

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 12317 of 2014

Plaintiff **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION) (ACN 077 208 461) AS
RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND ARSN 089 343 288**

AND

First Defendant **PETER CHARLES DRAKE**

AND

Second Defendant **LISA MAREE DARCY**

AND

Third Defendant **EGHARD VAN DER HOVEN**

AND

Fourth Defendant **FRANCENE MAREE MULDER**

AND

Fifth Defendant **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant **SIMON JEREMY TICKNER**

AND

Page 1

Signed:



Taken by:



AFFIDAVIT OF JARROD VILLANI

Filed on behalf of the Eighth Defendant

Form 47 Rule 435

MINTER ELLISON LAWYERS

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 DOB 1095787

Seventh Defendant

**LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) (ACN 077 208 461)**

AND

Eighth Defendant

**KORDAMENTHA PTY LTD ACN 100 169 391 AND
CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN
THEIR CAPACITY AS JOINT AND SEVERAL
TRUSTEES OF THE LM MANAGED PERFORMANCE
FUND**

AFFIDAVIT

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

Introduction

1. I am an Executive Director of KordaMentha Pty Ltd ("**Trustee**") the trustee of the LM Managed Performance Fund ("**MPF**").
2. I am duly authorised by the Trustee to swear this affidavit on its behalf.
3. Except where otherwise indicated, the matters deposed to in this affidavit are deposed to 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.
4. This affidavit is sworn in support of an application ("**S 96 Application**") by the Trustee for directions pursuant to section 96 of the *Trusts Act* 1973 (Qld) ("**Trusts Act**") as to whether it is justified in defending the plaintiff's proceedings against it.
5. The Trustee is also relying in the S 96 Application on a written statement of facts ("**Statement of Facts**") prepared pursuant to section 91(1) of the *Trusts Act*. To minimise duplication, I do not exhibit to this affidavit documents that are annexed to the Statement of Facts.
6. Exhibit **JV-1** is a true copy of a draft defence ("**Proposed Defence**") which the Trustee would file in this proceeding if directed to do so by this Honourable Court.

Page 2

Signed:



Taken by:



7. Upon the hearing of the S 96 Application, the Trustee will seek to tender a confidential legal advice, and submit that this Honourable Court should make an appropriate confidentiality order in respect of the advice to preserve the Trustee's legal professional privilege.

Parties

8. The plaintiff and seventh defendant, LM Investment Management Limited (Receivers and Managers appointed)(in Liquidation)(ACN 077 208 461) ("LMIM") was incorporated on 31 January 1997. A historical company search of LMIM obtained from the Australian Securities and Investments Commission's ("ASIC") electronic database on 3 March 2015 is annexed to the Statement of Facts.
9. LMIM established a unit trust called the LM Managed Performance Fund and became trustee of that trust by deed of 4 December 2001. The deed was called the 'Constitution'. A true copy of the Constitution is annexed to the Statement of Facts.
10. By Deed Poll dated 25 November 2009, LMIM exercised a power under the Constitution by deleting all save two of its terms and replacing those terms with the terms expressed in the Deed Poll. A true copy of the Deed Poll is annexed to the Statement of Facts.
11. LMIM remained the trustee of the MPF until it was removed and replaced by KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Ltd (ACN 108 318 985) by order of the Chief Justice of Queensland made on 12 April 2013 and confirmed on 13 May 2013. True copies of the Chief Justice's orders of 12 April 2013 and 13 May 2013 are annexed to the Statement of Facts. Historical company searches obtained from ASIC's electronic database on 3 March 2015 of KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Ltd (ACN 108 318 985) are annexed to the Statement of Facts.
12. Calibre Capital Ltd ceased to be a trustee of the MPF on 5 January 2015.
13. LMIM is also, and has at all material times been, the responsible entity for the LM First Mortgage Income Fund (ARSN 089 343 288) ('FMIF'), a registered managed



investment scheme. A true copy of a search of FMIF obtained from ASIC's electronic database on 3 March 2015 is annexed to the Statement of Facts.

Eighth defendants steps in the proceeding

14. On 29 December 2014, the Trustee was served with the plaintiff's claim and statement of claim.
15. On 18 February 2015, the Trustee applied before the Honourable Justice Ann Lyons for and obtained an order for substituted service of its application under section 96 of the *Trusts Act* 1973 (Qld) and its supporting material, upon the unitholders of the MPF. Annexed to the Statement of Facts is a true copy of her Honour's Order for substituted service made on 18 February 2015. The Trustee's compliance with this order will be the subject of a separate affidavit.
16. The Trustee has not yet filed and served its defence. However, its solicitors delivered a copy of the Proposed Defence on 27 February 2015.

Estimated Value of MPF

17. The Trustee estimates that the current net cash holdings of the MPF as at 2 March 2015, are approximately \$4,910,735.78, prior to future realisations and other recovery actions.
18. Absent future realisations and other successful recovery actions, the net cash holdings of the MPF will diminish over time due to:
 - (a) the Trustee funding the defence of this proceeding should it be directed to do so;
 - (b) the Trustee's involvement in other litigation;
 - (c) the general need for the Trustee to fulfil its role as trustee, which includes investigating the past conduct of LMIM as trustee for the MPF.
19. The Management Accounts of the MPF as at 28 February 2013, show invested funds of \$404,489,355.67 remain unpaid to unitholders. The loss to unitholders of the MPF in the absence of any return is likely to be at least this amount.



20. The Trustee does not know the asset position of the directors of LMIM, who are the first to sixth defendants (inclusive) ("**Directors**") in the proceedings. The first defendant is a bankrupt.
21. The Trustee is aware of the existence of an insurance policy in favour of the Directors that might respond to the plaintiff's claim. However, the Trustee does not know how much of that insurance policy will be available to meet any eventual judgment against the directors.
22. LMIM is in liquidation, and the Trustee understands that LMIM will have no money to meet any judgment against it.
23. If the plaintiff is wholly successful in its claim against the Trustee, the Trustee is of the opinion that the most likely result is that the members of the MPF will receive nothing from the MPF.
24. Even if the plaintiff is only substantially successful in its claim against the Trustee, the members of the MPF will likely receive very little.

The Trustee's opinion

25. In the opinion of the Trustee, it is in the best interests of the members of the MPF that the Trustee actively defend this proceeding.
26. The Trustee is of this opinion because:
- (a) the Trustee has been advised by its lawyers that it has reasonable prospects of successfully defending the claim;
 - (b) if the claim against the Trustee is wholly successful or substantially successful, the members of the MPF will likely receive nothing or very little.
27. Even if a successful claim would not wholly or substantially reduce the dividend payable to the members of the MPF, it would still be appropriate, in the Trustee's opinion, to defend the claim given the legal advice it has already received.



28. The Trustee considered whether it would be appropriate to not participate actively in the proceeding and abide the order of the Court. The Trustee concluded this was not appropriate, as the Trustee's grounds of defence need to be argued by it at trial.

SWORN by JARROD VILLANI on 4 March 2015

at Brisbane

in the presence of:


Deponent
Solicitor/Commissioner for
Declarations/Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 12317 of 2014

Plaintiff **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION) (ACN 077 208 461) AS
RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND ARSN 089 343 288**

AND

First Defendant **PETER CHARLES DRAKE**

AND

Second Defendant **LISA MAREE DARCY**

AND

Third Defendant **EGHARD VAN DER HOVEN**

AND

Fourth Defendant **FRANCENE MAREE MULDER**

AND

Fifth Defendant **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant **SIMON JEREMY TICKNER**

AND

Seventh Defendant **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) (ACN 077 208 461)**

CERTIFICATE OF EXHIBIT

Filed on behalf of the Eighth Defendant

Form 47 Rule 435

MINTER ELLISON LAWYERS

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 DOB 1095787

AND

Eighth Defendant

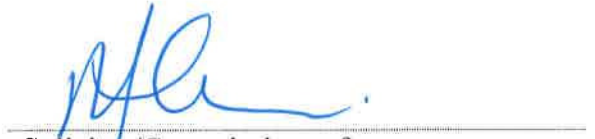
**KORDAMENTHA PTY LTD ACN 100 169 391 AND
CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN
THEIR CAPACITY AS JOINT AND SEVERAL
TRUSTEES OF THE LM MANAGED PERFORMANCE
FUND**

CERTIFICATE OF EXHIBIT

Exhibit JV-1 to the affidavit of Jarrod Villani sworn 4 March 2015

A handwritten signature in black ink, appearing to be 'Jarrod Villani', written over a horizontal line.

Deponent

A handwritten signature in blue ink, appearing to be 'M. L.', written over a horizontal line.

Solicitor/Commissioner for

Declarations/Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 12317 of 2014

Plaintiff **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) (ACN 077 208 461) AS RESPONSIBLE
ENTITY OF THE LM FIRST MORTGAGE INCOME
FUND ARSN 089 343 288**

AND

First Defendant **PETER CHARLES DRAKE**

AND

Second Defendant **LISA MAREE DARCY**

AND

Third Defendant **EGHARD VAN DER HOVEN**

AND

Fourth Defendant **FRANCENE MAREE MULDER**

AND

Fifth Defendant **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant **SIMON JEREMY TICKNER**

AND

Seventh Defendant **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) (ACN 077 208 461)**

DEFENCE

MINTER ELLISON
Lawyers
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE

Filed on behalf of the eighth defendant

Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email: qlit@minterellison.com
Reference DOB 1095787

Form 17 Rule 146

ME_119648579_1 (W2007)

AND

Eighth Defendant

**KORDA MENTHA PTY LTD ACN 100 169 391 AND
CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN
THEIR CAPACITY AS JOINT AND SEVERAL
TRUSTEES OF THE LM MANAGED PERFORMANCE
FUND**

DEFENCE OF THE EIGHTH DEFENDANT

The eighth defendant relies upon the following facts in defence of the plaintiff's claim.

In this defence the eighth defendant:

- (a) adopts the definitions used in the statement of claim unless a contrary intention is expressed; and
 - (b) refers to the first to sixth defendants as "the Directors".
1. The eighth defendant admits the allegations in paragraph 1 of the statement of claim.
 2. In relation to the allegations in paragraph 2 of the statement of claim, the eighth defendant:
 - (a) says the first defendant became a director of the seventh defendant on 31 January 1997 and remains so;
 - (b) says the second defendant was a director of the seventh defendant from 12 September 2003 to 21 June 2012;
 - (c) says the third defendant became a director of the seventh defendant on 22 June 2006 and remains so;
 - (d) says the fourth defendant became a director of the seventh defendant on 30 September 2006 and remains so;
 - (e) says the fifth defendant was a director of the seventh defendant from 27 November 2007 to 30 September 2012;

- (f) says the sixth defendant was a director of the seventh defendant from 18 September 2008 to 13 July 2012; and
 - (g) admits the allegations on the basis that "at all material times" refers to when the Directors were directors of the seventh defendant.
3. In relation to paragraph 3 of the statement of claim, the eighth defendant:
 - (a) admits the allegations in paragraph 3(a), (b), (c) and (d);
 - (b) in relation to paragraph 3(e), admits that the plaintiff is generally entitled to bring proceedings in the name of LMIM as RE of the FMIF, but denies that the plaintiff has standing to bring any claim against the Directors for a breach of duty they committed in their capacity as directors of the seventh defendant (as opposed to as directors of LMIM as RE of the FMIF).
 4. The eighth defendant admits the allegations in paragraph 4 of the statement of claim but says that on 5 January 2015, Calibre Capital Pty Ltd retired as a trustee of the MPF.
 5. The eighth defendant admits the allegations in paragraph 5 of the statement of claim but says:
 - (a) Bellpac Pty Ltd (**Bellpac**) was then known as GPC Bellambi Pty Ltd; and
 - (b) the plaintiff was also a party to the FMIF Bellpac Loan Agreement.
 6. The eighth defendant admits the allegations in paragraph 6 of the statement of claim.
 7. The eighth defendant admits the allegations in paragraph 7 of the statement of claim on the basis that the plaintiff intended to refer to PTAL at the end of the first line of paragraph 7 of the statement of claim.
 8. The eighth defendant admits the allegations in paragraph 8 of the statement of claim.
 9. The eighth defendant admits the allegations in paragraph 9 of the statement of claim.
 10. The eighth defendant admits the allegations in paragraph 10 of the statement of claim.

11. The eighth defendant admits the allegations in paragraph 11 of the statement of claim but says the MPF Mortgage pre-dated the MPF Bellpac Loan Agreement.
12. In relation to the allegations in paragraph 12 of the statement of claim the eighth defendant:
 - (a) admits paragraphs 12(a) and (b) of the statement of claim, but says PTAL was also a party to the Deed of Priority;
 - (b) denies paragraph 12(c) because the effect of clause 8, on its proper interpretation, was not to require the seventh defendant as trustee for the MPF to release any security held by it, but rather to release any securities to the extent that they secured the particular asset being sold.
13. The eighth defendant does not admit the allegations in paragraph 13 of the statement of claim because:
 - (a) the eighth defendant was not the trustee of the MPF at the relevant times; and
 - (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.
14. The eighth defendant admits the allegations in paragraph 14 of the statement of claim.
15. The eighth defendant admits the allegations in paragraph 15 of the statement of claim.
16. The eighth defendant admits the allegations in paragraph 16 of the statement of claim.
17. The eighth defendant admits the allegations in paragraph 17 of the statement of claim, save that the date on which the parties entered into the LASA appears to have been on or about 21 October 2004 and not 22 September 2004.
18. The eighth defendant admits the allegations in paragraph 18 of the statement of claim insofar as it refers to the Amendment Deed Bellpac No. 1 Colliery, but otherwise does not admit the allegations as despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.

19. The eighth defendant does not admit the allegations in paragraph 19 of the statement of claim because:
 - (a) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.

20. In relation to the allegations in paragraph 20 of the statement of claim, the eighth defendant:
 - (a) admits that Gujarat (formerly India NRE Minerals Limited), Southbulli Holdings Pty Ltd (**Southbulli**) and Bellpac entered into a Deed of Settlement on or about 12 September 2007;
 - (b) admits that Gujarat, Southbulli and Bellpac on or about 23 July 2008 entered into a Restated Settlement Deed;
 - (c) otherwise does not admit the allegations because:
 - (i) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (ii) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.

21. The eighth defendant does not admit the allegations in paragraph 21 of the statement of claim because:
 - (a) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.

22. The eighth defendant admits the allegations in paragraph 22 of the statement of claim.

23. The eighth defendant does not admit the allegations in paragraph 23 of the statement of claim because:
 - (a) the eighth defendant was not the trustee of the MPF at the relevant times;

- (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.

24. The eighth defendant admits the allegations in paragraph 24 of the statement of claim save that the amount advanced exceeded \$1,380,431.51.

Particulars

The eighth defendant will provide particulars of the amount advanced after disclosure is completed.

25. In relation to the allegations in paragraph 25 of the statement of claim the eighth defendant:

- (a) admits the existence of documents referred to as Mediation Heads of Agreement;
- (b) otherwise does not admit the allegations because:
 - (i) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (ii) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.

26. The eighth defendant generally admits the allegations in paragraph 26 but says:

- (a) on its proper interpretation the Mediation Heads of Agreement also permitted the seventh defendant to sell the Property;
- (b) the reference to a mortgagee sale or a sale by a liquidator, was to a hypothetical future sale.

27. In relation to the allegations in paragraph 28 of the statement of claim, the eighth defendant:

- (a) admits paragraph 28(a) and (b);
- (b) does not admit paragraph 28(c) because:
 - (i) the eighth defendant was not the trustee of the MPF at the relevant times;

- (ii) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.

28. The eighth defendant admits the allegations in paragraph 29 of the statement of claim.
29. The eighth defendant admits the allegations in paragraph 30 of the statement of claim.
30. The eighth defendant admits the allegations in paragraph 31 of the statement of claim but says the Deed Poll was also executed by the seventh defendant.
31. The eighth defendant admits the allegations in paragraph 32 of the statement of claim.
32. The eighth defendant does not admit the allegations in paragraph 33 of the statement of claim because:
 - (a) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.
33. The eighth defendant does not admit the allegations in paragraph 34 of the statement of claim because:
 - (a) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.
34. The eighth defendant admits the allegations in paragraph 35 of the statement of claim, save that:
 - (a) the sum received by LMIM as Trustee of the MPF was \$12,747,810.53 (based upon its current investigations).
 - (b) it does not admit that the proceeds were payable pursuant to the Gujarat Contract because despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegation.

35. In relation to the allegations in paragraph 36 of the statement of claim, the eighth defendant:
- (a) denies that the seventh defendant directed the payment because the plaintiff directed the payment;
 - (b) does not admit that the proceeds were payable pursuant to the Gujarat Contract, because despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegation.
36. The eighth defendant denies the allegations in paragraph 37 of the statement of claim because:
- (a) the plaintiff had the power to decide to make the Settlement payment to the seventh defendant as trustee for the MPF;

Particulars

Clause 13 of the Constitution of the FMIF.

- (b) the plaintiff made the Settlement payment for the reasons referred to in the Deed Poll.
37. In relation to the allegations in paragraph 38 of the statement of claim, the eighth defendant admits that the Directors owed those duties whilst they were directors of the seventh defendant (as opposed to LMIM as RE for the FMIF).
38. The eighth defendant does not admit the allegations in paragraph 39 of the statement of claim because:
- (a) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.
39. The eighth defendant denies the allegations in paragraph 40 of the statement of claim because the plaintiff has no standing to seek compensation for any breach of duty owed by the Directors to the seventh defendant (as opposed to LMIM as RE for the FMIF).
40. In relation to the allegations in paragraph 41 of the statement of claim the eighth defendant:

- (a) admits that the seventh defendant knew of the matters pleaded in paragraphs 1(b), 1(c), 5 to 12, 31 and 32 but says that only the allegations in paragraphs 9 to 11 were known to the seventh defendant because it was the trustee of the MPF;
 - (b) otherwise does not admit the allegations because:
 - (i) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (ii) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.
41. The eighth defendant does not admit the allegations in paragraph 42 of the statement of claim because:
- (a) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.
42. The eighth defendant does not admit the allegations in paragraph 43 of the statement of claim because:
- (a) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.
43. In relation to the allegations in paragraph 44 of the statement of claim, the eighth defendant admits that whilst the Directors were directors of the plaintiff, they owed those duties.
44. In relation to the allegations in paragraph 45 of the statement of claim the eighth defendant:
- (a) denies (if that is what is being alleged) that the matters pleaded in the statement of claim form a proper factual basis for alleging that the Directors gained, directly or indirectly, an advantage for themselves;
 - (b) says no advantage derived by the Directors is pleaded in the statement of claim;

- (c) otherwise does not admit the allegations in paragraph 45 of the statement of claim because:
 - (i) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (ii) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.
45. The eighth defendant does not admit the allegations in paragraph 46 of the statement of claim because:
- (a) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.
46. In relation to the allegations in paragraph 47 of the statement of claim the eighth defendant:
- (a) admits that the seventh defendant knew of the matters pleaded in paragraphs 1(b), 1(c), 5 to 12, 31 and 32 but says that only the allegations in paragraphs 9 to 11 were known to the seventh defendant because it was the trustee of the MPF;
 - (b) otherwise does not admit the allegations because:
 - (i) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (ii) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.
47. The eighth defendant does not admit the allegations in paragraph 48 of the statement of claim because:
- (a) the eighth defendant was not the trustee of the MPF at the relevant times;
 - (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.

48. The eighth defendant does not admit the allegations in paragraph 49 of the statement of claim because:

- (a) the eighth defendant was not the trustee of the MPF at the relevant times;
- (b) despite making reasonable inquiries the eighth defendant remains uncertain of the truth or falsity of the allegations.

49. The eighth defendant denies the allegations in paragraph 50 of the statement of claim because:

- (a) any right of indemnity is necessarily limited to acts or omissions of the seventh defendant as trustee for the MPF;
- (b) there can be no right of indemnity in relation to the liability pleaded in paragraph 43 of the statement of claim as it expressly relates to an alleged breach of duties owed by the Directors to the seventh defendant (see paragraphs 38 to 40 of the statement of claim) as opposed to the conduct of the seventh defendant as trustee for the MPF;
- (c) there can be no right of indemnity in relation to the liability pleaded in paragraph 49 of the statement of claim as it expressly relates to an alleged breach of duties owed by the Directors to LMIM as RE of the FMIF (see paragraph 44 to 46 of the statement of claim) as opposed to the conduct of the seventh defendant as trustee for the MPF;

further or in the alternative,

- (d) under section 72 of the *Trusts Act 1973* (Qld) (**Trusts Act**), a trustee may only reimburse itself or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trust or trust powers;
- (e) in equity, a trustee's right of indemnity:
 - (i) is excluded if the trustee was not acting properly;
 - (ii) is subject to the terms of the particular trust instrument;

- (f) the effect of clause 18.1(c) of the Constitution of the MPF (**MPF Constitution**) is to prohibit the seventh defendant from obtaining an indemnity if it has acted negligently, fraudulently or in breach of trust;
- (g) if the seventh defendant as trustee for the MPF was knowingly involved (which is not admitted) in a contravention by the Directors of their obligations under sections 180, 181, 182, 601FD(1)(b), (c) and (e) of the Corporations Act and at common law, then the seventh defendant as trustee for the MPF is not:
 - (i) entitled to an indemnity under section 72 of the Trusts Act because its expenses would not have been reasonably incurred;
 - (ii) entitled to an indemnity at common law because:
 - (A) it was not acting properly;
 - (B) its conduct was negligent or fraudulent for the purposes of clause 18.1(c) of the MPF Constitution;
 - (iii) entitled to an indemnity under the MPF Constitution because its conduct was negligent or fraudulent for the purposes of clause 18.1(c) of the MPF Constitution.

Particulars of the fraud and impropriety

The fraud and impropriety arises because on the plaintiff's case: (i) the Directors recorded in the Deed Poll that they had had a particular understanding when they did not; (ii) the Directors' did not act in good faith or for a proper purpose; and (iii) the seventh defendant as trustee for the MPF was knowingly involved in the Directors' breach.

Particulars of the negligence

The negligence arises because on the plaintiff's case: (i) the Directors did not exercise due care and diligence; and (ii) the seventh defendant as trustee for the MPF was knowingly involved in the Directors' breach.

50. The eighth defendant admits the allegations in paragraph 51 of the statement of claim, but says that because of the reasons pleaded in paragraph 50 of the defence no equitable lien arises.
51. The eighth defendant admits the allegations in paragraph 52 of the statement of claim, but says that because of the reasons pleaded in paragraph 50 of the defence no right of indemnity or equitable lien arises.
52. The eighth defendant admits the allegations in paragraph 53 of the statement of claim.
53. The eighth defendant denies the allegations in paragraph 54 of the statement of claim because of the reasons pleaded in paragraph 50 of the defence.
54. The eighth defendant denies that the plaintiff is entitled to any relief against it.

Signed:

Description: MINTER ELLISON
Solicitors for the eighth defendant

This pleading was settled by Andrew Crowe QC and Edward Goodwin of Counsel.

NOTICE AS TO REPLY

You have fourteen days within which to file and serve a reply to this defence. If you do not do so, you may be prevented from adducing evidence in relation to allegations of fact made in this defence.