

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 12716/15

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

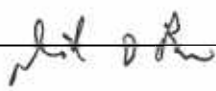
AND

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

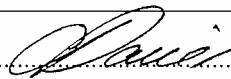
AFFIDAVIT

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 16 December 2015. The Court File Index ("CFI") number of these documents is CFI1.

Signed: 

Page 1

Taken by: 

AFFIDAVIT OF DAVID THOMAS O'BRIEN

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

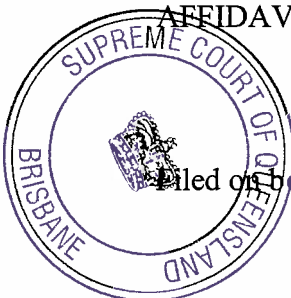
Telephone (07) 3119 6000

Facsimile (07) 3119 1000

Email

david.obrien@minterellison.com

Reference NYB DOB 407747963



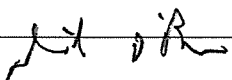
Filed on behalf of the Plaintiff

Form 47 Rule 431

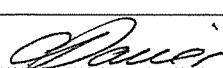
3. On 3 November 2016, the plaintiff applied pursuant to section 500(2) of the *Corporations Act 2001 (Cth)* for leave nunc pro tunc to commence and prosecute this proceeding. That application is CFI 2.
4. On 22 November 2016, the Honourable Justice Daubney ordered (CFI 8) in respect of the application (CFI 2) as follows:

- "1. 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 15 December 2016.
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, and to the solicitors for the receiver of the LM First Mortgage Income Fund, Tucker & Cowen, that a defence and any counterclaim is required to be filed.
4. 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."

5. At 8.46am on 22 November 2016, I served the claim and statement of claim in this proceeding by email upon the solicitors for the defendant, Clayton Utz. At 10.45am on the same day, Clayton Utz acknowledged service. Exhibit "DOB-1" is my email (excluding attachments) dated 28 November 2016, to Clayton Utz; and; Clayton Utz's email of 28 November 2016, in reply.
6. Since service of the claim and statement of claim on 22 November 2016, the plaintiff has not given notice to Clayton Utz nor to the solicitors for the Court appointed receiver of the LM First Mortgage Income Fund, Tucker & Cowen, that a

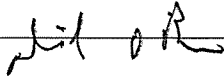
Signed: 

Page 2

Taken by: 

defence and any counterclaim is required to be filed, pursuant to paragraph 3 of the Honourable Justice Daubney's order (CFI 8).

7. I seek leave to refer to paragraphs [53] to [58] of Mr Villani's affidavit sworn on 17 November 2016, and filed in this proceeding (CFI 3). There Mr Villani outlines the reasons why he submitted the order made by the Honourable Justice Daubney on 22 November 2016 ought to have been made. In particular, at paragraph [54], Mr Villani stated, in effect, that there were then settlement negotiations on foot between several parties involving several proceedings, one of which was this one.
8. The settlement negotiations referred to in Mr Villani's affidavit concluded unsuccessfully earlier this year.
9. On 3 May 2018, my firm received by email, a letter from Tucker & Cowen calling upon the plaintiff to either progress its claim or discontinue this proceeding. Exhibit "**DOB-2**" is a copy of Tucker & Cowen's email of 3 May 2018, to MinterEllison.
10. On 14 May 2018, Tucker & Cowen sent my firm a letter seeking a response to their email of 3 May 2018. Exhibit "**DOB-3**" is a copy of Tucker & Cowen's letter dated 14 May 2018 to MinterEllison.
11. On 28 May 2018, I sent by email to Tucker & Cowen, a letter responding to their letter dated 3 May 2018. Exhibit "**DOB-4**" is a copy of MinterEllison's email dated 28 May 2018, to Tucker & Cowen.
12. On 4 June 2018, my firm received by email from Tucker & Cowen, a letter dated 4 June 2018, responding to my letter of 28 May 2018. Exhibit "**DOB-5**" is a copy of Tucker & Cowen's email dated 4 June 2018
13. On 13 June 2018, my firm received by email from Tucker & Cowen, a letter dated 13 June 2018, following up a response to their letter of 4 June 2018. Exhibit "**DOB-6**" is a copy of Tucker & Cowen's letter dated 13 June 2018.
14. On 25 June 2018, I caused to be hand delivered to Tucker & Cowen a letter dated 25 June 2018, a copy of which is exhibit "**DOB-7**".
15. On 26 June 2018, I received by email from Tucker & Cowen a letter, a copy of which is exhibit "**DOB-8**". This email was sent in response to my letter dated 25 June 2018.

Signed: 

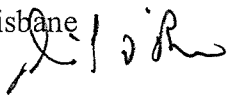
Page 3

Taken by: 

16. On 3 July 2018, I received an email from Tucker & Cowen following up a response to their letter dated 26 June 2018. Exhibit "**DOB-9**" is a copy of Tucker & Cowen's email dated 3 July 2018 to MinterEllison.
17. On 3 July 2018, I sent by email to Tucker & Cowen a letter stating that the plaintiff has decided to discontinue this proceeding if so directed by the Court acting pursuant to section 96 of the *Trusts Act* 1973 (Qld). This email was copied to Mark Waller and Christopher Erfurt of Clayton Utz. Exhibit "**DOB-10**" is a copy of my email dated 3 July 2018 to Tucker & Cowen and Clayton Utz.
18. On 5 July 2018, I sent by email to Tucker & Cowen and Clayton Utz, a letter enclosing the two applications in this proceeding (CFI 9 and 10) filed on that day. Exhibit "**DOB-11**" is a copy of my email dated 5 July 2018, to Tucker & Cowen and Clayton Utz.
19. On 10 July 2018, I sent by email to Tucker & Cowen and to Clayton Utz, a copy of Mr Villani's affidavit sworn and filed in this proceeding on 10 July 2018 (CFI 11). Exhibit "**DOB-12**" is a copy of my email (excluding Mr Villani's affidavit) dated 10 July 2018 to Tucker & Cowen and Clayton Utz.
20. 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.

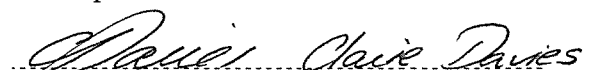
SWORN by DAVID THOMAS O'BRIEN on 11 July 2018

at Brisbane



Deponent

in the presence of:


Solicitor/Commissioner for
Declarations/Justice of the Peace

SUPREME COURT OF QUEENSLAND

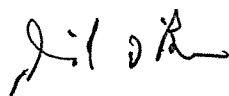
REGISTRY: Brisbane

NUMBER: 5329/14

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-12** the affidavit of DAVID THOMAS O'BRIEN sworn 11 July 2018.



Deponent


Solicitor/Commissioner for
Declarations/Justice of the Peace

AFFIDAVIT OF DAVID THOMAS O'BRIEN

Filed on behalf of the Plaintiff

Form 47 Rule 431

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 NYB DOB 407747963

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 5329/15

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

LIST OF EXHIBITS

Exhibit	Document	Pages
DOB-1	Emails MinterEllison to Clayton Utz; and, Clayton Utz to MinterEllison, both dated 28 November 2016 excluding attachments	1-2
DOB-2	Email Tucker & Cowen to MinterEllison dated 3 May 2018	3-4
DOB-3	Email Tucker & Cowen to MinterEllison dated 14 May 2018	5-6
DOB-4	Email MinterEllison to Tucker & Cowen dated 22 May 2018	7-13
DOB-5	Email Tucker & Cowen to MinterEllison dated 4 June 2018	14-21
DOB-6	Email Tucker & Cowen to MinterEllison dated 13 June 2018	22
DOB-7	Letter MinterEllison to Tucker & Cowen dated 25 June 2018	23-24
DOB-8	Email Tucker & Cowen to MinterEllison 26 June 2018	25-27
DOB-9	Email Tucker & Cowen to MinterEllison dated 3 July 2018	28-29
DOB-10	Email MinterEllison Tucker & Cowen dated 3 July 2018	30-39
DOB-11	Email MinterEllison to Tucker & Cowen and Clayton Utz dated 5 July 2018	40-46
DOB-12	Email MinterEllison to Tucker & Cowen and Clayton Utz dated 10 July 2018	47

From: Michelle Voser <mvoser@tuckercowen.com.au> on behalf of Alex Nase
<anase@tuckercowen.com.au>
Sent: Thursday 3 May 2018 04:56 pm
To: David O'Brien; Nadia Braad
Cc: Alex Nase; David Schwarz
Subject: KordaMentha Pty Ltd atf MPF v LM Investment Management Limited (R&M Appt'd)
(In Liq): Supreme Court of Queensland Proceeding No. 12716/15
Attachments: Letter to Minter Ellison Lawyers (TCS01512989).PDF

Dear Colleagues,

Please find **attached** correspondence.

Yours faithfully,

Sent on behalf of **Alex Nase**, Special Counsel

E: anase@tuckercowen.com.au | D: 07 3210 3503 | M: 0423 386 195

by:

Michelle Voser
Personal Assistant

E: mvoser@tuckercowen.com.au

D: 07 3210 3517 | T: 07 300 300 00 | F: 07 300 300 33

Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001

TCS Solicitors Pty Ltd. | ACN 610 321 509

Tucker&CowenSolicitors.

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Tucker & Cowen Solicitors.

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase
Your reference: Mr O'Brien / Mrs Braad

3 May 2018

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

Email:
david.obrien@minterellison.com
nadia.braad@minterellison.com

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Richard Cowen.
David Schwarz.
Justin Marschke.

Special Counsel.
Geoff Hancock.

Associates.
Sylvia Lopez.
Marcelle Webster.
Alex Nase.
Emily Anderson.
Daniel Davey.
Dugald Hamilton.
Olivia Roberts.
Ashley Moore.

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No 12716/15

We refer to the above matter.

We note that it has been over one year since your client took a step in this proceeding and your client must give one month's notice before proceeding.

We also note that your client has agreed to give our client, and LMIM, 28 days' notice before any defence is required.

It seems to our client that your client ought to either take steps to progress its claim in the proceeding or alternatively, discontinue the proceeding.

This is particularly so when the winding up of both the FMIF, and the MPF, cannot be completed until the various legal proceedings on foot are concluded.

We would be grateful if you could let us know your client's intention with respect to this proceeding within seven days.

Yours faithfully



Alex Nase
Tucker & Cowen

Direct Email: anase@tuckercowen.com.au
Direct Line: (07) 3210 3503

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David O'Brien

From: Jayleigh Sargent <JSargent@tuckercowen.com.au>
Sent: Monday 14 May 2018 04:01 pm
To: David O'Brien; Nadia Braad
Cc: David Schwarz; Alex Nase
Subject: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) - Supreme Court of Queensland Proceeding No 12716/15
Attachments: Letter to Minter Ellison (TCS01516948).pdf; Letter to Minter Ellison Lawyers (TCS01512989).pdf

Dear Colleagues

Please find **attached** correspondence and an enclosure.

Yours faithfully,

Sent on behalf of **Alex Nase**, Special Counsel

E: anase@tuckercowen.com.au | D: 07 3210 3503 | M: 0423 386 195

by:

Jayleigh Sargent
Personal Assistant

E: JSargent@tuckercowen.com.au

D: 07 3210 3502 | T: 07 300 300 00 | F: 07 300 300 33

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TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase
Your reference: Mr O'Brien / Mrs Braad

14 May 2018

Minter Ellison Lawyers
Level 22 Waterfront Place
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Brisbane Qld 4000

Email:
david.obrien@minterellison.com
nadia.braad@minterellison.com

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Justin Marschke.
Daniel Davey.

Consultant.
David Tucker.

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

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

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) - Supreme Court of Queensland Proceeding No 12716/15

We refer to the above matter, and to our letter to you dated 3 May 2018 (copy attached for ease of reference).

We note that our letter requested a reply by 10 May 2018; however, no reply has been received.

May we please have a reply to our letter?

Yours faithfully



Alex Nase
Tucker & Cowen

Direct Email: anase@tuckercowen.com.au
Direct Line: (07) 3210 3503

Encl.

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David O'Brien

From: David O'Brien <David.O'Brien@minterellison.com>
Sent: Monday 28 May 2018 02:25 pm
To: dschwarz@tuckercowen.com.au; Alex Nase
Cc: Nadia Braad
Subject: KM (MPF) v LMIM: BS12716/15 [ME-ME.FID2397644]
Attachments: 160518 Letter to Tucker & Cowen.pdf

Dear Colleagues

Please see **attached** correspondence.

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

28 May 2018

BY EMAIL

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

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15

We refer to your letters dated 3 and 10 May 2018.

We accept that our client must give each of the defendants 28 days' notice before any defence is required to be filed.

Our client has no present intention of giving such a notice.

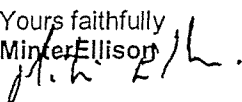
You have asked our client to either prosecute BS12716/15 or discontinue it because the winding up, relevantly of FMIF cannot be completed until various legal proceedings including BS12716/15 are concluded.

Amongst these legal various proceedings are BS12317/14, BS2166/15, BS11560/16 and BS13534/16, all of which have been commenced by your client, are complex, are seeking remedies involving tens of millions of dollars each and will take years to complete. There is no prospect in the near term of your client being in a position to complete the winding up of FMIF due to the actions he has commenced.

Our client is the eighth defendant in action BS12317/14, and has decided to concentrate its available trust funds in defending that action. If it is successful in doing so, it will likely deploy the significant costs your client will be obliged to pay it, in prosecuting action BS12716/15.

Therefore, your client will not suffer the prejudice it points to by action BS12716/15 remaining in its current state.

We trust this letter answers your request to let your know our clients intention with respect to proceeding BS12716/15.

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 407747963

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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_147434080_1



David O'Brien

From: Jayleigh Sargent <JSargent@tuckercowen.com.au>
Sent: Monday 4 June 2018 04:10 pm
To: David O'Brien; Nadia Braad
Cc: David Schwarz; Alex Nase
Subject: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation); QSC No. No 12716/15
Attachments: Letter to Minter Ellison (TCS01528954).pdf

Dear Colleagues,

Please find **attached** correspondence for your attention.

Yours faithfully,

Sent on behalf of **David Schwarz**, Principal

E: dschwarz@tuckercowen.com.au | D: 07 3210 3506 | M: 0438 400 348

by:

Jayleigh Sargent
Personal Assistant

E: JSargent@tuckercowen.com.au

D: 07 3210 3502 | T: 07 300 300 00 | F: 07 300 300 33

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Tucker & Cowen Solicitors.

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckerandcowen.com.au

Our reference: Mr Schwarz / Mr Nase
Your reference: Mr O'Brien / Mrs Braad

4 June 2018

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Brisbane Qld 4000

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Geoff Hancock.

Associates.
Sylvia Lopez.
Marcelle Webster.
Alex Nase.
Emily Anderson.
Daniel Davey.
Dugald Hamilton.
Olivia Roberts.
Ashley Moore.

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") – Supreme Court of Queensland Proceeding No 12716/15 ("AIIS Proceeding")

We refer to your letter dated 28 May 2018, which responded to our letters to you of 3 and 14 May 2018.

Your client's continuing delay in prosecuting the AIIS Proceeding

Our client remains of the view that your client's continued delay in this proceeding is unjustified, and that your client ought to either take steps to expeditiously progress its claim or discontinue the proceeding.

As you are aware, rule 5(3) of the *Uniform Civil Procedure Rules* provides that a party impliedly undertakes to the Court to proceed in an expeditious way. In our client's view, that implied undertaking requires that your client not delay further in progressing the AIIS proceeding.

The Claim in the AIIS Proceeding was filed on 16 December 2015, your client has not taken any step in the proceeding since service of the Claim and Statement of Claim on LMIM on or about 28 November 2016 and has not required a defence, or given notice that a defence is required.

Your letter suggests that this ongoing delay is justified because (as we understand the explanation) your client has not yet decided whether it will prosecute the AIIS Proceeding, does not presently have the resources to do so, and may only have sufficient resources if your client is successful in defending the proceedings commenced by LMIM (at the instigation of our client) against it, and in obtaining a substantial costs order against our client. With respect, these matters suggest that your client considers it appropriate to commence proceedings and then prosecute them at leisure, without any direction of the Court that it is justified in doing so, and in the meantime leaving them as a form of 'sword of Damocles' hanging over LMIM and the LM First Mortgage Income Fund ("FMIF"). Our client does not consider that to be in any way appropriate or consistent with the implied undertaking under Rule 5.

We further observe that the approach suggested in your letter is inconsistent with what was said by Mr Villani in his affidavit filed in support of your client's application for leave to proceed against LMIM in the AIIS Proceeding. At paragraphs 53 to 58 of that affidavit, Mr Villani deposed to his reasons for seeking a direction that the defendant (LMIM) not be obliged to file a notice of intention to defend and defence until 28 days after your client gives notice to LMIM requiring a defence to be filed.

In the result, Daubney J made orders on 22 November 2016 which included a direction in those terms, but also in terms that your client give notice to our client as receiver of the FMIF, by notice to this firm.

Mr Villani's reasons, as explained in his affidavit, were that:-

1. There were settlement negotiations underway at the time;
2. If there were to be a settlement, then the settlement would likely be the subject of applications for approval;
3. There may be some controversy, for a time, as to who (as between LMIM's liquidators and our client) would be responsible for the carriage of the defence of the AIIS Proceeding; and
4. Your client had not yet obtained a direction from the Court under section 96 of the *Trusts Act 1973* (Qld) that it is justified in prosecuting the AIIS Proceeding.

Mr Villani's reasons, as explained in his affidavit, did not include any mention of the resources available to your client.

Since your client's application for leave to proceed, it has become apparent that the settlement negotiations mentioned in the affidavit have been unsuccessful. To the extent (if any) to which there might be some controversy as to the representation on the defendant's side of the record, we note that our client has had the carriage of the defence of two other proceedings commenced by your client for similar relief (namely, Supreme Court of Queensland proceedings 8032/14 and 8034/14) under Orders made by the Court joining our client as the second defendant in each proceeding. We anticipate a similar regime would address any issue of representation in the AIIS Proceeding.

Your client has not made any application for directions under section 96 of the *Trusts Act*, nor has your client indicated when it intends to do so, notwithstanding that Mr Villani deposed to an intention to make that application in the first half of 2017; at least a year ago.

In the circumstances, our client does not accept that any further delay in your client's prosecution of the AIIS Proceeding is warranted.

Suggestion of lack of prejudice to the FMIF

We are instructed that our client does not accept that it will necessarily take years to bring proceedings BS12317/14, BS2166/15, BS11560/16 and BS13534/16 to a conclusion. We are instructed that Supreme Court proceeding BS12317/14 is likely to be listed for trial early next year. BS11560/16 may not ultimately be defended. It is also possible that one or more of the proceedings may settle.

In any case, even if it does take some time for those other proceedings to be determined or resolved, that does not justify delay by your client in this proceeding.

Your client's suggestion that, if it succeeds in its defence of BS12317/2014 and obtains a costs order in its favour, it will use the funds paid pursuant to such costs order to fund its prosecution of this proceeding, does not appear to our client to withstand closer scrutiny.

Your client pleads the 'clear accounts rule' in its defence of BS12317/2014 and refers to, *inter alia*, the claims made in this proceeding (the AIIS Proceeding) in support of that defence. However, the application of the clear accounts rule cannot be determined in the abstract, without consideration of, and factual findings as to whether, the alleged breaches of trust (the countervailing claims) are made out. A party relying upon the clear accounts rule, must prove the alleged breaches of trust

and the losses suffered as a result thereof, either in the proceeding in which the defence is pleaded, or in a separate proceeding. Presently, your client's Defence in BS12317/2014 simply refers to the claims pleaded in other proceedings (including the AIIS Proceeding) as a basis for invoking the clear accounts rule.

Of those claims mentioned in the Defence:-

1. two (BS8032/14 and BS8034/14) are the subject of your client's application for directions as to whether your client is justified in discontinuing the proceedings;
2. one is a proceeding in which LMIM is the defendant, but that does not concern the FMIF (in that no relief is sought against the property of the FMIF). We are not aware of any step having been taken in that proceeding following your client obtaining leave to proceed by Order of Atkinson J on 1 February 2018; we understand that the leave granted was conditional upon your client giving notice to the defendant in that proceeding by 31 January 2019, requiring a notice of intention and defence to be filed, failing which the leave to proceed would be revoked;
3. The only remaining proceeding, pleaded in the Defence to BS12317/2014 as providing grounds to invoke the clear accounts rule, is the AIIS Proceeding.

It may be the case that, before your client's defence based on the clear accounts rule in BS12317/2014 could be determined, your client would, in any event, have to run its claim in this proceeding, in which case your client may not in fact be able to obtain a costs order in BS12317/2014 and use the funds paid to it under the costs order, to fund its prosecution of this proceeding. Your client cannot, in any event, litigate at leisure.

Our client again requests that your client either takes steps to progress, or discontinue, this proceeding.

Issues in relation to the Statement of Claim

Our client considers it desirable to draw your client's attention to certain key issues relating to its Statement of Claim, at an early stage, so as to enable your client to consider its position, before substantial costs are incurred.

We note that in the Statement of Claim, your client seeks:-

1. equitable compensation against LMIM in the sum of \$16,820,356.30 ("Equitable Compensation Claim");
2. a declaration that LMIM as trustee of the FMIF holds the amount of \$3,905,721.81 on constructive trust for your client ("Constructive Trust Claim"); and
3. declarations to the effect that your client is entitled to be indemnified out of assets of the FMIF in respect of the alleged liability the subject of the proceeding, in respect of the amount of \$3,905,721.81, and that it is entitled to be subrogated to LMIM's alleged rights of indemnity ("Indemnity Claim").

Of these claims, only the Constructive Trust Claim and the Indemnity Claim are claims against assets of the FMIF. The Equitable Compensation Claim may, of itself, be of no practical utility.

Constructive Trust Claim

The Constructive Trust claim appears at paragraphs 115 to 117 of the Statement of Claim.

In those paragraphs, it is alleged that:-

1. LMIM as trustee of the MPF held assets of the MPF on Trust for the beneficiaries of the MPF;
2. LMIM was aware that the payments to itself at the FMIF, or alternatively, to PTAL as custodian of the FMIF, of \$3,905,721.81 were made in breach of trust;
3. In so far as PTAL "may" hold in its capacity as custodian of the FMIF, the sum of \$3,905,721.81, or assets representing "the value it received" from the payments of \$3,905,721.81, it holds those assets as agent for LMIM as RE of the FMIF;
4. LMIM holds those assets on constructive trust for the Plaintiff in its capacity as trustee of the MPF.

Significantly, there is no pleading of any material facts in support of any tracing process or any identifiable assets into which the payments of \$3,905,721.81, allegedly made to LMIM as Responsible Entity ("RE") of the FMIF in breach of duty, can be traced.

In the absence of a pleading of such material facts, our client would respectfully suggest that the Constructive Trust Claim is bound to fail and ought to be abandoned by your client.

Indemnity Claim

Our client wishes to raise the following issues in relation to the Indemnity Claim:

1. Firstly, the clear accounts rule may provide a defence to the claim; and
2. Secondly, the Indemnity Claim appears to be unsustainable by reason of s 601FH(b) of the *Corporations Act 2001* ("the Act").

On 18 April 2018, we sent a detailed letter to you about both of these issues in the context of BS8032/14 and BS8034/14. We refer to that letter; in particular, the authorities cited therein in relation to the clear accounts rule, and the observations therein as to the purpose and intended effect of s 601FH(b). We will therefore endeavour to deal with these issues, and their relevance to this proceeding, briefly.

Clear Accounts Rule

As you know:-

1. a trustee's right of indemnification is subject to the rule known as the clear accounts rule;
2. in essence, the clear accounts rule is that a trustee who has committed breaches of duty is not entitled to exercise any right of indemnity out of the trust fund, until the trustee has first made good any loss arising out of the previous breaches of trust. In effect, the clear accounts rule requires a set-off between the trustee's right of indemnity and its liability for the previous breaches of trust. If there is doubt about whether the trustee has committed a breach of trust by reason of claims made in another proceeding, the right of indemnity may be suspended until the other proceeding is resolved: see judgment of Justice Jackson in *Park & Muller (Liquidators of LM Investment Management Ltd v Whyte No 3* [2017] QSC 230 at [134] to [143];
3. our client, in the name of LMIM as RE of the FMIF, has filed an Amended Claim and Statement of Claim in BS11560/16 ("the Breach of Trust Proceeding"), making claims against LMIM for various breaches of trust.

We are instructed to convey to you that:

1. if joined as a defendant to this proceeding (the AIIS Proceeding), our client intends to rely upon the clear accounts rule and the claims made in the Breach of Trust Proceeding in defence of the claims made in this proceeding against assets of the FMIF;
2. the quantum of the claims made in the Breach of Trust Proceeding are presently estimated at in excess of \$30 million plus interest and costs, which, if successful, will be more than sufficient to overwhelm the claims made by your client against FMIF assets in this proceeding; and
3. therefore, your client's ability to be afforded monetary relief against assets of the FMIF with respect to the claims the subject of this proceeding, if they are otherwise successful, will likely depend upon the outcome of the Breach of Trust Proceeding.

We are therefore instructed to again give your client notice that it may have an interest in the Breach of Trust Proceeding being defended, and ask that you advise us of your client's position in this regard within seven days.

Statutory exclusion of creditor's right of subrogation

As you know, section 601FH(b) of the Act, relevantly provides as follows:

If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated:

...

(b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed.

It seems to our client, for reasons explained in our correspondence to you dated 18 April 2018 in relation to BS8032/14 and BS8034/14, that the purpose and effect of section 601FH(b) of the Act is to exclude any right that might otherwise be exercisable by a creditor of a registered scheme to be subrogated to the responsible entity's right to be indemnified (by exoneration) from the scheme's assets.

If that is correct, it seems to us that:

1. section 601FH(b) of the Act operates as a statutory bar to your client's purported exercise of a right to be subrogated to LMIM's alleged rights of indemnity from the assets of the FMIF; and
2. while your client might pursue relief against LMIM, it must rely on LMIM to exercise such rights of indemnity as may be available to it against the assets of the FMIF, subject to the operation of the clear accounts rule.

In light of this, we ask that your client clarify or confirm its position as to how it intends to overcome the effect and the operation of section 601FH(b) of the Act or why it asserts that s 601FH(b) does not have the effect suggested in this letter, within seven days.

Joinder of Mr Whyte

We note that our client is not presently a party to this proceeding.

As you are aware, our client was appointed, pursuant to Orders of Dalton J dated 21 August 2013, as the person responsible for ensuring that the FMIF is wound up in accordance with its Constitution, and as receiver of the property of the FMIF.

Our client intends to apply to Court for directions as to whether he would be justified in seeking to be joined as a defendant to this proceeding in his capacity as Court Appointed Receiver of the property of the FMIF, to defend the claims made against FMIF assets in the proceeding and for orders joining him as a defendant.

You would recall that a similar application was made by our client in BS8032/14 and BS8034/14, and our client was joined as a defendant.

Would you please advise whether your client consents to our client being joined as a defendant to this proceeding, within seven days of the date of this letter.

Conclusion

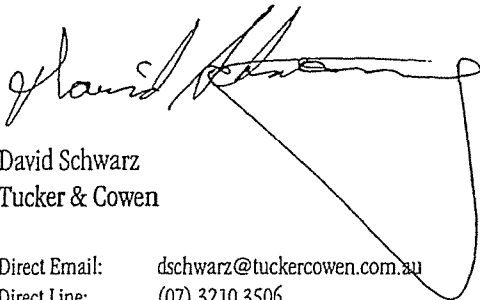
Would you please provide us with your client's response to this letter within seven days.

In the absence of a satisfactory response within that timeframe, we reserve our client's right to apply to Court to be joined as a defendant, or to take such other steps as he may be advised, without further notice.

If you have any queries about any of the issues raised by this correspondence, please do not hesitate to contact us.

We reserve all of our client's rights.

Yours faithfully



David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

Individual liability limited by a scheme approved under Professional Standards Legislation.

David O'Brien

From: Jayleigh Sargent <JSargent@tuckercowen.com.au>
Sent: Wednesday 13 June 2018 02:47 pm
To: David O'Brien; Nadia Braad
Cc: David Schwarz; Alex Nase
Subject: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) - Supreme Court of Queensland Proceeding No 12716/15
Attachments: Letter to Minter Ellison (TCS01533396).pdf; Letter to Minter Ellison (TCS01528954).pdf

Dear Colleagues,

Please find **attached** correspondence and an enclosure.

Yours faithfully,

Sent on behalf of **Alex Nase**, Special Counsel

E: anase@tuckercowen.com.au | D: 07 3210 3503 | M: 0423 386 195

by:

Jayleigh Sargent
Personal Assistant

E: JSargent@tuckercowen.com.au

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Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase
Your reference: Mr O'Brien / Mrs Braad

13 June 2018

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

Consultant.
David Tucker.

Special Counsel.
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Alex Nase.
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nadia.braad@minterellison.com

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") – Supreme Court of Queensland Proceeding No 12716/15 ("AHS Proceeding")

We refer to our letter to you dated 4 June 2018 (copy attached).

We note that no reply to our letter was received within the requested timeframe.

We are instructed to request that you reply to our letter by no later than close of business on Friday, 15 June 2018.

We reserve all of our client's rights.

Yours faithfully



Alex Nase
Tucker & Cowen

Direct Email: anase@tuckercowen.com.au
Direct Line: (07) 3210 3503

Individual liability limited by a scheme approved under Professional Standards Legislation.

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Our reference: Mr Schwarz / Mr Nase
Your reference: Mr O'Brien / Mrs Braad

4 June 2018

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Marcelle Webster.
Alex Nase.
Emily Anderson.
Daniel Davey.
Dugald Hamilton.
Olivia Roberts.
Ashley Moore.

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") – Supreme Court of Queensland Proceeding No 12716/15 ("AIIS Proceeding")

We refer to your letter dated 28 May 2018, which responded to our letters to you of 3 and 14 May 2018.

Your client's continuing delay in prosecuting the AIIS Proceeding

Our client remains of the view that your client's continued delay in this proceeding is unjustified, and that your client ought to either take steps to expeditiously progress its claim or discontinue the proceeding.

As you are aware, rule 5(3) of the *Uniform Civil Procedure Rules* provides that a party impliedly undertakes to the Court to proceed in an expeditious way. In our client's view, that implied undertaking requires that your client not delay further in progressing the AIIS proceeding.

The Claim in the AIIS Proceeding was filed on 16 December 2015, your client has not taken any step in the proceeding since service of the Claim and Statement of Claim on LMIM on or about 28 November 2016 and has not required a defence, or given notice that a defence is required.

Your letter suggests that this ongoing delay is justified because (as we understand the explanation) your client has not yet decided whether it will prosecute the AIIS Proceeding, does not presently have the resources to do so, and may only have sufficient resources if your client is successful in defending the proceedings commenced by LMIM (at the instigation of our client) against it, and in obtaining a substantial costs order against our client. With respect, these matters suggest that your client considers it appropriate to commence proceedings and then prosecute them at leisure, without any direction of the Court that it is justified in doing so, and in the meantime leaving them as a form of 'sword of Damocles' hanging over LMIM and the LM First Mortgage Income Fund ("FMIF"). Our client does not consider that to be in any way appropriate or consistent with the implied undertaking under Rule 5.

We further observe that the approach suggested in your letter is inconsistent with what was said by Mr Villani in his affidavit filed in support of your client's application for leave to proceed against LMIM in the AIIS Proceeding. At paragraphs 53 to 58 of that affidavit, Mr Villani deposed to his reasons for seeking a direction that the defendant (LMIM) not be obliged to file a notice of intention to defend and defence until 28 days after your client gives notice to LMIM requiring a defence to be filed.

In the result, Daubney J made orders on 22 November 2016 which included a direction in those terms, but also in terms that your client give notice to our client as receiver of the FMIF, by notice to this firm.

Mr Villani's reasons, as explained in his affidavit, were that:-

1. There were settlement negotiations underway at the time;
2. If there were to be a settlement, then the settlement would likely be the subject of applications for approval;
3. There may be some controversy, for a time, as to who (as between LMIM's liquidators and our client) would be responsible for the carriage of the defence of the AIIS Proceeding; and
4. Your client had not yet obtained a direction from the Court under section 96 of the *Trusts Act 1973* (Qld) that it is justified in prosecuting the AIIS Proceeding.

Mr Villani's reasons, as explained in his affidavit, did not include any mention of the resources available to your client.

Since your client's application for leave to proceed, it has become apparent that the settlement negotiations mentioned in the affidavit have been unsuccessful. To the extent (if any) to which there might be some controversy as to the representation on the defendant's side of the record, we note that our client has had the carriage of the defence of two other proceedings commenced by your client for similar relief (namely, Supreme Court of Queensland proceedings 8032/14 and 8034/14) under Orders made by the Court joining our client as the second defendant in each proceeding. We anticipate a similar regime would address any issue of representation in the AIIS Proceeding.

Your client has not made any application for directions under section 96 of the *Trusts Act*, nor has your client indicated when it intends to do so, notwithstanding that Mr Villani deposed to an intention to make that application in the first half of 2017; at least a year ago.

In the circumstances, our client does not accept that any further delay in your client's prosecution of the AIIS Proceeding is warranted.

Suggestion of lack of prejudice to the FMIF

We are instructed that our client does not accept that it will necessarily take years to bring proceedings BS12317/14, BS2166/15, BS11560/16 and BS13534/16 to a conclusion. We are instructed that Supreme Court proceeding BS12317/14 is likely to be listed for trial early next year. BS11560/16 may not ultimately be defended. It is also possible that one or more of the proceedings may settle.

In any case, even if it does take some time for those other proceedings to be determined or resolved, that does not justify delay by your client in this proceeding.

Your client's suggestion that, if it succeeds in its defence of BS12317/2014 and obtains a costs order in its favour, it will use the funds paid pursuant to such costs order to fund its prosecution of this proceeding, does not appear to our client to withstand closer scrutiny.

Your client pleads the 'clear accounts rule' in its defence of BS12317/2014 and refers to, *inter alia*, the claims made in this proceeding (the AIIS Proceeding) in support of that defence. However, the application of the clear accounts rule cannot be determined in the abstract, without consideration of, and factual findings as to whether, the alleged breaches of trust (the countervailing claims) are made out. A party relying upon the clear accounts rule, must prove the alleged breaches of trust

and the losses suffered as a result thereof, either in the proceeding in which the defence is pleaded, or in a separate proceeding. Presently, your client's Defence in BS12317/2014 simply refers to the claims pleaded in other proceedings (including the AIIS Proceeding) as a basis for invoking the clear accounts rule.

Of those claims mentioned in the Defence:-

1. two (BS8032/14 and BS8034/14) are the subject of your client's application for directions as to whether your client is justified in discontinuing the proceedings;
2. one is a proceeding in which LMIM is the defendant, but that does not concern the FMIF (in that no relief is sought against the property of the FMIF). We are not aware of any step having been taken in that proceeding following your client obtaining leave to proceed by Order of Atkinson J on 1 February 2018; we understand that the leave granted was conditional upon your client giving notice to the defendant in that proceeding by 31 January 2019, requiring a notice of intention and defence to be filed, failing which the leave to proceed would be revoked;
3. The only remaining proceeding, pleaded in the Defence to BS12317/2014 as providing grounds to invoke the clear accounts rule, is the AIIS Proceeding.

It may be the case that, before your client's defence based on the clear accounts rule in BS12317/2014 could be determined, your client would, in any event, have to run its claim in this proceeding, in which case your client may not in fact be able to obtain a costs order in BS12317/2014 and use the funds paid to it under the costs order, to fund its prosecution of this proceeding. Your client cannot, in any event, litigate at leisure.

Our client again requests that your client either takes steps to progress, or discontinue, this proceeding.

Issues in relation to the Statement of Claim

Our client considers it desirable to draw your client's attention to certain key issues relating to its Statement of Claim, at an early stage, so as to enable your client to consider its position, before substantial costs are incurred.

We note that in the Statement of Claim, your client seeks:-

1. equitable compensation against LMIM in the sum of \$16,820,356.30 ("Equitable Compensation Claim");
2. a declaration that LMIM as trustee of the FMIF holds the amount of \$3,905,721.81 on constructive trust for your client ("Constructive Trust Claim"); and
3. declarations to the effect that your client is entitled to be indemnified out of assets of the FMIF in respect of the alleged liability the subject of the proceeding, in respect of the amount of \$3,905,721.81, and that it is entitled to be subrogated to LMIM's alleged rights of indemnity ("Indemnity Claim").

Of these claims, only the Constructive Trust Claim and the Indemnity Claim are claims against assets of the FMIF. The Equitable Compensation Claim may, of itself, be of no practical utility.

Constructive Trust Claim

The Constructive Trust claim appears at paragraphs 115 to 117 of the Statement of Claim.

In those paragraphs, it is alleged that:-

1. LMIM as trustee of the MPF held assets of the MPF on Trust for the beneficiaries of the MPF;
2. LMIM was aware that the payments to itself at the FMIF, or alternatively, to PTAL as custodian of the FMIF, of \$3,905,721.81 were made in breach of trust;
3. In so far as PTAL "may" hold in its capacity as custodian of the FMIF, the sum of \$3,905,721.81, or assets representing "the value it received" from the payments of \$3,905,721.81, it holds those assets as agent for LMIM as RE of the FMIF;
4. LMIM holds those assets on constructive trust for the Plaintiff in its capacity as trustee of the MPF.

Significantly, there is no pleading of any material facts in support of any tracing process or any identifiable assets into which the payments of \$3,905,721.81, allegedly made to LMIM as Responsible Entity ("RE") of the FMIF in breach of duty, can be traced.

In the absence of a pleading of such material facts, our client would respectfully suggest that the Constructive Trust Claim is bound to fail and ought to be abandoned by your client.

Indemnity Claim

Our client wishes to raise the following issues in relation to the Indemnity Claim:

1. Firstly, the clear accounts rule may provide a defence to the claim; and
2. Secondly, the Indemnity Claim appears to be unsustainable by reason of s 601FH(b) of the *Corporations Act* 2001 ("the Act").

On 18 April 2018, we sent a detailed letter to you about both of these issues in the context of BS8032/14 and BS8034/14. We refer to that letter; in particular, the authorities cited therein in relation to the clear accounts rule, and the observations therein as to the purpose and intended effect of s 601FH(b). We will therefore endeavour to deal with these issues, and their relevance to this proceeding, briefly.

Clear Accounts Rule

As you know:-

1. a trustee's right of indemnification is subject to the rule known as the clear accounts rule;
2. in essence, the clear accounts rule is that a trustee who has committed breaches of duty is not entitled to exercise any right of indemnity out of the trust fund, until the trustee has first made good any loss arising out of the previous breaches of trust. In effect, the clear accounts rule requires a set-off between the trustee's right of indemnity and its liability for the previous breaches of trust. If there is doubt about whether the trustee has committed a breach of trust by reason of claims made in another proceeding, the right of indemnity may be suspended until the other proceeding is resolved: see judgment of Justice Jackson in *Park & Muller (Liquidators of LM Investment Management Ltd v Whyte No 3* [2017] QSC 230 at [134] to [143];
3. our client, in the name of LMIM as RE of the FMIF, has filed an Amended Claim and Statement of Claim in BS11560/16 ("the Breach of Trust Proceeding"), making claims against LMIM for various breaches of trust.

We are instructed to convey to you that:

1. if joined as a defendant to this proceeding (the AIIS Proceeding), our client intends to rely upon the clear accounts rule and the claims made in the Breach of Trust Proceeding in defence of the claims made in this proceeding against assets of the FMIF;
2. the quantum of the claims made in the Breach of Trust Proceeding are presently estimated at in excess of \$30 million plus interest and costs, which, if successful, will be more than sufficient to overwhelm the claims made by your client against FMIF assets in this proceeding; and
3. therefore, your client's ability to be afforded monetary relief against assets of the FMIF with respect to the claims the subject of this proceeding, if they are otherwise successful, will likely depend upon the outcome of the Breach of Trust Proceeding.

We are therefore instructed to again give your client notice that it may have an interest in the Breach of Trust Proceeding being defended, and ask that you advise us of your client's position in this regard within seven days.

Statutory exclusion of creditor's right of subrogation

As you know, section 601FH(b) of the Act, relevantly provides as follows:

If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated:

...

(b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed.

It seems to our client, for reasons explained in our correspondence to you dated 18 April 2018 in relation to BS8032/14 and BS8034/14, that the purpose and effect of section 601FH(b) of the Act is to exclude any right that might otherwise be exercisable by a creditor of a registered scheme to be subrogated to the responsible entity's right to be indemnified (by exoneration) from the scheme's assets.

If that is correct, it seems to us that:

1. section 601FH(b) of the Act operates as a statutory bar to your client's purported exercise of a right to be subrogated to LMIM's alleged rights of indemnity from the assets of the FMIF; and
2. while your client might pursue relief against LMIM, it must rely on LMIM to exercise such rights of indemnity as may be available to it against the assets of the FMIF, subject to the operation of the clear accounts rule.

In light of this, we ask that your client clarify or confirm its position as to how it intends to overcome the effect and the operation of section 601FH(b) of the Act or why it asserts that s 601FH(b) does not have the effect suggested in this letter, within seven days.

Joinder of Mr Whyte

We note that our client is not presently a party to this proceeding.

As you are aware, our client was appointed, pursuant to Orders of Dalton J dated 21 August 2013, as the person responsible for ensuring that the FMIF is wound up in accordance with its Constitution, and as receiver of the property of the FMIF.

Our client intends to apply to Court for directions as to whether he would be justified in seeking to be joined as a defendant to this proceeding in his capacity as Court Appointed Receiver of the property of the FMIF, to defend the claims made against FMIF assets in the proceeding and for orders joining him as a defendant.

You would recall that a similar application was made by our client in BS8032/14 and BS8034/14, and our client was joined as a defendant.

Would you please advise whether your client consents to our client being joined as a defendant to this proceeding, within seven days of the date of this letter.

Conclusion

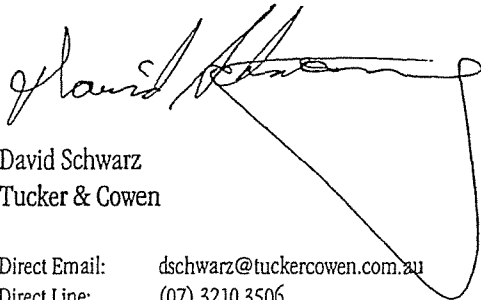
Would you please provide us with your client's response to this letter within seven days.

In the absence of a satisfactory response within that timeframe, we reserve our client's right to apply to Court to be joined as a defendant, or to take such other steps as he may be advised, without further notice.

If you have any queries about any of the issues raised by this correspondence, please do not hesitate to contact us.

We reserve all of our client's rights.

Yours faithfully



David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

Individual liability limited by a scheme approved under Professional Standards Legislation.

MinterEllison

25 June 2018

BY HAND

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

Dear Colleagues

KordaMentha Pty Ltd ("KM") in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15

We refer to our letter dated 28 May 2018, and to your letter dated 4 June 2018.

You complain in your letter that Mr Villani in his affidavit sworn on 17 November 2016, did not mention that the MPF's limited resources were an impediment to KM (MPF) prosecuting proceeding BS12716/15. At the time Mr Villani swore his affidavit, he had a reasonable expectation that proceeding BS12317/14 which was then the subject of settlement negotiations, would settle. Such a settlement would not only have ended the considerable drain upon the MPF of defending proceeding BS12317/14, but was expected to yield for the MPF a settlement sum. These expectations were not fulfilled because negotiations with the directors of LMIM broke down in December 2017; and, with your client earlier this year. That is to say, the position outlined in our letter of 4 June 2018, is the current position.

To accommodate our respective client's current positions, our client proffers the following undertaking:

If Mr Whyte succeeds after all appeals (if any) are exhausted in obtaining the relief he seeks against the eighth defendant ("KM (MPF)") in proceeding BS12317/14, KM (MPF) will, subject to obtaining a direction pursuant to section 96 of the *Trusts Act 1973* (Qld), ("S 96 Application") that it would be justified in discontinuing proceeding BS12716/15, forthwith discontinue proceeding BS12716/15.

KM (MPF) also undertakes to:

- (a) prosecute diligently any S 96 Application; and
- (b) give your client notice of any S 96 application.

Please advise in writing by 9 July 2018 if your client accepts our client's undertaking.

Our client reserves its right to respond to the balance of your letter dated 4 June 2018, should that become necessary. Further, our client reserves its rights generally.

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 407747963

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_150399101_1



From: Andrea Whisson <Reception@tuckercowen.com.au>
Sent: Tuesday 26 June 2018 01:52 pm
To: David O'Brien; Nadia Braad
Cc: David Schwarz; Alex Nase
Subject: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") – Supreme Court of Queensland Proceeding No 12716/15 ("AIIIS Proceeding")
Attachments: Letter to Minter Ellison Lawyers, 26.06.2018 (TCS01538799).pdf

Dear Colleagues,

Please find attached correspondence.

Yours faithfully,

Sent on behalf of **Alex Nase**, Special Counsel

E: anase@tuckercowen.com.au | D: 07 3210 3503 | M: 0423 386 195

by:

Andrea Whisson
Receptionist

E: reception@tuckercowen.com.au
T: 07 300 300 00 | F: 07 300 300 33
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001
TCS Solicitors Pty Ltd. | ACN 610 321 509

Tucker&CowenSolicitors.

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Best Lawyers® International 2013 -2019 - Justin Marschke for Litigation and Regulatory 2019

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Tucker & Cowen Solicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase
Your reference: Mr O'Brien / Mrs Braad

26 June 2018

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

Email:
david.obrien@minterellison.com
nadia.braad@minterellison.com

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

Consultant.
David Tucker.

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

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

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") – Supreme Court of Queensland Proceeding No 12716/15 ("AHS Proceeding")

We refer to your letter dated 25 June 2018.

Our client does not accept the undertaking offered by your client.

The proposed undertaking is unsatisfactory, because the winding up of the FMIF cannot be completed until the remaining legal proceedings are concluded.

Indeed, at a recent Court hearing, His Honour Boddice J observed to the effect that there ought to be a timeline for the resolution or determination of the remaining legal proceedings.

Our client is considering applying to Court for an order that he be joined as a defendant to the proceeding, and for directions with respect to the future conduct of the proceeding.

Our letter to you dated 4 June 2018 requested that you let us know within seven days whether your client consents to our client being joined as a defendant to the proceeding. No response to that request has been received.

Would you please let us know whether your client consents to our client being joined as a defendant to this proceeding, by no later than close of business on Friday, 29 June 2018.

Yours faithfully



Alex Nase
Tucker & Cowen

Direct Email: anase@tuckercowen.com.au
Direct Line: (07) 3210 3503

Individual liability limited by a scheme approved under Professional Standards Legislation.

David O'Brien

From: Alex Nase <anase@tuckercowen.com.au>
Sent: Tuesday 3 July 2018 01:11 pm
To: David O'Brien; Nadia Braad
Cc: David Schwarz
Subject: FW: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") – Supreme Court of Queensland Proceeding No 12716/15 ("AIS Proceeding")
Attachments: Letter to Minter Ellison Lawyers, 26.06.2018 (TCS01538799).pdf

Dear Colleagues,

We refer to our letter to you dated 26 June 2018 (copy attached).

We note that no reply to our letter was received within the requested timeframe.

Would you please let us know when we may expect a reply?

regards

Alex Nase
Special Counsel

E: anase@tuckercowen.com.au
D: 07 3210 3503 | M: 0423 386 195 | T: 07 300 300 00 | F: 07 300 300 33
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001
TCS Solicitors Pty Ltd. | ACN 610 321 509

Tucker&CowenSolicitors.

Leading Litigation & Dispute Resolution and Insolvency & Reconstruction Lawyers 2012 to 2017, First Tier for Insolvency 2017 - Doyle's Guide

Best Lawyers® International 2013 -2019 - Justin Marschke for Litigation and Regulatory 2019

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Please note that unencrypted electronic communications are not secure and may not be authentic. Please telephone to confirm if you have any doubts as to the contents or authenticity of this email.

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From: Andrea Whisson
Sent: Tuesday, 26 June 2018 1:52 PM

To: 'david.obrien@minterellison.com' <david.obrien@minterellison.com>; 'nadia.braad@minterellison.com' <nadia.braad@minterellison.com>

Cc: David Schwarz <dschwarz@tuckercowen.com.au>; Alex Nase <anase@tuckercowen.com.au>

Subject: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") – Supreme Court of Queensland Proceeding No 12716/15 ("AIIIS Proceeding")

Dear Colleagues,

Please find **attached** correspondence.

Yours faithfully,

Sent on behalf of **Alex Nase**, Special Counsel

E: anase@tuckercowen.com.au | D: 07 3210 3503 | M: 0423 386 195

by:

Tucker & Cowen Solicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase
Your reference: Mr O'Brien / Mrs Braad

26 June 2018

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

Consultant.
David Tucker.

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

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

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

Email:
david.obrien@minterellison.com
nadia.braad@minterellison.com

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") – Supreme Court of Queensland Proceeding No 12716/15 ("ALIS Proceeding")

We refer to your letter dated 25 June 2018.

Our client does not accept the undertaking offered by your client.

The proposed undertaking is unsatisfactory, because the winding up of the FMIF cannot be completed until the remaining legal proceedings are concluded.

Indeed, at a recent Court hearing, His Honour Boddice J observed to the effect that there ought to be a timeline for the resolution or determination of the remaining legal proceedings.

Our client is considering applying to Court for an order that he be joined as a defendant to the proceeding, and for directions with respect to the future conduct of the proceeding.

Our letter to you dated 4 June 2018 requested that you let us know within seven days whether your client consents to our client being joined as a defendant to the proceeding. No response to that request has been received.

Would you please let us know whether your client consents to our client being joined as a defendant to this proceeding, by no later than close of business on Friday, 29 June 2018.

Yours faithfully



Alex Nase
Tucker & Cowen

Direct Email: anase@tuckercowen.com.au
Direct Line: (07) 3210 3503

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David O'Brien

From: David O'Brien <David.O'Brien@minterellison.com>
Sent: Tuesday 3 July 2018 04:18 pm
To: David Schwarz; Alex Nase
Cc: Waller, Mark; Erfurt, Chris; Nadia Braad
Subject: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15 [ME-ME.FID2397644]
Attachments: 2018.07.02 Letter to Tucker & Cowen.PDF

Dear Colleagues,

Please see **attached** correspondence.

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
minterellison.com Follow us on **LinkedIn** and **Twitter**

MinterEllison

3 July 2018

BY EMAIL

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

Dear Colleagues

KordaMentha Pty Ltd ("KM") in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15

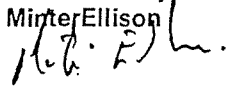
We refer to your letter dated 26 June 2018.

Our client has decided to discontinue this proceeding if so directed by the Court acting pursuant to section 96 of the *Trusts Act 1973* (Qld).

In these circumstances, it is unnecessary for your client to become a party to this proceeding.

We will keep you informed of the progress of our client's 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 407747963

Cc: Mr Mark Waller
Clayton Utz



David O'Brien

From: David O'Brien
Sent: Thursday 5 July 2018 01:26 pm
To: David Schwarz; 'Alex Nase'; Waller, Mark; 'Erfurt, Chris'
Cc: Nadia Braad
Subject: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15 [ME-ME.FID2397644]
Attachments: 2018.07.05 Letter to Tucker & Cowen.pdf; Application - service.pdf; Application - section 96.pdf

Dear Colleagues,

Please see attached correspondence and attachments.

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
minterellison.com Follow us on **LinkedIn** and **Twitter**

MinterEllison

5 July 2018

BY EMAIL

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

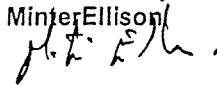
Dear Colleagues

KordaMentha Pty Ltd ("KM") in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15

We refer to our letter dated 3 July 2018.

We attach for your information, but not by way of service, two applications filed today.

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 407747963

Cc: Mr Mark Waller
Clayton Utz



SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 12716/15

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)**

APPLICATION

TAKE NOTICE that KordaMentha Pty Ltd (ACN 100 169 391) as trustee of the LM Managed Performance Fund ("plaintiff") is applying to the Court for the following orders:

1. In respect of the application filed on 4 July 2018 for directions under section 96 of the *Trusts Act* 1973 (Qld), the plaintiff serve by email all unitholders of the Managed Performance Fund ("MPF") for whom the plaintiff has an email address.
2. Where the plaintiff receives a response to an email that indicates the email was not received and the plaintiff has a postal address for that MPF unitholder, the plaintiff is to post the email to the postal address of the MPF unitholder.
3. By 4.00pm on 17 July 2018, the plaintiff is to email to the MPF unitholders a notice informing them that the plaintiff has applied ("S 96 Application") to this Honourable Court for directions under section 96 of the *Trusts Act* 1973 (Qld) to discontinue the proceeding, and that they may view all substantive Court documents upon which the plaintiff intends to rely in support of its S 96



APPLICATION

Filed on behalf of the Applicant

Form 9 Rules 31

ME_150887333_1

MINTER ELLISON
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email: david.o'brien@minterellison.com
Reference NYB DOB 407747963

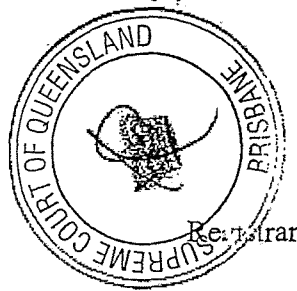
Application on the web-site whose address is:

<http://www.kordamentha.com/creditor-information/australia/109> ("Website").

4. By 4.00pm on 17 July 2018, the plaintiff is to upload to the Website, copies of:
 - (a) the S 96 Application;
 - (b) this application for directions about service;
 - (c) the affidavit of Jarrod Villani to be filed in support of the application for directions about service;
 - (d) the service order;
 - (e) the Statement of Facts drawn pursuant to section 96 (1) of the *Trusts Act* 1973 (Qld); and
 - (f) any substantive affidavits (including all the exhibits) that the plaintiff intends to reply upon in support of its S 96 Application.
5. Service in accordance with paragraph 4 of this order be deemed to be effective on each of the MPF unitholders as of 24 July 2018.
6. For all other emails by way of service on the MPF unitholders:
 - (a) the email shall, where appropriate, notify the unitholder of the further document or documents that has been uploaded to the Website;
 - (b) service shall be deemed to have been effected two business days after the day on which the email was sent.
7. The plaintiff is not required to take further steps to serve MPF unitholders whose email addresses return permanent undeliverable receipts and for which the Trustee does not have a postal address.
8. The plaintiff's costs and expenses of and incidental to its application for this order be paid on the indemnity basis out of the MPF.
9. The plaintiff is to serve a copy of this order on LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) (ACN 077 208 461) and Mr David Whyte in his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund.

This application will be heard by the Court at Brisbane
 on: Thursday, ¹⁶~~14~~ July 2018 at 10.00 am.

Filed on 5 July 2018



If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application the plaintiff intends to rely on the following affidavits and documents:

1. Affidavit of Jarrod Villani to be sworn and filed.
2. Affidavit of David Thomas O'Brien to be sworn and filed.

THE PLAINTIFF ESTIMATES THE HEARING SHOULD BE ALLOCATED 30
 Minutes

Signed:

M.T. Ellison

Description: MINTER ELLISON
 Solicitors for the Plaintiff

Dated: 5 July 2018

This application is not intended to be served on any person.

Notice of this application will be given to:

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

AND TO

Mr David Whyte in his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 12716/15

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

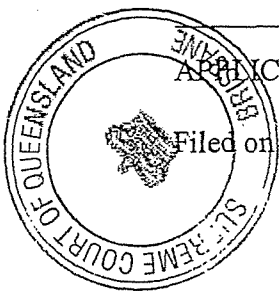
AND

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

APPLICATION

TAKE NOTICE that KordaMentha Pty Ltd (ACN 100 169 391) as trustee of the LM Managed Performance Fund ("plaintiff") is applying to the Court for the following orders:

1. In respect of the application filed on 4 July 2018 for directions under section 96 of the *Trusts Act* 1973 (Qld), the plaintiff serve by email all unitholders of the Managed Performance Fund ("MPF") for whom the plaintiff has an email address.
2. Where the plaintiff receives a response to an email that indicates the email was not received and the plaintiff has a postal address for that MPF unitholder, the plaintiff is to post the email to the postal address of the MPF unitholder.
3. By 4.00pm on 17 July 2018, the plaintiff is to email to the MPF unitholders a notice informing them that the plaintiff has applied ("S 96 Application") to this Honourable Court for directions under section 96 of the *Trusts Act* 1973 (Qld) to discontinue the proceeding, and that they may view all substantive Court documents upon which the plaintiff intends to rely in support of its S 96



APPLICATION

Filed on behalf of the Applicant

MINTER ELLISON
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email: david.o'brien@minterellison.com
Reference NYB DOB 407747963

Form 9 Rules 31

ME_150887333_1

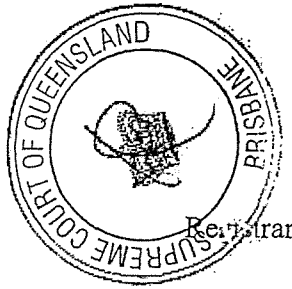
Application on the web-site whose address is:

<http://www.kordamentha.com/creditor-information/australia/109> ("Website").

4. By 4.00pm on 17 July 2018, the plaintiff is to upload to the Website, copies of:
 - (a) the S 96 Application;
 - (b) this application for directions about service;
 - (c) the affidavit of Jarrod Villani to be filed in support of the application for directions about service;
 - (d) the service order;
 - (e) the Statement of Facts drawn pursuant to section 96 (1) of the *Trusts Act* 1973 (Qld); and
 - (f) any substantive affidavits (including all the exhibits) that the plaintiff intends to reply upon in support of its S 96 Application.
5. Service in accordance with paragraph 4 of this order be deemed to be effective on each of the MPF unitholders as of 24 July 2018.
6. For all other emails by way of service on the MPF unitholders:
 - (a) the email shall, where appropriate, notify the unitholder of the further document or documents that has been uploaded to the Website;
 - (b) service shall be deemed to have been effected two business days after the day on which the email was sent.
7. The plaintiff is not required to take further steps to serve MPF unitholders whose email addresses return permanent undeliverable receipts and for which the Trustee does not have a postal address.
8. The plaintiff's costs and expenses of and incidental to its application for this order be paid on the indemnity basis out of the MPF.
9. The plaintiff is to serve a copy of this order on LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) (ACN 077 208 461) and Mr David Whyte in his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund.

This application will be heard by the Court at Brisbane
 on: Thursday, ¹⁶~~14~~ July 2018 at 10.00 am.

Filed on 5 July 2018



If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application the plaintiff intends to rely on the following affidavits and documents:

1. Affidavit of Jarrod Villani to be sworn and filed.
2. Affidavit of David Thomas O'Brien to be sworn and filed.

THE PLAINTIFF ESTIMATES THE HEARING SHOULD BE ALLOCATED 30
 Minutes

Signed:

M. T. Ellison

Description: MINTER ELLISON
 Solicitors for the Plaintiff

Dated: 5 July 2018

This application is not intended to be served on any person.

Notice of this application will be given to:

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

AND TO

Mr David Whyte in his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 12716/15

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

AND

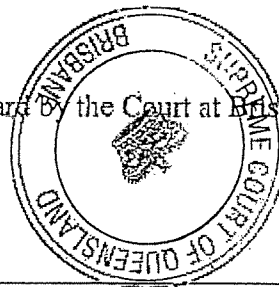
Defendant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) (ACN 077 208 461)**

APPLICATION

TAKE NOTICE that KordaMentha Pty Ltd (ACN 100 169 391) as trustee of the LM Managed Performance Fund ("plaintiff") is applying to the Court for the following orders:

1. Directions pursuant to section 96 of the *Trusts Act* 1973 (Qld), as to whether the plaintiff would be justified in discontinuing this proceeding against the defendant.
2. The plaintiff's costs and expenses of and incidental to this proceeding be paid on the indemnity basis out of the LM Managed Performance Fund.
3. Such further and other orders or directions as this Honourable Court deems appropriate.

This application for directions will be heard by the Court at Brisbane
on: Thursday 9 August 2018 at 10.00am.



ORIGINATING APPLICATION

Filed on behalf of the Applicant

Form 5 Rules Rule 26

ME_150901394_1

MINTER ELLISON
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email: qlit@minterellison.com
Reference: NYB DOB 407747963

Filed on 5 July 2018



If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application for directions the plaintiff intends to rely on the following material:

1. Affidavit of Jarrod Villani to be filed;
2. Affidavit of David Thomas O'Brien to be filed;
3. Statement of Facts pursuant to section 96(1) of the *Trusts Act* 1973 (Qld) to be filed.

THE PLAINTIFF ESTIMATES THE HEARING OF THE APPLICATION FOR DIRECTIONS SHOULD BE ALLOCATED 1.5 HOURS

Signed:

Description: MINTER ELLISON
Solicitors for the plaintiff

Dated: 5 July 2018

This application is not intended to be served on any person.

Notice of this application will be given to:

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

AND TO

Mr David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund



David O'Brien

From: David O'Brien
Sent: Thursday 5 July 2018 01:26 pm
To: David Schwarz; 'Alex Nase'; Waller, Mark; 'Erfurt, Chris'
Cc: Nadia Braad
Subject: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15 [ME-ME.FID2397644]
Attachments: 2018.07.05 Letter to Tucker & Cowen.pdf; Application - service.pdf; Application - section 96.pdf

Dear Colleagues,

Please see attached correspondence and attachments.

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

5 July 2018

BY EMAIL

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

Dear Colleagues

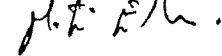
KordaMentha Pty Ltd ("KM") in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15

We refer to our letter dated 3 July 2018.

We attach for your information, but not by way of service, two applications filed today.

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 407747963

Cc: Mr Mark Waller
Clayton Utz



SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 12716/15

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

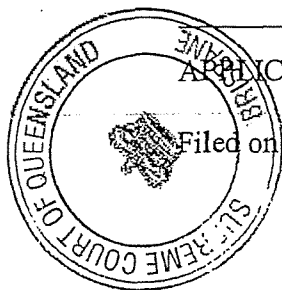
AND

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

APPLICATION

TAKE NOTICE that KordaMentha Pty Ltd (ACN 100 169 391) as trustee of the LM Managed Performance Fund ("plaintiff") is applying to the Court for the following orders:

1. In respect of the application filed on 4 July 2018 for directions under section 96 of the *Trusts Act* 1973 (Qld), the plaintiff serve by email all unitholders of the Managed Performance Fund ("MPF") for whom the plaintiff has an email address.
2. Where the plaintiff receives a response to an email that indicates the email was not received and the plaintiff has a postal address for that MPF unitholder, the plaintiff is to post the email to the postal address of the MPF unitholder.
3. By 4.00pm on 17 July 2018, the plaintiff is to email to the MPF unitholders a notice informing them that the plaintiff has applied ("S 96 Application") to this Honourable Court for directions under section 96 of the *Trusts Act* 1973 (Qld) to discontinue the proceeding, and that they may view all substantive Court documents upon which the plaintiff intends to rely in support of its S 96



APPLICATION

Filed on behalf of the Applicant

MINTER ELLISON
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email: david.o'brien@minterellison.com
Reference NYB DOB 407747963

Form 9 Rules 31

ME_150887333_1

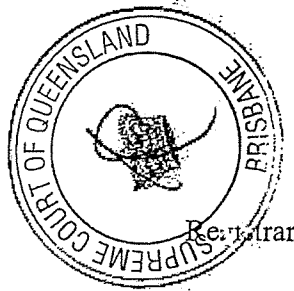
Application on the web-site whose address is:

<http://www.kordamentha.com/creditor-information/australia/109> ("Website").

4. By 4.00pm on 17 July 2018, the plaintiff is to upload to the Website, copies of:
 - (a) the S 96 Application;
 - (b) this application for directions about service;
 - (c) the affidavit of Jarrod Villani to be filed in support of the application for directions about service;
 - (d) the service order;
 - (e) the Statement of Facts drawn pursuant to section 96 (1) of the *Trusts Act* 1973 (Qld); and
 - (f) any substantive affidavits (including all the exhibits) that the plaintiff intends to reply upon in support of its S 96 Application.
5. Service in accordance with paragraph 4 of this order be deemed to be effective on each of the MPF unitholders as of 24 July 2018.
6. For all other emails by way of service on the MPF unitholders:
 - (a) the email shall, where appropriate, notify the unitholder of the further document or documents that has been uploaded to the Website;
 - (b) service shall be deemed to have been effected two business days after the day on which the email was sent.
7. The plaintiff is not required to take further steps to serve MPF unitholders whose email addresses return permanent undeliverable receipts and for which the Trustee does not have a postal address.
8. The plaintiff's costs and expenses of and incidental to its application for this order be paid on the indemnity basis out of the MPF.
9. The plaintiff is to serve a copy of this order on LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) (ACN 077 208 461) and Mr David Whyte in his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund.

This application will be heard by the Court at Brisbane
on: Thursday, ¹⁶~~14~~ July 2018 at 10.00 am.

Filed on 5 July 2018



If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application the plaintiff intends to rely on the following affidavits and documents:

1. Affidavit of Jarrod Villani to be sworn and filed.
2. Affidavit of David Thomas O'Brien to be sworn and filed.

THE PLAINTIFF ESTIMATES THE HEARING SHOULD BE ALLOCATED 30
Minutes

Signed:

M. T. Ellison

Description:

MINTER ELLISON
Solicitors for the Plaintiff

Dated:

5 July 2018

This application is not intended to be served on any person.

Notice of this application will be given to:

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

AND TO

Mr David Whyte in his capacity as Court appointed receiver of the property of the LM First Mortgage Income Fund

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane
NUMBER 12716/15

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

AND

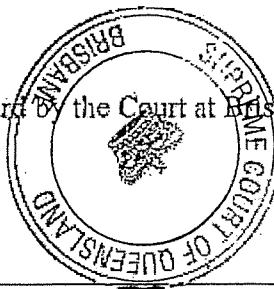
Defendant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) (ACN 077 208 461)**

APPLICATION

TAKE NOTICE that KordaMentha Pty Ltd (ACN 100 169 391) as trustee of the LM Managed Performance Fund ("plaintiff") is applying to the Court for the following orders:

1. Directions pursuant to section 96 of the *Trusts Act* 1973 (Qld), as to whether the plaintiff would be justified in discontinuing this proceeding against the defendant.
2. The plaintiff's costs and expenses of and incidental to this proceeding be paid on the indemnity basis out of the LM Managed Performance Fund.
3. Such further and other orders or directions as this Honourable Court deems appropriate.

This application for directions will be heard by the Court at Brisbane
on: Thursday 9 August 2018 at 10.00am.



ORIGINATING APPLICATION

Filed on behalf of the Applicant

Form 5 Rules Rule 26

ME_150901394_1

MINTER ELLISON
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000
DX 102 BRISBANE
Telephone (07) 3119 6000
Facsimile (07) 3119 1000
Email: qlit@minterellison.com
Reference: NYB DOB 407747963

Filed on 5 July 2018



If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the hearing of the application for directions the plaintiff intends to rely on the following material:

1. Affidavit of Jarrod Villani to be filed;
2. Affidavit of David Thomas O'Brien to be filed;
3. Statement of Facts pursuant to section 96(1) of the *Trusts Act* 1973 (Qld) to be filed.

THE PLAINTIFF ESTIMATES THE HEARING OF THE APPLICATION FOR DIRECTIONS SHOULD BE ALLOCATED 1.5 HOURS

Signed:

Mt E/L

Description:

MINTER ELLISON
Solicitors for the plaintiff

Dated:

5 July 2018

This application is not intended to be served on any person.

Notice of this application will be given to:

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

AND TO

Mr David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund



David O'Brien

From: David O'Brien
Sent: Tuesday 10 July 2018 01:21 pm
To: 'David Schwarz'; 'Alex Nase'; 'Waller, Mark'; 'Erfurt, Chris'
Cc: Nadia Braad
Subject: RE: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15 [ME-ME.FID2397644]
Attachments: 2018.07.10 Affidavit of Jarrod Villani.pdf

Dear Colleagues,

I refer to my email of 5 July 2018.

Attached for your information is Mr Villani's affidavit sworn today in support of the service application to be heard next Monday.

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
minterellison.com Follow us on **LinkedIn** and **Twitter**



From: David O'Brien
Sent: Thursday 5 July 2018 01:26 pm
To: David Schwarz <dschwarz@tuckercowen.com.au>; 'Alex Nase' <anase@tuckercowen.com.au>; Waller, Mark <mwaller@claytonutz.com>; 'Erfurt, Chris' <CErfurt@claytonutz.com>
Cc: Nadia Braad <Nadia.Braad@minterellison.com>
Subject: KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15 [ME-ME.FID2397644]

Dear Colleagues,

Please see attached correspondence and attachments.

Regards

David O'Brien
Partner
T +61 7 3119 6159 M +61 401 148 939
david.obrien@minterellison.com
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