

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3691/2013

Applicants

**KORDAMENTHA PTY LTD
(ACN 100 169 391)**

AND

**CALIBRE CAPITAL LTD (ABN 66 108 318 985)
IN THEIR CAPACITY AS TRUSTEES FOR
THE LM MANAGED PERFORMANCE FUND**

AND

First Respondents

**JOHN RICHARD PARK AND GINETTE
MULLER IN THEIR CAPACITY AS JOINT
AND SEVERAL LIQUIDATORS OF LM
INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) ACN 077 208 461**

AND

Second Respondent

**LM INVESTMENT MANAGEMENT LIMITED
(IN LIQUIDATION) ACN 077 208 461**

**OUTLINE OF SUBMISSIONS OF THE APPLICANTS –
APPLICATION TO WIND UP THE LM MANAGED PERFORMANCE FUND**

1. By an application filed 12 November 2013, the applicants applied for orders:
 - (a) that they be directed to wind up the LM Managed Performance Fund (“**the Trust**”), pursuant to clause 15.2(c) of its Constitution, and that they be authorised to exercise the powers contained in clauses 12 and 15.6 of the Constitution until all winding up procedures have been completed; and
 - (b) that directions be given pursuant to s.96 of the *Trust Act 1973* (Qld), as to whether the applicants are authorised in repaying amounts advanced by certain persons who sought to invest in the Trust, to whom no units in the Trust were issued.

BACKGROUND

2. The Trust was established in December 2001. It is governed by a Constitution, set out in a trust deed dated 25 November 2009¹ (“**the Constitution**”).
3. Under the Constitution the second respondent LM Investment Management Limited (“**the Former Trustee**”) was appointed trustee of the Trust, although styled as Manager (clauses 2.1 and 2.2 of the Constitution).
4. The Trust is a unit trust. It attracted a large amount of investment, and principally invested these funds by pooling investors’ contributions to make loans on mortgage securities.
5. The Trust was designed to be offered to investors outside Australia, global platform and portfolio investors and institutional/wholesale investors, which was the basis upon which the Former Trustee did not register the investment scheme as a managed investment scheme under the *Corporations Act*.²
6. The last annual return (30 June 2012) stated that the Trust had a total value of funds advanced on loan of approximately \$299.57 million.³ There are 4,593 unit holders in the Trust, 4,525 of whom live outside Australia.⁴
7. On 8 March 2013 the directors of the Former Trustee resolved to close the Trust to new investment, effective immediately.⁵ However, the Former Trustee did not notify any external party of the closure of the Trust at this time.⁶

¹ A consolidated version of the Trust deed appears at pages 25-68 of the affidavit of John Park filed 13 November 2013 in proceeding BS9550/13.

² Section 601ED(2) of the Act provides that a managed investment scheme is not required to be registered if all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made.

Investors located outside the jurisdiction: Pursuant to s.1012(D)(8) of the Act, as modified by reg.7.9.07FB of the *Corporations Regulations 2001*, in a recommendation situation, an issue situation or a sale situation a regulated person does not have to give the client a PDS if the client is not in this jurisdiction. This covers the majority of investors in the Trust, who were located overseas.

Non-retail clients: ss.1012A(3) and 1012B(3) (contained in Div. 2 of Part 7.9) provide that a regulated person must give a PDS to a “retail client.” Section 761G(7) and the regulations provide that certain clients are not “retail clients” – for instance, if the client invests more than \$500,000.00 (s.761G(7)(a) and reg.7.1.22(A)(2)); the client has net assets of at least \$2.5 million or has a gross income of at least \$250,000.00 (s.761G(7)(b) and (c) and reg.7.1.28); or the client is a professional investor (s.761G(d)). A further exception exists where the client is a “sophisticated investor” (s.761GA).

³ Page 445 of the affidavit of John Park filed 13 November 2013 in proceeding BS9550/13.

⁴ Paragraphs 32 and 34 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding BS3691/13.

⁵ Paragraphs 91.1(b) and (c) of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

The Former Trustee's insolvency, and the appointment of the applicants as New Trustees

8. On 19 March 2013 the first respondents, Mr. Park and Ms. Muller (**"the Administrators"**), were appointed voluntary administrators of the Former Trustee.
9. The appointment of voluntary administrators to the Former Trustee had important consequences under the Trust's Constitution.
10. Clause 23.1(b)(ii) provided that the Former Trustee "must resign" "if, being a corporation, it becomes an externally-administered body corporate as defined in the Corporations Act 2001."⁷
11. One month after their appointment, on 12 April 2013, the Administrators applied to the Supreme Court in proceeding BS2869/2013 for orders that they be appointed as trustees of the Trust, or alternatively that they be appointed as Court-appointed receivers of the assets of the Trust.
12. A number of unit holders of the Trust opposed the application, and sought instead that a trustee of their own choosing be appointed as replacement trustee.
13. On 12 April 2013 the Chief Justice made an order removing the Former Trustee as trustee, and appointing the applicants jointly and severally as trustees in its place (**"the New Trustees"**).

Application to set aside the appointment of the new trustees, and cross-application for a vesting order

14. On 10 May 2013 the Chief Justice heard two further applications in relation to the Trust:
 - (a) an application by the first respondents (in their capacity as voluntary administrators of the Former Trustee) under r.667 and r.668 to set aside the order appointing the applicants new trustees of the Trust (proceeding BS2869/13); and
 - (b) an application by the applicants for orders vesting certain assets of the Trust in them as new trustees (proceeding BS3691/13).

⁶ Paragraphs 91.1(b) and (c) of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

⁷ Page 66 of the exhibits to the affidavit of Mr. Park filed 13 November 2013 in proceeding BS9550/13.

15. The Chief Justice delivered judgment on 13 May 2013, and a further judgment on 23 May 2013 (as to the form of orders). His Honour:
- (a) dismissed the r.667/r.668 application, and ordered that the Administrators pay the New Trustees' costs of this application on the indemnity basis, without recourse to the assets of the Trust; and
 - (b) made the vesting orders sought by the New Trustees. His Honour ordered the New Trustees to hold the amount of \$1,364,299 from the balance of the Trust's assets on account of the liens claimed by the Former Trustee and the Administrators (without prejudice to the quantum and priority of those liens), and not to apply that amount until the lien claims were resolved.

The Former Trustee passes into liquidation

16. On 1 August 2013 the Administrators became the liquidators of the Former Trustee, by way of a creditors' voluntary winding up.⁸

APPLICATION TO WIND UP THE TRUST

17. On 12 November 2013 the New Trustees filed the present application, seeking a direction that they wind up the Trust, pursuant to clause 15.2(c) of its Constitution.
18. Ordinarily, Courts will not make orders that put an end to a trust. However, Courts will make orders giving effect to winding-up provisions contained in the trust deed. As Barrett J stated in *Re Gaydon* [2001] NSWSC 473 at [29]:

"[The order sought] is framed upon some implicit assumption that the Court may, by order, dissolve a trust in the same way as it may, for example, dissolve a partnership...Any such assumption is, of course, unwarranted. It is the duty of the Court to uphold and protect trusts, not destroy them, although where the terms of the trust envisage, in certain circumstances, realisation of property, winding up of the trust's affairs and final payments to beneficiaries, the Court will, naturally enough, give effect to those "winding up" provisions."

19. Such "winding up" provisions are contained in clause 15 of the Constitution.

⁸ ASIC historical company search for LMIM; p.134 to the affidavit of Simon Vertullo filed 18 November 2013 in proceeding BS3691/13.

20. Clauses 15.1, 15.2 and 15.3 of the Constitution govern the circumstances in which the Trust may be wound up. They provide:

15. Winding up the Scheme

15.1 *The Scheme shall only be wound up in accordance with the Law⁹ and this Constitution.*

15.2 *The Manager must wind up the Scheme in the following circumstances:-*

- (a) *if the term of the Scheme as detailed in this Constitution has expired¹⁰;*
- (b) *the Members pass an Extraordinary Resolution¹¹ directing the Manager to wind up the Scheme;*
- (c) *the Court makes an order directing the Manager to wind up the Scheme;*
- (d) *the Members pass an Extraordinary Resolution to remove the Manager but do not at the same time pass an Extraordinary Resolution choosing a company to be the new Manager that consents to becoming the Scheme's Manager.*

15.3 (a) *If the Manager considers that the purpose of the Scheme:*

- (i) *has been accomplished; or*
- (ii) *cannot be accomplished,*
it may take steps to wind up the Scheme.

(b) *If the Manager wishes to wind up the Scheme pursuant to Clause 15.3 (a), the Manager must give to the Members of the Scheme a notice in writing:*

- (i) *explaining the proposal to wind up the Scheme, including explaining how the Scheme's purpose has been accomplished or why that purpose cannot be accomplished;*
- (ii) *informing the Members of their rights to take action under Division 1 of Part 2G.4 of the Law for the calling of a Members' meeting to consider the proposed winding up of the Scheme and to vote on an*

⁹ Defined as the *Corporations Act 2001*: clause 1.1 of the Constitution.

¹⁰ The term of the Scheme is defined in clause 14 of the Constitution; it provides for an 80-year term, or any earlier date that the Manager in its absolute discretion may appoint as the Vesting Date, which is defined in clause 1.1 as the date of termination of the Scheme.

¹¹ Defined as having the same meaning as in the *Corporations Act* (clause 1.1 of the Constitution). Section 9 of the *Corporations Act* defines "extraordinary resolution" as follows: "*in relation to a registered scheme, means a resolution:*

(a) of which notice as set out in paragraph 252J(c) has been given; and

(b) that has been passed by at least 50% of the total votes that may be cast by members entitled to vote on the resolution (including members who are not present in person or by proxy)."

There is no definition that applies to an unregistered scheme.

Extraordinary Resolution Members propose about the winding up of the Scheme; and

(iii) informing the Members that the Manager is permitted to wind up the Scheme unless a meeting is called to consider the proposed winding up of the Scheme within 28 days of the Manager giving the notice to Members;

(c) if no meeting is called within that 28 days to consider the proposed winding up, the Manager may wind up the Scheme.”

21. Clauses 15.1, 15.2 and 15.3 of the Constitution refer to powers contained in the *Corporations Act*. Those references cannot apply to the present Trust, as it is not a managed investment scheme registered under that Act.¹² They reflect the requirements of Part 5C of the *Corporations Act*, which apply to registered managed investment schemes. They are:

- (a) clause 15.1: the reference to a winding up being conducted in accordance with “the Law”;
- (b) clauses 15.2(b) and (d): the references to an “Extraordinary Resolution” being passed; and
- (c) clause 15.3(b)(ii): the reference to a member’s right to take action under “Division 1 of Part 2G.4” of the *Corporations Act*. Part 2G.4 only applies to registered managed investment schemes. As the Manager cannot give a notice complying with clause 15.3(b)(ii), clause 15.3(b) cannot operate.

22. The powers contained in clauses 15.2(a) and (c) and 15.3(a) remain. As to these clauses:

- (a) clause 15.2(a): as the 80-year term of the Scheme has not expired (clause 14 of the Constitution), it does not apply;
- (b) clause 15.2(c) provides that the Manager must wind up the Scheme if the Court makes an order directing the Manager to wind up the Scheme; and
- (c) clause 15.3(a) provides that if the purpose of the Scheme cannot be accomplished, the Manager may take steps to wind up the Scheme.

¹² The Former Trustee was also the Manager and responsible entity of seven other registered managed investment schemes. The drafter of this Constitution may have inadvertently included provisions that apply to registered managed investment schemes.

The purpose of the Trust cannot be accomplished

23. Mr. Vertullo, on behalf of the New Trustees, has deposed to the New Trustees' view that the purpose of the Trust cannot be accomplished, given its financial state.
24. The Former Trustee described the Trust's "investment objective" in a number of ways over time, all of which required the Trust to provide an income stream or return to its investors. These descriptions were:
 - (a) in its 2009 and 2011 Information Memoranda: the Trust' "to provide a steady income stream relevant to the risk return of the Fund",¹³
 - (b) in its 2012 Information Memorandum: "to provide investors with a competitive return by benefiting from the Fund's investment in commercial loans, direct real property and cash"¹⁴; and
 - (c) in its 2012 Portfolio and Fund Update: "to provide a steady income stream relevant to the risk return of the Fund."¹⁵
25. The Trust cannot provide an income stream to its investors. Mr. Vertullo's evidence is that:
 - (a) unit holder contributions to the Trust presently total approximately \$412.8 million¹⁶;
 - (b) the net cash held as at the date of the New Trustees' appointment was \$3.8 million¹⁷;
 - (c) the New Trustees estimate that their total estimated recoveries (prior to Trust management costs) will only total approximately \$11.3 to \$12.3 million. The New Trustees have noted that some greater amount may be realised through potential legal claims available to the Trust, but the potential recoveries associated with these claims are not able to be quantified at present¹⁸;

¹³ Paragraphs 84 and 85 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding BS3691/13.

¹⁴ Paragraph 86 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding BS3691/13.

¹⁵ Paragraph 87 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding BS3691/13

¹⁶ Paragraph 41 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

¹⁷ Paragraph 53 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

¹⁸ Paragraphs 48-49 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

(d) accordingly, the New Trustees estimate that unit holders will only receive a return of five cents in the dollar.¹⁹

26. It is questionable whether a managed investment scheme can be described as “insolvent.” In *Capelli v Shepard* (2010) 29 VR 242 at 264 the members of the Victorian Court of Appeal considered extra-judicial statements of Barrett J, in which his Honour questioned the meaningfulness of the term when applied to trusts such as managed investment schemes. The Court of Appeal concluded (at 264):

“[92] In our opinion, there is much force in Barrett J’s opinion that the traditional concept of insolvency which presumes a legal personality and inability to pay debts as they fall due (commercial insolvency) or, at any rate, an excess of liabilities over assets (balance sheet insolvency) is, strictly speaking, inapplicable to managed investment schemes, which are predicated on trust property and are not in themselves legal persons, but rather, a network of obligations and relations between various entities.

[93] Nevertheless, a scheme may colloquially be characterised as insolvent in the sense that, as in Re Orchard, the liabilities referable to it cannot be satisfied as they fall due from its income or readily realisable assets.”

27. In the New Trustees’ submission, the Trust is insolvent in the way contemplated by paragraph [93] of the *Capelli* decision. Mr Vertullo has sworn that the Trust has made 19 loans that remain outstanding, and the total amount due to the Trust from such loans (including capital and interest) is \$455 million.²⁰ 18 of these 19 loans are in default.²¹ The New Trustees estimate that they will only recover monies on five of the loans in default,²² and the total estimated recoveries (prior to Trust management costs) are estimated to only total approximately \$11.3 to \$12.3 million.²³ In the circumstances, it is highly unlikely that the unit holder contributions to the Trust of \$412.8 million will be repaid in full, and (as stated above) the New Trustees’ present estimate is that unit holders will only receive a return of five cents in the dollar.

¹⁹ Paragraph 50 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

²⁰ Paragraph 46 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

²¹ Paragraph 47.1 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

²² Paragraph 47.3 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13. Save for one instance, the Trust does not hold first ranking mortgages as security for the loans it made, and the first ranking mortgages are usually held by other LM funds (paragraph 78 of Mr. Vertullo’s affidavit). These five loans are the only loans in default where the value of the underlying asset exceeds the amounts owed to the first mortgagees (paragraph 47.3).

²³ Paragraph 48 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

Directions sought as to New Trustees' powers when winding up the Trust

28. For the avoidance of any doubt, the New Trustees also seek directions that they be authorised to exercise the powers contained in clauses 12 and 15.6 of the Constitution until all winding up procedures have been completed.
29. As Austin J stated in *ASIC v Tasman Investment Management Ltd* (2006) 59 ACSR 113 at 118-119, the Court's powers to make orders and give directions in relation to the winding-up of both registered and unregistered managed investment schemes are extensive:

[19] Although the winding up of a managed investment scheme proceeds within the appropriate general law framework, the statutory provisions governing the winding up of schemes give the court a great deal of flexibility. Subject to the provisions of the scheme's constitution in the case of a registered scheme, the court may use its statutory powers under Ch 5C (s 601EE(2) for an unregistered scheme, and s 601NF(2) for a registered scheme), and its general statutory and inherent powers, to make appropriate orders for the winding up of the scheme: Warne v GDK Financial Solutions Pty Ltd [2006] NSWSC 259 at [93]–[100] per Young CJ in Equity; Cumulus Wines Pty Ltd v Huntley Management Ltd (2004) 50 ACSR 58; [2004] NSWSC 609. In the case of an unregistered scheme, the statute does not attempt to lay down a basis for or method of winding up, and s 601EE(2) empowers the court to make “any orders it considers appropriate for the winding up of the scheme” [emphasis added]. That led Barrett J to remark, in Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd (2002) 42 ACSR 240 ; [2002] NSWSC 576 at [13]:

[13] ... the court has jurisdiction to settle or prescribe any aspect or element of the basis for winding up or the winding up process which it is necessary to supply because that element cannot be obtained from any other source.

[20] The court may designate a person as responsible for winding up the scheme and appoint that person as scheme liquidator (as in Mier v FN Management), receiver, or (where appropriate, as in Australian Securities and Investments Commission v Tasman Investment Management Ltd) receiver and manager. It may confer on that person, by force of its orders, a liquidator's powers under s 477 or a receiver's powers under s 420 of the Corporations Act. The court may use its statutory and inherent powers to make orders and give directions in the course of the winding up of the scheme. For example, it may

give directions in the nature of judicial advice, analogous to directions under s 479(3): see, for example, *Hamilton v Piggott Wood & Baker* [2003] FCA 1055; *Woods v Dodge* [2003] FCA 1066), or make orders approving a compromise, analogous to orders under s 477(2A) (see, for example, *Cook v Law* [2003] FCA 966; *Australian Securities and Investments Commission v Tasman Investment Management Ltd* [2005] NSWSC 1332).

30. In *Mier v FN Management Pty Ltd* (2006) 1 Qd R 339 Keane JA (as his Honour then was) considered s.601EE of the *Corporations Act*, in relation to the winding-up of a managed investment scheme that, unlawfully, had not been registered under that Act. Section 601EE conferred very broad powers on the Court to “make any orders it considers appropriate for the winding up of the scheme.” Keane JA, with whom the other members of the Court of Appeal agreed, stated at 348:

“While it is true that the Act does not explicitly lay down a method for the winding up of an unregistered scheme it must be assumed that, in general, a court would be guided by analogies with the law relating to the winding up of companies, partnerships and trusts when deciding upon the appropriate procedure for the winding up of a scheme. The best analogy would suggest the procedure to be followed. In my opinion, good reason should be shown before a court would make an order in the winding up of a scheme that did not have a precedent or parallel in the Act, partnership legislation or the law relating to the winding up of trusts.”

31. As Keane JA noted at paragraph 20 of his judgment, there are “important differences between winding up a trust and winding up a company.” As White J stated in *Re application of Stacks Managed Investments Ltd (as responsible entity of Premium Mortgage Income Fund)* (2005) 219 ALR 532 at 542:

“[44] Winding up a trust is quite a different thing from winding up a company: Horwarth Corporate Pty Ltd v Huie (1999) 32 ACSR 43; [1999] NSWSC 583. Because the scheme, where it is a trust, is not a legal entity, the expression “scheme creditors” is at best a shorthand expression for those creditors of the responsible entity in respect of whose debts the responsible entity is entitled to be indemnified out of the scheme assets. There can be no question of settling an order of priority of “scheme creditors”, or of precluding “scheme creditors” from taking or continuing proceedings for the recovery of their debts, or requiring them to submit to a process of lodgement of proof of debts with consequent appeals to the court from a decision on the acceptance or rejection

of proofs. Unless the responsible entity were itself being wound up, creditors could not be precluded from enforcing the personal liability of the responsible entity in accordance with the ordinary processes of the court.”

32. In the present case, clause 15.6 of the Constitution sets out the procedure to be followed when the Trust is to be wound up. In the New Trustees’ submission, clause 15.6 is (appropriately) limited in scope to those powers and duties required to wind up a trust, as opposed to a company or partnership. It requires the Manager to realise the Trust’s assets, pay the trustee’s liabilities, distribute the net proceeds to beneficiaries, etc. Clause 15.6 also makes it clear that the Manager itself is the entity responsible for winding up the Trust.
33. Clause 12 is more wide-ranging in its scope. It sets out the general powers conferred on the Manager, in respect of the Trust and its property. In the New Trustees’ submission it would make sense for the Manager to retain these more general powers, should they be required while the Trust is being wound up. Importantly, clause 12.8(a) includes a power to ‘make any claim or demand or take any action on behalf of a Member of the Scheme’ – an important power given the potential claims identified by the New Trustees.²⁴
34. For the avoidance of any doubt, the New Trustees seek directions that they expressly be authorised to exercise the powers contained in clauses 12 and 15.6 when winding up the Trust.

QUARANTINED FUNDS

35. The New Trustees also seek a direction pursuant to s.96 of the *Trust Act 1973* (Qld) as to whether they are authorised in repaying amounts advanced by prospective investors in the Trust, to whom no units were issued.
36. The amounts in question total approximately \$AUD625,000.00 (subject to currency fluctuations), received in foreign currency transactions and \$AUD11,830 received in Australian currency, both before and after the appointment of the Administrators on 19 March 2013.²⁵

²⁴ Paragraphs 81 and 82 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

²⁵ Paragraph 92.2 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

Mechanism for foreign currency investments in the Trust

37. The New Trustees' investigations with the Former Trustee's Investment Services Manager²⁶ have shown that the Former Trustee would accept and process foreign currency investments in the Trust in the following way:

- (a) if foreign currency investments were received, the Former Trustee would identify the foreign currency investment in the Trust's bank accounts with HSBC, match the investment to an Application received for units, and then hedge the investment;
- (b) once the hedge was in place, the Former Trustee would sweep the funds to an Australian dollar account and invest the funds.²⁷

38. The Former Trustee would then issue Units in the Trust.

39. This accords with the process set out in the Former Trustee's Information Memorandum for the relevant period, dated 14 December 2012.²⁸ At page 17, the Information Memorandum states (emphasis added):

"Initial Investment for Non-AUD Investments

On receipt of the initial investment amount, completed Application Form and appropriate Anti-Money Laundering verification documentation...the Manager will confirm receipt with the investor.

The non-AUD investment amount is held in the subscription account until the Manager exchanges the foreign currency into Australian dollars and simultaneously hedges the relevant currency using a hedging instrument chosen by the Manager.

All non-Australian dollar investments commence on the day the Manager settles the hedging instrument. For example, if the Manager receives the investment amount, properly completed Application Form and appropriate Anti-Money Laundering verification documentation for a 1 Year term on 15 March and the hedging instrument settles on 17 March the commencement date will be 17 March."

²⁶ Mr. Steve Hannan – paragraphs 33 and 92.1 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

²⁷ Paragraph 91.2 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13. The process with Australian dollar investments was straightforward – when they were received, the Former Trustee would simply allocate units in the Trust.

²⁸ Pages 701-762 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

Closure of the Trust's foreign exchange facilities and removal of its ability to hedge foreign currency investments

40. The New Trustees' investigations with Ms. Francene Mulder, a director of the Former Trustee, have established that on 8 March 2013 one of the Trust's foreign exchange facilities closed. Ms. Mulder stated that the closure of this facility meant that the Former Trustee was no longer able to hedge foreign currency positions for new investments.²⁹ From 9 March 2013 the Former Trustee did not cause the Trust to enter into any new hedges.³⁰
41. Accordingly, on 8 March 2013 the directors of the Former Trustee agreed to stop accepting new investments in the Trust. However, the Former Trustee did not notify any external party of the closure of the Trust, and did not notify its own employees not to accept new investments in the Trust.³¹
42. The Administrators were appointed to the Former Trustee shortly thereafter, on 19 March 2013.
43. Both before and shortly after the Administrators' appointment on 19 March 2013, the Former Trustee received the following amounts of money from prospective investors in the Trust:
- (a) AUD\$11,830;
 - (b) €210,292.00;
 - (c) £287,381.54;
 - (d) SEK74,000 (Swedish kronor); and
 - (e) DKK57,500.00 (Danish kroner).
- (collectively, "**the Quarantined Funds**").
44. Details of the individual payments received by the Former Trustee are set out in paragraph 4 of the affidavit of Mr. Vertullo filed 30 January 2014.
45. As set out therein, the Former Trustee received the bulk of these payments between mid-March and mid-April 2013 – that is, after the Former Trustee's

²⁹ Paragraph 91.1(a) of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

³⁰ Paragraph 91.3 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

³¹ Paragraphs 91.1(b) and (c) of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

decision to close the Trust, and either shortly before or shortly after the appointment of the Administrators to the Former Trustee:

- (a) \$6,000 of the Australian dollar investments were received on 20 and 23 March 2013;
 - (b) all of the €210,292.00 was received between 18 and 27 March 2013; and
 - (c) all of the £287,381.54 was received between 14 March and 3 April 2013, save for one amount of £192.02 received on 9 January 2013, that the Former Trustee did not process.
46. The Former Trustee did not convert the Quarantined Funds received in foreign currencies into Australian currency. No doubt this was due to its inability to hedge these foreign currency positions after the closure of the foreign exchange facilities. They remain in their original currencies, in the various bank accounts in which they were received.³²

No application forms received

47. Further, it seems that the Former Trustee did not process three amounts received before the closure of the Trust, because no application forms accompanied these investments. They were:
- (a) AUD\$5,830.00, received on 27 December 2012;
 - (b) SEK74,000.00, received on 10 January 2013; and
 - (c) DKK57,500.00, received on 1 March 2013.³³
48. As with the other foreign currency transactions, once the Trust's foreign exchange facilities closed on 8 March 2013, the Former Trustee could no longer hedge foreign currency positions for the amounts of SEK74,000.00 or DKK57,500.00.

The Administrators quarantine the Funds

49. The Former Trustee did not issue any units in the Trust to any of the prospective investors, either before or after the appointment of the Administrators on 19 March 2013.³⁴

³² Paragraph 92.1(c) of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

³³ Paragraph 4 of the affidavit of Simon Vertullo filed 30 January 2014 in proceeding 3691/13

50. Shortly after their appointment the Administrators “quarantined” the Quarantined Funds.³⁵ The New Trustees have continued to keep these funds quarantined.

Return of the Quarantined Funds

51. In the New Trustees’ view, the Quarantined Funds should be returned to the prospective investors.

Foreign currency investments

52. The relevant terms of the Information Memorandum, set out at paragraph 39 above, state: “All non-Australian dollar investments commence on the day the Manager settles the hedging instrument.”
53. In the circumstances, the prospective investors’ investments in the Trust never commenced, as the Former Trustee did not enter into any hedging instruments in respect of the Quarantined Funds received in foreign currency.
54. The New Trustees have brought this application because of a notification of dispute received from the solicitors for the Former Trustee. By letter dated 20 August 2013³⁶ they:
- (a) noted that the application form annexed to the Information Memorandum stated that the return of the application form together with the application money would constitute an irrevocable offer to subscribe for units in the Trust;
 - (b) suggested that the Former Trustee may have accepted the offer to subscribe in another way than by issuing units in the Trust (for example, by an employee of the Former Trustee placing an application form in an in-tray for the necessary steps to be taken to issue units, or by an employee placing a tick on an application form with a record being made in an internal document noting that application as having been accepted);
 - (c) stated that the trustee of the Trust owed fiduciary duties to the existing members of the Trust to properly manage it, including (where appropriate) by enlarging the assets of the Trust; and

³⁴ Paragraph 92.2 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

³⁵ Paragraph 90 of the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

³⁶ Pages 94-99 of exhibit SMV-8 to the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

- (d) stated that before any definitive determination on the status of the Quarantined Funds could be made, further investigations would be required as to whether the applications had already been accepted.
55. In the New Trustees' submission, although the prospective investors may have made "irrevocable offers" to invest in the Trust, it is quite clear that the Former Trustee did not complete the process required to accept these offers. The terms of the Information Memorandum that accompanied the application forms stated that the Former Trustee would hedge foreign currency positions. The New Trustee cannot now do this, given the closure of the Trust's foreign exchange facility. The offer made by the prospective investors has not been, and cannot be, accepted.
56. Further, as Mr. Vertullo has deposed in paragraphs 14 and 15 of his affidavit filed 30 January 2013 and as stated in the New Trustees' solicitors' letter of advice dated 24 May 2013, even if the New Trustee could accept the offers, the statements contained in the current Information Memorandum dated December 2012 have become inaccurate and/or misleading. The Information Memorandum pre-dated, and accordingly does not refer to:
- (a) the closure of the Trust to new investment by the Former Trustee on 8 March 2013;
 - (b) the appointment of the Administrators to the Former Trustee on 19 March 2013;
 - (c) their appointment as liquidators on 1 August 2013; and
 - (d) the New Trustees' discovery of the true financial position of the Trust.
57. Mr. Vertullo has deposed to his concern that, in the circumstances that have arisen, statements contained in the Information Memorandum have now become misleading. In the circumstances, the New Trustees' solicitors advised that the New Trustees should disclose these matters to the prospective investors before their applications were accepted, to avoid the risk that the New Trustees would be engaging in misleading or deceptive conduct by not disclosing them.³⁷ Many of the quarantined investors have asked for their money to be returned.

³⁷ Pages 92-93 of exhibit SMV-8 to the affidavit of Simon Vertullo filed 18 November 2013 in proceeding 3691/13.

Unsurprisingly, none of the quarantined investors have asked for units to be issued.³⁸

Australian dollar investments

58. As set out above, the Former Trustee did not process the amount of AUD\$11,830, for two reasons:
- (a) AUD\$6,000 was received on 20 and 23 March 2013, after the Administrators' appointment; and
 - (b) no application form had accompanied the remaining AUD\$5,830.00, and so this prospective investment remained unprocessed as at the date of the Administrators' appointment.
59. In the New Trustees' submission, these amounts should be refunded to the prospective investors, for the same reasons set out in paragraphs 56 and 57 above.

Mr. A Crowe QC and Ms. P Ahern
Counsel for the Applicants
4 February 2014

³⁸ Paragraph 7 of the affidavit of Simon Vertullo filed 30 January 2014.