

Appendix 8 – Historical financial performance

Detailed below is a summary of the comparative balance sheets and profit and loss statements of the Company, extracted from the Company's books and records, for the previous four financial years (2009, 2010, 2011 and 2012).

Profit and loss statement for the years ending 30 June	2009 \$0	2010 \$0	2011 \$0	2012 \$0
Revenue from ordinary activities	7,001,348	8,922,608	15,992,679	13,597,207
Other revenue	57,624	51,658	58,530	58,195
Gross income	7,058,972	8,974,266	16,051,209	13,655,402
Expenditure				
Administration charges	(3,165,118)	(4,951,818)	(6,903,455)	(3,978,004)
Changes in fair value of Investment in joint venture	(650,000)	0	(296,703)	0
Depreciation expense	0	0	0	0
Directors Remuneration	0	0	0	0
Employment benefit expenses	0	0	0	0
Finance costs	(90,084)	(57,983)	(23,504)	(30,414)
Other expenses for ordinary activities	(3,519,737)	(3,031,402)	(8,820,571)	(9,710,391)
Share of net profit of equity accounted investment	228,830	(776,489)	267,805	169,180
Total expenditure	(7,196,109)	(8,817,692)	(15,776,428)	(13,549,629)
Profit/(loss) before income tax	(137,137)	156,574	274,781	105,773
Income tax credits/(expense)	45,933	(39,174)	(92,095)	(52,697)
Profit/(loss) for the period	(91,204)	117,400	182,686	53,076

REPORT BY ADMINISTRATORS LM Investment Management Limited (Administrators Appointed)

Balance sheet as at 30 June	2009 \$0	2010 \$0	2011 \$0	2012 \$0
Assets				
Current assets				
Cash and cash equivalents	1,109,041	1,281,597	1,061,590	1,059,430
Trade and other receivables	762,360	1,197,883	1,143,054	726,879
Other assets	14,221	27,791	27,181	26,736
Total Current Assets	1,885,622	2,507,271	2,231,825	1,813,045
Non-Current Assets				
Investments in associates	-	-	4,467,785	4,631,927
Investments accounted for using the equity method	5,406,835	4,336,952	-	-
Investments in subsidiaries	544,717	544,717	544,717	544,717
Investment properties	1,066,203	1,066,203	769,500	769,500
Deferred Tax Asset	-	-	89,111	89,111
Property, plant and equipment	-	-	-	-
Total Non-Current Assets	7,017,755	5,947,872	6,871,113	6,035,255
Total Assets	8,903,377	8,455,143	8,102,938	7,848,300
Liabilities				
Current Liabilities				
Trade and other payables	231,670	108,364	82,457	226,959
Income Tax Payable	131,501	340,191	154,913	45,398
Interest-bearing loans and borrowings	1,032,011	-	-	-
Total Current Liabilities	1,395,182	448,555	237,370	272,357
Non-Current liabilities				
Deferred tax liabilities	1,168,422	867,405	893,699	900,998
Total Non-Current Liabilities	1,168,422	867,405	893,699	900,998

REPORT BY ADMINISTRATORS LM Investment Management Limited (Administrators Appointed)

Balance sheet as at 30 June	2009 \$0	2010 \$0	2011 \$0	2012 \$0
Total Liabilities	2,563,604	1,315,960	1,131,089	1,173,355
Net Assets	6,339,773	7,139,183	6,971,869	6,674,945
Equity				
Contributed equity	2	1,032,012	1,032,012	1,032,012
Reserves	-	6,107,171	-	-
Retained profits	6,339,771	-	5,939,857	5,642,933
Total Equity	6,339,773	7,139,183	6,971,869	6,674,945

Annexure 9 – MIF Litigation Summary

Bruce & Anor v LM Investment Management Limited

(Administrators Appointed) & ors

Queensland Supreme Court Proceeding 3383 of 2013

Summary of Court Proceedings

1. Background

1.1 General

On 19 March, 2013, Ginette Muller and John Park of FTI Consulting (Australia) Pty Limited ("FTI") were appointed administrators of LM Investment Management Limited (Administrators Appointed) ("LMIM").

LMIM is the responsible entity of, relevantly, the LM First Mortgage Income Fund ("LMFMIF").

1.2 Suspension of AFSL

On 9 April, 2013, ASIC suspended LMIM's Australian Financial Services Licence, pursuant to s915B(3)(b) of the *Corporations Act* ("Act").

However, pursuant to s915H of the Act, ASIC specified that the licence continued in effect as though the suspension had not happened:

- (a) for the purposes of the provisions of Chapter 5C (Managed Investment Schemes) and Chapter 7 (Financial Services and Markets) other than the provisions in Parts 7.2, 7.3, 7.4 and 7.5; and
- (b) regarding the provision by LMIM of financial services which are reasonably necessary for, or incidental to:
 - (i) the transfer to a new responsible entity;
 - (ii) investigating or preserving the assets and affairs of; or
 - (iii) winding up of,

the LM First Mortgage Income Fund, the LM Currency Protected Australian Income Fund, the LM Institutional Currency Protected Australian Income Fund and four other funds.

2. Court Proceedings

2.1 Bruce Originating Application

On 15 April, 2013 an originating application was filed in the Supreme Court of Queensland by Mr and Mrs Bruce, unit holders¹ in the LMFMIIF. It was served on LMIM on or about 19 April, 2013.

By it, Mr and Mrs Bruce sought the following orders:

- (a) pursuant to s.601FN and 601FP of the Act (or alternatively, regulation 5C.2.02 of the Corporations Regulations 2001 (Cth)) ("**Regulations**"), that Trilogy Funds Management Limited ("**Trilogy**") (or such other company as the court determines appropriate) be appointed temporary responsible entity of the LMFMIIF;
- (b) alternatively, pursuant to s.80 of the *Trusts Act* (Qld) 1973, that Trilogy (or such other company as the court determines appropriate) be appointed responsible entity/trustee of the LMFMIIF until further order of the court or an extraordinary resolution of the Income Fund's members providing for an alternative appointment.

Trilogy agreed to indemnify Mr and Mrs Bruce for the costs of the proceeding. Mr and Mrs Bruce did not attend court. Several officers of Trilogy swore affidavits and attended court.

2.2 Shotton Application

On or about 29 April, 2013, Mr Roger Shotton, another unit holder² in the LMFMIIF, filed and served an application seeking the following orders:

- (a) pursuant to s.601NF(1) of the Act, that David Whyte (or such other person as the Court may deem appropriate) be appointed to take responsibility for ensuring that the LMFMIIF is wound up in accordance with its constitution;
- (b) pursuant to s.601ND of the Act, LMIM (in its capacity as the responsible entity of the LMFMIIF), be directed to wind up the LMFMIIF;
- (c) such further directions as the court thinks necessary about how the LMFMIIF ought to be wound up.

2.3 ASIC Intervener Application

On 3 May, 2013, the Australian Securities & Investments Commission intervened in the proceeding and filed an interlocutory application seeking the following orders:

- (a) pursuant to s.601ND(1) of the Act, LMIM be directed to wind up the LMFMIIF;
- (b) pursuant to s.601NF(1) of the Act, Derrick Vickers, Darryl Kirk and Gregory Hall (each of PriceWaterhouseCoopers), be appointed to take responsibility for ensuring that the LMFMIIF is wound up in accordance with its constitution;
- (c) pursuant to s.1101B(1) or s.601NF(2) of the Act, Mr Vickers, Mr Kirk and Mr Hall be appointed as joint and several receivers of the property of the FMIF.

¹ Mr and Mrs Bruce hold approximately (0.03 %) of the total value of units in the LMFMIIF.

² Mr Shotton holds approximately (0.06 %) of the total value of units in the LMFMIIF

ASIC also sought orders ancillary to those orders.

LMIM, in its capacity as responsible entity of the LMFMIF is the First respondent to each of the three applications. The members of the LMFMIF were the second respondents to the applications.

3. Chronology of Proceeding

3.1 Applications

The Bruce originating application was originally set down to be heard on 29 April, 2013. However, that hearing was unilaterally changed by the solicitors for Mr and Mrs Bruce speaking with the court registry, to 2 May, 2013.

On 2 May, 2013, P. Lyons J ordered that the Shotton application be heard on 13 May, 2013 and, subject to the discretion of the trial judge, that the Bruce originating application be heard on the same date.

In light of affidavit material served 3 May, 2013, on 7 May, 2013 the First Respondent sought and obtained an adjournment of the hearing of the applications until 15 July, 2013, for three days, which were the next available court hearing dates.

3.2 Subpoenas to Produce

On 30 April, 2013, subpoenas were issued by the Supreme Court of Queensland on behalf of the First Respondent, directed to Trilogy, Piper Alderman (Mr and Mrs Bruce's and Trilogy's solicitors), Ms Amanda Banton (the partner with the conduct of the matter at Piper Alderman), KordaMentha Pty Limited and Mr Winterbottom of KordaMentha Pty Ltd.

Applications by Trilogy, Piper Alderman and Ms Banton to set aside the subpoenas were unsuccessful and documents were subsequently produced.

On or about 28 June and 1 July, 2013, subpoenas were issued by the Supreme Court of Queensland on behalf of Mr and Mrs Bruce which sought a wide range of categories of documents. At a hearing to set aside the subpoenas, the categories were amended to reduce the scope of the documents sought. Nonetheless, a large number of documents were still required to be produced by FTI and LMIM in response to the amended subpoenas.

4. The Hearing

Ultimately, the hearing of the Originating Application, the Shotton Application and the ASIC Application was held on 15, 16 and 17 July before Dalton J.

Her Honour has reserved her decision.

Prior to the hearing, written submissions were filed on behalf of each of the parties, which were supplemented by oral submissions during the hearing.

A number of issues were covered by the four parties, over three days.

The main arguments for each of the parties are summarised below, to provide an overview of the positions of the parties. The summaries are not exhaustive, comprehensive lists of all the arguments that were raised.

Copies of the full transcripts of the hearing are available from Auscript, via the Supreme Court of Queensland.

4.1 Bruce Submissions

- (a) Trilogy should replace LMIM as the responsible entity of the LMFMIF because:
 - (i) LMIM does not have an Australian Financial Services Licence that meets the requirements of s.601FA of the Act, because the terms of the suspended AFSL are such that LMIM is not able to “operate” the scheme to the required full scope. The word, “operate” means to operate with the full suite of powers and duties of the scheme;
 - (ii) the power under s.601FN of the Act for a registered member to apply to the court for the appointment of a temporary responsible entity under s.601FP has been enlivened;
 - (iii) the appointment of Trilogy as a responsible entity is “in the interests of members” under s.601FP;
- (b) regulation 5C.2.02 of the *Corporations Regulations* provides an alternative basis upon which Trilogy may be appointed as the responsible entity. The appointment of Trilogy under regulation 5C.2.02 is necessary to protect the interests of members;
- (c) other grounds upon which LMIM’s AFSL is liable to be suspended or cancelled are:
 - (i) LMIM had not lodged the scheme’s financial report for the half-year ending 31 December, 2012 by 15 March, 2013; and
 - (ii) the administrators are investigating whether the prepayment of managements fees alters the Net Tangible Asset requirements of the AFSL;
- (d) LMIM’s AFSL is still susceptible to cancellation because ASIC has not said it will not cancel it. ASIC has said it is not right to have an insolvent company as responsible entity and LMIM is heading towards insolvency. It is a condition of the AFSL that the responsible entity be able to pay their debts as and when they fell due. The court should not lend its aid to enable a bankrupt to continue as responsible entity;
- (e) if Trilogy is the responsible entity of the LMFMIF, there is not a certainty of insolvency of the responsible entity, which means the AFSL held by the responsible entity is not under risk of being cancelled and there is not a responsible entity which seems to have engaged in deteriorating relations with the regulator;
- (f) the LMFMIF should be wound up;
- (g) the Bruces are opposed to the appointment of receivers. The LMFMIF is not insolvent but is illiquid;

- (h) receivers should not be appointed to the LMFMIF, including for the reason that doing so would introduce unnecessary costs;
- (i) in relation to the meeting of members to consider and vote upon the resolutions to remove LMIM as the responsible entity and appoint Trilogy as a temporary responsible entity of the LMFMIF:
 - (i) the meeting was not called upon a proper statutory basis;
 - (ii) the meeting was only called by the custodian of the assets of the LM Currency Protected Australian Income Fund (which is a member of the LMFMIF), at the direction of LMIM, to generate evidence for the purpose of the hearing and to achieve a forensic advantage;
 - (iii) the meeting was called upon an artificial basis, which was not disclosed to members of the LMFMIF;
 - (iv) Trilogy did not consent to being appointed as the new responsible entity as a result of the voting at the meeting;
 - (v) Trilogy preferred the issue to be determined by the court;
- (j) members of the LMFMIF were not told, but should have been told, ASIC's views that the meeting of members was called for an ulterior purpose for forensic advantage, was a waste of money and lacked utility;
- (k) if Trilogy is appointed as the temporary responsible entity of the LMFMIF, it is obliged to call a meeting of members within 3 months to appoint a permanent responsible entity and at that time a valid meeting could be called to canvass the views of members, which may lead to a different outcome to the outcome of the meeting of members on 13 June, 2013. No other relief that is sought provides the opportunity for members to have a say;
- (l) under the LMFMIF constitution LMIM, as responsible entity, is entitled to charge a management fee of up to 5.5% (including GST) of the net fund value;
- (m) the voluntary administrators have not obtained updated valuations of the assets of the LMFMIF, which would allow a higher calculation of management fees;
- (n) the management fee when LMIM was the responsible entity prior to the appointment of liquidators, was higher in value than perhaps it should have been, which may give the LMFMIF a claim against LMIM and/or a claim against LM Administration Pty Ltd ("LMA");
- (o) although the administrators have said they do not intend to charge the management fee, there is no document to record that arrangement. In relation to LMA, it would not be in its interests, or in the interests of LMA's creditors to give away that right;
- (p) the fees Trilogy will charge have been put into evidence, at a set rate cascading down as the assets are realised. Trilogy will charge the lesser of the 1.5% it has said it will charge and 5% under PWC's rates;

- (q) the work that has been undertaken by the voluntary administrators since their appointment can be used by Trilogy if it is appointed as the temporary responsible entity of the LMFMIF, so that work will not be wasted or duplicated;
- (r) the risk of increased costs if LMIM remains the responsible entity is greater than the risk of increased costs if Trilogy is appointed as the temporary responsible entity;
- (s) the voluntary administrators have not investigated potential claims against LMIM and its former directors in relation to, for example:
 - (i) the amendments made to the LMFMIF constitution, that permitted the increase of the loan to value ratio for investments by the LMFMIF, which was inappropriate; and
 - (ii) related party transactions;
- (t) prior to the appointment of the administrators, there has been an increase in the loan to value ratio and there were related entity payments;
- (u) Trilogy is the responsible entity of the LM Wholesale First Mortgage Income Fund and therefore owns 20% of the LMFMIF. If Trilogy is the responsible entity of the LMFMIF, it must act in the interests of the unitholders and would pursue all appropriate claims.
- (v) contrary to the suggestion made in the proceeding, Trilogy is not insolvent;
- (w) Trilogy should be permitted to undertake the winding up of the LMFMIF because it is an experienced responsible entity. It is familiar with other schemes and is experienced in property of the nature of the assets of the LMFMIF and its sort of mortgage portfolio. Trilogy is familiar with the LMFMIF as it has been looking at it since 2012;
- (x) LMIM is facing substantial potential conflicts:
 - (i) as responsible entity it must act in the interests of members of the main fund;
 - (ii) as responsible entity of feeder funds, it must act in the interests of members of those funds;
 - (iii) when LMIM goes into liquidation, there will be duties owed to creditors, which are not necessarily coincident with duties owed to unitholders;
- (y) the conflict issues are not present if Trilogy is appointed as the responsible entity of LMFMIF;
- (z) the access to the books and records that was offered to the solicitors for the Bruces and Trilogy by the solicitors for LMIM is not the same as if Trilogy was acting in the role as responsible entity;

4.2 Shotton Submissions

- (a) Mr Shotton does not support the appointment of Trilogy to replace LMIM as the responsible entity of the LMFMI, including because:
- (i) there is no statutory power to appoint Trilogy as the new responsible entity. The jurisdiction is not enlivened because the LMFMI has a current responsible entity and an AFSL;
 - (ii) Trilogy has not identified any good reason why a new responsible entity should be appointed;
 - (iii) the LMFMI should be wound up;
 - (iv) a new responsible entity would be entitled to charge up to 5.5% of the value of the assets under management (said to be approximately \$300 million). Although Trilogy has said it will charge a management fee of 1.5% per annum, doing so is not in the interests of members;
 - (v) the members voted at a meeting of members on whether Trilogy should be appointed as the new temporary responsible entity and that resolution was resoundingly defeated;
 - (vi) save for possible conflicts that have been identified, there is no good reason to appoint a new responsible entity. It is not in the interests of members to do so;
 - (vii) winding up the LMFMI will avoid the costs of undertaking an annual audit;
 - (viii) the appointment that is sought is as a temporary responsible entity only. A further meeting will be required to appoint a permanent responsible entity, at further cost;
 - (ix) Trilogy is not an appropriate new responsible entity as it has a conflict of interest because it is also the responsible entity of one of the feeder funds into the LMFMI, namely the LM Wholesale First Mortgage Income Fund. This is also relevant to any claims brought in the future against LMIM and any of its directors;
- (b) the voluntary administrators have informed the court of their intention to wind up the LMFMI;
- (c) the identity of the responsible entity is a matter within the discretion of the court;
- (d) the LMFMI should be wound up by LMIM, acting as the responsible entity of the LMFMI, upon the ground that it is just and equitable to do so;
- (e) there is no limit on the matters which the court may take into account in determining whether to appoint a person other than the responsible entity to conduct the winding up, other than that the power must be exercised by reference to the subject matter, scope and purpose of the legislation which created it (namely the LMFMI constitution);

- (f) FTI should not conduct the winding up, because of possible conflicts of interest, including in relation to:
 - (i) the management fee structure;
 - (ii) the feeder fund potential conflict as LMIM is also the responsible entity of the LM Currency Protected Australian Income Fund and the LM Institutional Currency Protected Australian Income Fund;
 - (iii) LM Administration Limited, as FTI is also the administrator of it;
 - (iv) the investigation of related party transactions;
- (g) It is necessary in the interests of members to have Mr Whyte appointed, because of the potential conflicts Mr Shotton has identified;
- (h) in seeking the appointment of Mr Whyte as the person to take responsibility for the winding up of the LMFMI, Mr Shotton is relying upon a similar approach taken in the decision of *Equititrust Limited v The Members of the Equititrust Income Fund* [2011] QSC 353;
- (i) a special purpose liquidator could be appointed;
- (j) the capital distribution to members should not have been paid and the funds should instead have been applied to reduce the debt owing to Deutsche Bank;
- (k) If Mr Whyte is appointed to conduct the winding up, he will utilise as much of the work undertaken by FTI as possible, to avoid duplicating the work and costs;
- (l) the fact the administrators have been working in that role for a few months should not be treated as reflecting they are entrenched in that position to preclude the appointment of Mr Whyte.

4.3 ASIC Submissions

- (a) the Bruce's application should be dismissed because there is no statutory or other basis upon which the court can order, on that application, the change of the responsible entity to Trilogy;
- (b) s601FA does not require an AFSL to permit the full exercise of all powers provided under the constitution of the scheme;
- (c) as long as the AFSL held by the first respondent permits those acts which constitute "the management of or the carrying out of the activities which constitute" the LMFMI, then it will permit the first respondent to operate the LMFMI;
- (d) the first respondent has met the requirements of s601FA and accordingly the power granted to the court under s601FN is not available;
- (e) Regulation 5C.2.02 should not provide an alternative avenue of relief for the Originating Application;

- (f) there is no ability for an application by a minority of scheme members under s80 of the *Trust Act*.
- (g) the LMFMIF should be wound up because:
 - (i) the LMFMIF has been closed since 2009;
 - (ii) the annual report for the year ending 30 June, 2012 indicated that during the reporting period the first respondent announced that the LMFMIF would not reopen;
 - (iii) the first respondent has determined under s601NC of the Act that the purpose of the scheme cannot be accomplished and that it should be wound up;
 - (iv) the suspended AFSL permits only the transfer to another responsible entity or the winding up and as LMIM is not retiring as the responsible entity, the only available option is to wind up the LMFMIF;
- (h) the winding up should be carried out by ASIC's nominees because:
 - (i) the "zealousness" of LMIM's response to the Originating Application appear to have distracted it from focusing on the interests of members and complying with its suspended AFSL;
 - (ii) LMIM has rejected the opportunity to enter into an enforceable undertaking proposed by ASIC;
 - (iii) the person(s) responsible for the winding up should be appropriately independent to ensure that the winding up proceeds in the most efficient and cost effective way to provide the best chance of achieving the maximum return for investors;
- (i) in relation to the meeting of members:
 - (i) the use of the procedures in Part 2G.4 of the Act was inappropriate;
 - (ii) the meeting had to be called by a person who could cast votes on the resolutions. The meeting was called by the custodian, Trust Company, which is the custodian of the LM Currency Protected Australian Income Fund. LMIM is the responsible entity of the LMCPAIF. The responsible entity and its associates are not entitled to vote. Trust Company is an associate of LMIM. Trust Company requisitioned the meeting at the direction of LMIM;
 - (iv) the meeting was not a meeting called under s.601FL because LMIM did not intend to retire as the responsible entity of the LMFMIF;
 - (v) the administrators' level of engagement in the adversarial process is surprising;

- (vi) the calling of the meeting of members was not authorised by the suspended AFSL;
 - (vii) the notice of meeting was misleading, although this submission was substantially withdrawn;
- (j) in relation to the notice of meeting provided to members:
 - (i) the notice states that if a liquidator is appointed, and assuming it is the administrators, they will have powers of clawback that liquidators have, to undo transactions which have been entered into by the company. That is misleading. They are not liquidators. Anything recovered in so called clawback transactions goes to the responsible entity. There is no reason to assume there are such claims. It was misleading to suggest that this was some benefit without actually identifying or having made enquiries about that facts that there might be such claims;
 - (ii) the notice of meeting did not say LMIM had an interest in continuing to be the responsible entity of the LMFMIF, because it would have been entitled to fees;
- (k) the responsible entity is a trustee of the LMFMIF for members. Faced with the application by Trilogy to replace it, LMIM should have come to the court for advice as to whether or not it should close the Trilogy application. If it had done so, it would have been told to call a meeting at which it said it wanted to resign, or to wind up the fund and would have avoided fighting the application as it has done, at the expense of the LMFMIF;
- (l) the litigation has not been defended to protect members. It has been done by a responsible entity who was required to retire fighting a person that wanted to take its place;
- (m) ASIC is concerned that the "zealousness" of the first respondent's conduct of the proceeding is disproportionate to the extent to which the interests of unit-holders of the scheme are likely to be advanced, as evidenced, for example, by the volume of affidavit material produced;
- (n) section 1101B of the act is invoked by the first respondent's breach of s.320 in failing to lodge a financial report for the half year ending 31 December, 2012, by 15 March, 2013;
- (o) the fees proposed to be charged by Messrs Vickers, Kirk and Hall are significantly less than the fees proposed to be charged by the administrators and by Mr Whyte;
- (p) the insolvency practitioners proposed by ASIC have not been criticised by any party.

4.4 First Respondent's Submissions

The submissions below have been set out for to reflect the submissions made in response to the other parties' submissions. However, a number of points made on behalf of the First Respondent related to submissions made by more than one party.

- (a) the first respondent's primary position is that all the applications against it should be dismissed;

4.4.1 Re: Originating Application by Mr and Mrs Bruce

- (a) there is no statutory basis to order that Trilogy replace LMIM as the responsible entity of the LMFMIF, under the Act or the Regulations;
- (b) even if there was, the discretion contained within s.601FP means such an order should only be made when it is in the interests of members to do so, which is not the present case;
- (c) Mr and Mrs Bruce did not raise any complaint about LMIM acting as responsible entity in the three years after 2009, when the LMFMIF ceased accepting new investments and froze the redemptions. If they did have concerns during that time, the concerns would not survive the appointment of the voluntary administrators. The evidence does not support any sound basis for the concerns expressed by Mr and Mrs Bruce;
- (d) the primary basis upon which the Bruces (and Trilogy) now rely is the assertion that an independent party is required to investigate potential claims against LMIM on behalf of the members of the LMFMIF;
- (e) The administrators have a statutory duty to investigate the conduct of the directors of LMIM. They are currently undertaking those investigations;
- (f) Trilogy has standing to bring proceedings against LMIM and its former directors, if there is sufficient evidence. However, the Bruces and Trilogy want investigations they wish to pursue to be funded by all members of the LMFMIF and Trilogy wishes for its fees to be paid by the other members of the Fund, for investigations it wants conducted in the interests of the Fund, of which it will be the responsible entity, if appointed;
- (g) where a member asserts a claim against a responsible entity, then primarily, the member should investigate and substantiate that claim;
- (h) the suggestion that LMIM suffers from a conflict of duty and duty or duty and interest, because of related party transactions, has no foundation;
- (i) the constitution of LMIM has provided for the payment of management fees by the LMFMIF to LMIM. There is no evidence, nor any expression of concern by any witness, that the fees were ever exceeded;
- (j) complaint is made regarding amendments made to the LMFMIF constitution, in relation to the loan to value ratio. There is no suggestion that any of the loans made

- by LMIM were made in breach of the provisions of the constitution. Property values on the Gold Coast have declined, which has adversely affected loan to value ratios;
- (k) the ASIC regulatory guide upon which Mr Wood, on behalf of Trilogy relied, regarding loan to value ratios has no force of law. Additionally, it refers to the loan to value ratios at the time the loans were made;
- (l) although the administrators have not closed their minds to the matters of concern asserted by Mr Wood, nothing has yet emerged from their investigations to substantiate those concerns;
- (m) at least at this stage, there is insufficient evidence to establish:
- (i) the members of the LMFMIF have any claims against LMIM;
 - (ii) Trilogy has been precluded from investigating the alleged claims by being unable to access the books and records of LMIM;
 - (iii) the administrators are unwilling or unable themselves to investigate the matters raised by Mr Wood;
 - (iv) the appointment of a new responsible entity to investigate the matters raised by Mr Wood is necessary or in the interests of members;
- (n) LMIM is not in breach of the net tangible asset requirements of its AFSL. ASIC has not taken any action regarding any purported infringement. The contention that the net tangible asset requirement has been contravened is based on an erroneous assumption. The opinion of the Bruce's expert witness about the net tangible asset position is based upon assumptions which have not been proved;
- (o) there is no evidence to suggest the assets of the LMFMIF are in jeopardy;
- (p) LMIM, through the administrators, has the benefit of detailed knowledge of the LMFMIF and its assets. A substantial amount of work has been undertaken by the administrators and their staff in reviewing the affairs of the LMFMIF, including a detailed review of the individual assets of the LMFMIF. They have developed a plan for the development and disposal of those assets, repayment of the loan facility with Deutsche Bank and a return of capital to members within the shortest possible timeframe;
- (q) if a replacement responsible entity is appointed, there is likely to be a significant duplication of work and wasted costs as the new responsible entity becomes informed about the matters already known to the LMIM, as responsible entity, via the administrators' work;
- (r) if Trilogy was appointed as the new responsible entity, in order to go into possession of property to enforce LMIM's securities, it would need to appoint qualified person, registered liquidators, as receivers and controllers, which would incur costs in addition to the management fee of 1.5% Trilogy proposes to charge as responsible entity. If LMIM remained as the responsible entity, the administrators see no need to incur the cost of other insolvency practitioners;

REPORT BY ADMINISTRATORS LM Investment Management Limited (Administrators Appointed)

- (s) the administrators have sworn evidence that they do not intend to charge any management fee and will charge only their usual rates (which will be subject to review by creditors and the courts);
- (t) the court has the benefit of the views of members on whether LMIM should be removed as responsible entity and replaced by Trilogy as responsible entity of the LMFMIF. Members who attended the meeting of members on 13 June, 2013 voted overwhelmingly against each resolution;
- (u) there can be no reasonable criticism of the meeting of members being called. The meeting of members was convened for the purpose of providing members with an appropriate forum in which they could express their views on whether LMIM should be removed as the responsible entity and whether Trilogy should be appointed as the new responsible entity;
- (v) the identity of the responsible entity of the LMFMIF is an important matter and it is entirely appropriate to consult members about their views;
- (w) Trilogy had the opportunity to provide members with information for the purpose of considering the resolutions;
- (x) by withdrawing its consent to be appointed as the responsible entity of the LMFMIF, had the vote carried that resolution at the meeting of members that was held, Trilogy spurned the process and was trying to frustrate it by absenting itself from the process. However, the vast majority of members opposed the resolutions to replace LMIM with Trilogy. It was not wrong and certainly not evidence of bad faith and certainly not misleading or deceptive for the administrators to hold out to the members of the LMFMIF their genuine belief that there was a prospect of the meeting of members saving costs;
- (y) Trilogy has claimed that if it was appointed as a temporary responsible entity, then within 3 months it would call a meeting of members, at which time the members' views would be obtained as the identity of the permanent responsible entity. However, that will only occur if the litigation brought by the Bruces is successful. In fact, the meeting called by the first respondent was the only opportunity for members to decide between Trilogy and LMIM to act as the responsible entity of the LMFMIF. Accordingly, the criticism about the calling of the meeting is misconceived;
- (z) the evidence suggests the originating application was brought with a view to commencing legal proceedings against LMIM. The solicitors for Mr and Mrs Bruce also act for Trilogy. They have advertised that they intend to bring a class action against LMIM. Trilogy has provided an indemnity to the Bruces for the costs of the originating application;
- (aa) the jurisdiction of the court to appoint Trilogy as temporary responsible entity has not been engaged and even if it had, discretionary factors heavily weight against making such an order;
- (ab) the originating application in respect of the *Trusts Act* is not pressed by the Bruces.

4.4.2 Re: Shotton Application

- (a) LMIM does not dispute that the LMFMIF should be wound up. The question is whether that winding up should be conducted by LMIM (through the Administrators) or by a new insolvency practitioner appointed under s.601NF of the Act, to take responsibility for ensuring that the LMFMIF is wound up in accordance with its constitution;
- (b) section 601NF(1) confirms a discretion of the Court to appoint a person to take responsibility of the winding up of the scheme, but only if the Court thinks it is "necessary" to do so;
- (c) the words in s.601NF(1), "take responsibility for ensuring that the scheme is wound up in accordance with its constitution" change their shape as the circumstances require. Combined with the word "necessity", s.601NF(1) is directed at extreme circumstances;
- (d) the suggested appointed under s.601NF(1) will be "necessary" only in circumstances where it has been demonstrated the responsible entity, for some reason, is unable or unwilling to wind up the scheme in accordance with the constitution and any relevant orders;
- (e) no party has shown that an appointment under s.601NF(1) is necessary. LMIM is under the control of administrators who are experienced insolvency practitioners and independent of former management of LMIM;
- (f) similarly, s.601NF(2) provides that a court may give directions about how a registered scheme is to be wound up if the court thinks it is "necessary" to do so;
- (g) the power to give directions about how a registered scheme is to be wound up, contained in s.601NF(2) is not the kind of language that would ordinarily be associated with a grant of a power to the Court to alter proprietary relationships in relation to property by imposition of a receivership and to create compulsory agency relationships between the responsible entity and third parties. A receiver takes control of property to deal with it to effect the purposes of the appointment, typically, to realise the assets under the receiver's control as agents of the owner and to pay the proceeds to the persons entitled. A receiver appointed under s.601NF(2) would be an agent for the responsible entity. However, there is no suggestion that LMIM would be in any way incapable or inappropriate as a person to perform the tasks that could otherwise be undertaken by a receiver. Accordingly, the role of a receiver does not add anything to what could be done by LMIM.
- (h) doing all the sorts of property management and realisation work that is done by all kinds of insolvency practitioners and can be done by LMIM under its current administrators or liquidators, should they become appointed. The only point at which the receiver appears to do something that is different is in conducting litigation, not generally, but specifically, against LMIM;
- (i) the whole receivership structure is directed at creating an advantage for the unit holders in one respect and that is if it comes to a situation where LMIM, as responsible entity, wants to sue LMIM in its personal capacity. That job would be done by a receiver, otherwise, everything that is to be done by the receiver could

conveniently and properly be done by LMIM, without the receivers. The relief that is sought overreaches. A simple and once and for all mechanism to deal with the possible conflict, if it arises, has been proposed by the administrators, namely, to appoint a special purpose liquidator to the company, the liquidation being the liquidation of all of its assets other than the assets that it has as a responsible entity;

- (j) Mr Shotton has not demonstrated any basis for his concern about the independence of the administrators. The administrators have a statutory duty to investigate the conduct of the directors of LMIM and are currently undertaking those investigations. The administrators have a statutory duty to investigate the conduct of the directors of LMIM and are currently undertaking those investigations. The administrators have no difficulty investigating and pursuing arguable and costs effective claims against any current or former officers of LMIM. Although the administrators have not closed their minds to such matters, nothing has yet emerged from their investigations to substantiate any concerns. If any conflict between LMIM and LMFMIF arises, the administrators are willing to seek to appoint special purpose liquidators to the assets of LMIM;
- (k) there is no suggestion that LMIM, being in control of the assets of the LMFMIF, is putting them at risk in any way or undertaking any mismanagement;
- (l) since their appointment, the administrators have not caused LMIM to charge any management fee from the assets of the LMFMIF and nor do the administrators intend to cause LMIM to charge the LMFMIF such management fees in the future;
- (m) Mr Shotton has complained about the capital distribution recently paid to members of the LMFMIF. However, that capital distribution was paid because:
 - (i) using that money would not have reduced the interest payable under the Deutsche Bank facility; and
 - (ii) LMIM had informed members, prior to the appointment of the administrators, that the distribution would be paid and the administrators expected that many members had budgeted to receive those funds.

No other member has complained about the interim capital distribution;

- (n) Mr Shotton has asserted that LMIM is a significant debtor of the LMFMIF, so that the interests of the responsible entity in winding up the LMFMIF would be in conflict of the interest of members. However, there is no evidence that LMIM is a significant debtor of the LMFMIF. No such indebtedness was recorded in the audited accounts of the LMFMIF as at 30 June, 2012 and a management balance sheet for the LMFMIF, as at 31 March, 2013, shows that the LMFMIF actually owes LMIM a small sum;
- (o) Mr Shotton asserts that it is not appropriate to put the recovery of bad loans in the hands of the party (LMIM) which arranged the loans. However, the administrators are experienced insolvency practitioners who are independent from the directors of LMIM. Mr Shotton has not identified any valid basis to impugn the conduct of the administrators in managing the affairs of the LMFMIF since their appointment and, ultimately, resolving to wind up the LMFMIF;

- (p) Mr Shotton's assertions that the administrators have delayed the hearing of Mr Shotton's application is rejected. The proceedings were subject to several lengthy directions hearings and the need for adjournments was caused by the late delivery, on two occasions, of affidavit material by the Bruces;
 - (q) against the weak arguments raised by Mr Shotton for seeking the appointment of an insolvency practitioner under s.601NF the Court must consider the potential detriment that would be caused to members if such an appointment was made.
 - (r) the loss of knowledge which the administrators and their staff have acquired concerning the affairs of the LMFMIF and the appropriate strategy to be adopted in winding up the LMFMIF, would be a significant detriment. Any practitioner appointed under s.601NF would necessarily have to spend time undertaking similar investigations to gain the same level of familiarity already possessed by the administrators and their staff, which will:
 - (i) lengthen the winding up process;
 - (ii) increase the costs of the winding up; and
 - (iii) reduce the return to members.
- LMIM relies on its submissions in connection with the Bruces' application regarding the duplication of work and increased costs associated with the appointment of another person;
- (s) the orders that are sought by Mr Shotton and ASIC go well beyond what is necessary to overcome any of the difficulties that have been the subject of the submissions;
 - (t) Mr Shotton's application ought to be dismissed.
 - (u) the matters that have been raised by Mr Shotton against LMIM have not established "necessity" for the purposes s.601NF(1) nor s.601NF(2).

4.4.3 Re: ASIC Application

- (a) ASIC's application for an appointment to be made under s.601NF should also be dismissed upon the same basis of the application made by Mr Shotton. It has not been demonstrated the appointment is "necessary";
- (b) ASIC's submissions do not go close to establishing that to ensure that the LMFMIF is wound up in accordance with its constitution, it is "necessary" to make an order of the kind that ASIC seeks. LMIM is under the control of administrators, who are experienced insolvency practitioners and are independent of the directors of LMIM. ASIC has not provided a sufficient basis to conclude it was necessary for the Court to make an appointment under s.601NF(1);
- (c) the circumstances of the LMFMIF are very different to those which led Applegarth J to make an appointment under s.601NF(1) in *Re Equititrust Ltd*. In that case, the proposed en masse resignation of the directors of the scheme, upon the expiration of the insurance cover, coupled with the fact that the Court's jurisdiction to appoint

a responsible entity had not been engaged, necessitated the appointment under section 601NF(1);

- (d) when ASIC suspended LMIM's AFSL on 9 April, 2013, ASIC specifically declared that the licence would remain effective insofar as required to permit LMIM to wind up the LMFMIF. Nothing has occurred since that time to justify a change in that position;
- (e) although ASIC has relied on LMIM's failure to lodge half yearly accounts in breach of the Act as a ground for the appointment of receivers under s.1101B, LMIM does not understand that ASIC contends that the breach is a reason why it is necessary for the Court to make an appointment under s.601NF. Such a submission could not be sustained. That breach occurred on 15 March, 2013, before the administrators were appointed. It was notified and explained to ASIC following the appointment of the administrators. Despite that notice, prior to bringing its application, ASIC did not take any further issue with the reported breach. The administrators have made arrangement for the annual financial report for the LMFMIF to be prepared, audited and provided to members from three months after the end of the 2013 financial year;
- (f) in relation to ASIC's application for the appointment of receivers to the assets of the LMFMIF under s.1101B, upon the basis that LMIM breached the Act in failing to lodge half of the yearly accounts:
 - (i) after learning of the default, ASIC modified LMIM's AFSL, to require it to either wind up the LMFMIF or to appoint another responsible entity to manage it, and gave a period of two years within which to do so;
 - (ii) while the breach may enliven the Court's jurisdiction to make an order under s.1101B, ASIC does not provide any sufficient basis for the exercise of the discretion to appoint receivers;
 - (iii) the power of the Court to appoint receivers is a remedial power directed towards the protection of assets. Moreover, s.1101B expressly provides that such an order can be made only if the Court is satisfied that the order would not unfairly prejudice any person;
 - (iv) while there may be a theoretical power under s.1101B to appoint receivers of the kind that are sought, making such an order is not a proper remedial response to the contravention that has been established, which is simply a failure to lodge accounts in a timely way by persons who are no longer in control of the company;
- (g) any general equitable power for the Court to provide relief has not been engaged. No-one has sought relief on that basis and if it were sought it would raise its own questions as to whether it was appropriate;
- (h) there is no justification for an appointment of receivers in this case where there is no evidence the assets of the LMFMIF are in jeopardy;
- (i) the first respondent rejects ASIC's criticism of the first respondent's alleged "zealousness" in relation to these proceedings. It specifically denies that the administrators, in conducting the proceeding, have not kept up and done all the

things that they had to do in relation to the administration of the funds. There is no evidence to support the assertion that, by reason of this proceeding, the administrators have been distracted from properly focusing on the administration of the Funds;

(j) the work that has been undertaken is set out in detail in the evidence of Mr Corbett. It includes:

(i) undertaking a comprehensive strategy review, including a detailed analysis of financial and developmental positions for each asset;

(ii) seeking, obtaining, collating and reviewing information from the records about the loan and mortgage arrangements, proposes for development for each property;

(iii) physically inspecting each property to:

(A) understand its physical characteristics;

(B) assess the proposed development;

(C) identify opportunities that might be available to provide value;,

(D) consider whether the existing development proposals are appropriate, given the appropriate timeframes, market conditions and need to optimise returns as quickly as possible;

(iv) developing individual cashflow models for each asset, which feed into an overarching cash flow model, which plans the entire workout of the fund, development of the underlying properties to maximise profitability and repayment in full of the Deutsche Bank facility with a minimum of interest;

(k) although ASIC has raised concerns about the calling of the meeting of members:

(i) LMIM had the power to call the meeting under its constitution. Specifically, clause 28.1 gives the power to call a meeting for any purpose;

(ii) it would be wrong to attribute to LMIM any improper motive in calling the meeting of members;

(iii) LMIM considered it was important for members of the LMFMI to be given an opportunity to vote on which company they wish to have act as responsible entity;

(iv) the administrators completely reject the suggestion that it was inappropriate to call and hold the meeting;

(v) even if the only possible consequence of the meeting was to ascertain the wishes of members about whether there should be a

change of responsible entity from LMIM to Trilogy, consulting the members and obtaining their views was an entirely appropriate thing to do. The whole of chapter 5C proceeds on the basis that the views of members at every vital point are significant;

(vi) on Tuesday, 23 April, 2013 there was a meeting between representatives of ASIC and representatives of the first respondent. During the course of that meeting Ms Muller said that she would be able to form a view about whether to wind up the LMFMIF, within two weeks of that meeting. On Monday, 6 May, 2013, the administrators decided to wind up the LMFMIF. Monday, 6 May, 2013 is within 2 weeks of Tuesday, 23 April, 2013;

(vii) further, the draft enforceable undertaking prepared by ASIC records that:

(A) the administrators offered to cause LMIM to convene meetings with the unit holders of all of the LM funds in a timely manner, to provide unit holders with an opportunity to determine the future of the LM funds quickly, efficiently and with minimal expense to the LM funds; and

(B) at the meetings the resolutions put to unit holders will include resolutions for:

(I) the appointment of a responsible entity over each of the funds; and

(II) whether the funds should be wound up.

ASIC was planning on proceeding on the basis that the licence was only then very recently amended and committed the calling of the meetings;

(viii) it was a perfectly natural course for a meeting of members to be held, particularly given ASIC was asking the administrators to execute an enforceable undertaking to call a meeting of members to consider:

(A) winding up the LMFMIF; and

(B) the replacement of the responsible entity.

There is no question, as far as ASIC was concerned, that there should be a meeting of some kind. They wanted a meeting and asked for an enforceable undertaking to give rise to it. ASIC has no doubt about the power to call the meeting because under the constitution the responsible entity was entitled to call a meeting of members. The meeting only considered the replacement of the responsible entity;

(ix) when an application is made to the court to remove a liquidator, where it is only the court that has the power to do it, the court will often direct a meeting be held to find out the views of creditors. Those views have no legal operation, it is just a poll;

(x) under the Act there are two possible routes to obtain a resolution that will have legal effect:

(A) s.601FL concerns the retirement of the responsible entity; and

(B) s.601FM operates where there is a wish of members for the responsible entity to be removed.

A meeting called other than under those routes that results in a resolution of the kind proposed is simply an expression of the views of the members, that is, it is a poll;

(xi) ASIC has criticised the use of s.601FL. It is the case that LMIM did want to retire if the members voted in favour of the resolution. That is giving a purposive effect to the section rather than a narrow literal one;

(xii) the mechanism that was adopted, of LMIM directing the custodian to issue the request for the meeting, which was said to enliven s.601FM, was done to create the possibility that if the resolution was passed, LMIM would be removed. That was the only purpose of calling the meeting in that way, that is, to ensure the meeting could fall within the provisions of the Act. As stated, if the meeting didn't come within the provisions it would be a poll only. The whole point of trying to ensure the meeting fell within the statutory provisions was to create the risk that LMIM would be removed. Once that is understood, the force of the objections made by ASIC and Mr Shotton disappear.

(xiii) It is said that the calling of the meeting was merely a device to produce evidence for the Court. That theory has no explanatory power. LMIM went to a lot of trouble to try and make the outcome of the meeting binding if the resolution was passed. If the resolution failed it doesn't matter if the sections were engaged or not; the engagement of the sections only mattered if the resolution passes. Rightly or wrongly LMIM went to a lot of trouble to try and engage them and that attempt is only consistent with a desire to see the meetings as a mechanism for giving effect to the wishes of the members;

(xiv) ASIC has asserted that LMIM's AFSL did not give it power to call the meeting. In fact, the licence extends to the provision of financial services reasonably necessary for, or incidental to, a transfer to a new responsible entity and investigating or preserving the assets or affairs of the LMFMIF, including the affairs of a winding up. Accordingly, calling a meeting to consider the removal of LMIM as responsible entity and its replacement by Trilogy is plainly within the terms of the licence;

- (i) In respect of ASIC's objection that Part 2G.4 was not properly engaged because the meeting of members was called by the custodian of one of the funds, at the direction of LMIM:

- (i) LMIM has the power under the constitution of the LMF MIF to call a meeting. Once a meeting has been called, there is no power to cancel that meeting. If there is an extraordinary resolution of the members on a topic such as LMIM should be removed and replaced by Trilogy as the responsible entity, then that result will have been effective by virtue of s.1322(2) of the Act, which cures any irregularity, unless there is substantial prejudice to someone, and in this case there would not have been;
- (ii) for the purposes of s.15 of the Act, the custodian was not acting "in concert" with LMIM in calling the meeting:
 - (A) if the custodian was acting in exercising independent discretion pursuant to their powers as a fiduciary at someone else's request, that is not "in concert";
 - (B) if it is at their direction, it is not "in concert";
- (iii) s.12 is the relevant section and it does not make the custodian an associate of LMIM;
- (m) although ASIC has raised concerns with LMIM about material sent to members in connection with the meeting held on 13 June, 2013, LMIM responded to those concerns by issuing further materials to members;
- (n) ASIC's allegation that LMIM has "launched a very expensive litigation", is rejected. The first respondent is the respondent to three applications. The issues in the case, save for one or two exceptions and that have been disposed of, have been raised by the other parties, not by the first respondent. The first respondent must respond to the matters raised by the other parties, across a wide range of issues. The first respondent did not launch a very expensive litigation;

4.4.4 Re Potential Conflicts

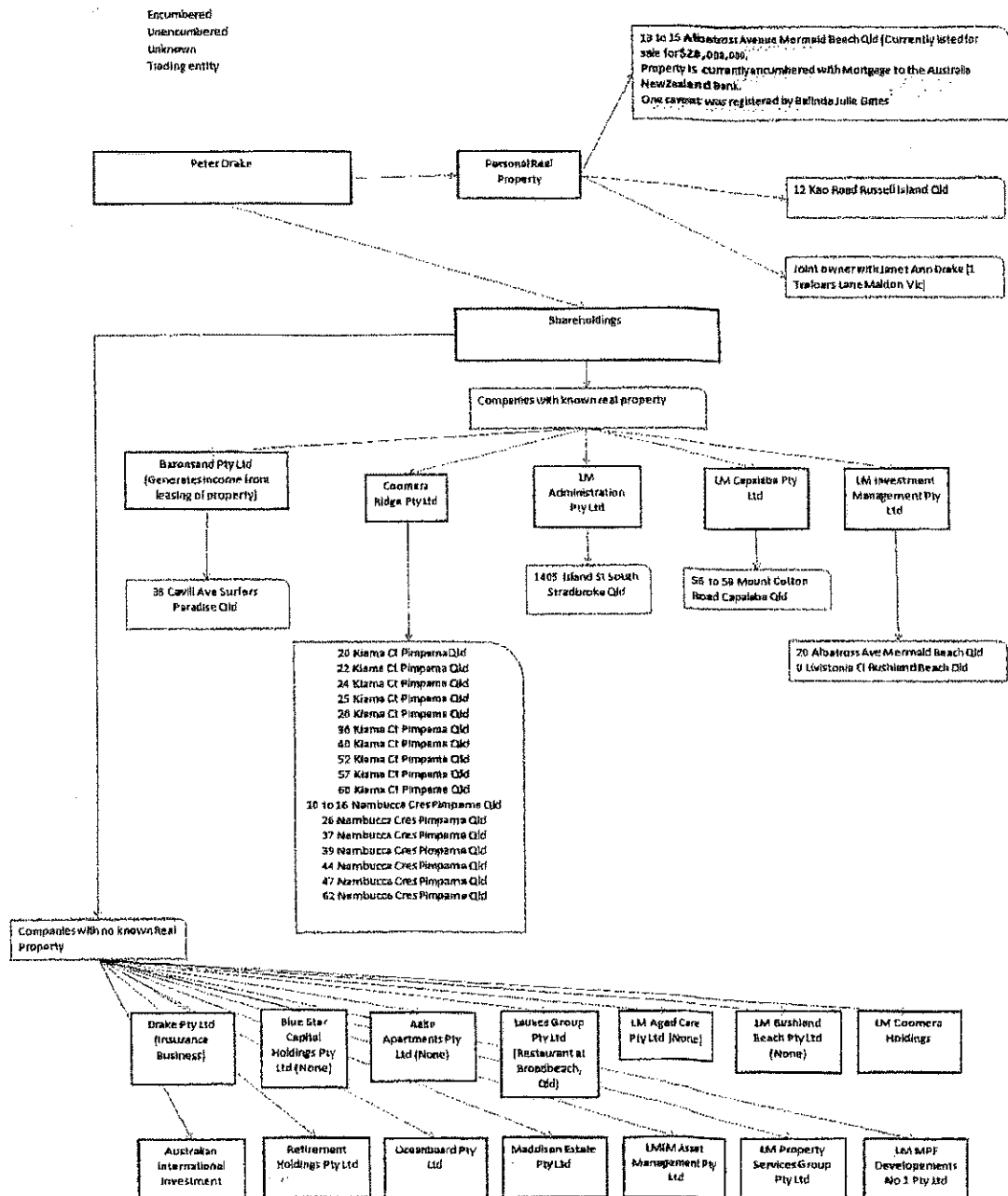
In relation to the arguments put by the parties regarding potential conflicts of LMIM and the administrators:

- (a) It is the sworn testimony of the administrators that they do not intend to charge the management fee which the responsible entity is otherwise entitled to charge under the LMF MIF constitution;
- (b) if a conflict arises because LMIM is the responsible entity of the LMF MIF and two of the feeder funds, the administrators will:
 - (i) investigate the conflict and the circumstances in which it arises;
 - (ii) form a view on the proper course to take
 - (iii) if necessary, take legal advice;
 - (iv) if necessary, approach the court for directions;

- (c) no money is owed by LMA to the LMFMIF. There is a small amount owed by the LMFMIF to LMA;
- (d) in relation to the loan management services fee, if a conflict arises the administrators and any liquidators must:
 - (i) investigate the conflict and the circumstances in which it arises;
 - (ii) form a view on the proper course to take
 - (iii) if necessary, take legal advice;
 - (iv) if necessary, approach the court for directions;
- (e) there are no related party transactions which give rise to a conflict of interest. There was no cross-examination of Ms Muller on this point;
- (f) the administrators are entitled to claim the fees for their work and there is more than one source of funds available to pay those fees. It is the same as in the case of any liquidator appointed to more than one company in a corporate group. If either Mr Whyte or Trilogy is appointed to act, they will be in the same position;
- (g) any responsible entity who is responsible for selling property and realising the assets will seek an indemnity from the fund for their proper expenses and they will be subject to appropriate oversight in doing so;
- (h) at the moment there is a bare possibility of legal action against the responsible entity and if that matures, those who are running it will:
 - (i) investigate the conflict and the circumstances in which it arises;
 - (ii) form a view on the proper course to take
 - (iii) if necessary, take legal advice;
 - (iv) if necessary, approach the court for directions;
 - (v) if necessary, seek the appointment of a special purpose liquidator for the assets of the company in its own capacity;
- (i) there is no evidence of joint lending between the LMFMIF and other funds;
- (j) it is possible that claims will be made and proofs of debt will be submitted by the LMFMIF against the responsible entity. If that happens, those responsible for operating the fund will have to:
 - (i) investigate the conflict and the circumstances in which it arises;
 - (ii) form a view on the proper course to take
 - (iii) if necessary, take legal advice;
 - (iv) if necessary, approach the court for directions;

- (v) if necessary, seek the appointment of a special purpose liquidator for the assets of the company in its own capacity;
- (k) it would be a mistake to work on the assumption that the administrators or anyone else who is proposed for this administration, would try and bury a conflict, as opposed to responding to it appropriately by reporting it to the overseer, by getting advice and seeking directions if there was no overseer. There is a lot of speculation at the moment and conflicts may emerge. If they do, they will be dealt with in an appropriate way and, in a more extreme solution, an appointment of a special purpose liquidator or overseer of some kind may be appropriate.
- (l) however, currently, by the test of "necessity" the case is not made out;

Annexure 10 – Peter Drake Company Shareholdings and Properties



Corporations Act 2001 (Cth)

NOTICE OF SECOND MEETING OF CREDITORS
OF COMPANY UNDER ADMINISTRATION

LM INVESTMENT MANAGEMENT LIMITED
(ADMINISTRATORS APPOINTED) (RECEIVERS & MANAGERS APPOINTED)
(the Company)
ACN 077 208 461

NOTICE IS HEREBY GIVEN that the second meeting of creditors of the Company will be held on 1 August 2013 at Training Room Level 1, 38 Cavill Avenue, Surfers Paradise, Queensland, commencing at 12:00pm.

AGENDA

1. The purpose of the meeting is:-
 - a) to review the report of the Administrators and their recommendation in connection with the business, property, affairs and financial circumstances of the Company; and
 - b) for the creditors of the Company to resolve:-
 - i) that the Company execute a deed of company arrangement; or
 - ii) that the administration should end; or
 - iii) that the Company be wound up.
2. Creditors will be requested to fix the remuneration to be paid to the Administrators, as calculated on a time basis, at the FTI Consulting Standard Rates, for the period 1 July 2013 to 1 August 2013;
3. If the Company is placed into Liquidation, to consider the appointment of alternative Liquidators, if required;
4. If the Company is placed into Liquidation, to consider the appointment of a Committee of Inspection and if required, to determine the members; and
5. Any other business properly brought before the meeting.

Creditors wishing to vote at the meeting, who will not be attending in person or are a company, must complete and return a Proxy Form by no later than 4.00pm on the last business day prior to the meeting, by post to FTI Consulting, PO Box 8965, GCMG, QLD, 9726, faxed to (07) 5630 5299 or email to Stuart.Clancy@fticonsulting.com. A form of proxy is ***attached**.

Dated this 25th day of July 2013.



Ginette Muller
Administrator

***Attach.**

Our Ref: LMC_8974n31(notice of mgt).doc

APPOINTMENT OF PROXY	Form 532 Regulation 5.6.29 Corporations Act 2001 (Cth)
LM Investment Management Limited (Administrators Appointed) (Receivers & Managers Appointed) ACN 077 208 461 ("the Company")	

A. Insert Full Name and Contact Details (please print)

Given Name _____ Surname _____

Company Name _____ Telephone Number _____

Address _____

B. Appointment of a Proxy (please complete)

I/We, a creditor of the Company appoint:

_____ of _____

as my/our proxy, or in his/her absence _____, to vote at the second meeting of creditors to be held on 1 August 2013 at the Training Room Level 1, 38 Cavill Avenue, Surfers Paradise, Queensland at 12:00pm or at any adjournment of that meeting.

C. Voting by Your Proxy

Option 1: If appointed as a general proxy, as he/she determines on my/our behalf. ☐

AND/OR

Option 2: If appointed as a special proxy for some or all resolutions, specifically in the manner set out below (please tick).

	Resolution (please specify the particular resolution)	For	Against	Abstain
(a)	That the Company executes a Deed of Company Arrangement; or	☐	☐	☐
(b)	That the Administration should end; or	☐	☐	☐
(c)	That the Company be wound up	☐	☐	☐
		☐	☐	☐
		☐	☐	☐

D. Signature Section (in accordance with Sections 82A, 127 or 250D of the Corporations Act 2001 (Cth))

Signature of individual or person authorised by corporate resolution to represent corporation

Print Name:

The common seal was affixed hereto in the presence of:

Director

Director/Company Secretary

Dated this _____ day of _____

CERTIFICATE OF WITNESS

Please Note: This certificate is to be completed only where the person giving the proxy is blind or incapable of writing. The signature of the creditor is not to be attested by the person nominated as proxy. I, _____ of _____ certify that the above instrument appointing a proxy was completed by me in the presence of and at the request of the person appointing the proxy and read to him before he attached his signature or mark to the instrument.

Signature of witness: _____

Our Ref: LMC_8974proxy.doc

Corporations Act 2001 (Cth)

LM Investment Management Limited
 (Administrators Appointed) (Receivers & Managers Appointed)
 ACN 077 208 461

FORMAL PROOF OF DEBT OR CLAIM (GENERAL FORM)

To: The Administrators of LM Investment Management Limited

1. This is to state that the company was on 19 March 2013 and still is, justly and truly indebted:-

TO:
 (name of creditor)

OF:
 (address of creditor)

FOR:
 (amount owed to creditor)

AND cents.

Particulars of the debt are:-

<u>Date</u> (insert date when debt arose)	<u>Consideration</u> (state how the debt arose & attach supporting invoices & statements of account)	<u>Amount (\$)</u>	<u>Remarks</u> (include details of voucher substantiating payment)
---	--	--------------------	--

2. To my knowledge or belief the creditor has not, nor has any person by the creditor's order, had or received any satisfaction or security for the sum or any part of it except for the following: (insert particulars of all securities held. If the securities are on the property of the company, assess the value of those securities. If any bills or other negotiable securities are held, show them in a schedule in the following form).

<u>Date</u>	<u>Drawer</u>	<u>Acceptor</u>	<u>Amount (\$...c)</u>	<u>Due Date</u>
-------------	---------------	-----------------	------------------------	-----------------

- *3. I am employed by the creditor and authorised in writing by the creditor to make this statement. I know that the debt was incurred for the consideration stated and that the debt, to the best of my knowledge and belief, remains unpaid and unsatisfied.

- *3. I am the creditor's agent authorised in writing to make this statement in writing. I know that the debt was incurred for the consideration stated and that the debt, to the best of my knowledge and belief, remains unpaid and unsatisfied.

Dated this _____ day of _____

Signature

Name

Address

*Delete if not applicable.

Our Ref: SAC_8974pod1.doc

Amy Sargent

From: Trenfield, Kelly-Anne <Kelly-Anne.Trenfield@fticonsulting.com>
Sent: Friday, 19 April 2013 1:57 PM
To: Jarrod Villani
Cc: Simon Vertullo; David Winterbottom
Subject: RE: LMMPF Books and Records

Dear Jarrod,

I refer to your email of 18 April 2013. Please note our response to the queries raised is below:

In reference to the general comments below:

- I confirm your current and previous requests for specific information and also the entirety of the books and records held by LM Managed Performance Fund ("MPF");
- I reiterate my previous advice that the large quantity of books and records does not allow an immediate provision of those records;
- The provision of records is further complicated by the intermingling of records with those of the First ranking mortgagee on the majority of loans being LM First Mortgage Income Fund and LM Australian Income Fund (the latter, of course, which you have no entitlement to);
- The process has been commenced but as stated above will take some time. We are endeavoring to complete the process in a timely manner taking into consideration the factors noted above and the other priorities of the operations of LM Investment Management Ltd ("LMIM") and LM Administration Pty Ltd ("LMA");
- A timeframe will be provided as soon as the same is determined by LMA management. They are currently working through the list of information/records required to determine the most relevant contact and the location of records. It is envisaged the bulk of requested information will be available by the middle of next week and will be provided progressively; and
- I note the information provided will consist of currently available information and the books and records held. We are not in a position to provide you with details of the analysis or review conducted by the Administrators. Likewise as you have refused to cover the costs of FTI in this regard the preparation of information will be conducted solely by LMA staff and will be invoiced to KordaMentha and Calibre Capital as Trustees.

In response to the specific queries:

- ***Further the exclusion from information is not just limited to hard documents, but has broadened to limitations on LMA/LMIM staff discussing matters with us in respect to assets to which we hold security whether that be 1st or 2nd ranking.***
 - o The staff of LMA have not been told not to withhold information, there has simply been a protocol but in place. Employees of LMA are conscious of seeking the correct authority prior to release information to ensure that no jeopardy is faced in relation to LMIM's position as Responsible Entity of the other funds.
- ***On several occasion we have been told that we are not entitled to information in respect to the Funds 2nd ranked mortgagee position on assets.***
 - o To correct this comment, you have been advised that whilst you are entitled to information in respect to MPF's position as 2nd ranking mortgagee you are not entitled to those records which relate to the 1st mortgagee's position or which cannot be released due to a duty of care to a third party. Where there is an intermingling of those records a review is required before the information is released.
- ***Additionally Simon Tickner and Trevor Fenwick told us this afternoon that they were unable to discuss details of the Lifestyle Investment Company asset as FTI had not provided permission to do so and this is despite the Fund's first ranking mortgagee position.***
 - o Mr Tickner and Mr Fenwick's reluctance to discuss this matter was entirely due to the circumstance where a meeting had been convened to discuss Maddison Estate and as such they were not aware this matter would be discussed. They were simply following protocol and had they been aware of this matter being discussed they would have been authorised to do so.

In relation to the requested information, I advise:

1. FX Position

- a. I confirm you have met with LM staff to discuss this issue and as such should be aware that all FX hedge positions have been closed out.
 - b. John Corbett of this office has conducted analysis of the FX position on behalf of the Administrators and as such his work to date does not constitute records of the fund.
 - c. Fund records in relation to the FX position will be collated and provided by LMA.
- 2. Accounting Records**
- a. Fund records will be collated and provided by LMA.
- 3. Quarantined Funds**
- a. Fund records in relation to the applicant details will be collated and provided.
 - b. You have been provided with the contact details of Steven Hannan who has carriage of this matter.
 - c. The fund's bank account details have previously been provided
- 4. The Lifestyle Investment Company Pty Ltd, LM Capalaba Pty Ltd, Tall Trees Mandurah Pty Ltd Peregian Beach Pty Ltd**
- a. Simon Tickner will arrange these meetings as requested.

Regards,

Kelly Trenfield
Senior Managing Director
Corporate Finance/Restructuring

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From: Jarrod Villani [<mailto:jvillani@kordamentha.com>]
Sent: Thursday, 18 April 2013 9:54 PM
To: Trenfield, Kelly-Anne
Cc: Simon Vertullo; David Winterbottom
Subject: LMMPF Books and Records

Kelly,

Over the last few days there has been numerous communications requesting the provision of LM Performance Management Fund's books records to us, in good faith we have continued to allow you time to provide these documents and notwithstanding our right to all books and records we have issued priority lists of documents.

As you are aware we specifically requested that this information not be provided via a data room but rather we receive:

- hard copy versions where they exist or
- where applicable electronic copies (ie where the documents are currently in electronic form).

I emphasise that we are simply requesting an exercise be conducted where LMA/LMIM staff at our expense collect and hand over the records of the fund.

Despite numerous requests and our presence at the LM offices today we have only received a limited amount of information.

At your discretion, a data room has now been set up to which we have access, disappointingly there is only one document available (Investor Information, see below) within the data room.

This outcome is inconsistent with the communications received from FTI directly to me personally and to David Johnston and Jacqui Kerr throughout the day.

With reference to our priority list, I requested this morning that you respond outlining which items could be provided and the likely timeframe, where documents could not be provided as requested that you provide rationale as to why, again we have not received any such communications.

Further the exclusion from information is not just limited to hard documents, but has broadened to limitations on LMA/LMIM staff discussing matters with us in respect to assets to which we hold security whether that be 1st or 2nd ranking.

On several occasion we have been told that we are not entitled to information in respect to the Funds 2nd ranked mortgagee position on assets.

Additionally Simon Tickner and Trevor Fenwick told us this afternoon that they were unable to discuss details of the Lifestyle Investment Company asset as FTI had not provided permission to do so and this is despite the Fund's first ranking mortgagee position.

In addition to rectifying the above situation immediately and providing all information previously requested, we further request the following information:

FX Position

In relation to the FX hedge positions held by LMPF, would you please urgently confirm:

- Whether all open FX hedge positions have now been closed out;
- If any positions remain open, please provide details;
- The name and specific contact details of the brokers which arranged the hedges;
- Whether or not the money in the margin accounts for each of the brokers has now been fully refunded;
- If the FX refunds have been received, please confirm:
 - Which broker/s the refunds relate to;
 - What bank account the refunds were paid into;
 - How much was received;
 - When the funds were received.
- If the margin refunds are yet to be received, please confirm:
 - Which broker/s these relate to;
 - How much refund is expected to be received;
 - What bank account these refunds will be paid into.

We understand from conversations with the FX Manager at LMA that John Corbett of your office has been working on this matter. It is critical that we are provided this information by first thing tomorrow morning.

Accounting records

- Current general ledger
- Current debtors ledger
- Current creditors ledger
- Current trial balance
- Cash book for last two years
- All tax returns and BAS statements for last two years

Quarantined Funds

We understand that application funds were received after the decision was made to cease accepting new funds into LMPF. We further understand that these funds have not been returned to the applicants ('the Quarantined Funds').

Would you please urgently provide details of the Quarantined Funds held by LMPF including a breakdown by:

- The bank accounts where the Quarantined Funds are held and the value of Quarantined Funds held in each account;
- The applicant's details including their bank account details, contact details and value of application funds received;
- Evidence of the funds received from each applicant including a copy of the application form and bank statements showing the receipt of the specific applicant's monies by LMPF.

The Lifestyle Investment Company Pty Ltd

- We immediately seek a meeting with the development director (or any other person with a detailed working knowledge) to discuss assets held, please advise of contact details and provide full permission to employee to discuss details of development
- All documentation, accounting and financial information relating to this entity.

- All agreements to which this entity is a party.

LM Capalaba Pty Ltd

- We immediately seek a meeting with the development director (or any other person with a detailed working knowledge) to discuss asset held, please advise of contact details and provide full permission to employee to discuss details of development

Tall Trees Mandurah Pty Ltd

- We immediately seek a meeting with the development director (or any other person with a detailed working knowledge) to discuss asset held, please advise of contact details and provide full permission to employee to discuss details of development

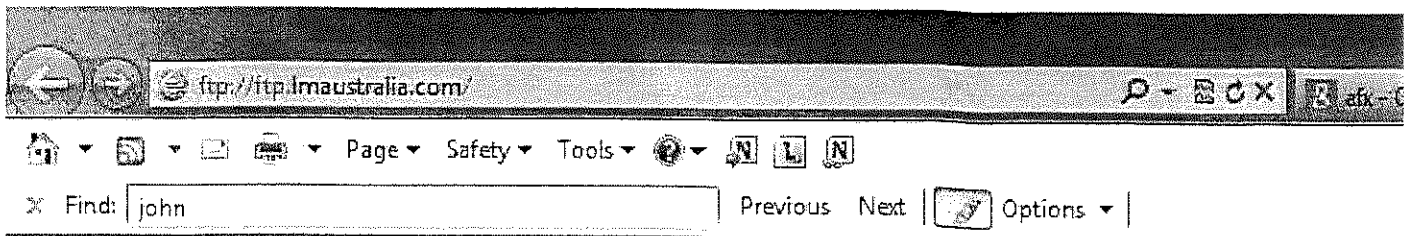
Peregian Beach Pty Ltd

- We immediately seek a meeting with the development director (or any other person with a detailed working knowledge) to discuss asset held, please advise of contact details and provide full permission to employee to discuss details of development

Given the urgency and the lack of information to date, please respond to the above by 10am tomorrow morning. If you have any questions in relation to the above please call me.

Best regards

Jarrold



FTP root at ftp.lmaustralia.com

To view this FTP site in Windows Explorer, press Alt, click View, and then click Open FTP Site in Windows Explorer.

04/18/2013 09:25AM

563,409 KFF Investor Information - Term PM FO.xlsx



Jarrold Villani | Director
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Amy Sargent

From: David Clout <dclout@cloutsinsolvency.com.au>
Sent: Friday, 16 August 2013 6:28 PM
To: Simon Vertullo
Cc: Michael Vickery (michael.vickery@minterellison.com.au); Paul Sweeney <PSweeney@mcgrathnicol.com> ('David Whyte')
Subject: RE: LMA Books and Records

Simon,

The issue of record ownership on the information servers and virtual servers is extremely complex and I am not in a position at this time to authorise the access you seek on Monday morning.

The information system operated by LMA hold records on behalf of other parties who need to be given notice of your intended access and be given the opportunity to respond.

I have been made aware of issues that will arise in providing a image of all LMA's electronic books and records because of the mixing of data I am not able to properly segregate the information you are legally entitled to view. I have received persuasive argument that whilst the employees of LMA have created and collated the information comprising "the books and records" of LMA, this information is the property of others.

My suggestion to BDO and McGrath Nicol is that we need to urgently meet to work out a process so each party can gain access to the appropriate records. I suggest a meeting time on Monday next week be organised. Accordingly would you provide times on Monday next that suit and I will arrange.

I have copied this email to David Whyte and Paul Sweeney to assist in fast tracking this solution.

Regards

David Clout - **David Clout & Associates**
105A Bowen Street, Spring Hill, Qld 4000
GPO Box 7870, Brisbane Qld 4001
Ph 07 3129 3316 Mob 0418 793 440

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From: Simon Vertullo [mailto:svertullo@kordamentha.com]
Sent: Friday, 16 August 2013 5:28 PM
To: David Clout
Cc: Michael Vickery (michael.vickery@minterellison.com)
Subject: RE: LMA Books and Records

David

Left you a message earlier, please let me know where you are at on this.

Simon

Simon Vertullo | Partner
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From: Simon Vertullo

Sent: Friday, 16 August 2013 3:27 PM

To: David Clout (dclout@cloutsinsolvency.com.au)

Cc: Michael Vickery (michael.vickery@minterellison.com)

Subject: LMA Books and Records

David

As discussed, we are proposing to image the servers of LMA on Monday morning.

I note that we are interested in obtaining:

- The records of LMA (pursuant to our charge and appointment as agent for MIP)
- The records of MPF

If required, we are happy to sign a confidentiality deed excluding records of other funds.

I note that:

- The plant and equipment (including the servers) is subject to our appointment as agent for MIP
- The lease for LMA is subject to our charge

I request your agreement to same by COB today.

I note my correspondence of 8 August (attached).

Any queries let me know.

Thanks

Simon

Simon Vertullo | Partner

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Amy Sargent

From: Jarrod Villani
Sent: Tuesday, 18 June 2013 9:53 AM
To: Trenfield, Kelly-Anne
Subject: RE: Meeting - KordaMentha & FTI
Attachments: Confidentiality Agreement - Access to LMIM and LMA documents.doc

Hi Kel,

Per the email train below. Please find attached a Confidentiality deed for your review. I have provided in word in case you wish to suggest changes.

Best regards

Jarrod

Jarrod Villani | Director
KordaMentha | Level 14, 12 Creek Street, Brisbane QLD 4000
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e jvillani@kordamentha.com | w www.kordamentha.com

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From: Trenfield, Kelly-Anne [<mailto:Kelly-Anne.Trenfield@fticonsulting.com>]
Sent: Monday, 17 June 2013 2:58 PM
To: Jarrod Villani
Subject: RE: Meeting - KordaMentha & FTI

Thanks JV – Sounds like a good start.

Christine will confirm a time etc for the call with Ben.

Kelly Trenfield
Senior Managing Director
Corporate Finance/Restructuring

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From: Jarrod Villani [<mailto:jvillani@kordamentha.com>]
Sent: Saturday, 15 June 2013 3:19 PM
To: Trenfield, Kelly-Anne
Subject: RE: Meeting - KordaMentha & FTI

I suspect the request for specific information will fall out once the investigations drill down further on the detail. It is difficult to look at the number of documents that we have at the moment and pin point exactly what is missing. Further what is missing is less the issue as to the proven integrity of the data, which is best obtained either through your

forensic data image or one we do ourselves. On this basis, and assuming Brendan Read (our F-Tech) and Ben agree on the process undertaken, I have instructed Minters to prepare a confidentially deed as requested, as I doubt that it is logistically possible to separate some information due to the co-mingling we understand exists.

Yesterday we agreed with Ginette and John that we would meet next week to discuss many of things on your original Meeting Agenda and specifically, common asset interests. In moving each of these elements forward I suggest:

- The call goes ahead as planned between Brendan and Ben next Tuesday (please advise time and details)
 - in the meantime you and I can hopefully agree the CD for access
- Tom D meets with Simon T and Ryan (John C, is not available) next week on assets, it may pay if you and I attend this meeting also to agree any practical matters for dealing with assets/certain costs.

In respect to the lien/indemnity matters I will come back to you early next week in this regard as I understand that our lawyers have been corresponding but I haven't had time to get up to speed on exactly where they are at.

Please let me know if the above is suitable to you?

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From: Trenfield, Kelly-Anne [<mailto:Kelly-Anne.Trenfield@fticonsulting.com>]
Sent: Friday, 14 June 2013 2:21 PM
To: Jarrod Villani
Subject: RE: Meeting - KordaMentha & FTI

Hi JV

Before a copy of the data is provided we need to deal with the issue that it contains information relating to the corporate entities and funds other than the MPF. My understanding was your Forensics team wanted to review the process undertaken to obtain the data imagine prior to obtaining access to determine its suitability and as such the need to speak with Ben Pascoe or obtain his documentation arose.

Putting that aside, I see there is two options, the MPF data only is extracted or if this is not logistically possible a confidentiality deed is entered to cover access to any non-MPF data obtained.

The consent provided does not deal with those issues, please provide a confidentiality deed for us to consider. Until such time as this is resolved maybe you can advise what specific information is required that has not yet been provided in the datarooms or that is not able to be specifically requested from the LMA staff?

Unfortunately, I don't think we can put indemnity/lien aside. The Orders require us to agree a process as to how not only our costs are dealt with but further how the balance of funds/assets held are able to be applied subject to the former Trustee's indemnity. Accordingly, we need to consider how to deal with those claims by advisors, creditors and any potential investor claims. In this regard I do believe the solicitors presence is appropriate.

Regards
Kelly

Kelly Trenfield
Senior Managing Director
Corporate Finance/Restructuring

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From: Jarrod Villani [<mailto:jvillani@kordamentha.com>]
Sent: Thursday, 13 June 2013 2:21 PM
To: Trenfield, Kelly-Anne
Subject: RE: Meeting - KordaMentha & FTI

Hi Kel,

Got your note just then, and was mid-way through drafting the below. We will see what tomorrow brings, it seems sensible to me.

In respect to the attached, I am happy to meet early next week (Tuesday) as I am tied up for the rest of this week. However I don't think it is necessary for Russell's or our lawyers to attend. It is not my intention to discuss the lien or indemnity matters as I think the process has been outlined by the Courts in this regard. I hope that we can agree the remainder ourselves.

Our focus at the moment is to conclude the discussion that commenced a couple of weeks ago in respect to our ability to obtain data in an appropriate format that allows us to commence our investigations. My impression following our discussion at KM's offices was that this would take approximately a week to sort through (a meeting with Christine and LMIM IT followed by a commercial discussion between you and I to agree data to be collected and how it was best transitioned) however we are nearly two weeks on with no further advancement. In the meantime our Forensic team is waiting on the necessary data and time is ticking on recovery actions which our investors are wanting immediate progress on.

Understand that Ben Pascoe is not available until Tuesday, but to expedite the process is it possible to have Brendan Read collect a copy of the data file which Ben captured following your appointment to enable our investigations to commence immediately. I am happy to discuss a recovery of some costs for the process that was undertaken by FTI in this regard. We have already prepared a consent form for you to sign which enables us to utilise the data captured by FTI or where necessary capture the data ourselves. Does this suggestion work for you?

I have attached a copy of the consent for your review.

I hope we can agree to an outcome asap. Let me know if easier to discuss over the phone, mobile is best for me.

Thanks

JV

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From: Trenfield, Kelly-Anne [<mailto:Kelly-Anne.Trenfield@fticonsulting.com>]
Sent: Wednesday, 12 June 2013 1:24 PM
To: Jarrod Villani
Subject: Meeting - KordaMentha & FTI

Hi Jarrod

We spoke about this a little while ago and I think it's probably now about time to organise it so we can get on with (or move on from) all things MPF. Attached are some of the issues we would like to discuss, please feel free to add any additional items.

We'd ideally like to meet this week or next. Please let me know if you and/or Simon are happy to meet and your availability.

Regards
Kelly

Kelly Trenfield
Senior Managing Director
Corporate Finance/Restructuring

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Confidentiality agreement

KordaMentha Pty Ltd & Calibre Capital
Limited

LM Managed Performance Fund

MinterEllison

L A W Y E R S

Confidentiality agreement

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Details

Date

June 2013

Parties

Name **KordaMentha Pty Ltd ACN 100 169 391 & Calibre Capital Limited ABN 66 108 318 985**
Short form name **Recipient**
Notice details Level 14, 12 Creek Street BRISBANE QLD 4000
Attention: Simon Vertullo

Name **LM Investment Management Limited ACN 077 208 461 (Voluntary Administrators Appointed)**
LM Administration Pty Ltd ACN 055 691 426 (Voluntary Administrators Appointed)
Short form name **LM Companies**
Notice details C/- FTI Consulting, 22 Market Street BRISBANE QLD 4000
Attn: Kelly Trenfield

Background

- A LM Investment Management Limited ACN 077 208 461 (Voluntary Administrators Appointed) was formerly the trustee of the LM Managed Performance Fund.
- B The Recipient is the new trustee of the LM Managed Performance Fund.
- C The LM Companies hold certain information concerning the LM Managed Performance Fund.
- D The Recipient has requested access to information concerning the LM Managed Performance Fund for the purposes of carrying out its duties as trustee of the LM Managed Performance Fund.
- E The LM Companies proposes to disclose to the Recipient information held by the LM Companies that is relevant to the LM Managed Performance Fund.
- F In the course of disclosing information concerning the LM Managed Performance Fund, the LM Companies may disclose information that is not relevant to LM Managed Performance Fund.
- G The Recipient has agreed to keep all information that is not relevant to LM Managed Performance Fund (being Confidential Information), confidential in accordance with the terms of this document.

Agreed terms

1. Defined terms & interpretation

1.1 Defined terms

In this document:

Authorised Person means:

- (a) an officer or employee of the Recipient;
- (b) a legal adviser of the Recipient; and
- (c) an officer or employee of a legal adviser of the Recipient.

Business Day means:

- (a) for receiving a notice under clause 7.1, a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the notice is received; and
- (b) for all other purposes, a day that is not a Saturday, Sunday, bank holiday or public holiday in Queensland, Australia.

Confidential Information means any information, irrespective of its form, not relevant to the LM Managed Performance Fund. For the avoidance of any doubt, information in relation to a provider of security which secures debts owed to the LM Managed Performance Fund (or its Custodian) is information that is relevant to the LM Managed Performance Fund.

Disclosing Party Related Person means:

- (a) a Related Body Corporate of the LM Companies;
- (b) an officer, employee, agent or consultant of the LM Companies; and
- (c) a Related Body Corporate of the LM Companies.

Purpose means ascertaining whether the Confidential Information is relevant to the LM Managed Performance Fund.

Related Body Corporate has the meaning given to it by sections 9 and 50 of the *Corporations Act 2001* (Cth).

1.2 Interpretation

In this document, except where the context otherwise requires:

- (a) headings are for reference only and do not affect interpretation;
- (b) any undertaking, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (c) the singular includes the plural and vice versa, a gender includes other genders and different grammatical forms of defined expressions have corresponding meanings;
- (d) unless stated otherwise, anything (other than making a payment) required to be done on or by a day which is not a Business Day, must be done on or by the next Business Day;
- (e) no provision or expression is to be construed against a party on the basis that the party (or its advisers) was responsible for its drafting; and

- (f) examples and use of the word **including** and similar expressions do not limit what else may be included.

Unless the context requires otherwise, a reference in this document to:

- (g) a party to any document includes that person's successors and permitted substitutes and assigns;
- (h) an agreement includes any legally enforceable arrangement, understanding, undertaking or representation whether or not in writing;
- (i) a document or agreement includes that document or agreement as novated, altered, amended, supplemented or replaced from time to time;
- (j) any thing includes any part of it and a reference to a group of things or persons includes each thing or person in that group;
- (k) clauses, schedules and annexures are to those in this document, and a reference to this document includes any schedule and annexure;
- (l) a person, corporation, trust, partnership, unincorporated body or other entity includes any of them;
- (m) time is to Brisbane time unless stated otherwise;
- (n) legislation or other law or a provision of them includes regulations and other instruments under them, and any consolidation, amendment, re-enactment or replacement;
- (o) an accounting term is to be interpreted according to the Accounting Standards; and
- (p) **property** or an **asset** includes any real or personal, present or future, tangible or intangible property or asset and any right, interest, revenue or benefit in, under or derived from the property or asset.

2. Disclosure and use of Confidential Information

2.1 Keep information confidential

The Recipient must, at its expense:

- (a) subject to clause 3, keep all the Confidential Information confidential;
- (b) establish and maintain effective security measures to safeguard the Confidential Information from access or use not authorised by this document;
- (c) keep the Confidential Information under its control and ensure that the Confidential Information is not entered into a computer database or network that is not solely operated and controlled by the Recipient or an Authorised Person; AND
- (d) ensure that any Authorised Person to whom Confidential Information is disclosed does each of those things.

2.2 Use of Confidential Information

The Recipient may only use the Confidential Information for the Purpose and must ensure that any Authorised Person to whom Confidential Information is disclosed does not use Confidential Information for another purpose.

2.3 Copying of Confidential Information

The Recipient must:

- (a) not copy Confidential Information, except to the extent needed for the Purpose; and

- (b) ensure that any Authorised Person to whom Confidential Information is disclosed does the same.

2.4 Disclosure of Confidential Information

The Recipient may disclose Confidential Information to an Authorised Person who has a need to know (but only if and to the extent the Authorised Person has a need to know) for the Purpose and has agreed to keep the Confidential Information confidential.

2.5 Unauthorised use, copying or disclosure of Confidential Information

The Recipient must:

- (a) immediately give the LM Companies notice if it becomes aware of any suspected or actual unauthorised use, copying or disclosure of Confidential Information;
- (b) immediately take all reasonable steps to prevent or stop the suspected or actual unauthorised use, copying or disclosure of Confidential Information; and
- (c) ensure that any Authorised Person to whom Confidential Information is disclosed does each of those things.

2.6 Enforcement of this document

The Recipient must provide assistance reasonably requested by the LM Companies in relation to any proceedings the LM Companies may take against any person for unauthorised use, copying or disclosure of Confidential Information.

3. Exclusions

3.1 Permitted disclosures

The obligations of confidentiality in relation to Confidential Information under this document do not extend to information which (whether before or after the date of this document):

- (a) is rightfully known to or in the possession or control of the Recipient or an Authorised Person and not subject to an obligation of confidentiality on the Recipient;
- (b) is public knowledge (except because of a breach of any obligation of confidence including, a breach of this document or the obligations of confidentiality under this document); or
- (c) the Recipient or an Authorised Person is required by law, regulation or an order of a court to disclose.

3.2 Disclosure by law

The Recipient must (if legally permitted and possible) within a reasonable time inform the LM Companies in writing of any disclosure that is required by law before the disclosure required is made.

4. Limitations

4.1 Limitation of liability

Except as and to the extent only required by law, the LM Companies are not liable for direct or indirect loss or damage arising in any way out of:

- (a) the use by the Recipient or any Authorised Person of information (including Confidential Information) directly or indirectly provided by or on behalf of the LM Companies; or
- (b) the termination of this document,

unless the loss or damage arises in connection with any gross negligence, or misrepresentation.

5. No transfer of intellectual property

No transfer

The Recipient acknowledges that this document does not convey any interest of a proprietary nature, and in particular does not transfer any interest in any intellectual property of the LM Companies (or any Disclosing Party Related Person).

6. Termination of right to use Confidential Information

6.1 Termination of right to use Confidential Information

The LM Companies may terminate the Recipient's right to use Confidential Information at any time with immediate effect by giving written notice to the Recipient.

6.2 Consequences on termination

On termination of this document, the right of the Recipient and all Authorised Persons, to use Confidential Information stops.

6.3 Actions on termination

On termination of this document, the Recipient must, and must procure that each Authorised Person:

- (a) return to the LM Companies; or
- (b) destroy and certify in writing to the LM Companies the destruction of,

all Confidential Information and copies of Confidential Information in the possession or control of the Recipient and each Authorised Person to whom the Recipient has disclosed Confidential Information, except that the Recipient and each Authorised Person may retain legal advice as well as Confidential Information stored on a back-up server for security purposes.

6.4 Accrued rights and remedies

Termination of this document does not affect any accrued rights or remedies the LM Companies may have.

7. Notices and other communications

7.1 Service of notices

A notice, demand, consent, approval or communication under this document (**Notice**) must be:

- (a) in writing, in English and signed by a person duly authorised by the sender; and
- (b) hand delivered or sent by prepaid post or facsimile to the recipient's address for Notices specified in the Details, as varied by any Notice given by the recipient to the sender.

7.2 Effective on receipt

A Notice given in accordance with clause 7.1 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, on the second Business Day after the date of posting (or on the seventh Business Day after the date of posting if posted to or from a place outside Australia);

- (c) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within eight hours after the transmission (being counted as hours from 9.00am to 5.00pm on a Business Day), the recipient informs the sender that it has not received the entire Notice,

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm (addressee's time) on a Business Day, the Notice is taken to be received at 9.00am (addressee's time) on the next Business Day.

8. General

8.1 Continuing obligations

- (a) The obligations of confidentiality under this document continue to apply to the parties to this document after termination of this document.
- (b) The rights and obligations of the parties under this document do not merge on completion of any transaction contemplated by this document.

8.2 Alterations

This document may only be altered in writing signed by each party.

8.3 Approvals and consents

Except where this document expressly states otherwise, a party may, in its discretion, give conditionally or unconditionally or withhold any approval or consent under this document.

8.4 Continuing indemnities

Any obligation of confidence under this document is independent and survives termination of this document.

8.5 Counterparts

This document may be executed in any number of counterparts.

8.6 Entire agreement

This document constitutes the entire agreement between the parties in connection with its subject matter.

8.7 Severability

A term or part of a term of this document that is illegal or unenforceable may be severed from this document and the remaining terms or parts of the term of this document continue in force.

8.8 Waiver

A party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the party giving the waiver.

8.9 Relationship

Except where this document expressly states otherwise, it does not create a relationship of employment, trust, agency or partnership between the parties.

8.10 Governing law and jurisdiction

This document is governed by the law of Queensland, Australia and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Queensland.

Signing page

EXECUTED as an agreement.

Signed for KordaMentha Pty Ltd by an authorised officer in the presence of

Signature of officer



Signature of witness



Name of officer (print)

Name of witness (print)

Office held

Name of witness (print)

Signed for Calibre Capital Limited by an authorised officer in the presence of

Signature of officer



Signature of witness

Name of officer (print)

Name of witness (print)

Office held

Signed for LM Investment Management Limited ACN 077 208 461 (Voluntary Administrators Appointed) by its joint and several voluntary administrator in the presence of

Signature of Voluntary Administrator



Signature of witness

Name of voluntary administrator (print)

Name of witness (print)

Office held

Signed for LM Administration Pty Ltd ACN
055 691 426 (Voluntary Administrators
Appointed) by its joint and several voluntary
administrator in the presence of

Signature of Voluntary Administrator

Signature of witness

← _____
Name of voluntary administrator (print)

Name of witness (print)

Office held

Amy Sargent

From: Jarrod Villani
Sent: Thursday, 20 June 2013 4:06 PM
To: Trenfield, Kelly-Anne
Subject: RE: Meeting - KordaMentha & FTI

That's fine, happy to review, can they be provided today?

Jarrod Villani | Director
KordaMentha | Level 14, 12 Creek Street, Brisbane QLD 4000
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e jvillani@kordamentha.com | w www.kordamentha.com

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From: Trenfield, Kelly-Anne [<mailto:Kelly-Anne.Trenfield@fticonsulting.com>]
Sent: Thursday, 20 June 2013 4:02 PM
To: Jarrod Villani
Subject: RE: Meeting - KordaMentha & FTI

Hi JV

The initial indication is that the Deed is not conclusive enough for our requirements and will require amendments.

Regards
Kelly

Kelly Trenfield
Senior Managing Director
Corporate Finance/Restructuring

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+61.7.3225.4920 direct
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From: Jarrod Villani [<mailto:jvillani@kordamentha.com>]
Sent: Thursday, 20 June 2013 3:42 PM
To: Trenfield, Kelly-Anne
Subject: FW: Meeting - KordaMentha & FTI

Hi Kel,

Do you have an update from your lawyers? I would like to finalise today, we cannot afford to wait any longer and an appointment is imminent if we cannot reach agreement.

Please call me if you would like to discuss.

Thanks

Jarrood

Jarrood Villani | Director
KordaMentha | Level 14, 12 Creek Street, Brisbane QLD 4000
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e jvillani@kordamentha.com | w www.kordamentha.com

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From: Jarrood Villani
Sent: Tuesday, 18 June 2013 9:53 AM
To: 'Trenfield, Kelly-Anne'
Subject: RE: Meeting - KordaMentha & FTI

Hi Kel,

Per the email train below. Please find attached a Confidentiality deed for your review. I have provided in word in case you wish to suggest changes.

Best regards

Jarrood

Jarrood Villani | Director
KordaMentha | Level 14, 12 Creek Street, Brisbane QLD 4000
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e jvillani@kordamentha.com | w www.kordamentha.com

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From: Trenfield, Kelly-Anne [<mailto:Kelly-Anne.Trenfield@fticonsulting.com>]
Sent: Monday, 17 June 2013 2:58 PM
To: Jarrood Villani
Subject: RE: Meeting - KordaMentha & FTI

Thanks JV – Sounds like a good start.

Christine will confirm a time etc for the call with Ben.

Kelly Trenfield
Senior Managing Director
Corporate Finance/Restructuring

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From: Jarrood Villani [<mailto:jvillani@kordamentha.com>]
Sent: Saturday, 15 June 2013 3:19 PM

To: Trenfield, Kelly-Anne
Subject: RE: Meeting - KordaMentha & FTI

I suspect the request for specific information will fall out once the investigations drill down further on the detail. It is difficult to look at the number of documents that we have at the moment and pin point exactly what is missing. Further what is missing is less the issue as to the proven integrity of the data, which is best obtained either through your forensic data image or one we do ourselves. On this basis, and assuming Brendan Read (our F-Tech) and Ben agree on the process undertaken, I have instructed Minters to prepare a confidentiality deed as requested, as I doubt that it is logistically possible to separate some information due to the co-mingling we understand exists.

Yesterday we agreed with Ginette and John that we would meet next week to discuss many of things on your original Meeting Agenda and specifically, common asset interests. In moving each of these elements forward I suggest:

- The call goes ahead as planned between Brendan and Ben next Tuesday (please advise time and details)
 - in the meantime you and I can hopefully agree the CD for access
- Tom D meets with Simon T and Ryan (John C, is not available) next week on assets, it may pay if you and I attend this meeting also to agree any practical matters for dealing with assets/certain costs.

In respect to the lien/indemnity matters I will come back to you early next week in this regard as I understand that our lawyers have been corresponding but I haven't had time to get up to speed on exactly where they are at.

Please let me know if the above is suitable to you?

Jarrood Villani | Director
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From: Trenfield, Kelly-Anne [<mailto:Kelly-Anne.Trenfield@fticonsulting.com>]
Sent: Friday, 14 June 2013 2:21 PM
To: Jarrod Villani
Subject: RE: Meeting - KordaMentha & FTI

Hi JV

Before a copy of the data is provided we need to deal with the issue that it contains information relating to the corporate entities and funds other than the MPF. My understanding was your Forensics team wanted to review the process undertaken to obtain the data image prior to obtaining access to determine its suitability and as such the need to speak with Ben Pascoe or obtain his documentation arose.

Putting that aside, I see there is two options, the MPF data only is extracted or if this is not logistically possible a confidentiality deed is entered to cover access to any non-MPF data obtained.

The consent provided does not deal with those issues, please provide a confidentiality deed for us to consider. Until such time as this is resolved maybe you can advise what specific information is required that has not yet been provided in the datarooms or that is not able to be specifically requested from the LMA staff?

Unfortunately, I don't think we can put indemnity/lien aside. The Orders require us to agree a process as to how not only our costs are dealt with but further how the balance of funds/assets held are able to be applied subject to the former Trustee's indemnity. Accordingly, we need to consider how to deal with those claims by advisors, creditors and any potential investor claims. In this regard I do believe the solicitors presence is appropriate.

Regards
Kelly

Kelly Trenfield
Senior Managing Director

Corporate Finance/Restructuring

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From: Jarrod Villani [<mailto:jvillani@kordamentha.com>]

Sent: Thursday, 13 June 2013 2:21 PM

To: Trenfield, Kelly-Anne

Subject: RE: Meeting - KordaMentha & FTI

Hi Kel,

Got your note just then, and was mid-way through drafting the below. We will see what tomorrow brings, it seems sensible to me.

In respect to the attached, I am happy to meet early next week (Tuesday) as I am tied up for the rest of this week. However I don't think it is necessary for Russell's or our lawyers to attend. It is not my intention to discuss the lien or indemnity matters as I think the process has been outlined by the Courts in this regard. I hope that we can agree the remainder ourselves.

Our focus at the moment is to conclude the discussion that commenced a couple of weeks ago in respect to our ability to obtain data in an appropriate format that allows us to commence our investigations. My impression following our discussion at KM's offices was that this would take approximately a week to sort through (a meeting with Christine and LMIM IT followed by a commercial discussion between you and I to agree data to be collected and how it was best transitioned) however we are nearly two weeks on with no further advancement. In the meantime our Forensic team is waiting on the necessary data and time is ticking on recovery actions which our investors are wanting immediate progress on.

Understand that Ben Pascoe is not available until Tuesday, but to expedite the process is it possible to have Brendan Read collect a copy of the data file which Ben captured following your appointment to enable our investigations to commence immediately. I am happy to discuss a recovery of some costs for the process that was undertaken by FTI in this regard. We have already prepared a consent form for you to sign which enables us to utilise the data captured by FTI or where necessary capture the data ourselves. Does this suggestion work for you?

I have attached a copy of the consent for your review.

I hope we can agree to an outcome asap. Let me know if easier to discuss over the phone, mobile is best for me.

Thanks

JV

Jarrod Villani | Director

KordaMentha | Level 14, 12 Creek Street, Brisbane QLD 4000

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e jvillani@kordamentha.com | w www.kordamentha.com

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From: Trenfield, Kelly-Anne [<mailto:Kelly-Anne.Trenfield@fticonsulting.com>]
Sent: Wednesday, 12 June 2013 1:24 PM
To: Jarrod Villani
Subject: Meeting - KordaMentha & FTI

Hi Jarrod

We spoke about this a little while ago and I think it's probably now about time to organise it so we can get on with (or move on from) all things MPF. Attached are some of the issues we would like to discuss, please feel free to add any additional items.

We'd ideally like to meet this week or next. Please let me know if you and/or Simon are happy to meet and your availability.

Regards
Kelly

Kelly Trenfield
Senior Managing Director
Corporate Finance/Restructuring

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Lisa Steedman

From: Jarrod Villani <jvillani@kordamentha.com>
Sent: Thursday, 27 June 2013 11:38 AM
To: Trenfield, Kelly-Anne (Kelly-Anne.Trenfield@fticonsulting.com)
Subject: RE: CD

This is getting a little frustrating, it is now 10 days since we provided the document, can you please have Russell's provide their comments on the CD so we can either come to a solution between parties or move on.

I await your feedback.

Thanks

Jarrold

Jarrold Villani | Director
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From: Jarrod Villani
Sent: Wednesday, 26 June 2013 8:40 AM
To: 'Trenfield, Kelly-Anne'
Subject: RE: CD

Could you please follow up your solicitors today?

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From: Trenfield, Kelly-Anne [<mailto:Kelly-Anne.Trenfield@fticonsulting.com>]
Sent: Monday, 24 June 2013 9:39 AM
To: Jarrod Villani
Subject: RE: CD

Hi JV

Have been chasing our solicitor – he's promised to get it to me by COB today. I'll be down the coast on LM this afternoon but will turn it around as soon as I can.

Cheers
Kel

Kelly Trenfield
Senior Managing Director
Corporate Finance/Restructuring

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From: Jarrod Villani [<mailto:jvillani@kordamentha.com>]
Sent: Monday, 24 June 2013 8:49 AM
To: Trenfield, Kelly-Anne
Subject: RE: CD

Hi Kel,

Any update on the CD yet?

Thanks

Jarrod

Jarrod Villani | Director
KordaMentha | Level 14, 12 Creek Street, Brisbane QLD 4000
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From: Trenfield, Kelly-Anne [<mailto:Kelly-Anne.Trenfield@fticonsulting.com>]
Sent: Friday, 21 June 2013 10:33 AM
To: Jarrod Villani
Subject: RE: CD

Hi JV

poke to our solicitor this morning. His suggestion is we get together with the relevant solicitors to nut it out rather than go back and forth with changes. Your thoughts?

Have you had any feedback from your solicitors in relation to the progress of the indemnity issues from your side?

Thanks
Kel

Kelly Trenfield
Senior Managing Director
Corporate Finance/Restructuring

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From: Jarrod Villani [<mailto:jvillani@kordamentha.com>]
Sent: Friday, 21 June 2013 9:31 AM
To: Trenfield, Kelly-Anne
Subject: CD

Hi Kel,

Any update on the Confidentiality Deed yet?

Best regards

Jarrod Villani | Director
KordaMentha | Level 14, 12 Creek Street, Brisbane QLD 4000
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RUSSELLS

27 September, 2013

Our Ref: Mr Tiplady/Mr Sean Russell
Your Ref: Mr Clout

EMAIL TRANSMISSION

Attention: Mr David Clout
The Liquidator
LM Administration Pty Ltd (in liquidation)
SPRING HILL QLD

email: dclout@cloutsinsolvency.com.au

Dear Mr Clout

LM Administration Pty Ltd (in liquidation) ("LMA") – Access to Books and Records

We act for the liquidators of LM Investment Management Limited (in liquidation) ("LMIM").

We refer to your email to Ms Kelly-Anne Trenfield of FTI Consulting dated 25 September, 2013 enclosing a draft confidentiality agreement regarding access being given to various third parties to the books and records held by LMA.

The agreement proposes giving access to the books and records held by LMA concerning LMIM itself, various trusts and managed investment schemes to a number of entities. Interestingly, the agreement does not include the receivers of the LM First Mortgage Income Fund ("FMIF"), Messrs Whyte, Hayes and Connelly, as parties.

LMIM remains as the responsible entity for all of these schemes, with the exception of the MPF.

On our instructions, whilst LMA has possession of these books and records, ownership of them remains with LMIM. In our view, LMA is either a bailee or a trustee, holding the documents on LMIM's behalf.

LMIM was removed as trustee of the LM Managed Performance Fund ("MPF") on 12 April, 2013. The new trustees of the MPF are KordaMentha Pty Ltd and Calibre Capital Limited. Our clients hold an indemnity pursuant to section 443D of the *Corporations Act 2001* (Cth) ("the Act") out of the MPF's assets, which is secured by a lien over the MPF's assets pursuant to 443F of the Act. That indemnity has not been satisfied.

Liability limited by a scheme approved under professional standards legislation

Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 21, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899

RussellsLaw.com.au

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LMIM and its liquidators similarly have rights of indemnity and associated liens in respect of the documents owned by the other funds of which LMIM is the responsible entity.

Accordingly, LMIM is either the legal owner of the books and records or it holds a possessory security interest.

Our clients assert their associated rights over the books and records and instruct you not to sign the confidentiality agreement and not to produce or allow access to the books and records to any third party.

In any event, we are not satisfied with the terms of the agreement. It would be, inter alia, a breach of trust and confidentiality on the part of LMIM as responsible entity of the various managed investment schemes to allow any third party, let alone a party which has threatened litigation (and which is presently seeking leave to commence proceedings) against LMIM to access to its books and records for the purpose of establishing whether the documents are relevant to (not, crucially, owned by) a particular fund.

We had previously agreed on this position with the new trustees of the MPF. We are surprised to see them, apparently, re-agitating the issue.

Our clients will not sign the confidentiality agreement and instruct you not to do so insofar as you hold books and records as bailee/trustee on behalf of LMIM. Our clients reserve all of their rights in respect of the ownership, confidentiality and lien over the books and records and at law generally.

Yours faithfully



Ashley Tiplady
Partner

Direct (07) 3004 8833
Mobile 0419 727 626
ATiplady@RussellsLaw.com.au

[illegible]245

Electronic

Access to the following email systems, (in particular employee email data/accounts, investor email data/accounts and group email data/accounts) for the purpose of being able to review and analyse recorded data within the email environments relating to Fund. If access is not possible then we request to be provided with a working copy2 of the virtual servers that contain the following email systems:

- Microsoft Exchange Server; and
- Commvault Backup Server.

Listing of all machines in the possession of LMA staff that worked on the Fund.

NO

N/A

N/A

No results for Machine

General

Copies of promotional material for the Fund including but not limited to:

- Product Disclosure Statements;
- Information Memorandum or Fund Profile; and
- Financial Services Guides.

All financial advisor agreements that were engaged directly or indirectly to the Fund or on behalf of the Fund by the former trustee.

Complaints register.

Terms of trade or contracts with all foreign exchange brokers.

NO

NO

3361, 3417, 3663, 10784

2708, 2759, 2778, 7224, 7241, 8899, 10349

3574, 3585

No results for Financial Advisor or Advisor Agreement

No results for Complaint

30-37

Use the Format Painter tool to apply the following styles in your table.
Refer to the below link for more information on launching classes and topics in Excel
Read, check out again to complete

Title	
Brief description outlining data	
Row heading	Data
Text format	10 (9)

RUSSELLS

1 July, 2013

Our Ref: Mr Tiplady/Mr Sean Russell
Your Ref: Mr O'Brien

EMAIL TRANSMISSION

Attention: Mr David O'Brien
Minter Ellison
Lawyers
BRISBANE

email: david.obrien@minterellison.com

Dear Colleagues

LM Investment Management Limited (Administrators Appointed) ("the Company") – Deed of Confidentiality for documents in respect of the LM Managed Performance Fund ("the Fund")

We refer to your conversation with our Mr Tiplady on Thursday, 27 June, 2013.

As discussed, our clients believe that they have already provided your clients with all of the books and records of the Fund in their possession or control. Naturally, if your clients believe that specific documents or documents within certain categories have not been provided, our clients are willing to attempt to locate and provide such records to your clients, following a specific request being made by your clients.

As we understand it, the purpose of your clients seeking access to the electronic files held by our client (which we note is terabytes in size, given that it contains documents for all LM funds, not just the Fund, dating from in excess of a decade ago and hence the requirement for the proposed Confidentiality Deed) is to facilitate your clients accessing the Company's documents to satisfy themselves that our clients have delivered up all of the books and records of the Fund.

As we discussed, there is a real risk that in inspecting the books and records of the Company, your clients will have access to the documents held by the Company in its capacity as trustee or responsible entity of other trusts and registered managed investment schemes. In our view, that would necessarily involve a breach of the confidence and other fiduciary obligations reposed in the Company by the beneficiaries of the other funds and schemes. Such a breach would found an action of strict liability against our clients which would not be capable of remedy by a simple confidentiality regime.

Accordingly, our clients decline to:-

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-
1. provide your clients with unchecked access to the records of the Company, particularly as threats of litigation against the Company have now been made by your clients; and
 2. enter into the draft deed of confidentiality.

We confirm Mr O'Brien's comments regarding his understanding and agreement with the position taken by our clients.

As a respected firm of professionals and, moreover, officers of the Court, our clients' assurance that they have delivered up all the books and records of the Fund should satisfy your clients. That being said, as detailed above, our clients are willing to conduct further searches and hand over any additional documents (if located) following a specific request from your clients.

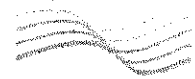
If your clients are of the view that certain categories of documents of the Fund have not been provided to them, please let us know (with specificity) the relevant documents so that we may raise the matter with our clients for instructions and revert to you.

Yours faithfully



Ashley Tiplady
Partner

Direct (07) 3004 8833
Mobile 0419 727 626
ATiplady@RussellsLaw.com.au



KordaMentha

8 July 2013

Ms Kelly-Anne Trenfield
Senior Managing Director
FTI Consulting
22 Market Street
Brisbane Qld 4000

By email: Kelly-Anne.Trenfield@fticonsulting.com

Dear Kelly-Anne

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

We refer to various prior correspondences pertaining to our requests for all books and records of the Fund to be provided by the former trustee, LM Investment Management Limited (Administrators Appointed) ("LMIM").

Although we maintain that the onus of delivery of the Fund's books and records remains on LMIM, to assist with the identification of specific items that we have observed are yet to be provided, we provide the following list of items; you will note that some of the items listed below have previously been requested but remain outstanding.

Property / Loans (pertaining to all loans of Fund)

- All feasibility models for all projects (excluding Maddison Estate Pty Ltd, Peregrine Beach Pty Ltd and The Lifestyle Investment Company Pty Ltd).
- All feasibility review work papers for all projects (excluding Maddison Estate Pty Ltd, The Lifestyle Investment Company Pty Ltd).
- Contact of sales for the all projects.
- Updated pre-sales schedules for all projects.
- Documents supporting all loan drawdowns made on all loans (excluding Peregrine Beach Pty Ltd - *post January 2012*, Tall Trees Mandurah Pty Ltd, Maddison Estate Pty Ltd - *post July 2012*).
- Authority matrix pertaining to approving draw requests for all borrowers.
- All correspondence (letters, emails, faxes) with, including but not limited to; banks, lawyers, valuers and auditors, pertaining to the value of MPF's loans.

Meetings and Corporate Governance

- All Board meeting minutes from 1 January 2003.

Corporate Recovery Services
Turnaround & Restructuring Services
Real Estate Advisory
Forensics

info@kordamentha.com
www.kordamentha.com

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Standards Legislation

Brisbane

KordaMentha Pty Ltd
ACN 100 169 391
Level 14, 12 Creek Street
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Office: 07 3338 0222
Fax: 07 3338 0298

Offices

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Gold Coast
Melbourne
New Zealand
Perth
Singapore
Sydney
Townsville

Cooperation with AlixPartners

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

- Investment Committee meeting minutes from 1 January 2003 (excluding Peter Drake Loan).
- Credit Committee meeting minutes for the initial approval of all loans from 1 January 2003 (excluding Aalto Apartments Pty Ltd).
- Credit Committee meeting minutes for all variations and changes to priority of all loan facilities from 1 January 2003 (excluding Peter Drake Loan, AIIS Pty Ltd, Aalto Apartments Pty Ltd, LM Capalaba Pty Ltd, Ekhard Property Trust, Tall Trees Mandurah Pty Ltd, 457-459 Lygon Street Pty Ltd).
- Risk Committee meeting minutes (excluding Peter Drake Loan).
- Legal advice pertaining to related party transactions that were paid for and/or instructed by LMIM in its capacity as trustee or manager of the Fund from 1 January 2003 (related parties refers to: Peter Drake, Ekhard Property Trust, The Lifestyle Investment Company Pty Ltd, Maddison Estate Pty Ltd, LM Capalaba Pty Ltd).
- Copy of the MPF Lending Policy (referred to in Credit Committee minutes).
- Copy of the LM Conflict Register (referred to in Credit Committee minutes).
- LM Group Annual board meeting minutes where the Fund was discussed directly or indirectly.

Accounting

- Access to the following financial systems, if access is not possible than we request to be provided with a working copy¹ of the virtual servers that contain the following financial systems;
 - Dynamics AX 2009 (Current financial system); and
 - Composer Funds Management System (Legacy system).
- All bank statements since the Fund's commencement 1 January 2003 and their reconciliations.
- All work papers pertaining to all lodgements with the Australian Taxation Office (including Business Activity Statements, Income Tax Returns) from 1 January 2003
- All work papers pertaining to tax decisions made by the Fund from 1 January 2003
- Internal audit policy.
- Foreign Currency Policy.
- Details of all payments made to the Fund from other LM Group funds.
- Documented decisions pertaining to the engagement of WPIAS as auditors of the Fund.

Electronic

- Access to the following email systems, (in particular employee email data/accounts, investor email data/accounts and group email data/accounts) for the purpose of being able to review and analyse recorded data within the email environments relating to Fund, if access is not possible than we request to be provided with a working copy² of the virtual servers that contain the following email systems;
 - Microsoft Exchange Server; and
 - Commvault Backup Server.
- Listing of all machines in the possession of LMA staff that worked on the Fund.

General

- Copies of promotional material for the Fund including but not limited to;

¹ A working copy of the virtual server means that the copy provided to KordaMentha will operate normally outside of the current LMI environment allowing KordaMentha to access the financial data to perform review and analysis of the content.

² A working copy of the virtual server means that the copy provided to KordaMentha will operate normally outside of the current LMI environment allowing KordaMentha to access the email data (including attachments) to perform review and analysis of the content.

- Product Disclosure Statements;
- Information Memorandum or Fund Profile; and
- Financial Services Guides.
- All financial advisor agreements that were engaged directly or indirectly to the Fund or on behalf of the Fund by the former trustee.
- Compliant register.
- Terms of trade or contracts with all Foreign Exchange brokers.

Forensic process for electronic data

Due to the nature of our inquiries and appointment as Trustee of MPF, KordaMentha requires that any electronic data provided has been captured in a forensic manner.

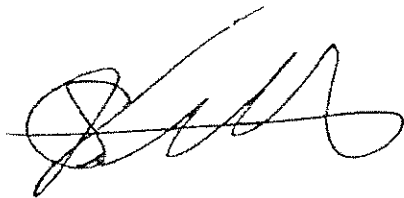
Any data provided to KordaMentha as part of this request (whether based on the prior collection completed by FTI or a new collection) requires that FTI also provide the following where present;

1. Any tool/application log file to support the capture/copying process used.
2. Any documentation to outline the size of the backup captured compared to the size of the original virtual machine.
3. Any notes taken in relation to the accuracy of the virtual machine times.
4. Any hash values for the VDMK files captured.
5. Chain of custody documentation.
6. Any other documentation to support the methodology used.

As you would appreciate, the majority of the material requested above, are those necessarily required to operate the Fund and review the Fund's prior activities. It is imperative that the above documents are provided to the Trustee as a matter of priority. We request that you respond to this correspondence by 12 July 2013 providing details of when the above information will be available.

If you have any queries regarding the above please contact David Johnstone of my office on (07) 3338 0283.

Yours sincerely



Simon Vertullo
Partner
For and on behalf of the Joint Trustee of the Fund

17 July 2013

John Park
FTI Consulting
22 Market Street
Brisbane Qld 4000

By email: Kelly-Anne.Trenfield@fticonsulting.com
Christine.Alterator@fticonsulting.com

Dear John

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

I refer to your correspondence of 12 July 2013 ('the Letter').

As you are aware the obligation to provide all books and records to the Trustees of the Fund resides with the former trustee, our initial request to provide this information was made on 15 April 2013 ('Original Request').

Since the date of our Original Request we have received some books and records of the Fund. However, contrary to previous communications from the former trustee where it has been stated that all books and records have been provided, a considerable amount of information remains outstanding. This outstanding information is pertinent to the Trustees' role and responsibilities.

Given our Original Request was made over three months ago we are unwilling to accept your advice in the Letter that the provision of information outlined in our letter dated 8 July 2013 ('Recent Request') "*may take some time*". Therefore we ask that all 'high priority' information and access requests detailed below is provided/facilitated by close of business on Friday, 19 July 2013. Other information and access is requested to be provided by 26 July 2013.

Whilst we believe our Recent Request clearly outlined specific information required and notwithstanding the former trustee's obligation to provide all books and records, we provide the following in response to the Letter and request that the below be read in conjunction with our Recent Request.

Property / Loans (pertaining to all loans of Fund)

All feasibility models and work papers for all projects (excluding Maddison Estate Pty Ltd, Peregrine Beach Pty Ltd and The Lifestyle Investment Company Pty Ltd)

- This includes all feasibility models and work papers of all projects since the commencement of the Fund excluding those specifically excluded above.

Corporate Recovery Services Turnaround & Restructuring Services Real Estate Advisory Forensics	Brisbane	Offices		Cooperation with AlixPartners	
info@kordamentha.com www.kordamentha.com	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	Adelaide Brisbane Gold Coast Melbourne New Zealand	Perth Singapore Sydney Townsville	Chicago Dallas Detroit Düsseldorf London Los Angeles Milan	Munich New York Paris San Francisco Shanghai Tokyo Washington, DC
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- We also confirm that all completed projects are to be provided as they are considered within the definition of 'all books and records of the Fund'.
- We confirm that all information pertaining to current projects are of a high priority.

Contract of sales for the all projects

- We confirm that all completed projects are to be provided as they are considered within the definition of 'all books and records of the Fund'.
- We confirm that all information pertaining to current projects are of a high priority.

All correspondence (letters, emails, faxes) with, including but not limited to; banks, lawyers, valuers and auditors, pertaining to the value of MPF's loans

- We confirm that all completed projects are to be provided as they are considered within the definition of 'all books and records of the Fund'.
- We confirm that all information pertaining to current projects are of a high priority.

Meetings and Corporate Governance

- Our request includes from the commencement of the Fund:
 - All meeting minutes of the Fund's Board.
 - All meeting minutes of the Fund's Investment Committee.
 - All meeting minutes of the Fund's Credit Committee.
 - All meeting minutes of the Fund's Risk Committee.
 - The Fund's Lending Policy.
 - The Fund's Conflict Register.
- We are cognisant that such boards, committees, policies and registers may be known by variations to the above descriptions but with a similar function. Obviously, even with variations to the descriptions, the relevant information still needs to be provided.
- We confirm that all information from 2008 onwards is of a high priority.

Accounting

Access to Financial Systems

- Our request for all financial information relating to the Fund from both the Dynamic AX 2009 and Composer Fund Management systems remains. The financial information of the Fund is integral to the Trustees' role and responsibilities to the Fund and our ability to comply with the Trustees' duties is directly impeded by the non-provision of this information.
- The fact that the financial information of the Fund is comingled with information which may not directly relate to the Fund is a matter for the former trustee to resolve. Notwithstanding this, as you refer to in your letter, the Trustees previously put to the former trustee on 18 June 2013 an option to assist in the transfer of this information which was unacceptable to you and no alternate strategy was proposed. If you wish to sign the Confidentiality Deed provided then the Trustees are willing to comply with the terms of the Deed.
- As previously stated the onus to transfer all information of the Fund is that of the former trustee.
- We note your query in relation to whether the Trustees hold the appropriate licences to manage and utilise the financial information. In this regard the Trustees consider this to be a matter for the Trustees to ensure compliance and is not a concern of the former trustee.
- We confirm that this is a matter of high priority.

Internal Audit Policy

- The Fund should have one Internal Audit Policy, should this policy be updated from time to time, it remains the relevant policy. I request you provide the current Internal Audit Policy and any other policy document that the current document supersedes since the commencement of the Fund.
- Should you be of the view that there is more than one Internal Audit Policy, please provide me with all policies in your possession or control.

Foreign Currency Policy

- The Fund should have one Foreign Currency Policy, should this policy be updated from time to time, it remains the relevant policy. I request you provide the current Foreign Currency Policy and any other policy document that the current document supersedes since the commencement of the Fund.
- Should you be of the view that there is more than one Foreign Currency Policy, please provide me with all policies in your possession or control.

Electronic Information

Email Systems

- As discussed above, the comingling of information which may not directly relate to the Fund is a matter for the former trustee to resolve, in this regard the Trustees have previously put to the former trustee an option to assist in the transfer of this information which was unacceptable to you. As outlined above if you wish to sign the Confidentiality Deed provided then the Trustees are willing to comply with the terms of the Deed.
- As previously stated the onus to transfer all information of the Fund is that of the former trustee which the Trustee is yet to receive.

Information Technology Equipment

- This information has previously been requested from your forensic technology division.
- A 'machine' is a desktop computer, laptop computer, server, back up storage systems, any smartphone/mobile device and all other portable electronic storage devices including but not limited to external hard drives and USB thumb drives.
- Please provide a listing of all 'machines' as defined above under the control of LMIM or LMA and which were utilised in the management of the Fund as at the date of your appointment, being 19 March 2013.

General

Copies of promotional material for the Fund

- The relevant period is from the commencement of the Fund.

Terms of trade or contracts with all foreign exchange brokers

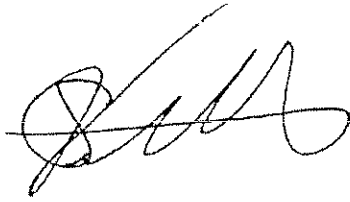
- The relevant period is from the commencement of the Fund.

Costs

- As previously agreed, the Trustees agree to pay all reasonable costs of LMA and LMIM staff for transitioning this information. Please provide us with an estimate and the Trustees will confirm whether the costs proposed are acceptable.

If the above has failed to clarify our position, to avoid further and unnecessary delays, we request that you contact David Johnstone of my office on (07) 3338 0283 to discuss any queries.

Yours sincerely

A handwritten signature in black ink, appearing to be 'S. Vertullo', with a large, stylized initial 'S' and a long, sweeping horizontal stroke at the end.

Simon Vertullo

Partner

For and on behalf of the Joint Trustee of the Fund

RUSSELLS

19 August, 2013

Our Ref: Mr Tiplady
Your Ref: MJV:DOB407735740

EMAIL TRANSMISSION

Mr Michael Vickery
Minter Ellison
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000

email: Michael.Vickery@minterellison.com

Dear Colleagues

**KordaMentha and Calibre Capital Limited as trustees of the LM
Managed Performance Fund ("MPF")
LM Investment Management Limited (in liquidation) ("LMIM") as
Responsible Entity of Australian Income Fund – Currency Protected
("AIF-CP")
Peregian Beach Pty Ltd ("Peregian") Conflict Claim**

We refer to our letter of 5 July, 2013. Please let us know if you see any utility in meeting with a view to refining the concerns that have been raised by your clients.

On our review of the material relevant to the issues that have been raised by your clients, it appears to us as though:

- a) MPF was always intended to be a second mortgagee on this particular development (see MPF synopsis and loan approval documents);
- b) the first mortgage in favour of Stockland North Lakes Pty Ltd ("Stockland") had its origins in the Deed of Variation of Contract dated 22 December, 2012, whereby the Vendor agreed to provide Vendor finance on part of the purchase price in return for registered first mortgage security over the land;
- c) the loan agreement dated 26 June, 2010 between Peregian Beach Pty Ltd and MPF ("the Loan Agreement") provided for security for the loan as being a first registered deed of charge over Peregian Beach Pty Ltd, a first registered deed of charge over Glenside Group (Qld) Pty Ltd and certain guarantees by various third parties, including Mr David Hawes, Lot 111 Pty Ltd, Glenside Group (Qld) Pty Ltd and Green Square Property Development Corporation Pty Ltd.

The initial funds drawn down from the funds available under the Loan Agreement was not to settle the purchase of the subject land but rather to finance soft costs, including development application

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Brisbane Sydney

Principal Place: 1101, Brisbane QLD 4000 • Minter Ellison Level 21, 300 Queen Street, Brisbane QLD 4000
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ABN 94 191 991 000 111 000 000

costs (including consultants). Accordingly, as the contract of sale for the subject land had not settled at the time of the initial draw down of the loan, there was no ability for first mortgage security to be taken; rather, MPF's security was (in addition to those positions detailed above) in effect a first ranking fixed and floating charge over the purchasing entity under the land acquisition contract and hence the borrower's interest in that contract.

As such, whilst it may have been that subsequent draw downs on the loan were intended to finance the acquisition of the land, such funding was always eventually to be secured by a second ranking mortgage, with the funder of the construction costs to hold priority security;

- d) following settlement of the land acquisition, which was facilitated by the 22 December, 2011 Deed of Variation to Contract:
- (i) Stockland held first registered mortgage over the land (registered 22 December, 2011); and
 - (ii) MPF second registered mortgage over the land (registered 23 December, 2011).
- (c) when AIF provided the necessary funding to complete the land acquisition on or about 18 July, 2012, the Stockland mortgage was released and a mortgage in favour of the Trust Company (PTAL) Limited (held on behalf of AIF – CP) was registered. On 25 June, 2012 a deed of priority in favour of AIF-CP was entered into regarding the mortgage securities arising from the advances made by AIF-CP and MPF respectively.

A historical title search for Lot 74 on SP236546 illustrates the registration date of these two mortgages is as detailed above. As such, it is incorrect to say that MPF's first registered mortgage was 'trumped' by a subsequent mortgage in favour of Stockland. Stockland held first registered mortgage over the subject land, given the vendor financing arrangement which was in place. From our review of the records held, it would seem that the vendor financing arrangements were prompted by apparent cashflow difficulties within MPF at the time such that there was not available within MPF funds to settle the land transaction.

Further, it would seem that upon settlement of the land acquisition contract, as MPF had limited funds, AIF-CP stepped in to payout the Stockland vendor finance amount and, in effect, stepped into Stockland's shoes as first mortgagee. This was anticipated to be for a short period of time (6 – 12 months) until construction finance was able to be obtained, at which time that financier would become first registered mortgagee.

Against this background we fail to see why it is that you say any conduct by LMIM is actionable. Perhaps you might more fully outline your clients' concerns against this factual background and let us know if you believe that a meeting would be beneficial.

It seems to us that the position is plainly that the registered mortgages exist with clear priority and that if your clients wish to allege any wrongful conduct by LMIM that is an issue that sounds against LMIM at a corporate level (being conduct prior to the appointment of the administrators (now liquidators)) as opposed to fund level.

Hence, it seems to us that any sale proceeds ought properly flow through to the relevant fund pursuant to the mortgage securities held. If you believe otherwise, please let us know on what basis.

Yours faithfully



Ashley Tiplady
Partner

Direct (07) 3004 8833
Mobile 0419 727 626
ATiplady@RussellsLaw.com.au

19 August 2013

LEVEL 22 WATERFRONT PLACE 1 EAGLE STREET BRISBANE
PO BOX 7844 WATERFRONT PLACE QLD 4001 AUSTRALIA
DX 102 BRISBANE www.minterellison.com
T +61 7 3119 6000 F +61 7 3119 1000

BY EMAIL

URGENT

Mr Ashley Tiplady
Partner
Russells
GPO Box 1402
BRISBANE QLD 4001

Dear Mr Tiplady

**KordaMentha and Calibre Capital Limited as trustees of the LM Management
Performance Fund (MPF)
LM Investment Management Limited (in liquidation) (LMIM) as Responsible Entity of
Australian Income Fund - Currency Protected (AIF-CP)
Peregrine Beach Pty Ltd (Peregrine)**

We refer to your letter dated 19 August 2013.

In your letter you refer to a number of documents that we do not have access to, namely:

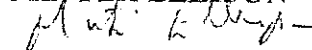
1. 'MPF Synopsis and loan approval documents';
2. 'contract of sale for the subject land';
3. 'records' that suggest that 'the vendor financing arrangements were prompted by apparent cash flow difficulties with MPF at the time';
4. 'the land acquisition contract'.

Please would you urgently provide us with these documents, all of which appear to be books and records of the MPF trust which our client has previously requested.

Once we have the opportunity to consider the abovementioned documents, we will let you know if there is any utility in a meeting to discuss our client Trustees' concerns.

Yours faithfully

MINTER ELLISON



Contact: David O'Brien Direct phone: +61 7 3119 6519 Direct fax: +61 7 3119 1519
Email: david.o'brien@minterellison.com
Our reference: DOB 40-7744031

MINTER ELLISON GROUP AND ASSOCIATED OFFICES

ADELAIDE AUCKLAND BEIJING BRISBANE CANBERRA DARWIN GOLD COAST HONG KONG
LONDON MELBOURNE PERTH SHANGHAI SYDNEY ULAANBAATAR WELLINGTON

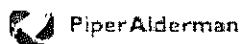
Amy Sargent

From: Davina Holland on behalf of Amanda Banton
Sent: Thursday, 20 June 2013 12:34 PM
To: luke.bona@au.kwm.com
Cc: Amanda Banton; jnewby@thetrustcompany.com.au
Subject: *KordaMentha Pty Ltd & Calibre Capital Limited ATF LM Managed Performance Fund - Claim by Administrators of LM Investment Management Limited on "MPF KPG Controller Account"
Attachments: letter & encl.pdf

Please find attached our letter dated 20 June 2013 together with enclosures.

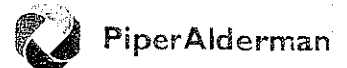
Kind regards

Amanda Banton
Partner | Piper Alderman



t +61 2 9253 9929 | m +61 424 156 859 | f +61 2 9253 9900
abanton@piperalderman.com.au | www.piperalderman.com.au

Our Ref: AKB.384382
Your Ref:



20 June 2013

By Email: luke.bona@au.kwm.com
Original forwarded by Post

King Wood Mallesons
Solicitors
Level 33, Waterfront Place
BRISBANE QLD 4000

Attention: Mr. Luke Bona

Dear Sir

Korda Mentha Pty Ltd and Calibre Capital Limited atf LM Managed Performance Fund - Claim by Administrators of LM Investment Management Limited (Administrators Appointed) on "MPF KPG Controller Account"

We refer to your email to the writer on 7 June 2013 and to our letter of 14 June 2013.

We are continuing to review documents in relation to the agreements relating to the assets controlled by Trust Company (PTAL) Limited (**Trust Co.**) on behalf of the LM Managed Performance Fund (**MPF**) and, in particular, the circumstances surrounding the entry into the 'AIF-CP and MPF Security Trust' Deed, on 28 December 2011 (**Trust Deed**).

Whilst your client may have an entitlement to monies held by the 'AIF-CP and MPF Security Trust', pursuant to clause 3.1 of the Trust Deed, there are a number of issues that we are required to investigate, before confirming that our clients have no entitlement to the monies.

In that regard, it is not immediately apparent from our review of the material provided to us in this matter, the reasons why;

1. On or about 28 August 2008, Permanent Trustee Australia Ltd (as custodian for the LM First Mortgage Income Fund) (**LMIF**) assigned to MPF all of the security property of Barly Wood Pty Ltd (formerly known as KPG 13th Beach stage 1 Pty Ltd)(**Barly Wood**) and further assigned to MPF the significant debts owed by Barly Wood to LMIF (**2008 Assignment**); and
2. LM Investment Management Ltd (as responsible entity for the LM Australia Income Fund – Currency Protected) (**AIF Trustee**) and LM Investment Management Limited (as trustee for the LM Managed Performance Fund) (**MPF Trustee**) entered into the Trust Deed, in circumstances where;

Lawyers

Sydney . Melbourne
Brisbane . Adelaide

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Australia

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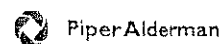
Partner:

Amanda Banton
t +61 2 9253 9929
abanton@piperalderman.com.au

Contact:

Amanda Banton
Partner
t +61 2 9253 9929
abanton@piperalderman.com.au

To: King Wood Mälesons
Date: 20 June 2013
Our Ref: AKB.384382
Page: 2



- 2.1 Trust Co. assumed complete control of the Barly Wood Securities from MPF (however held it on trust jointly for MPF and AIF);
- 2.2 MPF was only entitled to receive consideration of \$3,933,750.00 (pursuant to clause 3.3 of the Trust Deed) as a result of its having assigned all of its control of the Barly Wood Securities to Trust Co.;
- 2.3 AIF was entitled to receive payment of \$59,006.26 for its participation in the funding of loans of MPF to Barly Wood (pursuant to clause 2.6(c) of the Trust Deed);
- 2.4 AIF took a first priority right of interest in respect of the joint 'AIF-CP and MPF Security Trust' property and monies (by operation and effect of clause 3.1 of the Trust Deed); and
- 2.5 AIF was entitled to receive from MPF a guaranteed interest return of 14.5% per annum, on the total unpaid value of the Barly Wood loans facility (for the duration of the loan, pursuant to clause 3.4(b) of the Trust Deed).

Our presently held view is that each of the above transactions may have been undertaken in breach of trust by LMIM and that our client maybe entitled to those monies.

In order for us to fully understand the agreements between LMIF/MPF and AIF/MPF, we require copies of documents that evidence the reasons for the entry into the Trust Deed and the 2008 Assignment. In that regard, our client requested on Tuesday 18 June 2013 that FTI Consulting provide it with those further materials. A copy of that email is **enclosed** for your reference. Our client was informed by the representatives for FTI Consulting that the documents requested could not be immediately produced. A copy of that email is also **enclosed**.

Until such time as the abovementioned documents are provided, and sufficient time provided for us to consider those documents, we request that your client agree that the Security Trustee, Trust Co. or the AIF Trustee or any other party does not deal with the trust funds.

Please confirm that you agree to the above course by 4:00pm on Thursday 20 June 2013, failing which we reserve our client's rights to seek to injunct the monies.

Yours faithfully
Piper Alderman

Per:

A handwritten signature in black ink, appearing to read "A Banton", written over a horizontal line.

Amanda Banton
Partner

Enclosure: Email from David Johnstone to Kelly Trenfield dated 18 June 2013
Email from Kelly-Ann Trenfield to David Johnstone dated 18 June 2013

Copied To: Head of Property & Infrastructure Custody Services
The Trust Company (PTAL) Limited
GPO Box 4270
SYDNEY NSW 2001
Attention John Newby
email: jnewby@thetrustcompany.com.au

Mitchell Coidan

From: Mitchell Coidan
Sent: Tuesday, 18 June 2013 2:45 PM
To: Mitchell Coidan
Subject: FW: LM Managed Performance Fund | Barly Wood
Importance: High

From: David Johnstone
Sent: Tuesday, 18 June 2013 1:50 PM
To: 'kelly.trenfield@fticonsulting.com'
Cc: Jarrod Villani
Subject: LM Managed Performance Fund | Barly Wood
Importance: High

Kelly

I refer to the correspondence issued by King & Wood Mailesons to The Trust Company (PTAL) Limited on your behalf as Voluntary Administrators of LM Investment Management Limited as responsible entity for the LM Australian Income Fund.

In order to progress the matters addressed in the above correspondence, we require the provision of the following documents:

- Details regarding the assignment of property and securities by Permanent Trustee Australia Ltd (as custodian for LMIF) to LMIM (as the responsible entity for LMPF) and subsequent entry into the Deed of Assignment between them on 28/08/2008;
- Details evidencing the decisions regarding the entry into the Trust Deed dated 28/11/2011 and provisions of the \$3.933 million facility (AIF Facility), between AIF and LMIM; and
- Details evidencing the decisions regarding the assignment of the securities of the AIF Facility to The Trust Company Limited and subsequent entry into the Deed of Assignment (Between LMIM, dated 29/11/2011).

Documents which deal with the above may include but not limited to:

- Email communications between the decision makers.
- File notes / memoranda considering the transaction.
- Meeting minutes or the board, investment committee, risk committee etc.

The documents which have been provided to date to not contain the above.

Thank you in advance.

Regards,
David

David Johnstone | Senior Executive Analyst
KordaMentha | Level 14, 12 Creek Street, Brisbane QLD 4000
t +61 7 3338 0283 | m +61 402 723 866
e djohnstone@kordamentha.com | w www.kordamentha.com

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Mitchell Coidan

From: Mitchell Coidan
Sent: Thursday, 20 June 2013 9:37 AM
To: Mitchell Coidan
Subject: FW: LM Managed Performance Fund | Barly Wood

From: Trenfield, Kelly-Anne [<mailto:Kelly-Anne.Trenfield@fticonsulting.com>]
Sent: Wednesday, 19 June 2013 11:14 AM
To: David Johnstone
Cc: Jarrod Villani
Subject: RE: LM Managed Performance Fund | Barly Wood

Hello David

I passed your request onto the relevant staff at LM yesterday. They are however in the midst of facilitating a large distribution to investors on another fund and as such may not be able to attend to this request immediately.

Regards
Kelly

Kelly Trenfield
Senior Managing Director
Corporate Finance/Restructuring

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From: David Johnstone [<mailto:djohnstone@kordamentha.com>]
Sent: Tuesday, 18 June 2013 1:50 PM
To: Trenfield, Kelly-Anne
Cc: Jarrod Villani
Subject: LM Managed Performance Fund | Barly Wood
Importance: High

Kelly

I refer to the correspondence issued by King & Wood Mallesons to The Trust Company (PTAL) Limited on your behalf as Voluntary Administrators of LM Investment Management Limited as responsible entity for the LM Australian Income Fund.

In order to progress the matters addressed in the above correspondence, we require the provision of the following documents:

- Details regarding the assignment of property and securities by Permanent Trustee Australia Ltd (as custodian for LMIF) to LMIM (as the responsible entity for LMPF) and subsequent entry into the Deed of Assignment between them on 28/08/2008;

- Details evidencing the decisions regarding the entry into the Trust Deed dated 28/11/2011 and provisions of the \$3.933 million facility (**AIF Facility**), between AIF and LMIM; and
- Details evidencing the decisions regarding the assignment of the securities of the AIF Facility to The Trust Company Limited and subsequent entry into the Deed of Assignment (Between LMIM, dated 29/11/2011).

Documents which deal with the above may include but not limited to:

- Email communications between the decision makers.
- File notes / memoranda considering the transaction.
- Meeting minutes or the board, investment committee, risk committee etc.

The documents which have been provided to date to not contain the above.

Thank you in advance.

Regards,
David

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Amy Sargent

From: Lisa Tessier on behalf of Amanda Banton
Sent: Thursday, 25 July 2013 9:21 AM
To: luke.bona@au.kwm.com
Cc: Amanda Banton; Steven Faulkner; jnewby@thetrustcompany.com.au
Subject: *Korda Mentha Pty Ltd and Calibre Capital Limited aff LM Managed Performance Fund
Attachments: Letter Mallesons 25.7.13.pdf

Please find attached our letter dated 25 July 2013.

Kind regards

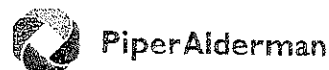
Amanda Banton
Partner | Piper Alderman



Piper Alderman

t +61 2 9253 9929 | m +61 424 156 859 | f +61 2 9253 9900
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Our Ref: AKB.384382
Your Ref



25 July 2013

By Email: luke.bona@au.kwm.com
Original forwarded by Post

King Wood Mallesons
Solicitors
Level 33, Waterfront Place
BRISBANE QLD 4000

Attention: Mr. Luke Bona

Dear Sir

Korda Mentha Pty Ltd and Calibre Capital Limited atf LM Managed Performance Fund - Claim by Administrators of LM Investment Management Limited (Administrators Appointed) on "MPF KPG Controller Account"

We refer to your emails of 7 June 2013 and 20 June 2013, and to our letters of 14 June 2013 and 20 June 2013.

We are concerned by your client's attitude to the issues we have now raised on several occasions regarding the conduct of LM Investment Management Limited (LMIM) in respect of the LM Managed Performance Fund (MPF), and by its continued requests to the Trust Company (PTAL) Limited (Trust Co.) to urgently distribute trust funds to LMIM as responsible entity for the Australia Income Fund (AIF). Please explain the urgency behind your clients request for those funds.

In this letter, save where the context is to the contrary, a reference to AIF is a reference to LMIM in its capacity as responsible entity for the AIF and a reference to MPF is a reference to LMIM in its capacity as trustee for the MPF.

In response to your email dated 20 June 2013;

1. We have never asserted that the AIF is "entitled" to the monies held by the Trust Co. As you are aware, those funds are held for the benefit of both the AIF and the MPF. We merely acknowledge that, if the Trust Deed is valid, then the terms of Clause 3.1 of the 'AIF-CP and MPF Security Trust' Deed (Trust Deed) appear to give AIF a first priority interest over the funds of the Facility, as AIF is entitled to direct Trust Co. in accordance with the Trust Deed, whilst there is any amount outstanding to AIF under the facility. We discuss the issues in relation to the Trust Deed and the priorities under the Trust Deed, below.

Lawyers

Sydney • Melbourne
Brisbane • Adelaide

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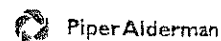
Partner:

Amanda Banton
T +61 2 9253 9929
abanton@piperalderman.com.au

Contact:

Amanda Banton
Partner
T +61 2 9253 9929
abanton@piperalderman.com.au

To: King Wood Mallesons
Date: 25 July 2013
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2. We have not yet been able to determine the validity, or otherwise, of the entry by LMIM (as the responsible entity for the AIF and trustee for MPF) into the Trust Deed on behalf of MPF and AIF. It is not clear, on the limited materials available to us, what the reasons were for the entry into the Trust Deed (and subsequent payment by AIF of the \$3,933,750 to MPF) on the terms stated in the Trust Deed. It is also not clear what necessitated the assignment of all of the Barly Wood debt to MPF in August 2008.

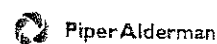
The Terms of the Trust Deed

3. Leaving aside arguments about breach of trust (which are discussed below), we do not accept that AIF is entitled to the moneys held by Trust Co. as trustee for the AIF-CP and MPF Security Trust.
4. To the extent that you have the power to direct Trust Co. pursuant to Clause 3.1 of the Trust Deed, your directions must be in accordance with the Trust Deed.
5. The MPF has a first priority right for the repayment of interest due under the Barly Wood loans facility pursuant to the terms of the Trust Deed. Clause 3.5 of the Trust Deed provides that, subject to Clause 3.4(c), amounts payable by any Transaction Party (defined under the Trust Deed to include Barly Wood, any Security Provider or Guarantor) and received by the AIF, the MPF or Trust Co. must be paid in accordance with Clause 6.1. Relevantly, Clause 3.4(c) provides that *"in consideration of the Second Fund [MPF] paying the interest that is referred to in clause 3.4(b) to the First Fund [AIF], the Second Fund [MPF] will be entitled to receive all interest that is payable under the Facility by a Transaction Party."*
6. It is clear that, pursuant to Clause 3.4(c), the MPF has a first priority right for the repayment of interest due under the Barly Wood loans facility by any of those Transaction Parties. In those circumstances MPF is entitled to repayment of interest paid to AIF.
7. We are instructed that the total interest paid by the Transaction Parties is a minimum of \$314,312.01. It follows that MPF is entitled to those monies.

Breaches of Trust

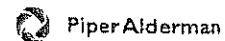
8. We do not agree with your assertions that, *prima facie*, we do not have sufficient grounds to seek injunctive relief from the Court. In our letter to you dated 20 June 2013, we have provided sufficient basis to at least give rise to a suspicion of breaches of trust by your client.
9. Furthermore, despite our clients previously having raised those concerns (in our letters to you of 14 June 2013 and 20 June 2013), you have failed to respond to any of the assertions we have made regarding the conduct of your client.
10. To be clear, the current basis for our contentions that your client has engaged in breaches of trust and that the Trust Deed itself may be unenforceable or invalid are borne out by the following facts and matters:

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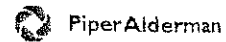
- 10.1 On or about 28 August 2008, Permanent Trustee Australia Ltd (as custodian for the LM First Mortgage Income Fund) (**LMIF**) assigned to MPF all of the security held over property of Barly Wood Pty Ltd (formerly known as KPG 13th Beach Stage 1 Pty Ltd) (**Barly Wood**). LMIF further assigned to MPF all of the significant debts owed by Barly Wood to LMIF (**2008 Assignment**).
- 10.2 As a result of those arrangements, Barly Wood owed MPF \$9,072,899.00 on or about 28 August 2008.
- 10.3 At the date of the assignment, Barly Wood was under external administration.
- 10.4 We note that the repayment date for the debt by MPF to LMIF was extended by variations to the 2008 Assignment (by Deeds of Variation) on 12 December 2008, 28 August 2009 and 30 November 2010.
- 10.5 On or about 28 December 2011, LM Investment Management Ltd (as responsible entity for the LM Australia Income Fund – Currency Protected) and LM Investment Management Limited (as trustee for the LM Managed Performance Fund) entered into the Trust Deed.
- 10.6 We note that as at 28 December 2011, Barly Wood owed the MPF approximately \$7,528,114.03.
11. Relevantly, the Trust Deed provided, *inter alia*, that:
 - 11.1 The MPF was required to make a once-only payment of \$59,006.25 to AIF for its participation in the funding of loans by AIF and MPF to Barly Wood (pursuant to Clause 2.6(c));
 - 11.2 The AIF paid MPF the sum of \$3,933,750.00 on 29 December 2011 (pursuant to Clause 3.3), which represented 52.3% of the total amount owed by Barly Wood to MPF as at 28 December 2011. With the limited information currently available to the Trustees, we are unable to confirm whether or not any monies have physically been transferred from AIF to the MPF, therefore we cannot say the real extent of any benefit, if any provided to the MPF in this regard;
 - 11.3 AIF and MPF agreed that AIF's contribution would not exceed seventy five percent (75%) of the market value of the Secured Property (**LVR**) (pursuant to Clause 2.7(a)). In the event that AIF's contribution exceeded 75% of the market value, the MPF agreed to pay an amount to AIF sufficient to ensure that AIF's contribution did not exceed 75% (pursuant to Clause 2.7(c));
 - 11.4 AIF was to be paid by MPF a guaranteed interest return of 14.5% per annum, on the total unpaid value of the Barly Wood loan facility (for the duration of the loan) (pursuant to Clause 3.4(b));

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- 11.5 MPF surrendered its control of all the Barly Wood securities to AIF, as Clause 3.1 exclusively entitles AIF to direct Trust Co. in relation to any monies outstanding in respect of the facility. Accordingly, MPF relinquished a first priority right to the monies as the AIF was entitled to first priority in respect of the AIF/MPF Trust monies.
12. In summary, on the limited information that we currently have available to us, it appears that the commercial context of the Trust Deed was as follows:
- 12.1 At the time the Trust Deed was entered into (28 December 2011), Barly Wood had a Controller appointed and was unable to service the loan to MPF;
- 12.2 Accordingly, MPF was entitled to enforce its securities over Barly Wood;
- 12.3 Instead, MPF effectively procured a new financier, AIF, who appears to have assumed \$3,933,750.00 of the debt owed by Barly Wood. In this regard, we note our comments at the second sentence in paragraph 11.2;
- 12.4 Under the terms of the Trust Deed, MPF:
- (a) paid \$59,006.25 to AIF without obtaining any rights of recourse against Barly Wood;
 - (b) guaranteed interest payments of 14.5% to AIF;
 - (c) surrendered its first mortgage security for the balance of the debt;
 - (d) guaranteed AIF's LVR such that MPF adopted the risk of any default in LVR (in circumstances where MPF surrendered its first mortgage security to AIF); and
 - (e) surrendered control over the Secured Property by allowing AIF to direct Trust Co in respect of any monies outstanding in respect of the facility.
13. We assert that by entering into the Trust Deed on behalf of the MPF, LMIM, *inter alia*:
- 13.1 failed to exercise the care, diligence and skill that a prudent professional trustee would have exercised in managing the affairs of the MPF; and
- 13.2 breached its duty to preserve the value of trust property in respect of the MPF,
- because, for the reasons set out above, particularly those in paragraph 12.4, the commercial arrangements were unfavourable to the MPF. In the circumstances, a prudent trustee of the MPF would not have entered the Trust Deed on its terms. Rather, a prudent trustee would have enforced its securities over Barly Wood.

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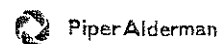


14. The relevant Information Memorandum for the MPF at the time (dated 25 November 2009) provided that *"If a borrower is late in effecting an interest payment or otherwise is in default, appropriate action is taken [by the Manager] to protect the interests of investors."* On the limited information available to us, there appears to be nothing to suggest that LMIM took *"appropriate action"* to protect the interests of investors of the MPF in respect of the Barly Wood loan facility.
15. Moreover, the arrangements appear to provide substantial benefits to AIF (for the reasons set out in paragraph 12.4). In this regard, LMIM appears to have breached its fiduciary duty to MPF as it preferred the interests of AIF to MPF in entering into the Trust Deed.
16. These matters amount to a breach of trust notwithstanding that MPF itself was entitled to receive all interest payable under the Barly Wood loans facility by any Transaction Party (defined under the Trust Deed to include Barly Wood, any Security Provider or Guarantor) under that facility (pursuant to Clause 3.4(c) of the Trust Deed).
17. Accordingly, LMIM and/or AIF have engaged in conduct in breach of trust, and further a *prima facie* case for obtaining injunctive relief from the Court has been established.
18. Furthermore, as discussed below, we are concerned about possible breaches of trust by LMIM in respect of entering into these commercial arrangements on 28 August 2008. Among other things, we will investigate:
 - 18.1 whether the decision to enter the transaction was in accordance with the *"conservative lending policy in relation to mortgage securities"* which is provided for in the MPF Information Memorandum dated 22 June 2007, at page 12; and
 - 18.2 whether LMIM engaged in *"rigorous due diligence"* in respect of the securities which were acquired under the arrangements, which was required of LMIM under the Information Memorandum dated 22 June 2007, at page 5.

Request for Documents from LMIM

19. We note that it may be that there were sound commercial reasons for entry into the 2008 Assignment and the Trust Deed, which we are not presently aware of. It is on this basis that our clients have requested further materials evidencing the considerations surrounding those decisions.
20. We disagree with your assertions in relation to our client's entitlement to the materials requested by our clients.
21. We acknowledge that in your client's capacity as responsible entity of the AIF your clients are under no obligation to provide the materials to our clients. However, in so far as your clients acquired the documents, and any related knowledge, in their capacity as trustee of the MPF, it is clear that our clients are entitled to the materials.

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22. In the circumstances, we do not consider that our clients' request that FTI Consulting provide the abovementioned materials is unreasonable, in circumstances where your client now seeks to obtain a benefit of \$906,643.15 (**Disputed Funds**) from the trust funds.
23. In that regard FTI Consulting has in fact agreed to provide those materials but has requested a further period of time to undertake that process. We do not see any issue in permitting FTI Consulting the indulgence that they have requested, and fail to understand the urgent nature of your instructions to Trust Co.
24. We assume that you will take no further action until our clients are provided with the materials.

We look forward to hearing from you as a matter of urgency.

Yours faithfully
Piper Alderman

Per:

A handwritten signature in black ink, appearing to read 'A Banton'.

Amanda Banton
Partner

Copied To: Head of Property & Infrastructure Custody Services
The Trust Company (PTAL) Limited
GPO Box 4270
SYDNEY NSW 2001
Attention John Newby
email: jnewby@thetrustcompany.com.au

Amy Sargent

From: Pan, Philip (AU) <Philip.Pan@au.kwm.com>
Sent: Tuesday, 1 October 2013 4:01 PM
To: Amanda Banton
Subject: *LM Investment Management Limited (In Liquidation) (Controller Appointed)
Attachments: 2221_001.pdf

Confidential communication

Dear Sirs

Please find attached our letter dated 1 October 2013.

Yours faithfully

Philip Pan | Partner
King & Wood Mallesons
Level 33, Waterfront Place, 1 Eagle Street, Brisbane QLD 4000
T +61 7 3244 8081 | F +61 7 3244 8999
philip.pan@au.kwm.com | www.kwm.com

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1 October 2013

Luke Bona
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luke.bona@au.kwm.com

Philip Pan
Partner

Piper Alderman
Level 23 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000
abanton@piperalderman.com.au

Dear Sirs

LM Investment Management Limited (In Liquidation) (Controller Appointed) ("LMIM") as responsible entity for the LM Australian Income Fund ("AIF") and KordaMentha Pty Ltd and Calibre Capital Limited as trustee for the LM Managed Performance Fund ("MPF")
Your ref AKB.384382

We refer to your letters of 20 June 2013 and 25 July 2013 and more generally, our correspondence with you concerning the above matter.

At the outset, we wish to clarify some ambiguity within your correspondence. Our clients are John Park and Ginette Muller, the joint and several liquidators of LMIM. Whilst it is true that LMIM is also our client to some extent by virtue of the liquidators' special agency with LMIM, we consider it misleading to allege and refer to breaches of trust by "our client", in circumstances where, as we understand it, no allegation of breach of trust is made against Mr Park or Ms Muller in any capacity they hold. All material transactions concerning this matter were undertaken by LMIM prior to our clients' appointment and accordingly we assume that any allegation by you of breach of trust is directed at LMIM and not our clients. If this is not the case, please let us know and provide us with the basis and evidence for your assertions.

Set out below are responses to the issues you raise in your correspondence. Capitalised expressions used in this letter which have been defined or ascribed a specific meanings in our various correspondence with you, have the same meanings when used in this letter unless the context suggests or requires otherwise.

1 The Terms of the Trust Deed

Leaving aside your allegations about breach of trust (which we respond to below), you assert that MPF has a first priority right for the repayment of interest due under the Barly Wood loan facility by virtue of clause 3.4(c) of the Trust Deed. Clause 3.4(c) is expressly stated to be "in consideration of [MPF] paying the interest that is referred to in clause 3.4(b) to [AIF]", being the 'interest guarantee' by MPF in favour of AIF. With respect,

your clients cannot 'cherry pick' only certain aspects of the 2011 loan participation transaction between MPF and AIF ("2011 Transaction") as being valid and enforceable. If your clients wish to uphold and enforce clause 3.4(c) of the Trust Deed, then it is only equitable that clause 3.4(b) also be enforced given that it was the promise made by MPF to receive the benefit of clause 3.4(c). We are instructed that presently, \$163,393.95 is due and owing by MPF to AIF pursuant to the interest guarantee within clause 3.4(b) of the Trust Deed.

2 Breaches of Trust

By way of summary, you assert that there may have been no commercial benefit for MPF in entering into either the 2008 Assignment or the 2011 Transaction, the transactions thereby constituting breaches of trust by LMIM as to MPF. We consider the two transactions are discrete and separate and must be considered separately. Accordingly, even if there was some evidence or basis for impugning the 2008 Assignment (which is not conceded by our clients), the proper course is for your clients to pursue any remedies they consider they are entitled to as against the Court appointed receiver in control of the assets of the LM First Mortgage Income Fund (Receiver Appointed) ("FMIF"). Your clients cannot seek to taint the rights acquired by AIF for valuable consideration in the 2011 Transaction by any alleged breach of trust by LMIM by causing MPF to enter into the 2008 Assignment. Looking at the transactions separately, our clients have provided us with books and records which evidence the following:

2.1 2008 Assignment

The conflict record dated 2 October 2008 attached to the resolution of the board of directors of LMIM dated 27 October 2008 (enclosed with this letter and marked "A") states:

- (a) Given the international credit crisis at the time and its impact on the Australian property market, LMIM did not consider it was an ideal time to sell the secured property. LMIM considered that the market would improve and that the secured property was a good medium to long term hold.
- (b) It was proposed to assign the Barly Wood debt and the securities from FMIF to MPF, as the MPF is more suited to strategically holding properties and developing properties in joint ventures.
- (c) LMIM obtained updated valuations of the secured property to establish the appropriate assignment price. It was proposed to assign the loans and securities for the valuation prices for the secured property as these amounts represented the likely recovery amounts for the loans.
- (d) FMIF and MPF's constitutions, FMIF's product disclosure statement and MPF's information memorandum specifically contemplate and allow dealings with related parties.

In light of the above, it is reasonable to conclude that there was a reasonable commercial basis for the 2008 Assignment as MPF acquired the loans and associated securities from FMIF on the same basis that it might from an unrelated party at arm's length, that is, for the then value of the secured property representing the likely recovery amounts to be achieved, if the secured property was realised as at the date of the assignment. The further commercial benefit for MPF was the prospect that in the medium to long term, prior to realisation, the secured property may appreciate in value thereby resulting in a profit on the transaction for MPF. This, of course, was not a certainty. If, in the events which have ensued and with hindsight, the 2008 Assignment has not proved to be beneficial from MPF's perspective, it may be that MPF has potential causes of action against, for example, the valuers who provided the valuations which formed the basis of the assignment amount. Or, it may simply be a case of unsuccessful speculation on the property market (hardly a rarity).

What is clear, however, is that it does not necessary follow that the 2008 Assignment was in breach of trust simply because it proved to be unprofitable over time from MPF's point of view.

Without derogation from our view that any breach of trust in connection with the 2008 Assignment cannot impact on AIF's rights acquired for value in the 2011 Transaction, please let us know if your clients are in possession of evidence or material which, contrary to the above, suggests a breach of trust by LMIM. As we understand it, the vast majority of books and records concerning the 2008 Assignment are in hard-copy format and have been provided to your clients. Your clients should therefore be in possession of any evidence or materials (if they exist) which suggest a breach of trust by LMIM.

2.2 2011 Transaction

The conflict record dated 29 December 2011 (enclosed with this letter and marked "B") states the commercial drivers for the 2011 Transaction as being that MPF had been experiencing some short term cash flow issues and AIF, having spare cash within its fund, was desirous of earning a better return than bank rates and avoiding the need to source new loans and undertake due diligence and legal processes. Accordingly, the commercial benefit to MPF in the 2008 Transaction was having fast access to cash at an interest rate which was said to be above that of a sampled "main-stream" lender (NAB) but below that of an "alternative lender" like Acquire Capital. This was said to be reflective of the nature of the transaction and was deemed to provide a fair cost of capital for MPF (who would have otherwise found it difficult to obtain finance through other sources) and a fair return for the risk taken by AIF (see the RWG Accountants expert's report dated 21 February 2012 in this regard).

Responding to the various matters raised in paragraph 11 of your letter of 25 July 2013:

- (a) the once only payment of the settlement fee of \$59,006.25 from MPF to AIF was 1.5% of the total amount of AIF's participation in the Barly Wood facility. RWG Accountants say in their report that this is within the normal range for private mortgage funds (being 1% to 3%);
- (b) enclosed with this letter and marked "C" is a bank statement for the period 1 December 2011 to 31 December 2011 for account number 034382579 styled "The Trust Company (PTAL) LIMITED ACF LM MANAGED PERFORMANCE FUND". Page 13 of that statement shows a deposit on 29 December 2011 in the amount of \$3,933,750.00 from account number 34685008 which, as per the enclosed list of Suncorp bank accounts enclosed with this letter and marked "D", is the "AIF WORKING ACC". Accordingly, even if it could be shown that either or both of the 2008 Assignment and 2011 Transaction were in breach of trust (which is not conceded by our clients), MPF has still had the benefit of receiving AIF's funds in the amount of \$3,933,750. On any view, AIF is entitled to have this amount returned to it;
- (c) AIF's LVR of 75% is said to have been within the normal commercial range for a transaction like the 2011 Transaction (RWG Accountants expert's report);
- (d) the interest payable under the Barly Wood facility exceeded the MPF's interest guarantee of 14.5% interest to MPF on the daily outstanding balance of MPF's contribution (clause 3.4(a) of the Trust Deed); and
- (e) MPF surrendered its control of the Barly Wood securities to AIF and relinquished its first priority right to moneys received into the Barly Wood controllership as this was a commercial term of the 2011 Transaction and the basis upon which the LVR interest rate for AIF's participation in the Barly Wood facility were calculated. The documents state that

MPF had short term liquidity problems and its best source of those funds was AIF. It is difficult to envisage a prudent lender participating in the Barly Wood facility on terms any more favourable to MPF given the deficit between the debt and value of the secured property. The terms of the 2011 Transaction reflect the risk taken on by AIF and according to the RWG Accountants expert's report were "fair and reasonable" and the 2011 Transaction was "being conducted on an arm's-length basis".

For completeness, paragraphs 12.2, 12.3 of your letter dated 24 July 2013 are inconsistent and paragraph 14 is incorrect. MPF did enforce its security over Barly Wood causing LMIM to enter into possession of the secured property as agent for the mortgagee. Such action seems, to us at least, to be entirely consistent with the information memorandum for the MPF requiring LMIM to take "appropriate action" where a borrower is in default.

In light of the above points, we cannot see how your clients can maintain any argument of a prima facie case for breach of trust in respect of either of the 2008 Assignment or the 2011 Transaction. The evidence and materials which we have seen and which are enclosed with this letter, to the contrary, establish a prima facie commercial benefit to MPF. Accordingly, the onus rests with your client to establish to the requisite standard of proof that a breach or breaches of trust have in fact taken place.

Regardless, even if your clients were able to establish a breach of trust (which is not conceded by our clients for the reasons set out above), as set out in paragraph 2.2(b) above, MPF has still had the benefit of receiving AIF's funds in the amount of \$3,933,750. On any view, AIF is entitled to have this amount returned to it with interest. We are instructed that LMIM's books and records state that as at 31 March 2013, AIF had received a total of \$3,230,254.44 from the Barly Wood controllership. Accordingly, AIF is at least entitled to the amount of \$703,495.56 (being the amount paid to MPF less the total received from the Barly Wood controllership to date) from the money held by Trust Co. in the "MPF KPG Controller Account".

Accordingly, we ask that within **seven days** of the date of this letter you instruct Trust Co. to release the amount of \$703,495.56 to our clients from the MPF KPG Controller Account. If your clients fail to do so, our clients reserve AIF's right to hold your clients personally liable for interest, costs and any other loss or damage to AIF and its members occasioned by your clients' refusal to allow our clients access to funds properly belonging to AIF.

3 Request for documents from LMIM

We are instructed that all hard-copy MPF records have now been provided to your clients and your client has had ample time to review those materials in respect of the 2011 Transaction.

Yours faithfully



"A"

RESOLUTION OF THE BOARD OF DIRECTORS OF
LM Investment Management Ltd

Date: 27 October 2008

Approval of assignment of FMIF loans (Albassit, KPG 13th Beach and Lifestyle) to the MPF

The LM First Mortgage Income Fund (FMIF) Credit Committee approved:

- the assignment of the Albassit, KPG 13th Beach and Lifestyle loans to the LM Managed Performance Fund (MPF) based on current valuation; and
 - the payment of the assignment to be made by the MPF in 6 months from the date of the assignment; and
 - interest to be paid by the MPF at 10%pa on the principal value until full payment is received; and
 - security of a fixed and floating charge over the assets of the MPF;
- by Committee Circular.

The MPF Investment Committee approved:

- the receipt of the assignment from the FMIF of the Albassit, KPG 13th Beach and Lifestyle loans based on current valuation; and
 - the payment of the assignment to be made by the MPF in 6 months from the date of the assignment; and
 - interest to be paid by the MPF at 10%pa on the principal value until full payment is received; and
 - security of a fixed and floating charge over the assets of the MPF;
- by Committee Circular.

This is a related party transaction. Attached to this minute is a copy of the conflict of interest record.

THE BOARD RESOLVED to approve the assignment from both the FMIF and MPF perspective.

Acceptance of the resolution: Each of the Directors accepts the resolution as signed below:

Signature

Peter Drake

Director

DATE: 27/10/08

Signature

Lisa Darry

Director

DATE: 27/10/08

**LM INVESTMENT MANAGEMENT LTD
CONFLICT RECORD**

Transaction: Assignment of FMIF loans (Albassit, KPG 13th Beach and Lifestyle) to MPF
Record date: 2 October 2008

Background and nature of conflict

- This conflict record concerns the assignment of the Albassit, KPG 13th Beach and Lifestyle loans by FMIF to MPF.
- The loans are in default.
- FMIF has held sale campaigns for the security properties, however no sale has eventuated.
- In the case of Albassit, the security property comprises 7 dwellings, fully leased, well located and close to the Sydney CBD.
- In the case of KPG 13th Beach, the security property comprises 20 residential units in a golf course complex at a beachside location approximately one hour from the Melbourne CBD. The units are let as part of a resort by an on-site manager.
- In the case of Lifestyle, the security property is located at Cattai, outside Sydney. The property is currently zoned for a golf course residential development. Pre-sales for this style of development did not reach required levels to enable construction funding to proceed, and most interested parties consider that a change of zoning would be desirable. The RE has been approached by a number of parties interested in developing the property in joint venture with the RE. It is expected that a joint venture development of the site for the purpose of a rural residential or similar development would satisfy the debt in full and produce a modest development profit.
- The international credit crisis has impacted on the Australian property market, and the RE considers this is not the best time to sell the subject properties.
- The RE believes that the market will improve, and that the properties are good medium to long term holds.
- In the case of the Lifestyle property, the RE believes that a joint venture development involving a change of zoning would be successful.
- The RE accordingly considered an assignment of the subject loans from FMIF to MPF, as the MPF is more suited to strategically holding properties and developing properties in joint ventures.
- The RE obtained updated valuations for the security properties to ascertain an appropriate assignment price.
- It is proposed to assign the loans for the valuation prices as these prices represent the likely recovery amounts for the loans.
- As MPF does not have sufficient cash reserves at this time to pay the assignment price, it is proposed that payment of the price be delayed by 6 months, with interest to be paid by MPF at the rate of 10% pa. The price is to be secured by a fixed and floating charge over the assets of MPF.
- The transaction is a related party transaction. A possible conflict also arises because the RE may prefer the interests of MPF over the interests of FMIF, or vice versa.

Assessment and evaluation of conflict

The first question to be asked is whether the transaction is prohibited by general principles of fiduciary law. Both FMIF's and MPF's constitutions as well as FMIF's PDS and MPF's information memorandum specifically allow and contemplate dealings with related parties. Therefore the transaction is not per se prohibited by general principles of fiduciary law.

The second question is whether Part 2E of the Corporations Act applies to the transaction. LM controls both the FMIF and the MPF, therefore pursuant to section 208 of the Act, Part 2E does apply to the transaction.