

SUPREME COURT OF QUEENSLAND

CITATION: *KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund (No 2)* [2022] QSC 13

PARTIES: **KORDAMENTHA PTY LTD (ACN 100 169 391) AS TRUSTEE FOR THE LM MANAGED PERFORMANCE FUND**
(applicant)
v
THE MEMBERS OF THE LM MANAGED PERFORMANCE FUND
(respondent)

FILE NO/S: BS No 11917 of 2015

DIVISION: Trial Division

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 18 February 2022

DELIVERED AT: Brisbane

HEARING DATE: 4 February 2022

JUDGE: Williams J

ORDER: **PURSUANT TO SECTION 96(1) OF THE TRUSTS ACT 1973 (QLD), THE COURT DIRECTS THAT:**

1. The applicant is justified:

- (a) in, when making the final distribution of the net proceeds of the assets to the unitholders of the LM Managed Performance Fund, identifying the unitholders to whom the Trustee will not be able to pay a final distribution payment, due to the Trustee holding insufficient bank account details for such unitholders;**
- (b) after processing the final distribution payment, identifying any unitholders whose distribution payments were unsuccessful, or whose payments have been returned by the recipient bank; and**
- (c) paying the distribution payments payable to the unitholders referred to in subparagraphs (a) and (b) to the Public Trustee of Queensland as unclaimed monies, pursuant to s 102 of the *Public Trustee Act 1978* (Qld).**

FURTHER, THE COURT ORDERS THAT:

- 2. The applicant's costs of and incidental to the application filed 10 December 2021 be paid out of the assets of the LM Managed Performance Fund, on the indemnity basis.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – GENERALLY – where the applicant trustee applies for directions under s 96 of the *Trusts Act 1973* (Qld) regarding finalising the winding up the LM Managed Performance Fund (the Fund) and making a final distribution to members – where directions had previously been given by the Court to the applicant trustee to finalise the winding up of the Fund – where paying the final distribution to unitholders had not yet occurred due to incorrect or insufficient details on the unitholder register – where unitholders with incorrect or insufficient details had been identified by the trustee applicant – where the applicant trustee applies for directions as to the appropriate way to deal with distributions unable to be sent to unitholders because of incorrect or insufficient details – whether the applicant trustee is justified in taking certain steps in relation to the winding up of the Fund – whether payment to Public Trustee of Queensland, payment to the Australian Securities and Investment Commission, payment into Court under s 102 of the *Trusts Act 1973* (Qld), or other order appropriate for dealing with unpaid amounts for the final distribution of the Fund – whether the applicant trustee is justified in paying the unpaid amounts to the Public Trustee of Queensland

EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – GENERALLY – where the applicant trustee applies for an order that service of the application under s 96(2) *Trusts Act 1973* (Qld) is deemed effected on each of the members of the Fund – where the applicant sought an order for substituted service on the respondent – where an order was made that substituted service could be effected by a copy of the application and any orders made in respect of the application which are not required to be served personally being posted on a specified website of the applicant and notification being given to members – whether the requirement of service under s 96(2) of the *Trusts Act 1973* (Qld) has been met

Corporations Act 2001 (Cth), s 601NF, s 601NG, s 601EE
Court Funds Regulation 2009 (Qld), s 8
Public Trustee Act 1978 (Qld), s 102

Trusts Act 1973 (Qld), s 96

In re Benjamin [1902] 1 Ch 732, considered
KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund (No 2) [2021] QSC 55, cited
Re NSW Trustee & Guardian; In the Estate of Rex [2015] NSWSC 841, cited
Wah Ying Cheong Company Ltd v Ping & Ors [2015] HKCFI 2045, cited

COUNSEL: P Ahern, for the applicant
 No appearance for the respondent

SOLICITORS: Banton Group for the applicant
 No appearance for the respondent

- [1] The applicant by an application filed 10 December 2021 applies to the Court for directions pursuant to s 96 of the *Trusts Act 1973 (Qld)* (the *Trusts Act*) as to whether it is justified in taking certain steps in relation to the winding up of the LM Managed Performance Fund (the Fund), particularly where payment of the final distribution payment to unitholders has been unsuccessful (s 96 application).
- [2] By an order of the Supreme Court of Queensland on 12 April 2013 KordaMentha Pty Ltd (the Trustee) was appointed the Trustee of the Fund. Further, by an order dated 10 February 2014, the Supreme Court of Queensland ordered that the Trustee wind up the Fund pursuant to its Constitution.
- [3] The directions sought by the Trustee are to enable it to finalise the winding up of the Fund, including the finalisation of the final distribution to the members.¹
- [4] The Trustee seeks a further direction pursuant to s 96 of the *Trusts Act* as a result of circumstances that have arisen after the making of the earlier directions.

Background – appointment of the applicant as Trustee of the Trust and winding up of the Trust

- [5] On 19 March 2021 I made directions and published reasons in respect of an application for directions under s 96 of the *Trusts Act* concerning whether the applicant was justified in taking particular steps in the winding up of the Fund: *KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund (No 2)*² (2021 s 96 Reasons).
- [6] The directions included that the Trustee was justified in adopting a particular register as the unitholder register of the Fund for the purposes of making a distribution to members and finalising the winding up of the Fund.
- [7] I refer to and incorporate the general background in respect of the Fund and the Trustee set out at [4] to [9] of the 2021 s 96 Reasons.

¹ These reasons adopt the terminology of the applicant's submissions, with the beneficiaries being referred to as members.

² [2021] QSC 55.

Jurisdiction pursuant to s 96 of the Trusts Act

- [8] The current application is brought pursuant to s 96 of the Trusts Act which states as follows:

“96 Right of trustee to apply to court for directions

- (1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
- (2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.”

Service

- [9] There are approximately 4,500 members of the Fund located in 77 countries. The majority of the members are located overseas, with only 54 members located in Australia. To effect service of the s 96 application, the applicant sought an order of this Court for substituted service on the respondent.
- [10] On 14 December 2021 Boddice J ordered that substituted service could be effected by a copy of the application filed 10 December 2021, any Court documents in respect of the application and the order made in respect of the application, being posted on a specified website of the applicant and notification being given to members.
- [11] The notification was to be given either by an email sent to each of the members at their last known email addresses or, if the applicant received a response that the email had not been received and the applicant has a postal address for that member, sending a notice by prepaid post to that member notifying them of the general nature of the Court documents and the documents having been posted on the website.
- [12] The effect of the order for substituted service is that the applicant was not required to take further steps to serve members whose email addresses returned an undeliverable receipt and for whom the applicant does not have a postal address.
- [13] Pursuant to the order, service is deemed to have been effected on each of the members, being the respondent, five days after these steps were undertaken.
- [14] The applicant relies on an affidavit of Stacey Clisby, affirmed 3 February 2022, which outlines the steps taken in relation to service of the current s 96 application in accordance with the orders for substituted service, including the following:
- (a) On 14 January 2022 PDF copies of each of the following documents were uploaded to the Trustee’s website:
 - (i) The application dated 10 December 2021;
 - (ii) The affidavit of Ms Clisby affirmed 10 December 2021, together with Exhibit SC-17; and

- (iii) The orders made by Boddice J on 14 December 2021.
 - (b) On or by 18 January 2022 emails were sent to the members of the Trust for whom the Trustee holds a valid email address notifying members that:
 - (i) The Trustee had made the application in the Supreme Court of Queensland; and
 - (ii) The relevant court documents relating to the application had been uploaded onto the Trustee's website.
 - (c) On 25 January 2022 a notice was sent by pre-paid post to the postal addresses corresponding with the 36 member email addresses identified in the "Email Bounceback Reports" obtained on 21 January 2022 and 24 January 2022.
- [15] Further, the Trustee identified 189 unitholder accounts for whom the Trustee holds no associated email address. On 14 January 2022 notices were sent by pre-paid post to 113 mail addresses associated with 187 unitholder accounts.
- [16] In accordance with the orders of Boddice J, the applicant is not required to take further steps to serve members whose email addresses return undeliverable messages and from whom the applicant has not been able to identify a postal address. This relates to one unitholder who holds two unitholder accounts for which there is no associated email address or physical mail address.
- [17] In any event, the relevant documents have been available on the website and the website has consistently been the primary method used by the applicant to communicate information to members.
- [18] Accordingly, pursuant to the orders dated 27 November 2015 and 17 December 2015, service is deemed to have been effected on all of the members of the Trust five days after the mailout was completed on 25 January 2022, being 30 January 2022.
- [19] In these circumstances, I am satisfied that the requirement of service under s 96(2) of the Trusts Act has been met.
- [20] For the purposes of the application generally, as at 3 February 2022, the Trustee has not received any responses from members referring to the Trustee's application. Some responses have been received from members of a general or administrative nature.³
- [21] The Trustee had received one response from a member that refers to issues relevant to this application, which is considered further below.⁴
- [22] The Trustee was not notified that any members intended to appear at the hearing. At the commencement of the hearing on 4 February 2022 the Bailiff called the name of the respondent outside of Court. There was no response and no appearances by members at the hearing of the application.

³ Affidavit of Ms Clisby affirmed 3 February 2022 at [26].

⁴ Second Affidavit of Ms Clisby affirmed 3 February 2022 at [15].

Is the application properly brought under s 96 of the Trusts Act?

[23] The 2021 s 96 Reasons set out the relevant considerations in relation to the requirements of an application under s 96 of the Trusts Act. I do not repeat that discussion here and incorporate [43] to [50] of the 2021 s 96 Reasons as part of these reasons.

[24] In summary:

- (a) Section 96 of the Trusts Act is engaged as the applicant is a trustee of the Fund appointed by the orders of de Jersey CJ dated 12 April 2013.
- (b) The Fund was established pursuant to the MPF Constitution and was constituted as a trust.
- (c) The Fund is a lawfully unregistered managed investment scheme.
- (d) As a consequence, s 601NF(2) of the *Corporations Act* 2001 (Cth) (the Corporations Act) does not apply and the applicant relies upon s 96 of the Trusts Act as the basis for the Court to give directions about the winding up of the Fund.

What principles are to be applied in an application for judicial advice?

[25] The relevant principles to be applied are set out at [51] to [68] of the 2021 s 96 Reasons. I incorporate those paragraphs as part of these reasons.

[26] In summary:

- (a) The Court is engaged in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties.
- (b) An important purpose of directions is the protection of the interest of the trust.
- (c) There is no implied limitation on the power to give advice or the discretionary factors.
- (d) The procedure is summary in nature.
- (e) The function of the advice is to give personal protection to the trustee and operates as an exception to the ordinary function of deciding disputes between litigants.
- (f) Judicial advice resolves doubt as to the propriety of the trustee's action when the trustee acts in accordance with the advice given by the Court.
- (g) A written statement of facts is required. Affidavits may be received verifying the statement of facts.
- (h) The Court is entitled to act on the facts stated by the trustee, even if they are contested or controversial.
- (i) The authorities in respect of registered and unlawfully unregistered managed investment schemes under the Corporations Act may provide some assistance given the similar issues which may arise in respect of a lawfully unregistered managed investment scheme.

- (j) The approach is to consider whether:
 - (i) there is a reasonable basis for the proposal sufficient to persuade the Court that it is proper to exonerate the trustee from liability for implementing the proposal; or
 - (ii) there is any good reason why the trustee should not proceed as proposed.
 - (k) The Court does not rubber stamp what is proposed but does not interfere unless there is lack of good faith, an error of law or principle or real and substantial grounds for doubting the prudence of the proposal.
- [27] A statement of facts in support of the current application is found at exhibit SC-17 to the affidavit of Ms Clisby affirmed 10 December 2021. The statement of facts sets out 29 paragraphs containing the relevant facts as required by the Trusts Act.
- [28] The applicant also relies on an affidavit of Stacey Clisby affirmed 10 December 2021 and a further affidavit of Ms Clisby affirmed 3 February 2022. Ms Clisby is a chartered accountant and a director and authorised officer of KordaMentha Pty Ltd, the applicant/trustee, and she is duly authorised by Mr Korda and Mr Mentha, the directors of the trustee, to affirm the affidavit on behalf of the trustee.
- [29] Further, since 2021, Ms Clisby has been the person principally responsible for conducting the affairs of the Fund on behalf of the Trustee and she has been involved in managing the affairs of the Fund since October 2015.
- [30] Relevant background information is also set out in the affidavit of Jarrod Villani sworn 8 December 2020. Exhibited to the Villani affidavit is a detailed statement of facts upon which the 2020 s 96 application proceeded and is referenced in the 2021 s 96 Reasons.
- [31] The affidavits of Ms Clisby, and the earlier affidavit of Mr Villani, provide further details of the relevant facts. Ms Clisby's affidavit also goes further to explain the reasoning behind the current s 96 application.

Direction sought

- [32] The direction sought by the applicant is as follows:
- “1. An order pursuant to section 96 of the *Trusts Act* 1973 (Qld), or alternatively in the inherent jurisdiction of the Court, that the Applicant is justified in:
 - (a) when making the final distribution of the net proceeds of the assets to the unitholders of the LM Managed Performance Fund, identifying the unit holders to whom the Trustee will not be able to pay a final distribution payment, due to the Trustee holding insufficient bank account details for such unitholders;
 - (b) after processing the final distribution payment, identifying any unitholders whose distribution payments were unsuccessful, or whose payments have been returned by the recipient bank; and

- (c) paying the distribution payments payable to the unitholders referred to in subparagraphs (a) and (b):
 - (i) to the Public Trustee of Queensland as unclaimed moneys, pursuant to section 102 of the *Public Trustee Act* 1978 (Qld); or
 - (ii) in the alternative, to the Registrar of the Supreme Court of Queensland, pursuant to section 102 of the *Trusts Act* 1973 (Qld) and section 4 of the *Court Funds Regulation* 2009 (Qld)."

[33] The statement of facts addresses the facts relevant to the current application in [22] to [29]. The affidavits of Ms Clisby set out these issues in more detail and also update the information in some respects.

[34] In summary:

- (a) In June 2021 the Trustee started the process of updating the unitholder register for the Fund (being the register directed in the 2021 s 96 Reasons).⁵
- (b) The process involved contacting members by email and then members updating relevant contact and banking details via a secure website or direct contact with members where insufficient details were identified and also engaging in correspondence with institutions and unitholders.⁶
- (c) Contact has been made with 3,689 of the 4,525 unique unitholders in the Fund (82%)⁷ to update the relevant details.
- (d) The Trustee has been unable to contact 18% of members to confirm or update their details (Uncontacted Members).⁸
- (e) The checking process has identified that the Trustee holds insufficient bank account details for 288 unitholders.⁹
- (f) Further, in respect of the required international bank account details deficiencies have been identified in respect of 114 bank account details. Some of these issues may be able to be resolved by further enquiries with members prior to the final distribution being made.¹⁰
- (g) Whilst there are bank account details for many of the Uncontacted Members, these details may not be current or the accounts could be closed as some of the information is nearly a decade old.¹¹

[35] In these circumstances, the Trustee's final distribution payments may fail:

- (a) where the Trustee lacks sufficient bank account details; or

⁵ Affidavit of Ms Clisby affirmed 10 December 2021 at [30]-[31].

⁶ Affidavit of Ms Clisby affirmed 10 December 2021 at [31]; [39].

⁷ See Second Affidavit of Ms Clisby sworn 3 February 2022 at [10], which updates the information in the Statement of Facts and her first affidavit.

⁸ Ibid.

⁹ Second Affidavit of Ms Clisby affirmed 3 February 2022 at [13].

¹⁰ Affidavit of Ms Clisby affirmed 10 December 2021 at [53].

¹¹ Affidavit of Mr Jarrod Villani filed 8 December 2020 at [45].

- (b) where the bank account details are incorrect or not current (such as a closed account).
- [36] Where the final distribution payments are unsuccessful or are returned by the recipient banks, the resulting amounts are described as the Unpaid Amounts in these reasons.
- [37] The issue arises as to what is the appropriate way for the Unpaid Amounts to be dealt with by the Trustee. In particular, this issue arises in the context of the Fund being a lawfully unregistered managed investment scheme.¹²
- [38] In contrast:
- (a) If the Fund was a registered managed investment scheme, s 601NG of the Corporations Act provides for unclaimed or undistributed money to be paid to the Australian Securities and Investment Commission (ASIC) to be dealt with under Part 9.7 as unclaimed property.
 - (b) If the Fund were an unlawfully unregistered managed investment scheme, under s 601EE(2) of the Corporations Act a similar process may be open to be authorised.
- [39] The applicant has been unable to identify any provision of the Corporations Act that would authorise the Unpaid Amounts being paid to ASIC and dealt with as unclaimed property.
- [40] As a result, the Trustee seeks a direction under s 96 of the Trusts Act as to the appropriate way to proceed in these circumstances. The Trustee has identified several possible options but ultimately seeks a direction that it is justified in paying the Unpaid Amounts to the Public Trustee of Queensland.
- [41] It is appropriate to consider each of the identified options and the reasons why the Trustee submits the payment to the Public Trustee is the preferred option.

Payment to the Public Trustee

- [42] The first option identified is payment to the Public Trustee under Part 8 of the *Public Trustee Act 1978 (Qld)* (the Public Trustee Act).
- [43] “Unclaimed moneys” are defined in s 98 of the Public Trustee Act as follows:
- “all principal and interest moneys and all dividends, bonuses, profits, and sums of money whatsoever which at any time have become payable ... by an accountable person, in the course of the person’s trade, business or profession, to the owner and the whole or part of which have been in the possession of the accountable person for 2 years or more ...”

¹² See discussion of this issue at [43]-[50] of the 2021 s 96 Reasons.

[44] Further s 98 defines “accountable person” as follows:

“a person ... or body ... having as an object the carrying on of any trade, business or profession in the ordinary course of which money is held for payment to others...”¹³

[45] It is submitted that the Trustee falls within this definition as:

- (a) it carries on the business or profession of acting as trustee; and
- (b) in the ordinary course of acting as trustee it holds money for payment to members of the Fund.

[46] Consequently, it is submitted that the Unpaid Amounts fall within the definition of “unclaimed moneys” as they are sums of money payable by an accountable person, in the course of the accountable person’s business or profession, to the owner, the whole or part of which have been in the possession of the accountable person for 2 years or more.

[47] Section 102(1) of the Public Trustee Act states:

“All unclaimed moneys ... which have not been paid by an accountable person to the owner thereof within 1 year after they have been or should have been entered in the register kept by the accountable person under section 100 shall be paid by such person to the public trustee.”¹⁴

[48] Section 115 provides that moneys paid pursuant to s 102 shall be placed by the Public Trustee to the credit of the unclaimed moneys fund.

[49] Importantly to the current considerations, s 117(1) of the Public Trustee Act permits the Public Trustee to pay claimants amounts to which they are entitled as follows:

“If a person claims to be entitled to receive any money in the unclaimed moneys fund, the public trustee, upon being satisfied that the person has a just claim to receive such money, may pay the same to the person out of the unclaimed moneys fund.”

[50] The Trustee also points to the object of Part 8 of the Public Trustee Act which is set out in s 97A including as follows:

“(1) The object of this part is to provide a scheme for paying or giving unclaimed property held by a particular person to the public trustee and for returning unclaimed property to persons lawfully entitled to it.”

[51] The Trustee submits that the proposal is aligned with both components of the statutory objectives of the Public Trustee: receiving unclaimed moneys and returning unclaimed moneys to the persons lawfully entitled to it.

¹³ The Trustee is not within (c) of the definition as it does not fall within the definition of “a trustee company defined in the *Trustee Companies Act* 1968.”

¹⁴ Section 100 provides that an accountable person must keep and maintain a register in the approved form with the details of all unclaimed moneys.

- [52] The Trustee has been unable to identify any authorities considering these provisions of the Public Trustee Act.
- [53] However, the Trustee submits that the Unclaimed Amounts fall within the definition of unclaimed moneys in the Public Trustee Act and are therefore able to be paid to the Public Trustee if the Unclaimed Amounts cannot be paid to the true owners. Further, this is consistent with the statutory objects of the Public Trustee as discussed above.
- [54] Further, enquiries have been made with the Public Trustee and a Team Leader of the Public Trustee's Unclaimed Money Unit has indicated to the Trustee that based on the Trustee's description of the circumstances the Public Trustee can accept the Unpaid Amounts.¹⁵
- [55] Pursuant to the Public Trustee (Fees and Charges Notice) (No 1) 2021, being subordinate legislation under the Public Trustee Act, the Public Trustee is entitled to charge fees and charges in respect of unclaimed moneys. This includes:
- (a) \$267.85 being the fee payable for receipt of unclaimed moneys pursuant to Part 8 Division 1 of the Public Trustee Act.¹⁶
 - (b) A fee for managing the unclaimed moneys fund at the rate of 6.6% per annum on the first \$50,000 of income received and then at the rate of 5.5% per annum on the excess income over \$50,000.¹⁷
- [56] The fees and charges are a relevant consideration to the evaluation of the reasonableness of this proposed course.

Payment into Court under Trusts Act

- [57] An alternative option is the payment of the Unclaimed amounts into Court pursuant to s 102 of the Trusts Act. Section 102 states:
- “(1) A trustee or trustees, or the majority of trustees, having in his, her or their hands under his, her or their control money or securities belonging to a trust, may pay the same into court; and the same shall, subject to rules of court, be dealt with according to the orders of the court.
 - (2) The receipt or certificate of the proper officer shall be a sufficient discharge to the trustee or trustees for the moneys or securities so paid into court.
 - ...
 - (5) Every transfer payment and delivery made in pursuance of any order under this section shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.”

¹⁵ See email exhibited at pages 91-92 to the affidavit of Ms Clisby affirmed 10 December 2021.

¹⁶ Section 48 of the Notice.

¹⁷ Section 50 of the Notice.

- [58] While s 102(1) is a broad power it has been infrequently used. Ford & Lee describe the section as “a course of last resort where the trustee desires to be discharged of the burdens of trusteeship but cannot arrange to retire and appoint new trustees...”¹⁸
- [59] An analogous provision was used where beneficiaries entitled to funds could not be located in *Wah Ying Cheong Company Limited v Ping & Ors.*¹⁹ In that case the provision was used as the basis for an order that a trustee pay the funds into Court.
- [60] Under this option, an order of the Court would need to be obtained to have the Unpaid Amounts paid out to one or more of the Uncontacted Members. Section 8 of the *Court Funds Regulation* 2009 provides:
- “Unless the [UCPR] provide otherwise, money or securities in court may only be paid, delivered or transferred out of court, or be invested or sold, under an order of the court”.
- [61] Part 6 of the Regulation sets out the process to be followed to obtain payment of money out of court.
- [62] The Trustee submits that as the individual distribution payments are only a small proportion of members’ original investments, it may not be economically viable for Uncontacted Members to apply to the Court and obtain such orders.

Payment to ASIC

- [63] Clause 15.7 of the Constitution of the Fund provides as follows:
- “15.7 If on completion of the winding up of a registered Scheme, the Manager or such other person who may be winding up the Scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the Scheme Property the Manager or person winding up the Scheme must, as soon as practicable, pay the money or transfer the property to the ASIC to be dealt with pursuant to Part 9.7 of the Law.”²⁰
- [64] This clause is unhelpful as it cannot operate as intended. The clause could operate as intended if the Fund was a registered scheme and s 601NG of the Corporations Act applied. As the Fund is a lawfully unregistered scheme s 601NG of the Corporations Act cannot apply, contrary to what is envisaged by clause 15.7 of the Constitution.
- [65] The Trustee has been unable to identify any other provision of the Corporations Act which would authorise the Unpaid Amounts to be paid to ASIC and dealt with under Part 9.7 or which would enable the Court to direct that the Unpaid Amounts be paid to ASIC and dealt with under Part 9.7 of the Corporations Act.²¹

¹⁸ Ford & Lee, *The Law of Trusts*, (3rd edition), at [17.800].

¹⁹ [2015] HKCFI 2045.

²⁰ Affidavit of Mr Villani filed 8 December 2020 at page 29.

²¹ The Trustee has identified s 544(2)(c) permits the Court to direct a liquidator of a company to pay unclaimed or undistributed funds to ASIC to be dealt with as unclaimed property. There is no equivalent provision that could be utilised here.

- [66] Further, the Trustee has been unable to identify any provision in the Corporations Act that would permit ASIC to deal with the Unpaid Amounts under Part 9.7.
- [67] This position is consistent with a response received from ASIC which identified the relevant provisions of the Corporations Act under which ASIC considered it could receive unclaimed moneys.²²
- [68] Clause 15.7 of the Constitution provided for a process of paying the unclaimed money to a statutory body who had the statutory role of managing the unclaimed moneys until they could be paid to the persons entitled to the money. It is submitted that this is not inconsistent with the Trustee's proposal for payment of the Unclaimed Amounts to the Public Trustee.
- [69] That is, the proposal is consistent with the intent of clause 15.7 but utilises the Public Trustee rather than ASIC to perform the appropriate functions.

Re Benjamin order

- [70] The final option identified is what is described as a *Re Benjamin* order.²³ Such an order would authorise the Trustee to distribute the Unpaid Amounts amongst the other members of the Fund.
- [71] It is submitted that such orders are usually made:
- (a) where an executor cannot locate all potential beneficiaries of a deceased estate; and
 - (b) without prejudice to the unidentified beneficiaries' right to recover their entitlement from the identified beneficiaries to whom the unclaimed funds have been distributed.
- [72] This second element was further described in *Re NSW Trustee & Guardian; In the Estate of Rex*²⁴ as follows:
- “.... The making of a Benjamin order does not destroy the rights of other beneficiaries who may be undiscovered at the time of the making of the order. However, the order does permit for the orderly administration of the estate in accordance with ... the ‘practical probabilities’.”
- [73] The Trustee submits that this option is not practical in the circumstances of the current application because:
- (a) The distribution to be made to individual members is low and there are a large number of members. As a result, only a small additional amount would be paid to each individual member if the Unpaid Amounts were to be distributed amongst the other members of the Fund.
 - (b) Given these circumstances, it would be practically impossible for Uncontacted Members to recover the Unpaid Amounts from the other members of the Fund, particularly given they are located around the world.

²² Affidavit of Ms Clisby affirmed 10 December 2021, page 85 of the exhibit.

²³ *In re Benjamin* [1902] 1 Ch 723.

²⁴ [2015] NSWSC 841 at [9].

- [74] Such an order in the current circumstances would effectively deprive the Uncontacted Members of any final distribution from the assets of the Fund. The Trustee's position is that such an outcome should be avoided if at all possible.
- [75] One member raised in correspondence a number of issues including that the Unclaimed Amounts should be "disbursed to all remaining unit holders after a given amount of time".²⁵ An order along these lines is not consistent with the second component of a *Re Benjamin* order which would enable an Uncontacted Member to claim their component of the Unpaid Amounts.
- [76] There is no legal basis for an order as suggested by the member being a distribution to all members without any reservation.

Consideration

- [77] Having considered each of the options outlined and in the factual circumstances relevant to the Fund, the Trustee seeks a direction that it is justified:
- (a) When making the final distribution of the net proceeds of the assets to the unitholders of the Fund, in identifying the unitholders to whom the Trustee will not be able to pay a final distribution payment, due to the Trustee holding insufficient bank account details for such unitholders;
 - (b) After processing the final distribution payment, in identifying any unitholders whose distribution payments were unsuccessful, or whose payments have been returned by the recipient bank; and
 - (c) Paying the distribution payments payable to the unitholder referred to in (a) and (b) to the Public Trustee of Queensland as unclaimed monies, pursuant to s 102 of the Public Trustee Act.
- [78] Whilst the Trustee does seek in the alternative a direction that it is justified in paying such amounts to the Registrar of the Supreme Court of Queensland pursuant to s 102 of the Trusts Act and s 4 of the *Court Funds Regulation* 2009, the Trustee considers that the superior or preferable option is the payment to the Public Trustee.
- [79] If the Unpaid Amounts were paid into Court, any claimant would need to obtain a Court order to have moneys paid out. There would also be a further administrative burden on the Court Registrars in administering the Unclaimed Amounts.
- [80] Payment of the Unpaid Amounts to the Public Trustee is consistent with the statutory object and functions of the Public Trustee in respect of both holding the Unpaid Amounts and payment to any Uncontacted Members who later seek to recover the unclaimed moneys.
- [81] The Public Trustee has an existing mechanism under the legislation for an Uncontacted Member to contact the Public Trustee and prove their entitlement to obtain payment. The Public Trustee Act authorises the Public Trustee to pay out moneys in the unclaimed moneys fund upon being satisfied that the claimant has a just claim to receive such money.

²⁵ Second Affidavit of Ms Clisby affirmed 3 February 2022, page 3 of the exhibit.

- [82] Proceeding on this basis also enables the Trustee to wind up the Fund and retire as Trustee, thereby stopping further costs and expenses being incurred in continuing to manage the Fund.
- [83] The Trustee submits that the analysis of the various options supports the conclusion that there is a reasonable basis for the direction sought. Further, the Trustee is not aware of any reason why it should not proceed as proposed.
- [84] The benefits of the Unclaimed Amounts being paid to the Public Trustee are:
- (a) The Unpaid Amounts are held securely by the Public Trustee.
 - (b) The Public Trustee has a relevant statutory function and the Public Trustee Act contains a mechanism for an Uncontacted Member to be recover their relevant part of the Unclaimed Moneys where they can establish an entitlement to the satisfaction of the Public Trustee.
 - (c) The Unclaimed Amount can be recovered and paid without the need for a Court order.
 - (d) The other members of the Fund have the benefit of the Fund being wound up and the Trustee not incurring further expenses (which otherwise would reduce the Fund assets).
 - (e) While there are fees and charges involved in the Public Trustee managing the Unclaimed Moneys, this is to be balanced against the Trustee incurring further costs and delays to the finalisation of the winding up of the Fund and the other identified benefits.
- [85] I am satisfied on the facts set out in the statement of facts, and supplemented by the affidavits of Ms Clisby, that the Trustee has established a reasonable basis for a direction that it is justified in paying the Unpaid Amounts to the Public Trustee of Queensland pursuant to s 102 of the Public Trustee Act.

Costs

- [86] The applicant seeks costs to be paid out of the Fund, on an indemnity basis. In the circumstances, I am satisfied that the proposed order in respect of costs is appropriate.

Orders

- [87] Accordingly:

PURSUANT TO SECTION 96(1) OF THE TRUSTS ACT 1973 (QLD), THE COURT DIRECTS THAT:

1. The applicant is justified:
 - (a) in, when making the final distribution of the net proceeds of the assets to the unitholders of the LM Managed Performance Fund, identifying the unitholders to whom the Trustee will not be able to pay a final distribution payment, due to the Trustee holding insufficient bank account details for such unitholders;

- (b) after processing the final distribution payment, identifying any unitholders whose distribution payments were unsuccessful, or whose payments have been returned by the recipient bank; and
- (c) paying the distribution payments payable to the unitholders referred to in subparagraphs (a) and (b) to the Public Trustee of Queensland as unclaimed monies, pursuant to s 102 of the *Public Trustee Act 1978* (Qld).

FURTHER, THE COURT ORDERS THAT:

- 2. The applicant's costs of and incidental to the application filed 10 December 2021 be paid out of the assets of the LM Managed Performance Fund, on the indemnity basis.