



NOTICE OF MOTION ACKNOWLEDGEMENT

NOTICE OF MOTION RECEIVED

Your motion has been received and is being processed by the registry. This acknowledgement and its attachments should NOT be served.

WHAT NEXT?

Once the motion has been processed, you will be able to see any orders made online. To do this, you should:

- Log in to the Online Registry
- Click on the name of the case on the case list page
- Click on the Judgments & orders tab

If your motion requires a listing, an order will be made to list the motion. If there is an order to list the motion, you will be required to download your sealed Notice of Motion and the relevant Notice of Listing and serve both of these on all parties. To do this, you should click on the Filed documents tab.

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2021/00179305

TITLE OF PROCEEDINGS

First Plaintiff	PP New Pty Ltd ACN 088406437
Second Plaintiff	KordaMentha Shelf Co (APMSPSAF) Pty Ltd
First Defendant	.

Form 20 (version 3)
UCPR 18.1 and 18.3

NOTICE OF MOTION

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	General
Registry	Sydney
Case number	2021/00179305

TITLE OF PROCEEDINGS

First Plaintiff	PP New Pty Ltd ACN 088 406 437
Second Plaintiff	KordaMentha Shelf Co (APMSPSAF) Pty Ltd ACN 642 981 799

FILING DETAILS

Person seeking orders	Second Plaintiff
Filed in relation to	Second Plaintiff's notice of motion dated 2 December 2022
Legal representative	Bernard Colin Walrut, Ashurst Australia
Legal representative reference	1000-122-769
Legal representative PCN	51098
Contact name and telephone	Aaron Kam (02) 9528 6014
Contact email	Aaron.Kam@ashurst.com

PERSON AFFECTED BY ORDERS SOUGHT

Second Plaintiff

HEARING DETAILS

This motion is listed at _____.

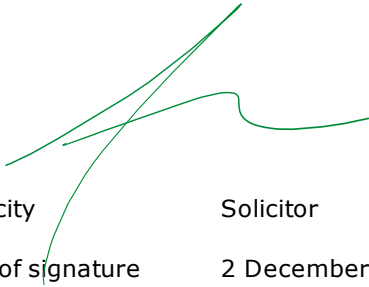
ORDERS SOUGHT

The Second Plaintiff (**New Custodian Trustee**) seeks the following relief:

1. An order pursuant to section 63 of the *Trustee Act 1925* (NSW) (**Trustee Act**) and/or rule 54.3(1) and/or 54.3(4) of the *Uniform Civil Procedure Rules 2005* (NSW), giving the Court's opinion, advice and direction to New Custodian Trustee, as trustee of the APM Security Plan Sickness & Accident Fund ABN 57 413 197 086 (**Fund**) trust (**Custodian Trust**), that New Custodian Trustee is justified in:
 - (a) completing the sale of Lot 16 in Deposited Plan 9417 being known as 67 Victory Parade, Tascott NSW 2250, as affected by the Contract for the Sale and Purchase of Land dated 15 October 2022 (**67 Victory Parade Contract**); and
 - (b) completing the sale of Lot 15 in Deposited Plan 9417 being known as 69 Victory Parade, Tascott NSW 2250, as affected by the Contract for the Sale and Purchase of Land dated 15 October 2022 (**69 Victory Parade Contract**).
2. Pursuant to section 85 of the *Trustee Act*, order that New Custodian Trustee be relieved from any personal liability for breach of trust in connection with its entering into the 67 Victory Parade Contract and 69 Victory Parade Contract.
3. Pursuant to section 7 of the *Court Suppression and Non-publication Orders Act 2010* (NSW), on the grounds that the order is necessary to prevent prejudice to the proper administration of justice and otherwise necessary in the public interest and that public interest significantly outweighs the public interest in open justice, until further order of the Court, an order that Confidential Exhibit "CMC-12" to affidavit of Catherine Margaret Conneely sworn 2 December 2022 be kept confidential and not be provided or disclosed to any person other than:
 - (a) New Custodian Trustee and the officers and staff of KordaMentha; and
 - (b) the legal advisors of New Custodian Trustee.
4. An order pursuant to section 93 of the *Trustee Act* that New Custodian Trustee's costs and expenses of and incidental to this application are paid on an indemnity basis out of the assets of the Fund.
5. Such further or other order as to this Honourable Court deems fit or the nature of the case requires.

SIGNATURE

Signature of legal representative



Capacity

Solicitor

Date of signature

2 December 2022

NOTICE TO PERSON AFFECTED BY ORDERS SOUGHT

If you do not attend, the court may hear the motion and make orders, including orders for costs, in your absence.

REGISTRY ADDRESS

Street address	Law Courts Building, 184 Phillip Street, Sydney NSW 2000
Postal address	Supreme Court of NSW, GPO Box 3, Sydney NSW 2001
Telephone	1300 679 272

Form 40 (version 6)
UCPR 35.1

**AFFIDAVIT OF CATHERINE MARGARET CONNEELY
SWORN 2 DECEMBER 2022**

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	General
Registry	Sydney
Case number	2021/00179305

TITLE OF PROCEEDINGS

First plaintiff	PP New Pty Ltd ACN 088 406 437
Second plaintiff	KordaMentha Shelf Co (APMSPSAF) Pty Ltd ACN 642 981 799

FILING DETAILS

Filed for	Second Plaintiff
Filed in relation to	Second plaintiff's notice of motion dated 2 December 2022
Legal representative	Ashurst Australia Lawyers ABN 75304286095 Level 11 5 Martin Place SYDNEY NSW 2000 DX: 388 SYDNEY Tel: (02) 9258 6000 Fax: (02) 9258 6999
Legal representative reference	1000 122 769
Legal representative PCN	51098
Contact name and telephone	Aaron Kam (02) 9528 6014
Contact email	Aaron.Kam@ashurst.com

AFFIDAVIT

Name Catherine Margaret Conneely
 Address Level 5, Chifley Tower, 2 Chifley Place, Sydney NSW 2000
 Occupation Registered liquidator and chartered accountant
 Date 2 December 2022

I say on oath:

A Introduction

1. I am a registered liquidator, chartered accountant and partner of KordaMentha.
2. I am also a director of the Second Plaintiff, KordaMentha Shelf Co (APMSPSAF) Pty Ltd ACN 642 981 799 (**New Custodian Trustee**), along with my partners of KordaMentha, Scott David Harry Langdon, Mark Anthony Korda and Mark Francis Xavier Mentha.
3. New Custodian Trustee was appointed in substitution of the first plaintiff, PP New Pty Ltd (**PP New**), as trustee of the APM Security Plan Sickness & Accident Fund ABN 57 413 197 086 (**Fund**) trust (**Custodian Trust**), pursuant to orders made by Ward CJ in Eq (as her Honour then was) on 22 June 2021 in these proceedings (**22 June 2021 Orders**).
4. Subsequently, Mr Langdon and I were appointed as joint and several liquidators of the Fund (**Liquidators**) pursuant to orders made by Hammerschlag CJ in Eq on 6 May 2022 in proceedings no. 2022/00130874 (**6 May 2022 Winding Up Orders**).
5. I make this affidavit from my own knowledge and the books and records of the Fund (**Books and Records**), except where otherwise indicated. Where I make this affidavit from facts outside my personal knowledge, I am informed by the source stated and believe those facts to be true. Where I refer in this affidavit to an opinion being held by me, I do so after having discussed the matter with Mr Langdon and having confirmed that he also holds the opinion to which I depose.
6. The investigations referred to in this affidavit have been carried out by me and by staff at KordaMentha who have acted on my instructions. My references to KordaMentha or New Custodian Trustee in this affidavit also include, where the context so dictates, information which I have obtained from those staff.
7. Exhibited to me at the time of swearing this affidavit are two bundles of documents titled "Exhibit CMC-11" and "Confidential Exhibit CMC-12". Unless otherwise stated, where I refer to documents in this affidavit, I do so by reference to the page number in Exhibit CMC-11 and Confidential Exhibit CMC-12.
8. Confidential Exhibit CMC-12 contains documents which disclose details of Interested Persons (as defined below). New Custodian Trustee seeks an order under section 7 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) limiting the disclosure of these documents.

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B Purpose of this affidavit

9. This affidavit is filed in support of the notice of motion dated 2 December 2022, for orders concerning New Custodian Trustee:
- (a) completing the sale of Lot 16 in Deposited Plan 9417 being known as 67 Victory Parade, Tascott NSW 2250 (**67 Victory Parade**), as affected by the Contract for the Sale and Purchase of Land dated 15 October 2022, a copy of which appears at pages 1 to 77 of Exhibit CMC-11 (**67 Victory Parade Contract**); and
 - (b) completing the sale of Lot 15 in Deposited Plan 9417 being known as 69 Victory Parade, Tascott NSW 2250 (**69 Victory Parade**), as affected by the Contract for the Sale and Purchase of Land dated 15 October 2022, a copy of which appears at pages 78 to 146 of Exhibit CMC-11 (**69 Victory Parade Contract**).

C Background

10. I seek leave to rely upon the following affidavits filed in these proceedings:
- (a) affidavit of Bernard Colin Walrut affirmed 22 June 2021;
 - (b) my affidavit sworn on 22 June 2021;
 - (c) my affidavit sworn 28 October 2021 (**Second Conneely Affidavit**); and
 - (d) my affidavit sworn 24 March 2022 (**Fourth Conneely Affidavit**).

Appointment of New Custodian Trustee and vesting of Property

11. I refer to paragraph 12 of the Second Conneely Affidavit where I depose to the background to the commencement of these proceedings.
12. As a result of the matters deposed to in paragraph 12 of the Second Conneely Affidavit, on 22 June 2021, the plaintiffs made an application (**First Application**) before Ward CJ in Eq, seeking the appointment of New Custodian Trustee in substitution of PP New as custodian trustee of the Custodian Trust, the vesting of property held under the Custodian Trust (including 67 Victory Parade and 69 Victory Parade) (**Property**) in New Custodian Trustee and consequential relief, including the authorisation of a prescribed course of action by New Custodian Trustee (**First Course of Action**). At pages 147 to 149 of Exhibit CMC-11 is a copy of the 22 June 2021 Orders.

First Course of Action

13. Following the First Application and in accordance with the 22 June 2021 Orders, New Custodian Trustee undertook the First Course of Action. I deposed to the steps taken by New Custodian Trustee pursuant to the First Course of Action in paragraphs 17 to 61 of the Second Conneely Affidavit.
14. As part of the First Course of Action, on 2 November 2021, New Custodian Trustee made an application (**Second Application**) before Ward CJ in Eq, seeking authorisation to, among other things, convene and hold a meeting of the current and past members of the Fund, creditors, claimants and contributories or potential creditors, claimants and contributories of the Fund and persons who have been acting as officeholders on behalf of

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the Fund (together, **Interested Persons**) to vote on the future of the Fund, and facilitate the holding of the meeting (**Second Course of Action**). At pages 150 to 154 of Exhibit CMC-11 is a copy of the orders made by Ward CJ in Eq on 2 November 2021 in these proceedings (**2 November 2021 Orders**).

Second Course of Action

15. Following the Second Application and in accordance with the 2 November 2021 Orders, New Custodian Trustee undertook the Second Course of Action. I depose to the steps taken by New Custodian Trustee pursuant to the Second Course of Action in paragraphs 15 to 62 of the Fourth Conneely Affidavit.
16. In particular, I note that:
 - (a) On 25 November 2021, New Custodian Trustee issued a report to Interested Persons dated 24 November 2021 (**24 November Report**). In the 24 November Report, New Custodian Trustee recommended that the Fund be wound up, including, on the basis that the winding up (compared to the option of continuing the Fund) would likely yield a better financial outcome for Interested Persons due to avoiding significant fees in respect of any external management of the Fund, reinstating a committee of management for the Fund, legal fees in establishing new applicable rules for the Fund and trust deed for the Custodian Trust, and ongoing compliance costs. New Custodian Trustee's recommendation was made based on the information available at the time and in the best interests of all Interest Persons. At pages 155 to 194 of Exhibit CMC-11 is a copy of the 24 November Report.
 - (b) On 9 December 2021, at a meeting of Interested Persons (**First Meeting**), a resolution that the Fund be wound up was passed, with 55 Interested Persons voting in favour of the resolution and one Interested Person voting against. At pages 1 to 24 of Confidential Exhibit CMC-12 is a copy of the minutes of the First Meeting which annexes the voting register for the First Meeting.
17. As part of the Second Course of Action, on 6 May 2022, New Custodian Trustee made an application (**Third Application**) before Hammerschlag CJ in Eq, seeking, among other things, authorisation to (**Third Course of Action**):
 - (a) bring proceedings to wind up the Fund (**Winding Up Proceedings**);
 - (b) provide notice to the Interested Persons of:
 - (i) the orders made in respect of the Third Application and any reasons for judgment;
 - (ii) the Winding Up Proceedings; and
 - (iii) any orders or directions made by the Court in the Winding Up Proceedings;
 - (c) issue the Third Notice by:
 - (i) sending the Third Notice to the email addresses of Interested Persons known to New Custodian Trustee;

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- (ii) sending the Third Notice to the postal addresses of Interested Persons known to New Custodian Trustee; and/or
- (iii) publishing the Third Notice and the documents referred to in the Third Notice on the following website: <https://www.kordamentha.com/creditors/apm-security-plan-sickness-accident-fund> (**New Custodian Trustee Website**);
- (d) sell the property held under the Custodian Trust (i.e., the Property);
- (e) to the extent necessary, bring proceedings seeking the Court's opinion, advice and direction in relation to the sale of any of the Property;
- (f) transfer the net amount of the transferring the sale proceeds of the Property and any other funds held by New Custodian Trustee under the Custodian Trust (**Proceeds**) to the Liquidators, after paying all expenses incurred in respect of the Third Course of Action and retaining such other amount as to New Custodian Trustee appears to be reasonably necessary for satisfying any other liability or contingent liability of the Custodian Trust; and
- (g) obtain professional representation and advice for the purposes of sub-paragraphs (a) to (f) above.

At pages 195 to 198 of Exhibit CMC-11 is a copy of the orders made by Hammerschlag CJ in Eq on 6 May 2022 in these proceedings (**6 May 2022 Judicial Advice Orders**).

Third Course of Action

Winding Up Proceedings

18. At that time and in accordance with the 6 May 2022 Judicial Advice Orders, on 6 May 2022, New Custodian Trustee made an application before Hammerschlag CJ in Eq in proceedings no. 2022/00130874 seeking to wind up the Fund under section 583(c) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and/or the inherent jurisdiction of the Court (i.e., the Winding up Proceedings). Hammerschlag CJ in Eq ordered that the Fund be wound up and appointed Mr Langdon and I as the liquidators of the Fund. At pages 199 to 200 of Exhibit CMC-11 is a copy of the 6 May 2022 Winding Up Orders.

Issuing the Third Notice

19. On 6 May 2022, my staff uploaded the 6 May 2022 Judicial Advice Orders and 6 May 2022 Winding Up Orders (together, **6 May 2022 Orders**) to the New Custodian Trustee Website. The 6 May 2022 Orders can be downloaded from the New Custodian Trustee Website by clicking on "Orders – Judicial Advice" and "Orders – Winding Up" in the "Download documents" section of the New Custodian Trustee Website. At page 201 of Exhibit CMC-11 is a screenshot of the New Custodian Trustee Website taken on or around the date of this affidavit.
20. On 17 May 2022, New Custodian Trustee sent a copy of the 6 May 2022 Orders to the known email and/or postal addresses of the Interested Persons identified by New Custodian Trustee at the time. At pages 25 to 29 of Confidential Exhibit CMC-12 is a list of the

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Interested Persons (and their email and/or postal addresses) to whom the 6 May 2022 Orders was sent (**Interested Persons List**).

21. At page 202 of Exhibit CMC-11 is a copy of the covering email sent to the email addresses of Interested Persons referred to in the Updated Interested Persons List on 17 May 2022. I note that the recipient or "To" field in the email is blank because the Interested Persons were all blind copied such that an Interested Person could not identify another Interested Person the email was sent to.
22. At pages 203 to 210 of Exhibit CMC-11 is a copy of the covering letter sent with a copy of the 6 May 2022 orders to the postal addresses of Interested Persons referred to in the Updated Interested Persons List on 17 May 2022.
23. As at the date of swearing this affidavit, New Custodian Trustee has received nine responses to the 6 May Orders, including in respect of the sale of the Property by New Custodian Trustee (as prescribed by the Third Course of Action). At pages 30 to 36 of CMC-12 are copies of these responses.

Selling the Property

24. On 26 September 2022, New Custodian Trustee sold:
 - (a) 289,200 fully paid ordinary shares in Amcor plc (**Amcor Shares**); and
 - (b) 231,360 fully paid ordinary paid shares in Orora Ltd (**Orora Shares**).
25. The Amcor Shares were sold for \$4,864,140.43 (\$16.8193 per share) and the Orora Shares were sold for \$709,372.84 (136,732 at \$3.0700 per share, 2,929 at \$3.0750 per share, and 91,699 at \$3.0600 per share).
26. At pages 211 to 214 of Exhibit CMC-11 are copies of contract notes relating to the sale of the Amcor Shares and Orora Shares.
27. I depose to the sale process of 67 Victory Parade and 69 Victory Parade (together, **Point Clare Properties**) in the following section.

D Sale of the Point Clare Properties

28. The sale of the Point Clare Properties was undertaken in consultation with KordaMentha's Real Estate team (and other professional advisors). KordaMentha's Real Estate team regularly advises on, develops, transacts and invests in real estate (including in respect of external administrations and other insolvency processes) and has detailed knowledge of all facets of property and construction. In particular, the team has extensive experience in traditional commercial and residential property sectors and assists clients to achieve commercial and strategic outcomes from their real estate holdings.
29. At pages 215 to 264 of Exhibit CMC-11 is a copy of a valuation dated 6 August 2021 prepared by Preston Rowe Paterson (**PRP**) for the Point Clare Properties (**PPR Valuation**).

Sales agent

30. In June 2022, New Custodian Trustee and KordaMentha's Real Estate team considered a number of potential sales agents to market and sell the Point Clare Properties. The local

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market was reviewed for recent comparable sales to the Point Clare Properties to determine the most prominent sales agents, with JMB (NSW) Pty Ltd, Alan Bowler and Alan Bowler Pty Ltd (together, **McGrath**) and Ray White Macdonald Partners (**Ray White**) being, I believe, the most active agents in the area. New Custodian Trustee then requested fulsome submissions from both agents to allow it to evaluate the most suitable agent. Key criteria included sale method, timing, commission, estimated value range, key comparable sales as sold by the agency, consideration to the jetty configuration located on 67 Victory Parade (i.e. whether there was value in a shared licence or not – see paragraphs 33 to 37 below), and whether the properties should be sold together or separately. At pages 265 to 322 of Exhibit CM-11 are copies of the submissions received from McGrath and Ray White. Following this, meetings with both agents took place on-site in June 2022 to perform an inspection of the Point Clare Properties, and to discuss the most appropriate course to realise the assets.

31. In respect of:
 - (a) 67 Victory Parade, McGrath's initial estimated selling price was \$1,800,000 to \$2,000,000 (including GST if any) and recommended method of sale was auction; and
 - (b) 69 Victory Parade, McGrath's initial estimated selling price was \$1,500,000 to \$1,650,000 (including GST if any) and recommended method of sale was auction.
32. I received these estimated selling prices on 20 June 2022. Subsequently, New Custodian Trustee and Ashurst completed investigations into the jetty, as detailed at paragraph 33 to 37 below.

Jetty and Licence consideration

33. By about June 2022, New Custodian Trustee, in consultation with KordaMentha's Real Estate team, was considering the options available to the incoming purchaser of 69 Victory Parade (which does not have a jetty) to use the domestic waterfront jetty located on 67 Victory Parade. This was based on the recommendation from PRP that jetty licence no LI 560360 issued to PP New (the former registered proprietor of the Point Clare Properties) (**Licence**) should be reconfigured as a shared licence between each of the registered proprietors of the Point Clare Properties to maximise the value of both properties (see section 14 of the PRP Valuation at pages 243 to 244 of Exhibit CMC-11). Photos of each of the Point Clare Properties along with a copy of the Licence are contained in the PRP Valuation at pages 221 to 227 and 229 of Exhibit CMC-11.
34. Considering this advice, New Custodian Trustee subsequently liaised with the Domestic Waterfront Tenures, Ashurst and the sales agents who provided submissions for the Point Clare Properties (see paragraph 30 above), regarding the possibility and advantages of a shared jetty licence. Through this process it was found that:
 - (a) the Domestic Waterfront Tenures would not grant a "joint licence" as the jetty structure was not exactly on the property boundary of the Point Clare Properties;

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- (b) access to the jetty could be provided by way of a Deed Poll, however, in the absence of the Domestic Waterfront Tenures granting a "joint licence" it would be difficult to enforce the Deed Poll rights and ensure that a future owner of the 69 Victory Parade would be able to access the jetty. Further it would be difficult for New Custodian Trustee to implement a Deed Poll arrangement considering the jetty was still in the name of PP New and New Custodian Trustee was not the Licence holder; and
 - (c) both agents recommended selling the Point Clare Properties with the jetty as is, as a reconfiguration or shared licence agreement is confusing and difficult to enforce, which would negatively impact value for 67 Victory Parade more materially than the increase in value to 69 Victory Parade.
35. Considering the above, the jetty configuration was left as is, with access granted to 67 Victory Parade only.
 36. Separately, between around June and August 2022, Ashurst, on behalf of New Custodian Trustee, liaised with the Domestic Waterfront Tenures in relation to the process to transfer the Licence to New Custodian Trustee in light of the upcoming sale of the Point Clare Properties. I understand that the Domestic Waterfront Tenures was experiencing delays of up to 18 months to process new licence applications. At pages 323 to 325 of Exhibit CMC-11 is a copy of an email thread between Kate Ferguson of Ashurst and Domestic Waterfront Tenures dated 12 July to 30 August 2022.
 37. Given the long delay in processing times, New Custodian Trustee did not apply for a new jetty licence and instead decided to leave the Licence in the name of PP New and leave it for the incoming purchaser to apply for a new jetty licence. I was of the view that holding up the sale of the Point Clare Properties by up to 18 months was not in the best interests of Interested Persons, particularly where, as deposed to below, market conditions were worsening.

Sales process

38. On 28 July 2022, following the receipt of marketing proposals and strategy discussions with both McGrath and Ray White, New Custodian Trustee engaged McGrath. McGrath was engaged as it had a more comparable sales history, transacted many recent comparable sales and agreed to lower its commissions to be in line with Ray White. McGrath also had over 39 years' experience in real estate and specialised in the Point Clare and Tascott area. McGrath's realisation estimate was in line with the PRP Valuation. At pages 326 to 329 of Exhibit CMC-11 is a copy of a memorandum prepared by KordaMentha's Real Estate team detailing its recommendation in the appointment of McGrath.
39. At pages 330 to 349 of Exhibit CMC-11 is a copy of the Sales Inspection Report and Exclusive Agency Agreement for 67 Victory Parade dated 24 August 2022 and a copy of the Sales Inspection Report and Exclusive Agency Agreement for 69 Victory Parade dated 24 August 2022.

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40. On 31 August 2022, McGrath provided updated guidance on the market value of the Point Clare Properties based on market deterioration observed in the preceding months. In respect of:

- (a) 67 Victory Parade, McGrath's revised estimated selling price was \$1,700,000 to \$1,800,000 (including GST if any); and
- (b) 69 Victory Parade, McGrath's revised estimated selling price was \$1,400,000 to \$1,500,000 (including GST if any).

At pages 350 to 354 of Exhibit CMC-11 are copies of two emails from Alan Bowler to Kate Berry of KordaMentha dated 31 August 2022.

41. Due to ongoing movement in the market, it was decided, in consultation with the KordaMentha Real Estate Team, that the Point Clare Properties would be advertised without a price guide. I considered that this strategy enabled the market to determine the appropriate value of the Point Clare Properties, without a false ceiling or mispricing by New Custodian Trustee which may have resulted in reduced interest. The Point Clare Properties were advertised with recent comparable sales provided to prospective purchasers, in place of a price guide. At pages 355 to 359 of Exhibit CMC-11 is an update from the KordaMentha Real Estate Team in respect of price guides dated 16 September 2022.
42. In selecting the appropriate sale method and marketing campaign, New Custodian Trustee relied on the expertise of McGrath and also consulted with the KordaMentha Real Estate team. The auction sale method was ultimately selected over the private treaty or expressions of interest methods. This method of sale was recommended by both agents who provided submissions, based on their understanding of the local market and buyer pool. Based on my discussions with both agents, I understand that an auction allows the market to be sufficiently tested, through a focused, wide-reaching and fulsome marketing campaign, and is therefore a transparent way of determining the market price.
43. The Point Clare Properties were advertised with a fulsome four-week online marketing strategy to maximise the marketing reach during the sale campaign. In addition, the Point Clare Properties were professionally cleaned internally and externally. This included high pressure hosing, rectification of broken jetty slats, rectification of broken water pipes and reinstatement of broken fencing. Furthermore, in line with McGrath's advice, each room of the Point Clare Properties was professionally styled with updated furniture as much of the original furniture was outdated. Photos of the original furniture are in the PRP Valuation at pages 221 to 227 of Exhibit CMC-11 and photos (post-styling) are available on the McGrath website referred to in the paragraph 45 below and separately extracted at pages 360 to 367 of Exhibit CMC-11.
44. Based on McGrath's advice, the Point Clare Properties were advertised as separate lots. Both McGrath and Ray White recommended this method in the proposals submitted to New Custodian Trustee noting that this would appeal to a wider pool of purchasers and generate greater interest, thereby attracting a higher price than if sold in one-line (i.e. together). In line with McGrath's advice, the ability to purchase the properties in-one-line was noted in

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the marketing text of the advertisements and McGrath was instructed to ensure all prospective purchasers were aware this was an option.

45. On 21 September 2022, I was informed by McGrath that the marketing campaign for the Point Clare Properties had commenced on 20 September 2022. The marketing campaign included:

(a) advertisements on the following websites:

- (i) <https://www.mcgrath.com.au/67-victory-parade-tascott-nsw-2250-for-sale-554418>;
- (ii) <https://www.mcgrath.com.au/69-victory-parade-tascott-nsw-2250-for-sale-554423>;
- (iii) <https://www.realestate.com.au/property/67-victory-pde-tascott-nsw-2250>;
- (iv) <https://www.realestate.com.au/property/69-victory-pde-tascott-nsw-2250>;
- (v) <https://www.domain.com.au/67-victory-parade-tascott-nsw-2250-2018078555>; and
- (vi) <https://www.domain.com.au/property-profile/69-victory-parade-tascott-nsw-2250>;

(b) signage out the front of each of the Point Claire Properties; and

(c) email distribution of marketing material to McGrath's potential buyer database.

46. At pages 368 to 376 of Exhibit CMC-11 are extracts from the websites referred to in the preceding paragraph and photos of the signage out the front of 69 Victory Parade.

47. On 21 September 2022, New Custodian Trustee provided notice of the sale of the Point Clare Properties to Interested Persons. Notice was provided to Interested Persons as an Interested Person at the First Meeting enquired as to the ability of Interested Persons to purchase the Point Clare Properties. At page 377 of Exhibit CMC-11 is a copy of the covering email sent to the email addresses of Interested Persons referred to in the Updated Interested Persons List. I note that the recipient or "To" field in the email is blank because the Interested Persons were all blind copied such that an Interested Person could not identify another Interested Person the email was sent to.

48. New Custodian Trustee did not receive any response directly to the notice referred to in the preceding paragraph. New Custodian Trustee received one telephone request from the spouse of an Interested Person requesting to purchase the Point Clare Properties. The enquiry was directed to McGrath to allow them to participate fairly in the sale process.

49. In relation to the marketing campaigns for the Point Clare Properties, New Custodian Trustee regularly met with McGrath to discuss interest to date and sale strategy. In respect of:

(a) 67 Victory Parade:

- (vii) 107 enquiries were received;

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- (viii) 39 prospective buyers inspected; and
- (ix) 16 contracts were issued to prospective buyers.
- (b) 69 Victory Parade:
 - (x) 118 enquiries were received;
 - (xi) 24 prospective buyers inspected; and
 - (xii) 13 contracts were issued to prospective buyers.
- 50. McGrath advised that the Point Clare Properties received strong enquiry and inspection numbers, greater than other properties listed by McGrath during that period
- 51. Throughout the course of the sales campaign, the KordaMentha Real Estate Team prepared regular updates in respect of the Point Clare Properties marketing campaigns (based on discussions with McGrath). At pages 378 to 383 of Exhibit CMC-11 are copies of these updates dated 28 September, 6 October and 12 October 2022.
- 52. Despite strong enquiry levels, throughout the first two weeks of the sales campaign, little meaningful interest was received for 69 Victory Parade. Post-inspection buyer feedback was largely negative, relating to the lack of jetty, and water views being largely obstructed by mangroves (a protected tree, which could not be removed to improve interest). Considering the lack of interest at the original guide price and following advice from McGrath, the price guide for 69 Victory Parade was reduced to \$1,250,000. This was performed to appeal to a larger pool of purchasers and increase enquiry and inspection rates for the property. McGrath subsequently reported positive feedback received from the inspections undertaken at the new price level. At pages 384 to 388 of Exhibit CMC-11 is an email exchange with McGrath dated 4 to 6 October 2022 confirming this change in price guide.
- 53. I note that the price guide was not advertised at any stage during the campaign, and the 'price guide' referred to above relates to the back search criteria of Real Estate.com and Domain. McGrath continued to guide prospective purchasers based on recent comparable sales and market evidence, to ensure a non-guided market price was achieved.
- 54. Shortly after the price guide for 69 Victory Parade was recommended by McGrath to be reduced and considering the time which had passed since the PRP Valuation was undertaken, New Custodian Trustee engaged PRP to perform an updated valuation due to an apparent decline in market conditions. The valuation was a desktop assessment and ascribes a market value "as is" of the Point Clare Properties as at 5 October 2022 (**Updated PRP Valuation**), as follows:
 - (a) \$1,750,000 for 67 Victory Parade; and
 - (b) \$1,300,000 for 69 Victory Parade.

At pages 389 to 406 of Exhibit CMC-11 are copies of revised valuations prepared by PRP for the Point Clare Properties.

Grant Kinnally

55. In the Updated PRP Valuation, PRP noted a significant cooling in the market in the preceding months PRP attributed the decline in valuation to the following:
- (a) the Point Clare Properties' valuation in August 2021 was temporarily inflated by unprecedented price growth in the area in post-COVID period;
 - (b) demand for real estate in New South Wales had fallen, with a 37% fall in sales of residential property in the period March 2021 to September 2022, partially driven by interest rate rises;
 - (c) the Point Clare Properties are in a low-lying flood liable area, with similar properties in the area experienced flooding events in April 2022 and July 2022, which would increase insurance premiums in the area; and
 - (d) local agents had reported properties requiring renovations/rebuilds are showing greater discounts given the turmoil in the building industry and construction price increases.
56. On 15 October 2022, McGrath conducted the auction of the Point Clare Properties on site. I am informed by Ms Berry (who attended the auction) that there were approximately 20-30 people who attended (excluding the auctioneer/McGrath) In respect of:
- (a) 67 Victory Parade:
 - (xiii) its reserve price was \$1,750,000 (in line with the Updated PRP Valuation);
 - (xiv) it had 2 registered bidders; and
 - (xv) it sold for \$1,750,000.
 - (b) 69 Victory Parade:
 - (xvi) its reserve price was \$1,300,000 (in line with the Updated PRP Valuation);
 - (xvii) it had 2 registered bidders; and
 - (xviii) it sold for \$1,300,000.
57. New Custodian Trustee subsequently entered into the 67 Victory Parade Contract and 69 Victory Parade Contract (together, **Contracts**). The Contracts are at pages 1 to 146 of Exhibit CMC-11.
58. At pages 407 to 408 of Exhibit CMC-11 are copies of the Sales Advices in respect of each of the Point Clare Properties.
59. The key clauses in the Contracts in respect of why the Approval Application has been brought by New Custodian Trustee, are summarised below:
- (a) Clause 36.1 of the Contracts provides that unless waived by New Custodian Trustee pursuant to clause 36.2, completion is subject and conditional upon satisfaction of the following condition precedent: New Custodian Trustee notifies the purchaser that it has obtained such opinion, advice and/or direction pursuant to the Trustee Act 1925 (NSW) as it considers appropriate in relation to the sale of the Point Clare Properties.

Grain K. Connolly

- (b) Clause 36.2 of the Contracts provides that New Custodian Trustee alone may waive the "Condition Precedent". Condition Precedent means the condition precedent described in clause 36.
- (c) Clause 36.3 of the Contracts provides that if the Condition Precedent is not satisfied by the "Sunset Date", then either party may terminate at any time until the Condition Precedent has been satisfied. Sunset Date means six months after the Contracts date (i.e., 15 April 2023).
- (d) Clause 37 provides that the parties must complete the Contracts by the "Date for Completion" at a time nominated by New Custodian Trustee. Date for Completion means the later of (a) 42 days after the contract date (i.e. 26 November 2022); and (b) 10 business days after satisfaction of the Condition Precedent. I note that the Contracts were subsequently hand amended to provide for completion on the later of 60 days after the contract date (i.e. 14 December 2022) and 10 business days after satisfaction of the Condition Precedent.

E Sale is in interests of Interested Persons

60. As set out in the 24 November Report and deposed to in paragraph 16(a) above, it was in New Custodian Trustee's opinion that the Fund be wound up (which inherently involves selling the Point Clare Properties), as this course was, in New Custodian Trustee's opinion, likely to yield a better financial outcome for Interested Persons compared to the option of continuing the Fund. New Custodian Trustee's view in relation to the sale of the Point Clare Properties remains the same, for the following reasons:

- (a) the significant majority of Interested Persons in attendance at the First Meeting voted in favour of winding up the Fund. This Court subsequently gave judicial advice to, and authorised, New Custodian Trustee to, among other things, bring an application to wind up the Fund and sell Property (i.e., the Third Course of Action). No Interested Persons have sought to challenge the Third Course of Action or the conduct of New Custodian Trustee in accordance with the Third Course of Action.
- (b) In order to obtain the best sale price for the Point Clare Properties, New Custodian Trustee engaged independent real estate agents, McGrath, to advise and conduct the sale process (including an extensive marketing campaign) for the Point Clare Properties. As deposed to above, the appointment of McGrath and decisions in relation to the sale process of the Point Clare Properties were undertaken in consultation with KordaMentha's Real Estate team.
- (c) New Custodian Trustee, in consultation with KordaMentha's Real Estate team relied on the expertise of McGrath throughout the sale process, in particular, in respect of the type and duration of the marketing campaign, the sale method and the reserve (or minimum) sale price that New Custodian Trustee should accept to sell the Point Clare Properties based on the current market valuations of the Point Clare Properties.

Grant *KordaMentha*

- (d) The sale price of each of the Point Clare Properties was in the range of McGrath's estimated selling prices and the Updated PRP Valuation.
- (e) If the sale of the Point Clare Properties does not complete, New Custodian Trustee will continue to incur annual holding costs in respect of the properties (and potentially further sale costs if the properties are sold in the future). As deposed to in paragraph 57 of the Second Conneely Affidavit, New Custodian Trustee anticipated that the annual holding costs for the Point Clare Properties would be approximately \$30,000. The costs currently incurred by New Custodian Trustee are \$60,046. Costs incurred in preparing for and conducting the sale of the Point Clare Properties were a further \$17,384, bringing total costs incurred to \$77,430. At pages 409 of Exhibit CMC-11 is a copy of a statement of costs in respect of the Point Clare Properties incurred by New Custodian Trustee since its appointment as trustee of the Custodian Trust.
- (f) While the annual holding costs need to be considered against any appreciation in the value of the Point Clare Properties if they are not sold, I note that, in the approximate 16 months since New Custodian Trustee was appointed as trustee of the Custodian Trust, there has been a considerable decline in the value of the Point Clare Properties. While it is difficult to predict the state of the property market in the future, I consider that the sale of the Point Clare Properties now avoids the uncertainty of future property price fluctuations and the risk of any further depreciation in the value of the Point Clare Properties.
- (g) As deposed to in paragraph 53 of the Fourth Conneely Affidavit, I understood that there had been no visitors to the Point Clare Properties since the first lockdown in New South Wales in around March 2020 as a result of the coronavirus pandemic. There have been no visitors who have stayed at the Point Clare Properties since I swore the Fourth Conneely Affidavit in March 2022. In circumstances where Interested Persons have not enjoyed the benefit of staying at the Point Clare Properties for over two years, and to permit them to do so now would require the incurrence of costs to, among other things, restore management to the Fund, I consider the sale of the Point Clare Properties is the only realistic option which will allow Interested Persons to realise a (financial) benefit from these assets.

F Notice and urgency of this application

- 2. I will provide notice of the hearing of the Approval Application to Interested Persons on the New Custodian Trustee Website once it has been filed with the Court.
- 3. As deposed to in paragraphs 59(c) and 59(d) above:
 - (a) if the Condition Precedent is not satisfied by the "Sunset Date", then either party may terminate at any time until the Condition Precedent has been satisfied. Sunset Date means six months after the Contracts date (i.e., 15 April 2023); and
 - (b) the Date for Completion is the later of 60 days after the contract date (i.e. 14 December 2022) and 10 business days after satisfaction of the Condition Precedent.

Brandon Conneely

4. Accordingly, the Date of Completion could, at the latest, occur on 28 April 2023. However, I was informed by Mr Bowler on 30 November 2022 that the preference of the purchaser of the Point Clare Properties is to settle by 14 December 2022. I understand that the urgency relates to the terms of the purchaser's finance which effectively requires the purchaser to complete the sale by early 2023.
5. While I consider that this is a matter for the purchaser and there may be options available to New Custodian Trustee if the purchaser is unable to complete by the Date for Completion and New Custodian Trustee is subsequently required to commence a fresh sale process of the Point Clare Properties, I consider it desirable, and in the interests of the Fund, to try and accommodate the purchaser to complete as soon as possible. This would avoid the time, cost and risks associated with another sale process and recovering any loss suffered by New Custodian Trustee by reason of the sales not completing by the Date for Completion.
6. I understand that the 2022 Court term concludes on 16 December 2022 and the 2023 Court term commences on 30 January 2023. In the circumstances deposed to in paragraph 64 above, New Custodian Trustee respectfully seeks a hearing date before 14 December 2022.

SWORN at Sydney NSW

Signature of deponent

Klanawely.

Name of witness

Samantha Brandon

Address of witness

Level 11, 5 Martin Place, Sydney NSW 2000

Capacity of witness

Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness

Brandon.