

**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

**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**

AND

Second Respondent

**DAVID CLOUT IN HIS CAPACITY AS LIQUIDATOR OF  
LM ADMINISTRATION PTY LTD**

**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 at KordaMentha.

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**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. Except where otherwise indicated, I depose to the matters in this affidavit from my own personal knowledge of the facts and circumstances. Where I depose to matters from information and belief, I believe those matters to be true.
3. Throughout this affidavit, I make references to various documents that are contained in a tabbed and paginated bundle of documents exhibited to this affidavit and marked "SMV-5" ("the Exhibit"). The tabs that I refer to are the tabs within the Exhibit.
4. By order of this Court dated 12 April 2013:
  - 4.1 LM Investment Management Limited (In Liquidation) ("LMIM") was removed as trustee of the trust named The LM Managed Performance Fund ("the Trust"); and
  - 4.2 Korda Mentha Pty Ltd and its related entity Calibre Capital Pty Ltd ("the New Trustees") were appointed jointly and severally as trustees of the Trust.
5. Following our appointment, the New Trustees took possession of certain books and records of the Trust, including books and records held and maintained by the First Respondent and/or the Second Respondent in respect of the Trust. Where I state below that documents were "among the books and records of the Trust," I refer to these books and records obtained by the New Trustees after our appointment.

## BACKGROUND

### The Trust

6. A copy of a Constitution for the Trust dated 25 November 2009 ("the Constitution") was among the books and records of the Trust. A true copy of this Constitution is at tab 1 of the Exhibit. The earlier Constitution for the Trust dated 22 June 2007 (which was substantially replaced by the Constitution at tab 1 of the Exhibit) is exhibited at tab 2 of the Exhibit.
7. The Constitution is in the form of a Deed Poll, and sets out amendments made on 25 November 2009 to the Constitution. Based on my review of the books and records of the Trust in the possession of the Trustees, these are the most recent amendments made to the Constitution.

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8. Recital A and clause 1.1 of the Schedule to the Constitution state that LMIM, as Manager, was the trustee of the Trust (**"the Former Trustee"**).
9. The Trust has never been registered as a Managed Investment Scheme under Part 5.9 of the Corporations Act.
10. The Former Trustee is the responsible entity of a number of registered managed investment schemes, including the LM First Mortgage Income Fund (**"FMIF"**) and the LM Australian Income Fund (**"AIF"**). A copy of the historical company extracts from the database maintained by the Australian Securities and Investments Commission for inter alia, the LM First Mortgage Income Fund and the LM Australian Income Fund dated 4 April 2013, are at **tab 3** of the Exhibit.

**Provision of services to the Trust by LM Administration Pty Ltd**

11. A copy of the Trust's financial statements for the financial year ended 30 June 2012 was among the books and records of the Trust. A true copy of these financial statements is at **tab 4** of the Exhibit.
12. These financial statements:
  - 12.1 record that during that financial year the Trust paid \$11,368,182 in management fees to LM Administration Pty Limited (**"LMA"**) (page 3 of the report);
  - 12.2 state: "Administration and funds management services are provided to the Scheme on behalf of the Manager by LM Administration Pty Limited, as associate of the Manager. LM Administration Pty Limited is paid a management fee for these services directly from the Scheme assets..." (page 22 of the report);
  - 12.3 record in the Consolidated Statement of Cash Flows: "Management fees paid/prepaid\*" (\$26,953,511) (page 9 of the report). The asterisk refers to Note 12 for further information.
  - 12.4 record in Note 12 that the aggregate amount "receivable from" LMA was \$20,752,639, being "management and development management fees prepaid by the Scheme" (page 23 of the report);
  - 12.5 record in Note (i) to Note 12: (page 23 of the report) *"The Directors target a gradual paydown of this prepaid balance throughout the next financial year and*

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as at the date of this report the balance has reduced to \$17.7 million. These amounts are included in prepayments of \$20,752,639 at 30 June 2012 (2011: \$5,167,310). No amounts are payable to related parties by the Scheme other than LM Administration Pty Ltd. The average monthly balance of prepayments during the year was \$16,989,994 (2011: \$3,617,404) which was non-interest bearing. This prepaid management fee will be recovered through LM Administration Pty Limited's Agreement to offset future payable management fees through the guarantee from a Director, Peter Charles Drake. This is documented and secured through a letter of undertaking authorising that the full balance is payable if LM Investment Management Ltd or its related entities are sold in part or in full. An external report from an independent firm engaged in November 2012 assessed this full security holding at \$107 million."

13. A copy of a Services Agreement dated 1 July 2010 between LMIM and LMA was among the books and records of the Trust ("the **Services Agreement**"). A true copy of the Services Agreement is at **tab 5** of the Exhibit. Although the first page of the Services Agreement bears the date 1 July 2010, Schedule 1 to the Services Agreement provides that the date of the agreement and the "commencement date" is 1 July 2005.
14. I caused my solicitors Piper Alderman to obtain a historical company extract search of the records maintained by the Australian Securities and Investments Commission ("**ASIC**") in respect of LMA. A true copy of this search dated 30 October 2013 is **tab 6** of the Exhibit.

#### **Appointment of Voluntary Administrators to LMIM**

15. I caused my solicitors Piper Alderman to obtain an historical company extract search of the records maintained by the ASIC in respect of the Former Trustee. A true copy of this search dated 30 September 2013 is at **tab 7** of the Exhibit.
16. As recorded in that search:
  - 16.1 on 19 March 2013 Ginette Dawn Muller and John Richard Park were appointed voluntary administrators of the Former Trustee; and
  - 16.2 on 1 August 2013 Ms. Muller and Mr. Park were appointed liquidators of the Former Trustee.
17. Clause 23.1 of the Constitution required the Manager to resign if (relevantly) it became an externally administered body corporate, as defined in the *Corporations Act*.

### Appointment of the Applicants as Trustees of the Trust

18. By orders of the Chief Justice dated 12 April 2013 ~~the~~ Former Trustee was removed as trustee of the Trust, and the New Trustees were ~~a~~ppointed jointly and severally as trustees of the Trust. A true copy of these Orders is at ~~tab~~ 8 of the Exhibit.
19. Following the New Trustees' appointment, the New Trustees have obtained and reviewed the books and records of the Trust (where they have been able to do so), carried out investigations, gathered information about the assets and liabilities of the Trust, and taken steps to assess the financial position of the Trust.
20. Relevantly, clause 23.3 of the Constitution provides:

#### **23.3 Transfer of Records**

*Upon the resignation, retirement, or removal of the Manager, the Manager must hand to the new Trustee all books, records, documents and other matters pertaining to the Scheme and at the expense of the Scheme do all things necessary to transfer legal title and the assets of the Scheme to the new Trustee.*

### Steps taken to obtain the books and records of the Trust

#### Documents received via File Transfer Protocol

21. On 15 April 2013 I wrote to Mr. Park and Ms. Muller ("**the Administrators**") and requested that they provide the books and records of the Trust to the New Trustees. A true copy of this letter is at **tab 9** of the Exhibit.
22. In response to this letter, the New Trustees received approximately 38,000 documents from the Administrators, which they provided via a file transfer protocol ("**FTP**") data room administered by their firm, FTI Consulting. I have not exhibited a listing of the documents provided, because of its very large size. While the number of documents provided by the Administrators are substantial, Jarrod Villani advised me and I verily believe that the documents provided on the FTP relate mainly to:
  - 22.1 investor correspondence and investment records (approximately 26,350 records);
  - 22.2 Maddison Estate planning and development information (approximately 10,700 records);

22.3 loan documentation in relation to the Trust's mortgages, consisting of approximately 570 records including:

- (a) Originating Loan Agreements
- (b) General Security Deeds
- (c) Deeds of Guarantees
- (d) Deeds of Indemnities
- (e) Authorities to act on mortgagor's behalf
- (f) PPSR Searches
- (g) Deed of Variations
- (h) Mortgage Registrations
- (i) Land Availability Agreements
- (j) Valuations
- (k) Title Searches
- (l) Priority Deeds
- (m) Deed of Assignments
- (n) Certificates of Title.

22.4 the Trust's General Ledger for the period 1 July 2012 to 18 March 2013; and

22.5 bank account statement summaries for three Suncorp accounts for the period 1 July 2011 to 31 March 2013.

156 boxes of hard copy documents received

23. In addition, the Administrators provided the New Trustees with 156 file storage boxes of records of the Trust. The Administrators did not provide any listing of the records.

24. Accordingly, I caused David Johnstone, Miranda Olsen, Isobel Farquharson, Eliza Dixon, and Andrea Boscaino of my staff to create a listing of the books and records received in the 156 file storage boxes. A true copy of the listing is at tab 10 of the Exhibit.
25. The documents supplied by the Administrators in the 156 file storage boxes included:
- 25.1 various non-sequential Bank statements for the Trust;
  - 25.2 various HSBC Foreign Currency Bank statements;
  - 25.3 various Suncorp Bank statements;
  - 25.4 miscellaneous information for the loans of the Trust;
  - 25.5 various reports from construction professionals regarding developments where the Trust has loaned monies;
  - 25.6 end of Month Trust statements;
  - 25.7 applications for finance;
  - 25.8 various invoices relating to various loans; and
  - 25.9 information on foreign exchange accounts.
26. I am informed by Jarrod Villani, James King, David Johnstone, Poppy Potter, Bruce O'Shea, Amanda Smith, Brendan Read, Jacqui Kerr, and David James, who are employed by KordaMentha, and verily believe that they have also received a number of documents via email from the Former Trustee and the Administrators, which are:
- 26.1 financial records of the Trust;
  - 26.2 certain feasibility studies;
  - 26.3 various credit committee meeting minutes;
  - 26.4 real property purchase contracts; and
  - 26.5 various Information Memoranda of the Trust.

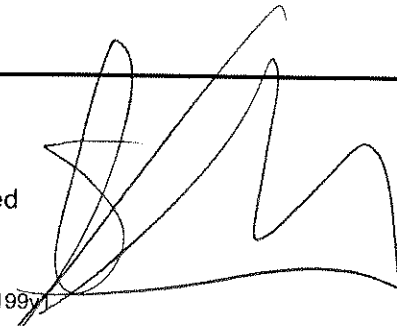
### **Specific requests for information from the Administrators**

27. On or about 8 July 2013 I wrote to the Administrators requiring specific documents pertaining to the Trust to be delivered to the New Trustees. A true copy of my letter dated 8 July 2013 is at **tab 11** of the **Exhibit**.
28. On or about 12 July 2013 the Administrators sent a letter to the New Trustees. A true copy of the letter is at **tab 12** of the **Exhibit**.
29. On or about 17 July 2013 I caused a further letter to be sent to the Administrators, following up on the above request. A true copy of my letter dated 17 July 2013 is at **tab 13** of the **Exhibit**.
30. In addition to the above letters, I am informed by Jarrod Villani and Brendan Read, who are employed by KordaMentha, and verily believe that:
- 30.1 On 18 June 2013 they had a discussion with Christine Alterator of FTI Consulting and Ben Fisher of the Former Trustee, in which they proposed adopting a different document transfer protocol which Brendan Read believed to be more conducive to the size and types of files that the New Trustees needed to have transferred;
- 30.2 On 26 June 2013 Ms. Alterator said words to the effect that they agreed to change the document transfer protocol;
- 30.3 however, despite multiple requests by Brendon Read, the new methodology was not implemented.
31. I am informed by Brendan Read and verily believe that Christine Alterator said to them words to the effect that the Former Trustee resisted the proposed change to the document transfer protocol, on the basis that the records could not be provided due to the intermingling of the books and records held by the Former Trustee.

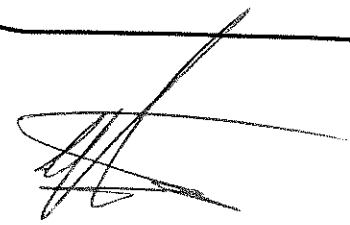
### **Alleged intermingling of books and records of the Trust with other documents**

#### Loans made by the Trust

32. In total, the Trust made 19 loans to borrowers. The real property mortgages held by the Trust as security for the loans it made:

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- 32.1 were secured over 18 different assets; and
- 32.2 15 of those mortgages were second mortgages \_
33. A copy of the asset register that was prepared by the ~~F~~ormer Trustee is at **tab 14** of the Exhibit.
34. With respect to those second mortgages:
- 34.1 the first registered mortgages over 10 of these ~~s~~ecurity properties are held by the LM First Mortgage Income Fund; and
- 34.2 the first registered mortgages over five of these ~~s~~e security properties are held by the LM Australian Income Fund.

Management of the loans made by the LM schemes

35. In the Administrators' report ("**Report**") under s.439A ~~o~~f the Corporations Act dated 25 July 2013, the Administrators stated that:
- 35.1 LMA employed all the staff who operated the various LM funds, including the Trust, the FMIF and the AIF (see section 1.6, page 5 of the Report); and
- 35.2 LMA provided services to all LM funds (including the Trust) pursuant to a series of service agreements (see section 1.6, page 5 and bullet point 5 on page 7 of the Report). This included the management of books and records for those LM funds.
36. A true copy of the Report referred to above is at **tab 15** of the Exhibit.
37. I received emails from Ms. Kelly Anne Trenfield of the Administrators' staff dated 19 April 2013, and from Mr. David Clout, the liquidator of LMA, of 16 August 2013. True copies of these emails are at **tabs 16 and 17** of the Exhibit.

Certain books and records now held by the liquidator of LMA

38. As recorded in the historical company search of LMA that is **tab 6** of the Exhibit, on 26 July 2013 Mr. David Clout was appointed as the Liquidator of LMA. During a meeting on 31 July 2013, Mr. Clout informed me, by words to the effect, that as a result of his

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appointment as the liquidator of LMA, he now had possession of all of the books and records of LMA.

Proposed Confidentiality Agreement with the Administrators

39. In order to overcome the issues relating to intermingling of the books and records of various LM Trusts, I have caused my staff to engage in the correspondence set out below with Ms. Kelly-Anne Trenfield and Ms. Alterator of FTI Consulting, proposing a confidentiality agreement ("**the Confidentiality Agreement**").
40. On 18 June 2013, I caused the proposed Agreement to be sent to Ms. Trenfield. A true copy of the email and the proposed Confidentiality Agreement is at **tab 18** of the **Exhibit**.
41. I am informed by Mr. Jarrod Villani of my staff and believe that:
- 41.1 on 20 June 2013 he received an email from Ms. Trenfield stating that the Administrators would require amendments to the proposed Confidentiality Agreement. A copy of the email is at **tab 19** of the **Exhibit**.
- 41.2 From 21 June 2013 to 28 June 2013, he sent emails to Ms Trenfield requesting a meeting to discuss and execute the Agreement. True copies of those emails are at **tab 20** of the **Exhibit**.
42. On or about 30 September 2013 I received an email from Mr David Clout, the Liquidator of LMA, attaching a letter from Russells, the solicitors for the Liquidators of the Former Trustee, to him dated 27 September 2013. A true copy of this correspondence is at **tab 21** of the **Exhibit**.

**Categories of books and records that the New Trustees have not received**

43. In order to ascertain whether the New Trustees have possession of all the books and records of the Trust, the following procedures have been undertaken by the New Trustees:
- 43.1 Miranda Olsen of my staff searched the list of documents provided via the FTP data room (referred to in paragraph 22 above) by reference to key topic areas for the documents for which she was searching. A copy of the spreadsheet prepared by Ms Olsen which sets out the key topic areas and the search results is at **tab 21A** of the **Exhibit**; and

43.2 I have caused the contents of the file boxes delivered to my office to be listed and the list has then been searched by David Johnstone, Miranda Olsen, Isobel Farquharson, Eliza Dixon, and Andrea Borscaino of my staff by key words for certain required and requested documents.

44. Based on these searches, I am informed by Jarrod Villani of my staff and verily believe that as at the date of swearing this affidavit, the New Trustees have not received the categories of documents listed below. I consider these categories of documents to be pivotal to allow the New Trustees to conduct a proper investigation of the affairs of the Trust:

- 44.1 All documents recording the financial transactions entered into by the Trust;
- 44.2 All documents recording the financial transactions entered into by the Trust in relation to LM Coomera Pty Ltd in respect of the development known as Maddison Estate;
- 44.3 Current and historical development feasibility studies for past and present loans and for each asset of the Trust;
- 44.4 All email communications between staff which relate to the affairs of the Trust;
- 44.5 All bank statements from the Trust's commencement on 1 January 2003 onwards, together with their reconciliations;
- 44.6 All working papers pertaining to all lodgements with the Australian Taxation Office (including Business Activity Statements, Income Tax Returns) from 1 January 2003 onwards;
- 44.7 All working papers pertaining to tax decisions made by the Trust from 1 January 2003 onwards;
- 44.8 The Internal Audit Policy of the Trust (and any amended policy or variation);
- 44.9 The Foreign Currency Policy of the Trust (and any amended policy or variation);
- 44.10 Details of all payments made to/from the Trust from/to other LM Group funds;
- 44.11 Documented decisions pertaining to the engagement of Williams Partners Independent Audit Specialists ("WPIAS") as auditors of the Trust;

- 44.12 All legal agreements entered into between the Trust and other parties;
- 44.13 Minutes of the meetings of the Trust's credit committee relating to the Fund and including the approval of the initial loans and subsequent increases to loan limits; and
- 44.14 Meetings of the minutes of the Trust's conflict committee.
45. On 1 July 2013 Mr Tiplady of Russells, the solicitors for the Administrators, sent an email letter to David O'Brien of Minter Ellison (solicitors for the New Trustees) advising that his clients considered that, they had provided all books and records of the Trust in their possession or control to the Trustees. A copy of the email letter dated 1 July 2013 is at **tab 22** of the Exhibit.
46. On 8 July and again on 17 July 2013, I wrote to the Administrators and requested delivery up of the books and records of the Trust, including the above documents. Copies of these letters are at **tab 23** and **tab 24** of the Exhibit. A copy of the response from the Administrators dated 12 July 2013 is at **tab 12** of the Exhibit.

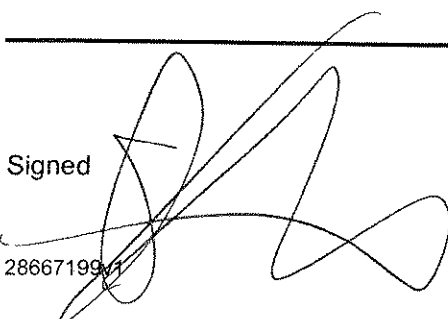
Documents referred to by the Former Trustee's solicitors in correspondence

47. Given the scope of the documents that the New Trustees have not received to date, it is difficult for the Trustees to have fully assessed what other books and records of the Trust may be held by LMA or the Former Trustee.
48. By way of example, on 19 August 2013 I received a letter via email from the Administrator's solicitors, Russells. A true copy of the letter is at **tab 25** of the **Exhibit**.
49. Russells' letter dated 19 August 2013 referred to the following documents:
- 49.1 'MPF Synopsis and loan approval documents';
- 49.2 'Contract of sale for the subject land';
- 49.3 'records' that suggest that 'the vendor's [Stockland] financing arrangements were prompted by apparent cash flow difficulties with MPF at the time'; and
- 49.4 'the land acquisition contract'.

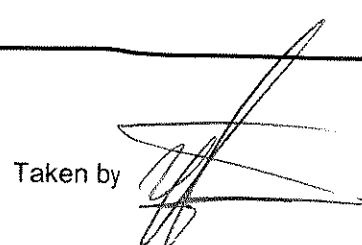
50. Despite the attempts the New Trustees had made to obtain (or at least access) all the books and records of the Trust, the New Trustees did not have the documents referred to in Russells' letter, even though they appeared to be records of the Trust.
51. Accordingly, on 19 August 2013 I caused the New Trustees' solicitors Minter Ellison to write to Russells and request the documents listed above. A true copy of that letter is at **tab 26** of the **Exhibit**. The New Trustees subsequently received these documents from the Former Trustee.
52. Further, I caused the New Trustees' solicitors Piper Alderman to send letters dated 20 June and 25 July 2013 to the Former Trustee in relation to a potential breach of trust claim. True copies of these letters are at **tabs 27 and 28** of the **Exhibit**.
53. On 1 October 2013, the Former Trustee's solicitors, King Wood Mallesons, sent a letter to the New Trustees' solicitors in response, that listed the following documents:
- 53.1 the Former Trustee's internal Conflict Records for both the 2008 and the 2011.
- 53.2 Independent advice received from accountants and solicitors in relation to the transaction.
54. A true copy of this letter is at **tab 29** of the **Exhibit**.
55. Based on my review of the documents provided to the New Trustees, the New Trustees do not have the documents listed above.
56. Since 1 October 2013, the New Trustees have continued to request copies of the books and records of the Trust from the Former Trustee. At **tab 29A** of the Exhibit are copies of emails dated 16 October 2013 to 11 November 2013 between David James of my staff and Ben Fisher and Simon Tickner of the Former Trustees, in which David James requests certain further books and records of the Trust, some of which have subsequently been provided to the New Trustees.

#### **Request for Data Imaging**

57. Following our initial request to obtain the books and records of the Trust, I also authorised Brendan Read of KordaMentha's Forensic division to discuss with the Administrators and the Former Trustee a process to obtain a forensic image of the books and records of the Trust that were held electronically.

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58. I am informed by Mr. Brendan on 5 June 2013, an initial meeting was held between Mr Read, Mr. Villani, Christine Alterator of FTI Consulting and Ben Fisher of the Former Trustee to discuss the process to forensically image this data;
59. During this meeting, Ms. Alterator said that, through Mr Ben Pasco of their Forensic division based in Hong Kong, the Administrators had already undertaken a forensic image of the Former Trustee's and LMA's data systems. Both Mr Read and Mr Villani discussed in the meeting, the requirement to obtain a forensic image of the data held by LMA, and avoiding having to repeat the process if possible to save on costs.
60. Following this meeting, on 6 June 2013, Jarrod Villani sent an email to Christine Alterator and Kelly-Anne Trenfield outlining our request (as made in the meeting and set out above) to obtain a forensic image of the data (referred to in the email as the f-tech imaging process) that was held by LMA. A copy of the email dated 6 June 2013 and subsequent emails up to 17 June 2013 between Jarrod Villani and Christine Alterator are at **tab 30** of the Exhibit.
61. On 21 June 2013, Christine Alterator emailed Jarrod Villani and Brendan Read 5 documents relating to our request for the ASIC production order, the chain of custody documents, the listing of servers imaged, and the draft business continuity plan as prepared by LMIM. A copy of the email (including the listing of servers imaged but excluding the other documents attached to the email) is at **tab 31** of the Exhibit.
62. After reviewing the email at tab 31 and the attached documents, it was unclear to Mr Read and Mr Villani as to what servers had actually been imaged and what process had been undertaken by Mr Pasco to obtain the data that was supplied to ASIC. On 24 June 2013 KordaMentha subsequently requested further information from the Administrators as to the process undertaken and an explanation of the documents provided. A copy of the email dated 24 June 2013 and Ms Alterator's response of 26 June 2013 are at **tab 32** of the Exhibit. Mr Read and Mr Villani subsequently had two teleconference calls with Ms Alterator and Mr Pasco to discuss the process undertaken.
63. Despite our requests, the New Trustees still require access to the relevant servers to capture an image of the electronic books and records of the Trust.

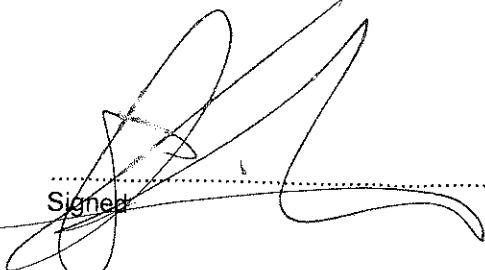
Sworn by SIMON MICHAEL VERTULLO  
on 18 November 2013  
at Brisbane, Queensland, in the presence of:

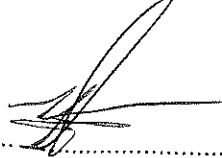
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{Person taking the affidavit to sign -  
Commission for  
~~Declarations/Solicitors/JPs~~

Denis Beattie