trusts Act* 1973 (Qld), as to whether the applicant would be justified in discontinuing proceedings against the defendants to the relief claimed in the Claim and Statement of Claim filed in Supreme Court of Queensland proceeding number 8032/14; and
2. Directions pursuant to section 96 of the *Trusts Act* 1973 (Qld), as to whether the applicant would be justified in discontinuing proceedings against the defendants to the relief claimed in the Claim and Statement of Claim filed in Supreme Court of Queensland proceeding number 8034/14; and
3. The applicant's costs and expenses of and incidental to this application be paid on the indemnity basis out of the LM Managed Performance Fund.
4. Such further and other orders or directions as this Honourable Court deems appropriate.

This application for directions will be heard by the Court at Brisbane



Form 5 Rules Rule 26

ME_147047925_1

MINTER ELLISON
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email: qlit@minterellison.com
Reference: NYB DOB 407747737

on: Thursday, 7 June 2018 at 10.00am.

4 MAY 2018

Filed on 4 May 2018



If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application for directions the Applicant intends to rely on the following affidavits:

1. Affidavit of Jarrod Villani to be filed;
2. Affidavit of Nadia Suzanne Braad to be filed;
3. Statement of Facts pursuant to section 96(1) of the *Trusts Act* 1973 (Qld) to be filed.

If you intend on the hearing to rely on any affidavits they must be filed and served at the applicant's address for service prior to the hearing date.

If you object that these proceedings have not been commenced in the correct district of the Court, you must apply to the Court for dismissal of the proceedings.

THE APPLICANT ESTIMATES THE HEARING OF THE APPLICATION FOR DIRECTIONS SHOULD BE ALLOCATED 1.5 HOURS

Applicant: KORDAMENTHA PTY LTD (ACN 100 169 391) AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND

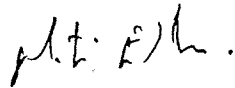
Applicant's residential or business address: Level 14, 12 Creek Street, Brisbane, Qld 4000

Applicant's solicitors name: David Thomas O'Brien

and firm name: Minter Ellison

Solicitor's business address: Lvl 22 Waterfront Pl, 1 Eagle St, Brisbane Qld
 Address for service: Lvl 22 Waterfront Pl, 1 Eagle St, Brisbane Qld
 4000
 Dx if any
 Telephone: 07 3119 6000
 Fax: 07 3119 10000
 E-mail address if any david.obrien@minterellison.com

Signed:



Description: MINTER ELLISON
 Solicitors for the Applicant

Dated: 4 May 2018

This application is not intended to be served on any person.

Notice of this application will be given to:

The first defendant in Supreme Court of Queensland proceedings numbered 8032/14 and 8034/14, LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 077 208 461)

AND TO

The second defendant, in Supreme Court of Queensland proceedings numbered 8032/14 and 8034/14 Mr David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund

David O'Brien

From: Associate JacksonJ <Associate.JusticeJackson@courts.qld.gov.au>
Sent: Tuesday 8 May 2018 09:48 am
To: David O'Brien
Cc: David Schwarz; atiplady@russellslaw.com.au; Alex Nase; Nadia Braad
Subject: RE: KM(MPF) v LMIM & anor : BS 8032/14 and BS 8034/14

Good morning,

Thank you for advising as to the below. It would be appreciated if you could please advise the outcome of the below referenced applications, once known.

Kind regards

James Rigby
Associate to the Honourable Justice David Jackson
Supreme Court of Queensland
P: (07) 3008 8736
E: associate.justicejackson@courts.qld.gov.au

From: David O'Brien [mailto:David.O'Brien@minterellison.com]
Sent: Tuesday, 8 May 2018 9:18 AM
To: Associate JacksonJ <Associate.JusticeJackson@courts.qld.gov.au>
Cc: David Schwarz <dschwarz@tuckercowen.com.au>; atiplady@russellslaw.com.au; Alex Nase <anase@tuckercowen.com.au>; Nadia Braad <Nadia.Braad@minterellison.com>
Subject: KM(MPF) v LMIM & anor : BS 8032/14 and BS 8034/14

Dear Associate,

We act for the plaintiff in Queensland Supreme Court proceedings BS8032/14 and BS 8034/14, both of which are listed on the Commercial List before his Honour.

On 16 December 2016, his Honour adjourned both proceedings to enable the parties to participate in settlement negotiations.

With effect from 1 May 2018, the plaintiff's litigation funding of each action was terminated. This has led the Trustee to decide, subject to the Court's direction, to discontinue both actions.

The purpose of this email is to inform his Honour as a matter of courtesy that the plaintiff has applied in the Applications List for direction pursuant to section 96 of the *Trusts Act 1973* (Qld) to discontinue both actions. Copies of the two applications by which direction is sought are attached for your information.

We will, of course, inform his Honour if and when the proceedings are discontinued.

We have copied this email to the solicitors for each of the other parties to the abovementioned proceedings.

Yours faithfully

David O'Brien
Partner
T +61 7 3119 6159 M +61 401 148 939
david.obrien@minterellison.com
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minterellison.com Follow us on **LinkedIn** and **Twitter**



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