

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 8034/14

Plaintiffs

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

AND

First Defendant

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

AND

Second Defendant

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

Filed in Brisbane registry on 19 April 2016

THIRD FURTHER AMENDED STATEMENT OF CLAIM

19 APR 2016

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

1. The plaintiffs:

(a) ~~are companies~~ is a company duly incorporated according to law;

**THIRD FURTHER AMENDED STATEMENT OF
CLAIM**

Filed on behalf of the Plaintiffs

MINTER ELLISON
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1 Eagle Street
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Reference MJV 40-7747729

Form 16 Rules 22 and 146



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

2. The first defendant:

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

2A The second defendant (“**Receiver**”):

- (a) is a partner of BDO Business Recovery & Insolvency (Qld) Pty Ltd;
- (b) on 21 August 2013, was appointed by order of the Supreme Court of Queensland as the receiver of the property of the FMIF.

2B The Receiver controls cash at bank belonging to the first defendant ATF the FMIF in the amount of at least \$58.7 million (plus future accretions) (“**Fund**”).

~~2C The FMIF has approximately 4,500 unitholders (“**FMIF Unitholders**”).~~

3. In this pleading:

- (a) the first defendant, when acting in its capacity as the trustee of the MPF, is referred to as “the first defendant ATF the MPF”;

- (b) the first defendant, when acting in its capacity as the responsible entity of the FMIF, is referred to as “the first defendant ATF the FMIF.”

The LM Managed Performance Fund

4. By a trust deed dated December 2001 (“**the First Trust Deed**”), the first defendant:
 - (a) established a unit trust named The LM Managed Performance Fund (“**the MPF**”); and
 - (b) became trustee of the MPF.
5. By a Deed of Variation dated 11 November 2002 (“**the Second Trust Deed**”), the first defendant ATF the MPF deleted all parts of the First Trust Deed other than the parties, and replaced it with the terms set out in the Second Trust Deed (Recital B of the Second Trust Deed).
6. By a Deed of Variation dated 25 November 2009 (“**the Third Trust Deed**”), the first defendant ATF the MPF deleted clauses 1, 2.3, 2.4 and 3 to 27 of the Second Trust Deed, and replaced it with the terms set out in the Schedule to the Third Trust Deed (clause 1 of the Third Trust Deed).
7. Relevantly, the following were terms of the First, Second and Third Trust Deeds:
 - (a) the first defendant was the Manager (clause 1.1 of each Deed);
 - (b) the Constitution was the Trust Deed including any Schedule, Annexure or Amendments to it (clause 1.1 of each Deed);
 - (c) the Scheme was the trust created by the Deed to be known as the LM Managed Performance Fund (clause 1.1 of each Deed);
 - (d) the assets of the Scheme were:
 - (i) the Scheme Fund (clauses 1.1 of the First and Second Trust Deeds); subsequently

- (ii) the Scheme Property (clause 1.1 of the Third Trust Deed);
 - (e) the Manager agreed to act as trustee of the Scheme (clause 2.1 of each Deed);
 - (f) the Manager declared that it held:
 - (i) the Scheme Fund (clauses 2.2 of the First and Second Deeds); subsequently
 - (ii) the Scheme Property (clause 2.2 of the Third Trust Deed);

on trust for the Members;
 - (g) the name of the Scheme was:
 - (i) The LM Managed Performance Fund (clause 2.3 of the First Trust Deed); subsequently
 - (ii) The LM Managed Performance Fund or any other name that the Manager may determine from time to time (clauses 2.3 of the Second and Third Trust Deeds);
 - (h) the beneficial interest in the Scheme Fund would be divided into Units (clause 3.1 of each Deed);
 - (i) the Constitution might be modified or repealed or replaced with a new Constitution by the Manager if the Manager reasonably considered that the change would not adversely affect Members' rights or was deemed necessary to conduct the affairs of the Scheme (clauses 24.1 of the First and Third Trust Deeds; clause 18.1 of the Second Trust Deed);
 - (j) the Manager must resign if (being a corporation) it became an externally-administered body corporate as defined in the *Corporations Act 2001* (clauses 23.1(b)(ii) of the First and Third Trust Deeds; clause 17.1(b)(ii) of the Second Trust Deed).
8. On or about 19 March 2013, John Richard Park and Ginette Dawn Muller were appointed voluntary administrators of the first defendant.

9. In the premises, pursuant to clause 23.1(b)(ii) of the Third Trust Deed the first defendant was required to resign as Manager of the MPF.
10. By order of this Honourable Court dated 12 April 2013:
 - (a) the first defendant was removed as trustee of the MPF; and
 - (b) ~~the plaintiffs~~ KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Limited (ACN 108 318 985) ("Calibre") were appointed trustees of the MPF.
- 10A. On 5 January 2015 Calibre Capital Limited (ACN 108 318 985) resigned as trustee of the MPF.

The LM First Mortgage Income Fund

11. On or about 28 September 1999 the first defendant established the LM First Mortgage Income Fund ("the FMIF").
12. Since on or about 28 September 1999:
 - (a) the FMIF has been, and remains, a registered managed investment scheme, pursuant to s.601EB of the *Corporations Act 2001* (Cth).
 - (b) the first defendant has been, and remains, the Responsible Entity of the FMIF;
 - (c) the first defendant has held, and continues to hold, the property of the FMIF on trust for its members, pursuant to s.601FC of the *Corporations Act 2001* (Cth).
13. Pursuant to the terms of a Custody Agreement dated 4 February 1999 between the first defendant and Permanent Trustee Australia Ltd ACN 008 412 913 (later re-named The Trust Company (PTAL) Ltd) ("PTAL"):
 - (a) PTAL agreed to custodially hold the Portfolio and Title Documents as agent for the first defendant in relation to (inter alia) the FMIF (clause 2.1 and Schedule 2);

- (b) the first defendant was responsible for taking all decisions in relation to the Portfolio and, subject to the Custody Agreement, PTAL was required to act on the first defendant's Instructions in relation to any assets of the Portfolio (clause 4.1);
- (c) the plaintiffs will rely upon the full terms of the Custody Agreement at the hearing of this proceeding.

Duties owed by the first defendant ATF the MPF

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

- (v) the cost (including commissions, fees, charges and duties payable) of making the proposed investment (s.24(n)).

The FMIF's loan to Lifestyle

17. On or about 30 March 2005:

- (a) the first defendant ATF the FMIF;
- (b) Lifestyle Investment Company Pty Ltd ("**Lifestyle**") as Borrower; and
- (c) PTAL as Lender/Custodian;

entered into a Loan Agreement ("**the Lifestyle Loan**").

18. Relevantly, the following were terms of the Lifestyle Loan:

- (a) the Lender (as Custodian for the Responsible Entity) had, at the Borrower's request, agreed to lend and advance to the Borrower the Loan Amount on the conditions, among others, that the Borrower execute the Agreement (page 2);
- (b) the Loan Amount was \$15,120,000.00 (item 4, schedule);
- (c) the date for repayment was 18 months from the date of the advance (item 5, schedule);
- (d) the following securities were taken as security for the performance of Lifestyle's obligations under the Lifestyle Loan (item 9, schedule):
 - (i) registered mortgage AB414899G from Lifestyle to PTAL over real property situated at 76 Wisemans Ferry Road, Cattai in the State of New South Wales, more particularly described as:

A. lot 31 on DP136837 as contained in title reference folio 31/136837;

B. lot 38 on DP136838 as contained in title reference folio 38/136838; and

C. lot 37 on DP752039 as contained in title reference folio 37/752039;

(**“the Cattai Property”**);

- (ii) a Deed of Guarantee and Indemnity given by Grahame Beach and Jacink Pty Ltd ACN 064 853 201 (**“Jacink”**) in its own right and as trustee for the Beach Family Trust (as Guarantors) to PTAL (as Lender);
- (iii) a fixed and floating charge given by Lifestyle as Mortgagor to PTAL as Mortgagee, registered with the Australian Securities and Investment Commission (**“ASIC”**) as registered charge 1147332; and
- (iv) a fixed and floating charge given by Jacink as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1147334;
- (e) the Facility to Security Ratio was defined as the maximum acceptable ratio between the Money Secured and the Principal Security (clause 1.1);
- (f) the Money Secured was defined to include:
 - (i) the Loan Amount;
 - (ii) all moneys deemed to be principal in arrears; and
 - (iii) all money now or hereafter owing or payable to the Lender by the Borrower; and
 - (iv) all advances and further advances that may be given by the Lender to, for, on account of or at the expressed or implied request of the Borrower;

(clause 1.1);
- (g) the Cattai Property was the Principal Security (item 11, schedule);

- (h) the Facility to Security Ratio was 63% from time to time, at the discretion of the Lender (item 13, schedule);
- (i) if at any time the Lender determined that the Facility to Security Ratio had been exceeded, the Lender had power to require the Borrower to provide additional security (clause 5.4).

Variation of the Lifestyle Loan

19. On or about 5 February 2007:

- (a) the first defendant ATF the FMIF (~~in its capacity as Responsible Entity of the FMIF~~);
- (b) Lifestyle as the Borrower;
- (c) PTAL as Lender/Custodian; and
- (d) Grahame Beach and Jacink in their own right and as trustee for the Beach Family Trust, as Guarantor;

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

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

- (a) the variation to the Principal Security contained in the Deed would be effective as and from 30 September 2006 (clause 4.11(f));
- (b) the Principal Security was defined as the Lifestyle Loan (item 4, Schedule);
- (c) the Lifestyle Loan was varied so that:
 - (i) the Loan Amount of the Lifestyle Loan was increased to \$16,070,000.00 (item 6, Schedule);
 - (ii) the date for repayment was varied from 31 (sic) September 2006 to 30 April 2007 (item 6, Schedule); and

- (iii) the Facility to Security Ratio was amended to “67% from time to time at the discretion of the lender” (item 6, Schedule).

Default under the Lifestyle Loan and attempt to sell the Cattai Property

21. In breach of the term of the Lifestyle Loan pleaded in paragraph 20(c)(ii) above, Lifestyle failed to repay the Loan Amount by 30 April 2007.
22. On 11 February 2008 PTAL appointed Blair Alexander Pleash of Hall Chadwick receiver and manager of Lifestyle pursuant to registered charge 1147332 (as pleaded in paragraph 18(d)(iii) above).
23. On 29 February 2008 Mr. Pleash, in his capacity as receiver and manager of Lifestyle, obtained a valuation of the Cattai Property from Hymans Asset Management Pty Ltd (“**the Hymans Valuation**”).
24. Relevantly, the Hymans Valuation stated that:
 - (a) the inspection date was 9 February 2008;
 - (b) the valuation date was 29 February 2008;
 - (c) the purpose of the valuation was “to assess the current market value as is in accordance with current DA approvals for proposed sale”;
 - (d) the development application approval obtained for the Cattai Property was for a tourist recreation resort and community title subdivision comprising an 18-hole golf course, tourist accommodation, conference centre and associated facilities;
 - (e) the current market value of the Cattai Property, exclusive of GST, was \$19 million;
 - (f) the valuation “*is made at the express request and is prepared solely for the use of Hall Chadwick for a proposed sale*”;
 - (g) Hymans “*accepts no responsibility for any negative outcomes to any third party who may use or rely on the whole or any part of this valuation for any purpose, without prior written consent*”;

(h) the valuation:

“...is current as at the date of valuation only. The value assessed herein may change significantly and unexpectedly over a relatively short period (including as a result of general market movements or factors specific to the particular property). We do not accept liability for losses arising from such subsequent changes in value. Without limiting the generality of the above comment, we do not assume any responsibility or accept any liability where this valuation is relied upon after the expiration of three months from the date of valuation, or such earlier date if you become aware of any factors that have any effect on the valuation.”

25. On 26 May 2008 Mr. Pleash was:

- (a) removed as receiver and manager of Lifestyle;
- (b) was appointed managing controller of Lifestyle.

26. At a time which is unknown to the plaintiffs, but which the plaintiffs believes occurred between the appointment of Mr. Pleash as receiver and manager of Lifestyle on 11 February 2008 and the execution of the Assignment Deed (as defined in paragraph 28 below) on 28 August 2008:

- (a) the first defendant ATF the FMIF; and/or
 - (b) Mr. Pleash in his capacity as receiver and manager appointed to Lifestyle; and/or
 - (c) Mr. Pleash in his capacity as managing controller appointed to Lifestyle;
- conducted a sale campaign for the Cattai Property.

27. The sale campaign did not result in a sale of the Cattai Property.

Particulars of the sale campaign for the Cattai Property

- (a) The best particulars the plaintiffs can provide are that in a document entitled “Conflict Record” dated 2 October 2008, which referred to three loans including the Lifestyle Loan, the first defendant stated:

“FMIF has held sale campaigns for the security properties, however no sale has eventuated.”

- (b) The plaintiffs will not be able to provide further particulars of the sale campaign until the completion of interlocutory steps in this proceeding.

Assignment of the Lifestyle Loan to the MPF

28. On 28 August 2008:

- (a) PTAL, in its capacity as Custodian of the FMIF, as Assignor;
- (b) the first defendant ATF the FMIF; and
- (c) the first defendant ATF the MPF, as Assignee;

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

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

- (a) in consideration of the Assignee agreeing to pay the Settlement Sum to the Assignor, the Assignor unconditionally, irrevocably and absolutely assigned all its right, title and interest in the Securities to the Assignee, which was to take effect from the Settlement Date (clause 2.1);
- (b) the Assignee was required to pay the Settlement Sum to the Assignor six months from the Settlement Date (clause 2.2);
- (c) “Securities” was defined to include the Lifestyle Loan, the Deed of Variation and the securities pleaded in paragraph 18(d) above (clause 1.1);
- (d) “Settlement Date” was defined as “ 2008 or such other date as is agreed by the Parties in writing” (clause 1.1);
- (e) “Property” was the Cattai Property (clause 1.1);
- (f) “Interest Rate” was 10% per annum (clause 1.1);
- (g) Clause 4 provided:

“4. Valuation and Payment of the Settlement Sum

4.1 Valuation

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

4.2 Settlement Sum

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

4.3 Interest

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

30. On 28 August 2008, the first defendant caused:

- (a) registered mortgage AB414899G over the Cattai Property to be transferred from PTAL as Custodian of the FMIF to the first defendant ATF MPF; and
- (b) registered charges 1147332 and 1147334 to be assigned from PTAL as Custodian of the FMIF to the first defendant ATF MPF.

Internal approvals for the assignment of the Lifestyle Loan

31. On 2 October 2008 Mr. David Monaghan of the first defendant prepared a document entitled “Conflict Record” (“**the Conflict Record**”).
32. Relevantly, the Conflict Record stated that:
 - (a) the Lifestyle Loan was in default;
 - (b) the FMIF had held a sale campaign for the security property, but no sale had eventuated;
 - (c) the Cattai Property was currently zoned for a golf course residential development;
 - (d) pre-sales for this style of development had not reached required levels to enable construction funding to proceed;
 - (e) most interested parties considered that a change of zoning would be desirable;
 - (f) the responsible entity (in the premises, LMIM ATF the FMIF) believed that a joint venture development involving a change of zoning would be successful;
 - (g) the responsible entity (in the premises, LMIM ATF the FMIF) had obtained an updated valuation for the security property to ascertain an appropriate assignment price;
 - (h) it was proposed to assign the loan to the MPF for the valuation price, as this price represented the likely recovery amount for the loan;
 - (i) as the MPF did not have sufficient cash reserves at that time to pay the assignment price, it was proposed that payment of the price be delayed by six months, with interest to be paid by the MPF at the rate of 10% per annum;
 - (j) the price was to be secured by a fixed and floating charge over the assets of the MPF;

- (k) it was not anticipated that there would be any recovery from the guarantors.
33. On 15 October 2008 Ms. Shelley Chalmers of the first defendant sent an email with the subject “FW: for consideration by MIF and MPF CCs – Lifestyle” to the following recipients:
- (a) “321 MPF Investment Committee”;
 - (b) “801 Credit Committee”;
 - (c) Grant Fischer;
 - (d) Eghard van der Hoven;
 - (e) Ann McCallum;
 - (f) Lisa Darcy; and
 - (g) David Monaghan.
34. The email dated 15 October 2008 had attached to it a document entitled “MPF Credit Committee – Synopsis,” dated 28 August 2008 (“**the Synopsis**”).
35. The Synopsis was headed: *“Transaction: Proposed purchase from and short term finance from LM First Mortgage Income Fund to acquire ppty at 76 Wisemans Ferry Road, Cattai.”*
36. Relevantly, the Synopsis stated that:
- (a) the MPF proposed to acquire an existing FMIF mortgage, which was secured over the Cattai Property;
 - (b) the Cattai Property comprised a future residential/golf course type development site;
 - (c) the Cattai Property was not income producing;
 - (d) the first defendant ATF the FMIF had obtained an updated valuation, and the MPF was relying on this report for its purposes;

(e) the MPF wished to enter into a six month sale contract to buy the Lifestyle Loan as at 28 August 2008, on the following finance terms:

- (i) the purchase price was \$19,551,800.65, which was the total of the FMIF's debt as at 28 August 2008;
- (ii) the MPF had until 28 February 2009 to settle the purchase;
- (iii) until the payment of the settlement amount, the MPF would pay to the FMIF 10% interest per annum on the purchase price.

37. On 22 October 2008 Ms. Shelley Chalmers of the first defendant sent a further email with the subject "FW: for consideration by MIF and MPF CCs – Lifestyle" to the recipients listed in paragraph 33 above.

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

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

39. In response, on 22 October 2008 and 23 October 2008 the recipients listed in paragraph 33 above, together with Ms. Chalmers, responded that they approved the transaction.

Approval of the Assignment by the first defendant's Board of Directors

40. By a resolution dated 27 October 2008 ("**Resolution**"), to which the Conflict Record was attached, the Board of Directors of the first defendant ATF the MPF and ATF the FMIF resolved to approve the assignment of the Lifestyle Loan from the FMIF to the MPF.

40A. The effect of the Resolution and the Synopsis was that LMIM ATF the MPF and ATF the FMIF, agreed that the amount of \$19,551,800.65 would be treated as the amount of the Settlement Sum referred to in clause 4 of the Assignment Deed.

40B. Hereafter, a reference to the Settlement Sum is a reference to the amount of \$19,551,800.65.

Variations of the Assignment Deed

41. On 12 December 2008:

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

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

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

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

43. On 10 August 2009:

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

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

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

- (a) the definition of Interest Rate set out in clause 1.1 of the Assignment Deed was varied, to read 7% per annum (item 2, Schedule);

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

45. On 30 November 2010:

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

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

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

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

46A. Hereafter, the Assignment Deed, the First Deed of Variation of the Assignment Deed, the Second Deed of Variation of the Assignment Deed and the Third Deed of Variation of the Assignment Deed are collectively referred to as the "**Deeds**".

Payment of the Settlement Sum under the Assignment Deed

47. By no later than ~~On or about 30~~ May 2011 the first defendant ATF the MPF as Assignee paid the Settlement Sum to PTAL (acting as Custodian for the first defendant ATF the FMIF) as Assignor or, in the alternative, to the first defendant ATF the FMIF, pursuant to clause 2.2 of the Assignment Deed (as varied).

Particulars

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

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

- (b) By an ASIC Form 312 dated 7 July 2011 the first defendant as Chargor notified ASIC that registered charge number 1768753, which was a fixed and floating charge in favour of PTAL, had been paid or satisfied in full and had therefore been discharged or released on 6 July 2011;
- (c) The first defendant ATF the MPF had provided registered charge number 1768753 to PTAL as security for (relevantly) payment of all moneys that the first defendant ATF the MPF owed to PTAL, which included the Settlement Sum payable under the Assignment Deed.
- (d) The first defendant maintained an internal account ledger no. 13041 called "Receivable – MPF Purchase of Loan Assets" that recorded receivables to

be paid by the first defendant ATF the MPF to the first defendant ATF the FMIF in relation to the Settlement Sum in this proceeding, a separate settlement sum in related proceeding S8032/14 ("First Proceeding") and an unrelated (but similar) assignment concerning a Mr Kamel Albassit in the total amount of \$33,420,755.57. Ledger no. 13401 shows that as at 27 May 2011, the first defendant ATF the MPF had paid all receivables owing.

(e) At page 33 of the FMIF's Audited Annual Financial Report dated 30 June 2011 it is stated that "LM MPF has successfully settled the full value of these loans as at 30 June 2011". The loans being referred to included the loans assigned to the first defendant ATF the MPF under the Assignment Deed.

(f) ~~The plaintiffs will not be able to provide further particulars of the payment of the Settlement Sum until the completion of interlocutory steps in this proceeding.~~

47A—The Settlement Sum:

(a) ~~consisted of, at least:~~

- i. ~~direct cash payments;~~
- ii. ~~payments on behalf of or for the benefit of the defendant ATF FMIF, to third parties:~~

Particulars

~~The plaintiff will not be able to provide particulars of the payments until the completion of interlocutory steps in this proceeding.~~

(b) ~~delivered value to the defendant ATF the FMIF in relation to which the plaintiff is entitled to trace.~~

Particulars

The plaintiff will not be able to provide particulars of the assets represented by that value until the completion of interlocutory steps in this proceeding.

~~47A. The Settlement Sum consisted of a total payment of principal in the amount of \$19,551,800.65, comprising the following classes of payments made between 28 August 2008 and 27 May 2011:~~

- ~~(a) payments by the first defendant ATF MPF direct to the first defendant ATF FMIF (“Direct Payments”);~~
- ~~(b) payments by the first defendant ATF MPF to LM Administration Pty Ltd (“LMA”) for FMIF’s operation fees, at the direction of the first defendant ATF FMIF;~~
- ~~(c) payments by the first defendant ATF MPF to the first defendant for trust management fees;~~
- ~~(d) payments by the first defendant ATF MPF to borrowers from FMIF, at the direction of the first defendant ATF FMIF;~~
- ~~(e) payments by the first defendant ATF MPF to unitholders of the FMIF, at the direction of the first defendant ATF FMIF;~~
- ~~(f) payments by the first defendant ATF MPF to sundry third party creditors of the FMIF, at the direction of the first defendant ATF FMIF.~~

Particulars

~~The transactions within these classes are identified within internal ledger account no. 13041, which was maintained by the first defendant in relation to the Settlement Sum in this proceeding, a separate Settlement Sum in related proceeding S8032/14 and an unrelated (but similar) assignment concerning Mr Kamel Albassit (“Albassit assignment”)~~

~~47B. The total Direct Payments by the first defendant ATF MPF to the first defendant ATF FMIF as part of the Settlement Sum in this proceeding and as part of the Settlement Sum in related proceeding S8032/14 (“First Proceeding”), was~~

~~\$5,556,008. The plaintiff accepts that this amount has to be apportioned between this proceeding and the First Proceeding.~~

Payment of interest on the Settlement Sum under the Assignment Deed

47C. As pleaded in paragraphs 29(f), 29(g), 44(a) and 46(a) above, by clause 4.3 of the Assignment Deed (as varied) the first defendant ATF the MPF agreed to pay interest to the Assignor on the unpaid Settlement Sum at the rates of:

- (a) 10% per annum between 28 August 2008 and 28 August 2009;
- (b) 7% per annum between 28 August 2009 and 28 August 2010; and
- (c) 8.5% per annum from 28 August 2010.

47D. ~~Between August 2008 and July~~By no later than May 2011, the first defendant ATF the MPF had paid at least \$5,679,658 ("**Total Interest**") to PTAL (acting as Custodian for the first defendant ATF the FMIF) as Assignor or, in the alternative, the first defendant ATF the FMIF for interest on(~~"Interest~~):

- (a) ~~the Settlement Sum under the Assignment Deed in this proceeding;~~
- (b) ~~the Settlement Sum settlement sum referred to in under the Assignment Deed in the assignment deed the subject of the First Proceeding. The plaintiff accepts that this amount has to be apportioned between this proceeding and the First Proceeding.~~

Particulars

The best particulars that the plaintiff can currently give in relation to the composition of the \$5,679,658 was provided in the plaintiff's further and better particulars dated 30 March 2016.

~~The interest transactions are identified within: (i) internal ledger account no. 1300/A1472 which was maintained by the first defendant in relation to the Settlement Sum in this proceeding, the Settlement Sum in the First Proceeding, the Albassit assignment and an unrelated loan for \$5.1 million and (ii) internal ledger account no. 13041 and (iii) internal ledger account no. 13040.~~

47E. Of the Total Interest, the plaintiff claims the amount of \$3,805,370.86 ("Interest") as having been paid in relation to the Settlement Sum.

Particulars

This represents 67% of \$5,679,658.

The amount of 67% was calculated by dividing \$19,551,800.65 by \$29,283,463.41.

The amount of \$29,283,463.41 was calculated by adding \$19,551,800.65 to the amount of \$9,731,662.76, which is the settlement sum in the First Proceeding.

Contribution to the Fund

47E. The Payment by the first defendant ATF MPF of the Settlement Sum and the Interest to the first defendant ATF FMIF, was a contribution to the Fund in that:

(a) but for the payment of the Settlement Sum and the Interest, the Fund would have been for a considerably lesser sum;

(b) the first defendant ATF FMIF used the Settlement Sum and the Interest to continue its business, which contributed to the creation of the Fund.

The first defendant's breaches of duty

The "no conflict" duty

48. By entering into the Assignment Deed, the first defendant ATF the MPF placed itself in a position where the duties that it owed to the beneficiaries of the FMIF were in conflict with the duties that it owed to the beneficiaries of the MPF, in that:

- (a) the interests of the beneficiaries of the FMIF required LMIM to maximise the amount the FMIF could recover for the Lifestyle Loan; while
 - (b) the interests of the beneficiaries of the MPF required LMIM to minimise, as far as reasonably possible, the amount it paid to acquire assets on behalf of the MPF.
49. The first defendant ATF the MPF did not seek, or obtain, the informed consent of the beneficiaries of the MPF:
- (a) to the first defendant being in the position of conflict pleaded in paragraph 48 above; or
 - (b) to enter into the ~~Deeds Assignment Deed or the First, Second or Third Deeds of Variation of the Assignment Deed, as pleaded in paragraphs 28 to 47 of this Statement of Claim.~~

Equitable dutiesduty of care

50. Notwithstanding its knowledge of the matters pleaded in paragraphs 32 and 36 above:
- (a) if the first defendant ATF the MPF relied upon the Hymans Valuation in entering into the Assignment Deed:
 - (i) the first defendant ATF the MPF failed to comply with the obligation in clause 4.1 of the Assignment Deed for the Assignee to obtain a new valuation of the Cattai Property within 90 days of the Settlement Date;
 - (ii) the “valuation date” of the Hymans Valuation was 29 February 2008, and (as pleaded in paragraph 24(h) above) the Hymans Valuation stated that Hymans did not assume any responsibility or accept any liability where the valuation was relied upon after the expiration of three months from the date of valuation;
 - (iii) notwithstanding the matters pleaded in paragraphs 24(f) and 24(g) above, the first defendant ATF the MPF did not obtain Hymans’

prior written consent to the first defendant ATF the MPF relying upon the Hymans Valuation for the purposes of entering into the Assignment Deed;

(iv) notwithstanding the matters pleaded in paragraph 24(h) above, the first defendant ATF the MPF did not advise Hymans of the following factors that would be likely to have an effect on the valuation of the Cattai Property:

- A. that the FMIF had held a sale campaign for the security property, but no sale had eventuated; and
- B. that the first defendant, and most interested parties, considered that a change of zoning for the Cattai Property would be desirable;

(b) in the premises pleaded in paragraph 36(e)(i) above, the first defendant ATF the MPF agreed to pay the amount of \$19,551,800.65 as the Settlement Sum under the Assignment Deed, notwithstanding that:

- (i) in breach of clause 4.1 of the Assignment Deed the first defendant ATF the MPF and as the Assignee did not commission and pay for an independent valuation (or any valuation) as contemplated by that clause.
- (ii) this breached clause 4.2 of the Assignment Deed, as this was not the market value of the Cattai Property as determined by a valuation obtained pursuant to clause 4.1 of the Assignment Deed;
- (iii) this was \$551,880.65 more than the value of \$19 million ascribed to the Cattai Property by the Hymans Valuation;
- (iv) the first defendant did not anticipate that there would be any recovery from the guarantors (that is, Beach and Jacink, as pleaded in paragraph 18(d) above);

(v) when the Assignment Deed was executed on 28 August 2008, the Facility to Security Ratio for the Lifestyle Loan was approximately 103%, in circumstances where, in the premises pleaded in paragraphs 18(e), 18(h) and 20(c)(iii) above:

A. between 30 March 2005 and 5 February 2007 the Facility to Security Ratio had been required to be 63%, at the discretion of the Lender; and

B. from 5 February 2007, the Facility to Security ratio was required to be 67%, at the discretion of the Lender;

~~(e) as pleaded in paragraphs 29(f), 29(g), 44(a) and 46(a) above, by clause 4.3 of the Assignment Deed the first defendant ATF the MPF agreed to pay interest to the Assignor on the unpaid Settlement Sum at the rates pleaded at 47C above of:~~

~~(i) 10% per annum between 28 August 2008 and 28 August 2009;~~

~~(ii) 7% per annum between 28 August 2009 and 28 August 2010; and~~

~~(iii) 8.5% per annum from 28 August 2010;~~

notwithstanding that:

(iv) in or about August 2008 or, alternatively, when the Conflict Record was prepared in October 2008, the MPF did not have sufficient cash reserves to pay the Settlement Sum to the FMIF;

(v) in the premises pleaded in paragraph 47 above, the MPF did not have sufficient cash reserves to pay the Settlement Sum until approximately July 2011;

(vi) in the premises, the Assignment Deed as varied caused interest to accrue on the Settlement Sum ~~on the amount of \$19,551,800.65~~ per annum, at the rates pleaded in paragraph 47C above ~~50(e)~~ above, for a period of almost three years;

- (vii) as pleaded in paragraph 50(b)(v) above, the Facility to Security Ratio for the Lifestyle Loan was approximately 103% as at 28 August 2008, before interest commenced accruing on the unpaid Settlement Sum pursuant to clause 4.3 of the Assignment Deed; and
- (viii) the Cattai Property was not income producing (as pleaded in paragraph 36(c) above); and
- (d) as pleaded in paragraphs 29(a) and 30 above, in breach of clause 2.1 of the Assignment Deed the first defendant caused the Securities to be assigned to itself ATF the MPF on 28 August 2008, notwithstanding that:
 - (i) clause 2.1 provided that the assignment was to take effect from the Settlement Date;
 - (ii) as pleaded in paragraph 46(b) above, the Assignment Deed was varied so that the Settlement Date was 28 August 2011 or such earlier date as may be mutually agreed;
 - (iii) in the premises pleaded in paragraphs 39 and 40 above neither the MPF Credit Committee, nor the Board of Directors of LMIM, had approved the Assignment Deed when the Securities were assigned to the first defendant ATF the MPF.

Breach of duty

51. In the premises pleaded in paragraphs 48, 49 and 50 above, by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds, the first defendant ATF the MPF breached the duty (pleaded at paragraph 14 above) that it owed to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty, in that the duties that it owed to the beneficiaries of the MPF conflicted with the duties that it owed to the beneficiaries of the FMIF.
52. In the premises pleaded in paragraph 50 above, by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds, the first defendant ATF the MPF

breached the duty (pleaded at paragraph 15 above) that it owed to the beneficiaries of the MPF to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.

Duties under the *Trusts Act* 1973 (Qld)

53. In the premises pleaded in paragraph 50 above, by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds, the first defendant ATF the MPF breached the duty (pleaded at paragraph 16(a) above) it owed pursuant to s.22 of the *Trusts Act* to the beneficiaries of the MPF, 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.
54. The first defendant ATF the MPF breached the duties (pleaded at paragraph 16(b) above) that it owed pursuant to s.24 of the *Trusts Act* to the beneficiaries of the MPF, in that by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds:
 - (a) in the premises pleaded in paragraphs 50(a), 50(b) and 50(c) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(e) of the *Trusts Act* to take into account the risk of capital or income loss or depreciation when exercising its power of investment;
 - (b) in the premises pleaded in paragraphs 50(b), 50(c) and 50(d) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(g) of the *Trusts Act* to take into account the likely income return and the timing of income return;
 - (c) in the premises pleaded in paragraphs 50(c)(iv) and (v) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(h) of the *Trusts Act* to take into account the length of the term of the proposed investment;

- (d) in the premises pleaded in paragraphs 50(a), 50(b) and 50(c) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(j) of the *Trusts Act* to take into account the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment; and
- (e) in the premises pleaded in paragraph 50(c) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(n) of the *Trusts Act* to take into account the cost of making the proposed investment.

Loss suffered by the MPF

55. But for the first defendant ATF the MPF's breach of duties pleaded at paragraphs 48 to 54 above, the first defendant ATF the MPF would not have:

- (a) entered into the Deeds;
- (b) paid the Settlement Sum;
- (c) paid the Interest.

~~In consequence of the first defendant's breaches of duty:~~

- ~~(d) in or about July 2011 the first defendant ATF the MPF paid the amount of \$19,551,800.65 as the Settlement Sum pursuant to the Assignment Deed, plus the Interest calculated at the rates pleaded in paragraphs 50(c)(i) to (iii) above, to PTAL in its capacity as Custodian of the FMIF;~~
- ~~(e) in exchange, the only valuable security that the first defendant ATF the MPF received pursuant to the Assignment Deed was registered mortgage AB414899G over the Cattai Property.~~

55A. As a result of the matters pleaded in paragraph 55, the first defendant ATF the MPF suffered a loss in the amount of \$18,982,171.51 ("Loss").

Particulars

(Settlement Sum plus Interest) minus (the Sale Proceeds – defined below)

(\$19,551,800.65 and \$3,805,370.86) minus (\$4,375,000)

55B. The first defendant is liable (the "**Liability**") to pay equitable compensation to the plaintiff for the Loss.

~~56. The market value of the Cattai Property as at:~~

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

~~was, and will be, significantly less than:~~

- ~~(d) the amount of \$19,551,800.65 that the first defendant ATF the MPF agreed to and did pay as the Settlement Sum pursuant to the Assignment Deed; and~~
- ~~(e) the amount of \$19,551,800.65 plus the Interest calculated between 28 August 2008 and July 2011 at the rates pleaded in paragraphs 50(c)(i) to (iii) above, which the first defendant ATF the MPF agreed to pay and did pay pursuant to the Assignment Deed (as amended).~~

Particulars

~~The best particulars the plaintiffs can provide are that:~~

- ~~(i) on or about 1 July 2013 the plaintiffs KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Limited (ACN 108 318 985) obtained a valuation from LandMark White valuers for the Cattai Property in the amount of \$4,180,000.00, excluding GST; and~~

~~(ii) the plaintiffs KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Limited (ACN 108 318 985) sold the Cattai Property for \$4,357,000 plus GST in July 2013.~~

56A. In July 2013, the plaintiff and Calibre sold the Cattai Property for \$4,357,000 ("Sale Proceeds").

Particulars

The best particulars that the plaintiff can provide the sale process are provided in the further and better particulars dated 30 March 2016 save that to those particulars one further sale dated 23 April 2012 by PTAL to Mr Peter Farrell of Lot 177 in the amount of \$455,000 should be added.

~~57. The first defendant was:~~

~~(a) in the premises pleaded in paragraphs 4 to 7 above, aware that it, ATF the MPF, held the assets of the MPF on trust for the beneficiaries of the MPF;~~

~~(b) in the premises pleaded in paragraphs 31 to 36, paragraph 40 and paragraphs 48 to 50 above, aware that the payments to itself ATF the FMIF, or alternatively to PTAL as Custodian of the FMIF, of \$19,551,800.65 as the Settlement Sum pursuant to the Assignment Deed, and the Interest pursuant to clause 4.3 of the Assignment Deed, were made in breach of trust.~~

58. In the premises pleaded in paragraph 13(a) above, insofar as PTAL may hold the Fund or other assets in its as Custodian of the FMIF, it holds the Fund or other assets, as agent for the first defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement.

(a) the amount pleaded in paragraph 57 above in its capacity as Custodian of the FMIF, it holds that amount as agent for the defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement;

(b) assets representing the value it received from the Settlement Sum, it holds those assets as agent for the defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement.

59. ~~In the premises, the defendant ATF the FMIF holds:~~

~~(a) — the amount of \$19,551,800.65 paid as the Settlement Sum pursuant to the Assignment Deed (subject to any appropriate adjustments); and~~

~~(b) — all interest paid pursuant to clause 4.3 of the Assignment Deed;~~

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

The first defendant's right of indemnity and the plaintiff's right of subrogation

61. The first defendant is insolvent.

62. The first defendant ATF the FMIF entered into the Deeds acting for the benefit of the FMIF.

63. The Deeds, the payment of Settlement Sum and the payment of the Interest, provided a benefit to LMIM ATF the FMIF and the FMIF.

64. The first defendant was acting ATF the MPF and ATF the FMIF when it entered into the Deeds.

65. The first defendant was acting ATF the MPF and ATF the FMIF when the Settlement Sum was paid.

66. The first defendant was acting ATF the MPF and ATF the FMIF when the Interest was paid.

67. The first defendant was acting ATF the MPF and ATF the FMIF when it passed the Resolution.

68. In the premises pleaded at paragraphs 64 to 67, the first defendant incurred the Liability to the plaintiff, in circumstances where the first defendant was acting ATF the MPF and ATF the FMIF.

69. The first defendant is entitled to an indemnity out of the assets of the FMIF, including the Fund, in respect of the Liability and any other liabilities to the plaintiff in this proceeding ("**Indemnity**").

70. The first defendant is entitled to a lien or charge over the assets of the FMIF, including the Fund, to secure the Indemnity.

71. The plaintiff is entitled to be subrogated to the rights of the first defendant in relation to the Indemnity.

~~In the premises pleaded at paragraphs 17 to 47A, the first defendant:~~

~~(a) incurred the liabilities for breaches of duty pleaded above pleaded at paragraphs 55 to 59, while acting as the trustee of the FMIF;~~

~~(b) is entitled to an indemnity out of the assets of the FMIF in respect of the liabilities of the first defendant to the plaintiff in this proceeding;~~

~~(c) is entitled to a lien or charge over the assets of the FMIF to secure that indemnity;~~

~~62. The plaintiff is entitled to be subrogated to the rights of the first defendant in relation to the assets of the FMIF, including the Fund.~~

The plaintiffs claims the following relief:

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

(a) the first defendant is entitled to be indemnified an indemnity out of the assets of the FMIF, including the Fund, in respect of the Liability Liability

and any other liabilities of the first defendant to the plaintiff in this proceeding;

- (b) the first defendant has a lien or charge over the assets of the FMIF, including the Fund, in respect of the ~~liability~~ Liability and any other liabilities of the first defendant to the plaintiff in this proceeding;
- (c) the plaintiff is entitled to be subrogated to the rights of the first defendant in respect of the assets of the FMIF, including the Fund in relation to the indemnity;

~~6A Further or in the alternative, a declaration that:~~

- ~~(a) the plaintiff and the FMIF Unitholders rank equally in the Fund;~~
- ~~(b) the plaintiff is entitled to a rateable distribution in the Fund in relation to the Settlement Sum and the Interest;~~
- ~~(c) the plaintiff is entitled to an equitable charge or lien over the Fund to the extent of its rateable distribution;~~

~~7. Further, or in the alternative, an equitable charge or lien over the assets of the defendant to the extent of the defendant's liability to the plaintiff in this proceeding.~~

8. Further or in the alternative, an order that the first defendant and the second defendant instruct PTAL pursuant to clause 2.1 of the Custody Agreement to do all things necessary to give effect to any orders made against the first defendant.

Signed:

Description: MINTER ELLISON
Solicitors for the plaintiffs

Dated: ~~27 August 2014 1 September 2015 14 October 2015 29 February 2016~~ 19 April 2016

This pleading was settled by Mr Crowe QC and Ms Ahern of Counsel. The amendments to this pleading were settled by Mr Crowe QC and Mr Goodwin of Counsel.

NOTICE AS TO DEFENCE

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