

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 8032/14

**Plaintiffs: KORDAMENTHA PTY LTD (ACN 100 169 391) AND
CALIBRE CAPITAL PTY LTD (ACN 108 318 985) IN THEIR
CAPACITY AS TRUSTEES OF THE LM MANAGED
PERFORMANCE FUND**

AND

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

CLAIM

The plaintiff claims:

1. Equitable compensation;
2. A declaration that the defendant holds the amount paid pursuant to the Assignment Deed (as varied) on constructive trust for the plaintiffs;
3. Interest pursuant to s.58 of the *Civil Proceedings Act* 2011 (Qld);
4. Costs; and
5. Such further or other order as the Court sees fit.

The plaintiff makes this claim in reliance on the facts alleged in the attached Statement of Claim.



Form 2 Rule 22

ME_115567500_1 (W2007)

MINTER ELLISON
Lawyers
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Reference MJV DOB 407747729

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND

And filed in the Brisbane Registry on 27th August 2014

Registrar



To the defendant: TAKE NOTICE that you are being sued by the plaintiff in the Court. If you intend to dispute this claim or wish to raise any counterclaim against the plaintiff, you must within 28 days of the service upon you of this claim file a Notice of Intention to Defend in this Registry. If you do not comply with this requirement judgment may be given against you for the relief claimed and costs without further notice to you. The Notice should be in Form 6 to the Uniform Civil Procedure Rules. You must serve a sealed copy of it at the plaintiff's address for service shown in this claim as soon as possible.

Address of Registry: QEII Courts of Law Complex
415 George Street
Brisbane Qld 4000

If you assert that this Court does not have jurisdiction in this matter or assert any irregularity you must file a Conditional Notice of Intention to Defend in Form 7 under Rule 144, and apply for an order under Rule 16 within 14 days of filing that Notice.

PARTICULARS OF THE PLAINTIFF:

Name:	KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Pty Ltd (ACN 108 318 985) in their capacity as Trustees of the LM Managed Performance Fund
Plaintiff's residential or business address:	Level 14, 12 Creek Street, Brisbane Qld 4000, Australia
Plaintiff's solicitors name:	Michael James Vickery
and firm name:	Minter Ellison
Solicitor's business address:	Waterfront Place, 1 Eagle Street, BRISBANE QLD 4000
Address for Service:	Waterfront Place, 1 Eagle Street, BRISBANE QLD 4000

DX: 102 BRISBANE
Telephone: (07) 3119 6000
Fax: (07) 3119 1000
Email address: Michael.Vickery@minterellison.com

Signed:

Description: MINTER ELLISON
Solicitors for the plaintiff

Dated: 27 August 2014

This claim is to be served on: LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) (ACN 077 208 461)
of: FTI CONSULTING, 'CORPORATE CENTRE ONE' LEVEL
9, 2 CORPORATE COURT, BUNDALL, QLD, 4217
and of: McGRATHNICOL, LEVEL 14, 145 EAGLE STREET,
BRISBANE, QLD, 4000
and of: BDO, LEVEL 10, 12 CREEK STREET, BRISBANE, QLD,
4000

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER

Plaintiffs

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

AND

Defendant

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

Filed in Brisbane registry on

2014.

STATEMENT OF CLAIM

This claim in this proceeding is made in reliance on the following facts:

1. The plaintiffs:

- (a) are companies duly incorporated according to law;
- (b) are capable of suing in their corporate names; and
- (c) in the premises pleaded in paragraphs 4 to 10 below, have been the trustees of a trust named the LM Managed Performance Fund since 12 April 2013.

STATEMENT OF CLAIM

Filed on behalf of the Plaintiffs

Form 16 Rules 22 and 146

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DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Reference MJV 40-7747729

2. The defendant:

- (a) is a company duly incorporated according to law;
- (b) is capable of being sued in its corporate name;
- (c) since at least 1999, has carried on business as a professional trustee for reward, in which capacity it created and managed investment schemes;
- (d) in the premises pleaded in paragraphs 4 to 10 below, was the trustee of the MPF from in or about December 2001 until 12 April 2013; and
- (e) in the premises pleaded in paragraphs 11 and 12 below, has been the responsible entity of a registered managed investment scheme named the LM First Mortgage Income Fund (“**the FMIF**”) since 28 September 1999.
- (f) in the premises pleaded in paragraphs 14 and 16 below, has been the responsible entity of a registered managed investment scheme named the LM Australian Income Fund – Currency Protected (“**the AIFCP**”) since 14 October 2008.

3. In this pleading:

- (a) the defendant, when acting in its capacity as the trustee of the MPF, is referred to as “the defendant ATF the MPF”;
- (b) the defendant, when acting in its capacity as the responsible entity of the FMIF, is referred to as “the defendant ATF the FMIF”;
- (c) the defendant, when acting in its capacity as the responsible entity of the AIFCP, is referred to as “the defendant ATF the AIFCP.”

The LM Managed Performance Fund

4. By a trust deed dated December 2001 (“**the First Trust Deed**”), the defendant:

- (a) established a unit trust named The LM Managed Performance Fund (“**the MPF**”); and

- (b) became trustee of the MPF.
5. By a Deed of Variation dated 11 November 2002 ("**the Second Trust Deed**"), the defendant ATF the MPF deleted all parts of the First Trust Deed other than the parties, and replaced it with the terms set out in the Second Trust Deed (Recital B of the Second Trust Deed).
 6. By a Deed of Variation dated 25 November 2009 ("**the Third Trust Deed**"), the defendant ATF the MPF deleted clauses 1, 2.3, 2.4 and 3 to 27 of the Second Trust Deed, and replaced it with the terms set out in the Schedule to the Third Trust Deed (clause 1 of the Third Trust Deed).
 7. Relevantly, the following were terms of the First, Second and Third Trust Deeds:
 - (a) the defendant was the Manager (clause 1.1 of each Deed);
 - (b) the Constitution was the Trust Deed including any Schedule, Annexure or Amendments to it (clause 1.1 of each Deed);
 - (c) the Scheme was the trust created by the Deed to be known as the LM Managed Performance Fund (clause 1.1 of each Deed);
 - (d) the assets of the Scheme were:
 - (i) the Scheme Fund (clauses 1.1 of the First and Second Trust Deeds); subsequently
 - (ii) the Scheme Property (clause 1.1 of the Third Trust Deed);
 - (e) the Manager agreed to act as trustee of the Scheme (clause 2.1 of each Deed);
 - (f) the Manager declared that it held:
 - (i) the Scheme Fund (clauses 2.2 of the First and Second Deeds); subsequently
 - (ii) the Scheme Property (clause 2.2 of the Third Trust Deed);

on trust for the Members;

(g) the name of the Scheme was:

(i) The LM Managed Performance Fund (clause 2.3 of the First Trust Deed); subsequently

(ii) The LM Managed Performance Fund or any other name that the Manager may determine from time to time (clauses 2.3 of the Second and Third Trust Deeds);

(h) the beneficial interest in the Scheme Fund would be divided into Units (clause 3.1 of each Deed);

(i) the Constitution might be modified or repealed or replaced with a new Constitution by the Manager if the Manager reasonably considered that the change would not adversely affect Members' rights or was deemed necessary to conduct the affairs of the Scheme (clauses 24.1 of the First and Third Trust Deeds; clause 18.1 of the Second Trust Deed);

(j) the Manager must resign if (being a corporation) it became an externally-administered body corporate as defined in the *Corporations Act 2001* (clauses 23.1(b)(ii) of the First and Third Trust Deeds; clause 17.1(b)(ii) of the Second Trust Deed).

8. On or about 19 March 2013, John Richard Park and Ginette Dawn Muller were appointed voluntary administrators of the defendant.

9. In the premises, pursuant to clause 23.1(b)(ii) of the Third Trust Deed the defendant was required to resign as Manager of the MPF.

10. By order of this Honourable Court dated 12 April 2013:

(a) the defendant was removed as trustee of the MPF; and

(b) the plaintiffs were appointed trustees of the MPF.

The LM First Mortgage Income Fund

11. On or about 28 September 1999 the defendant established the FMIF.
12. Since on or about 28 September 1999:
 - (a) the FMIF has been, and remains, a registered managed investment scheme, pursuant to s.601EB of the *Corporations Act 2001* (Cth).
 - (b) the defendant has been, and remains, the Responsible Entity of the FMIF;
 - (c) the defendant has held, and continues to hold, the property of the FMIF on trust for its members, pursuant to s.601FC of the *Corporations Act 2001* (Cth).
13. Pursuant to the terms of a Custody Agreement dated 4 February 1999 between the defendant and Permanent Trustee Australia Ltd ACN 008 412 913 (later re-named The Trust Company (PTAL) Ltd) (“PTAL”):
 - (a) PTAL agreed to custodially hold the Portfolio and Title Documents as agent for the defendant in relation to (inter alia) the FMIF (clause 2.1 and Schedule 2);
 - (b) the defendant was responsible for taking all decisions in relation to the Portfolio and, subject to the Custody Agreement, PTAL was required to act on the defendant’s Instructions in relation to any assets of the Portfolio (clause 4.1);
 - (c) the plaintiffs will rely upon the full terms of the Custody Agreement at the hearing of this proceeding.

LM Australian Income Fund – Currency Protected

14. On or about 14 October 2008 the defendant established the AIFCP.
15. The defendant commenced operating the AIFCP on or about 25 November 2008.
16. Since on or about 14 October 2008, or alternatively 25 November 2008:

- (a) the AIFCP has been, and remains, a registered managed investment scheme, pursuant to s.601EB of the *Corporations Act 2001* (Cth).
- (b) the defendant has been, and remains, the Responsible Entity of the AIFCP;
- (c) the defendant has held, and continues to hold, the property of the AIFCP on trust for its members, pursuant to s.601FC of the *Corporations Act 2001* (Cth).

Duties owed by the defendant ATF the MPF

17. At all material times the defendant ATF the MPF owed a fiduciary duty to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty.
18. At all material times the defendant ATF the MPF owed a duty to the beneficiaries of the MPF to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.
19. At all material times the defendant ATF the MPF owed duties to the beneficiaries of the MPF:
 - (a) pursuant to s.22 of the *Trusts Act 1973* (Qld) (“**the Trusts Act**”), to exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, when exercising a power of investment; and
 - (b) pursuant to s.24 of the *Trusts Act*, to take into account, inter alia, the following matters, when exercising a power of investment:
 - (i) the risk of capital or income loss or depreciation (s.24(e));
 - (ii) the likely income return and the timing of income return (s.24(g));
 - (iii) the length of the term of the proposed investment (s.24(h));

- (iv) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment (s.24(j)); and
- (v) the cost (including commissions, fees, charges and duties payable) of making the proposed investment (s.24(n)).

The FMIF's first loan to KPG 13th Beach Stage 1 Pty Ltd

20. On or about 26 November 2003:

- (a) the defendant ATF the FMIF;
- (b) KPG 13th Beach Stage 1 Pty Ltd ACN 105 265 923 ("**KPG**") as Borrower; and
- (c) PTAL as Lender/Custodian;

entered into a Loan Agreement ("**the First KPG Loan**").

21. Relevantly, the following were terms of the First KPG Loan:

- (a) the Lender (as Custodian for the Responsible Entity) had, at the Borrower's request, agreed to lend and advance to the Borrower the Loan Amount on the conditions, among others, that the Borrower execute the Agreement (page 2);
- (b) the Loan Amount was \$5,933,000.00 (item 4, schedule);
- (c) the date for repayment was 28 May 2005, being 18 months from the date of the advance (item 5, schedule);
- (d) the following securities were taken as security for the performance of KPG's obligations under the First KPG Loan (item 9, schedule):
 - (i) registered mortgage AC626247K from KPG to PTAL over property situated at S10 and S11 at 13th Beach Golf Links Estate, Barwon Heads in the State of Victoria, more particularly described as all that land contained in lot S10 and lot S11 in plan of subdivision

443550R, Certificates of Title volume 10686 folio 369 and volume 10686 folio 370 ("**Lots S10 and S11**");

- (ii) a Deed of Guarantee and Indemnity given by David Robert Kirkham ("**Kirkham**"), Tristaleigh Pty Ltd ACN 086 855 898 ("**Tristaleigh**"), Jamieson Woods Pty Ltd ACN 088 725 642 ("**Jamieson Woods**") and Turnstile Pty Ltd ACN 059 943 887 ("**Turnstile**") to PTAL (as Lender);
- (iii) a fixed and floating charge given by KPG as Mortgagor to PTAL as Mortgagee, registered with the Australian Securities and Investment Commission ("**ASIC**") as registered charge 1003923;
- (iv) a fixed and floating charge given by Tristaleigh as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003927;
- (v) a fixed and floating charge given by Jamieson Woods as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003926;
- (vi) a fixed and floating charge given by Turnstile as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003924;
- (e) the Facility to Security Ratio was defined as the maximum acceptable ratio between the Money Secured and the Principal Security (clause 1.1);
- (f) the Money Secured was defined to include:
 - (i) the Loan Amount;
 - (ii) all moneys deemed to be principal in arrears; and
 - (iii) all money now or hereafter owing or payable to the Lender by the Borrower; and

- (iv) all advances and further advances that may be given by the Lender to, for, on account of or at the expressed or implied request of the Borrower;

(clause 1.1);

- (g) Lots S10 and S11 were the Principal Security (item 10, schedule);
- (h) the Facility to Security Ratio was 66.67% from time to time, at the discretion of the Lender (item 13, schedule);
- (i) if at any time the Lender determined that the Facility to Security Ratio had been exceeded, the Lender had power to require the Borrower to provide additional security (clause 5.4).

Variation of the First KPG Loan

22. On a date which the plaintiff is unable to particularise, but which occurred in or about 2004:

- (a) the defendant (in its capacity as Responsible Entity of the FMIF);
- (b) KPG as the Borrower;
- (c) PTAL as Lender/Custodian; and
- (d) Kirkham, Tristaleigh, Jamieson Woods and Turnstile as the Guarantor;

entered into a Deed of Variation of the First KPG Loan (**“the Deed of Variation of the First Loan”**).

23. Relevantly, the following were terms of the Deed of Variation:

- (a) the variation to the Principal Security contained in the Deed would be “effective as and from the day of 200 “ (item 6, schedule);
- (b) the Principal Security was defined as the First KPG Loan (item 4, Schedule);

- (c) the First KPG Loan was varied so that the Loan Amount was increased to \$7,108,000.00 (item 6, Schedule);
- (d) the Guarantor consented to the variation of the Principal Security as provided by the Deed of Variation (clause 5).

The Second KPG Loan

24. On or about 3 March 2004:

- (a) the defendant ATF the FMIF;
- (b) KPG as Borrower; and
- (c) PTAL as Lender/Custodian;

entered into a further Loan Agreement ("**the Second KPG Loan**").

25. Relevantly, the following were terms of the Second KPG Loan:

- (a) the Lender (as Custodian for the Responsible Entity) had, at the Borrower's request, agreed to lend and advance to the Borrower the Loan Amount on the conditions, among others, that the Borrower execute the Agreement (page 2);
- (b) the Loan Amount was \$2,415,000.00 (item 4, schedule);
- (c) the date for repayment was 12 September 2005, being 18 months from the date of the advance (item 5, schedule);
- (d) the following securities were taken as security for the performance of KPG's obligations under the Second KPG Loan (item 9, schedule):
 - (i) registered mortgage AC754113R from KPG to PTAL over property situated at Lot S12 at 13th Beach Golf Links Estate, Barwon Heads in the State of Victoria, more particularly described as all that land contained in lot S12 in plan of subdivision 443550R, Certificate of Title volume 10686 folio 371 ("**Lot S12**");

- (ii) a Deed of Guarantee and Indemnity given by Kirkham, Tristaleigh, Jamieson Woods and Turnstile to PTAL (as Lender);
- (iii) a fixed and floating charge given by KPG as Mortgagor to PTAL as Mortgagee, registered with the Australian Securities and Investment Commission ("ASIC") as registered charge 1003923;
- (iv) a fixed and floating charge given by Tristaleigh as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003927;
- (v) a fixed and floating charge given by Jamieson Woods as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003926;
- (vi) a fixed and floating charge given by Turnstile as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003924;
- (e) the Facility to Security Ratio was defined as the maximum acceptable ratio between the Money Secured and the Principal Security (clause 1.1);
- (f) the Money Secured was defined to include:
 - (i) the Loan Amount;
 - (ii) all moneys deemed to be principal in arrears; and
 - (iii) all money now or hereafter owing or payable to the Lender by the Borrower; and
 - (iv) all advances and further advances that may be given by the Lender to, for, on account of or at the expressed or implied request of the Borrower;(clause 1.1);
- (g) Lot S12 was the Principal Security (item 10, schedule);

- (h) the Facility to Security Ratio was up to 66.67% from time to time, at the discretion of the Lender (item 13, schedule);
- (i) if at any time the Lender determined that the Facility to Security Ratio had been exceeded, the Lender had power to require the Borrower to provide additional security (clause 5.4).

Variation of the Second KPG Loan

26. On a date which the plaintiff is unable to particularise, but which occurred in or about 2004:

- (a) the defendant (in its capacity as Responsible Entity of the FMIF);
- (b) KPG as the Borrower;
- (c) PTAL as Lender/Custodian; and
- (d) Kirkham, Tristaleigh, Jamieson Woods and Turnstile as the Guarantor;

entered into a Deed of Variation of the Second KPG Loan (**"the Deed of Variation of the Second Loan"**).

27. Relevantly, the following were terms of the Deed of Variation of the Second Loan:

- (a) the variation to the Principal Security contained in the Deed would be "effective as and from the day of 200 " (item 6, schedule);
- (b) the Principal Security was defined as the Second KPG Loan (item 4, Schedule);
- (c) the Second KPG Loan was varied so that the Loan Amount was increased to \$2,892,000.00 (item 6, Schedule);
- (d) the Guarantor consented to the variation of the Principal Security as provided by the Deed of Variation (clause 5).

The Priority Deed

28. On or about 30 May 2005 the following parties entered into a Priority Deed:

- (a) PTAL as the First Mortgagee;
- (b) the defendant as the Responsible Entity;
- (c) KPG as the Mortgagor;
- (d) Kathleen Monica Murphy and others as the Second Mortgagee;
- (e) Kathleen Monica Murphy and others as the Third Mortgagee;
- (f) Contract Control Constructions Pty Ltd as the Builder;
- (g) David Robert Kirkham;
- (h) Tristaleigh Pty Ltd;
- (i) Jamieson Woods Pty Ltd; and
- (j) Turnstile Pty Ltd.

29. The recitals to the Priority Deed state:

- A. The First Mortgagee is the custodian for the Responsible Entity;*
- B. The First Mortgagee has at the request of the Mortgagor made available or proposes to make financial accommodation on the First Mortgagee's Securities;*
- C. The Second Mortgagee has at the request of the Mortgagor made available financial accommodation on the Second Mortgagee's Securities;*
- D. The Third Mortgagee has at the request of the Mortgagor made available financial accommodation on the Third Mortgagee's Securities;*
- E. The Builder has been engaged to construct a residential development on the Land pursuant to the Construction Contract;*

F. Money owing by the Mortgagor to the Builder pursuant to the Construction Contract is secured by the Builder's Caveat;

G. The parties have agreed to regulate the priorities between the Securities on the terms set out in this Deed.

30. "Land" was defined as the Parcel 1 Land and the Parcel 2 Land (clause 1.1(14)); further defined as:

(a) Parcel 1 Land: Lots S10 and S11 (clause 1.1(19));

(b) Parcel 2 Land: Lot S12 (clause 1.1(20)).

31. The First Mortgagee's Priority was defined as the First Mortgagee's Principal Amount plus Interest and Enforcement Expenses (Item 4, Schedule).

32. The First Mortgagee's Principal Amount was defined as \$10,000,000.00 (clause 1.1(10));

33. The First Mortgagee's Securities were defined as the securities specified in Item 1 (clause 1.1(11)), which included the securities pleaded in paragraphs 21(d) and 25(d) above;

34. Clause 3 provided (relevantly):

(a) that PTAL as First Mortgagee had first priority on the First Mortgagee's Securities over the Land, for the amount specified in Item 4 (clause 3.1(1)), that is, \$10,000,000.00 plus interest and enforcement expenses;

(b) that PTAL as First Mortgagee had the fourth priority on the First Mortgagee's Securities over the Land, for the balance of the money thereby secured (clause 3.1(5)).

Default under the First and Second KPG Loans

35. In breach of the terms of the First and Second KPG Loans pleaded in paragraphs 21(c) and 25(c) above, KPG:

(a) failed to repay the First KPG Loan by 28 May 2005; and

- (b) failed to repay the Second KPG Loan by 12 September 2005.
36. On 21 November 2006 KPG changed its name to Barly Wood Pty Ltd.
37. On 28 February 2008 PTAL appointed Blair Alexander Pleash of Hall Chadwick managing controller of KPG, pursuant to registered charge 1003923.
38. On 14 August 2008 Mr. Pleash, in his capacity as managing controller of KPG, obtained a valuation report for the land that was previously Lots S10, S11 and S12 from Hymans Asset Management Pty Ltd (**"the Hymans Valuation"**).
39. Relevantly, the Hymans Valuation stated that:
- (a) the "date of valuation review" was 14 August 2008;
 - (b) the "date of desk review" was 14 August 2008;
 - (c) the "instructions" were *"to undertake a desk basis review of the market values on each lot as valued by Fitzroys Pty Ltd dated 6 September 2007 and having regard to a marketing period of 12-18 months"*;
 - (d) the valuation dated 6 September 2007 had valued the lots at amounts that totalled \$8,700,000.00;
 - (e) the Hymans Valuation valued the lots at amounts totalling \$7,781,000.00;
 - (f) Hymans *"owe no duty of care to any third party that becomes aware of this valuation and, without our knowledge, chooses to act or rely on the whole or any part of it"*;
 - (g) the valuation:

"...is current as at the date of valuation only. The value assessed herein may change significantly and unexpectedly over a relatively short period (including as a result of general market movements or factors specific to the particular property). We do not accept liability for losses arising from such subsequent changes in value. Without limiting the generality of the above, we do not assume any responsibility or accept any liability in

circumstances where this valuation is relied upon after the expiration of three (3) months from the date of valuation.”

40. At a time which is unknown to the plaintiffs, but which the plaintiffs believe occurred in 2008:
 - (a) the defendant ATF the FMIF; and/or
 - (b) Mr. Pleash in his capacity as managing controller appointed to KPG; conducted a sale campaign for Lots S10, S11 and S12.
41. The sale campaign did not result in a sale of Lots S10, S11 and S12.

Particulars of the sale campaign

- (a) The best particulars the plaintiffs can provide are that in a document entitled “Conflict Record” dated 2 October 2008, which referred to loans including the First and Second KPG Loans, the defendant stated:

“FMIF has held sale campaigns for the security properties, however no sale has eventuated.”
- (b) The plaintiffs will not be able to provide further particulars of the sale campaign until the completion of interlocutory steps in this proceeding.

Assignment of the First and Second KPG Loans to the MPF

42. On 28 August 2008:
 - (a) PTAL, in its capacity as Custodian of the FMIF, as Assignor;
 - (b) the defendant ATF the FMIF; and
 - (c) the defendant ATF the MPF, as Assignee;

entered into an Assignment Deed (“**the Assignment Deed**”).

43. Relevantly, the following were terms of the Assignment Deed:

- (a) in consideration of the Assignee agreeing to pay the Settlement Sum to the Assignor, the Assignor unconditionally, irrevocably and absolutely assigned all its right, title and interest in the Securities to the Assignee, which was to take effect from the Settlement Date (clause 2.1);
- (b) the Assignee was required to pay the Settlement Sum to the Assignor six months from the Settlement Date (clause 2.2);
- (c) "Securities" was defined to include the First KPG Loan, the Deed of Variation of the First KPG Loan, the Second KPG Loan, the Deed of Variation of the Second Loan, the Priority Deed and the securities pleaded in paragraphs 21(d) and 25(d) above (clause 1.1);
- (d) "Settlement Date" was defined as " 2008 or such other date as is agreed by the Parties in writing" (clause 1.1);
- (e) "Property" was Lots S10, S11 and S12 (clause 1.1);
- (f) "Interest Rate" was 10% per annum (clause 1.1);
- (g) Clause 4 provided:

"4. Valuation and Payment of the Settlement Sum

4.1 Valuation

- (a) *The Assignee must commission and pay for an independent valuation of the Property addressed to the Assignor by a valuer approved by the Assignor (approval not to be unreasonably withheld) for the purpose of determining the market value of the Property as at the Settlement Date. The valuation must be delivered to the Assignor within 90 days of the Settlement Date.*
- (b) *If the Assignee does not deliver to the Assignor the valuation under clause 4.1(a) the Assignor will obtain a valuation for the purposes of determining the market value of the Property as at the*

Settlement Date. The reasonable costs of the valuation must be paid by the Assignee to the Assignor at the same time as the Settlement Sum is paid.

4.2 Settlement Sum

The Settlement Sum shall be the market value as determined by the valuation pursuant to clause 4.1.

4.3 Interest

Interest shall be payable by the Assignee on the full amount of the Settlement Sum, from the Settlement Date until the date that the Settlement Sum is paid in full. Interest shall be calculated daily at the Interest Rate and paid at the same time as the Settlement Sum is paid.

44. On 28 August 2008, the defendant caused:

- (a) registered mortgages AC626247K and AC754113R to be transferred from PTAL as Custodian of the FMIF to the defendant ATF MPF; and
- (b) registered charges 1003923, 1035436 and 1003923 to be assigned from PTAL as Custodian of the FMIF to the defendant ATF MPF.

Internal approvals for the assignment of the First and Second KPG Loans

45. On 2 October 2008 Mr. David Monaghan of the defendant prepared a document entitled "Conflict Record" ("**the Conflict Record**").

46. Relevantly, the Conflict Record stated that:

- (a) the First and Second KPG Loans were in default;
- (b) the FMIF had held a sale campaign for the security properties, but no sale had eventuated;
- (c) the security property comprised 20 residential units in a beachside golf course complex located approximately one hour from the Melbourne CBD;

- (d) the responsible entity (in the premises, LMIM ATF the FMIF) had obtained an updated valuation for the security property to ascertain an appropriate assignment price;
 - (e) it was proposed to assign the loans to the MPF for the valuation price, as this price represented the likely recovery amount for the loans;
 - (f) as the MPF did not have sufficient cash reserves at that time to pay the assignment price, it was proposed that payment of the price be delayed by six months, with interest to be paid by the MPF at the rate of 10% per annum;
 - (g) the price was to be secured by a fixed and floating charge over the assets of the MPF;
 - (h) it was not anticipated that there would be any recovery from the guarantors.
47. On 15 October 2008 Ms. Shelley Chalmers of the defendant sent an email with the subject “FW: for consideration by MIF and MPF CCs – KPG 13th Beach” to the following recipients:
- (a) “321 MPF Investment Committee”;
 - (b) “801 Credit Committee”;
 - (c) Grant Fischer;
 - (d) Eghard van der Hoven;
 - (e) Ann McCallum;
 - (f) Lisa Darcy; and
 - (g) David Monaghan.
48. The email dated 15 October 2008 had attached to it a document entitled “MPF Credit Committee – Synopsis,” dated 28 August 2008 (“**the Synopsis**”).

49. The Synopsis was headed: *“Transaction: Proposed purchase from and short term finance from LM First Mortgage Income Fund to acquire residential units at Barwon Heads, Victoria.”*
50. Relevantly, the Synopsis stated that:
- (a) the MPF proposed to acquire an existing FMIF loan, which was secured over units 152, 158 and 160-177 at Barwon Heads;
 - (b) the units were residential holiday letting units, attached to a golf resort, and leased on a holiday letting basis;
 - (c) the income fluctuated from month to month depending on the time of year, and historically it ranged anywhere between \$3,000 and \$20,000 per month;
 - (d) the MPF was relying on a recent valuation conducted for the FMIF by Hymans dated 14 August 2008, to verify the property value;
 - (e) the MPF wished to enter into a six month sale contract to buy the loan as at 28 August 2008, on the following finance terms:
 - (i) the purchase price was \$9,731,662.76, which was the total of the FMIF’s debt as at 28 August 2008;
 - (ii) the MPF had until 28 February 2009 to settle the purchase;
 - (iii) until the payment of the settlement amount, the MPF would pay to the FMIF 10% interest per annum on the purchase price;
 - (iv) from 28 August 2008, the MPF would look after the property and pay levies, taxes, insurance etc. as if it were the owner.
51. On 22 October 2008 Ms. Shelley Chalmers of the defendant sent a further email with the subject “FW: for consideration by MIF and MPF CCs – KPG 13th Beach” to the recipients listed in paragraph 47 above.

52. In her email dated 22 October 2008, Ms. Chalmers stated:

“As a number of committee members will be away please register your vote or wish for discussion.”

53. In response, on 22 October 2008 and 23 October 2008 the recipients listed in paragraph 47 above, together with Ms. Chalmers, responded that they approved the transaction.

Approval of the Assignment by the defendant’s Board of Directors

54. By a resolution dated 27 October 2008, the Board of Directors of the defendant resolved to approve the assignment of the First and Second KPG Loans from the FMIF to the MPF.

Variations of the Assignment Deed

55. On 12 December 2008:

- (a) the defendant ATF the FMIF;
- (b) PTAL as the Assignor; and
- (c) the defendant ATF the MPF, as Assignee;

entered into a Deed of Variation of the Assignment Deed (**“the First Deed of Variation of the Assignment Deed”**).

56. Relevantly, the following were terms of the First Deed of Variation of the Assignment Deed:

- (a) clause 2.2 of the Assignment Deed was varied, so that the Assignee was required to pay the Settlement Sum to the Assignor on the date falling 12 months from the Settlement Date (item 2, Schedule);
- (b) the variation to the Assignment Deed contained in the First Deed of Variation would be effective as and from the 12th day of December 2008 (item 2, Schedule).

57. On 28 August 2009:

- (a) the defendant ATF the FMIF;
- (b) PTAL as the Assignor; and
- (c) the defendant ATF the MPF, as Assignee;

entered into a Deed of Variation of the Assignment Deed (“**the Second Deed of Variation of the Assignment Deed**”).

58. Relevantly, the following were terms of the Second Deed of Variation of the Assignment Deed:

- (a) the definition of Interest Rate set out in clause 1.1 of the Assignment Deed was varied, to read 7% per annum (item 2, Schedule);
- (b) clause 2.2 of the Assignment Deed was varied and replaced, so that the Assignee was required to pay the Settlement Sum to the Assignor on 28 August 2010 or such earlier date as may be mutually agreed (item 2, Schedule);
- (c) the variation to the Assignment Deed contained in the Second Deed of Variation would be effective as and from 28 August 2009.

59. On 30 November 2010:

- (a) the defendant ATF the FMIF;
- (b) PTAL as the Assignor; and
- (c) the defendant ATF the MPF, as Assignee;

entered into a Deed of Variation of the Assignment Deed (“**the Third Deed of Variation of the Assignment Deed**”).

60. Relevantly, the following were terms of the Third Deed of Variation of the Assignment Deed:

- (a) the definition of Interest Rate set out in clause 1.1 of the Assignment Deed was varied, to read 8.5% per annum (item 2, Schedule);
- (b) clause 2.2 of the Assignment Deed was varied and replaced, so that the Assignee was required to pay the Settlement Sum to the Assignor on 28 August 2011 or such earlier date as may be mutually agreed (item 2, Schedule);
- (c) the variation to the Assignment Deed contained in the Second Deed of Variation would be effective as and from 28 August 2010.

Payment of the Settlement Sum under the Assignment Deed

61. On or about 30 May 2011 the defendant ATF the MPF as Assignee paid the Settlement Sum to PTAL as Assignor, pursuant to clause 2.2 of the Assignment Deed (as varied).

Particulars

- (a) Page 21 of the MPF's Audited Annual Financial Report dated 30 June 2011 states:

"On August 2008, it was resolved by the Board of Directors of the Responsible Entity, to transfer three mortgage loans to the value of \$33,513,345 and the related first mortgage security to the Scheme from a related Scheme, LM First Mortgage Income Fund. There is a fixed charge over these two specific secured properties plus a floating charge over the remaining assets of the Scheme to provide security to the LM First Mortgage Income Fund in the event of default by the Scheme. This loan between the Scheme and LM First Mortgage Income Fund is interest bearing at 7% with the interest being capitalised. On 30 May 2011, this receivable was successfully repaid in full by the Scheme";

- (b) By an ASIC Form 312 dated 6 July 2011 the defendant as Chargor notified ASIC that registered charge number 1768753, which was a fixed and floating charge in favour of PTAL, had been paid or satisfied in full and had therefore been discharged or released on 6 July 2011;
- (c) The defendant ATF the MPF had provided registered charge number 1768753 to PTAL as security for (relevantly) payment of all moneys that the defendant ATF the MPF owed to PTAL, which included the Settlement Sum payable under the Assignment Deed;
- (d) The plaintiffs will not be able to provide further particulars of the payment of the Settlement Sum until the completion of interlocutory steps in this proceeding.

The defendant's breaches of duty

The "no conflict" duty

- 62. By entering into the Assignment Deed, the defendant placed itself in a position where the duties that it owed to the beneficiaries of the FMIF were in conflict with the duties that it owed to the beneficiaries of the MPF, in that:
 - (a) the interests of the beneficiaries of the FMIF required LMIM to maximise the amount the FMIF could recover for the First and Second KPG Loans; while
 - (b) the interests of the beneficiaries of the MPF required LMIM to minimise, as far as reasonably possible, the amount it paid to acquire assets on behalf of the MPF.
- 63. The defendant did not seek, or obtain, the informed consent of the beneficiaries of the MPF:
 - (a) to the defendant being in the position of conflict pleaded in paragraph 62 above; or

- (b) to engage into the Assignment Deed or the First, Second and Third Deeds of Variation of the Assignment Deed, as pleaded in paragraphs 42 to 61 of this Statement of Claim.

Equitable duty of care

64. Notwithstanding its knowledge of the matters pleaded in paragraphs 46 and 50 above:

- (a) if the defendant ATF the MPF relied upon the Hymans Valuation in entering into the Assignment Deed:
 - (i) the defendant ATF the MPF failed to comply with the obligation in clause 4.1 of the Assignment Deed for the Assignee to obtain a new valuation of Lots S10, S11 and S12 within 90 days of the Settlement Date;
 - (ii) notwithstanding the matters pleaded in paragraphs 38 and 39(f) above, the defendant ATF the MPF did not obtain Hymans' consent to the defendant ATF the MPF relying upon the Hymans Valuation for the purposes of entering into the Assignment Deed;
- (b) in the premises pleaded in paragraph 50(e)(i) above, the defendant ATF the MPF agreed to pay the amount of \$9,731,662.76 as the Settlement Sum under the Assignment Deed, notwithstanding that:
 - (i) in breach of clause 4.1 of the Assignment Deed the defendant ATF the MPF and as the Assignee did not commission and pay for an independent valuation (or any valuation) as contemplated by that clause;
 - (ii) this breached clause 4.2 of the Assignment Deed, as this was not the market value of the Lots S10, S11 and S12 as determined by a valuation obtained pursuant to clause 4.1 of the Assignment Deed;

- (iii) this amount was \$1,950,662.76 more than the value of \$7,781,000.00 ascribed to Lots S10, S11 and S12 by the Hymans Valuation;
 - (iv) the First and Second KPG Loans were in default;
 - (v) the defendant did not anticipate that there would be any recovery from the guarantors;
 - (vi) when the Assignment Deed was executed on 28 August 2008, the Facility to Security Ratio for the First and Second KPG Loans was approximately 125%, in circumstances where, in the premises pleaded in paragraph 21(h) and 25(h) above, the maximum permitted Facility to Security Ratio was 66.67%, at the discretion of the Lender;
- (c) as pleaded in paragraphs 43(f), 43(g), 58(a) and 60(a) above, by clause 4.3 of the Assignment Deed the defendant ATF the MPF agreed to pay interest to the Assignor on the unpaid Settlement Sum at the rates of:
- (i) 10% per annum between 28 August 2008 and 28 August 2009;
 - (ii) 7% per annum between 28 August 2009 and 28 August 2010; and
 - (iii) 8.5% per annum from 28 August 2010;

notwithstanding that:

- (iv) in or about August 2008 or, alternatively, when the Conflict Record was prepared in October 2008, the MPF did not have sufficient cash reserves to pay the Settlement Sum to the FMIF;
- (v) in the premises pleaded in paragraph 61 above, the MPF did not have sufficient cash reserves to pay the Settlement Sum until approximately July 2011;
- (vi) in the premises, the Assignment Deed as varied caused interest to accrue on the amount of \$9,731,662.76 per annum, at the rates

pleaded in paragraphs (c)(i) to (iii) above, for a period of almost three years;

- (vii) as pleaded in paragraph 64(b)(vi) above, the Facility to Security Ratio for the First and Second KPG Loans was approximately 125% as at 28 August 2008, before interest commenced accruing on the unpaid Settlement Sum pursuant to clause 4.3 of the Assignment Deed; and
- (d) as pleaded in paragraphs 43(a) and 44 above, in breach of clause 2.1 of the Assignment Deed the defendant caused the Securities to be assigned to itself ATF the MPF on 28 August 2008, notwithstanding that:
 - (i) clause 2.1 provided that the assignment was to take effect from the Settlement Date;
 - (ii) as pleaded in paragraph 60(b) above, the Assignment Deed was varied so that the Settlement Date was 28 August 2011 or such earlier date as may be mutually agreed;
 - (iii) in the premises pleaded in paragraphs 53 and 54 above neither the MPF Credit Committee, nor the Board of Directors of LMIM, had approved the Assignment Deed when the Securities were assigned to the defendant ATF the MPF.

Breach of duty

65. In the premises pleaded in paragraphs 62, 63 and 64 above, by entering into the Assignment Deed on 28 August 2008, and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds the defendant breached the duty that it owed to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty, in that the duties that it owed to the beneficiaries of the MPF conflicted with the duties that it owed to the beneficiaries of the FMIF.

66. In the premises pleaded in paragraph 64 above, by entering into the Assignment Deed on 28 August 2008, and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds the defendant breached the duty that it owed to the beneficiaries of the MPF to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.

Duties under the *Trusts Act 1973* (Qld)

67. In the premises pleaded in paragraph 64 above, by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds, the defendant breached the duty it owed pursuant to s.22 of the *Trusts Act*, to exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, when exercising a power of investment.
68. The defendant breached the duties that it owed pursuant to s.24 of the *Trusts Act*, in that by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds:
- (a) in the premises pleaded in paragraphs 64(a), 64(b) and 64(c) above, the defendant breached the duty that it owed pursuant to s.24(e) of the *Trusts Act* to take into account the risk of capital or income loss or depreciation when exercising its power of investment;
 - (b) in the premises pleaded in paragraphs 64(a), 64(b) and 64(c) above, the defendant breached the duty that it owed pursuant to s.24(g) of the *Trusts Act* to take into account the likely income return and the timing of income return;
 - (c) in the premises pleaded in paragraphs 64(c)(iv), (v) and (vi) above, the defendant breached the duty that it owed pursuant to s.24(h) of the *Trusts Act* to take into account the length of the term of the proposed investment;

- (d) in the premises pleaded in paragraphs 64(a), 64(b) and 64(c) above, the defendant breached the duty that it owed pursuant to s.24(j) of the *Trusts Act* to take into account the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment; and
- (e) in the premises pleaded in paragraph 64(c) above, the defendant breached the duty that it owed pursuant to s.24(n) of the *Trusts Act* to take into account the cost of making the proposed investment.

Loss suffered by the MPF

69. In consequence of the defendant's breaches of duty:

- (a) in or about July 2011 the defendant ATF the MPF paid the amount of \$9,731,662.76 as the Settlement Sum pursuant to the Assignment Deed, plus interest calculated at the rates pleaded in paragraphs 64(c)(i) to (iii) above, to PTAL in its capacity as Custodian of the FMIF;
- (b) in exchange, the only valuable securities that the defendant ATF the MPF received pursuant to the Assignment Deed were registered mortgages AC626247K and AC754113R over Lots S10, S11 and S12.

70. On or about 29 December 2011:

- (a) PTAL as security trustee;
- (b) the defendant ATF the AIFCP; and
- (c) the defendant ATF the MPF;

entered into a Deed that created The AIF-CP and MPF Security Trust, pursuant to which (relevantly):

- (d) the defendant ATF the AIFCP and the defendant ATF the MPF acknowledged that on 29 December 2011, the defendant ATF the AIFCP had paid the amount of \$3,933,750.00 to PTAL as Custodian Trustee of the MPF (clause 3.3(b)); and

- (e) the security trustee was required to apply all money thereafter received under the First and Second KPG Loans, and/or the securities provided for those loans, in the order and manner set out in clause 6.1 of the Deed; and
- (f) the security trustee was (relevantly) required to pay the amount of \$3,933,750.00 to the defendant ATF the AIFCP, before paying any secured moneys owed to the defendant ATF the MPF (clauses 6.1(a)(vi) and (vii)).

71. The market value of Lots S10, S11 and S12 as at:

- (a) 28 August 2008, being the date of the Assignment Deed;
- (b) July 2011, being the date on or about which the defendant ATF the MPF paid the Settlement Sum to PTAL in its capacity as Custodian of the FMIF; and
- (c) the trial of this proceeding;

was, and will be, significantly less than:

- (d) the amount of \$9,731,662.76 that the defendant ATF the MPF agreed to pay as the Settlement Sum pursuant to the Assignment Deed; and
- (e) the amount of \$9,731,662.76 plus interest calculated between 28 August 2008 and July 2011 at the rates and on the basis pleaded in paragraphs 64(c)(i) to (iii) above, which the defendant ATF the MPF agreed to pay pursuant to the Assignment Deed (as varied);
- (f) the amount of \$5,797,912.76 plus interest calculated between 28 August 2008 and July 2011 at the rates and on the basis pleaded in paragraphs 64(c)(i) to (iii) above, being the amount of \$9,731,662.76 paid as the Settlement Sum, less the amount of \$3,933,750.00 received from the defendant ATF the AIFCP on 29 December 2011.

Particulars

At the present time, the best particulars that the plaintiffs can provide of the market value of Lots S10, S11 and S12 are that a letter of advice from RWG Accountants and Advisers to Ms. Shelley Chalmers of LMIM, dated 21 February 2012, states:

“Valuations have been conducted by a recognised member of the Australian Property Institute – Nicholas Harvey Valuations \$5,245,000.00.”

72. The defendant was:

- (a) in the premises pleaded in paragraphs 4 to 7 above, aware that it, ATF the MPF, held the assets of the MPF on trust for the beneficiaries of the MPF;
- (b) in the premises pleaded in paragraphs 45 to 50, paragraph 54 and paragraphs 62 to 64 above, aware that the payments to itself ATF the FMIF, or alternatively to PTAL as Custodian of the FMIF, of \$9,731,662.76 as the Settlement Sum pursuant to the Assignment Deed, and interest pursuant to clause 4.3 of the Assignment Deed, were made in breach of trust.

73. In the premises pleaded in paragraph 13 above, insofar as PTAL may hold the amount pleaded in paragraph 72 above in its capacity as Custodian of the FMIF, it holds that amount as agent for the defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement.

74. In the premises, the defendant ATF the FMIF holds:

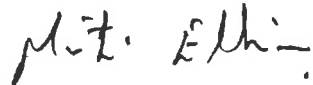
- (a) the amount of \$9,731,662.76 paid as the Settlement Sum pursuant to the Assignment Deed; and
- (b) all interest paid pursuant to clause 4.3 of the Assignment Deed;

on a constructive trust for the plaintiffs, in their capacity as trustees of the MPF.

The plaintiffs claim the following relief:

1. Equitable compensation;
2. A declaration that the defendant holds the amount paid pursuant to the Assignment Deed (as varied) on constructive trust for the plaintiffs;
3. Interest pursuant to s.58 of the *Civil Proceedings Act 2011* (Qld);
4. Costs;
5. Such further or other order as the Court sees fit.

Signed:



Description: MINTER ELLISON
Solicitors for the plaintiffs

Dated: 27 August 2014

This pleading was settled by Mr. Crowe QC and Ms. Ahern of Counsel.

NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.