

REASONS FOR JUDGMENT

Chief Justice**

13 May 2013

L M MANAGED PERFORMANCE FUND

- [1] I deal first with the application in 2869/2013 that the order made on 12 April 2013 appointing Korda Mentha and Calibre as trustees of the Performance Fund be set aside. The application is brought under Rule 668 of the Uniform Civil Procedure Rules. The discretion under that Rule relevantly arises if facts are discovered post-order which if discovered in time would have entitled Mr Park and Ms Muller to a different order.
- [2] Mr Morrison first takes the point that no-one for those applicants deposes to when they first became aware of the facts in issue. I do not think I should assume that the awareness first arose only after the order was made.
- [3] In any event, had the circumstances now relied on been raised before me then, the administrators would not have been entitled to an order appointing them as receivers or trustees, or to a different order.
- [4] As to the licence, I left to the new trustees the need to ensure that they were adequately licensed. That remains their obligation. For the reasons developed in paras 26-47 of Mr Morrison's written submissions, the new trustees consider either that they do not need a licence because of the exemption in s 911A(2)(f)(iii) of the *Corporations Act*, or that if they need one, they have it. If informed on 12 April of the alleged inadequacy of Calibre's level of tangible assets, a matter raised by Mr Dunning for the first time in his oral reply, I doubt that I would have taken a different course, noting the way I dealt with the licence issue on that occasion. If a licence is needed, and the present one is inadequately based, then other avenues may be open, such as the arrangement reached with Alpha Securities. My strong preference was to leave all licence issues to Korda Mentha in the confident expectation that it would be capable and determined to resolve them.

- [5] As to the suggested conflict of interest in relation to Korda Mentha's engagement by the Commonwealth Bank, that work related to a separate and distinct fund. Responsibly however, Korda Mentha raised that issue with Piper Alderman before the appointment was made by me. That knowledge again would not have dissuaded me from appointing Korda Mentha as trustee of the Performance Fund.
- [6] Neither would knowledge that Piper Alderman had raised the issue of a class action with unit holders. The internal Piper Alderman message of 10 April 2013 actually proposed counselling against a class action. The Piper Alderman web page refers to a class action, but in respect of a different fund. The emails in exhibits 2 and 3 suggest no more than a responsible consideration of possible conflict.
- [7] I do not consider that the discretion under Rule 668 has been enlivened. It is important to remember that this is not an application for removal of the trustees. They have been regularly appointed and there is no complaint about the way they have been operating. Their appointment is challenged on the basis of circumstances not raised at the time. It is of note that the applicants do not say when they first became aware of those matters. But in any event, if then disclosed, those matters would not have produced a different outcome. The application was not conducted on an ex parte basis, with the heightened obligation of disclosure which that sort of application involves.
- [8] The application brought by Mr Park and Ms Muller is therefore dismissed.
- [9] I turn to the trustees' application. For the reasons expressed in paras 15-25 of Mr Morrison's submission, a vesting order should be made. The matter should not be left on the cooperative basis which Mr Dunning urged. There is a need for certainty. I therefore make orders in terms of paras 1, 2, 3 and 5 of the suggested amended originating application exhibited to the affidavit of Michael David Gill sworn 10 May 2013 and filed by leave on Friday.
- [10] While Mr Tucker's four clients have supported the retention of the present trustees, Dr Derrington's 11 clients urged the appointment of a new independent trustee. Mr Morrison points out those clients have not applied for the removal of the present trustees. But in any case, for the reasons already expressed, I am not prepared to interfere with the present regime, where it was established after careful

consideration on 12 April and the basis on which that was done has not been successfully challenged.

[11] I will hear submissions on costs.