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

SECOND STATEMENT OF FACTS OF THE APPLICANT

FILED PURSUANT TO SECTION 96(1) OF THE TRUSTS ACT 1973 (Qld)

FOR S8032/14

Introduction

- 1. This is the second statement of facts filed by the applicant, KordaMentha Pty Ltd (ACN 100 169 391) ("Trustee") in its capacity as trustee of the LM Managed Performance Fund ("MPF"), in relation to a claim commenced by the Trustee in proceeding S8032/14 ("First Proceeding") in the Supreme Court of Queensland against LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ("LMIM").
- 2. The third further amended statement of claim ("**3FASOC**") filed on 19 April 2016, is the Trustee's current statement of claim in the First Proceeding.
- 3. The Trustee is the current trustee of the MPF (which is a unit trust), having, together with Calibre Capital Ltd ("Calibre"), replaced LMIM as trustee on 12 April 2013, by order of the Chief Justice in Supreme Court of Queensland proceeding \$2869/13.
- 4. On 5 January 2015, Calibre retired as trustee of the MPF.
- 5. The First Proceeding is similar in nature to a claim commenced by the Trustee in proceeding S8034/14 ("Second Proceeding") in the Supreme Court of Queensland against LMIM.

- 6. The claim and statement of claim in the First Proceeding and the Second Proceeding (collectively the "**Proceedings**") were initially only brought against LMIM. However, by order dated 17 December 2015 of Justice Jackson, David Whyte as the Court Appointed Receiver of the property of the LM First Mortgage Income Fund ("**FMIF**"), was added as the second defendant in each of the Proceedings.
- 7. The FMIF is relevant because although the Trustee's primary claim is for equitable compensation¹ against LMIM in both Proceedings, the Trustee also seeks a declaration in each Proceeding that:²
 - (a) LMIM is entitled to an indemnity out of the assets of the FMIF;
 - (b) LMIM has a lien or charge over the assets of the FMIF in respect of LMIM's liability to the Trustee;
 - (c) the Trustee is entitled to be subrogated to LMIM's rights in relation to the indemnity, collectively "**Indemnity Claim**".
- 8. The legal basis of the Indemnity Claim was explained by Applegarth J in Kordamentha Pty Ltd v LM Investment Management Ltd & Anor [2016] QSC 183 at [18] to [21].
- 9. The Trustee must succeed upon its claim for equitable compensation to get to the Indemnity Claim.
- 10. The second statement of facts has been prepared in support of the Trustee's second application under section 96(1) ("Second Section 96 Application") of the *Trusts Act* 1973 (Qld) ("Trusts Act"), filed on 4 May 2018, in which the Trustee seeks a direction as to whether it would be justified in discontinuing the Proceedings.
- 11. The first statement of facts was prepared in support of the Trustee's first application (being the originating application) under section 96(1) of the Trusts Act ("First Section 96 Application").

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Which is not a proprietary claim.

See [1] and [6] of the prayer for relief in the 3FASOC.

- 12. To minimise the duplication of content and annexures, the second statement of facts has been prepared to update, where relevant, and supplement the first statement of facts.
- 13. The Proceedings are both on the Commercial List before Justice Jackson, who has been informed that the Second 96 Application is being brought. Justice Jackson asked to be informed (by the Trustee) of, relevantly, the outcome of the Second Section 96 Application.
- 14. Annexure 1 to the second statement of facts is a true copy of an email exchange dated 8 May 2018, between the Trustee's lawyers and the associate to Justice Jackson.

Service of the Second Section 96 Application

- 15. The MPF has in excess of 4,500 unitholders the majority of whom reside overseas.
- 16. On 9 May 2018, Douglas J made an order ("**Service Order**") regarding service of the Second Section 96 Application and supporting material upon the unitholders of the MPF.
- 17. Annexure 2 to the second statement of facts is a true copy of the Service Order.
- 18. After the Service Order was made, the Trustee discovered that there were 384 accounts held by 295 MPF unitholders for which there was no email address on the Trustee's existing email mail-out list ("Email mail-out list"). To protect the confidentiality of the account holders, the email addresses have not been included in the second statement of facts.
- 19. Those 384 accounts are associated with 12 member email addresses ("12 Email Addresses").
- 20. On 17 May 2018, and prior to the email mail-out on that day, the 12 Email Addresses were added to the Email mail-out list meaning that all accounts are associated with the email address of a particular unitholder or a financial

- adviser recorded as the representative of unitholders. As disclosed to Justice Douglas, not all of the email addresses on the Email mail-out list work.
- 21. The compliance by the Trustee with the Service Order will be dealt with in an affidavit filed after 17 May 2018.

The First Section 96 Application

- 22. The Trustee's position in the First Section 96 Application was that if litigation funding could not be obtained, it was likely that the Trustee would not prosecute the Proceedings.³
- 23. On 18 August 2015, Daubney J heard the First Section 96 Application.
- 24. Annexure 3 to the second statement of facts is a true copy of the order made by Daubney J on 26 August 2015 in relation to the First Section 96 Application ("Order").
- 25. Annexure 4 to the second statement of facts is a true copy of his Honour's reasons for making the Order, which are cited as *Kordamentha Pty Ltd v LM Investment Management Limited (Receivers and Managers Appointed); Re: KordaMentha Pty Ltd* [2015] QSC 376 ("Reasons").
- 26. Subject to Order 2 of the Order, Daubney J directed at Orders 1.1 and 1.2, pursuant to section 96 of the Trusts Act that the Trustee would be justified in prosecuting the First Proceeding and the Second Proceeding.
- Order 2 states that each of Orders 1.1 and 1.2 is conditional upon there being filed in each of the First Proceeding and the Second Proceeding respectively a Deed Poll executed by IMF Bentham Limited ("IMF") by which IMF agrees to pay adverse costs orders made against the Trustee in each proceeding during the term of the litigation funding made between the Trustee and IMF and to give the defendant(s) in each proceeding written notice of any termination of the litigation funding agreement within 7 days of such termination.

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³ [132] of the first statement of facts.

- 28. Annexure 5 to the second statement of facts is a true copy of the Deed Poll dated 8 September 2015 and filed in the First Proceeding.
- 29. Daubney J stated at [17] of the Reasons:

"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."

- 30. The existence of a funding agreement for the Proceedings was important for two principal reasons:
 - (a) it enabled the Trustee reliably to fund its own costs of prosecuting the Proceedings; and
 - (b) it provided the defendant in the Proceedings with more certainty that any costs orders in its favour against the Trustee would be met.
- 31. In the statements of claim considered by Daubney J in relation to the Proceedings, the Trustee sought equitable compensation and a declaration that LMIM held certain amounts on constructive trust ("Constructive Trust Claim"). The Constructive Trust Claim in each of the Proceedings was proprietary in nature.⁴
- 32. The Trustee also proposed pursuing a "tracing remedy" in each of the Proceedings based upon the principles discussed in *Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2016] AC 297.⁵

^[10] of the Reasons.

⁵ [10] of the Reasons.

33. His Honour Justice Daubney did not consider the Indemnity Claim, which had not yet been pleaded.

Current litigation relevant to the Trustee

- 34. The Trustee is the plaintiff in the following proceedings and LMIM is the first defendant or the defendant:
 - (a) the First Proceeding for \$5,128,071.34 plus interest and costs;
 - (b) the Second Proceeding for \$18,982,171.51 plus interest and costs;
 - (c) Supreme Court proceeding S1076/17 for \$12,340,378 plus interest and costs; and
 - (d) Supreme Court proceeding S12716/15 for \$20,726,078.11 plus interest and costs, collectively the "**KM Proceedings**".
- 35. The Trustee has not yet obtained directions under section 96 of the Trusts Act in relation to proceedings \$1076/17 and \$12716/15.
- The Trustee is the eighth defendant in Supreme Court of Queensland Proceeding no. S12317/14 ("**FMIF Proceeding**") in which LM Investment Limited (Receivers and Managers Appointed) (In Liquidation) as responsible entity for the FMIF is suing six current and former directors of LMIM, LMIM and the Trustee, for, at most, \$15,546,147 n plus interest and costs.⁶
- 37. The Trustee is defending the FMIF Proceeding, having obtained a direction under section 96 of the Trusts Act that it would be justified in doing so. Annexure 6 to the second statement of facts is a true copy of the order dated 19 March 2015, by Justice Applegarth.
- 38. In Supreme Court proceeding S11560/16, LM Investment Limited (Receivers and Managers Appointed) (In Liquidation) as responsible entity for the FMIF is suing LMIM for various declarations, equitable compensation, compensation pursuant to section 1317H(1) of the *Corporations Act* 2001

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Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2 [2017] QSC 229 at [187].

- (Cth) ("Corporations Act"), interests and costs ("RE Management Fee Proceeding").
- 39. The quantum of the RE Management Fee Proceeding is difficult to ascertain from the amended statement of claim but appears to be in excess of \$30 million.
- 40. The Trustee is not a party to the RE Management Fee Proceeding but it is relevant because Mr Whyte will seek to rely upon the RE Management Fee Proceeding in the Proceedings as a basis for deploying the clear accounts rule.
- 41. The clear accounts rule has recently been discussed by Jackson J in *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2* [2017] QSC 229 at [186] and [187] and *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 3* [2017] QSC 230 at [124] to [143].
- 42. Relevantly, the clear accounts rule provides that:⁷

"...where trustee's entitlement to an indemnity for a liability properly incurred is subject to a counter-liability for his breach of trust a balance is to be ascertained on the cross-liabilities and the trustee is entitled to payment of any balance in his or her favour."

Material events since the Order was made

- 43. On 29 February 2016, the Trustee amended its claim in each of the Proceedings to:
 - (a) delete the Constructive Trust Claim:
 - (b) add the Indemnity Claim.
- 44. On 26 April 2016, Mr Whyte applied to, inter alia, strike out the Indemnity Claim in each of the Proceedings.

⁷ RWG Management Ltd v Cmr for Corporate Affairs [1985] VR 385 per Brooking J.

- 45. On 19 August 2016, Applegarth J refused to strike out the Indemnity Claim in each of the Proceedings.⁸
- 46. On 28 April 2016, Justice Jackson ordered that a mediation occur in the FMIF Proceeding by 31 July 2016.
- 47. The mediation was held before James Bell QC on 12 July 2016. Although the order only related to the FMIF Proceeding, the parties took the opportunity to attempt to reach a global resolution of the multiple proceedings and issues arising out of the liquidation of LMIM.
- 48. The mediation was adjourned to allow further negotiations to take place.
- 49. On 16 December 2016, the Proceedings were reviewed by Justice Jackson. His Honour adjourned the Proceedings to allow the negotiations to continue.
- 50. On 9 January 2018, Mr Whyte's lawyers wrote to the Trustee's lawyers to, inter alia, state that the settlement negotiations had not been successful and to inquire whether the Trustee proposed to proceed with the Proceedings.
- 51. Annexure 7 to the second statement of facts is a true copy of the letter dated 9 January 2018 from Tucker & Cowen.
- 52. On 1 March 2018, Mr Whyte's lawyers wrote to the Trustee's lawyers:
 - (a) attaching a revised draft Deed Polls to name Mr Whyte (to ensure he received the benefit of the Deed Poll);
 - (b) requesting the most recent financial statements for IMF.
- 53. Annexure 8 to the second statement of facts is a true copy of the letter dated 1 March 2018, from Tucker & Cowen.
- 54. On 29 March 2018, the Trustee's lawyers wrote to Mr Whyte's lawyers, attaching:

⁸ Kordamentha Pty Ltd v LM Investment Management Ltd & Anor [2016] QSC 183 at [43] to [47].

- (a) a draft amended Deed Poll that IMF was prepared to sign;
- (b) the most recent financial statements for IMF.
- 55. Annexure 9 to the second statement of facts is a true copy of the letter dated 29 March 2018 from MinterEllison.
- 56. On 5 April 2018, Mr Whyte's lawyers wrote to the Trustee's lawyers:
 - (a) requesting the financial statements for IMF as a standalone entity so that Mr Whyte may confirm its capacity to satisfy an adverse costs order;
 - (b) attaching an amended draft of the Supplementary Deed Poll;
 - (c) reserving Mr Whyte's rights with respect to security for costs.
- 57. Annexure 10 to the second statement of facts is a true copy of both letters dated 5 April 2018 from Tucker & Cowen.
- 58. On 17 April 2018, IMF gave notice to the Trustee, 14 days' notice of the termination of the funding agreement.
- 59. On 18 April 2018, Mr Whyte's lawyers wrote to the Trustee's lawyers in each of the Proceedings to:
 - (a) seek further particulars of the 3FASOC;
 - (b) raise section 601FH(b) of the Corporations Act as a possible defence to the Indemnity Claim;
 - (c) raise section 60GA(2) of the Corporations Act as a possible defence to the Indemnity Claim.
- Annexure 11 to the second statement of facts is a true copy of both letters dated 18 April 2018 from Tucker & Cowen.
- On the same day, Mr Whyte's lawyers wrote to the Trustee's lawyers in relation to the Proceedings to:

- (a) further confirm settlement negotiations had ceased;
- (b) issue a notice of intention to proceed;
- (c) propose a timetable for the filing of a fourth further amended statement of claim in each Proceeding;
- (d) follow up the request for particulars in each Proceeding;
- (e) propose the listing of the Proceedings for review before Jackson J.
- Annexure 12 to the second statement of facts is a true copy of the letter dated 18 April 2018, from Tucker & Cowen.
- 63. On the same day, Mr Whyte's lawyers wrote to the Trustee's lawyers in relation to the Proceedings and the RE Management Fee Proceeding (S11560/16) to (relevantly):
 - (a) raise section 601FH(b) of the Corporations Act as a possible defence to the Indemnity Claim;
 - (b) inform the Trustee that Mr Whyte intends to raise the clear accounts rule in the Proceedings and in doing so, to rely on the breaches of trust alleged in the RE Management Fee Proceeding.
- Annexure 13 to the second statement of facts is a true copy of the letter dated 18 April 2018, from Tucker & Cowen.
- 65. On 24 April 2018, Mr Whyte's lawyers wrote to the Trustee's lawyers:
 - (a) requesting the financial statements for IMF as a standalone entity so that Mr Whyte may confirm its capacity to satisfy an adverse costs order;
 - (b) requesting a copy of Supplementary Deed Polls to be signed and filed in the Proceedings;
 - (c) reserving Mr Whyte's rights with respect to security for costs.

- 66. Annexure 14 is a true copy of the letter dated 24 April 2018, from Tucker & Cowen.
- 67. On 1 May 2018, the funding agreement terminated. In addition to adversely affecting the Trustee, the termination of the funding agreement means that the defendants in the Proceedings cannot recover their costs incurred after the date of the termination from IMF.
- On the same day, the Trustee's lawyers wrote to Mr Whyte's lawyers and LMIM's lawyers to:
 - (a) give written notice of the termination of the funding agreement;
 - (b) advise that the Trustee intends to discontinue the Proceedings if so advised by the Supreme Court of Queensland acting pursuant to section 96 of the Trusts Act.
- 69. Annexure 15 to the second statement of facts is a true copy MinterEllison's letter dated 1 May 2018.
- 70. On 3 May 2018, Mr Whyte's lawyers wrote to the Trustee's lawyers to inquire whether the Second Section 96 Application was necessary.
- 71. Annexure 16 to the second statement of facts is a true copy of the letter dated 24 April 2018 from Tucker & Cowen.
- 72. On 4 May 20018, the Trustee's lawyers wrote to Mr Whyte's lawyers to explain why the Second Section 96 Application was necessary.
- 73. Annexure 17 to the second statement of facts is a true copy of MinterEllison's letter dated 4 May 2018.
- 74. Annexure 18 to the second statement of facts is a true copy of a bundle of the other correspondence that does not need to be addressed individually.
- 75. The Trustee will bring to the attention of the Court further relevant correspondence sent or received after the second statements of facts is finalised.

Estimated Value of the MPF

- 76. As at 10 May 2018, the Trustee holds cash at bank in the amount of \$8,577,745.73.
- 77. Of that amount, \$6,258,640.13 ("**Tax Refund**") relates to money recently refunded by the Australian Taxation Office ("**ATO**") to the Trustee in respect of withholding tax paid. The ATO paid the tax Refund to the Trustee on the basis that it would be distributed to the unitholders of the MPF.
- 78. The available cash after deducting the Tax Refund is \$2,319,105.60.
- 79. The Trustee holds the Tax Refund on trust for the purpose of making a distribution to the unitholders of the MPF.
- 80. The Trustee expects to receive approximately \$1,000,000 from the sale of the assets of a company called 457-459 Lygon Street Pty Ltd.
- 81. The only other significant assets held by the Trustee are the choses in action in the KM Proceedings. These are contingent assets.
- 82. The Trustee expects cash outgoings (net of GST) over the next 12 months alone to be in excess of \$2,000,000, which includes the following:
 - (a) an invoice in the amount of \$586,010 (excluding GST) payable to PwC in relation to recovery of the Tax refund from the ATO;
 - (b) remuneration for the Trustee estimated to be approximately \$600,000 (no remuneration has been paid to the Trustee in the past 12 months);
 - (c) legal fees relating to ongoing litigation. In this respect it does not appear likely that the FMIF Proceeding is going to settle and the Trustee is going to have to continue to defend the claim to protect the remaining assets of the MPF;
 - (d) legal fees and other costs associated with the administration of the MPF and the distribution process.

83. Even if the cash outgoings do not exceed \$2,000,000, the outgoings will be significant.

Estimated value of the assets of LMIM and the FMIF

- 84. LMIM is in liquidation, and the Trustee understands that LMIM will have no money of its own (as opposed to money in the FMIF) to meet any judgment against it.
- 85. The Trustee does not have a copy of the insurance policies, but it is a matter of public record that LMIM has the benefit of insurance policies that *might* respond to the Proceedings if successful.
- 86. In the Reasons at [14], Daubney J noted that the insurer "had declined to respond" to the claims the subject of the Proceedings and that the liquidator of LMIM does not presently intend to challenge that denial of coverage.
- 87. In relation to those insurance policies the Trustee further states:
 - (a) the insurance policies were drawn upon by the directors of LMIM to defend themselves in Australian Securities and Investments Commission v Drake (No. 2) (2016) 340 ALR 75 ("Drake No. 2");
 - (b) the insurance policies are being drawn upon by the directors of LMIM to defend themselves in the FMIF Proceeding;
 - (c) the directors' defence costs in the FMIF Proceedings will be significant.
- 88. Annexure 19 to this statement of facts is a true copy of a report dated 29 March 2018 ("March 2018 FMIF Report") by Mr David Whyte in relation to the FMIF.
- 89. The March 2018 Report estimates that (as at 31 December 2017) the <u>net</u> assets available to distribute to unitholders in the FMIF to be between \$68,242,091.
- 90. The Trustee cannot independently verify this figure.

Financial inability to fund the Proceedings

- 91. The Trustee provided an estimate of the costs of prosecuting the Proceedings to Justice Daubney in the First Section 96 Application.
- 92. The Trustee's lawyers have reviewed that costs estimate for the purposes of preparing the second statement of facts. The Trustee's lawyers (in particular David O'Brien ⁹) estimate that the Trustee's costs of prosecuting the Proceedings to trial will be not less than \$1.376 million taking into consideration that:
 - (a) since the first estimate was prepared, Mr Whyte has been joined as the second defendant in each of the Proceedings;
 - (b) no defences have been filed in either of the Proceedings;
 - (c) the rates charged by all of the key professionals referred to in the First Estimate have increased;
 - (d) Mr Whyte has recently raised further defences in correspondence;
 - (e) Mr Whyte is a well-resourced defendant who has demonstrated a willingness to bring interlocutory applications (this is not intended in any way as a criticism).
- 93. Even if the costs are less than the amount estimated, the costs will be significant.
- 94. The Trustee is of the opinion that it cannot fund the prosecution of the Proceedings out of the Trustee's own resources.
- 95. The Trustee has not received any offer from unitholders of the MPF to fund the Proceedings.
- 96. The Trustee has not sought litigation funding from other litigation funders in relation to the Proceedings because it costs money to seek funding and the Trustee it is of the opinion that such funding is unlikely to be forthcoming.

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⁹ Mr O'Brien's affidavit filed on 5 June 2015 exhibits the estimate prepared in relation to the First Section 96 Application.

- 97. In this respect, the Trustee notes that *after* IMF agreed to fund the Proceedings:
 - (a) Mr Whyte started the RE Managements Fee Proceeding, which is relevant to the clear accounts rule;
 - (b) the amount of funding available under insurance policies held by LMIM has decreased as a result of, inter alia, the ongoing FMIF Proceeding the proceeding relating to Drake No. 2;
 - (c) Mr Whyte has raised new defences in the Proceedings;
 - (d) the directors were successful in the *Drake No.* 2, which, relevantly, included issues concerning the constitution of the MPF and exclusions therein;
 - (e) the Trustee had to abandon its Constructive Trust Claim for factual reasons following the receipt of, in effect, advance disclosure.
- 98. The Trustee would also disclose to any potential funder that IMF had terminated its funding agreement.

The Trustee's opinion regarding the discontinuance

- 99. The Trustee is aware that if it discontinues the Proceedings, the Trustee will likely be ordered to pay the defendants costs of the Proceedings on the standard basis.
- 100. Such a costs order in relation to the Proceedings will not affect the costs order made by Applegarth J in *Kordamentha Pty Ltd v LM Investment Management Ltd & Anor* [2016] QSC 183.
- 101. In all of the circumstances, the Trustee is of the opinion that it is in the best interests of the unitholders of the MPF for the Proceedings to be discontinued.

Attitude of unitholders of the MPF

- 102. The Trustee does not yet know the attitude of any unitholders of the MPF to the Second Section 96 Application.
- 103. The Trustee will bring to the attention of this Honourable Court the attitude of any unitholders of the MPF who communicate with the Trustee in that respect.

17 May 2018

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

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Nadia Braad

From: Associate JacksonJ <Associate.JusticeJackson@courts.gld.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.OBrien@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

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david.obrien@minterellison.com

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Daniel Anni

SUPREME COURT OF QUEENSLAND

REGISTRY:

Brisbane

NUMBER:

5329/15

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

ORDER

Before:

Justice Douglas

Date:

9 May 2018

Initiating document:

Application filed 4 May 2018

THE ORDER OF THE COURT IS THAT:

1. The applicant serve the application for direction under section 96 of the Trusts Act 1973 (Qld) on unitholders of the Managed Performance Fund ('MPF') in accordance with this order.

- 2. 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 BS8032/14 and BS8034/14 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 intends to rely in support of its S 96 Application on the web-site the address of which is: http://www.kordamentha.com/creditor-information/australia/109 ("Website").
- 3. Where the applicant receives a response to an email that indicates the email was not received and the applicant has a postal address for any relevant MPF

ORDER:

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

Form 59 Rule 661

unitholder or unitholders, the applicant is to post the email to the postal address of the MPF unitholder.

- 4. Service of the S 96 Application be deemed to be effective on each of the MPF unitholders as of 24 May 2018.
- 5. Before sending the emails referred to in paragraph 2 of this order, the applicant is to upload to the Website, copies of:
 - (a) the S 96 Application;
 - (b) the 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 affidavit of David O'Brien to be filed in support of the application for directions about service;
 - (e) this order;
 - (f) the Statement or Statements of Facts drawn pursuant to section 96 (1) of the *Trusts Act* 1973 (Qld); and
 - (g) the substantive affidavits (including all the exhibits) that the applicant intends to reply upon in support of its S 96 Application.
- 6. Where the applicant proposes to rely on further material in support of its S 96 Application, it may serve that material by uploading the material to the website, sending letters to a postal address to unitholders to whom order 3 applies, and otherwise by email to the unitholders.
- 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 applicant does not have a postal address.
- 8. The applicant's costs and expenses of and incidental to its application for this order are reserved.
- 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.

Signed:

Deputy Registrar

ME_147141834_1

-1 JUL 2018



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

ORDER

Before:

Daubney J

Date:

26 August 2015

Initiating document:

Originating Application filed 29 May 2015

THE ORDER OF THE COURT IS THAT:

1. Subject to Order 2:

1.1 Pursuant to section 96 of the *Trusts Act* 1973 (Qld) ("**Trusts Act**"), the Applicant is directed that it would be justified in prosecuting proceedings against the defendant, LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) (ACN 077 208 461) ("**LMIM**") for the relief claimed in the Claim and Statement of Claim filed in Supreme Court of Queensland proceeding number 8032/14 ("**First Proceeding**").

1.2

Pursuant to section 96 of the *Trusts Act*, the Applicant is directed that it would be justified in prosecuting proceedings against the defendant, LMIM for the relief

ORDER

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

Form 59 Rule 661

- claimed in the Claim and Statement of Claim filed in Supreme Court of Queensland proceeding number 8034/14 ("Second Proceeding").
- Each of Orders 1.1 and 1.2 is conditional upon there being filed in each of the First Proceeding and the Second Proceeding respectively a Deed Poll executed by IMF Bentham Limited ("IMF") by which IMF agrees to pay adverse costs orders made against the Applicant in each proceeding during the term of a litigation funding agreement made between the Applicant and IMF and to give the defendant(s) in each proceeding written notice of any termination of the litigation funding agreement within 7 days of such termination.
- The Applicant serve the Claim and Statement of Claim in the First Proceeding within 14 days of this order.
- 4. The Applicant serve the Claim and Statement of Claim in the Second Proceeding within 14 days of this order.
- The costs and expenses of and incidental to the application (including any reserved costs) of each of the Applicant, the Respondent Liquidators of LMIM and the Respondent David Whyte (receiver of the property of the LM First Mortgage Income Fund and the person appointed to take responsibility for the winding up of that fund) be paid on the indemnity basis out of the LM Managed Performance Fund.
- The following documents handed up to the Court be placed in a sealed envelope marked "Not to be opened without an order of a Judge of this Court":
 - (a) the joint memorandum of advice of Counsel in the First Proceeding;
 - (b) the joint memorandum of advice of Counsel in the Second Proceeding;
 - (c) the confidential submissions on the merits:
 - (d) the confidential summary of the main commercial terms of the proposed funding agreement;
 - (e) the confidential draft of the proposed funding agreement.

7. The affidavit of Ashley John Tiplady sworn 23 July 2015 and filed by leave on 18 August 2015 be placed in a sealed envelope marked "Not to be opened without an order of a Judge of this Court".

AND IT IS FURTHER DIRECTED that the Applicant forthwith make application for each of the First Proceeding and the Second Proceeding to be placed on the Commercial List.

Signed:

Deputy Registrar

SUPREME COURT OF QUEENSLAND

CITATION: Kordamentha Pty Ltd v LM Investment Management Limited

(Receivers & Managers Appointed); Re: Kordamentha Pty

Ltd [2015] QSC 376

PARTIES: In 5329 of 2015:

KORDAMENTHA PTY LTD AS TRUSTEE FOR THE

LM MANAGED PERFORMANCE FUND

(applicant)

DAVID WHYTE IN HIS CAPACITY AS COURT-APPOINTED RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND

(not a party to the application)

In 8032 of 2014 and 8034 of 2014:

KORDAMENTHA PTY LTD AS TRUSTEE OF THE

LM MANAGED PERFORMANCE TRUST

(plaintiff/applicant)

V

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN

LIQUIDATION) ACN 077 208 461

(defendant/respondent)

FILE NO/S: 8032 of 2014

8034 of 2014

5329 of 2015

DIVISION: Trial Division

PROCEEDING: Civil Hearing

ORIGINATING

Supreme Court of Queensland

COURT:

DELIVERED ON: 26 August 2015 (ex tempore)

DELIVERED AT: Brisbane

HEARING DATE: 18 August 2015; written submissions on 20 August 2015

JUDGE: Daubney J

ORDER: 1. Subject to Order 2:

1.1. Pursuant to section 96 of the *Trusts Act* 1973 (Qld)

("Trusts Act"), the Applicant is directed that it would be justified in prosecuting proceedings

against the defendant, LM Investment

Management Limited (Receivers and Managers

Appointed) (In Liquidation) (ACN 077 208 461) ("LMIM") for the relief claimed in the Claim and Statement of Claim filed in the Supreme Court of Queensland proceeding number 8032/14 ("First Proceeding").

- 1.2. Pursuant to section 96 of the *Trusts Act*, the Applicant is directed that it would be justified in prosecuting proceedings against the defendant, LMIM for the relief claimed in the Claim and Statement of Claim filed in the Supreme Court of Queensland proceeding number 8034/14 ("Second Proceeding").
- 2. Each of Orders 1.1 and 1.2 is conditional upon there being filed in each of the First Proceeding and the Second Proceeding respectively a Deed Poll executed by IMF Bentham Limited ("IMF") by which IMF agrees to pay adverse costs orders made against the Applicant in each proceeding during the term of a litigation funding agreement made between the Applicant and IMF and to give the defendant(s) in each proceeding written notice of any termination of the litigation funding agreement within 7 days of such termination.
- 3. The Applicant serve the Claim and Statement of Claim in the First Proceeding within 14 days of this order.
- 4. The Applicant serve the Claim and Statement of Claim in the Second Proceeding within 14 days of this order.
- 5. The costs and expenses of and incidental to the application (including any reserved costs) of each of the Applicant, the Respondent Liquidators of LMIM and the Respondent David Whyte (receiver of the property of the LM First Mortgage Income Fund and the person appointed to take responsibility for the winding up of that fund) be paid on the indemnity basis out of the LM Managed Performance Fund.
- 6. The following documents handed up to the Court be placed in a sealed envelope marked "Not to be opened without an order of a Judge of this Court":
 - (a) the joint memorandum of advice of Counsel in the First Proceeding;
 - (b) the joint memorandum of advice of Counsel in the Second Proceeding;

- (c) the confidential submissions on the merits;
- (d) the confidential summary of the main commercial terms of the proposed funding agreement;
- (e) the confidential draft of the proposed funding agreement.
- 7. The affidavit of Ashley John Tiplady sworn 23
 July 2015 and filed by leave on 18 August 2015 be
 placed in a sealed envelope marked "Not to be
 opened without an order of a Judge of this Court".

AND IT IS FURTHER DIRECTED that the Applicant forthwith make application for each of the First Proceeding and Second Proceeding to be placed on the Commercial List.

CATCHWORDS:

EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION FOR SUMMONS OR ADVICE – GENERALLY – where there is an application for directions with respect to whether or not a proceeding should be brought against the respondents – where the statement of facts gives rise to a justiciable case – where the likely legal costs of the proceedings are significant – where there is a litigation funder – where the litigation funder will effectively assume liability for adverse costs orders made against the trustee – whether the proceedings should be pursued in the best interests of the trust estate – whether the liquidators should be indemnified out of the trust estate in respect of costs incurred on the application under s 96 of the *Trusts Act* 1973

PROCEDURE – COMMENCING PROCEEDINGS – where the defendant is subject to voluntary liquidation – where leave to proceed against a company in liquidation was not obtained at the time that proceedings were instituted – whether leave to proceed under s 500 of the *Corporations Act* 2001 should be granted

Trusts Act 1973 (Qld), s 96

Corporations Act 2001 (Cth), s 500

Federal Republic of Brazil v Durant International Corporation [2015] UKPC 35

Glassock v The Trust Company (Aust) Pty Ltd [2012] QSC 15

Coore v Coore [2013] QSC 196

KordaMentha Pty Ltd & Calibre Capital Ltd v LM Investment Management Ltd (in liquidation) & Anor [2015] QSC 4

Macedonian Orthodox Community Church St Petka

Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand (2008) 249 ALR 250

COUNSEL: In 5329 of 2015:

A Crowe QC with E Goodwin for the applicant M Luchich for David Whyte in his capacity as courtappointed receiver of the property of the LM First Mortgage Income Fund

In 8032 of 2014 and 8034 of 2014:

A Crowe QC with E Goodwin for the applicant J Peden for the respondent

SOLICITORS: In 5329 of 2015:

Minter Ellison for the applicant

Tucker & Cowan for David Whyte in his capacity as courtappointed receiver of the property of the LM First Mortgage

Income Fund

In 8032 of 2014 and 8034 of 2014:

Minter Ellison for the applicant Russells for the respondent

- Until the 12th of April 2013, LM Investment Management Ltd, (Receivers and Managers Appointed) (In Liquidation) ("LMIM") was the trustee of a unit trust called the LM Managed Performance Fund ("MPF"). On that date de Jersey CJ ordered that the present applicant, KordaMentha Pty Ltd ("the Trustee") replace LMIM as trustee of the MPF.
- LMIM was placed into voluntary administration on the 23rd of March 2013, and since the 1st of August 2013, has been administered under a voluntary winding up with Mr Park and Ms Muller ("the liquidators") as liquidators.
- [3] LMIM also was (and remains) the responsible entity for a particular registered managed investment scheme called LM First Mortgage Income Fund ("FMIF"). On 21 August 2013, Mr David Whyte ("Mr Whyte") was appointed, *inter alia*, as Court appointed receiver to the FMIF.
- Relevant for present purposes is the fact that the Trustee has issued two sets of proceedings against LMIM. In respect of each proceeding, the Trustee seeks directions under s 96 of the *Trusts Act* as to whether it would be justified in prosecuting each proceeding. Moreover, leave to proceed against a company in liquidation was not obtained at the time that proceedings were instituted, and an application is now made for the necessary orders under s 500 of the *Corporations Act*.

- For quite a number of years, LMIM carried on business as a professional trustee for reward, in which capacity it created and managed both registered and unregistered investment schemes. It has been the responsible entity of the FMIF since 28 September 1999. FMIF is registered under s 601EB of the *Corporations Act*, and LMIM holds the property of the FMIF on trust for its members.
- The trust company PTAL Ltd ("PTAL") (formerly known as Permanent Trustee Australia Limited) is a professional corporate trustee which, under the terms of the custody agreement dated 4 February 1999:
 - (a) custodially holds the portfolio of title documents as agent for LMIM in relation to, amongst others, the FMIF;
 - (b) was required to act on LMIM's instructions in relation to any asses of the portfolio (including the assets of the FMIF).
- [7] Whilst PTAL held legal title to various assets, it did not carry out any discretionary management functions.
- In argument before me, the two relevant proceedings were referred to as "the first proceeding" (being proceeding S8032 of 2014), and "the second proceeding" (being proceeding S8034 of 2014). Both proceedings were filed on 27 August 2014. It is convenient to adopt that terminology for present purposes.
- [9] The following summary of the nature of each of the first proceeding and the second proceeding, as set out in the trustee's written submissions, was uncontentious:

Nature of the First Proceeding.

- 22. The business of both LMIM ATF the MPF and LMIM ATF the FMIF was to use funds obtained from members by entering into property investment and structured loan transactions for the purchase and/or development of Australian real property for the eventual benefit of members.
- 23. The essence of the trustee's complaint is that LMIM ATF the MPF entered into a deed of assignment pursuant to which PTAL, in its capacity as Custodian of the FMIF, assigned existing loans and securities to LMIM ATF the MPF in exchange for payment of a settlement sum, in circumstances where the value of the securities received were significantly less than settlement sum paid.
- 24. The trustee's complaint is that, by entering into the deed of assignment (and subsequent deeds of variation), LMIM:
 - (a) breached the duty that it owed to the beneficiaries (i.e., unitholders of the MPF) not to place itself in a position of conflict of duty, in that the duties that it owed to the beneficiaries of the MPF conflicted with the duties it owed to the beneficiaries of FMIF; and

- (b) 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.
- 25. The principal relief claimed in the first proceeding is:
 - (a) equitable compensation;
 - (b) a declaration that LMIM ATF the FMIF holds the amount of \$9,731,662.76 paid as the settlement sum pursuant to the Assignment Deed as varied on constructive trust of the trustee.
- 26. However, the final quantum awarded after a successful trial will likely be affected by a number of other factors mentioned further below.

Nature of the second proceeding

- 27. The essence of the Trustee's complaint is that LMIM ATF the MPF entered into a Deed of Assignment pursuant to which PTAL, in its capacity as custodian of the FMIF, assigned an existing loan and securities to LMIM ATF the MPF in consideration for a Settlement Sum where the value of the securities received were, at the date of the assignment deed, and will be at the time of the proposed proceeding, significantly less than the Settlement Sum paid pursuant to the deed.
- 28. The trustee's complaint is that by entering into the Deed of Assignment and subsequent Deeds of Variation, LMIM:
 - (a) breached the duty that it owed to the beneficiaries of the MPF not to place itself in a position of conflict of duty, in that the duties that it owed to the beneficiaries of the MPF conflicted with the duties it owed to the beneficiaries of the FMIF; and
 - (b) 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.
- 29. The principal relief proposed to be claimed in the proceeding is:
 - (a) equitable compensation; and
 - (b) a declaration that LMIM holds the amount of \$19,551,800.65 paid as a Settlement Sum pursuant to the Assignment Deed (as varied) on constructive trust of the Trustee.

- 30. As with the first proceeding, the final quantum awarded after a successful trial will likely be affected by a number of other factors mentioned further below.
- Whilst, as is apparent from this summary, and indeed as is apparent from a review of the statement of claim in each of the first proceeding and the second proceeding, the claims are presently framed to seek equitable compensation and relief of a proprietary nature, it became clear from argument that the trustee also proposes pursuing a tracing claim in each proceeding. In so doing, it will be seeking to identify not merely specific assets still held by LMIM over which it has a direct proprietary claim, but also will seek to trace (if it can) the value of its claim into other assets of LMIM. In pursuing its tracing remedy in that regard by seeking to follow value, and not just cash, the Trustee drew support from the very recent advice of the Privy Council in *Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35.
- The bulk of the argument before me was directed to the applications under s 96 of the *Trusts Act*. That section relevantly provides for the Court, in effect, to give private judicial advice to a trustee. The consequence of giving such advice is that personal protection is afforded to the trustee in pursuing a proceeding and the giving of the advice operates to protect the interests of the trust. The principles relevant to consideration of an application under s 96 have recently been essayed by Boddice J in *Glassock v The Trust Company (Aust) Pty Ltd* [2012] QSC 15 and by Atkinson J in *Coore v Coore* [2013] QSC 196. The relevant passages of those judgments were set out at length in the judgment of Martin J in *KordaMentha Pty Ltd & Calibre Capital ltd v LM Investment Management Ltd (in liquidation) & Anor* [2015] QSC 4. I respectfully adopt those statements of principle without setting them out at length.
- It was not in issue before me that Mr Whyte was a proper interested party to be heard on the present applications. Mr Whyte's attitude was that he did not oppose the directions sought by the Trustee, but considered it appropriate to put before the Court some matters which went to the Court's consideration as to the appropriateness of making the directions. In particular, the information provided by Mr Whyte went to the Court's consideration of the likely return if the Trustee as successful in the proceedings.
- For the liquidators, it was properly conceded that the information before the Court demonstrated in each proceedings that there is a *prima facie* legal case underpinning each proceeding. Arguments advanced on behalf of the liquidators in opposing the making of the directions went to questioning the true value of the claims, particularly in the context of the cost of pursuing each proceeding.
- Counsel for the liquidators accepted that if there were an insurance policy that responded to the claims, then the liquidators would accept that the proceedings could be justified. The situation, on the material before me, is that an insurer has declined to respond in respect of the claims which are the subject of the first proceeding and the second proceeding. I was informed by counsel for the liquidators that his current instructions from the liquidators are that LMIM does not presently intend to challenge the refusal of coverage; counsel for the liquidators further

informed me that this was not to be taken to be a concession that there was no policy, nor an assertion that the liquidators abandoned any claim on such policy.

- Apart from a significant quantity of material filed in open court in respect of each of the claims made in the first proceeding and the second proceeding, I was provided, as is conventional on applications of this sort, with material on a confidential basis. That material included advices by counsel and confidential submissions by counsel for the Trustee, which were directed particularly to the benefits of prosecuting the first proceeding and the second proceeding. I was also provided, on a confidential basis, with details of the proposed funding arrangements for the first proceeding and the second proceeding from a litigation funder, IMF Bentham. Subject to one matter to which I will refer specifically later, it is not appropriate for me to refer in any detail to those funding arrangements, save to record that I have had regard to the terms of the currently proposed funding agreement for the purposes of forming a view as to the appropriateness or otherwise of giving directions under s 96.
- [16] Moreover, in response to particular concerns raised on behalf of the liquidators, an affidavit has now been filed on behalf of the Trustee which confirms that the litigation funder has been informed that the insurer has declined cover in respect of the claims made in the first proceeding and the second proceeding, and the litigation funder has also been provided with copies of the material put before me which raised questions as to the availability of assets to meet the claims made in the first proceeding and the second proceeding. The affidavit confirms that, at the present time, the offer of litigation funding remains open, and further that the litigation funder is still reviewing the documentation filed before me which went to the question of the availability of assets to meet the claims made in the proceedings.
- 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.
- After counsel for the Trustee informed the Court of the information which had been provided to the litigation funder, counsel for the liquidators took instructions as to the liquidators' attitude with respect to the application under s 96. Counsel for the liquidators was then able to advise the Court to the effect that if, on receiving the confidential information, I was satisfied as to the appropriateness of the litigation funding arrangements proposed to be entered into then, as with their attitude with respect to insurance, the liquidators would properly concede that this would be an issue which would be taken into account in justifying the making of directions under s 96.
- [19] I turn then to the matters with which I need to be concerned on the applications under s 96.

- [20] First, I note that each application has been made "upon a written statement of facts". As I have already noted, there was no real issue before me that the facts, as stated, give rise to justiciable cases to be pursued in the first proceeding and the second proceeding.
- Secondly, I am satisfied that service has been effected on "all persons interested in the application". In that regard, on 29 May 2015 an order was obtained from Peter Lyons J regarding the mode of service on the approximately 4,500 unitholders of MPF. There was no issue that service has been effected in accordance with that order.
- [22] The real issue in respect of whether I ought accede to the applications for directions came down to, in effect, an assessment of the likely costs to be incurred in the proceedings, and the prospective benefit to be obtained for MPF from the proceedings.
- [23] Each of the first proceeding and the second proceeding is a significant piece of litigation. The estimate put before me was that the Trustee's total legal costs of separately prosecuting both proceedings will be in the order of \$1.8 million. As was said by counsel for the Trustee, it ought be possible to reduce those costs if the first proceeding and the second proceeding are tried at the same time, or at least sequentially, by the same judge. Be that as it may, there will undoubtedly be significant costs and outlays incurred in prosecuting the proceedings.
- As against that, questions are being raised, particularly by Mr Whyte, as to the quantum of monies which actually would be available to meet any judgments obtained in the proceedings. So, for example, the Trustee points to a large value (approximately \$40 million) which it contends was transferred from the MPF to the FMIF and which, it would argue, represents value into which it can trace for the purposes of recovery on its claim. Mr Whyte, however, points to facts which would call into question whether such transfers, or transfers of that value, actually occurred. He says, for example, that within that alleged transfer of value of some \$40 million, there were cash payments only amounting to some \$9.5 million, and of those cash payments at least 40 per cent were not attributable to the transactions which are the subject of the first proceeding and the second proceeding. Indeed, Mr Whyte says that, as at the date of appointment of voluntary administrators, the only amount which then remained in FMIF over which any constructive trust might be declared for the benefit of MPF was in the order of \$1.6 million.
- [25] Despite having properly raised these questions, Mr Whyte also properly acknowledged the relevance to my consideration of the details of the litigation funding (details of which remained confidential).
- [26] Counsel for the liquidators was also anxious to ensure that I had regard to the serious questions which had been raised as to the availability of assets to meet the potential claims under the first proceeding and the second proceeding, and also assisted considerably by pointing me to particular matters which might be of relevance when considering the terms of the proposed litigation funding agreement.

- It is, of course, neither appropriate nor possible on an application such as the present to descend into making findings as to the true quantum and extent of the assets which will properly be available to meet any judgment in the proceedings. It is, however, completely appropriate for me to have cognisance of the issues which have been raised on behalf of Mr Whyte and the liquidators, acknowledging also that the issues that they have raised will inevitably contribute to the complexity (and cost) of the litigation to be pursued. It cannot, I think, be said on any fair reading of the material before me that either the first proceeding or the second proceeding would be fruitless. On the other hand, it can equally be said that it is apparent that pursuit of the proceedings will be costly for all parties concerned. That is why it has been particularly relevant for me to have regard to the terms of the proposed litigation funding agreement.
- As I have said, the terms of that proposed litigation funding agreement are confidential, and, save for one respect, it is inappropriate for the details of that proposed agreement to be publicised in this judgment. It is sufficient to record that the terms of the proposed litigation funding agreement have been put before me, and, having reviewed those terms and considered those in the commercial context of the relief claimed in each proceeding and also the prospective limitations on recovery which have been flagged by counsel to the liquidators and counsel for Mr Whyte, I have reached the view that it is in the best interests of the trust estate of MPF that, with the proposed litigation funding agreement in place, each of the first proceeding and the second proceeding should be pursued.
- The one particular matter which arises out of the proposed funding agreement is this, namely that in each of the first proceeding and the second proceeding, the litigation funder will be required to file in Court a deed poll (in the form provided to me on a confidential basis) the effect of which will be that the litigation funder effectively assumes liability for adverse cost orders made against the Trustee in those proceedings. In view of the complexities of the litigation to which I have already referred, and the limitations on the MPF funds for recourse in the event of adverse costs orders being made, it seems to me that the provision of such a deed poll in each of the first proceeding and the second proceeding is necessary. Indeed, the approval I give under s 96 in respect of each of the proceedings will be conditioned on such a deed poll being filed in each of the proceedings.
- It is also necessary for me to deal with the applications which have been made under s 500 of the *Corporations Act*. LMIM is subject to voluntary liquidation. The relief sought in each of the proceedings is outside the scope of the usual proof of debt procedure this is particularly the case insofar as proprietary claims are pursued. It seems to me to be clearly appropriate for there to be leave to proceed in each case under s 500, and such leave shall be granted *nunc pro tunc*.
- [31] As to the costs of the s 96 application, I accept, as was said by Martin J in his KordaMentha judgment at [28], that in applications of this type the Trustee's costs are ordinarily ordered to be paid out of the trust estate on the indemnity basis.
- [32] The Trustee, however, resisted orders that the liquidators and Mr Whyte be similarly idemnified. It was argued that it would be inappropriate for either of those parties, effectively representing the interest of LMIM as they do, to have their costs now in

11

circumstances where each of the first proceeding and the second proceeding is founded on allegations of breach of trust by LMIM. It was contended that an allegedly defaulting trustee should only have its costs out of a trust fund after the proceeding has been resolved in its favour.

- [33] In the present case, however, there are a number of considerations to be taken into account.
- First, an application under s 96 is not a regular adversarial proceeding. Rather, it is the procedure by which a trustee obtains advice from the Court in relation to the management or administration of trust property. An important legal and a practical consequence of an order being made is that a trustee who acts on the direction of the Court is taken, as regards its own liability, to have discharged its duty as trustee so long as the trustee, has not been guilty of fraud, wilful concealment or misrepresentation in obtaining the direction see *Coore v Coore* [2013] QSC 196 at [6]. The making of an order is important for the trust, because the Court would necessarily have had regard to the proper use of the trust assets, and it is important for the Trustee, because of the practical protection which the making of the order provides for the trustee. So the nature of an application under s 96 is quite different as has been said by the High Court in the *Macedonian Church* case, it represents an exception to the Court's ordinary function of deciding disputes between competing litigants.¹
- [35] Secondly and consequentially, it was appropriate in the present case to hear from the liquidators and Mr Whyte. Moreover, the liquidators and Mr Whyte provided the Court with information and assistance which was highly relevant to my considerations as to whether or not to make the orders sought. That assistance particularly went to the questions concerning the availability of assets to meet any prospective judgment in the first proceeding and the second proceeding, and also relevant issues to which I needed to turn my mind when considering the appropriateness or otherwise of the litigation funding agreement.
- [36] In all of the circumstances, I have decided that it is appropriate, in this particular case, for each of the liquidators and Mr Whyte to be indemnified out of the MPF in respect of the costs they have incurred on the present application under s 96.
- The costs incurred in respect of the applications under s 500 of the *Corporations Act*, in my view, fall into a different category. Given the circumstances of the present case, and the particular nature of the allegations made, it seems to me that those are costs which should abide the event. Accordingly, the parties' costs in respect of the applications under s 500 shall be reserved costs in the first proceeding and the second proceeding respectively.
- Finally, it became clear in the course of argument that there will be issues which will need to be addressed early in the course of each of the proceedings. Not the least of these will be to identify the parties which will have carriage of the defences for LMIM. In any event, each proceeding is patently of such complexity as to warrant

¹ See Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand (2008) 249 ALR 250 at [64].

active case management. Accordingly, I will be directing the applicant to move immediately to have each proceeding placed on the commercial list.

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)

DEED POLL

DEED POLL

Filed on behalf of the plaintiff

MINTER ELLISON

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DX 102 BRISBANE

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Email

david.obrien@minterellison.com Reference NYB DOB 407747729

Form 1

ME 124474890_1 (W2003x)

067 298 088

DEED POLL

PARTY

NAME

IMF BENTHAM LIMITED ("IMF")

ACN

ADDRESS

LEVEL 10, 39 MARTIN PLACE,

SYDNEY NSW 2000

TELEPHONE ATTENTION 02 8223 3567 DIANE JONES

E-MAIL

djones@imf.com.au

DEFINITIONS

ADVERSE COST ORDER

Means any costs order made in favour of the

Respondent against the Applicant in the Proceedings in

respect of costs incurred during the term of the LFA.

APPLICANT

KordaMentha Pty Ltd

COURT

The Court where the Proceedings are conducted.

LFA

The litigation funding agreement which commenced on

4 September 2015 between IMF and the Applicant.

PROCEEDINGS

Supreme Court of Queensland Proceeding No. 8032/14

RESPONDENT

LM Investment Management Limited (Receivers and

Managers Appointed) (In Liquidation) (ACN 077 208 461)

GOVERNING LAW

The law of Queensland.

BY THIS DEED POLL, IMF, for the benefit of the Court and the Respondent:

- (a) submits to the jurisdiction of the Court in relation to any order the Court may wish to make directly against IMF in the Proceedings that IMF pay any Adverse Costs Order;
- (b) agrees not to oppose any joinder application made by the Respondent in the Proceedings for the purpose of seeking an order that IMF pay any Adverse Cost Order, and agrees, in circumstances where the rules of the Court prevent that joinder, at the Respondent's request, to itself apply to be joined to the Proceedings, to enable such an order to be made against it;
- (c) agrees to pay to the Respondent the final, quantified amount of any Adverse Cost Order such that the Respondent may enforce the payment of that amount as a debt due and owing by IMF to the Respondent;
- (d) agrees to notify the Respondent in writing of any termination of the LFA within 7 days of it so terminating; and
- (e) acknowledges having received valuable consideration for this Deed Poll.

DATED this the 8th day of September 2015.

Executed as a Deed Poll By IMF Bentham Limited

Director

Director (Secretary)

SUPREME COURT OF QUEENSLAND

SUPREME COURT OF QUEENSLAND

2 0. MAR 2015

FILED BRISBANFlaintiff REGISTRY

Brisbane

NUMBER

12317 of 2014

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

ORDER

Filed on behalf of the Eighth Defendant

MINTER ELLISON Waterfront Place

1 Eagle Street

BRISBANE OLD 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

ORDER

Before:

Justice Applegarth

Date:

19 March 2015

Initiating document:

Application filed on 17 February 2015

THE ORDER OF THE COURT IS THAT:

- 1. Pursuant to section 96 of the *Trusts Act* 1973 (Qld), the first named eighth defendant is directed that it would be justified in defending this proceeding on the grounds set out in the draft defence ("Defence") exhibited as exhibit 'JV-1' to the affidavit of Jarrod Villani filed on 4 March 2015.
- The eighth defendant file and serve in this proceeding its Notice of Intention to Defend and Defence within 7 days of this order.
- The eighth defendant's costs and expenses of and incidental to the application be paid on the indemnity basis out of the LM Managed Performance Fund.
- 4. The joint memorandum of advice of Counsel (Exhibit 2) be placed in a sealed envelope marked "not to be opened without an order of a Judge of this Court".



Deputy Registrar:

TCS Solicitors Ptv. 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

9 January 2018

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

Your reference:

Mr O'Brien / Mrs Braad

Consultant. David Tucker.

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

Email:

david.obrien@minterellison.com nadia.braad@minterellison.com Special Counsel. Geoff Hancock. Alex Nase, Brent Weston.

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

Dear Colleagues

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 ("the Proceedings")

We refer to our letter to you dated 21 December 2017, and to your email to us dated 22 December 2017.

The settlement negotiations have not been successful because they have not culminated in any settlement. However, that statement is not to be taken as an indication that our client is not prepared to participate in the proposed discussions with LMIM's liquidators represented by Clayton Utz, and your client, for the purpose of considering whether to further engage with LMIM's directors or alternatively, to consider whether a settlement between LMIM, FMIF and MPF is possible. We are instructed that our client is prepared to participate in such discussions.

However, our client is conscious that:

- 1. the settlement negotiations started in about July of 2016 and went on for about 18 months;
- 2. no steps have been taken in the Proceedings for over one year;
- 3. under rule 5(3) of the *Uniform Civil Procedure Rules* ("UCPR"), a party impliedly undertakes to the Court and to the other parties to proceed in an expeditious way;
- 4. the winding up of the FMIF has been ongoing for a number of years, and cannot be completed or any distributions made to investors, until the remaining legal proceedings are resolved, or determined.

Having regard to the above matters, our client is of the view that the parties cannot justify keeping the Proceedings in abeyance indefinitely and that, unless and until the Proceedings are discontinued by your client or settle, the parties ought to take steps to progress the Proceedings expeditiously.

We are also instructed to note that the claim by LMIM as RE of the FMIF against your client and others in Supreme Court of Queensland Proceeding 12317/14 is not in abeyance and is to be listed for review on the commercial list.

Accordingly, we would be grateful for your response to the queries in our letter of 21 December 2017 as to whether or not your client intends to proceed with the claims made in the Proceedings and if so, your client's attitude to the parties writing to His Honour's Associate to request that the matter be listed for a review on the commercial list.

We note that the next step in the Proceedings is for your client to file and serve fourth further amended statement of claims in a form which contains amendments described in your letter to us of 26 May 2016 and amendments in accordance with paragraph 48 of the reasons for judgment pronounced on 19 August 2016, in accordance with paragraph 1 of the orders made on 7 December 2016.

If your client intends to proceed with the claims made in the Proceedings, we would be grateful if you would let us know when your client anticipates being in a position to file and serve fourth further amendment statements of claim.

We look forward to hearing from you.

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.

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Our reference:

Mr Schwarz / Mr Nase

1 March 2018

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

Your reference:

Mr O'Brien / Mrs Braad

Consultant. David Tucker.

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

Email:

david.obrien@minterellison.com nadia.braad@minterellison.com Special Counsel. Geoff Hancock. Alex Nase. Brent Weston.

Associates.
Marcelle Webster.
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Robert Tooth.

Dear Colleagues

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 ("the Proceedings")

We refer to:

- 1. our letter to you dated 14 June 2016 outlining the basis upon which our client considers there is reason to believe that your client will not be able to pay our client's costs for the Proceedings, if ordered to do so;
- 2. your letter to us dated 1 July 2016 advising that IMF Bentham Ltd ("IMF") and the plaintiff are prepared to amend the definition of "Respondent" in the Deed Polls to include Mr Whyte.

A copy of those letters is **enclosed** for ease of reference.

We note that revised Deed Polls do not appear to have been filed in the Court, nor have we received a copy of the revised Deed Polls from you.

We are instructed to request that:

- 1. you provide us with a copy of the revised Deed Polls, if they have been signed, or the draft of the revised Deed Polls, if they have not yet been signed, so that our client may consider the adequacy of the amendments or proposed amendments, as the case may be. We reserve our client's position in relation to the adequacy of the proposed amendments and in relation to security for costs;
- 2. you provide us with a copy of the most recent financial statements for IMF, so that our client may confirm its capacity to pay our client's costs of the proceedings, if ordered to do so.

We would be grateful if you would reply to this letter and provide the requested documents at your earliest convenience and in any case, within 14 days of the date of this letter.

If you have any queries or wish to discuss the matter, please do not hesitate to contact us.

Yours faithfully

Alex Nase

Tucker & Cowen

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anase@tuckercowen.com.au

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(07) 3210 3503

Encl.

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MinterEllison

29 March 2018

BY EMAIL

Mr Alex Nase Tucker & Cowen Level 15 15 Adelaide Street BRISBANE QLD 4000

Dear Mr Nase

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 ("the Proceedings")

We refer to your letter dated 1 March 2018.

We attach a draft Amended Deed Poll, which MF Bentham Limited ("IMF") is prepared to sign. Please would you let us know by Friday, 6 April 2018, whether your client has any comments upon the terms of the attached draft.

We also attach a copy of the most recent financial statements of IMF, as requested.

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: 407747737

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Our reference:

Mr Schwarz / Mr Nase

5 April 2018

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

Your reference:

Mr O'Brien / Mrs Braad

Consultant. David Tucker.

Special Counsel. Geoff Hancock.

Alex Nase.

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

Email:

david.obrien@minterellison.com nadia.braad@minterellison.com Associates.

Marcelle Webster.
Emily Anderson.

Olivia Roberts. James Morgan. Scott Hornsey.

Robert Tooth.

Dear Colleagues

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 ("the Proceedings")

We refer to your letter dated 29 March 2018 regarding security for costs.

Financial Statements

We note that the financials provided are the consolidated financials of the IMF Group.

Our client is unable to confirm the financial capacity of IMF Bentham Limited, the entity signing the Deed Poll, based on the consolidated financials.

Would you please provide us with the financial statements for IMF Bentham Limited itself (as a stand alone entity), so that our client may confirm its capacity to satisfy an adverse costs order?

Draft Supplementary Deed Poll

We now <u>attach</u> an amended draft of the Supplementary Deed Poll, with changes suggested by our client marked-up for your client's consideration.

Most of the changes are self-explanatory.

It seems to us that the document should be described as a Supplementary Deed Poll (preferably), or if it is intended that the Deed Poll will replace the previous Deed Poll, LMIM should be included in the definition of Defendant (and corresponding amendments made to other clauses in the Deed Poll).

Would you please clarify whether or not the intention is that the Amended Deed Poll will replace the Deed Polls previously filed by your client in the Court? We note that the previous Deed Polls were filed pursuant to order 2 of the orders of Daubney J dated 26 August 2015 in Proceeding No. 5329/15.

Please provide us with a copy of the Supplementary Deed Polls, once they have been signed by IMF and filed in the Court.

We reserve all of our client's rights with respect to security for costs.

Yours faithfully

Alex Nase

Tucker & Cowen

Direct Email:

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Direct Line:

(07) 3210 3503

Encl.

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Our reference:

Mr Schwarz / Mr Nase

18 April 2018

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

Your reference:

Mr O'Brien / Mrs Braad

Consultant. David Tucker.

Special Counsel.

Geoff Hancock. Alex Nase.

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Associates. Marcelle Webster. Emily Anderson. Olivia Roberts. James Morgan.

Scott Hornsey. Robert Tooth.

Dear Colleagues

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 ("the KPG Loan Proceedings")

- 1. We refer to the Third Further Amended Statement of Claim filed by your client, the Plaintiff, on 19 April 2016, in Supreme Court Proceedings 8032/14 (3FASOC).
- 2. We anticipate that the Plaintiff will file a Fourth Further Amended Statement of Claim, to make the amendments foreshadowed by your letter to us dated 25 May 2016, and to give effect to his Honour Justice Applegarth's reasons for Judgment pronounced 19 August 2016.
- 3. In addition to those amendments, we write to raise three further issues regarding your client's 3FASOC, as follows:
 - (a) First, Mr Whyte seeks certain further and better particulars of the allegations made by the 3FASOC, as set out below;
 - (b) Second, we raise for your consideration the operation of section 601FH(b) of the Corporations Act 2001 (Cth) (the Act), which we understand to preclude your client from subrogating to LMIM's rights of indemnity;
 - (c) Third, we raise for your consideration the operation of section 601GA(2) of the Act on the case we understand to be advanced by paragraphs 76 and 77 of the 3FASOC, namely that there is a right to an indemnity notwithstanding that the liability may not have been properly incurred, because a benefit was conferred on the FMIF.

Request for particulars

- 4. This letter is written under Part 8 of Chapter 11 of the UCPR.
- Mr Whyte's complaint is that the Plaintiff has failed to provide adequate particulars of certain aspects of its claim, as set out below.
- 6. Without a proper pleading and particularisation of the plaintiff's case, Mr Whyte is unable to know, with requisite certainty, the claim advanced against assets of the LM First Mortgage Income Fund (FMIF).

- 7. In the absence of a satisfactory response to this correspondence, Mr Whyte intends to file an application seeking orders for the provision of the particulars sought by this letter under rule 161 of the UCPR.
- 8. The relevant facts are as follows:
 - (a) The Plaintiff has sought to articulate a claim for loss in a number of iterations of its pleading. Initially it sought to advance a constructive trust claim against the assets of the FMIF, however that has been abandoned.
 - (b) The Plaintiff's claim is now that LMIM acted in breach of trust as the trustee of the MPF by entering into an assignment of the KPG Loans, as a result of which the MPF suffered loss for which it is entitled to equitable compensation from LMIM. The loss in question is alleged to comprise the payments allegedly made from the MPF in satisfaction of the consideration for those assignments.
 - (c) However, Mr Whyte's accounting investigations (the results of which were communicated to you by letter of 13 January 2016) have confirmed only the total sum of \$5,227,270.82 received into bank accounts of the FMIF, in satisfaction not only of the consideration (including interest) for the assignment of the KPG Loans, but also in satisfaction of the consideration (including interest) for the assignment of the Lifestyle Loan (the subject of Supreme Court Proceedings 8034/14, the Lifestyle Loan) a third loan, concerning a Mr Kamel Albassit (the Albassist Loan) and an unrelated transaction concerning the assignment from LM Administration Pty Ltd to LMIM as trustee of the MPF a debt of \$5.1 million that was originally a prepayment of management fees by LMIM as RE of the FMIF to LM Administration Pty Ltd.

The further and better particulars required

- 9. In the circumstances, Mr Whyte requires the following further and better particulars:
- 10. *First*, Mr Whyte requires the Plaintiff to provide the following further and better particulars of paragraph 61 of the 3FASOC:
 - (a) The date and amount of each payment from the MPF alleged to be in satisfaction of the Settlement Sum; and
 - (b) The account details of the bank account into which each such payment was transferred or deposited.
- 11. We note that the particulars provided by the Plaintiff to date are all by reference to accounting ledgers of LMIM.
- 12. In our view, that is not an adequate particularisation of the Plaintiff's case.
- 13. The bank records of the MPF are within the control of the Plaintiff. They are not within Mr Whyte's control nor, we understand, of the liquidators of LMIM. Mr Whyte therefore cannot fully investigate the destination of payments that were not made to bank accounts of the FMIF.
- 14. In any event, it is not appropriate to require Mr Whyte to establish or prove the Plaintiff's case, and for the FMIF to bear the expense of doing so.
- 15. *Second*, Mr Whyte requires the Plaintiff to provide the following further and better particulars of paragraph 61D of the 3FASOC:
 - (a) The date and amount of each payment from the MPF alleged to be in payment of interest on the Settlement Sum.
 - (b) The account details of the bank account into which each such payment was transferred or deposited.
- 16. Again, the particulars provided by the Plaintiff to date are all by reference to accounting ledgers of LMIM.

- 17. In our view, and for the same reasons as above, that does not constitute an adequate particularisation of the Plaintiff's case.
- 18. *Third*, insofar as any of the particularised payments are not payments made into an account of the FMIF, Mr Whyte requires the Plaintiff to provide full particulars or a proper pleading of each transaction by which each payment into an account other than an account of the FMIF was at the time or later reconciled as being in satisfaction of the Settlement Sum.
- 19. Of course, the nature and extent of the further particulars or pleading required to be provided will depend on the nature of the transaction said to explain the pleading.
- 20. It is not appropriate to require Mr Whyte to guess at the basis upon which transactions said to have been in satisfaction of the Settlement Sum or interest in fact have that character.
- 21. Those are matters which your client is required to prove and which, if not properly particularised or pleaded, have the potential to take our client by surprise.

Timing for compliance

- 22. We appreciate that the particulars requested may require some further investigation on the part of your client.
- 23. However, in our client's view there is no longer any justification for your client's continued delay in progressing these proceedings, and there has not been for some time now.
- 24. As such, our client requires your client to provide the required further and better particulars by Wednesday, 16 May 2018.
- 25. In the circumstances, we require your reply to this letter pursuant to rule 445, indicating whether your client will provide the required further and better particulars by 16 May 2018, within 7 days of the date of this letter.

Section 601FH(b) of the Act and the right of subrogation

- 26. The Plaintiff asserts a right of subrogation, that it is alleged entitles it to exercise LMIM's right of indemnity against the assets of the FMIF.
- 27. In that regard, we draw your attention to section 601FH(b) of the Act, which relevantly provides as follows:
 - "If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated: ... (b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed."
- 28. As to the purpose and intended effect of this provision, we draw your attention to the comments of the Australian Law Reform Commission (ALRC) in its report No. 45 (General Insolvency Inquiry) at [259] and [260], as follows:
 - [259] Trust creditors' derivative rights. . . . If, consequent upon the insolvency of a trustee, each creditor were to be allowed to claim separately against the trust fund or a beneficiary it would be time-consuming and expensive, prevent the orderly administration of the trust fund and prejudice the creditors who had not exercised such a right.
 - [260] Liquidator to exercise trust creditors' derivative rights. To avoid such multiple actions it was proposed in DP 32 (para 184) that upon the insolvency of a corporate trustee the liquidator should exercise the right of indemnity on behalf of all trust creditors. Submissions to the Commission supported this proposal . . .

Recommendation

[261] The Commission therefore recommends that, upon the insolvency of a corporate trustee, the exercise of the right of indemnity against both the trust property and the beneficiaries (if such a right exists) should be a 'collective' right exercisable by the company, through its liquidator, on behalf of all trust creditors. . . .

- 29. These comments were adopted by ALRC Report 65 (Collective Investments: Other People's Money) at paragraph 8.8 (page 76), which led to the enactment of the Managed Investments Act 1998, 1 and thereby to section 601FH(b) of the Act.
- 30. As such, it appears that section 601FH(b) of the Act, properly construed, excludes any right that might otherwise be exercisable by a creditor of a registered scheme to be subrogated to the responsible entity's right to be indemnified (by exoneration) from the scheme's assets, where the responsible entity is being wound up.
- 31. That interpretation is consistent with the comments made by Justice Jackson in *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283 at [41], [42] and [78].
- 32. If that is the correct interpretation, it seems to us that:
 - (a) Paragraph 85 of the 3FASOC and 6(c) of the Prayer for Relief are liable to be struck out, as reflecting an inaccurate and thus embarrassing proposition of law; and
 - (b) Your client may not have standing to seek the relief identified in paragraphs 6(a), 6(b) and 7 of the Prayer for Relief.
- 33. We invite your client reconsider its position as to these allegations, in finalising its 4FASOC, and we reserve all of our client's rights to make an appropriate application in due course, if they are maintained, without further notice.

Section 601GA(2) of the Act and indemnification of a trustee in circumstances of benefit

- 34. We understand the Plaintiff to be advancing a case by paragraphs 76 and 77 of the 3FASOC that, whether or not LMIM's liability to reconstitute the MPF was properly incurred, there is a right to an indemnity because LMIM as trustee has benefited the trust estate.
- 35. Such a case would be arguable at general law.² However, we understand the terms of section 601GA(2) of the Act to be mandatory, and to require that indemnification of the responsible entity of a registered scheme only be for liabilities or expenses that are in relation to the *proper* performance of its duties.
- 36. If that is correct, it seems to us that paragraphs 76 and 77 of the 3FASOC are irrelevant, and liable to be struck out on that basis.

Concluding comments

37. If you have any queries about any of the issues raised by this correspondence, please do not hesitate to contact us. We reserve all of our client's rights.

¹ See paragraphs 1.1 and 8.26 of the Explanatory Memorandum to the Managed Investments Bill 1997.

² See Kordamentha Pty Ltd v LM Investment Management Ltd [2016] QSC 183 at [20], and the cases cited there by his Honour.

Yours faithfully

Alex Nase

Tucker & Cowen

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Our reference:

Mr Schwarz / Mr Nase

18 April 2018

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

Your reference:

Mr O'Brien / Mrs Braad

Consultant. David Tucker.

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

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Scott Hornsey.
Robert Tooth.

Dear Colleagues

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 8034/14 ("the Lifestyle Loan Proceedings")

- 1. We refer to the Third Further Amended Statement of Claim filed by your client, the Plaintiff, on 19 April 2016, in Supreme Court Proceedings 8034/14 (3FASOC).
- 2. We anticipate that the Plaintiff will file a Fourth Further Amended Statement of Claim, to make the amendments foreshadowed by your letter to us dated 25 May 2016, and to give effect to his Honour Justice Applegarth's reasons for Judgment pronounced 19 August 2016.
- 3. In addition to those amendments, we write to raise three further issues regarding your client's 3FASOC, as follows:
 - (a) First, Mr Whyte seeks certain further and better particulars of the allegations made by the 3FASOC, as set out below;
 - (b) Second, we raise for your consideration the operation of section 601FH(b) of the Corporations Act 2001 (Cth) (the Act), which we understand to preclude your client from subrogating to LMIM's rights of indemnity;
 - (c) Third, we raise for your consideration the operation of section 601GA(2) of the Act on the case we understand to be advanced by paragraphs 62 and 63 of the 3FASOC, namely that there is a right to an indemnity notwithstanding that the liability may not have been properly incurred, because a benefit was conferred on the FMIF.

Request for particulars

- 4. This letter is written under Part 8 of Chapter 11 of the UCPR.
- Mr Whyte's complaint is that the Plaintiff has failed to provide adequate particulars of certain aspects of its claim, as set out below.
- 6. Without a proper pleading and particularisation of the plaintiff's case, Mr Whyte is unable to know, with requisite certainty, the claim advanced against assets of the LM First Mortgage Income Fund (FMIF).

- 7. In the absence of a satisfactory response to this correspondence, Mr Whyte intends to file an application seeking orders for the provision of the particulars sought by this letter under rule 161 of the UCPR.
- 8. The relevant facts are as follows:
 - (a) The Plaintiff has sought to articulate a claim for loss in a number of iterations of its pleading. Initially it sought to advance a constructive trust claim against the assets of the FMIF, however that has been abandoned.
 - (b) The Plaintiff's claim is now that LMIM acted in breach of trust as the trustee of the MPF by entering into an assignment of the Lifestyle Loan, as a result of which the MPF suffered loss for which it is entitled to equitable compensation from LMIM. The loss in question is alleged to comprise the payments allegedly made from the MPF in satisfaction of the consideration for that assignment.
 - (c) However, Mr Whyte's accounting investigations (the results of which were communicated to you by letter of 13 January 2016) have confirmed only the sum of \$5,227,270.82 received into bank accounts of the FMIF, in satisfaction not only of the consideration (including interest) for the assignment of the Lifestyle Loan, but also in satisfaction of the consideration (including interest) for the assignment of the KPG Loans Loan (the subject of Supreme Court Proceedings 8032/14, the KPG Loans), a third loan, concerning a Mr Kamel Albassit (the Albassist Loan), and an unrelated transaction concerning the assignment from LM Administration Pty Ltd to LMIM as trustee of the MPF a debt of \$5.1 million that was originally a prepayment of management fees by LMIM as RE of the FMIF to LM Administration Pty Ltd.

The further and better particulars required

- 9. In the circumstances, Mr Whyte requires the following further and better particulars:
- 10. First, Mr Whyte requires the Plaintiff to provide the following further and better particulars of paragraph 47 of the 3FASOC:
 - (a) The date and amount of each payment from the MPF alleged to be in satisfaction of the Settlement Sum; and
 - (b) The account details of the bank account into which each such payment was transferred or deposited.
- 11. We note that the particulars provided by the Plaintiff to date are all by reference to accounting ledgers of LMIM.
- 12. In our view, that is not an adequate particularisation of the Plaintiff's case.
- 13. The bank records of the MPF are within the control of the Plaintiff. They are not within Mr Whyte's control nor, we understand, of the liquidators of LMIM. Mr Whyte therefore cannot fully investigate the destination of payments that were not made to bank accounts of the FMIF.
- 14. In any event, it is not appropriate to require Mr Whyte to establish or prove the Plaintiff's case, and for the FMIF to bear the expense of doing so.
- 15. *Second*, Mr Whyte requires the Plaintiff to provide the following further and better particulars of paragraph 47D of the 3FASOC:
 - (a) The date and amount of each payment from the MPF alleged to be in payment of interest on the Settlement Sum.
 - (b) The account details of the bank account into which each such payment was transferred or deposited.
- 16. Again, the particulars provided by the Plaintiff to date are all by reference to accounting ledgers of LMIM.

- 17. In our view, and for the same reasons as above, that does not constitute an adequate particularisation of the Plaintiff's case.
- 18. Third, insofar as any of the particularised payments are not payments made into an account of the FMIF, Mr Whyte requires the Plaintiff to provide full particulars or a proper pleading of each transaction by which each payment into an account other than an account of the FMIF was at the time or later reconciled as being in satisfaction of the Settlement Sum.
- 19. Of course, the nature and extent of the further particulars or pleading required to be provided will depend on the nature of the transaction said to explain the pleading.
- 20. It is not appropriate to require Mr Whyte to guess at the basis upon which transactions said to have been in satisfaction of the Settlement Sum or interest in fact have that character.
- 21. Those are matters which your client is required to prove and which, if not properly particularised or pleaded, have the potential to take our client by surprise.

Timing for compliance

- 22. We appreciate that the particulars requested may require some further investigation on the part of your client.
- 23. However, in our client's view there is no longer any justification for your client's continued delay in progressing these proceedings, and there has not been for some time now.
- 24. As such, our client requires your client to provide the required further and better particulars by Wednesday, 16 May 2018.
- 25. In the circumstances, we require your reply to this letter pursuant to rule 445, indicating whether your client will provide the required further and better particulars by 16 May 2018, within 7 days of the date of this letter.

Section 601FH(b) of the Act and the right of subrogation

- 26. The Plaintiff asserts a right of subrogation, that it is alleged entitles it to exercise LMIM's right of indemnity against the assets of the FMIF.
- 27. In that regard, we draw your attention to section 601FH(b) of the Act, which relevantly provides as follows:
 - "If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated: ... (b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed."
- 28. As to the purpose and intended effect of this provision, we draw your attention to the comments of the Australian Law Reform Commission (ALRC) in its report No. 45 (General Insolvency Inquiry) at [259] and [260], as follows:
 - [259] *Trust creditors' derivative rights.* . . . If, consequent upon the insolvency of a trustee, each creditor were to be allowed to claim separately against the trust fund or a beneficiary it would be time-consuming and expensive, prevent the orderly administration of the trust fund and prejudice the creditors who had not exercised such a right.
 - [260] Liquidator to exercise trust creditors' derivative rights. To avoid such multiple actions it was proposed in DP 32 (para 184) that upon the insolvency of a corporate trustee the liquidator should exercise the right of indemnity on behalf of all trust creditors. Submissions to the Commission supported this proposal . . .

Recommendation

[261] The Commission therefore recommends that, upon the insolvency of a corporate trustee, the exercise of the right of indemnity against both the trust property and the beneficiaries (if such a right exists) should be a 'collective' right exercisable by the company, through its liquidator, on behalf of all trust creditors. . . .

- 29. These comments were adopted by ALRC Report 65 (Collective Investments: Other People's Money) at paragraph 8.8 (page 76), which led to the enactment of the Managed Investments Act 1998, and thereby to section 601FH(b) of the Act.
- 30. As such, it appears that section 601FH(b) of the Act, properly construed, excludes any right that might otherwise be exercisable by a creditor of a registered scheme to be subrogated to the responsible entity's right to be indemnified (by exoneration) from the scheme's assets, where the responsible entity is being wound up.
- 31. That interpretation is consistent with the comments made by Justice Jackson in *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283 at [41], [42] and [78].
- 32. If that is the correct interpretation, it seems to us that:
 - (a) Paragraph 71 of the 3FASOC and 6(c) of the Prayer for Relief are liable to be struck out, as reflecting an inaccurate and thus embarrassing proposition of law; and
 - (b) Your client may not have standing to seek the relief identified in paragraphs 6(a), 6(b) and 7 of the Prayer for Relief
- 33. We invite your client reconsider its position as to these allegations, in finalising its 4FASOC, and we reserve all of our client's rights to make an appropriate application in due course, if they are maintained, without further notice.

Section 601GA(2) of the Act and indemnification of a trustee in circumstances of benefit

- 34. We understand the Plaintiff to be advancing a case by paragraphs 62 and 63 of the 3FASOC that, whether or not LMIM's liability to reconstitute the MPF was properly incurred, there is a right to an indemnity because LMIM as trustee has benefited the trust estate.
- 35. Such a case would be arguable at general law.² However, we understand the terms of section 601GA(2) of the Act to be mandatory, and to require that indemnification of the responsible entity of a registered scheme only be for liabilities or expenses that are in relation to the *proper* performance of its duties.
- 36. If that is correct, it seems to us that paragraphs 62 and 63 of the 3FASOC are irrelevant, and liable to be struck out on that basis.

Concluding comments

37. If you have any queries about any of the issues raised by this correspondence, please do not hesitate to contact us. We reserve all of our client's rights.

¹ See paragraphs 1.1 and 8.26 of the Explanatory Memorandum to the Managed Investments Bill 1997.

² See Kordamentha Pty Ltd v LM Investment Management Ltd [2016] QSC 183 at [20], and the cases cited there by his Honour.

Yours faithfully

Alex Nase

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Our reference:

Mr Schwarz / Mr Nase

18 April 2018

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

Your reference:

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Dear Colleagues

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 ("the Proceedings")

We refer to our letter to you dated 21 December 2017, your email to us dated 22 December 2017, our letters to you dated 9 January 2018 and 23 February 2018, and to your letter to us dated 29 March 2018.

Fourth Further Amended Statements of Claim

On 7 December 2016, His Honour Applegarth J ordered that your client have leave to file and serve Fourth Further Amended Statements of Claim that contain amendments that reflect those described in your letters to us dated 25 May 2016, and that give effect to His Honour's reasons for Judgment pronounced 19 August 2016.

Your client has failed to amend in accordance with this order, despite repeated requests from our client.

We are instructed to again request that your client file and serve fourth further amended statements of claim, in accordance with His Honour's orders.

Commercial List Review

This matter was last reviewed by His Honour Jackson J on the Commercial List on 16 December 2016.

You client has failed to take any steps in the proceedings for well over one year.

At the time of adjourning the matter to a date to be fixed, our client does not imagine that His Honour would have contemplated the proceedings being kept in abeyance for this amount of time.

We are instructed to again confirm that the discussions between our respective clients have ceased.

Accordingly, if your client wishes to proceed with its claims in these proceedings, there is no longer any justification for your client's continued delay (and has not been for some time now).

We are also instructed that Supreme Court of Queensland Proceeding 12317/14, which was also one of the proceedings the subject of the discussions between our respective clients, is on the commercial list before His Honour, and directions are being made, and steps are being taken in that proceeding. It is unclear to our client why your client considers it is appropriate that these Proceedings continue to be kept in abeyance, notwithstanding that directions are being made and steps are being taken in Proceeding 12317/14.

Request for Particulars

We refer to the two letters that accompany this correspondence, sent pursuant to rule 444 of the Uniform Civil Procedure Rules 1999. We look forward to receiving your client's response to that correspondence within the time nominated.

Notice of Intention to Proceed

For the sake of completeness, and to the extent that it is necessary to do so, we hereby give one month's notice, pursuant to rule 389 of the *Uniform Civil Procedure Rules*, of our client's intention to proceed in each of the Proceedings.

Proposed Timetable in the Proceedings

Our client proposes that: -

- 1. your client file and serve its Fourth Further Amended Statements of Claim, and provide its responses to the requests for Further and Better Particulars, within 28 days; and
- 2. thereafter, both Proceedings be listed for review on the next available date convenient to His Honour and the parties.

We are instructed to request that your client agree to this timetable.

Would you please provide us with a list of dates on or after Monday, 14 May 2018 that suit your client for the next review, so that we may prepare draft correspondence to His Honour's Associate requesting that the matter be listed for review?

Alternatively, if your client no longer wishes to proceed with its claims, please confirm that position, so that we mayseek instructions from our client as to whether he would be agreeable to the Proceedings being dismissed.

We would be grateful if you would reply to this letter at your earliest convenience, and, in any event, within 7 days.

Yours faithfully

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Email:

david.obrien@minterellison.com nadia.braad@minterellison.com Special Counsel. Geoff Hancock. Alex Nase. Brent Weston.

Dear Colleagues

Associates. Marcelle Webster. Emily Anderson. Olivia Roberts. James Morgan.

KordaMentha Pty Ltd in its capacity as trustee of the LM Management Performance Fund (MPF) (KordaMentha) v LMcott Hornsey. Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) (LMIM) and David Whtye in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund (FMIF) (Mr Whyte) — Supreme Court of Queensland Proceeding 8032/14 (KPG Loan Proceeding)

KordaMentha v LMIM and Mr Whyte - Supreme Court of Queensland Proceeding 8034/14 (Lifestyle Loan Proceeding)

LMIM as responsible entity of the FMIF v LMIM - Supreme Court of Queensland Proceeding 11560/16 (Breach of Trust Proceeding)

- 1. We act for Mr Whyte in each of the KPG Loan Proceeding, the Lifestyle Loan Proceeding and the Breach of Trust Proceeding.
- 2. In circumstances where it would seem that the KPG and Lifestyle Loan Proceedings may proceed, we write to raise two issues that are important to their future management and conduct. Relevantly, as we understand the allegations made by your client in those proceedings, they involve the following series of propositions by your client:
 - (a) First, that LMIM acted in breach of trust as the trustee of the MPF by entering into a series of transactions involving the KPG Loans and the Lifestyle Loan, as a result of which the MPF suffered loss for which it is entitled to equitable compensation from LMIM.
 - (b) Second, that in entering into each of those transactions, LMIM was also acting as trustee and responsible entity of the FMIF.
 - (c) Third, that, as a result, LMIM has a right of indemnity against the assets of the FMIF to exonerate it of its liability to pay equitable compensation to the MPF.
 - (d) Fourth, that your client is entitled to subrogate to and thereby to itself enforce LMIM's right of indemnity against the assets of the FMIF.
- 3. The purpose of this correspondence is to raise two matters for your consideration, regarding the third and fourth propositions. Specifically:
 - (a) First, we believe that your client may have an interest in the Breach of Trust Proceeding being defended. That is because, as we explain below, the effect of the clear accounts rule includes that your client's ability, if any, to be afforded monetary relief against the assets of the FMIF, if the claims made by your client in the KPG and Lifestyle Loan Proceedings are otherwise successful, depends on the outcome of the Breach of Trust Proceeding. We ask you to consider and advise us of your position on this issue.

(b) Second, we ask that you clarify or confirm how your client proposes to address the effect of section 601FH(b) of the Corporations Act 2001 (Cth) (the Act) on any right of subrogation, which might otherwise have been available to your client.

-2-

The Breach of Trust Proceeding

- 4. We refer to our emails to you dated 16 December 2016, by which we provided you with a copy of the Claim and Statement of Claim filed in the Breach of Trust Proceeding.
- 5. We advise that our client has filed an Amended Claim and Statement of Claim, and Consolidated Particulars, copies of which are enclosed for your consideration.
- 6. Relevantly, and as you are aware, a trustee's right of indemnification is subject to the rule known as the 'clear accounts rule'.
- 7. The existence of that rule was noted by Justice Applegarth in his Honour's judgment in the KPG and Lifestyle Loan Proceedings: see [2016] QSC 183 at [21].
- 8. More recently, it was the subject of specific consideration and findings by Justice Jackson in related proceedings: see [2017] QSC 230 at [124] to [143]. In that case, LMIM (as the Second Applicant) had asserted a right of indemnity against the assets of the FMIF, which was resisted by Mr Whyte on the basis of the clear accounts rule.
- 9. Specifically, we draw your attention to paragraphs [137] to [143] of Justice Jackson's judgment, as follows (footnotes omitted):
 - [137] In some quarters, the clear accounts rule is seen as derived from the rule in *Cherry v Boultbee*. A reasonable argument exists that it is either separable from or a sub-set of the principles for which *Cherry v Boultbee* is often cited. The Court of Appeal in *Re Dacre, Whitaker v Dacre,* without considering *Cherry v Boultbee*, acted on the footing that there was a long series of authorities that "a defaulting trustee cannot claim a share in the estate unless and until he has made good his default" and that the rule is based on the theory "that the [c]ourt treats the trustee as having received his share by anticipation", meaning that the trustee is treated as already having received its share to the extent of the default. Modern statements do not gainsay those propositions.
 - [138] In *RWG Management*, Brooking J considered and rejected an argument that a trustee was prevented from making a claim for indemnity for expenses against the estate until it has made good the loss to the estate from default, in the sense of payment of the amount of the default. Instead, he accepted that the counter-liabilities were to be applied (as if set off) against each other on the principle set out above, so that the trustee is entitled to any excess in its favour.
 - [139] To the extent that the reasons of Gordon J in Australian Securities and Investments Commission v Lettern and ors (No 17) suggest that the trustee's obligation to make good the default is a condition precedent to the right to an indemnity, in my view, they should not be taken as requiring anything more than the process of reducing the amount of the right by the amount of the counter-liabilities in accordance with the principle stated by Brooking J, as already mentioned.
 - [140] That may mean that the net amount of the right to an indemnity will not be capable of ascertainment until the amount of the loss caused by the breach of trust that is the basis of the counter-liability can be established. But that is a procedural matter, not an element of the right to indemnity or a matter of substantive defence. Hence, in my view, the statement of Young CJ in *Warne v GDK Financial Solutions Pty Ltd; Billingham v Parberry* that the trustee has a *prima facie* right to indemnity but an order for accounts will be made if there is doubt about a default that suspends the right of the trustee while the accounts are taken is correct. This reflects how matters would have proceeded in an administration action in equity involving an allegation of breach of trust.
 - [141] Gordon J in *Lettern* accepted that a breach of certain "core" duties will as a matter of course result in a loss of the right to indemnity for an associated expense. However, it is necessary to distinguish that statement from the operation of the clear accounts rule or the wider rule in *Cherry v Boultbee*. That statement was not concerned with either principle,

but a trustee's right to indemnity for an expense incurred in connection with the postulated breach of a core duty. There is no principle that the operation of the clear accounts rule is confined to a trustee's right to indemnity for an expense connected with a breach of trust.

- [142] Following these steps, in the present case, reduction of the amount of the right of indemnity by the amount of the claim for the counter-liabilities in proceeding BS11560/16 [i.e. the Breach of Trust Proceedings] would exceed the amounts claimed by LMIM for payment for indemnity for expenses, even if the claim for indemnity were otherwise accepted as one made for expenses properly incurred by LMIM as trustee or responsible entity.
- [143] It follows that the clear accounts rule operates to "suspend" the claimed right to payment from the assets of the FMIF until the resolution of that claim and that LMIM's indemnity claims, to the extent that they are otherwise maintainable, should not be finally resolved until the claim in proceeding BS11560/16 is resolved.
- 10. Those findings are directly applicable to your client's claims in the KPG and Lifestyle Loan Proceedings. Relevantly, even in the event that your client is entirely successful in establishing a right to equitable compensation against LMIM, and in establishing a prima facie right for LMIM to be indemnified against the assets of the FMIF, that right of indemnity:
 - (a) is suspended until the Breach of Trust Proceeding is resolved; and
 - (b) may not be productive of a money order in LMIM's or (subject to what we say below, by subrogation) your client's favour, in the event that LMIM is found to have counter-liabilities to the FMIF for breach of trust in the Breach of Trust Proceeding exceeding the amount of any compensation to which your client is found to be entitled.
- We are instructed that our client intends to raise the clear accounts rule in response to the indemnity asserted by your client in the KPG and Lifestyle Loan Proceedings, and in doing so to rely on the breaches of trust alleged in the Breach of Trust Proceeding.
- 12. With the above in mind, we note that our client is required to approach the Court for directions under section 59 of the *Trusts Act* 1973 as to who should represent the differing interests in the Breach of Trust Proceeding, because LMIM is on both sides of the record in different capacities.
- 13. Our client is of the view that it ought to bring the required application under section 59 of the *Trusts Act* without further undue delay.
- 14. To that end, we have corresponded with the liquidators of LMIM about the appropriate directions to be made. They have advised that they are without funds, and that consequently they do not intend to take any active role in the proceeding.
- 15. Although our client considers the liquidators of LMIM to be appropriate persons to represent LMIM's interests as the defendant to the allegations made in the Breach of Trust Proceeding, nonetheless we are drawing all of this to your attention because, in light of the effect of the clear accounts rule, it seems to us that your client has a clear interest in the Breach of Trust Proceedings being actively defended.
- 16. We ask that you consider these matters and advise us of your client's position by Wednesday, 16 May 2018.

The existence of a right of subrogation

17. In both the KPG and Lifestyle Loan Proceedings, your client asserts a right of subrogation, that it is alleged entitles your client to exercise LMIM's right of indemnity against the assets of the FMIF.

18. In that regard, we draw your attention to section 601FH(b) of the Act, which relevantly provides as follows:

If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated: ... (b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed.

19. As to the purpose and intended effect of this provision, we draw your attention to the comments of the Australian Law Reform Commission (ALRC) in its report No. 45 (General Insolvency Inquiry) at [259] and [260], as follows:

[259] *Trust creditors' derivative rights.* ... If, consequent upon the insolvency of a trustee, each creditor were to be allowed to claim separately against the trust fund or a beneficiary it would be time-consuming and expensive, prevent the orderly administration of the trust fund and prejudice the creditors who had not exercised such a right.

[260] Liquidator to exercise trust creditors' derivative rights. To avoid such multiple actions it was proposed in DP 32 (para 184) that upon the insolvency of a corporate trustee the liquidator should exercise the right of indemnity on behalf of all trust creditors. Submissions to the Commission supported this proposal . . .

Recommendation

[261] The Commission therefore recommends that, upon the insolvency of a corporate trustee, the exercise of the right of indemnity against both the trust property and the beneficiaries (if such a right exists) should be a 'collective' right exercisable by the company, through its liquidator, on behalf of all trust creditors. . . .

- 20. These comments were adopted by ALRC Report 65 (Collective Investments: Other People's Money) at paragraph 8.8 (page 76), which led to the enactment of the Managed Investments Act 1998, and thereby to section 601FH(b) of the Act.
- 21. As such, it seems to us that the purpose and effect of section 601FH(b) of the Act is to exclude any right that might otherwise be exercisable by a creditor of a registered scheme to be subrogated to the responsible entity's right to be indemnified (by exoneration) from the scheme's assets.
- 22. If that is correct, it seems to us that:
 - (a) section 601FH(b) of the Act defeats your client's purported exercise of a right to be subrogated to LMIM's rights of indemnity from the assets of the FMIF;
 - (b) your client can of course pursue relief against LMIM, but it must rely on LMIM to exercise such rights of indemnity as may be available to it against the assets of the FMIF, subject to the operation of the clear accounts rule.
- 23. In light of this, we ask that your client clarify or confirm its position as to how it intends to overcome the effect and the operation of section 601FH(b) of the Act or why it asserts that s 601FH(b) does not have the effect suggested in this letter, by Wednesday, 16 May 2018.
- 24. If you have any queries about any of the issues raised by this correspondence, please do not hesitate to contact us. We reserve all of our client's rights.

Yours faithfully

Alex Nase

Tucker & Cowen

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See paragraphs 1.1 and 8.26 of the Explanatory Memorandum to the Managed Investments Bill 1997.

Encl.

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24 April 2018

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Robert Tooth.

Dear Colleagues

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 ("the Proceedings")

We refer to your letter dated 29 March 2018 regarding security for costs, and to our letter to you dated 5 April 2018 (copy attached).

We note that we have not yet received a response to our letter.

Would you please:-

- 1. provide us with the financial statements for IMF Bentham Limited itself (as a standalone entity), so that our client may confirm its capacity to satisfy an adverse costs order; and
- provide us with a copy of the Supplementary Deed Polls once they have been signed by IMF and filed in the Court, within seven days of the date of this letter.

We reserve all of our client's rights with respect to security for costs.

Yours faithfully

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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 .

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Our reference:

Mr Schwarz / Mr Nase

3 May 2018

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

Your reference:

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Consultant. David Tucker.

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James Morgan.
Scott Hornsey.
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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.

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.

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

RUSSELLS

11 May 2018

Our Ref: AJT:JTW:20150642

Your Ref: Mr O'Brien

David O'Brien Minter Ellison Level 22, Waterfront Place 1 Eagle Street BRISBANE QLD 4000

By Email: david.obrien@minterellison.com

Dear Colleagues

KordaMentha Pty Ltd atf the LM Managed Performance Fund Supreme Court of Queensland Proceeding No. 5329 /15

KordaMentha Pty Ltd atf the LM Managed Performance Fund 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) & David Whyte in his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund Supreme Court of Queensland Proceeding No. 8034/14

We refer to your letter of 1 May 2018 and to your email of 9 May 2018.

We request that our client is served with your client's application pursuant to section 96 of the *Trusts Act 1973* (Qld) ("**the Trusts Act**") and all affidavits in support of that application. Please also tell us as soon as possible the hearing dates in respect of that application.

Your letter of 1 May 2018 gives notice of IMF Bentham Limited's ("**IMF**") termination of its agreement to fund proceedings 8032/14 and 8034/14 effective 1 May 2018 and states that your client intends to discontinue those proceedings if so advised by the Supreme Court of Queensland following the hearing of your client's application under the Trust Act.

Rule 307(1) of the UCPR provides that a party who discontinues or withdraws is liable to pay the costs of the party to whom the discontinuance or withdraw relates up to the discontinue or withdraw and the

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costs of another party or parties caused by the discontinuance or withdrawal. Accordingly, our client is, *prima facie*, entitled to its costs of proceedings 8032/14 and 8034/14 upon your client discontinuing those matters presently before the Court. Please let us know if you disagree and, if so, why.

In your 1 May 2018 letter you also refer to order 2 of the Order made by the Honourable Justice Daubney in proceeding BS5329/15 on 26 August 2015, that Order setting out a condition in respect of a Deed Poll being executed by IMF.

As our client understands the situation, on 8 September 2015 IMF executed a Deed Poll in respect of proceedings 8032/14 and 8034/14; clause (c) of that Deed Poll stating, amongst other things, that IMF for the benefit of the Court and the Respondent "agrees to pay the Respondent the final, quantified amount of any Adverse Cost Order such that the Respondent may enforce the payment of that amount as a debt due and owing by IMF to the Respondent."

"Respondent" is defined in the Deed Poll as LMIM and "Adverse Cost Order" is defined as "any costs order made in favour of the Respondent against the Applicant in the Proceedings in respect of costs incurred during the term of the LFA". LFA is defined as the "litigation funding Agreement which commenced on 5 September 2015 between IMF and the Applicant."

It is our view that IMF's obligations under clause (c) of the Deed Poll are in respect of legal costs incurred prior to the termination of the LFA. Our client is therefore entitled, should your client discontinue proceedings 8032/14 and 8034/14, to all its legal costs up to the date of termination in accordance with the Deed Poll, particularly given rule 307(1) of the UCPR.

Consequently, on the hearing of your client's application under the Trusts Act our client will be seeking orders that proceedings 8032/14 and 8034/14 are only discontinued if costs orders are made against your client, with IMF obligated to pay our client's legal costs. We will then be seeking to relist proceedings 8032/14 and 8034/14 so that orders can be made under rule 307(2) of the UCPR.

Please let us know if your client takes an alternative view and, if so, on what basis.

There is obvious commercial benefit to both sides in attempting to agree the quantum of any costs order and our client has instructed us to offer to discuss this issue with you. Please let us know if you wish to so do.

Further, in respect of the costs of the proceeding 5329/15 (being your client's application pursuant to the Trusts Act), although, for the reasons outlined earlier by Tucker & Cowen, we see little need for such an application to be made, our client's position is that it's costs of that application should be paid on an indemnity basis from the trust assets of the MPF. Please let us know if you take a different view and if so, why. That being said, our client is cognisant of the commerciality in getting too far into the detail of that application but will, only if necessary, appear at the eventual hearing of your client's Trusts Act application to seek the above orders (assuming that those orders are contested). Our client will otherwise be adopting a minimalist approach to that application.

Page 2 of 3

Yours faithfully

Julian Walsh Special Counsel

Direct 07 3004 8836 Mobile 0449 922 233

JWalsh@RussellsLaw.com.au

Our Ref: AJT:JTW:20150642

Your Ref: Mr O'Brien

MinterEllison

14 May 2018

BY EMAIL

Mr Julian Walsh 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 you letter dated 11 May 2018.

Our client has applied for a direction to discontinue BS8032/14 and BS8034/14. That application is to be heard on 7 June 2018, commencing at 10am.

If our client obtains a direction to do so, it will then file notices of discontinuance pursuant to rule 304(1)(a) *UCPR*; neither defendant to BS8032/14 and BS8034/14 having filed a defence.

Upon filing these notices of discontinuance, our client accepts that it will be liable to pay the defendants' costs of and incidental to proceedings BS8032/14 and BS8034/14 on the standard basis up to the date of discontinuance. IMF Bentham Ltd will pay the portion of those costs incurred during the period its Funding Agreement was in operation.

In view of the above, our client will not be serving your client with its *ex parte* application for a section 96 direction in BS5329/15. As we have previously said, we will keep you informed of the progress of that application.

Our client would welcome an opportunity to agree with your client the quantum of the costs, which are to be paid if and when our client is directed to file notices of discontinuance and these notices have been filed.

Yours faithfully Minter Ellison

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F: +61 7 3119 1159 david.obrien@minterellison.com

Partner: David O'Brien T: +61 7 3119 6159

OUR REF: 407747729

cc Mr David Schwartz and Mr Alex Nase, Tucker & Cowen



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Level 10, 12 Creek St Brisbane QLD 4000 GPO Box 457 Brisbane QLD 4001 Australia

TO THE INVESTOR AS ADDRESSED

29 March 2018

LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)

ARSN 089 343 288 ('the Fund' or 'FMIF')

I refer to my appointment as the Receiver of the Fund's assets and the person responsible for ensuring the winding up of the Fund in accordance with the terms of its constitution by Order of the Supreme Court of Queensland on 8 August 2013.

I now provide my 21st update to investors. This report is prepared in accordance with the Exemption granted by the Australian Securities and Investments Commission (ASIC Exemption) in relation to financial reporting obligations of the Fund. In this regard, the ASIC Exemption requires a report to be made available to investors for each period of six months starting on 1 January 2016, which includes the following information:

- (i) Information about the progress and status of the winding up of the Fund, including details of:
 - A. The actions taken during the period;
 - B. The actions required to complete the winding up;
 - C. The actions proposed to be taken in the next 12 months; and
 - D. The expected time to complete the winding up.
- (ii) The financial position of the Fund as at the last day of the relevant period (based on available information);
- (iii) Financial information about receipts (and payments) of the Fund during the period; and
- (iv) The following information at the end of the period:
 - A. The value of the Fund's property; and
 - B. The potential return to investors.

This report covers, inter alia, the period 1 July 2017 to 31 December 2017 (the Period). On 15 March 2018 ASIC extended the exemption on financial reporting obligations of the Fund until 16 March 2020. A copy of the exemption (relief instrument) is available for viewing at www.lmfmif.com



1. Progress and Status of the Winding Up

- 1.1 Position of the Secured Creditor, the potential claim by KordaMentha, the trustee of the LM Managed Performance Fund ('MPF') and claims filed against the Fund
- 1.1.1 Proceedings by the Trustee of the MPF against LMIM and the Fund

1.1.1.1 Assigned Loans Claims

I refer to my previous updates to investors in relation to these proceedings, in which the Trustee of the MPF is the plaintiff, and the defendants are LMIM, and myself as Receiver of the property of the FMIF.

The relief claimed by the Trustee of the MPF (MPF) in these proceedings includes equitable compensation against LMIM and claims against assets of the FMIF in the total sum of about \$24.1 million plus interest.

At the review hearing on 16 December 2016, the proceedings were adjourned to a date to be fixed as the parties wished to continue negotiations to settle the litigation in conjunction with the proceedings in both sections 1.1.1.2 and 1.1.2 below. However, given that the proceedings have not settled, I intend to take steps to progress the matter. In this regard, I have written to the MPF seeking an update on whether the MPF intend to proceed with the proceedings and if so, an approach will be made to the court to have the matter listed for a review hearing to set a timetable for the prosecution of the proceedings. I have not received a response to date.

1.1.1.2 AIIS Loan Claim

I refer to my previous updates to investors in relation to this proceeding in which the Trustee of the MPF is the plaintiff, and LMIM is the defendant.

The MPF Trustee has claimed approximately \$16.82 million as equitable compensation against LMIM and relief against the assets of the FMIF for approximately \$3.9 million (this may be increased to \$4.1 million) being alleged interest paid by the MPF to the FMIF in respect of the loan made by the FMIF to AIIS in 2005.

As with the proceedings in 1.1.1.1 above, these proceedings had also not progressed as negotiations to settle these proceedings were continuing. However, given the matters have not settled, I intend to take steps to progress the matter. However, as no step in the proceeding has been made by MPF for 12 months, the MPF is required to give one month's notice before taking any further steps in the proceeding.

1.1.1.3 Position of the Secured Creditor

I refer to my comments in my previous updates to investors. The DB Receivers have advised the matter precluding their retirement is that prior to retiring, they request the provision of a release by the MPF Trustee, with respect to various claims that the MPF Trustee has made or foreshadowed.



I continue to liaise with the DB Receivers about their ongoing role and the possibility of their retirement. Given that the DB Receivers have sold the remaining property held as security for a FMIF loan and they will retire as controllers of that property shortly, I will again be pursuing the retirement of the DB Receivers' as soon as possible.

1.1.2 Proceedings against the MPF, LMIM and the Directors of LMIM

I refer to my previous updates to investors in relation to a statement of claim I caused to be filed in the Supreme Court of Queensland, against a number of parties, including the MPF Trustee, in respect of loss allegedly suffered by the FMIF as a result of an amount paid to MPF in the Bellpac litigation matter. The claim is for \$15.5M plus interest.

Whilst attempts to settle the proceedings had been continuing in relation to these proceedings and those proceedings referred to in section 1.1.1 above, I continued to take steps to progress the proceedings including:

- Requiring the director defendants to file amended defences pursuant to the Court rules. As at 31 December 2017, all director defendants, except for Peter Drake, had filed amended defences;
- I have filed Replys to the amended defences received and made requests for further particulars which have all now been responded to;
- Obtaining orders enabling me to disclose for the purposes of these proceedings relevant transcripts obtained during the public examinations and documents produced for the public examinations by the former auditors.

As previously advised, the proceedings have not settled. As settlement discussions did not resolve the proceedings, I am now taking further steps to progress these proceedings to a trial. A review hearing was held on 14 March 2018 and orders were made setting a timetable for the next steps in the proceedings including the following:

- the 1st director defendant (being Peter Drake) has now filed his amended defence;
- by 29 March 2018, I am to file and serve any reply to the further amended defences of the 3rd and 4th defendants which were received on 12 March 2018;
- by 6 April 2018, I am to file and serve any reply to the amended defence of the 1st defendant;
- by 20 April 2018, I am to file and serve any reply to the amended defences of the 2nd, 6th and 8th defendants (which amended defences are to be filed by 6 April 2018);
- by 20 April 2018, I am to deliver any further disclosure (with all parties required to exchange disclosure on this date);
- various orders in relation to preparation of and producing document bundles for trial and production of any expert report are to completed by mid-May 2018;
- the next review hearing date is set for 16 August 2018.

As the proceedings are ongoing, an update will be provided to investors in relation to this matter in my next report.



1.2 Legal Actions/Potential Recoveries

I provide an update in relation to other legal proceedings on foot and further work to be done, as follows:

1.2.1 Claim against the former auditors

I refer to my previous updates to investors and briefly summarise the background as follows:

- A public examination (PE) of the former auditors and certain directors and former directors (Directors) of LM Investment Management Limited (In Liquidation) was conducted in 2015;
- Following the PEs, a further amended statement of claim was filed by me and served on the former auditors of the Fund on 14 April 2016;
- The former auditors lodged and served on me a strike-out application and supporting affidavit on 27 April 2016 seeking orders to strike-out certain parts of the statement of claim;
- At the hearing of the former auditors' strike out application, the Court granted my application and placed the proceedings on the commercial list and reserved its decision on the auditor's strike out application;
- The reserved decision from the hearing of the strike out application was handed down on 8 May 2017. Orders were made that the statement of claim be amended to delete certain causes of action and to include details of the quantification of loss;
- In accordance with the Court's judgment, the parties were required to agree the form of orders including a timetable for the filing of a further amended statement of claim and the costs of the former auditors' strike-out application;
- The amended statement of claim was filed on 20 November 2017 and served on the former auditors. Details of the loss has been included in the amended statement of claim which has been calculated (at its highest) in excess of \$200 million. A significant amount of work has been undertaken in this regard, including quantifying the loss at 6 monthly hypothetical winding up dates between 1 July 2009 and 1 January 2013 being the estimated additional costs and expenses incurred by the Fund as a consequence of the alleged delay in winding up the Fund;
- I have received a number of requests pursuant to Rule 222 of the Court Rules (Rules) from the former auditors to provide documents referred to in the amended statement of claim which requests have been responded to.

I summarise developments since my last update to investors as follows:

 All of the documents requested in accordance with Rule 222 have now been provided to the former auditors.

The next steps in the proceedings are expected to include the following:

- seeking leave from the court to amend the claim and directions from the Court to progress the claim;
- dealing with any request from the former auditors for further and better particulars; and



the filing by the former auditors of a defence to the amended claim.

The proceedings are ongoing and an update will be provided to investors in relation to this matter in my next report.

1.2.2 Bellpac Proceedings

In addition to the claim filed and served against the MPF in relation to a loss suffered by the Fund from litigation pertaining to the Bellpac loan noted at 1.1.2 above, there is another matter relating to Bellpac that has been progressed during the Period, as detailed below.

Wollongong Coal Ltd (WCL) - \$10 million Convertible Bonds

I refer to my previous updates to investors and provide a brief summary as follows:

- The liquidator of Bellpac has received the settlement amount of \$2 million from WCL in relation to the claim for redemption of the \$2 million Bonds held in WCL;
- The Bellpac liquidator applied for the conversion of the remaining \$8 million Bonds to shares.
 As WCL did not issue all of the shares as required under the terms of the Bonds, the Bellpac Liquidator brought proceedings against WCL;
- The Bellpac liquidator and WCL entered into a binding heads of agreement (HOA) to settle
 the litigation commenced against WCL. The terms of the heads of agreement include that
 WCL will pay to Bellpac a settlement sum of \$6.3 million in return for certain releases and
 Bellpac returning or cancelling the WCL shares issued to Bellpac;
- A final condition precedent to the settlement with WCL has been delayed as WCL is now required to seek shareholder approval however, certain documents needed to support the proposal to shareholders has taken longer than expected;
- The remaining condition precedent (Sunset Date) to the settlement with WCL had been extended to March 2018 and the Liquidator was successful in negotiating as part of the agreement to extend the Sunset Date that WCL pay interest at 3% p.a. from 2 October 2017 until settlement. This is expected to realise \$6.3 million plus interest from 2 October 2017 for the benefit of investors:
- The MPF has demanded from the Liquidator approximately \$680K plus interest out of the proceeds of the Bonds litigation for repayment of funding the MPF allegedly made for the Bonds litigation from late 2010 to early 2013. The MPF has also reserved its rights in relation to claiming 35% of the funds realised from the successful Bonds proceedings. I have disputed the MPF's entitlement to a priority ahead of the Fund's first ranking security over the proceeds from the Bellpac bonds;
- Although there has been correspondence between the parties, no resolution has been reached in respect of the MPF claim to the proceeds of the bonds.

Developments since my last update to investors is as follows:

• The Bellpac liquidator received an update from WCL on additional time required to obtain and prepare documentation for shareholders for the meeting of shareholders to approve the



- settlement. He advised me that he has agreed to again extend the sunset date to 18 May 2018;
- The Bellpac liquidator has recently been pursuing WCL for an update on their progress with preparation for the shareholders meeting however, a response has not yet been received.

1.2.3 Redemptions and Distributions paid to Class B Unit Holders

I refer to my previous updates to investors and summarise the background as follows:

- Investigations have been undertaken via the PE conducted in 2015 and subsequent thereto in relation to redemptions and distributions paid to the Class B unit holders (Feeder Funds) when the Fund had suspended redemptions and distributions to other classes of members;
- The Feeder funds are the LM Currency Protected Australian Income Fund (CPAIF), the LM Institutional Currency Protected Australian Income Fund (ICPAIF) and the LM Wholesale First Mortgage Income Fund (WMIF);
- On 28 July 2017, I caused to be filed an amended statement of claim against LMIM and the Feeder Funds and the claim was then formally served on the parties. The relief sought in the claim includes declarations to withhold from distributions or payments otherwise payable from the Fund to:
 - CPAIF in the sum of \$40,583,109.06 plus interest, as adjusted for the difference between the sum paid for capital distributions in early to mid-2013 and the amount the CPAIF would otherwise have been entitled as referred to in the amended statement of claim;
 - ICPAIF in the sum of \$5,044,118.30 plus interest, as adjusted for the difference between the sum paid for capital distributions in early to mid-2013 and the amount the CPAIF would otherwise have been entitled as referred to in the amended statement of claim;
 - WMIF in the sum of \$9,432,090.76 plus interest, as adjusted for the difference between the sum paid for capital distributions in early to mid-2013 and the amount the WMIF would otherwise have been entitled as referred to in the amended statement of claim
- In October 2017, I caused to be filed an application under Section 59 of the Trusts Act to seek
 directions in relation to how the differing interests of LMIM are to be represented in the
 proceedings and an application under Section 500 of the Corporations Act to seek leave to
 proceed against LMIM (which is required because it is in liquidation) (the Applications);
- The receivers for the CPAIF and ICPAIF (Grant Thornton) have advised they will not consent to my Section 59 application unless orders are made:
 - that their reasonable costs and fees be fixed by the Court and paid out of the FMIF up to them preparing and filing a defence and considering any Reply filed by me;
 - that I disclose to them certain books and records as requested by them.



• The parties consented to adjourn the hearing of the Applications (which was originally set down on 8 December 2017) to a date to be fixed.

I summarise developments since my previous update to investors as follows:

- I have also informed the parties that I will be making an application to have the matter listed on the Court's commercial list. The application and supporting documents have been prepared in respect of this application and sent to the parties for their comments;
- It is intended that the Applications and the Commercial List Application will be set down for hearing shortly, at which time I will also seek directions for the further conduct of the proceedings. At the hearing of those Applications, I also intend to seek orders for a timetable for the future conduct of the proceedings, including the filing of defences and replys;
- I am also corresponding with the parties as to the provision of certain documents requested by them to assist with the just and expeditious resolution of the real issues of the proceedings.

If the Court grants the relief sought against the Feeder Funds and putting aside any other recoveries for the benefit of investors:

- the CPAIF and ICPAIF are not likely to receive any distribution in the winding up of the FMIF;
- the WMIF is likely to receive a smaller distribution than it otherwise would have been entitled, subject to the outcome of litigation against the FMIF and future operating costs of the FMIF;
- the FMIF can use the funds which otherwise would have been paid to the Feeder Funds for distributions to investors generally instead and, as a result, the return to other investors (Class A and Class C) is likely to increase.

I will keep investors updated as to the progress of this claim.

1.2.4 Various claims against guarantors

Developments since my last report to investors are as follows:

- Judgement has been obtained against the guarantor that defaulted on a payment obligation
 in a deed of settlement entered into with him however, my solicitors have had difficulties in
 serving the judgment on the guarantor. Once service has been effected and if the guarantor
 then fails to pay the judgement, bankruptcy proceedings may then be pursued;
- I recently received a report from the trustee of a bankrupt guarantor that his investigations have identified potential recoveries for the benefit of creditors of which the Fund is the major creditor. I am liaising with the trustee in regard to his continuing investigations and negotiations with certain of the parties involved in the land development, the proceeds of which we are informed the bankrupt has an entitlement.

1.2.5 Western Union

Western Union held funds on account of the FMIF, which represented investor distributions returned due to incorrect account details held.



Western Union sought to set off funds held in the FMIF account against liabilities of other LM related entities, however a confidential commercial settlement has been negotiated. This matter was finalised and the settlement funds deposited into the Fund's bank account during the Period.

1.2.6 Liquidators of LMIM (FTI Consulting)

1.2.6.1 Application for remuneration approval

I refer to my previous updates to investors and summarise the background as follows:

- FTI filed a Further Amended Originating Application on 16 December 2015 for the
 determination of their remuneration claimed as administrators or liquidators of LMIM in the
 amount of \$3,098,251.83 for the period from the date of their appointment to 30 September
 2015 from assets of the Fund;
- Judgement was reserved;
- FTI had not submitted further details of their additional remuneration and costs claimed after mid December 2015 as they were awaiting the outcome of the judgement noted above.
- The Court handed down its reasons for judgment on 17 October 2017. Orders reflecting His Honour's reasons for judgment were made on 22 November 2017 that FTI be paid a total of \$1,827,205.23 plus any GST for remuneration and out of pocket expenses from property of the FMIF for the relevant period. The result is a significant cost saving for the investors as the amount to be paid to FTI from property of the FMIF for the relevant period is significantly less than the claimed amount from the property of the FMIF of approximately \$3.1 million (plus GST);
- As to the costs of the proceedings, the court orders provide that certain specified proportions
 of FTI's costs on an indemnity basis are to be paid from the property of the Fund and three
 other LM funds. The quantum of those costs is to be assessed if they cannot be agreed between
 FTI and me.

I summarise developments since my update to investors as follows:

- FTI filed an application on 19 December 2017 for further orders against me for payment of the amounts ordered on 22 November 2017 to be paid. That application has been adjourned to a date to be fixed;
- The amount of \$1,827,205.23, being the remuneration (excluding any amount for GST) for the period to 30 September 2015 as approved by the Court, was paid on 20 December 2017 together with an amount of interest. However, a dispute has arisen as to the appropriate treatment for GST purposes (by FTI, LMIM and the FMIF) of any GST attributable to the work performed by FTI. The additional amount claimed for GST has not been paid by the Fund.

1.2.6.2 Indemnity claim against the Fund and proof of debt process

As advised in my previous reports to investors, the orders handed down in relation to FTI's ongoing role and extent of their powers and responsibilities set out, amongst other things, the process for me to adjudicate on claims made by LMIM for indemnity against the property of the FMIF in respect to any expense or liability of, or claim against, LMIM in acting as Responsible Entity of the FMIF.



I refer to my previous updates to investors and summarise the background as follows:

- FTI submitted two indemnity claims for \$241,453.54 and \$375,499.78 against the assets of the Fund;
- The first claim of \$241,453.54 relates to legal costs incurred in relation to the appeal of the decision appointing me as receiver to wind up the Fund. I rejected this claim in full;
- In respect of the second claim, I accepted and paid \$84,954.41 (\$93,449.85 less GST of \$8,495.44) (Accepted Claim), rejected \$169,243.26 and deferred \$5,473.59 pending the judgement to be handed down in relation to FTI's remuneration application. The balance of FTI's claim has been withdrawn;
- FTI made an application to Court challenging my decision to reject their indemnity claim noted above (Indemnity Application);
- I obtained judicial advice to the effect that I am justified in raising the clear accounts rule in opposition to the Indemnity Application, in relation to certain identified claims;
- FTI's Indemnity Application challenging my decision to reject FTI's indemnity claim was heard on 19 and 20 June 2017. The Court reserved its decision;
- The Court handed down its reasons for judgment on 17 October 2017. His Honour found that the legal costs of the appeal in 8895 of 2013 of \$263,127.13 and costs of assessment of those costs in the sum of \$9,068.68 cannot be paid out of the property of the FMIF, that the Liquidators are entitled to direct indemnity out of the FMIF for various amounts totalling \$44,158, and that the clear accounts rule operates to suspend LMIM's claimed right to payment from the assets of the FMIF until the resolution of the claim made in the proceeding 11560/16 (the LMIM Claim) and that LMIM's indemnity claims, to the extent that they are otherwise maintainable, should not be finally resolved until the LMIM Claim is resolved;
- Orders reflecting His Honour's reasons for judgment were made on 22 November 2017;
- As to the costs of the proceedings, the court orders provide that 90% of FTI's costs of the
 application be paid on an indemnity basis as agreed with me or otherwise as assessed by the
 Court;
- In summary, of the total amount sought of \$616,953 under FTI's indemnity claim, only \$129,112 has to be paid from the Fund's assets.

I summarise developments since my update to investors as follows:

The amount of \$44,158 was paid to FTI on 20 December 2017

Please note that material filed, decisions and orders made in relation to FTI's remuneration claim and indemnity claim are available on the websites www.lmfmif.com and www.lminvestmentadministration.com.

1.2.6.3 Additional remuneration claimed

As the judgement had been handed down, I requested FTI to provide details of any additional remuneration and costs incurred subsequent to the remuneration claimed in the above mentioned court application.



FTI has informed me that for the period since late 2015 and up to 31 December 2017 they have incurred additional remuneration of \$329,678 plus GST and expenses of \$7,731 plus GST. FTI have advised that they propose to make application to the court for the approval of the remuneration shortly.

FTI have provided me with these figures so that the Fund may properly record the expense in the December 2017 management accounts. I have yet to receive details of these amounts claimed and FTI have advised these amounts are subject to change based on the formulation of its application for court approval.

1.2.6.4 Proof of debt process

If a debt or claim is admitted by FTI in the winding up of LMIM and a claim for indemnity out of the FMIF with respect to such debt or claim is identified, I summarise the process as outlined in the Court Orders as follows:

- FTI must notify me within 14 days of the claim for indemnity against the assets of the Fund;
- Within 14 days I may seek further information in relation to the claim;
- Within 30 days of receipt of the claim from FTI or from receipt of further information I have requested, I am required to:
 - o Accept the claim, or
 - o Reject the claim, or
 - o Accept part of it and reject part of the claim; and
 - o To give FTI written notice of the decision;
- I am required to give FTI written reasons for rejecting any part of a claim within 7 days after giving notice of my decision including those claims identified through the proof of debt process mentioned above;
- Within 28 days of receiving a notice of rejection, FTI may apply to the Court for directions in relation to the rejection and advise the creditor of my decision and other specified matters.

I have sought a number of updates from FTI as to when they will be commencing the process. I am hopeful that this process can be undertaken in the near future so the quantum of any creditor claims against the Fund can be ascertained and dealt with as soon as possible. These claims may be subject to the "clear accounts rule" described above and if so, a set off against that claim may be able to be made.

1.2.6.5 Claim filed against LMIM

I refer to my previous report to investors and summarise the background as follows:

- In November 2016, I caused LMIM as RE of the FMIF to commence a proceeding against LMIM
 in relation to certain transactions to avoid possible expiry of the statutory limitation periods
 for making the claims;
- This claim alleges that, inter alia, LMIM breached its duties to members of the FMIF by:



- causing to be paid out of assets of the FMIF management fees in advance of it becoming entitled to payment of same;
- o overpaying management fees to itself out of assets of the FMIF;
- causing to be paid to LMA additional fees purportedly for loan management and controllership services;
- directing payments to be made by the MPF, purportedly in satisfaction of liabilities owed by the MPF to the FMIF, to be paid to itself as RE of the feeder funds;
- Following further investigations, an amended claim and statement of claim and consolidated particulars have been filed and served on LMIM;
- Steps have been taken to prepare an application under Section 59 of the Trusts Act for directions of the Court in relation to how the differing interests of the parties (LMIM as RE of the FMIF, and LMIM in its personal capacity) are to be represented in the proceedings and an application under Section 500 of the Corporations Act to seek leave to proceed against LMIM (the Applications) and supporting Affidavits.

No further steps have been taken since my previous update to investors.

Subject to any directions that may be made by the Court, if the claims made in this proceeding are successful, they may be able to be relied upon as a set-off against certain claims made by LMIM for indemnity out of assets of the FMIF, including those claims identified through the proof of debt process mentioned above or claims made by other parties seeking to subrogate to LMIM's alleged rights of indemnity.

I will keep investors updated as to the progress of this claim.

1.3 Realisation of Assets

All real property assets have now been sold. What remains to be realised or resolved are the various claims and legal proceedings both for and against the Fund as set out above.



2. Financial Position of the Fund

The management accounts for the year ending 31 December 2017 have now been completed and are available on the website www.lmfmif.com on the page titled 'Financial Statements & Other Key Documents'.

A summary of the financial position of the Fund as at 31 December 2017 is provided below.

	31 December 2017
ASSETS	\$
Cash and cash equivalents	69,932,089
Receivables	389,476
Loans & Receivables	1,716,378
TOTAL ASSETS	72,037,943
LIABILITIES	
Payables	2,423,816
Distributions payable	1,372,036
Total liabilities excluding net assets attributable to unitholders	3,795,852
	200
NET ASSETS	68,242,091

2.1 Fund Assets

The total assets of the Fund as at 31 December 2017 were \$72,037,943.

The balance includes cash at bank of \$69,932,089, interest receivable on term deposits and GST refunds of \$389,476 and net default loans of \$1,716,378. The net default loans balance represents the cash held in controllership bank accounts.

2.2 Fund Liabilities

The total liabilities of the Fund as at 31 December 2016 were \$3,795,852.

The Distributions Payable balance relates to distributions paid prior to the date of the receiver's appointment which have not cleared or were returned unclaimed.

The Payables balance primarily consists of trade creditors, custodian fees, legal fees, receiver's fees and fees and expenses claimed by FTI, which remain unpaid as at 31 December 2017.

2.3 Net Assets Attributable to Unit Holders

Net assets attributable to unit holders as at 31 December 2017 were \$68,242,091.



The net assets of the Fund and number of units on issue as at 31 December 2017 and 30 June 2017 is detailed in the table below:

	31 December 2017	30 June 2017
Estimated net amount of assets available to investors as at the period end (\$)	68,242,091	68,809,977
Total investor units (# of units) *	478,100,386	478,100,386
Estimated net asset amount per unit available to investors as at the period end (cents in the dollar)	0.143	0.144

Investments made in Foreign Currencies

Investigations undertaken by BDO have identified that the number of units held by investors who invested in foreign currencies appears to be incorrectly recorded in the membership records of the FMIF. It appears that when LMIM transferred the member records of the FMIF to a new database in 2010 the number of units of investors who invested in a foreign currency were incorrectly recorded in the new database, by allocating to the investors concerned one unit in the FMIF for each unit of foreign currency invested, rather than one unit in the FMIF for each \$1AUD invested (after the foreign currency amount invested had been converted to AUD at the applicable exchange rate) in accordance with the PDS and Constitution. Further investigations are ongoing and appropriate steps, including an application to Court for directions approving the correction of the member records of the FMIF, will be taken to address the issue and to ensure that the member records of the FMIF are accurate.

3. Receipts and Payments of the Fund

The receipts and payments of the Fund, as maintained by the DB Receivers, for the period 1 July 2017 to 31 December 2017 is summarised in the table below.

	\$
Receipts	
Interest received	923,454
GST received	80,290
Asset realisations (from controllerships and legal matters)	1,569,614
TOTAL RECEIPTS	2,573,358
-	
Payments	
Bank charges	11,424
Deed of assignment payment	14,000
Consultants' fees	51,829
GT Controller fees	8,578



Custodian fees	11,000
DB Receivers' fees	138,936
GST paid	298
IT expenses	60,820
Legal fees	1,013,944
FTI Liquidators' fees & expenses	1,882,252
Loan draws	85,384
Printing and stationary	19,298
Receiver's fees and disbursements	2,242,734
Record management and storage	6,460
TOTAL PAYMENTS	5,546,957
NET RECEIPTS (PAYMENTS)	(2,973,599)

Please note that the Receiver's fees and disbursements relate to work undertaken for the 12 month period between 1 November 2016 to 30 October 2017, however, payment was made during this six months reporting period.

4. Investor Information

4.1 Estimated Return to Investors

I provide an estimated return to Investors of between 13.1 cents and 14.3 cents per unit as at 28 February 2018, calculated as follows:

Description	Low \$	High \$
Cash at bank	70,181,022	70,181,022
Other assets	320,708	1,359,538
Estimated Assets	70,501,730	71,540,560
Other unsecured creditors	6,234,582	1,505,517
FTI Fees & legal expenses (subject to approval) (55% RITC)	694,756	694,756
Receivers and Managers' fees (DB Receivers) (55% RITC)	42,200	42,200
Receiver's fees & outlays (BDO) (including controllerships) (55% RITC)	641,481	641,481



Receiver's legal fees (BDO) (55% RITC)	79,414	79,414
Estimated Liabilities	7,692,432	2,963,367
Estimated net amount available to investors as at 28 February 2018	62,809,297	68,577,192
Total investor units (as at 31 December 2016)	478,100,386	478,100,386
Estimated return in the dollar	13.1 cents	14.3 cents

Please note that the estimate and prior estimates do not take into account future operating costs and future Receiver's fees or any legal recoveries against borrowers, valuers or other third parties.

In calculating the estimated return to investors, I have also not provided any allowance for the claims filed by the MPF Trustee as the prospects of a successful claim against the Fund is unknown.

4.2 Estimated Unit Price as at 31 December 2017

The estimated unit price as at 31 December 2017 is 14.3 cents.

	\$
Total Value of Fund Assets as at 31 December 2017	72,038,217
Less Creditors and Other Payables	3,801,353
Total Net Value of Fund Assets	68,236,864
Total Number of Units	478,100,386
Unit Price	14.3 cents

I attach a copy of a letter confirming the unit price as at 31 December 2017, which may be forwarded to Centrelink to assist with the review of investors' pensions.

4.3 Distributions to Investors

Once the DB Receivers have retired and funds released to me, I will be required to retain certain funds to meet the liabilities of the Fund, including contingent claims that may arise from the auditor claim and Bellpac litigation.

I am also required to seek the directions of the Court before proceeding with the next distribution.

I will update investors as to the expected timing of a distribution as these matters become clearer, however, I am hopeful to be in a position to commence distributions during this calendar year, although it is subject to resolving matters before the court where I cannot necessarily control the timeframe to resolve the issues.



The matters before the court which need to be resolved prior to a distribution to investors are:

- the Bellpac litigation claim against the directors, MPF and LMIM and the MPF's claims against the Fund (see sections 1.1.1 and 1.1.2 above). These proceedings have not settled and I am now taking further steps to progress the matter to a trial;
- the claim served on the Feeder Funds seeking declarations that any distribution to the Feeder Funds be withheld (see section 1.2.3 above);
- obtaining directions from the Court for approval to proceed with a distribution and the retirement of the DB Receivers so that the funds of the FMIF held by them are released to me.

In addition to the above, an application to Court for directions approving the correction of the member records pertaining to foreign investors of the FMIF, will need to be determined.

Please note that a distribution to investors will take place after paying DB's receivers fees and costs, remaining property expenses, receiver's fees and costs and the unsecured creditors who rank ahead of investors' interests.

4.4 Ongoing Reporting to Investors

Reports will be distributed to investors in accordance with the preferred method of correspondence recorded for each investor in the Fund's database. In order to assist in reducing distribution costs, it would be appreciated if investors could nominate an email address as their preferred method to receive correspondence. Investors may update their details as outlined in Section 4.5 below. For those investors that do not have an email address, correspondence will continue to be sent to you via post.

My next report to investors will be issued by 30 June 2018.

4.5 Investors Queries

Arrangements are in place to ensure that any reasonable questions asked by members of the FMIF, about the winding up of the FMIF, will be answered within a reasonable period of time (generally seven days) and without charge to the investor.

For any changes to investors details, please review the Useful Forms/Procedures tab on the website www.lmfmif.com which includes information regarding the following procedures:

- Change of Contact Address/Bank Account Details
- Change of Contact Address/Bank Accounts Details of a Deceased Estate
- Change of Trustee of Self-Managed Super Fund
- Transfer of Unit Holding from a Super Fund/ Trustee Company to Personal Name(s)
- Transfer of Unit Holding from a Deceased Estate to a Sole Survivor
- Transfer from a Deceased Estate to a Beneficiary of an Estate

It is a requirement that advisors or other third parties acting on behalf of Unit Holders are doing so pursuant to a relevant Authority/Power of Attorney. Please ensure that a relevant Authority/Power



of Attorney accompanies the abovementioned documents as necessary (if an Authority/Power of Attorney has not previously been provided).

It is preferable that all questions about the winding up, or communications are sent via email to enquiries@lmfmif.com with original documents to be mailed as required to:

BDO GPO Box 457 Brisbane QLD 4001

Phone:

+61 7 3237 5999

Fax:

+61 7 3221 9227

5. Receiver's Remuneration and Expenses

There have been eight applications to Court to date to approve my remuneration from the date of my appointment on 8 August 2013 until 31 October 2017.

The eighth application for the approval of my remuneration for the period 1 May 2017 to 31 October 2017 was heard on 30 November 2017. The Court ordered that my remuneration for this period be fixed in the amount of \$1,280,897.20 (inclusive of GST). In addition, the Court approved my remuneration sought of \$26,155.25 (inclusive of GST) in respect of the work undertaken on the controllerships.

A copy of all documentation in relation to my applications can be found on the website www.lmfmif.com.

In addition to the remuneration previously approved by the Court, I calculate that, on a time basis, I have incurred further remuneration of \$588,073.50 plus outlays of \$12,459.91 plus GST from 1 November 2017 to 28 February 2018 plus work undertaken in respect of the controllerships for the retirement village assets of \$13,320.50 plus GST as detailed in the table below and attached summaries.



	Remuneration (GST exclusive) \$	Outlays (GST exclusive) \$
LM First Mortgage Income Fund (Receivers & Managers Appointed) (Receiver Appointed)	588,073.50	12,459.91
OVST Pty Ltd (In Liquidation) (Controllers Appointed)	9,666.50	0.86
Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed)	729.00	5.
Bridgewater Lake Estate Ltd (In Liquidation) (Controllers Appointed)	1,241.00	wr
Redland Bay Leisure Life Ltd (In Liquidation) (Controllers Appointed)	960.50	0.86
Redland Bay Leisure Life Development Ltd (In Liquidation) (Controllers Appointed)	423.00	0.86
Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers & Managers Appointed) (Controllers Appointed)	300.50	0.86
Total	601,394.00	12,461.63

The fees for the four months from November 2017 to February 2018 average approximately \$150,348.50 per month.

I anticipate that my next application to Court for the approval of my remuneration will be made in May/June 2018 covering the period 1 November 2017 to 30 April 2018. A copy of my application in this respect will be posted to the website www.lmfmif.com and investors will be notified when this application has been lodged.

5.1 Actions taken during the Period

I provide below a summary of actions taken during the Period:

- Work undertaken in relation to the litigation matters, which among other things, include:
 - o Progressing the claim against the former auditors regarding the financial statements and compliance plan audits. The majority of the work undertaken was to comply with the court's decision on the former auditor's strike out application including, amending the statement of claim to include details of the quantification of the loss suffered by the Fund and preparing loss calculations for each six month period from 1 July 2009 to 1 January 2013;



- In addition to the above work undertaken in progressing the claim against the former auditors, work was also undertaken to comply with the court rule 222 request for documents;
- Providing assistance to the Liquidator of Bellpac regarding the \$8M bond claim including progressing the settlement with WCL;
- o Progressing the claim against the MPF and others;
- Progressing the claim against the Feeder Funds in relation to redemptions and distributions paid to Class B unitholders;
- Progressing claims against guarantors;
- Dealing with FTI's proceedings to review the rejection of parts of their claims for indemnity against the assets of the Fund for expenses and costs incurred in their capacity as liquidators of the responsible entity;
- o Progressing the claim against LMIM.
- Liaising with various parties in relation to the potential for the DB Receiver's retirement;
- · Finalising the Western Union matter;
- Maintaining the management accounts of the Fund;
- Preparing an application to ASIC for an extension of the relief from complying with requirements to conduct financial audits and reviews of the Fund's accounts;
- Undertaking the investor management function for approximately 4,500 investors including answering queries on the winding up of the Fund and maintaining the investment database, including any change in details or transfer of units;
- Progressing the investigation of the AX files to determine the alternatives to resolving the incorrect conversion of foreign investors units into AX;
- Preparing affidavit and supporting material for an application to Court for approval of the receiver's remuneration for the period 1 May 2017 to 31 October 2017; and
- Finalising outstanding residual matters from the sale of five retirement villages, including tax compliance issues.

5.2 Actions proposed to be taken in the next 12 months

I provide below a summary of the proposed actions to be taken in the next 12 months in relation to the winding up of the Fund:

- Take steps to finalise the various ongoing litigation matters outlined in this report;
- Progressing the claim against the former auditors as outlined at section 1.2.1 of this report
 which will likely include responding to any requests for particulars and reviewing and
 responding to the defence filed by the former auditors and otherwise progress the matter to
 trial;



- Take steps to determine or resolve the claim regarding the Bellpac bonds and realise this asset as outlined at section 1.2.2 of this report;
- Resolve the MPF claim against the proceeds of the Bonds;
- Resolve the position in relation to the distributions and redemptions paid to the Feeder Funds;
- Finalise all claims against guarantors;
- Dealing with any further FTI indemnity claims against the Fund including proof of debt claims per the regime set out in section 1.2.6.4 above;
- Maintain the accounts of the Fund and prepare management accounts and finalise the management accounts for the half year ending 31 December 2017 and for the year ending 30 June 2018;
- Resolve the issues relating to the investor units subscribed in foreign currencies in the investor management database, and obtain court approval to correct the member records of the FMIF;
- Maintain the investor management database;
- Subject to resolution of the litigation/court matters raised in section 4.3 above, obtain approval from the Court to process interim distributions to investors;
- Report to investors on a quarterly basis; and
- Make applications to Court for remuneration approval.

Please note that the timing to finalise some of the above matters will be subject to judgments being handed down by the Court.

5.3 Actions required to complete the winding up

I provide below a summary of the key actions required to complete the winding up:

- Finalise all litigation currently on foot and contemplated;
- Finalise any further FTI's indemnity claims against the Fund and any proof of debt claims;
- Discharge all liabilities of the Fund;
- Obtain a discharge of the DB security and of the DB Receivers;
- Obtain approval from the Court to process interim distributions and a final distribution to investors;
- Prepare final accounts for the Fund;
- Arrange for an auditor to audit the final accounts of the Fund after the Fund is wound up; and
- Obtain court orders in relation to the finalisation of my role in relation to the Fund.

I anticipate that the winding up of the Fund will be finalised in approximately 18 months, however, this may vary subject to the progression of the outstanding legal matters detailed in this report.



6. Queries

Should unit holders wish to advise of any changes in details or require further information, please contact BDO as follows:

BDO

GPO Box 457

Brisbane QLD 4001

Phone: +61 7 3237 5999

Fax: +61 7 3221 9227

Email: enquiries@lmfmif.com

Yours faithfully

David Whyte

Receiver



REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 November 2017 to 28 February 2018

LM First Mortgage Income Fund (Receivers & Managers Appointed)

			Tot	Totals	Section 1				Task Area	ırea				
					Assets	ets	Creditors	tors	Trade On	4 On	Investigations	ations	Adminis	Administration
Employee	Position	Rate	hrs	v	hrs	v	hrs	S	hrs	v.	hrs	v	hrs	S
Leisa Rafter	Partner	089	6.1	4,148.00	6.1	4,148.00								
David Whyte	Partner	280	116.8	67,744.00	33.6	19,488.00	13.6	7,888.00	43.2	25,056.00			26.4	15,312.00
Clark Jarrold	Partner	580	45.9	26,622.00	45.9	26,622.00								
Mark Whittaker	Partner	260	16.7	9,352.00	16.7	9,352.00								
John Garrard	Senior Manager	540	2.5	1,350.00	2.5	1,350.00								
Craig Jenkins	Partner	515	1.0	515.00					1.0	515.00				
Craig Jenkins	Partner	200	11.8	5,900.00					11.8	5,900.00				
Eric Leeuwendal	Executive Director	495	418.1	206,959.50	266.6	131,967.00	47.1	23,314.50	76.1	37,669.50	26.9	13,315.50	1.4	693.00
Samuel Alexander	Manager	450	6.1	2,745.00	6.1	2,745.00								
Chris Demeyere	Manager	430	9.0	3,870.00	9.0	3,870.00								
Julie Pagcu	Senior Manager	400	8.4	3,360.00					8.4	3,360.00				
Julie Pagcu	Senior Manager	385	24.4	9,394.00	24.4	9,394.00								
Ainsley Watt	Senior Accountant I	350	350.0	122,500.00	47.7	16,695.00	165.6	57,960.00	112.1	39,235.00	8.7	3,045.00	15.9	5,565.00
Joanna Lane	Senior Consultant II	280	0.4	112.00	0.4	112.00								
Reuben Tham	Senior Consultant II	240	2.2	528.00	2.2	528.00								
Andrew Hack	Analyst I	225	2.4	540.00	2.4	540.00								
Sarah Cunningham	Team Assistant	215	0.1	21.50									0.1	21.50
Andrew Whittaker	Accountant II	215	9.79	14,534.00			63.5	13,652.50			3.1	666.50	1.0	215.00
Antoinette Fielding	Accountant II	215	6.6	2,128.50	9.0	129.00	9.3	1,999.50						
Antoinette Fielding	Accountant II	175	146.8	25,690.00	4.1	717.50	117.3	20,527.50	12.9	2,257.50	8.9	1,190.00	5.7	997.50
George Lethbridge	Undergraduate	175	126.3	22,102.50	38.2	6,685.00	83.0	14,525.00	1.1	192.50	2.6	455.00	4.1	245.00
Ryan Whyte	Undergraduate	175	305.7	53,497.50	24.2	4,235.00	209.0	36,575.00	7.1	1,242.50	44.2	7,735.00	21.2	3,710.00
Brooke Streidl	Team Assistant	130	3.1	403.00	1.8	234.00			1.3	169.00				
Emma Gatti	Junior Practice Assistan	120	0.4	48.00					0.4	48.00				
Moira Hattingh	Team Assistant	95	42.2	4,009.00									42.2	4,009.00
		TOTALS	1,723.9	588,073.50	532.5	238,811.50	708.4	176,442.00	275.4	115,645.00	92.3	26,407.00	115.3	30,768.00
			GST	58,807.35										
		TOTA	TOTAL INC GST	646,880.85										
	A	AVERAGE HOURLY RATE	JRLY RATE	341		448		249		420		286		267

Note: All amounts exclude GST unless otherwise noted



REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 November 2017 to 28 February 2018 Bridgewater Lake Estate Pty Limited (Controllers Appointed)

			Totals	lls		Task Area	rea	
					Trade On		Administration	ion
Employee	Position	Rate	hrs	\$	hrs	\$	hrs	S
Eric Leeuwendal	Executive Director	495	0.8	396.00	0.8	396.00		
Ainsley Watt	Senior Accountant I	350	1.2	420.00	0.2	70.00	1.0	350.00
Sarah Cunningham	Team Assistant	215	1.4	301.00			1.4	301.00
Ryan Whyte	Undergraduate	175	9.0	105.00			9.0	105.00
Moira Hattingh	Team Assistant	95	0.2	19.00			0.2	19.00
		TOTALS	4.2	1,241.00	1.0	466.00	3.2	775.00
			TSD	124.10				
		L	TOTAL INC GST	1,365.10				
		AVERAGE	AVERAGE HOURLY RATE	295		466		242

Note: All amounts exclude GST unless otherwise noted



REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 November 2017 to 28 February 2018 Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Controllers Appointed)

			Totals		Task Area	
					Administration	
Employee	Position	Rate	hrs	\$	hrs	\$
Sarah Cunningham	Team Assistant	215	0.4	86.00	0.4	86.00
Antoinette Fielding	Accountant II	175	0.3	52.50	0.3	52.50
Ryan Whyte	Undergraduate	175	9.0	105.00	9.0	105.00
Moira Hattingh	Team Assistant	95	9.0	57.00	9.0	57.00
		TOTALS	1.9	300.50	1.9	300.50
			TSD	30.05		
			TOTAL INC GST	330.55		
		AVER	AVERAGE HOURLY RATE	158		158

Note: All amounts exclude GST unless otherwise noted



REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 November 2017 to 28 February 2018

OVST Pty Ltd (Controllers Appointed)

			Totals	25					Task Area	Area				
					Ass	Assets	Creditors	ors	Trade On	* On	Investigations	tions	Administration	ration
Employee	Position	Rate	hrs	~	hrs	S	hrs	S	hrs	S	hrs	S	hrs	S
Leisa Rafter	Partner	089	1.2	816.00	1.2	816.00								
David Whyte	Partner	580	0.3	174.00					0.3	174.00				
Eric Leeuwendal	Executive Director	495	1.6	792.00	0.5	247.50	0.2	00.66	6.0	445.50				
Samuel Alexander	Manager	450	5.1	2,295.00	5.1	2,295.00								
Ainsley Watt	Senior Accountant I	350	9.0	3,150.00	0.8	280.00	1.0	350.00	3.6	1,260.00	0.5	175.00	3.1	1,085.00
Reuben Tham	Senior Consultant II	240	6.1	1,464.00	6.1	1,464.00								
Sarah Cunningham	Team Assistant	215	1.9	408.50									1.9	408.50
Antoinette Fielding	Accountant II	215	0.2	43.00									0.2	43.00
Andrew Whittaker	Accountant II	215	1.2	258.00							1.2	258.00		
Ryan Whyte	Undergraduate	175	1.0	175.00									1.0	175.00
Sarah Matthews	Team Assistant	150	0.1	15.00	0.1	15.00								
Moira Hattingh	Team Assistant	95	0.8	76.00									0.8	76.00
		TOTALS	28.5	9,666.50	13.8	5,117.50	1.2	449.00	4.8	1,879.50	1.7	433.00	7.0	1,787.50
			CST	966.65										
		TOT	TOTAL INC GST	10,633.15										
	A	VERAGE HO	AVERAGE HOURLY RATE	339		37.1		374		392		255		255

Note: All amounts exclude GST unless otherwise noted



REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 November 2017 to 28 February 2018 Pinevale Villas Morayfield Pty Ltd (Controllers Appointed)

				Totals	Task Area	Area
					Administration	itration
Employee	Position	Rate	hrs	\$	hrs	\$
Ainsley Watt	Senior Accountant I	350	0.5	175.00	0.5	175.00
Sarah Cunningham	Team Assistant	215	2.0	430.00	2.0	430.00
Ryan Whyte	Undergraduate	175	9.0	105.00	9.0	105.00
Moira Hattingh	Team Assistant	95	0.2	19.00	0.2	19.00
		TOTALS	3.3	729.00	3.3	729.00
			TSD	72.90		
			TOTAL INC GST	801.90		
		AVERA	AVERAGE HOURLY RATE	221		22.1

Note: All amounts exclude GST unless otherwise noted



REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 November 2017 to 28 February 2018 Redland Bay Leisure Life Pty Ltd (Controllers Appointed)

			Totals	Task Area	Area
				Administration	tration
Employee	Position	Rate	hrs	\$ hrs	\$
Ainsley Watt	Senior Accountant I	350	0.5	175.00 0.5	175.00
Sarah Cunningham	Team Assistant	215	2.7 580	580.50	580.50
Antoinette Fielding	Accountant II	175	0.3 52	52.50 0.3	52.50
Ryan Whyte	Undergraduate	175	0.6	105.00	105.00
Moira Hattingh	Team Assistant	95	0.5	47.50 0.5	47.50
		TOTALS	4,6 960,50	.50 4.6	960,50
			96 T2D	96.05	
			TOTAL INC GST 1,056.55	.55	
		AVERA	AVERAGE HOURLY RATE	209	209

Note: All amounts exclude GST unless otherwise noted



REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 November 2017 to 28 February 2018 Redland Bay Leisure Life Development Pty Ltd (Controllers Appointed)

			Totals		Task Area	rea
					Administration	ation
Employee	Position	Rate	hrs	S	hrs	\$
Ainsley Watt	Senior Accountant I	350	0.5	175.00	0.5	175.00
Sarah Cunningham	Team Assistant	215	0.2	43.00	0.2	43.00
Antoinette Fielding	Accountant II	175	0.3	52.50	0.3	52.50
Ryan Whyte	Undergraduate	175	9.0	105.00	9.0	105.00
Moira Hattingh	Team Assistant	95	0.5	47.50	0.5	47.50
		TOTALS	2.1	423.00	2.1	423.00
			GST	42.30		
			TOTAL INC GST	465.30		
		AVE	AVERAGE HOURLY RATE	201		201

Note: All amounts exclude GST unless otherwise noted



Disbursements for the period 1 November 2017 to 28 February 2018

		Exper	Expense Type		
Entity	Postage	Printing	Search Fee	General	Total (\$ ex GST)
LM First Mortgage Income Fund (Receivers & Managers Appointed)	9,834.94	325.20	70.77	2,229.00	12,459.91
Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Controllers Appointe	0.86				0.86
OVST Pty Ltd (Controllers Appointed)	0.86				0.86
Redland Bay Leisure Life Pty Ltd (Controllers Appointed)	0.86				0.86
Redland Bay Leisure Life Development Pty Ltd (Controllers Appointed)	0.86				0.86
				TOTAL	12,463.35
				GST	1,246.34
				TOTAL INC GST	13,709.69



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Level 10, 12 Creek St Brisbane QLD 4000 GPO Box 457 Brisbane QLD 4001 Australia

29 March 2018

TO WHOM IT MAY CONCERN

LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ARSN 089 343 288 ('the Fund' or 'FMIF')

I refer to my appointment as the Receiver of the Fund's assets and the person responsible for ensuring the winding up of the Fund in accordance with the terms of its constitution by Order of the Supreme Court of Queensland on 8 August 2013.

I provide an update on the estimated unit price of the fund as at 31 December 2017, calculated as follows:

	\$
Total Value of Fund Assets as at 31 December 2017 (net of land tax and rates)	72,037,943
Less Creditors and Other Payables	3,795,852
Total Net Value of Fund Assets	68,242,091
Total Number of Units	478,100,386
Unit Price	14.3 cents

Should you have any queries in respect of the above, please contact Ryan Whyte of my office on (07) 3237 5921.

Yours faithfully,

David Whyte Receiver