

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 1076/17

Plaintiff: **KORDAMENTHA PTY LTD (ACN 100 169 391) IN ITS
CAPACITY AS TRUSTEE OF THE LM MANAGED
PERFORMANCE FUND**

AND

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

AFFIDAVIT

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

1. I am a member of the firm MinterEllison, the solicitors for KordaMentha Pty Ltd (ACN 100 169 391) in its capacity as trustee for the LM Managed Performance Fund ("Trustee"). I have the conduct of this proceeding on behalf of the Trustee, and I am duly authorised to swear this affidavit on its behalf.
2. This proceeding was commenced by claim and statement of claim filed in this Honourable Court on 6 February 2017. The Court File Index ("CFI") number of these documents is CFI 1.

Signed: *David Thomas O'Brien* Page 1
Taken by: *David Thomas O'Brien*

AFFIDAVIT OF DAVID THOMAS O'BRIEN

MINTER ELLISON
Waterfront Place, 1 Eagle Street
BRISBANE QLD 4000
DX102 BRISBANE

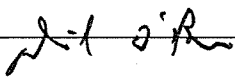
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email
david.obrien@minterellison.com
Reference DOB 1109005



Filed on behalf of the Plaintiff

Form 47 Rule 431

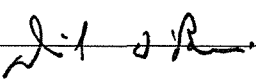
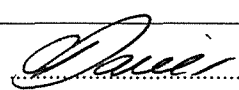
3. On 22 January 2018, the plaintiff applied pursuant to section 500(2) of the *Corporations Act 2001* (Cth) for leave nunc pro tunc to commence and prosecute this proceeding. That application is CFI 2.
4. On 1 February 2018, the Honourable Justice Atkinson ordered (CFI 7) in respect of the leave application (CFI 2) as follows:
 1. *"Subject to further order, pursuant to section 500(2) of the Corporations Act 2001 (Cth), the plaintiff be granted leave nunc pro tunc to commence and to proceed with this Supreme Court of Queensland proceeding against the defendant, LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) (ACN 077 208 461), on the condition that any judgment against the defendant will not be enforced without further leave of the Court.*
 2. *The plaintiff serve the claim and statement of claim in this matter on or before 5 February 2018.*
 3. *The defendant is not required to file a defence and any counterclaim until 28 days after the plaintiff gives written notice to the defendant's solicitors, Clayton Utz, that a defence and any counterclaim is required to be filed.*
 4. *Nothing in this order affects the ability of the defendant or any insurer of the defendant to argue at any trial of the proceeding or on any application to revoke the leave granted under paragraph 1, that an insurance policy does not respond to the claim.*
 5. *The applicant plaintiff's costs and expenses of and incidental to this application be paid on the indemnity basis out of the LM Managed Performance Fund.*
 6. *If the plaintiff does not give notice in accordance with paragraph 3 by 31 January 2019 then the leave to proceed in paragraph 1 is withdrawn.*
 7. *Liberty to apply on 3 clear day's notice."*
5. On 2 February 2018, I caused to be served upon the defendant's solicitors, Clayton Utz, Court sealed copies of the claim and statement of claim (CFI 1) under cover of a letter dated 2 February 2018, a copy of which is exhibit "DOB-1".

Signed: 

Page 2

Taken by: 

6. On 2 February 2018, Clayton Utz sent me an email attached to which was a copy of the claim and statement of claim endorsed with their acceptance of service. Exhibit "**DOB-2**" is a copy of Clayton Utz's email dated 2 February 2018, and the attachment to it.
7. Since service of the claim and statement of claim on 2 February 2018, the plaintiff has not given notice to Clayton Utz pursuant to paragraph 3 of the Honourable Justice Atkinson's order (CFI 7) that a defence and any counterclaim is required to be filed.
8. I seek leave to refer to paragraphs [59] to [61] of Mr Villani's affidavit sworn on 24 January 2018, and filed in this proceeding (CFI 3). There Mr Villani outlines the reasons why the Trustee had not to that date made an application under section 96 of the *Trusts Act* 1973 (Qld) for a direction to prosecute this proceeding. Essentially, at that time there was a possibility of this proceeding and related proceedings being settled. Subsequently, those settlement negotiations concluded unsuccessfully.
9. On 8 November 2018, I sent by email to Clayton Utz, a letter enclosing Court sealed copies of the two applications (CFI 8 and CFI 9) filed in this proceeding on 8 November 2018. Exhibit "**DOB-3**" is a copy of my email and letter (excluding enclosures).
10. On 14 November 2018, I sent by email to Clayton Utz a copy of Jarrod Villani's affidavit sworn on 14 November 2018, and filed in this proceeding (CFI 10). Exhibit "**DOB-4**" is a copy of my email (excluding the attachment) of 14 November 2018 to Clayton Utz.
11. On 15 November 2018, I received by email from Clayton Utz their letter dated 15 November 2018 to my firm outlining the defendant's position with respect to the two applications referred to in paragraph 9 above. Exhibit "**DOB-5**" is a copy of Clayton Utz's email and letter dated 15 November 2018 to MinterEllison.
12. On 15 November 2018, I sent by email to Clayton Utz a letter dated 15 November 2018, responding to their letter dated 15 November 2018. Exhibit "**DOB-6**" is a copy of my email and letter dated 15 November 2018 to Clayton Utz.

Signed:  Page 3 Taken by: 

13. All the facts and circumstances deposed to in this affidavit are within my own knowledge except where they have been deposed to from information only and my means of knowledge and sources of information appear in my affidavit.

SWORN by DAVID THOMAS O'BRIEN on 15 November 2018

at Brisbane

David Thomas O'Brien

Deponent

in the presence of:

Claire Davies

Solicitor/Commissioner for
Declarations/Justice of the Peace

SUPREME COURT OF QUEENSLAND

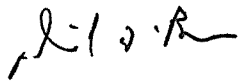
REGISTRY: Brisbane

NUMBER: 1076/17

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

CERTIFICATE OF EXHIBIT

Exhibit **DOB-1** to exhibit **DOB-6** the affidavit of DAVID THOMAS O'BRIEN sworn 15
November 2018.



Deponent



Solicitor/Commissioner for
Declarations/Justice of the Peace

AFFIDAVIT OF DAVID THOMAS O'BRIEN

MINTER ELLISON
Waterfront Place, 1 Eagle Street
BRISBANE QLD 4000
DX102 BRISBANE

Filed on behalf of the Plaintiff

Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email
david.obrien@minterellison.com
Reference DOB 1109005

Form 47 Rule 431

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 1076/17

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

LIST OF EXHIBITS

Exhibit	Document	Pages
DOB-1	Letter MinterEllison to Clayton Utz (excluding enclosures) dated 2 February 2018	1-2
DOB-2	Email Clayton Utz to MinterEllison dated 2 February 2018	3-24
DOB-3	Emailed letter MinterEllison to Clayton Utz (excluding enclosures) dated 8 November 2018	25-26
DOB-4	Email MinterEllison to Clayton Utz (excluding attachment) dated 14 November 2018	27
DOB-5	Emailed letter Clayton Utz to Minter Ellison dated 15 November 2018	28-29
DOB-6	Emailed letter MinterEllison to Clayton Utz dated 15 November 2018	30-32

MinterEllison

2 February 2018

BY HAND DELIVERY

Mr William Gollinelli
Clayton Utz
Level 28 Riparian Plaza
71 Eagle Street
BRISBANE QLD 4000

Dear Mr Gollinelli

KordaMentha Pty Ltd (ACN 100 169 391) in its capacity of Trustee of the LM Managed Performance Fund v LM Investment Management Limited (Receivers and Managers Appointed) (in liquidation) (ACN 077 208 461)

Queensland Supreme Court Proceeding No. BS1076/17 ("Proceeding")

We refer to our Mr O'Brien's telephone conversation with you this afternoon.

We confirm that the Honourable Justice Atkinson yesterday made the following order in the Proceeding:

1. Subject to further order, pursuant to section 500(2) of the *Corporations Act* 2001 (Cth), the plaintiff be granted leave *nunc pro tunc* to commence and to proceed with this Supreme Court of Queensland proceeding against the defendant, LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) (ACN 077 208 461), on the condition that any judgment against the defendant will not be enforced without further leave of the Court.
2. The plaintiff serve the claim and statement of claim in this matter on or before 5 February 2018.
3. The defendant is not required to file a defence and any counterclaim until 28 days after the plaintiff gives written notice to the defendant's solicitors, Clayton Utz, that a defence and any counterclaim is required to be filed.
4. Nothing in this order affects the ability of the defendant or any insurer of the defendant to argue at any trial of the proceeding or on any application to revoke the leave granted under paragraph 1, that an insurance policy does not respond to the claim.
5. The applicant plaintiff's costs and expenses of and incidental to this application be paid on the indemnity basis out of the LM Managed Performance Fund.
6. If the plaintiff does not give notice in accordance with paragraph 3 by 31 January 2019 then the leave to proceed in paragraph 1 is withdrawn.

Level 22 Waterfront Place 1 Eagle Street Brisbane
PO Box 7844 Waterfront Place QLD 4001 Australia DX 102 Brisbane
T +61 7 3119 6000 F +61 7 3119 1000 minterellison.com

ME_144651222_1



7. Liberty to apply on 3 clear days' notice.

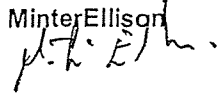
Pursuant to paragraph 2 of the abovementioned order, we hereby serve the Court sealed claim and statement of claim in this matter.

Please would you confirm service today.

We will provide you with a Court sealed copy of her Honour's order once we have obtained it.

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 1109005

David O'Brien

From: Golinelli, William <wgolinelli@claytonutz.com>
Sent: Friday 2 February 2018 08:05 pm
To: David O'Brien
Subject: RE: KM(MPF) v LMIM [ME-ME.FID3078676]
Attachments: Claim and Statement of Claim (endorsed r. 115 UCPR) 1076_17 proceeding.PDF

David,

Please see **attached** copy of the claim and statement of claim endorsed pursuant to rule 115 of the UCPR.

Kind regards,

Will Golinelli, Lawyer (Senior)

Clayton Utz

Level 28 Riparian Plaza, 71 Eagle Street, Brisbane QLD 4000 Australia | D +617 3292 7067 | F +617 3221 9669 |
wgolinelli@claytonutz.com | www.claytonutz.com

Please consider the environment before printing this e-mail

From: David O'Brien [mailto:David.O'Brien@minterellison.com]
Sent: Friday, 2 February 2018 5:49 PM
To: Golinelli, William
Subject: RE: KM(MPF) v LMIM [ME-ME.FID3078676]

Dear Will,

One further thing.

Would you be able to send me a copy of the claim and statement of claim endorsed with the note contemplated by Rule 115(2) UCPR on Monday morning ?

Thank you in anticipation.

Regards

David O'Brien

Partner
T 07 3119 6159 M +61 401 148 939
david.obrien@minterellison.com

MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000
minterellison.com Follow us on **LinkedIn** and **Twitter**

From: David O'Brien
Sent: Friday 2 February 2018 04:50 pm
To: 'Golinelli, William' <wgolinelli@claytonutz.com>
Subject: RE: KM(MPF) v LMIM [ME-ME.FID3078676]

Dear Will,

Thank you for confirming service.

I will send through a sealed copy of her Honour's order as soon as it is available.

Regards

David O'Brien

Partner

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

david.obrien@minterellison.com

MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000

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From: Golinelli, William [mailto:wgolinelli@claytonutz.com]

Sent: Friday 2 February 2018 04:31 pm

To: David O'Brien <David.O'Brien@minterellison.com>

Subject: RE: KM(MPF) v LMIM [ME-ME.FID3078676]

Dear David,

Further to your below email, I confirm receipt of the claim and statement of claim.

Kind regards,

 William Golinelli, Lawyer (Senior)
Clayton Utz

Level 28 Riparian Plaza, 71 Eagle Street, Brisbane QLD 4000 Australia | D +617 3292 7067 | F +617 3221 9669 |
wgolinelli@claytonutz.com | www.claytonutz.com

Please consider the environment before printing this e-mail

From: David O'Brien [mailto:David.O'Brien@minterellison.com]

Sent: Friday, 2 February 2018 3:50 PM

To: Golinelli, William

Subject: KM(MPF) v LMIM [ME-ME.FID3078676]

Dear Will,

I understand that the claim and statement have claim have now been delivered.

Please could you confirm service ?

Regards



David O'Brien

Partner

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

david.obrien@minterellison.com

MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000

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SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 1076/17

Plaintiff: KORDAMENTHA PTY LTD (ACN 100 169 391)
IN ITS CAPACITY AS TRUSTEE OF THE LM
MANAGED PERFORMANCE FUND

AND

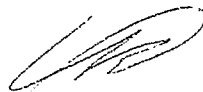
Defendant: LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION) (ACN 077 208 461)

CLAIM

*Pursuant to rule 115 of the
Uniform Civil Procedure Rules 1999
(Qld), I confirm service of this
Claim and Statement of Claim
on behalf of the Defendant.*

The plaintiff claims:

1. Equitable compensation.
2. Interest pursuant to section 58 of the *Civil Proceedings Act 2011 (Qld)*; and
3. Costs.



Will Golinelli,
Solicitor

2 February 2018

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

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND

And filed in the Brisbane Registry on 6 February 2018



CLAIM

MinterEllison
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 Brisbane

Filed on behalf of the Plaintiff

Telephone (07) 3119 6000
Facsimile 3119 1000
Email nadia.braad@minterellison.com
Reference NYB DOB 1109005

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

Address of Registry: QEII Courts of Law Complex
415 George Street
Brisbane Qld 400

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

PARTICULARS OF THE PLAINTIFF:

Name: KordaMentha Pty Ltd (ACN 100 169 391) in its capacity as trustee of the LM Managed Performance Fund

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

Plaintiff's solicitors name: Nadia Suzanne Braad
and firm name: MinterEllison

Solicitor's business address: Waterfront Place, 1 Eagle Street, BRISBANE QLD 4000

Address for Service: Waterfront Place, 1 Eagle Street, BRISBANE QLD 4000

DX: 102 Brisbane

Telephone: (07) 3119 6000

Fax: (07) 3119 1000

Email address: nadia.braad@minterellison.com

Signed:

M. T. Ellison

Description:

MINTER ELLISON
Solicitors for the plaintiff

Dated:

6 February 2017

This claim is to be served on:

LM Investment Management Limited (Receivers and
Managers Appointed)(in liquidation) (ACN 077 208
461)

of:

FTI Consulting, 'Corporate Centre One' Level 9, 2
Corporate Court, Bundall Qld 4217

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER

Plaintiff: **KORDAMENTHA PTY LTD (ACN 100 169 391)**
 IN ITS CAPACITY AS TRUSTEE OF THE LM
 MANAGED PERFORMANCE FUND

AND

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

Filed in the Brisbane registry on 6 February 2017

STATEMENT OF CLAIM

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

1. The plaintiff is and has been at all times material to this proceeding:
 - (a) a company duly incorporated according to law; and
 - (b) capable of suing in its corporate name.
2. The defendant:
 - (a) is and has been at all times material to this proceeding, a company duly incorporated according to law;
 - (b) is and has been at all times material to this proceeding, capable of being sued in its corporate name; and

STATEMENT OF CLAIM

Filed on behalf of the plaintiff

Form 16, Rules 22 and 146

ME_136047720_1

MINTER ELLISON
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Reference 1109005

- (c) has at all times material to this proceeding since at least 1999, carried on business as a professional trustee for reward, in which capacity it established and managed a number of registered and unregistered managed investment schemes.

The MPF

3. By a trust deed dated December 2001 ("**Trust Deed**"), the defendant:
 - (a) established a unit trust named "*The LM Managed Performance Fund*" ("**MPF**"); and
 - (b) became the trustee of the MPF.
4. By a deed of variation dated 11 November 2002 ("**First Deed of Variation**"), the defendant in its capacity as trustee of the MPF varied the Trust Deed by:
 - (a) deleting all parts of the Trust Deed other than the references to the parties; and
 - (b) inserting the terms set out in the First Deed of Variation.
5. By a further deed of variation dated 25 November 2009 ("**Second Deed of Variation**"), the defendant in its capacity as trustee of the MPF varied the Trust Deed (as earlier varied by the First Deed of Variation) by:
 - (a) deleting clauses 1, 2.3, 2.4 and 3 to 27 of the Trust Deed; and
 - (b) inserting the provisions contained in the schedule to the Second Deed of Variation.
6. On and from 25 November 2009, the Trust Deed (as amended by the First Deed of Variation and the Second Deed of Variation) contained the following express provisions material to this proceeding:
 - (a) by the definitions contained in clause 1.1:
 - (i) the defendant was styled "*the Manager*";
 - (ii) the trust created by the trust deed and to be known as the MPF was styled the "*Scheme*";

- (iii) “*Scheme Property*” was defined to mean assets of the Scheme including but not limited to:
 - (A) contributions of money or money’s worth to the Scheme;
 - (B) money borrowed or raised by the Manager for the purposes of the Scheme;
 - (C) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in subparagraphs 6(a)(iii)(A) or (B) above;
 - (D) the income and property derived, directly or indirectly from contributions, money or property referred to in subparagraphs 6(a)(iii)(A) to (C) above;
- (iv) “*Unit*” was defined to mean an undivided interest in the Scheme Property created and issued under the Trust Deed;
- (v) “*Net Fund Value*” was defined to mean the value of the Scheme Property less the Liabilities on the Valuation Date;
- (vi) “*Liabilities*” was defined to mean at any time the aggregate of the following at that time as calculated by the Manager in accordance with the Accounting Standards (as defined by clauses 1.1 and 1.3):
 - (A) each liability, excluding Unit Holder Liability, of the Manager in respect of the Scheme or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability;
 - (B) each other amount payable out of the Scheme, excluding Unit Holder Liability or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability;

- (C) other appropriate provisions in accordance with the applicable Accounting Standards;
- (vii) “*Unit Holder Liability*” was defined to mean the liability of the Scheme to the Members for their undivided interest in the Scheme Property;
- (viii) the “*Valuation Date*” was defined to mean the date which is the last day of each month or any date during each month at the Manager’s discretion or the date on which the Manager determines there has been a material change in the value of the Scheme Property;
- (b) by clause 2.1, the Manager agreed to act as trustee of the Scheme;
- (c) by clause 2.2, the Manager declared that it held the Scheme Property on trust for the members of the Scheme;
- (d) by clause 3.1, the beneficial interest in the Scheme was divided into Units;
- (e) by clause 12.1, the Manager was vested with a range of powers, including all of the powers of a natural person to invest and borrow on the security of the Scheme Property;
- (f) by clause 17.3, the Manager was entitled to be paid a management fee from Scheme Property up to 10% per annum of the Net Fund Value in relation to the performance of its duties as detailed in the Trust Deed and “*the Law*” (defined by clause 1.1 to mean the *Corporations Act 2001* (Cth)), which fee was to be calculated monthly and paid at such times as the Manager determined;
- (g) by clause 17.4, the Manager was entitled to fees for the following duties:
 - (i) in relation to the subscription and withdrawal of units;
 - (ii) in relation to the transfer or transmission of Units;
 - (iii) in relation to arranging any finance facility in connection with the purchase of any asset of the Scheme;

- (iv) in relation to due diligence enquiries generally;
 - (v) in relation to the sale of real estate or assets of the Scheme Property;
 - (vi) in relation to the promotion and management of the Scheme;
 - (vii) in relation to the winding-up of the Scheme;
 - (viii) in relation to the performance of its duties and obligations pursuant to the Law and the Trust Deed;
- (h) by clause 17.9, the Manager was entitled to recover fees and expenses from the Scheme provided such fees and expenses had been incurred in accordance with the Trust Deed;
- (i) by clause 17.6, the Manager was entitled to be indemnified out of Scheme Property for, relevantly, expenses incurred in relation to the performance of its duties, including:
- (i) by clause 17.6(d), fees and expenses incurred in respect of any service providers of the Scheme;
 - (ii) by clause 17.6(v), fees and expenses of any agent or delegate appointed by the Manager;
- (j) by clause 12.7(b), the Manager was empowered to engage any *"managers and other employees"*; and
- (k) by clause 23.1(b)(ii), the Manager was obliged to resign as Manager if it became an externally-administered body corporate as defined by the *Corporations Act 2001 (Cth)*;

7. On or about 19 March 2013:

- (a) Mr John Richard Park and Ms Ginette Dawn Muller were appointed voluntary administrators of the defendant; and
- (b) in the premises and pursuant to clause 23.1(b)(ii) of the Trust Deed pleaded in subparagraph 6(k) above, the defendant was obliged to resign as trustee of the MPF.

8. By order of this Honourable Court made on 12 April 2013:
 - (a) the defendant was removed as trustee of the MPF; and
 - (b) KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Limited (ACN 108 318 985) were appointed trustees of the MPF.
9. On 5 January 2015, Calibre Capital Limited (ACN 108 318 985) resigned as trustee of the MPF, leaving KordaMentha Pty Ltd (ACN 100 169 391) as sole trustee of the MPF.
10. KordaMentha Pty Ltd (ACN 100 169 391) is and has been at all times since 5 January 2015 the sole trustee of the MPF.

The Service Agreement

11. By an agreement in writing dated 1 July 2010 but commencing in operation on 1 July 2005 styled "*Service Agreement*" ("**Service Agreement**"), the defendant engaged LM Administration Pty Ltd (ACN 055 691 426) as trustee of the LM Administration Trust ("**LMA**") to provide services to the defendant in connection with, among other things, the performance by the defendant of its duties as trustee of the MPF.
12. The Service Agreement contained the following express provisions material to this proceeding:
 - (a) by clause 1.9 and item 2 of schedule 1, "*the Principal*" was defined to mean the defendant and any other company or person which may at any time after the commencement date merge with the Principal or take over or carry on either in whole or in part the business and the undertaking of the Principal;
 - (b) by clause 1.10 and item 3 of schedule 1, the "*the Service Provider*" was defined to mean LMA and any other company or person which may at any time after the commencement date merge with the Service Provider or take over or carry on either in whole or in part the business and undertaking of the Service Provider;
 - (c) by clauses 1.2, 3 and item 6 of schedule 1, the "*commencement date*" of the Service Agreement was 1 July 2005, and the Service Agreement

continued in operation until any termination of the Service Agreement in accordance with clause 16;

- (d) by clause 16.6, the Service Agreement was deemed to be terminated forthwith upon the appointment of an administrator to the Service Provider or the Principal under the provisions of the "*Corporations Law*" (which, on the proper construction of clause 16.6, was a reference to the *Corporations Act 2001 (Cth)*), or the Service Provider or the Principal entered into any arrangement, reconstruction or composition with its creditors or any of them proposes to do so;
- (e) by clause 1.1 and item 4 of schedule 1, "*the business*" was defined to mean the business of funds management and any other business from time to time conducted by the Principal and which the Principal and the Service Provider may from time to time agree shall be subject to the provisions of the Service Agreement;
- (f) by clause 1.11 and item 7 of schedule 1, "*the services*" was defined to mean a range of services including, relevantly, by item 7.3.1.4 of schedule 1, the provision of all administration funds management services on behalf of the Principal for which the Service Provider would be entitled to payment (on behalf of the Principal) of all management fees earned by the Principal in its business of operating managed investment schemes, which management fees would be paid directly to the Service Provider and were in addition to the quarterly service fee paid for all other services;
- (g) by clause 1.1, "*the service fees*" was defined to mean the fees payable to the Service Provider pursuant to clause 5;
- (h) by clause 5:
 - (i) the Principal was obliged, subject to any review of the method of calculation of the service fees pursuant to clause 14.1.1 of the Service Agreement, to pay to the Service Provider for the provision of the services the service fees set out in schedule 1;

- (ii) the service fees were to be calculated quarterly, with the first of such quarterly payments being due and payable on the last day of the quarter;
 - (iii) the Service Provider acknowledged and agreed that in any review of the method of calculation of the service fees, it would not seek to have the service fees set at rates which exceeded commercial rates for the services on the date of the review;
- (i) by item 8 of schedule 1, the service fees consisted of:
- (i) 52% of the total expenses incurred by the Service Provider for the provision of the services, plus such percentage or proportionate amount of that cost as may be agreed between the Principal and the Service Provider;
 - (ii) all management fees on behalf of the Principal earned in the Principal's capacity as manager of all of its managed investment schemes, such management fees to be paid directly to the Service Provider; and
- (j) by clause 6, the Service Provider was obliged for each quarter or part of a quarter during the term as soon as practicable after the last day of each quarter of the term to prepare and submit to the Principal a tax invoice for the service fees payable for each such quarter or part of a quarter.

13. On or about 19 March 2013:

- (a) Mr John Richard Park and Ms Ginette Dawn Muller were appointed voluntary administrators of LM Administration Pty Ltd (ACN 055 691 426), in addition to their appointment as voluntary administrators of the defendant as pleaded in subparagraph 7(a) above; and
- (b) in the premises and pursuant to clause 16.6 of the Service Agreement pleaded in subparagraph 12(d) above, the Service Agreement terminated.

Duties owed by the defendant in its capacity as trustee of the MPF

14. At all times material to this proceeding, the defendant in its capacity as trustee of the MPF owed an equitable duty to the beneficiaries of the MPF to adhere to the

terms of the trust constituted by the MPF as set out in the Trust Deed as varied from time to time.

15. Further, at all times material to this proceeding, the defendant in its capacity as trustee of the MPF owed an equitable duty to the beneficiaries of the MPF to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own (“**equitable duty of care**”).

Prepayment claim

16. On the proper construction of the Trust Deed as varied from time to time, and in particular pursuant to the provisions of the Trust Deed pleaded in paragraph 6 above, the defendant in its capacity as trustee of the MPF:

- (a) was not entitled to be paid or to recover from the assets of the MPF a management fee unless such fee had been incurred and was payable in accordance with the Trust Deed by:
 - (i) the antecedent performance by the defendant in its capacity as trustee of the MPF of its duties pursuant to the Trust Deed;
 - (ii) the defendant in its capacity as trustee of the MPF having calculated the management fee payable to it for the performance of such duties, retrospectively on a monthly basis; and
- (b) was not entitled to be indemnified out of the assets of the MPF in respect of fees or expenses payable to any service providers, or to any agent or delegate appointed by the defendant in its capacity as trustee of the MPF, unless a liability for such fees or expenses had been incurred.

17. Further, on the proper construction of the Service Agreement, and in particular pursuant to the provisions of the Service Agreement pleaded in paragraph 12 above, LMA was not entitled to be paid by the defendant (and the defendant was not obliged to pay to LMA) any part of the service fees attributable to management fees in respect of, relevantly, the MPF, unless the defendant in its capacity as trustee of the MPF (whether by itself or by LMA as its service provider, agent or delegate) had earned such management fees by the antecedent performance of duties pursuant to the Trust Deed.

18. In the period 1 January 2009 to 12 April 2013, by the operation of management fee account number 14000 (operated from about 1 January 2009 to about December 2011) and subsequently management fee account number 14005 (operated from about December 2011 to 19 March 2013, following the transfer of the balance of account number 14000 to account number 14005 in about December 2011) (referred to below compendiously as “the Account”):

- (a) the defendant caused a series of payments to be made to LMA out of the assets of the MPF by way of credit entries in the Account in favour of LMA, purportedly for management fees pursuant to the provisions of the Trust Deed and the Service Agreement;
- (b) the defendant caused a series of entries to be made in the Account as expenses chargeable to the MPF purportedly for management fees payable out of the assets of the MPF in favour of LMA; and
- (c) further miscellaneous sums were debited and credited to the Account as set out in the particulars below,

in consequence of which, as at 12 April 2013, the net balance of the Account was the sum of \$12,340,378 standing to the credit of LMA, representing a surplus sum of moneys paid to LMA out of the assets of the MPF, purportedly for management fees, over and above any entitlement of LMA to such management fees.

Particulars

- (i) Particulars of the payments and entries pleaded above are set out in:
 - (A) **Schedule 1**, entitled “*Management Fees prepaid to LMA – Annual Assessment*”;
 - (B) **Schedule 2**, entitled “*Management Fees prepaid to LMA – Monthly Breakdown*”;
- (ii) As at 1 January 2009, the balance of the Account was \$5,368 standing to the credit of LMA;
- (iii) In the period 1 January 2009 to 12 April 2013:

- (A) payments in the aggregate sum of \$51,790,589 were made to LMA out of the assets of the MPF by way of credit entries in the Account in favour of LMA, purportedly for management fees pursuant to the provisions of the Trust Deed and the Service Agreement (described in Schedule 1 and Schedule 2 as "*Payment made from MPF to LMA*");
- (B) entries were made in the Account as expenses chargeable to the MPF purportedly for management fees payable out of the assets of the MPF in favour of LMA in the aggregate sum of \$27,249,250 (including GST) (described in Schedule 1 and Schedule 2 as "*Management/development fee expense*");
- (C) payments in the aggregate sum of \$2,137,340 were made to the MPF by way of credit entries in favour of the MPF against LMA (described in Schedule 1 and Schedule 2 as "*Repayment to MPF*");
- (D) payments in the aggregate sum of \$8,446,272 were made to or on account of LMA out of the assets of the MPF by way of debit entries against the MPF in respect of development fees purportedly payable in connection with a property known as "*Maddison Estate*" (described in Schedule 1 and Schedule 2 as "*Maddison Estate development fee*"). The legal basis for the making of these payments (if any) will be identified following disclosure in this proceeding;
- (E) further payments were made from the Account to or on account of LMA in the aggregate sum of \$1,735,503, and from LMA to the MPF in the aggregate sum of \$112,786, leaving a balance in favour of LMA of \$1,622,717 (described in Schedule 1 and Schedule 2 as "*Other accounting adjustment*"). The legal basis for the making of these payments (if any) will be identified following disclosure in this proceeding.

19. The Account was operated by way of a running account in which the payments made to LMA out of the assets of the MPF pleaded in subparagraph 18(a) above:

- (a) were not referable to particular entries in the Account for expenses charged to the MPF for management fees pleaded in subparagraph 18(b) above;
 - (b) were on each occasion paid at a time when the result of the payment was to cause a surplus of the sum of such payments over and above the sum of the expenses charged to the MPF for management fees pleaded in subparagraph 18(b) above, such that the management fees were being pre-paid in advance;
 - (c) were on each occasion paid to LMA:
 - (i) in breach of the Trust Deed on its proper construction as pleaded in paragraph 16 above;
 - (ii) in circumstances where LMA had no entitlement to such payments pursuant to the Service Agreement on its proper construction as pleaded in paragraph 17 above; and
 - (d) resulted as at 12 April 2013 in management fees having been pre-paid in the sum of \$12,340,378 as pleaded in paragraph 18 above.
20. In the premises, the conduct of the defendant pleaded in paragraphs 18 and 19 above constituted:
- (a) a breach of trust by the defendant; and
 - (b) further or alternatively, a breach by the defendant of the equitable duty of care, by reason that no prudent person of business in the conduct of the defendant's trusteeship of the MPF would have engaged in the conduct pleaded in paragraphs 18 and 19 above.
21. In the premises, in consequence of the defendant's breach of trust and, further or alternatively, the equitable duty of care, the MPF has suffered loss in the sum of \$12,340,378.

The plaintiff claims the following relief as against the defendant:

1. Equitable compensation in the sum of \$12,340,378.

2. Interest pursuant to section 58 of the *Civil Proceedings Act* 2011 (Qld); and
3. Costs.

Signed:

Description:

MINTER ELLISON

Solicitors for the plaintiff

Dated:

6 February 2017

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

NOTICE AS TO DEFENCE

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

Schedule 1

LM Managed Performance Fund

	FY09	FY10	FY11	FY12	FY13	Total
Payment made from MPF to LMA	2,850,405	6,121,775	3,305,341	31,745,329	7,767,739	51,790,589
Management / development fee expense	(499,250)	-	(1,500,000)	(12,200,000)	(13,050,000)	(27,249,250)
Other adjustments to running balance account						
Repayment to MPF	(1,700,000)	-	(147,340)	-	(290,000)	(2,137,340)
Maddison Estate development fee	-	(1,646,272)	-	(3,960,000)	(2,840,000)	(8,446,272)
Other accounting adjustment	-	(1,735,503)	112,786	-	-	(1,622,716)
	(1,700,000)	(3,381,775)	(34,554)	(3,960,000)	(3,130,000)	(12,206,329)
Opening balance (account 14000 / 14005)	5,368	656,522	3,396,522	5,167,310	20,752,639	5,368
Net prepaid management fees in year	651,154	2,740,000	1,770,787	15,585,329	(8,412,261)	12,335,010
Prepaid management fees closing balance	656,522	3,396,522	5,167,310	20,752,639	12,340,378	12,340,378
Expense amount	465,909	-	1,397,727	11,368,182	12,397,500	25,629,318
GST component	33,341	-	102,273	831,818	652,500	1,619,932
	499,250	-	1,500,000	12,200,000	13,050,000	27,249,250

Schedule 2

LM Managed Performance Fund

Management fees prepaid to LMA - Annual Assessment

Monthly breakdown

FY09

	Jan-09	Feb-09	Mar-09	Apr-09	May-09	Jun-09	Total
	1	2	3	4	5	6	
Payment made from MPF to LMA	160,951	241,954	225,500	500,000	1,142,000	580,000	2,850,405
Management / development fee expense	-	-	-	-	-	(499,250)	(499,250)
Other adjustments to running balance account							
Repayment to MPF	-	-	-	(1,200,000)	(500,000)	-	(1,700,000)
Maddison Estate development fee	-	-	-	-	-	-	-
Other accounting adjustment	-	-	-	-	-	-	-
	-	-	-	(1,200,000)	(500,000)	-	(1,700,000)
Opening balance (account 14000 / 14005)	5,368	166,319	408,273	633,773	(66,227)	575,773	5,368
Net prepaid management fees in year	160,951	241,954	225,500	(700,000)	642,000	80,750	651,154
Prepaid management fees closing balance	166,319	408,273	633,773	(66,227)	575,773	656,522	656,522

FY10

	Jul-09	Aug-09	Sep-09	Oct-09	Nov-09	Dec-09	Jan-10	Feb-10	Mar-10	Apr-10	May-10	Jun-10	Total
	7	8	9	10	11	12	1	2	3	4	5	6	
Payment made from MPF to LMA	805,000	307,000	700,000	412,000	80,000	436,000	291,000	1,550,000	1,540,775	-	-	-	6,121,775
Management / development fee expense	-	-	-	-	-	-	-	-	-	-	-	-	-
Other adjustments to running balance account													
Repayment to MPF	-	-	-	-	-	-	-	-	-	-	-	-	-
Maddison Estate development fee	-	-	-	-	-	-	-	-	(1,646,272)	-	-	-	(1,646,272)
Other accounting adjustment	-	-	-	-	-	-	(280,000)	-	(1,455,503)	-	-	-	(1,735,503)
	-	-	-	-	-	-	(280,000)	-	(3,101,775)	-	-	-	(3,381,775)
Opening balance (account 14000 / 14005)	656,522	1,461,522	1,768,522	2,468,522	2,880,522	2,960,522	3,396,522	3,407,522	4,957,522	3,396,522	3,396,522	3,396,522	656,522
Net prepaid management fees in year	805,000	307,000	700,000	412,000	80,000	436,000	11,000	1,550,000	(1,551,000)	-	-	-	2,740,000
Prepaid management fees closing balance	1,461,522	1,768,522	2,468,522	2,880,522	2,960,522	3,396,522	3,407,522	4,957,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522

LM Managed Performance Fund
Management fees prepaid to LMA - Annual Assessment

FY11

	Jul-10	Aug-10	Sep-10	Oct-10	Nov-10	Dec-10	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Total
	7	8	9	10	11	12	1	2	3	4	5	6	
Payment made from MPF to LMA	-	-	-	-	-	-	-	-	-	-	767,000	2,538,341	3,305,341
Management / development fee expense	-	-	-	-	-	-	-	-	-	-	-	(1,500,000)	(1,500,000)
Other adjustments to running balance account													
Repayment to MPF	-	-	-	-	-	-	-	-	-	-	-	(147,340)	(147,340)
Maddison Estate development fee	-	-	-	-	-	-	-	-	-	-	-	-	-
Other accounting adjustment	-	-	-	-	-	-	-	-	-	-	112,786	-	112,786
	-	-	-	-	-	-	-	-	-	-	112,786	(147,340)	(34,554)
Opening balance (account 14000 / 14005)	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	4,276,309	3,396,522
Net prepaid management fees in year	-	-	-	-	-	-	-	-	-	-	879,706	891,001	1,770,707
Prepaid management fees closing balance	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	3,396,522	4,276,309	5,167,310	5,167,310

FY12

	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	Jan-12	Feb-12	Mar-12	Apr-12	May-12	Jun-12	Total
	7	8	9	10	11	12	1	2	3	4	5	6	
Payment made from MPF to LMA	500,000	2,309,000	2,739,000	3,306,000	3,304,000	1,768,000	2,794,000	3,816,902	3,622,908	2,796,029	2,843,490	1,926,000	31,745,329
Management / development fee expense	-	-	-	-	-	-	-	-	-	-	-	(12,200,000)	(12,200,000)
Other adjustments to running balance account													
Repayment to MPF	-	-	-	-	-	-	-	-	-	-	-	-	-
Maddison Estate development fee	-	-	-	-	-	(5,000,000)	-	-	-	(1,333,333)	(333,333)	2,706,667	(3,960,000)
Other accounting adjustment	-	-	-	-	-	-	-	-	-	-	-	-	-
	-	-	-	-	-	(5,000,000)	-	-	-	(1,333,333)	(333,333)	2,706,667	(3,960,000)
Opening balance (account 14000 / 14005)	5,167,310	5,667,310	7,976,310	10,715,310	14,021,310	17,325,310	14,113,310	16,907,310	20,724,211	24,347,119	25,809,815	28,319,972	5,167,310
Net prepaid management fees in year	500,000	2,309,000	2,739,000	3,306,000	3,304,000	(3,212,000)	2,794,000	3,816,902	3,622,908	1,462,696	2,510,157	(7,567,333)	15,685,329
Prepaid management fees closing balance	5,667,310	7,976,310	10,715,310	14,021,310	17,325,310	14,113,310	16,907,310	20,724,211	24,347,119	25,809,815	28,319,972	20,752,639	20,752,639

LM Managed Performance Fund
Management fees prepaid to LMA - Annual Assessment

FY13

	Jul-12	Aug-12	Sep-12	Oct-12	Nov-12	Dec-12	Jan-13	Feb-13	Mar-13	Apr-13	Total
	7	8	9	10	11	12	1	2	3	4	
Payment made from MPF to LMA	283,855	-	734,950	1,452,068	575,000	773,968	885,000	2,274,899	788,000	-	7,767,739
Management / development fee expense	-	-	(3,200,000)	(1,000,000)	(1,500,000)	(1,650,000)	(3,800,000)	(1,900,000)	-	-	(13,050,000)
Other adjustments to running balance account											
Repayment to MPF	-	-	-	-	-	-	(290,000)	-	-	-	(290,000)
Maddison Estate development fee	(330,000)	(330,000)	(330,000)	(330,000)	(330,000)	(330,000)	(530,000)	(330,000)	-	-	(2,840,000)
Other accounting adjustment	-	-	-	-	-	-	-	-	-	-	-
	(330,000)	(330,000)	(330,000)	(330,000)	(330,000)	(330,000)	(820,000)	(330,000)	-	-	(3,130,000)
Opening balance (account 14000 / 14005)	20,752,639	20,706,494	20,376,494	17,581,444	17,703,511	16,448,511	15,242,479	11,507,479	11,552,378	12,340,378	20,752,639
Net prepaid management fees in year	(46,145)	(330,000)	(2,785,050)	122,068	(1,255,000)	(1,208,032)	(3,735,000)	44,899	788,000	-	(6,412,261)
Prepaid management fees closing balance	20,706,494	20,376,494	17,581,444	17,703,511	16,448,511	15,242,479	11,507,479	11,552,378	12,340,378	12,340,378	12,340,378

David O'Brien

From: David O'Brien <David.O'Brien@minterellison.com>
Sent: Thursday 8 November 2018 09:57 am
To: Golinelli, William
Cc: Waller, Mark; Nadia Braad
Subject: KM (MPF) v LMIM: BS1076/17 [ME-ME.FID3078676]
Attachments: Application - service.PDF; Application - section 96.PDF; 081118 Letter to Clayton Utz.PDF

Dear Mr Golinelli,

Please see **attached** correspondence and enclosures.

Regards

David O'Brien

Partner

61 7 3119 6159 M +61 401 148 939

david.obrien@minterellison.com

MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000

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MinterEllison

8 November 2018

BY EMAIL

Mr William Golinelli
Clayton Utz
Level 28 Riparian Plaza
71 Eagle Street
BRISBANE QLD 4000

Dear Mr Golinelli

KordaMentha Pty Ltd (ACN 100 169 391) in its capacity of Trustee of the LM Managed Performance Fund v LM Investment Management Limited (Receivers and Managers Appointed) (in liquidation) (ACN 077 208 461)

Queensland Supreme Court Proceeding No. BS1076/17 ("Proceeding")

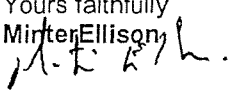
We refer to our letter of 2 February 2018, to your email of 4 February 2018 and to our email of 7 February 2018.

Our client has decided to apply to the Court for a direction pursuant to s.96 of the *Trusts Act 1973* (Qld) to discontinue this proceeding.

We enclose by way of notice (but not by way of service) two applications that our client has today filed to this end.

We will keep you informed of the progress of each application.

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 1109005

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PO Box 7844 Waterfront Place QLD 4001 Australia DX 102 Brisbane
T +61 7 3119 6000 F +61 7 3119 1000 minterellison.com

ME_154966129_1



David O'Brien

From: David O'Brien
Sent: Wednesday 14 November 2018 12:04 pm
To: 'Golinelli, William'
Cc: 'Waller, Mark'; 'Nadia Braad'
Subject: RE: KM (MPF) v LMIM: BS1076/17 [ME-ME.FID3078676]
Attachments: Affidavit of Jarrod Villani 07.11.18.pdf

Dear Mr Golinelli,

We refer to our email of 8 November 2018 (copy below).

Attached is the affidavit of Jarrod Villani sworn today in support of our client's application for substituted service. As you know, that application is to be heard on Tuesday, 20 November 2018.

The attached affidavit is provided for your information only and not by way of service.

Regards

David O'Brien

Partner

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

david.obrien@minterellison.com

MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000

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From: David O'Brien [mailto:David.O'Brien@minterellison.com]

Sent: Thursday 8 November 2018 09:57 am

To: Golinelli, William <wgolinelli@claytonutz.com>

Cc: Waller, Mark <mwaller@claytonutz.com>; Nadia Braad <Nadia.Braad@minterellison.com>

Subject: KM (MPF) v LMIM: BS1076/17 [ME-ME.FID3078676]

Dear Mr Golinelli,

Please see **attached** correspondence and enclosures.

Regards

David O'Brien

Partner

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

david.obrien@minterellison.com

MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000

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David O'Brien

From: Golinelli, Will <wgolinelli@claytonutz.com>
Sent: Thursday 15 November 2018 07:32 am
To: David O'Brien; Nadia Braad
Cc: Waller, Mark; Erfurt, Chris
Subject: RE: KM (MPF) v LMIM: BS1076/17 [ME-ME.FID3078676]
Attachments: 328879476_1.pdf

Dear David and Nadia,

Please see **attached**.

Kind regards,

Will Golinelli, Senior Associate
Clayton Utz

Level 28, Riparian Plaza, 71 Eagle Street, Brisbane QLD 4000 Australia | D +617 3292 7067 | F +617 3221 9669 |
wgolinelli@claytonutz.com | www.claytonutz.com



Australian Law Firm of the Year

Please consider the environment before printing this e-mail

From: David O'Brien [mailto:David.O'Brien@minterellison.com]
Sent: Thursday, 8 November 2018 9:57 AM
To: Golinelli, Will
Cc: Waller, Mark; Nadia Braad
Subject: KM (MPF) v LMIM: BS1076/17 [ME-ME.FID3078676]

Dear Mr Golinelli,

Please see **attached** correspondence and enclosures.

Regards

David O'Brien

Partner

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

david.obrien@minterellison.com

MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000

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Confidential

Email

Mr David O'Brien
Minter Ellison

David.O'Brien@minterellison.com

Email

Mrs Nadia Braad
Minter Ellison

nadia.braad@minterellison.com

15 November 2018

Dear Colleagues

**LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ("LMIM")
KordaMentha Pty Ltd atf the LM Managed Performance Fund
Queensland Supreme Court Proceeding No. BS1076/17 ("Proceeding")**

1. We refer to the application filed by your client in the Proceeding seeking service orders, which is listed to be heard on Tuesday, 20 November 2018 (**Service Application**).
2. We are instructed that the Liquidator neither consents nor opposes the Service Application. We are agreeable to your client bringing this letter to the attention of the Court for the purposes of the Service Application so as to avoid the cost of any appearance on behalf of the Liquidator on Tuesday, 20 November 2018.
3. As to the separate application filed by your client in the Proceeding seeking directions pursuant to section 96 of the *Trusts Act 1973* (Qld) (**Discontinuance Application**), the Liquidator seeks confirmation that your client will agree to pay LMIM's costs of the Proceeding on the standard basis.
4. Subject to our client receiving that confirmation, we are instructed that the Liquidator will neither consent nor oppose the Discontinuance Application. We are agreeable to your client bringing this letter to the attention of the Court for the purposes of the Discontinuance Application so as to avoid the cost of any appearance on behalf of the Liquidator on Wednesday, 19 December 2018.
5. We look forward to receiving your client's prompt response. Once we receive your confirmation, we will contact you to discuss whether we can agree on the amount of costs payable or if an assessment is required.

Yours sincerely



Mark Waller, Partner
+61 7 3292 7005
mwaller@claytonutz.com

David O'Brien

From: David O'Brien
Sent: Thursday 15 November 2018 09:25 am
To: 'Golinelli, Will'; Nadia Braad
Cc: Waller, Mark; Erfurt, Chris
Subject: RE: KM (MPF) v LMIM: BS1076/17 [ME-ME.FID3078676]
Attachments: 151118 Letter to Clayton Utz.pdf

Dear Will,

Please see **attached** correspondence.

Regards

David O'Brien

Partner

+61 7 3119 6159 M +61 401 148 939

David.obrien@minterellison.com

MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000

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From: Golinelli, Will [mailto:wgolinelli@claytonutz.com]

Sent: Thursday 15 November 2018 07:32 am

To: David O'Brien <David.O'Brien@minterellison.com>; Nadia Braad <Nadia.Braad@minterellison.com>

Cc: Waller, Mark <mwaller@claytonutz.com>; Erfurt, Chris <CErfurt@claytonutz.com>

Subject: RE: KM (MPF) v LMIM: BS1076/17 [ME-ME.FID3078676]

Dear David and Nadia,

Please see **attached**.

Kind regards,

Will Golinelli, Senior Associate

Clayton Utz

Level 28, Riparian Plaza, 71 Eagle Street, Brisbane QLD 4000 Australia | D +617 3292 7067 | F +617 3221 9669 |

wgolinelli@claytonutz.com | www.claytonutz.com



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From: David O'Brien [mailto:David.O'Brien@minterellison.com]

Sent: Thursday, 8 November 2018 9:57 AM

To: Golinelli, Will

Cc: Waller, Mark; Nadia Braad

Subject: KM (MPF) v LMIM: BS1076/17 [ME-ME.FID3078676]

Dear Mr Golinelli,

Please see **attached** correspondence and enclosures.

Regards

David O'Brien

Partner

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

david.obrien@minterellison.com

MinterEllison Waterfront Place 1 Eagle Street Brisbane QLD 4000

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MinterEllison

15 November 2018

BY EMAIL

Mr William Golinelli
Clayton Utz
Level 28 Riparian Plaza
71 Eagle Street
BRISBANE QLD 4000

Dear Mr Golinelli

KordaMentha Pty Ltd (ACN 100 169 391) in its capacity of Trustee of the LM Managed Performance Fund v LM Investment Management Limited (Receivers and Managers Appointed) (in liquidation) (ACN 077 208 461) .

Queensland Supreme Court Proceeding No. BS1076/17 ("Proceeding")

Thank you for your letter dated 15 November 2018.

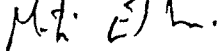
We confirm that our client will pay your client's costs of the Proceeding on the standard basis upon discontinuance of the Proceeding.

We also confirm that we will bring your letter dated 15 November 2018, to the Court's attention on the hearing of each of the extant applications.

Assuming the Proceeding is discontinued, we will contact you then to discuss agreeing the costs payable.

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 1109005