SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 11917 of 2015

Applicant	**KORDAMENTHA PTY LTD (ACN 100 169 391) AS TRUSTEE FOR THE LM MANAGED PERFORMANCE FUND**
	AND
Respondent	**THE MEMBERS OF THE LM MANAGED PERFORMANCE FUND**

FOURTH AFFIDAVIT OF JARROD VILLANI

SWORN ON: 3 JULY 2018

I, **JARROD VILLANI** of Level 14, 12 Creek Street, Brisbane in the State of Queensland, chartered accountant, say on oath:

1. I am a Partner and authorised officer of KordaMentha, the accounting firm representing KordaMentha Pty Ltd, the trustee (the **Trustee**) of the LM Managed Performance Fund (the **MPF**).

2. I am duly authorised by Mr Korda and Mr Mentha, the directors of the Trustee, to swear this affidavit on behalf of the Trustee.

3. Except where otherwise indicated, I depose to the matters in this affidavit from my own personal knowledge of the facts and circumstances. Where I depose to matters from information and belief, I believe those matters to be true.

4. This affidavit is sworn in support of an application by the Trustee (the **2018 Remuneration Application**) pursuant to section 101 of the *Trusts Act* 1973 (Qld) (the **Trusts Act**) for

AFFIDAVIT OF JARROD VILLANI
Filed on Behalf of the Applicant
Uniform Civil Procedure Rules 1999
Form 47, Rule 435

Sworn:..............................

Squire Patton Boggs
Level 17, 88 Philip Street
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Taken by:..............................

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authorisation to charge remuneration for its services as Trustee of the MPF for the period between 15 August 2016 and 27 May 2018 (the **Relevant Period**).

5. The 2018 Remuneration Application seeks orders authorising payment of the Trustee's remuneration during the Relevant Period totalling $584,770 (excl. GST and disbursements).

6. The 2018 Remuneration Application also seeks authorisation, *nunc pro tunc*, for the payment of the Trustee's additional remuneration in the sum of $171,296 (excl. GST) for services provided by the Trustee in connection with the sale of the property located at 457-459 Lygon Street, Brunswick East, Victoria (the **Lygon Street Property**) in the period between 2 November 2016 and 27 May 2018.

7. The Trustee has previously filed the following applications in these proceedings seeking authorisation to be paid remuneration out of the assets of the MPF for earlier periods of time:

   7.1 Originating Application filed in the Supreme Court of Queensland on 24 November 2015, which application sought the court's approval for the Trustee's professional fees for the period from 12 January 2015 to 31 October 2015 (the **2015 Remuneration Application**).

   7.2 Interlocutory Application filed on 19 September 2016, which application sought the court's approval for the Trustee's professional fees for the period from 1 November 2015 to 14 August 2016 (**2016 Remuneration Application**).

8. The 2018 Remuneration Application - in support of which this affidavit is sworn - is a separate and distinct application to the above-mentioned applications, and relates to the period immediately following that which was the subject of the 2016 Remuneration Application.

9. Throughout this affidavit, I make reference to various documents that are contained in a tabbed and paginated bundle of documents exhibited to this affidavit and marked "**Exhibit JV-13**" (the **Exhibit**).

10. I also make reference to various documents that are contained in a paginated bundle of documents exhibited to this affidavit and marked "**Confidential Exhibit JV-14**" (the **Confidential Exhibit**). Documents contained within the Confidential Exhibit have been treated confidentially by the Trustee as they contain confidential or commercially sensitive

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information relating to the realisation of assets of the MPF and litigation being pursued or investigated by the Trustee. As disclosure of the information contained in these documents may prejudice asset realisations and/or current and future litigation, I respectfully request that the Court maintain the confidentiality of the Confidential Exhibit by storing that bundle on the court file in a sealed envelope and not permitting it to be inspected or copied except with the leave of the Court.

11. Much of the information concerning the background to the 2018 Remuneration Application is set out in affidavits that I have previously sworn in support of the 2015 Remuneration Application and the 2016 Remuneration Application. To avoid unnecessary duplication, I respectfully seek leave to rely upon:

    11.1 my affidavit sworn in these proceedings on 2 December 2015 (the **December 2015 Affidavit**) and its exhibits marked "JV-1" (the **December 2015 Exhibit**) and "Confidential Exhibit JV-2" (the **December 2015 Confidential Exhibit**); and

    11.2 my affidavit sworn in these proceedings on 19 September 2016 (the **September 2016 Affidavit**) and its exhibits marked "JV-11" (the **September 2016 Exhibit**) and "Confidential Exhibit JV-12" (the **September 2016 Confidential Exhibit**).

A. BACKGROUND

12. A detailed summary of the background to the creation of the MPF, the appointment of the Trustee, and the basis on which remuneration has previously been paid to the Trustee, is set out at paragraphs 8 to 44 of the December 2015 Affidavit and paragraphs 9 to 40 of the September 2016 Affidavit.

13. Relevantly for the purposes of this application:

    13.1 The MPF was constituted as a unit trust pursuant to a deed dated December 2001 (**Constitution**), which provided that the manager and trustee of the MPF was LM Investment Management Ltd (**LMIM**). A copy of the Constitution is at pages 1 to 24 of the December 2015 Exhibit.

    13.2 By order of the Supreme Court of Queensland made on 12 April 2013, LMIM was removed as trustee of the MPF, and the Trustee and Calibre Capital Ltd (**Calibre**) were appointed jointly and severally as trustees of the MPF. A copy of these Orders is at pages 146 to 147 of the December 2015 Exhibit.

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13.3 On 5 January 2015, Calibre retired as trustee pursuant to a written notice issued to the members of the MPF, informing them of its intention to retire as trustee effective on 5 January 2015. A copy of Calibre's notice of intention to retire is at page 152 of the December 2015 Exhibit.

13.4 The Trustee has continued to act as sole trustee of the MPF since Calibre retired.

13.5 No management or other fees have been paid pursuant to the Constitution since the Trustee and Calibre were appointed on 12 April 2013.

13.6 For the period from 12 April 2013 until 11 January 2015, remuneration was paid pursuant to a service agreement entered into between the Trustee, Calibre and KordaMentha Pty Ltd as trustee for the KordaMentha Unit Trust (the **Service Agreement**). A copy of the Service Agreement is at pages 171 to 175 of the December 2015 Exhibit.

13.7 Following Calibre's retirement in January 2015, the Trustee's remuneration has been authorised pursuant to section 101 of the Trusts Act. Relevantly:

(a) Pursuant to the 2015 Remuneration Application, orders were made in the Queensland Supreme Court on 17 December 2015 authorising payment of $666,522 (excl. GST) out of the assets of the MPF as the Trustee's remuneration for the period from 12 January 2015 to 31 October 2015. A copy of the Court's orders is at page 3 of the September 2016 Exhibit. Details relating to the 2015 Remuneration Application are set out at paragraphs 45 to 90 of the December 2015 Affidavit.

(b) Pursuant to the 2016 Remuneration application, orders were made in the Queensland Supreme Court on 6 October 2016 authorising payment of $479,227 (excl. GST) out of the assets of the MPF as the Trustee's remuneration for the period from 1 November 2015 to 14 August 2016. A copy of the Court's orders is at page 1 of the Exhibit. Details relating to the 2016 Remuneration Application are set out at paragraphs 41 to 73 of the September 2016 Affidavit.

B. UPDATES TO INVESTORS

14. Investor updates have periodically been sent to members of the MPF. I have set out in detail information in relation to these investor updates at paragraphs 20 to 28 of the

December 2015 Affidavit and 10 to 20 of the September 2016 Affidavit. Copies of the updates are located at pages 153 to 170 of the December 2015 Exhibit, pages 1 to 142 of the December 2015 Confidential Exhibit and pages 1 to 27 of the September 2016 Confidential Exhibit.

15. Since my September 2016 Affidavit was sworn, the Trustee has issued the following updates:

Update No.	Date of Issue of Update	Location of Update
Update 17	20 December 2016	Pages 1 to 14 of the Confidential Exhibit
Update 18	30 November 2017	Pages 15 to 27 of the Confidential Exhibit

16. In the December 2015 Affidavit and the September 2016 Affidavit, I deposed that the Trustee maintains an email mailing list which contains the last-known email address for each of the approximately 4500 members of the MPF (the **Email Mailing List**).

17. In May 2018, the Trustee discovered that there were 384 accounts held by 295 MPF unitholders for which there was no email address on the Email Mailing List. To protect the confidentiality of the account holders, the email addresses have not been included in this affidavit.

18. Those 384 accounts were associated with a total of 12 email addresses (**12 Email Addresses**). The number of email addresses is lower than the number of associated accounts because a large proportion of the accounts have nominated the same email addresses.

19. On 17 May 2018, the 12 Email Addresses were added to the Email Mailing List, meaning that all accounts are associated with the email address of a particular unitholder or a financial adviser recorded as the representative of unitholders.

20. Copies of Update 17 and Update 18 were sent to the members of MPF via the email address recorded in the Email Mailing List at the time the updates were issued.

21. As disclosed in a number of affidavits previously sworn in these proceedings, not all of the email addresses on the Email Mailing List work (for instance, because the relevant email address is no longer used by the relevant unitholder). Where the Trustee has been

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informed or become aware of a change to a member's contact information, the mailing list has been updated to record that change.

C. REMUNERATION SOUGHT WITH RESPECT TO THE MPF

22. A written overview of the key work performed by the Trustee during the Relevant Period is at page 2 of the Exhibit.

23. The schedule which is at pages 3 to 4 of the Exhibit gives an overview of the quantum of remuneration claimed by the Trustee for the Relevant Period. The schedule identifies the following information:

    23.1 each individual who carried out work during the Relevant Period;

    23.2 their position within KordaMentha;

    23.3 their hourly charge out rate;

    23.4 the hours of work they performed in total, for each of the fortnights during the Relevant Period;

    23.5 their total hours of work; and

    23.6 the total remuneration charged in respect of their work.

24. The schedule also contains information about disbursements that were incurred by the Trustee during the Relevant Period, although those disbursements are not the subject of the present application.

25. In my view all of the tasks detailed in this affidavit and the documents in the Exhibit were necessary for the proper administration of the MPF, in order to maximise realisations and recover funds for the benefit of the members.

26. My staff and I record time on a daily basis, in six minute units. When recording our time, we also enter a description of the tasks undertaken in an electronic system. Each time entry is allocated to one of the five following categories:

    26.1 Administration and risk management;

    26.2 Assets;

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26.3 Investors;

26.4 Investigations; and

26.5 Fund trading.

27. While my staff and I used the above categories to record time, certain items of work could have fallen within more than one of the categories, so that, for example, communicating with investors could have been recorded under either the "Administration and risk management" category or the "Investors" category. However, each task is only recorded once, and the time for carrying out each task has only been recorded once.

28. I have reviewed the narrations for all the work claimed in the present application on a line-by-line basis. From my knowledge of the work carried out and my supervision of the tasks undertaken, I am satisfied that the time recorded for each of the tasks is commensurate with what was required to be undertaken and that the records are accurate.

29. The partners of KordaMentha are members of the Australian Restructuring Insolvency and Turnaround Association (**ARITA**), and they follow the ARITA Code of Professional Practice for Insolvency Practitioners (**ARITA Code**) in relation to the insolvency appointments they undertake.

30. The Trustee has adopted the ARITA Code as a guide to the performance of the duties involved in administering the MPF. At pages 178 to 206 of the December 2015 Exhibit is a true and correct copy of sections 14 to 16 of the Third Edition of the ARITA Code of Professional Practice (which came into effect on 1 January 2014) with respect to a practitioner's claim for remuneration.

31. I confirm that the Trustee has followed the ARITA Code in administering the MPF. As to the hourly charge out rates for the Trustee, I can say from my own knowledge and experience that these rates are commensurate with the fees charged by other insolvency practitioners.

32. Immediately below is a summary of the amounts claimed in respect of work undertaken in each of the five categories identified in paragraph 26 above. At paragraphs 33 to 59 below, I provide more specific details of the work my staff and I performed during the Relevant Period by reference to those five categories.

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Category	Fees sought to be recovered for period 15 August 2016 to 27 May 2018
Administration and Risk Management	$213,694.50
Assets	$104,157.50
Investors	$169,359.50
Investigations and Statutory Compliance	$47,208.00
Fund Trading	$50,350.50
TOTAL (excl. GST and disbursements)	**$584,770.00**

I. Administration and Risk Management

33. The total amount of remuneration sought with respect to this category is $213,694.50 (excl. GST).

34. A schedule setting out each time entry allocated to this category during the Relevant Period is at pages 5 to 13 of the Exhibit. This schedule includes a description of each task undertaken, the name of the person who performed the task, the date the task was undertaken, the length of time it took, the amount charged and a narration of the task undertaken.

35. There are a number of litigated matters, which the Trustee is conducting on behalf of the MPF. In general terms, the Trustee has charged fees for:

35.1 attending with and instructing two firms of lawyers (Minter Ellison and Squire Patton Boggs) in a number of ongoing proceedings (including giving instructions, seeking advice, discussing strategy and overall litigation position);

35.2 reviewing legal correspondence and communications regarding ongoing litigation and matter strategy; and

35.3 reviewing and finalising affidavit materials, statements of claim and other evidence.

Existing Litigation

36. There are a number of existing legal proceedings in respect of which the Trustee has continued to undertake work during the Relevant Period. These matters are as follows:

36.1 Proceeding BS12317/2014 in the Supreme Court of Queensland (**LMIM's Bellpac Proceedings**).

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(a) These proceedings are brought by LMIM in its capacity as responsible entity for the First Mortgage Income Fund (**FMIF**). The FMIF was another fund managed by LMIM prior to its collapse. The Trustee (in its capacity as trustee of the MPF) is the 8th defendant in LMIM's Bellpac Proceedings.

(b) LMIM's Bellpac Proceedings relate to a dispute arising from the realisation of various properties held by Bellpac Pty Ltd (in liquidation) (**Bellpac**) that were subject to securities held by LMIM on behalf of the MPF and on behalf of the FMIF. Part of the proceeds from the realisation of the property were paid to the MPF as a fee for funding the litigation that realised the property. The payment of this funding fee is now in dispute and LMIM (in its capacity as responsible entity of the FMIF) has commenced proceedings against the Trustee (amongst others) to recover amounts paid to the MPF. All of the relevant transactions occurred before the new trustees were appointed in April 2013.

(c) Before the Relevant Period, the Trustee undertook the following work in respect of this matter:

(1) applied for and obtained directions pursuant to section 96 of the Trusts Act that it was justified in defending the claim;

(2) prepared and filed a defence on behalf of the MPF; and

(3) investigated the possibility of obtaining litigation funding for the defence of the claim; and

(4) prepared for and attended a mediation with the other parties to the proceedings.

(d) During the Relevant Period, the Trustee primarily undertook the following tasks in connection with LMIM's Bellpac Proceedings:

(1) engaging in without prejudice discussions with the parties to the proceedings following an unsuccessful mediation;

(2) reviewing draft settlement deeds in relation to the various parties' claims;

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(3) liaising with the Trustee's solicitors in relation to amended pleadings filed in the proceedings;

(4) liaising with the Trustee's solicitor in relation to various procedural steps in the proceedings, including reviewing documents for the purpose of giving further disclosure; and

(5) liaising with the Trustee's solicitors in relation to expert evidence.

(e) The settlement discussions referred to in paragraph 36.1(d)(1) above were not successful and the proceedings have continued towards trial.

36.2 Proceeding BS8032/14 in the Supreme Court of Queensland (the **Barly Wood Proceedings**).

(a) The Barly Wood Proceedings relate to another transaction that occurred before the Trustee was appointed. The proceedings involve a claim by the Trustee against LMIM, and the receiver appointed to the FMIF. At a time when LMIM was trustee of the MPF and the responsible entity of the FMIF, it caused a loan provided by the FMIF to be assigned to the MPF. The basis of the claim is that LMIM breached its duties as trustee of the MPF by causing the loan to be assigned to the MPF in circumstances where the value of the loan was significantly less than the consideration given by the MPF as part of the transaction.

(b) Prior to the Relevant Period:

(1) The Trustee obtained litigation funding from IMF Bentham with respect to the Barly Wood Proceedings.

(2) The Trustee obtained directions pursuant to section 96 of the Trusts Act that it would be justified in prosecuting the Barly Wood Proceedings.

(3) The Trustee, through its solicitors Minter Ellison, defended a strike-out application brought by the second defendant, the receiver of the FMIF.

(4) Amended pleadings were filed and served.

(c) During the Relevant Period, the work principally undertaken by the Trustee in connection with the Barly Wood Proceedings has involved:

(1) corresponding with the Trustee's solicitors and the litigation funder in relation to the proposed settlement of the proceedings; and

(2) reviewing and amending proposed settlement deeds providing for the resolution of the proceedings;

(3) liaising with the Trustee's solicitors in relation to the termination of the litigation funding agreement;

(4) providing instructions to the Trustee's solicitors regarding discontinuance of the proceedings;

(5) preparing an application for directions pursuant to section 96 of the Trusts Act that the Trustee would be justified in discontinuing the Barly Wood Proceedings.

(d) On 7 June 2018, the Court gave directions that the Trustee would be justified in discontinuing the Barly Wood Proceedings. Accordingly, the Trustee does not anticipate that significant additional costs will be incurred in respect of the proceeding in the future.

36.3 Proceeding BS8034/14 in the Supreme Court of Queensland (the **Lifestyle Proceedings**).

(a) The Lifestyle Proceedings are similar to the Barly Wood Proceedings as, although the proceedings relate to a different loan, the relevant loan was assigned from the FMIF to the MPF as part of the same transaction as the Barly Wood loan. Again, the Trustee contends that LMIM breached its duties as trustee of the MPF, by causing the Lifestyle loan to be assigned to the MPF in circumstances where the value of the loan was significantly less than the consideration given by the MPF as part of the transaction

(b) Prior to the Relevant Period:

(1) The Trustee obtained litigation funding from IMF Bentham with respect to the Lifestyle Proceedings.

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(2) The Trustee obtained directions pursuant to section 96 of the Trusts Act that it would be justified in prosecuting the Lifestyle Proceedings.

(3) The Trustee, through its solicitors Minter Ellison, defended a strike-out application brought by the second defendant, the receiver appointed to FMIF.

(4) Amended pleadings were filed and served.

(c) During the Relevant Period, the work principally undertaken by the Trustee in connection with the Lifestyle Proceedings has involved:

(1) corresponding with the Trustee's solicitors and the litigation funder in relation to the proposed settlement of the proceedings; and

(2) reviewing and amending proposed settlement deeds providing for the resolution of the proceedings;

(3) liaising with the Trustee's solicitors in relation to the termination of litigation funding agreement;

(4) providing instructions to the Trustee's solicitors regarding discontinuance of the proceedings;

(5) preparing an application for directions pursuant to section 96 of the Trusts Act that the Trustee would be justified in discontinuing the Lifestyle Proceedings.

(d) On 7 June 2018, the Court gave directions that the Trustee would be justified in discontinuing the Lifestyle Proceedings. Accordingly, the Trustee does not anticipate that significant additional costs will be incurred in respect of the proceeding in the future.

36.4 Proceeding 12716/15 in the Supreme Court of Queensland (the **AIIS Proceedings**).

(a) These proceedings concern a loan agreement entered into between the MPF and Australian International Investment Services Pty Ltd (**AIIS**) in around January 2005. At the time of entering into the loan agreement with AIIS, the MPF took a first ranking security position. However LMIM (as

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trustee of the MPF) subsequently entered into a deed of priority with AIIS and FMIF which effectively converted the MPF's security into a second-ranking security. The MPF alleges that LMIM breached a number of duties owed to the MPF in the course of these transactions.

(b) Although a statement of claim was filed on 16 December 2016, it was not served on LMIM as settlement discussions were ongoing and it was hoped that the dispute might be resolved before the proceedings commenced.

(c) During the Relevant Period, the following work was performed:

(1) On 3 November 2016, the Trustee filed an application pursuant to section 500(2) of the *Corporations Act 2001* (Cth) seeking leave to proceed against LMIM. This application was made as the Trustee was concerned that the Statement of Claim might become stale pursuant to rule 24(1) of the *Uniform Civil Procedure Rules 1999* (Qld).

(2) The Trustee's application was heard on 22 November 2016 and the Court made orders that the Trustee be granted leave to proceed against LMIM. The Court also made orders that LMIM is not required to file any defence or counterclaim until 28 days after the Trustee gives written notice that a defence or counterclaim is required to be filed.

(3) In the period since the Court granted leave to proceed, the parties have continued to engage in settlement discussions.

(4) In addition to the above, the Trustee has undertaken work to review the loan statements for the AIIS loan for the purposes of identifying evidence in support of the claim.

(d) Settlement discussions with respect to the AIIS Proceedings have concluded unsuccessfully.

(e) The Trustee is presently considering its position in relation to the AIIS Proceedings, and in particular, whether it wishes to proceed with the claim. In the event that the Trustee does not wish to proceed with the proceedings,

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it will likely bring an application for further directions pursuant to section 96 of the Trusts Act.

37. In addition to the specific tasks set out above, the Trustee has also undertaken various work in relation to the proceedings more generally. That work includes:

37.1 reviewing draft affidavits and providing input where required;

37.2 considering the impact of other legal proceedings relating to the MPF, including the impact of the Court's decision in *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552;

37.3 reviewing the books and records of the MPF for documents as required by the Trustee's solicitors;

37.4 undertaking detailed analysis of the impact of the litigation on the MPF's overall financial position and the likely return to members; and

37.5 attendances in chambers and in Court for various matters where the Trustee's attendance has been required.

Other or Potential Litigation

38. During the Relevant Period, the Trustee engaged in significant work related to investigating and pursuing various additional or potential claims on behalf of the MPF, as well as facilitating the making of various administrative applications:

38.1 Auditor Action

(a) During the Relevant Period, the Trustee considered the scope of and prospects of success of a potential claim against the auditors, Williams Partners Independent Audit Specialists (**WPIAS**), in respect of their provision of audit services to the MPF in 2011 and 2012. The work undertaken by the Trustee in that regard has included:

(1) Preparing and filing an application for the issue of summonses for examination in the Federal Court of Australia.

(2) Preparing and filing orders for production to various parties in connection with the audits of the MPF.

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(3) Conducting reviews of the WPIAS audit files for the 2011 and 2012 audit files and other associated documents.

(4) Obtaining supplementary orders for production with respect to the insurance position of WPIAS and considering the recoveries likely to be available from any proceedings.

(5) Considering potential causes of action against WPIAS and preparing for public examinations.

(6) Considering issues in relation to causation and loss.

(7) Issuing a detailed letter of demand to WPIAS.

(8) Corresponding with the representatives for WPIAS in relation to potential settlement.

38.2 Trustee's claim in relation to Bellpac

(a) This potential claim arises out of similar facts to those in LMIM's Bellpac Proceedings insofar as the dispute concerns the MPF's and FMIF's entitlement to monies realised by or on behalf of Bellpac. The Trustee considers that in circumstances where the relevant monies were recovered by Bellpac using litigation funding provided by the MPF, the MPF might be entitled to a portion of those monies in priority to the FMIF. The relevant funds are currently held by the liquidators of Bellpac.

(b) The work undertaken by the Trustee in that regard has included:

(1) liaising with the Trustee's solicitors in relation to requests for documents made of the liquidators of Bellpac;

(2) considering whether to take legal action to require the production of documents sought from the liquidator of Bellpac;

(3) considering the payment of certain fees and costs of the liquidator of Bellpac;

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(4) reviewing ASX announcements made by Woollongong Coal Limited regarding the provision made for the contingent claim the subject of the potential claim; and

(5) providing instructions to the Trustee's solicitors in relation to the future conduct of the proceedings.

(c) The Trustee is currently considering whether it intends to take further action with respect to its potential entitlement to the monies being held by the liquidators of Bellpac.

38.3 2016 Remuneration Application

(a) This includes work on the 2016 Remuneration Application (that is, the previous application for approval of remuneration for the period from 1 November 2015 to 14 August 2016), including:

(1) attendances on Squire Patton Boggs in August and September 2016 to provide instructions in relation to the 2016 Remuneration Application; and

(2) attendance at the hearing on 7 October 2016.

(b) Order 2 of the orders made by Justice Martin in these proceedings on 6 October 2016 (at page 1 of the Exhibit), authorises the payment of the Trustee's costs associated with the 2016 Remuneration Application from the assets of MPF. They are nevertheless included in the total for this category for completeness.

<u>II. Assets</u>

39. The total amount of remuneration claimed for this category is $104,157.50 (excl. GST).

40. A schedule setting out each time entry allocated to this category during the Relevant Period is at pages 14 to 19 of the Exhibit. This schedule includes a description of each task undertaken, the name of the person who performed the task, the date the task was undertaken, the length of time it took, the amount charged and a narration of the task undertaken.

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41. By the beginning of the Relevant Period, most of the material loan assets of the MPF had been realised, with the exception of a loan of approximately $900,000 given by the MPF to 457-459 Lygon Street Pty Ltd (**Lygon Street Pty Ltd**) with respect to the Lygon Street Property, secured by a second registered mortgage. The Lygon Street Property consists of approximately 40 residential apartments, plus 2 retail lots.

42. As detailed at paragraphs 60 to 79 below, the Trustee was appointed as agent to the mortgagee in possession of the Lygon Street Property. The costs incurred by the Trustee in its capacity as agent to the mortgagee in possession have been accounted for separately to those contained in this category.

43. In addition to the costs it has incurred acting as agent to the mortgagee in possession of the Lygon Street Property, the Trustee has incurred costs administering the Lygon Street Property and its sale from the Trustee's perspective as lender. Those costs have predominately involved the Trustee's reporting obligations and its liaising with the various stakeholders in relation to the status of the property.

44. The Trustee has also undertaken a significant amount of work in relation to the recovery of withholding tax paid to the Australian Taxation Office (**ATO**) on behalf of the members of the MPF. Relevantly:

    44.1 The historical financial statements of the MPF for the years 2009 to 2012 financial years failed to record that a number of loans provided by the MPF were impaired. This had the consequence that the profits of the MPF (and so, the members) were overstated during the 2011 and 2012 financial years, and a higher amount of withholding tax was paid to the ATO than should have been.

    44.2 In order to recover the withholding tax paid to the ATO on behalf of the MPF's members, it was necessary for the Trustee to restate the MPF's financial statements for the 2011 and 2012 financial years to demonstrate the true profit earned by the fund during those periods.

    44.3 After considerable correspondence between the Trustee and the ATO, approximately $7.48m was returned by the ATO and the net proceeds have been quarantined and will be distributed directly to unitholders.

45. The work undertaken with respect to the withholding tax claim is split across the "Assets" and "Administration and Risk Management" categories of the fee schedule.

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46. The Trustee and its advisors are currently investigating whether similar withholding tax issues may exist in relation to earlier financial years.

III. Investors

47. The total amount of remuneration claimed for this category is $169,359.50 (excl. GST).

48. A schedule setting out each time entry allocated to this category during the Relevant Period is at pages 20 to 33 of the Exhibit. This schedule includes a description of each task undertaken, the name of the person who performed the task, the date the task was undertaken, the length of time it took, the amount charged and a narration of the task undertaken.

49. As noted in my December 2015 and September 2016 Affidavits, there are approximately 4,500 members of the MPF. As such, during the Relevant Period my staff and I have been required to answer an extensive number of investor enquiries, and issuing investor communications to keep investors updated on the process of winding up the MPF. This has included updating investors on the progress of realising the assets of the MPF and providing current projections on the expected return to investors.

50. During the Relevant Period, the specific tasks my staff and I have undertaken in this category include:

50.1 responding to investor queries in the "LM Inbox", which is a long-standing email account established as a channel for investor enquiries;

50.2 preparing and drafting correspondence to investors, including preparing mass information updates that were provided to all members online and via mail outs;

50.3 preparing a summary of investors in 2010 and 2011 affected by the withholding tax matter; and

50.4 occasionally adding investor details to the Trustee's email distribution list, where required.

51. As is the case for other categories, work undertaken in relation to communications with investors may be recorded in more than one category. However, time for carrying out each task has only been recorded once.

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IV. Investigations and Statutory Compliance

52. The total amount of remuneration claimed for this category is $47,208 (excl. GST).

53. A schedule setting out each time entry allocated to this category during the Relevant Period is at pages 34 to 39 of the Exhibit. This schedule includes a description of each task undertaken, the name of the person who performed the task, the date the task was undertaken, the length of time it took, the amount charged and a narration of the task undertaken.

54. This category has been used to a limited extent to record time spent in reviewing the MPF's books and records. However most time recorded in this category relates to preparing and lodging income tax returns and BAS returns. BAS returns are prepared on a monthly basis, and the fees charged to this category accordingly include work undertaken to prepare and lodge the MPF's BAS statement for each month from July 2016 to April 2018, inclusive.

55. This category has also been used to record time spent on general accounting tasks connected with the MPF, including processing payments and receipts, attending to bank account reconciliations and processing receipts and payments into our accounting system, Insol, in accordance with the Trustee's statutory obligations under the *Corporations Act 2001* (Cth).

V. Fund Trading

56. The total amount of remuneration claimed for this category is $50,350.50 (excl. GST).

57. A schedule setting out each time entry allocated to this category during the Relevant Period is at pages 40 to 44 of the Exhibit. This schedule includes a description of each task undertaken, the name of the person who performed the task, the date the task was undertaken, the length of time it took, the amount charged and a narration of the task undertaken.

58. The remuneration claimed in this application includes work my staff and I undertook in respect of the administration of the MPF and carrying out the winding up of the MPF, which I would describe as 'fund trading'. In a general sense, time charged to this category relates to work undertaken in administering the trading activities of the MPF and managing its cashflows. The work captured by this category is necessary for the MPF to continue operating during the period of its winding up.

59. More specifically, this category includes time spent on tasks associated with the management of the accounts of the MPF during the Relevant Period, including:

59.1 preparing management accounts for the 2016 financial year;

59.2 reviewing current and forecast cash flows;

59.3 cash reconciliation; and

59.4 considering accounts payable and preparing invoices for payment.

D. REMUNERATION RELATING TO THE SALE OF THE LYGON STREET PROPERTY

60. In addition to the $584,770 (excl. GST) in remuneration sought for the Trustee's work performed with respect to the MPF generally, the Trustee seeks an order authorising, *nunc pro tunc,* the payment of an additional $171,296 (excl. GST) from the assets of the MPF (namely, monies arising from the sale of the Lygon Street Property) with respect to its remuneration in connection with the sale of the Lygon Street Property.

61. As detailed at paragraph 41 above, the MPF was the lender with respect to a loan to 457-459 Lygon Street Pty Ltd (the **Borrower**). Upon the Trustee's appointment (together with Calibre) in 2013, the balance of this loan was approximately $900,000. At the time of swearing this affidavit, the balance of the loan is approximately $2.3 million. As security for this loan, the MPF held, through its custodian trustee The Trust Company (PTAL) Limited (**Trust Company**), a second mortgage over the Lygon Street Property.

62. In addition to the MPF's second registered mortgage:

62.1 LM Australian Income Fund (**AIF**) held a first registered mortgage over the Lygon Street Property; and

62.2 Valeo Construction Pty Ltd (**Valeo**) held a third registered mortgage over the Lygon Street Property.

63. After the appointment of the Trustee, the AIF agreed to assume the MPF's remaining funding obligations under its loan in respect of the development, in exchange for the MPF (via the Trust Company) entering into a new Priority and Subordination Deed (the **Priority Deed**) with the AIF and Valeo. A copy of the Priority Deed is at pages 28 to 51 of the Confidential Exhibit.

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64. In the period between around May 2013 and September 2016, the Borrower completed the development of the Lygon Street Property and achieved sales of all but 7 lots comprising the property. On 20 September 2016, orders were made by the Victorian registry of the Federal Court for the Borrower to be wound up.

65. Shortly after the Borrower entered into liquidation, its liquidators negotiated with the AIF for the sale of 1 of the then unsold lots.

66. In the period prior to and immediately following the Borrower's entry into liquidation, discussions took place between the trustee of the AIF (as first mortgagee) and the Trustee (as second mortgagee) as to which party was best suited to take possession of the remaining unsold lots of the Lygon Street Property. As the MPF was prevented from enforcing its rights under its security without the prior written consent of AIF (pursuant to clause 3.1(b) of the Priority Deed), it was necessary for agreement to be reached before the MPF was able to realise its security over the Lygon Street Property.

67. As at September 2016, the balance of the AIF's outstanding loan was approximately $1.6 million. The MPF's loan to the Borrower had a balance of approximately $1.7m as at September 2016 (a large portion of which being interest on the original loan value of approximately $900,000). In circumstances where the Trustee considered that the remaining lots of the Lygon Street Property had a value of approximately $2.5 - $3.0 million, and it appeared highly unlikely that the sale of the Lygon Street Property would produce sufficient monies to pay out both the AIF's and the MPF's securities in full, the Trustee wished to ensure that the sale price of the Lygon Street Property was maximised and that the sale process was conducted as efficiently and economically as possible in order to maximise recoveries for the MPF. In particular, I was of the view that given the majority of the initial recoveries would be paid to the AIF in satisfaction of its security, the Trustee had a particular incentive to ensure that the highest possible sale prices were obtained and that sale costs were kept as low as possible in order to maximise the residual sale proceeds that would be paid to the MPF for distribution to the unitholders. Further, the AIF's outstanding loan was subject to default interest rates and the Trustee therefore wanted to ensure that the debt was repaid as soon as possible to maximise return to the MPF.

68. In the circumstances detailed above, I considered that it was in the MPF's best interest for the Trustee to be appointed as mortgagee in possession so that it could exercise control over the sale process and seek to maximise recoveries for the MPF. In any event,

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I was aware that if the Trustee was not appointed as mortgagee in possession, the AIF would likely appoint a different entity in that role (which may not have been familiar with the Lygon Street Property) and the costs of it doing so would be paid out of the sale proceeds in priority to the MPF's security.

69. Following negotiations between the AIF and the Trustee, on 29 September 2016 Hickey Lawyers (the solicitors acting on behalf of the Liquidators of the Responsible Entity of the AIF) sent a letter to the Trustee pursuant to clause 11.3(a) of the Priority Deed confirming that AIF consented to the MPF:

69.1 accelerating the debt owed to it by Lygon Street Pty Ltd;

69.2 issuing notices of exercise of power of sale to the Lygon Street Pty Ltd in respect of the Lygon Street Property;

69.3 marketing the Lygon Street Property for sale; and

69.4 entering into and settling contracts for the sale of the Lygon Street Property.

A copy of the letter from Hickey Lawyers is at pages 52 to 54 of the Confidential Exhibit.

70. It was a condition of the AIF's consent that, in respect of the sale of the Lygon Street Property, the MPF:

70.1 would be entitled to retain a maximum amount of $10,000 (excluding GST) from the sale proceeds of each sale, to be wholly applied towards the professional and administrative costs of the Trustee; and

70.2 would immediately distribute the balance of the net sale proceeds to AIF (or as AIF directs), until AIF had been repaid in full.

71. In around November 2016, the Trust Company appointed KordaMentha Pty Ltd as its agent with respect to the Lygon Street Property. A copy of the relevant Deed of Appointment of Agent is at pages 55 to 61 of the Confidential Exhibit.

72. Since around November 2016, the Trustee has been engaged in marketing and selling the remaining properties comprising the Lygon Street Property. Relevantly:

72.1 The Trustee took possession of 5 residential apartments and 1 retail property; that is, the remaining unsold properties after the Borrower's entry into liquidation.

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72.2 At the date of swearing this affidavit, all of the lots in the Trustee's possession have been sold. In total, $2,881,671 (inclusive of GST) has been realised by the Trustee as agent for the mortgagee in possession.

72.3 The AIF has been paid a total of $1,385,201 out of the net proceeds of sale in satisfaction of its first-ranking mortgage.

72.4 To date, the Trustee has retained $60,000 from the proceeds of the sale of the Lygon Street Property on account of its remuneration for the sale process (consistent with the terms of the AIF's consent summarised at paragraphs 67 to 70 above). In addition to the $60,000 already retained from the sale proceeds, the Trustee has incurred a further $111,296 in fees associated with the sale of the Lygon Street Property. That is to say, the Trustee has incurred total fees of $171,296 in connection with its engagement as agent for the mortgagee in possession.

72.5 After deduction of the $1,385,201 paid to the AIF, the $171,296 in remuneration for the Trustee and various other costs of the sale process, the total net proceeds available to the MPF as a result of the sale of the Lygon Street Property are approximately $830,000.

73. The Trustee has maintained separate job numbers and fee records for its engagement as agent with respect to the Lygon Street Property. To that end, the fees incurred by the Trustee in its capacity as agent to the mortgagee in possession are in addition to the fees incurred by the Trustee in its regular capacity and I believe that there is no 'double-counting' of the Trustee's remuneration.

74. A written overview of the key work performed by the Trustee in relation to its engagement as agent to the mortgagee in possession is at page 45 of the Exhibit.

75. The schedule which is at pages 46 to 48 of the Exhibit provides an overview of the quantum of fees incurred by the Trustee in connection with the sale of the Lygon Street Property. The schedule identifies the following information:

75.1 each individual who carried out work in relation to the engagement;

75.2 their position within KordaMentha;

75.3 their hourly charge out rate;

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75.4 the hours of work they performed in total, for each of the fortnights during the Relevant Period;

75.5 their total hours of work; and

75.6 the total remuneration charged in respect of their work.

76. A schedule setting out each time entry relating to the Trustee's engagement as agent to the mortgagee in possession is at pages 49 to 67 of the Exhibit. The schedule includes a description of each task undertaken, the name of the person who performed the task, the date the task was undertaken, the length of time it took, the amount charged and a narration of the task undertaken.

77. The specific work undertaken by the Trustee in relation to the sale of the Lygon Street Property includes:

77.1 overseeing the sale process, including liaising with legal advisors and marketing team;

77.2 attendances on listing agents in relation to offers for purchase and related issues;

77.3 liaising with other secured parties in relation to sales;

77.4 preparing materials for distribution to creditors; and

77.5 preparing cashbooks and BAS details for secured creditors.

78. As detailed at paragraph 72.4 above, the Trustee has been paid $60,000 to date with respect to its fees associated with the sale of the Lygon Street Property. In addition to seeking approval *nun pro tunc* in respect of those fees, the Trustee seeks approval to pay the balance of its fees incurred to 27 May 2018 ($111,296) out of the proceeds of the sale of the final retail lot.

79. To the extent that the Trustee incurs additional fees in finalising its engagement as the agent for the mortgagee in possession of the Lygon Street Property, it intends to seek Court approval of those fees at the time it next makes an application for approval of its remuneration.

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E. STATUS OF THE ADMINISTRATION OF THE MPF

80. As detailed at paragraphs 33 to 46 above, the Trustee has been, and continues to be, involved in complex litigation on behalf of the MPF with a variety of other parties.

81. Given the complexities involved in the administration of the MPF, and the length of the period for which fees are sought to be recovered, I believe that the remuneration sought of $756,066 (exclusive of GST) for professional fees (across all five categories) and including the sale of the Lygon Street Property represents a fair and reasonable claim for remuneration. I also believe that the work undertaken to which the remuneration relates was necessary for the proper conduct of the administration and winding up of the MPF.

82. I respectfully request that this Honourable Court make orders:

    82.1 authorising payment of the Trustee's general remuneration for the Relevant Period in the amount of $584,770 (excl. GST) out of the assets of the MPF; and

    82.2 authorising, *nunc pro tunc*, payment of the Trustee's remuneration of $171,296 with respect to the sale of the Lygon Street Property out of the assets of the MPF.

83. Whilst this is the third application the Trustee has made to the Court to recover its professional fees, as the winding up of the MPF is ongoing there will likely be a need for further applications for approval of remuneration. In particular, multiple proceedings are still ongoing (see paragraphs 33 to 46 above) and various tasks will need to continue to be undertaken in order for the winding up to be completed.

84. The further length of time that it will take to finalise the winding up of the MPF is heavily dependent upon the conduct of the proceedings to which the MPF is party or could be a party (summarised at paragraphs 36 to 38 above). If that litigation were to come to an end in the near future, I estimate that it will take approximately 12-18 months to complete the winding up. However, if the MPF continues to be party to litigation in the future, the length of time required to wind up the affairs of the MPF will naturally be extended beyond that period.

F. SUBSTITUTED SERVICE ORDERS

85. The Originating Application filed on 24 November 2015 sought orders from the Court that the materials in support of the application be permitted to be served by way of substituted service. Specifically, the Court ordered that the application documents would be deemed

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to have been effectively served on the MPF's approximately 4,500 members, five days after the Applicants:

85.1 made the application materials available online on the page dedicated to the MPF on the Trustee's website; and

85.2 either sent an email to all members of the MPF at their last known email addresses notifying them of the Court documents and their availability on KordaMentha's website, or where an undeliverable message was received and a postal address held for that member, sent a copy of the notice by prepaid post (the **Substituted Service Orders**).

A copy of the Substituted Service Orders is at pages 1 to 2 of the September 2016 Exhibit.

86. The Substituted Service Orders included a provision permitting any further applications the Trustee might file for approval of its remuneration to be served by way of substituted service. At the hearing of the primary application on 17 December 2015, the Court varied paragraph 1(d) of the Substituted Service Orders, to permit substituted service of "any further applications and supporting affidavits" the Trustee might file for approval of its remuneration. A copy of the orders made on 17 December 2015 varying the Substituted Service Orders is at page 3 of the September 2016 Exhibit.

87. In the present application, the Trustee relies on the Substituted Service Orders (as varied) permitting substituted service of any further applications made by the Trustee for approval of its remuneration in the manner set out therein.

Sworn by JARROD VILLANI
On 3 July 2018
at Brisbane, Queensland, in the presence of:

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QUEENSLAND GOVERNMENT
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....

Signed ~~Solicitor~~ Commissioner for Declarations

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