

SUPREME COURT OF QUEENSLAND

CITATION: *KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund* [2022] QSC 12

PARTIES: **KORDAMENTHA PTY LTD (ACN 100 169 391) AS TRUSTEE FOR THE LM MANAGED PERFORMANCE FUND (applicant)**
v
THE MEMBERS OF THE LM MANAGED PERFORMANCE FUND (respondent)

FILE NO/S: BS No 11917 of 2015

DIVISION: Trial Division

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 18 February 2022

DELIVERED AT: Brisbane

HEARING DATE: 4 February 2022

JUDGE: Williams J

ORDER: **1. Pursuant to s 101 of the *Trusts Act 1973* (Qld) the applicant be authorised to pay out of the assets of the LM Managed Performance Fund the amount of \$586,697.10 inclusive of GST (being the sum of \$533,361.00 plus GST) as the applicant's remuneration for its services as trustee for the period from 2 November 2020 to 28 November 2021.**
2. The applicant's costs of and incidental to the application be paid out of the assets of the LM Managed Performance Fund, on the indemnity basis.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES RIGHTS AND LIABILITIES OF TRUSTEES – REMUNERATION – ALLOWANCE BY THE COURT – PRINCIPLES AND GROUNDS FOR GRANT OR REFUSAL – where the applicant was ordered to wind up the LM Managed Performance Fund (the Trust) – where the applicant was appointed trustee of the Trust – where the applicant seeks orders pursuant to s 101 of the *Trusts Act 1973* (Qld) authorising the payment of remuneration – whether and in what amount the applicant is entitled to remuneration

Trusts Act 1973 (Qld), s 101

Conlan v Adams (2008) 65 ACSR 521

KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund [2021] QSC 54

KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund (No 2) [2021] QSC 55

Owen, in the matter of Rivercity Motorway Pty Ltd (admins apptd) (recs and mgrs apptd) v Madden (No 2) [2012] FCA 312

Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr (2017) 93 NSWLR 459

Venetian Nominees Pty Ltd v Conlan (1998) 20 WAR 96

COUNSEL: P Ahern, for the applicant
No appearance for the respondent

SOLICITORS: Banton Group for the applicant
No appearance for the respondent

- [1] By the application filed on 17 December 2021, the applicant seeks orders pursuant to s 101 of the *Trusts Act 1973 (Qld)* (the *Trusts Act*) that the Trustee be authorised to pay out of the assets of the LM Managed Performance Fund (the Trust) the amount of \$586,697.10 inclusive of GST, (being the sum of \$533,361.00 plus GST) as the applicant's remuneration for its services as trustee for the period from 2 November 2020 to 28 November 2021 (2021 Remuneration Application).
- [2] The applicant further seeks its costs of incidental to the application be paid out of the assets of the Trust, on an indemnity basis.

Service of the remuneration application

- [3] The Trust has approximately 4,500 members, the vast majority of whom are located overseas.
- [4] On 27 November 2015 and 17 December 2015, orders were made by the Supreme Court of Queensland for substituted service in respect of service of any further application the applicant may file for approval of its remuneration on the members of the Trust.
- [5] The effect of the orders was that service of any further applications, and supporting affidavits, the applicant may file for approval of its remuneration be deemed effected on the members of the Trust five days after the trustee:
 - (a) posts such documents in PDF format on the trustee's website; and
 - (b) either sends an email to the members at their last known addresses notifying them of the Court documents and their availability on the trustee's website, or when an undeliverable message is received, and a postal address is held for that member, sending a copy of the notice by prepaid post.

- [6] The affidavit of Stacey Clisby affirmed 3 February 2022, and filed by leave on 4 February 2022, outlines the steps taken in relation to service of the remuneration application in accordance with the orders for substituted service, including as follows:
- (a) On 14 January 2022 PDF copies of each of the following documents were uploaded to the Trustee's website:
 - (i) The application dated 17 December 2021;
 - (ii) The affidavit of Ms Clisby affirmed 17 December 2021, together with Exhibit SC-19; and
 - (iii) The orders made by Applegarth J on 27 November 2015.
 - (b) On or by 18 January 2022 emails were sent to the members of the Trust for whom the Trustee holds a valid email address notifying members that:
 - (i) The Trustee had made the application in the Supreme Court of Queensland; and
 - (ii) The relevant court documents relating to the application had been uploaded onto the Trustee's website.
 - (c) On 25 January 2022 a notice was sent by pre-paid post to the postal addresses corresponding with the 36 member email addresses identified in the "Email Bounceback Reports" obtained on 21 and 24 January 2022.
- [7] Further, the Trustee identified 189 unitholder accounts for whom the Trustee holds no associated email address. On 14 January 2022 notices were sent by pre-paid post to 113 mail addresses associated with 187 unitholder accounts.
- [8] In accordance with the orders of Applegarth J, the applicant is not required to take further steps to serve members whose email addresses return undeliverable messages and from whom the applicant has not been able to identify a postal address. This relates to one unitholder who holds two unitholder accounts for which there is no associated email address or physical mail address.
- [9] In any event, the relevant documents have been available on the website and the website has consistently been the primary method used by the applicant to communicate information to members.
- [10] Accordingly, pursuant to the orders dated 27 November 2015 and 17 December 2015, service is deemed to have been effected on all of the members of the Trust five days after the mailout was completed on 25 January 2022, being 30 January 2022.
- [11] In the circumstances, I am satisfied that service has been effected in accordance with the substituted service orders.
- [12] For the purposes of the application generally, as at 3 February 2022 the Trustee has not received any responses from members referring to this application. However, some responses were received of a general or administrative nature only.¹

¹ Affidavit of Clisby affirmed 3 February 2022 at [27].

- [13] Further, the Trustee was not notified that any members intended to appear at the hearing.
- [14] At the commencement of the hearing on 4 February 2022 the Bailiff called the name of the respondent outside of Court. There was no response and no appearances by members at the hearing of the application.

Application for remuneration

- [15] The applicant has made four previous applications for approval of its remuneration as trustee of the Trust as follows:
- (a) On 17 December 2015, Martin J ordered that the payment of \$733,174.20 be authorised from the assets of the Trust, as the applicant's remuneration for the period from 12 January 2015 to 31 October 2015.
 - (b) On 6 October 2016, Martin J ordered that the payment of \$479,227 be authorised from the assets of the Trust as the applicant's remuneration for the period from 1 November 2015 to 14 August 2016.
 - (c) On 7 August 2018, Douglas J ordered that:
 - (i) the payment of \$643,247.00 be authorised from the assets of the Trust as the applicant's remuneration for the period from 15 August 2016 to 27 May 2018;
 - (ii) the applicant be authorised to pay \$122,425.60 from the assets of the Trust and be authorised to retain the amount of \$66,000.00, as the applicant's remuneration for its services in relation to the sale of a property located at Lygon Street, Melbourne.
 - (d) On 28 October 2019, Boddice J ordered that the payment of \$501,260.10 be authorised from the assets of the Trust, as the applicant's remuneration for the period from 28 May 2018 to 1 September 2019.
 - (e) On 19 March 2021, I ordered that the payment of \$280,129.30, be authorised from the assets of the Trust, as the applicant's remuneration for the period from 2 September 2019 to 1 November 2020 (2020 Remuneration Application).
- [16] In respect of each of the previous applications, affidavits of Jarrod Villani was relied on in relation to each of the previous applications. Those affidavits are also read and relied upon in relation to this application, to the extent that they are relevant.
- [17] An affidavit of Stacey Clisby affirmed 17 December 2021 is relied on in relation to this current application. Ms Clisby is a chartered accountant and a director and authorised officer of KordaMentha Pty Ltd, the applicant/trustee, and she is duly authorised by Mr Korda and Mr Mentha, the directors of the trustee, to affirm the affidavit on behalf of the trustee.
- [18] Ms Clisby's affidavit:
- (a) exhibits the detailed fee narrations which set out the work done, by whom it was performed and the amount charged for that work²; and

² Affidavit of Clisby affirmed 3 February 2022, pages 34 to 51.

- (b) provides a detailed explanation as to why the identified task were necessary or appropriate to wind up the Trust.

Relevant background

- [19] The relevant background to the Trust (namely, the LM Managed Performance Fund), the appointment of the applicant as trustee of the Trust and the history of the winding up of the Trust is set out at [27] to [35] of my reasons in respect of the 2020 Remuneration Application, *KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund* [2021] QSC 54 (2020 Remuneration Reasons).
- [20] I do not repeat the facts in these reasons but incorporate them in these reasons as appropriate.

Application pursuant to s 101 of the Trusts Act

- [21] This application, pursuant to s 101 of the Trusts Act, seeks orders authorising the payment of remuneration.
- [22] Section 101 of the Trusts Act provides as follows:

“101 Remuneration of trustee

- (1) The court may, in any case in which the circumstances appear to it so to justify, authorise any person to charge such remuneration for the person’s services as trustee as the court may think fit.
- (2) In the absence of a direction to the contrary in the instrument creating the trust, a trustee, being a person engaged in any profession or business for whom no benefit or remuneration is provided in the instrument, is entitled to charge and be paid out of the trust property all usual professional or business charges for business transacted, time expended, and acts done by the person or the person’s firm in connection with the trust, including acts which a trustee not being in any profession or business could have done personally; and, on any application to the court for remuneration under subsection (1), the court may take into account any charges that have been paid out of the trust property under this subsection.
- (3) For the purpose of this section –
trustee includes a custodian trustee.”

- [23] The 2020 Remuneration Reasons set out a consideration of the relevant authorities at [38] to [42]. I incorporate the discussion of the relevant legal principles into these reasons, without repeating them here.
- [24] In respect of the Trust’s Constitution, clause 17.4(g) provides that the trustee is entitled to fees in relation to the winding up of the Trust. However, the constitution does not specify the fees payable, or how they are to be calculated. The applicant

submits the general discretion of the Court under s 101 of the Trusts Act applies and there is no restriction on that discretion found in the terms of the constitution.

- [25] Further, reference is made to the legislative provisions authorising the payment of liquidators' and receivers' remuneration. These provisions provide some guidance, by analogy, as to a determination of appropriate remuneration in the present case.
- [26] Consistent with the relevant authorities, the overriding principle to be applied by the Court is that the remuneration is fair and reasonable. This is to be determined by the Court, even in the absence of a contradictor.
- [27] Further, the onus is on the applicant to establish an entitlement to remuneration. Accordingly, there must be some evidence before the Court to establish a *prima facie* case for the determination of the amounts claimed.³ It has been accepted that the rules of evidence need not be strictly observed.⁴
- [28] As recognised in the authorities, the material placed before the Court in relation to an application for remuneration pursuant to s 101 of the Trusts Act must show:
 - (a) the work undertaken was appropriate or necessary;
 - (b) the work done by particular persons, how long it took to do the work, their hourly rate and the reasonableness of the rate;
 - (c) the level of detail is proportionate to the size of the estate and the volume of work done; and
 - (d) whether it was reasonable for the applicant to perform the work and whether the amount claimed for it is reasonable.
- [29] It has also been recognised that time-based costing is acceptable as an appropriate basis for determining remuneration.⁵
- [30] Work will not be reasonably undertaken where it is unnecessary, where it is performed by persons of inappropriate seniority and where it is undertaken at inappropriate hourly rates.⁶
- [31] In determining an application under s 101 of the Trusts Act, the Court is not required to undertake an item-by-item assessment of the costs, but rather even where there is detailed evidence the assessment of reasonableness may come down to "judicial impression."⁷

³ *Conlan v Adams* (2008) 65 ACSR 521 at 529 [28].

⁴ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 102 per Kennedy, Ipp JJ, Wallwork J agreeing.

⁵ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 105-106, followed in *Conlan v Adams* (2008) 65 ACSR 521 at 531 [37]; *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* (2017) 93 NSWLR 459 at 470 [51] per Bathurst CJ, with whom the other members of the Court of Appeal agreed.

⁶ *Conlan v Adams* (2008) 65 ACSR 521 at 532 [44] per McLure JA (Buss JA and Newnes AJA agreeing).

⁷ *Owen, in the matter of Rivercity Motorway Pty Ltd (admins apptd)(recs and mgrs apptd) v Madden* (No 2) [2012] FCA 312 at [20] per Logan J.

- [32] Ms Clisby, in her affidavit filed in support of the application, deposes to the work undertaken by the applicant and the basis upon which remuneration is sought. An itemised breakdown of the work performed has been provided in the exhibits to the affidavit. This breakdown includes the identity of the person who performed the work, their level of experience and the amount charged for that work. The affidavit also sets out an explanation as to why the work was necessary or appropriate.
- [33] I note that part of the work undertaken arises out of the orders made on 19 March 2021 in relation to facilitating distributions to unit holders, being the 2021 directions orders in *KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund (No 2)* [2021] QSC 55.
- [34] The 2021 Remuneration Application is separate and distinct from the 2020 Remuneration Application period.
- [35] The affidavit material provides an explanation for the different categories of work undertaken and a description of the key work performed in respect of those categories. At a summary level this includes:
- (a) Administration and risk management:
 - (i) Preparation and review of materials and liaising with legal advisors regarding distribution directions application;
 - (ii) Preparation and review of material and liaising with legal advisors regarding remuneration application;
 - (iii) Attending to service of unitholders regarding court applications;
 - (b) Assets:
 - (i) Ongoing correspondence with the Trustee for the Bankrupt Estate of Peter Drake;
 - (c) Investors:
 - (i) Correspondence with investors and investor groups;
 - (ii) Preparing materials for distribution to investors;
 - (iii) Consideration of matters impacting unit holdings, including balance sheet items;
 - (iv) Consideration of distribution methodology;
 - (v) Correspondence with Link regarding unitholder update process;
 - (vi) Consideration of various matters regarding distribution logistics;
 - (vii) Correspondence with OFX and preparation for distribution payments;
 - (viii) Consideration of strategy for unclaimed funds and correspondence with legal advisors;
 - (ix) Ongoing review of investor register and distribution bank details;
 - (d) Fund trading
 - (i) Accounting for receipts and payments;

- (ii) Cash flow monitoring and forecast;
- (e) Investigations and statutory compliance:
 - (i) Ongoing tax and other statutory compliance.

[36] Further, Ms Clisby deposes to the following:

- (a) the work undertaken to which the remuneration relates was necessary for the proper conduct of the administration and winding up of the Trust.
- (b) She has reviewed the narrations for all of the work claimed and from her knowledge of the work undertaken and her supervision of the tasks undertaken, she is satisfied that the time recorded in the narrations for each task is commensurate with what was required to be undertaken and the records are accurate and there is no “double recording” of work between the different categories.
- (c) The Trustee has not increased the hourly charge out rates applied in administering the Trust since its appointment on 12 April 2013 and as a result the hourly charge out rates are currently on average approximately 20% lower than KordaMentha’s standard hourly charge out rates.
- (d) Given the complexities involved in the administration of the Trust, in particular calculation of the final distribution, the 2020 directions application⁸ and the 2021 directions application and hearing⁹, and the length of the period for which the fees are sought to be recovered, she is of the view that the remuneration of \$533,361.00 (excluding GST) for professional fees across each of these five categories represents a fair and reasonable claim for remuneration.

[37] It is anticipated that there is likely to be one more application for remuneration following the outcome of the 2021 directions application, the final distribution to unit holders and associated steps (subject to the outcome of the 2021 directions application) and administrative matters, including the lodgement of final tax returns.

[38] On the basis of the information contained in Ms Clisby’s affidavit affirmed on 17 December 2021, I am satisfied, particularly in the circumstances of the size of the Trust and the volume and complexity of the work undertaken, that the work performed by the applicant was reasonable and appropriate and that the remuneration sought in respect of the work ought to be approved by the Court.

[39] In the circumstances, it is appropriate that the orders sought by the applicant in paragraphs 1 and 2 of the application dated 17 December 2021 be made.

[40] Accordingly, I order that:

1. Pursuant to s 101 of the *Trusts Act* 1973 (Qld) the applicant be authorised to pay out of the assets of the LM Managed Performance Fund the amount of \$586,697.10 inclusive of GST (being the sum of \$533,361.00 plus GST) as the

⁸ *KordaMentha Pty Ltd v The Members of the LM Managed Performance Fund (No 2)* [2021] QSC 55.

⁹ Application filed 10 December 2021 and heard on 4 February 2022 in respect of the process to be followed for the final distribution where there are no banking details or the payments were unsuccessful.

applicant's remuneration for its services as trustee for the period from 2 November 2020 to 28 November 2021.

2. The applicant's costs of and incidental to the application be paid out of the assets of the LM Managed Performance Fund, on the indemnity basis.