

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3691/2013

Applicants

KORDAMENTHA PTY LTD (ACN 100 169 391)

AND

**CALIBRE CAPITAL LTD (ABN 66 108 318 985) IN THEIR
CAPACITY AS TRUSTEES FOR THE LM MANAGED
PERFORMANCE FUND**

AND

First Respondent

**THE MEMBERS OF THE LM MANAGED
PERFORMANCE FUND**

AND

Second Respondent

**JOHN RICHARD PARK AND GINETTE MULLER IN
THEIR CAPACITY AS JOINT AND SEVERAL
LIQUIDATORS OF LM INVESTMENT MANAGEMENT
LIMITED (IN LIQUIDATION) ACN 077 208 461**

AFFIDAVIT

I, **SIMON MICHAEL VERTULLO** of Level 14, 12 Creek Street, BRISBANE QLD 4000, Partner,
say on oath:

1. I am a Partner of KordaMentha Pty Ltd and am authorised to swear this affidavit on behalf of the Applicants. I am the person principally responsible for conducting the affairs of the LM Managed Performance Fund ("**Trust**") at KordaMentha.
2. By order of this Court dated 12 April 2013:

Page 1

Signed

Taken by

Affidavit

Filed on behalf of the Applicants
Form 46 (Rule 431)

Piper Alderman
Level 23, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000
Tel: +61 2 9253 9999
Fax: +61 2 9253 9900
Ref: AKB.LG.ST.386376

- 2.1 LM Investment Management Limited (In Liquidation) ("**LMIM**") was removed as trustee of the Trust (**Former Trustee**); and
- 2.2 KordaMentha Pty Ltd and its related entity Calibre Capital Pty Ltd ("**the New Trustees**") were appointed jointly and severally as trustees of the Trust.
3. Throughout this affidavit, I make references to various documents which are contained in a paginated bundle of documents exhibited to this affidavit and marked "SMV-6" (the **Exhibit**) and the pages I refer to are the pages in the Exhibit. At page 8 of the Exhibit is a true and correct copy of the Orders under which the New Trustees were appointed.
4. The New Trustees have made an application for the winding up of the Trust and for related orders (**Application**).
5. I am seeking orders from the Court *inter alia*:
- (a) That notice of the Application be made by the New Trustees in these proceedings be effected on the members of the Trust by:
- (i) sending a notice of the Application by email to all known members of the Trust and/or their financial advisors at their last known email address; and
- (ii) posting a notice of the Application in a prominent location on the website <http://www.kordamentha.com/creditor-information/australia/109>.
- (b) That service of the Application, my supporting affidavit, any further court documents to be filed by the Applicants in these proceedings, and any orders made in respect of the Application be deemed effective on each of the members of the Trust five (5) days after those documents are made available in PDF on the website <http://www.kordamentha.com/creditor-information/australia/109>.

Signed

28662714v1

Page 2

Taken by

Background

6. The Trust was established in 2001 as an Australian income fund suitable for global investors.
7. Prior to our appointment as the New Trustees, LMIM was the trustee and manager of the Trust. The Trust has never been registered as a managed investment scheme under Part 5.9 of the Corporations Act 2001 (Cth).
8. On 19 March 2013, Ginette Muller and John Park were appointed voluntary administrators of LMIM by resolution of the board of directors of LMIM pursuant to section 436A of the Corporations Act 2001 (Cth).
9. As detailed above, on 12 April 2013, by order of Chief Justice de Jersey, LMIM was removed as trustee of the Trust and the Applicants were appointed the joint and several trustees of the Trust.
10. The Trust allowed for investment by:
 - 10.1 investors outside Australia;
 - 10.2 indirect investors, including operators of global platforms, global portfolio bonds, master trusts and wrap accounts and institutions investing the funds of their clients ;
 - 10.3 certain wholesale investors by invitation only.
11. There are over 4,500 unit holders on the register of the Trust, and they reside predominantly overseas. This includes investors represented by financial advisors.

Communications with investors

12. Following our appointment, on 15 April 2013, the New Trustees sent an initial notification to investors by email at their last known email addresses. At page 10 of the Exhibit is a true and correct copy of the initial notification.
13. The New Trustees have also set up and maintained a website to communicate with investors, which is to be found at <http://www.kordamentha.com/creditor-information/australia/109>. A copy of the initial notification was posted to this website.

14. Since our appointment, the New Trustees have also sent a number of updates to investors in the Trust by email to their last known email addresses. The New Trustees have also sent a separate update to investors' financial advisors.
15. These updates set out in detail the financial position of the Trust and the actions that have been taken by the New Trustees from 12 April 2013 onwards. Certain of those updates are confidential and were not made publicly available as they contain sensitive information and may prejudice negotiations, asset realisations and potential litigation. For these reasons, the confidential updates do not appear on the website that KordaMentha has maintained to communicate with investors. The other updates that are not considered confidential by the New Trustees appear on the website.
16. In a non-confidential portion of a confidential update dated 16 September 2013 (**September Update**), the New Trustees advised investors (inter alia) that:

"Under the MPF's constitution the trustees have an obligation to consider the winding down of the Fund, if it is considered inter alia that the Fund is unable to achieve its objectives. Other reasons supporting a winding down of the Fund include:

The overall financial position of the Fund;

The Fund is no longer in a position to accept/raise further funds due to its financial position;

The likely return to investors is a small percentage of the amount originally invested;

The future of the Fund only involves realising monies from existing mortgage assets or legal actions;

There are further investigations to be conducted regarding such legal actions with respect to the conduct of the former trustees, directors and related parties which are typically conducted as part of a wind down process.

There are various claims against the Fund and a priority arrangement needs to be in place for the Fund assets, dealing with the claims of, and distributing monies, to investors.

Over the course of the next month, the trustees will consider the position of the Fund and if it is deemed by the trustee to be in the best interest of Unitholders, the trustees will consider a winding down application."

17. Following the issue of the September Update, we have not received any correspondence from investors objecting to the proposed winding up of the Trust. However, the Trustees did receive a small number of communications from investors about whether the Trustees can raise funds to allow for the property developments of the Trust to continue.

Application for vesting orders

18. On 23 April 2013, the New Trustees filed an Originating Application which commenced these proceedings ("**application**") seeking orders vesting certain choses in action in the New Trustees.
19. On 29 April 2013, Justice P Lyons made orders requiring the application and the service orders to be served on the members of the Trust by email. In addition, the New Trustees were ordered to provide copies of any supporting affidavits to any members who requested the affidavits by email. At page 12 of the Exhibit is a copy of the orders obtained in those proceedings dated 29 April 2103. Whilst the attached copy of the orders is not signed or sealed by the Court, I understand that these orders are the orders that were made by the Court as they were the orders confirmed to have been made by the Associate to His Honour in an email to the parties' solicitors. At page 14 of the Exhibit is a true copy of that email dated 30 April 2013.
20. I seek similar orders in this present application. I am concerned that if the New Trustees are required to serve any exhibits to any affidavits by email to members of the Trust, that service of those exhibits by email may not be effective, depending on the size of those exhibits. KordaMentha has an incoming and outgoing mail serve limit of 25 megabytes (MB) per email. I am informed by Mr Brendan Read of KordaMentha's forensic and IT team and verily believe that many companies have a mail server limit of 10MB per email and individual mailboxes vary significantly from 2MB to an unlimited size. In the event that the exhibits to any affidavits are voluminous, it would become necessary to split the exhibits and send multiple emails to investors.

Cost of service of the application and supporting material

21. In order to serve by postal mail each of the approximately 4,500 investors of the Trust, we would need to outsource the task of printing and compiling all of the relevant material (being the Application and supporting affidavits to be sworn).
22. I have obtained a quote for the cost of outsourcing the printing of the current application for the winding up of the Trust and the supporting affidavit and exhibits which is estimated to be at least \$112,725. A copy of the quotation from Worldwide Printing Solutions is at page 18 of the Exhibit.
23. In addition, in order to issue the application and supporting affidavit by postal mail, I estimate the cost to be a further \$225,000 in accordance with the rates advertised by Australia Post.
24. In respect of any further or ancillary applications, it is likely that similar costs would be incurred in outsourcing the printing for service and posting of each of those applications and the supporting affidavits.
25. Given that there are approximately 4,500 investors in the Trust of which the large majority are located outside Australia, it is not only impractical but costly and time consuming to serve the application and supporting documents on each investor in the manner prescribed by the *Uniform Civil Procedure Rules 1999 (QLD)*.

Service

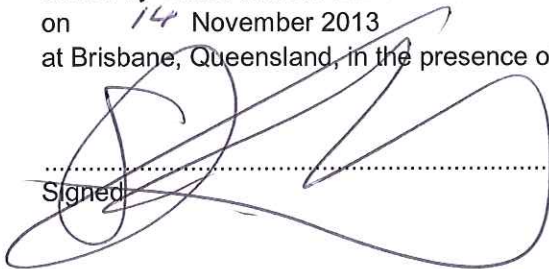
26. Given that:
 - 26.1 there are approximately 4,500 investors the large majority of which are located outside Australia in the Trust and that it would be impractical and costly to serve the current application and any supporting documents on each investor in the manner prescribed by the *Uniform Civil Procedure Rules 1999 (QLD)*;
 - 26.2 pursuant to an order dated 29 April 2013 obtained by the New Trustees in these proceedings, service of the Court documents has been previously effected by emailing those documents to the members of the Trust;
 - 26.3 during the course of our appointment as the New Trustees, I have prepared updates to investors of the Trust updating them as to the financial position of the

Trust, and the actions taken by the New Trustees, and the New Trustees have emailed those updates to each of the investors' last known email address as well as posted them to the KordaMentha website;

I verily believe that by notifying the investors of the Trust of the Application and serving the documents in respect of same in the manner sought in this application, that the fact of the application for the winding up of the Trust will come to the attention of the investors of the Trust.

ALL THE FACTS and circumstances deposed to above are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit.

Sworn by SIMON MICHAEL VERTULLO
on 14 November 2013
at Brisbane, Queensland, in the presence of:

Signed 


Denis Beattie
Solicitor

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3691/2013

Applicants

KORDAMENTHA PTY LTD (ACN 100 169 391)

AND

**CALIBRE CAPITAL LTD (ABN 66 108 318 985) IN
THEIR CAPACITY AS TRUSTEES FOR THE LM
MANAGED PERFORMANCE FUND**

AND

First Respondent

**THE MEMBERS OF THE LM MANAGED
PERFORMANCE FUND**

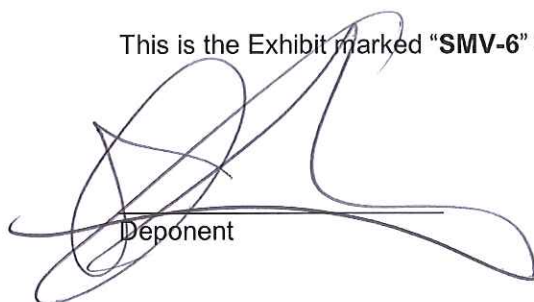
AND

Second Respondent

**JOHN RICHARD PARK AND GINETTE MULLER IN
THEIR CAPACITY AS JOINT AND SEVERAL
LIQUIDATORS OF LM INVESTMENT MANAGEMENT
LIMITED (IN LIQUIDATION) ACN 077 208 461**

CERTIFICATE OF EXHIBIT

This is the Exhibit marked "**SMV-6**" to the affidavit of Simon Michael Vertullo sworn 14 November 2013



Deponent



Solicitor

Certificate for Exhibit

Filed on behalf of the Applicant
Form 47 Rule 435

Piper Alderman
Level 23, Governor Macquarie
Tower
1 Farrer Place
SYDNEY NSW 2000
Tel: +61 2 9253 9999
Fax: +61 2 9253 9900
Ref: AKB.LG.ST.386376

INDEX TO EXHIBIT SMV-6

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" 5MV-6 "

SUPREME COURT OF QUEENSLAND

Duplicate

REGISTRY: Brisbane
NUMBER: 2869/13

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED
(ADMINISTRATORS APPOINTED) ABN 68077 208 461 AND LM ADMINISTRATION
PTY LTD (ADMINISTRATORS APPOINTED) ACN 055 691 426

Applicants JOHN RICHARD PARK AND GINETTE MULLER IN
 THEIR CAPACITY AS JOINT AND SEVERAL
 ADMINISTRATORS OF LM INVESTMENT
 MANAGEMENT LIMITED (ADMINISTRATORS
 APPOINTED) AND LM ADMINISTRATION PTY LTD
 (ADMINISTRATORS APPOINTED)

Respondents THE MEMBERS OF THE MANAGED
 PERFORMANCE FUND

ORDER

Judge: de Jersey CJ
Date: 12 April 2013
Initiating document: Originating Application filed 26 March 2013

The Court orders that:

1. LM Investment Management Limited (Administrators Appointed) is removed as trustee of the trust named The LM Managed Performance Fund.
2. Korda Mentha Pty Ltd (ACN 100 169 391) and Calibre Capital Pty Ltd (ABN 66 108 318 985) are appointed as joint and several trustees of the trust named The LM Managed Performance Fund.
3. Orders 1 and 2 are made without prejudice to any lien or charge, or any right of reimbursement or any right of indemnity that :

(a) LM Investment Management Limited, as former trustee; and



Piper Alderman

(b) The Applicants in their capacity as joint and several administrators of LM Investment Management Limited,

may have against the assets of the trust.

4. The costs of both the applicants and the respondents shall be assessed on the indemnity basis and paid out of the assets of the trust.



REGISTRAR

NOTIFICATION TO INVESTORS



15 April 2013

Dear Investor

LM Managed Performance Fund
ABN 95 595 833 174 ('the Fund')

On 12 April 2013, KordaMentha and our affiliated firm Calibre Capital Limited were appointed as trustees of the LM Managed Performance Fund pursuant to an Order of the Supreme Court of Queensland in Brisbane.

LM Investment Management Limited ('Administrators Appointed') ('LMIM') was previously the trustee of the Fund. We note that John Park and Ginette Muller of FTI Consulting were appointed as Voluntary Administrators of this company on 19 March 2013.

However, pursuant to our appointment, LMIM has been removed and replaced as trustee of the Fund.

Priorities as new trustee

Our initial priorities as trustee are to:

- preserve and retain the value of the assets and investments of the Fund
- assess the overall financial position of the Fund and its investments
- enable investors' concerns and desires to be communicated
- consider and investigate the previous operation of the Fund including historical application of investors' funds and transactions involving related parties
- enable the position of the Fund to be openly explained to investors.

Status of the Fund, redemptions and interest payments

The status of the fund is being investigated. Based on our preliminary investigations, it is our understanding that:

- the Fund is closed and no further monies are being accepted by the Fund
- all interest payments and redemptions are suspended
- the Fund is not considering any further investments.

Should our further investigations indicate anything to the contrary, we will notify investors.

Corporate Finance Services
Investment & Structuring Services
Real Estate Advisory
Insurance

info@kordamentha.com
www.kordamentha.com

Liability limited by a scheme
approved under Professional
Standards Legislation

Brisbane

KordaMentha Pty Ltd
ACN 100 169 391
Level 14, 12 Creek Street
Brisbane QLD 4000
GPO Box 964
Brisbane QLD 4001
Office: 07 3338 0222
Fax: 07 3338 0298

Offices

Adelaide Perth
Brisbane Singapore
Gold Coast Sydney
Melbourne Townsville
New Zealand

Cooperation with AlixPartners

Chicago Munich
Dallas New York
Detroit Paris
Düsseldorf San Francisco
London Shanghai
Los Angeles Tokyo
Milan Washington, DC

Further communication with investors

On an ongoing basis we will be updating investors in relation to those priority issues listed above and all relevant matters in relation to the Fund.

Investors are able to obtain further information in the interim as follows:

- All investors can telephone +61 7 3338 0286
- All investors can access the KordaMentha website at www.kordamentha.com

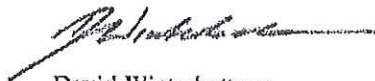
Additionally, specific questions are able to be emailed to linvestors@kordamentha.com. We will answer your questions as soon as possible. In the interim, you may also contact David James on +61 7 3338 0281 or djames@kordamentha.com if you have any questions.

We are in the process of obtaining the books and records of the Fund. If your contact details have changed since your initial investment, we ask that you forward these details to the above email address.

Yours sincerely



Simon Vertullo
Partner



David Winterbottom
Partner

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3691 of 2013

Applicants: KORDA MENTHA PTY LTD (ACN 100 169 391)

AND

CALIBRE CAPITAL LIMITED (ABN 66 108 313) (in
their capacity as trustees of the LM MANAGED
PERFORMANCE FUND)

Respondents: THE MEMBERS OF THE LM MANAGED
PERFORMANCE FUND

ORDER

Before: Justice P Lyons

Date: 29 April 2013

Initiating document: Originating Application filed 23 April 2013

THE ORDER OF THE COURT IS THAT:

1. The applicants be granted leave to amend their Originating Application;
2. LM Investment Management Limited (administrators appointed) and John Richard Park and Ginette Muller in their capacity as administrators of LM Investment Management Limited (administrators appointed) be added as the second respondents to the proceeding;
3. Trust Company (PTAL) Limited be added as the third respondent to the proceeding;
4. The further hearing of the application be adjourned to 10am on Thursday 2 May 2013;
5. Costs reserved.

THE COURT DIRECTS THAT:

1. The applicants serve a copy of this order forthwith on the third respondent;
2. The applicants take all reasonable steps to serve by email this order, and the Amended Originating Application, on the persons who are the first respondents;

ORDER

Filed on Behalf of the Plaintiff
Form 59, Version 1

Uniform Civil Procedure Rules 1999
Rule 661
28082822v1

Name: Amanda Banton
Address: Piper Alderman
Level 23, 1 Farrer Place,
Sydney NSW 2000
Phone No: 9253 9999
Fax No: 92539900

3. Should any of the first respondents or the third respondent request copies of the affidavit material, the applicants provide that affidavit material forthwith by email;
4. The second respondents file and serve their affidavit material by 6pm on Tuesday 30 April 2013;
5. The parties exchange their list of objections to the affidavit material already received by 6pm Tuesday 30 April 2013;
6. The applicants file and serve their affidavit material in reply by 4pm on Wednesday 1 May 2013;
7. The parties exchange their written submissions and send them to the Associate to P Lyons J by 9am on Thursday 2 May 2013.

Signed:

Davina Holland

From: Associate PLYons J <Associate.PLYonsJ@courts.qld.gov.au>
Sent: Tuesday, 30 April 2013 2:37 PM
To: Amanda Banton
Cc: seanrussell@russellslaw.com.au; m.gill@dlapiper.com; Lisa Gallate; Davina Holland; Sarah Wooster; Jasmin Shaw
Subject: RE: KordaMentha Pty Ltd and Calibre Capital Limited v The Members of the LM Managed Performance Fund - 3691 of 2013

Good afternoon

His Honour has made an order in terms of the draft. I will place it with the file this afternoon.

Thank you for your assistance.

Kind regards

Ben Grant
Associate to the Hon Justice Peter Lyons
Supreme Court of Queensland
t: +61 (0)7 3247 4291
f: +61 (0)7 3221 7565
e: Associate.PLYonsJ@courts.qld.gov.au

From: Davina Holland [<mailto:DHolland@piperalderman.com.au>] **On Behalf Of** Amanda Banton
Sent: Tuesday, 30 April 2013 10:47 AM
To: Associate PLYons J
Cc: seanrussell@russellslaw.com.au; SDC Orders; m.gill@dlapiper.com; Amanda Banton; Lisa Gallate; Davina Holland; Sarah Wooster; Jasmin Shaw
Subject: KordaMentha Pty Ltd and Calibre Capital Limited v The Members of the LM Managed Performance Fund - 3691 of 2013

Dear Associate

We refer to the orders made by the Honourable Justice Lyons in this matter yesterday.

As requested by His Honour, we attach a word copy of these orders.

We note that the Second Respondent's solicitors have also reviewed these orders.

Kind regards

Amanda Banton
Partner | Piper Alderman



t +61 2 9253 9929 | m +61 424 158 859 | f +61 2 9253 9900
abanton@piperalderman.com.au | www.piperalderman.com.au

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SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3691 of 2013

Applicants: **KORDA MENTHA PTY LTD (ACN 100 169 391)**

AND

CALIBRE CAPITAL LIMITED (ABN 66 108 318) (in
their capacity as trustees of the LM MANAGED
PERFORMANCE FUND)

Respondents: **THE MEMBERS OF THE LM MANAGED
PERFORMANCE FUND**

ORDER

Before: Justice P Lyons

Date: 29 April 2013

Initiating document: Originating Application filed 23 April 2013

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Name: Amanda Banton
Address: Piper Alderman
Level 23, 1 Farrer Place,
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Phone No: 9253 9999
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7. The parties exchange their written submissions and send them to the Associate to P Lyons J by 9am on Thursday 2 May 2013.

Signed:



Quotation

Worldwide
printing solutions

M A R K E T S T

QUOTE DATE 13 Nov 2013

PRINT DATE 13 Nov 2013

Sprint Tyres Pty Ltd
Trading as Worldwide Printing Solutions Market Street
ABN: 23 976 705 494
10 Market Street
Brisbane QLD 4000
T (07) 3211 9550 F (07) 3211 9546
E marketst@worldwide.com.au

Korda Mentha

Level 14
12 Creek Street
BRISBANE QLD 4000

Korda Mentha

ATT Rachael Di Russo
Level 14
12 Creek Street
BRISBANE QLD 4000

Dear Rachael,

We thank you for your enquiry and have pleasure in providing a quotation for the following.

JOB TITLE Large Run Printing - PRINTING ONLY		Quote Number: 4001-1768949
DESCRIPTION		TOTAL
4500 copies x 500pp A4 Document		\$102,477.28
Print in black & white		
Print single sided		
Print on 80gsm bond		
Tinted paper in between each set		
	Total Ex GST	\$102,477.27
	GST	\$10,247.73
	TOTAL Inc GST	\$ 112725.00

Kind Regards
Jessica Fillmore

PLEASE SIGN TO ACCEPT QUOTE

DATE

T 3338 0225

F

M

E rdirusso@kordamentha.com

Standard Terms & Conditions - QUOTATION IS VALID FOR 30 DAYS

DISCLAIMER:

All jobs sent for Off Set Printing at Worldwide Printing Solutions will take between 7 to 10 working days, from the date of upload.

All print orders must be paid in full prior to the job being uploaded to print, unless you are a business account of this store.

Clients paying by EFT are required to produce their banks confirmation of the transfer details, before the job will be uploaded.

Artwork/uploads are carried out between 9:00am & 4:00pm Monday to Friday.

Artwork received after 3:00pm Friday is not considered to be received until Monday at 8:30am. Orders will not proceed without a signed off proof or e-mailed acceptance of Print disclaimer & that the proof is correct and ready for print.