



APM Security Plan Sickness & Accident Fund ('Fund')

ABN 57 413 197 086

KordaMentha Shelf Co (APMSPSAF) Pty Ltd ('New Trustee')

Report by the New Trustee

24 November 2021

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1 Executive summary

1.1 Appointment of New Trustee

On 22 June 2021, by Order of the Supreme Court of New South Wales ('the First Order'), the New Trustee was appointed to replace PP New Pty Ltd (ACN 088 406 437) ('PP New') as trustee of the Fund trust ('Trust'). Pursuant to the Order and section 71 of the *Trustee Act 1925* (NSW) ('Trustee Act'), all property held on trust for the Fund vested in the New Trustee from this date. A full copy of the Order and further details of the New Trustee's appointment is available at <https://www.kordamentha.com/creditors/apm-security-plan-sickness-accident-fund>.

On appointment the New Trustee:

- assumed control of the Fund's operations and assets
- communicated with all key stakeholders including Interested Persons (as defined below), statutory authorities, essential service providers, and creditors
- placed appropriate insurance cover
- implemented new controls for transactional banking and payments.

On 2 November 2021, further orders were made by the Supreme Court of New South Wales (proceeding no 2021/00179305) to require the New Trustee to convene a meeting of Interested Persons to consider the future of the Fund ('the Second Order'). A full copy of the Second Order and reasons for judgement are included at Appendix A of this report and are available at <https://www.kordamentha.com/creditors/apm-security-plan-sickness-accident-fund>.

1.2 Meeting of Interested Persons

Pursuant to the Second Order, the New Trustee is required to convene a meeting of current and past members of the Fund, creditors, claimants and contributories or potential creditors, claimants and contributories, and persons acting as officeholders on behalf of the Fund (together 'Interested Persons') to consider the future of the Fund ('the Meeting').

Pursuant to the Second Order, the New Trustee is also required to prepare and issue a report to Interested Persons. This report has been issued pursuant to the Second Order and sets out the Fund's history, property, affairs, and financial circumstances and provides a recommendation as to the future of the Fund.

Interested Persons will then be permitted to vote at the Meeting as to whether they wish for:

- the Fund to be continued in some capacity, or
- the Fund to be wound up.

1.2.1 Recommendation

It is the recommendation of the New Trustee that the Fund be wound up, due, in part, to the:

- extended time for which the Fund has been held in a passive state
- uncertainties as to the status of Interested Persons with respect to the Fund, resolution of which requires obtaining advice from lawyers and Counsel, and most likely seeking guidance of the Court
- significant cost, logistical and legal challenges that would need to be overcome to continue and manage the Fund and its assets in some capacity.

The recommendation of the New Trustee is detailed further in section 4.1.3 of this report.

1.2.2 Notice of Meeting

The Meeting will be held via online videoconference on Microsoft Teams on 9 December 2021 at 10:00am AEDT. Registration for the meeting will commence at 9.30 am AEDT.

A Notice of Meeting is attached as Appendix B of this report.

1.2.3 Virtual meeting

The Meeting will be held via videoconference on Microsoft Teams. At the Meeting, you will be able to ask questions and vote on resolutions.

If you wish to attend the Meeting, please send confirmation of your attendance via email to botanymillfund@kordamentha.com or fax to (02) 8257 3099 by 5.00 pm 8 December 2021. Once we receive your details, we will provide you with the link to access the Meeting.

If you want to ensure your vote is recorded ahead of time or are unable to attend the virtual meeting, please complete and return the Proposal Voting Form by no later than 5:00pm 8 December 2021. A copy of the Proposal Voting Form is enclosed at Appendix C of this report.

Resolutions put to Interested Persons will be resolved via a poll. The New Trustee will consider a resolution passed if a majority of the Interested Persons (whether in person or by proxy) vote in favour of the resolution. Pursuant to the Second Order, following the Meeting, the New Trustee is required to make an application to the Court to report on the outcome and seek directions and orders for the future of the Fund.

The form is to be returned by email to botanymillfund@kordamentha.com, faxed to (02) 8257 3099 or by mail to KordaMentha at GPO Box 2523, Sydney NSW 2001, to the attention of Elyse Diamond.

Your name will be visible to other attendees at the Meeting. This information is also required to be included on the attendance register and attached to the minutes of the Meeting, which will likely be provided to Court at a later date on a confidential basis.

Further information relating to the Meeting can be found on the KordaMentha website at <https://www.kordamentha.com/creditors/apm-security-plan-sickness-accident-fund>.

2 Background to the Fund

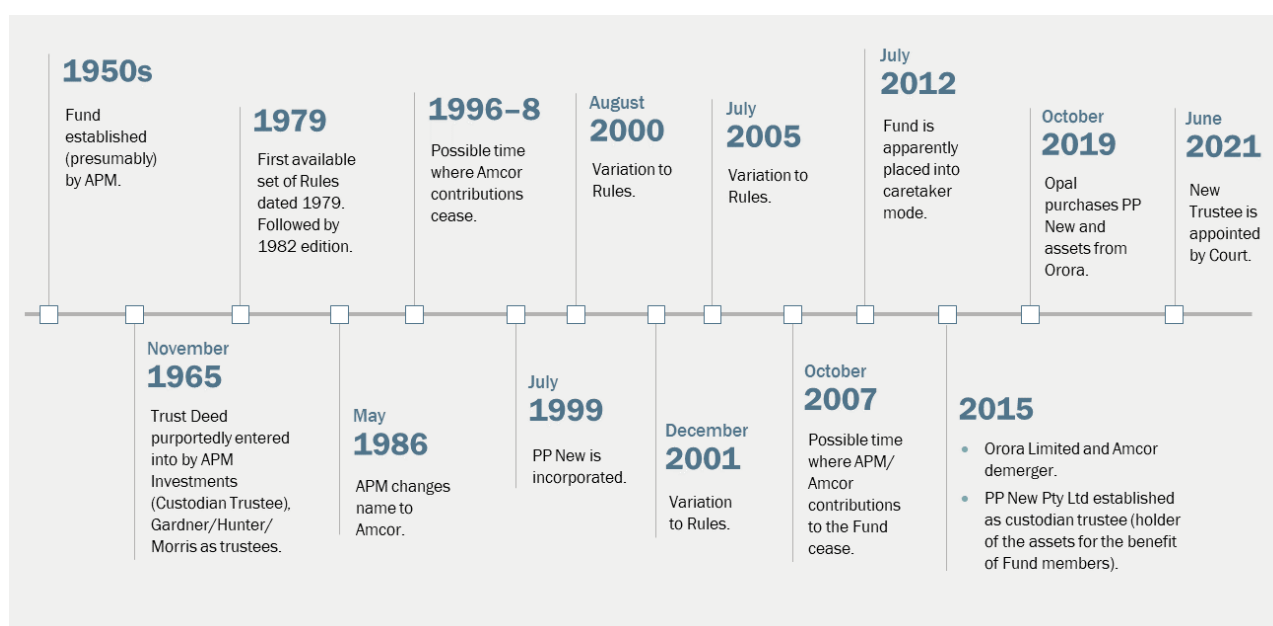
2.1 History of the Fund

The Fund appears to have been established in or around the 1950s for the purpose of providing benefits to full-time employees of Australian Paper Manufacturers Ltd (ACN 000 017 372) ('APM') based in New South Wales, as well as employees of a separate entity known as Demcon. APM was subsequently renamed APM Ltd in 1984, Amcor Ltd in 1986 and Amcor Pty Ltd in August 2019 ('Amcor').

It is understood that Fund members largely encompassed full time employees associated with APM's paper mill at Botany Road, Matraville NSW 2036 ('Botany Mill').

The books and records provided to the New Trustee reveal the Fund is not incorporated nor registered and, historically, both individuals and an entity associated with APM, APM Investments Pty Ltd (ACN 004 345 868) (previously named A.P.M. Investments Proprietary Ltd in 1955 and then Amcor Investments Proprietary Ltd in 1986) ('APM Investments'), have held assets and investments on trust for the Fund.

Since its establishment, ownership of the Botany Mill itself, and the ensuing management of the Fund, has been transferred to several entities and is set out in the following timeline:



The New Trustee understands PP New, as a former wholly owned subsidiary of Orora Limited (ACN 004 275 165) ('Orora'), took on the role of custodian trustee of the Fund from Amcor following the demerger of Orora and Amcor in 2015. On 10 April 2015, PP New (then a wholly owned subsidiary of Orora), replaced APM Investments as custodian trustee of the Trust.

In 2020, Orora's Australasian fibre business, including PP New, was acquired by Opal Packaging Australia Pty Ltd (ACN 636 682 883) ('Opal'). Opal itself is a wholly owned subsidiary of Paper Australia Pty Ltd, with its ultimate parent company being Nippon Paper Industries Co., Ltd, a company domiciled in Japan.

The books and records of the Fund reveal the Fund has been in 'caretaker mode' since the B7 and B8 paper machines at the Botany Mill were decommissioned in or around 2012, with contributions from members ceasing from 1 July 2012. Since PP New became custodian trustee of the Fund, its primary function has been to hold assets on trust for the Fund and to continue ongoing maintenance of the Fund's two properties at Point Clare, NSW.

2.2 Committee members and other officeholders

The books and records reveal that several committees of management ('Committee') governed the affairs of the Fund over its history. The Committee typically consisted of nine members.

Since 2012, the Fund appears to have been governed by a Committee of three to five officeholders, with the last recorded Committee having ceased in or around late August 2019. At that time, it appears there were only three remaining Committee members. We have been advised these three officeholders are no longer employed at the Botany Mill and no functioning Committee has been in place since.

2.3 Rules

The Fund's management is understood to have been governed by published rules as purportedly varied from time to time ('Rules'). Various iterations of the Rules have been identified in the books and records of the Fund in the New Trustee's possession, with copies also provided by Interested Persons.

It is the intention of the New Trustee to seek advice and the direction of the Court to determine which set of Rules are in force and effect.

2.4 Historical financial position

The Fund's financial statements were last prepared as at 30 June 2014. Appendix D is an excerpt of these financial statements for the financial years ending 30 June 2014, 30 June 2013 and 30 June 2012.

Investigations have revealed several of the assets detailed in the 30 June 2014 financial report to be still on hand. An update on assets held by the Fund can be found in section 3 of this report.

3 Update on the progress of the New Trustee

Pursuant to the First Order, the New Trustee has undertaken the following actions to date:

- identified the assets, including real property, shares and cash, ('Property')
- identified and quantified the liabilities of the Fund
- assumed control of the Fund's operations and Property
- conducted a review of the books and records of the Fund
- undertaken a process of advertising to Interested Persons
- liaised with Interested Persons and financial institutions
- communicated with all key stakeholders including Interested Persons, statutory authorities, essential service providers, and creditors
- placed appropriate insurance cover
- implemented new controls for transactional banking and payments.

An overview of the actions taken in respect of the requirements of the First Order is set out below.

3.1 Books and records review

The books and records of the Fund consisted of over 7,000 individual documents which were made available to the New Trustee in or around June 2021. The New Trustee has created electronic versions of these documents which are stored in an online repository and review platform, and a comprehensive review has been undertaken to identify critical Fund records.

3.2 Identifying the Interested Persons

3.2.1 Issuing the Notice of New Trustee

The First Order provided for a notice ('Notice') to be issued to the Interested Persons to:

- notify of the orders made in proceeding 2021/00179305
- seek information and documentation about the Fund and Trust
- seek notification of any claims in respect of the Property
- seek opinions about the winding up of the Fund or any alternatives to winding up the Fund.

Pursuant to the First Order, the New Trustee issued the Notice by:

- publishing the Notice on KordaMentha's website on 1 July 2021
- publishing the Notice in The Australian, Sydney Morning Herald and the Daily Telegraph newspapers on 6 July 2021
- liaising with Opal staff for correspondence regarding the Notice to be published on the internal employee network by Opal on behalf of the previous trustee, PP New, on 6 July 2021
- sending the Notice to known addresses and email addresses of last known members on 13 July 2021
- sending the Notice to other identified Interested Persons via known addresses and email addresses on 13 July 2021
- sending Notice to a subsequent batch of identified Interested Persons via post on 28 July 2021.

3.2.2 Responses received

As a result of the advertising process and a review of the books and records of the Fund, a listing of current members, past members, or otherwise Interested Persons has been collated comprising:

- the 32 members who were considered 'current' members of the Fund in the books and records on or around June 2012, when the Fund entered caretaker mode
- an additional 21 Interested Persons who have contacted the New Trustee in response to the issued Notice
- members who have been identified through the available books and records as having made claims at some point in the Fund's history, totalling 89 individuals.

Interested Persons were requested to provide any supporting information they held in respect of their membership of the Fund. For those Interested Persons yet to provide the requested documentation, please do so before the Meeting.

Determinations as to the validity of each of these potential classes of membership has not yet been made by the New Trustee and will be subject to judicial advice from the Court.

3.3 Identifying the assets and liabilities of the Fund

Pursuant to the Order, the New Trustee has commenced the process of identifying the assets and liabilities of the Fund.

A summary of the assets of the Fund as at 17 November 2021 is provided in the table below:

Overview of Fund assets at 17 November 2021

Asset	Description	Estimated value
Cash	- Several transaction accounts and term deposits held with St George and Bank Australia. - At the time of appointment, estimated \$0.68m with St George and \$1.45m with Bank Australia.	Total cash position \$1.88m.
Shares	289,200 fully paid ordinary shares in Amcor CDI (ASX:AMC). 231,360 fully paid ordinary shares in Orora Limited (ASX:ORA).	Amcor holding \$5.06m (@ \$16.77 per share). Orora holding \$0.78m (@ \$3.35 per share).
Real property	- Lot 16 in deposited plan 9417, being the property located at 67 Victory Parade Tascott NSW 2250 - Lot 15 in deposited plan 9417, being property located at 69 Victory Parade Tascott NSW 2250 (together 'the Properties').	Market value of: \$2.05m for 67 Victory Parade; and \$1.55m for 69 Victory Parade.
Total estimated asset value		\$11.10 million

3.4 Taxation

The Australian Taxation Office ('ATO') was formally notified of the First Order and the appointment of the New Trustee on 28 June 2021. The ATO provided copies of correspondence between the ATO and the Fund, including the Fund's historical tax lodgements, on 17 September 2021.

The New Trustee has recently commenced a review of the tax status of the Fund to determine whether outstanding taxation returns are required and/or whether the Fund is entitled to refunds from the ATO.

4 Alternatives available for consideration by Interested Persons

Set out below are the two potential alternatives available for consideration by Interested Persons of the Fund, being:

1. continuation of the Fund in some capacity, or
2. winding up the Fund.

4.1.1 Continuation of the Fund

The continued operation of the Fund may be possible in some capacity. However, the New Trustee is of the view several issues would likely be encountered in pursuing this option, many of which will not be resolved unless and until the Fund is wound up. **Accordingly, the New Trustee does not consider this to be a viable option, open to consideration by Interested Persons.** Some of the more significant matters which mean continuation of the Fund is not practical include:

- the Fund has been effectively dormant for the past nine years since being placed into 'caretaker mode'. There have not been any contributions, active members, or clear purpose for the Fund's continued operation in the past nine years
- a review of the books and records of the Fund has not revealed any significant interest in resuming Fund operations having been expressed by former employees, former and current members, or other Interested Persons
- as discussed in section 3 of the report, the previous trustee is no longer affiliated with the Fund. Additionally, the New Trustee has been appointed, initially, for the purposes of gathering information in respect of the Fund, contacting, and

reporting to Interested Persons on the affairs of the Fund and convening a meeting for the purpose of the Interested Persons determining the future of the Fund

- maintaining the New Trustee, or seeking a replacement trustee, would be an expensive undertaking, and unlikely to be in the best financial interests of the Interested Persons. Prolonging any external management of the Fund would involve significant fees incurred and diminish the value of the assets in the Trust. The alternative of reinstating a (willing) Committee to manage the Fund would be an expensive and complex process
- significant and detailed investigations are required in order to ascertain the correct legal and taxation status of the Fund. As discussed in Section 2.1, the Fund pre-dates compulsory superannuation, meaning consideration needs to be given to the Fund's status as an unincorporated association or otherwise and the associated taxation implications. We estimate these costs to be in the range of \$50,000 to \$100,000 initially. Although the New Trustee will be required to undertake certain investigations in a wind-up scenario, in the event the Fund is continued, the New Trustee (or replacement trustee or new Committee) would incur significant additional and/or ongoing costs, including but not limited to, ensuring that the most appropriate legal structure for the Fund is selected and that the Fund complies with its ongoing taxation requirements
- the Trust Deed has not been located in the books and records of the Fund. There is no clear documentary evidence as to how the affairs of the Trust can be governed or assets managed in a long-term capacity. This would require significant legal fees to establish and execute, along with a direction from the Court
- there is uncertainty as to which set of Rules govern the affairs of the Fund, meaning there is no clear path for a replacement trustee or new Committee to manage the Fund's affairs, nor is it necessarily clear as to which Interested Persons are entitled to benefit from the Fund and its assets. It is likely a new set of Rules may need to be established; however, this would be a difficult and costly undertaking without the establishment of a revised Trust Deed and functioning Committee
- based on the Rules available in the books and records, it appears that the Trustees' powers are limited to the investment of the monies of the Fund, with management and ultimate control undertaken by the Committee. There is no functioning Committee at present however as per the First Order and the Second Order, the New Trustee has limited management powers (in addition to holding the Property on trust for the Fund) in order to allow it to report to Interested Persons on the affairs of the Fund and convene a meeting of Interested Persons to consider the future of the Fund. As a practical matter, unless and until members of the Fund can be identified and the presently applicable Rules are identified, it would not be possible to appoint a Committee of the type envisaged in the Rules which have been reviewed to date
- a new set of Rules, or, at a minimum, significant amendments to the Rules would be required, particularly as membership criteria based on employment does not reflect the current ownership of the Botany Mill or employment status of the majority of the Fund's members. The development of a new set of Rules would require member input and approval and likely direction from the Court.

The New Trustee is of the opinion there is a significant cost impost on the Fund and Interested Persons in attempting to reach a resolution on the above which far outweighs any benefits to Interested Persons as it stands today. Coupled with the lack of clear ongoing purpose of the Fund, **it is not recommended that the Fund continue.**

4.1.2 Winding up the Fund

It is the recommendation of the New Trustee that the Fund be wound up.

The New Trustee is of the view that winding up the Fund has several advantages, including:

- from a review of the books and records, it appears the wind-up of the Fund has been a preferred course of action of several past members of the Fund, following it entering 'caretaker mode' in 2012
- aligning the wind up of the Fund with the cessation/retirement of the majority of the Fund's members – given the Fund was initially established to provide benefits to the employees of the Botany Mill, the Botany Mill has since been decommissioned and the majority of the Fund's members are no longer engaged in employment at the Botany Mill
- given the time which has elapsed since the Fund entered 'caretaker mode' and the state of the books and records of the Fund, the Fund cannot be managed in accordance with its Rules and would likely require, at a minimum, a new set of Rules. Given the initial purposes of the Fund and the status of the majority of the Fund's members, there is inherent uncertainty as to the form in which the Fund would be continued and its ultimate purpose. This would need to be covered in any new set of Rules and would require member input and approval and likely direction from the Court. The winding up of the Fund avoids this uncertainty
- although Court involvement will be required to confirm relevant courses of action in respect of the Rules and distribution of proceeds, no replacement trustee, re-formation of a Committee or prolonged external management would be required for the New Trustee to effectively manage a wind-up process of the Fund which will save significant time and consideration

- the winding up of the Fund is likely to yield a better financial outcome for the Interested Persons, due to avoiding significant fees in respect of any external management of the Fund, reinstating a Committee, cost of legal fees in establishing new applicable Rules and a trust deed for the Fund, and significant ongoing compliance costs.

The New Trustee is of the view that the winding up of the Fund has limited (if any) disadvantages in circumstances where the Fund has been in 'caretaker mode' and there have not been any contributions, active members, or clear purpose for the Fund's continued operation in the past nine years.

Due to the difficulties outlined in Section 4.1.1 and summarised advantages of winding up the Fund, **it is the New Trustee's recommendation that the Fund be wound up.**

4.1.3 Recommendation

It is the recommendation of the New Trustee that the Fund be wound up. The New Trustee makes this recommendation to Interested Persons as to the future of the Fund based on the information to hand and, in the best interests of all Interested Persons and other stakeholders of the Fund.

5 Next steps

5.1 Further Court application

Once the Meeting has been convened, and the views of the Interested Persons have been established, the New Trustee will apply to the Court for further directions on the future of the Fund. This is a requirement of the Second Order.

Should it be decided that the Fund be wound up, applications to the Court will also be required to resolve ambiguities on the Fund's governing Rules, asset realisations, confirm any proposed distribution of proceeds and seek any orders necessary to further effect the wind up of the Fund.

6 Other matters

6.1 Receipts and payments

A summary of the receipts and payments of the Fund, from the date of appointment of the New Trustee is attached at Appendix E.

6.2 Remuneration and disbursements

Pursuant to the First Order, the New Trustee's costs and expenses incidental to the initial proceeding have been paid on an indemnity basis out of the assets of the Fund. Pursuant to section 59(4) of the Trustee Act, the New Trustee's future remuneration and disbursements are to be paid from the assets of the Trust on an indemnity basis, as and when the New Trustee considers appropriate.

Pursuant to section 90 of the *Civil Procedure Act 2005* (NSW), the New Trustee must make an application to the Court for review of its remuneration and disbursements paid in the prior 6-month period. The New Trustee was originally required to seek Court review of its remuneration by 22 December 2021., however the Second Order provides the New Trustee must make an application to the Court within four weeks of the Court making an order in respect of the future of the Fund. This is currently anticipated to occur in the first quarter of calendar year 2022.

The summary of receipts and payments at Appendix E provides details of the remuneration and disbursements that have already been paid.

7 Further information

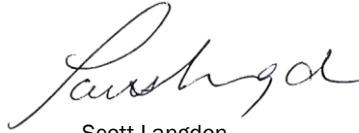
Interested Persons requiring further information regarding the Fund, or this report, can contact Elyse Diamond on (02) 8257 3014 or by email at botanymillfund@kordamentha.com.

Dated: 24 November 2021



Kate Conneely
Director, New Trustee

Level 5, Chifley Tower
2 Chifley Square
Sydney NSW 2000



Scott Langdon
Director, New Trustee



Appendix A Second Order and Reasons for Judgment





Issued: 4 November 2021 3:08 PM

JUDGMENT/ORDER

COURT DETAILS

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

TITLE OF PROCEEDINGS

First Applicant	PP New Pty Ltd ACN 088406437
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First Respondent	.
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DATE OF JUDGMENT/ORDER

Date made or given	2 November 2021
Date entered	4 November 2021

TERMS OF JUDGMENT/ORDER

ORDERS:

Her Honour, Ward CJ in Eq, makes the following orders:

1. Make orders in accordance with the Short Minutes of Order provided to the Court, initialled and dated by her Honour today.

Short Minutes of Order:

1. The Second Plaintiff (New Trustee) has leave to file in Court the affidavit of Catherine Margaret Conneely sworn 28 October 2021 and the affidavit of Catherine Margaret Conneely sworn 2 November 2021.

2. Pursuant to section 81 of the Trustee Act 1925 (NSW) (Trustee Act), and sections 61 and 90 of the Civil Procedure Act 2005 (NSW) (Civil Procedure Act) and rules 2.1 and 36.1 of the Uniform Civil Procedure Rules 2005 (NSW), New Trustee is authorised to undertake the following course of action (Second Course of Action):

(a) provide notice (Second Notice) to the current and past members of the APM Security Plan Sickness & Accident Fund ABN 57 413 197 086 (Fund), creditors, claimants and contributories or potential creditors, claimants and contributories of the Fund, and the persons who have been acting as officeholders on behalf of the Fund (together, Interested Persons):

- (i) of the orders made in respect of this application and any reasons for judgment;
- (ii) of New Trustee's intention to issue the Report (as defined in sub-paragraph (c) below) to Interested Persons and convene and hold a meeting (First Meeting) of Interested Persons by 31 December 2021, unless adjourned in accordance with sub-paragraph (e) below;
- (iii) seeking any additional information and documentation about the Fund and the Fund trust (Trust);

(iv) seeking notification of any claims in respect of any property (Property) held on trust for the Fund under the Trust; and
(v) seeking their opinion about the winding up of the Fund or any alternatives to winding up the Fund;

(b) issue the Second Notice by:

(i) sending the Second Notice to the known email addresses of the Interested Persons;
(ii) sending the Second Notice to the known postal addresses of the Interested Persons;
(iii) publishing the Second Notice on <https://www.kordamentha.com/creditors/apm-security-plan-sickness-accident-fund> (the New Trustee Website); and
(iv) publishing the Second Notice in the The Australian, the Sydney Morning Herald and the Daily Telegraph;

(c) prepare and issue a report to Interested Persons (Report) via email to known email addresses of Interested Persons and downloadable from the New Trustee Website, which Report is to include information about the following:

(i) the appointment of New Trustee as trustee of the Fund;
(ii) the Fund's history, current status, property, affairs, and financial circumstances;
(iii) New Trustee's investigations into the affairs of the Fund and work undertaken since its appointment;
(iv) an outline of options concerning the future of the Fund and, if and to the extent that New Trustee considers it appropriate, any recommendation(s) and the reasons for any such recommendation(s);
(v) notice of the First Meeting (which must be provided not less than two weeks before the scheduled date of the First Meeting); and
(vi) a proxy form to vote at the First Meeting in respect of the future of the Fund and any other resolutions that New Trustee considers appropriate for this purpose;

(d) hold the First Meeting via video teleconference;

(e) if required, adjourn the First Meeting (Adjourned First Meeting) for a period of no more than 45 business days and prepare and issue a supplementary report to Interested Persons (Supplementary Report), subject to the following:

(i) any Supplementary Report is to be issued to Interested Persons via email to known email addresses of Interested Persons and downloadable from the New Trustee Website, and is to include:

(A) notice of the Adjourned Meeting (which must be provided not less than two weeks before the scheduled date of the Adjourned Meeting); and
(B) a proxy form to vote at the Adjourned Meeting in respect of the future of the Fund and any other resolutions New Trustee considers appropriate for this purpose; and

(ii) the Adjourned Meeting is to be held via video teleconference;

(f) following the First Meeting or any Adjourned Meeting, make an application to the Court to report on the outcome of the meeting(s), and seek directions and orders for the future of the Fund, further conduct of the management of the Fund, and/or the determination of any questions arising in connection with the Trust and/or the Fund;

(g) for the purposes of the above sub-paragraphs:

(i) conduct any further review of the books and records of the Fund and any additional information obtained after issuing the Second Notice;
(ii) liaise with the Interested Persons, financial institutions and any other persons associated with the Fund; and

(iii) identify the Property and liabilities of the Fund, including any Property held in the name of individuals or other third parties on behalf of the Fund;

(h) open new accounts (each a New Account) in the name of the Fund with St George Bank for each of the following accounts (each a Bank Australia Account) presently held with Bank Australia in the name of the Fund:

- (i) transaction account 7311;
- (ii) term deposit 0423;
- (iii) term deposit 0430;
- (iv) term deposit 0445;
- (v) term deposit 0482;
- (vi) term deposit 1168;
- (vii) term deposit 1169;
- (viii) term deposit 1166;
- (ix) term deposit 1167; and
- (x) term deposit 0486;

(i) transfer the funds held in each Bank Australia Account into the corresponding New Account;

(j) in respect of the New Accounts and the following accounts in the name of the Fund presently held with St George Bank, to the extent the account is a term deposit, reinvest the term deposit as required:

- (i) transaction account 4771;
- (ii) term deposit 5349;
- (iii) term deposit 5671; and
- (iv) term deposit 4611;

(k) obtain professional representation and advice for the purposes of sub-paragraphs (a) to (j) above.

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, the following documents (Documents):

(a) pages 80, 223, 226, 229, 232, 233, 234, 235 and 237 of exhibit marked "BCW-1" to the affidavit of Bernard Colin Walrut affirmed 22 June 2021; and

(b) confidential exhibit marked "CMC-4" to the affidavit of Catherine Margaret Conneely sworn 28 October 2021,

are to be marked "confidential" on the Court file and are not to be provided or disclosed to any person other than:

(a) New Trustee and the officers and staff of KordaMentha; and

(b) the legal advisors of the New Trustee.

4. Pursuant to section 85 of the Trustee Act, New Trustee is relieved from any personal liability for breach of trust in connection with the reinvestment of the following term deposits:

(a) St George Bank term deposit 5349;

(b) St George Bank term deposit 4611; and

(c) Bank Australia term deposit 0445.

5. Pursuant to section 93 of the Trustee Act, New Trustee's costs and expenses of and incidental to this application are to be paid on an indemnity basis out of the assets of the Trust.

6. Pursuant to section 59(4) of the Trustee Act, New Trustee's future remuneration and disbursements in connection with the Second Course of Action are to be paid from the assets of the Trust on an indemnity basis, as and when New Trustee considers appropriate, subject to order 8 below.

7. Pursuant to section 90 of the Civil Procedure Act, New Trustee make such application for advice and/or orders as it may be advised, within 120 days of holding the First Meeting or Adjourned First Meeting as contemplated by order 2 above, and any Interested Persons shall be entitled to seek leave to appear in any such proceeding.

8. Vary Order 10 of the orders made on 22 June 2021 to require the Second Plaintiff to make application to the Court for review of its remuneration and disbursements paid in accordance with:

(a) Order 8 of the orders made on 22 June 2021; and

(b) Order 6 above,

within four weeks after the Court determines the application referred to at Order 2(f) above.

9. Pursuant to section 90 of the Civil Procedure Act that, at least every six months from the date hereof until further or other order, New Trustee make an application to the Court for review of its remuneration and disbursements paid in accordance with order 6 in the prior six-month period.

10. New Trustee have leave to apply to Ward CJ in Eq in chambers on five (5) days' notice to amend or vary the terms of orders 2 and 7, or if any circumstances so require.

SEAL AND SIGNATURE



Signature Chris D'Aeth
Capacity Principal Registrar
Date 4 November 2021

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FURTHER DETAILS ABOUT Applicant(s)

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Client reference

Legal representative for plaintiffs

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FURTHER DETAILS ABOUT Respondent(s)

First Respondent

Name .
Address



Supreme Court
New South Wales

Case Name: PP New Pty Ltd

Medium Neutral Citation: [2021] NSWSC 1426

Hearing Date(s): 2 November 2021

Decision Date: 2 November 2021

Jurisdiction: Equity

Before: Ward CJ in Eq

Decision: See [44] of judgment

Catchwords: EQUITY — Trusts and trustees — Court's supervision — Powers, duties, rights and liabilities — Breaches of trust — Court's power to excuse — Remuneration

Legislation Cited: Civil Procedure Act 2005 (NSW), ss 61, 90
Corporations Act 2001 (Cth), s 439A, Pt 5.3A, Sch 2
Court Suppression and Non-publication Orders Act 2010 (NSW), ss 7, 8
Insolvency Practice Schedule (Corporations) 2016, Div 65
Trustee Act 1925 (NSW), ss 59, 70, 81, 85, 93
Uniform Civil Procedure Rules 2005 (NSW), rr 2.1, 36.1

Cases Cited: Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Dobrijevic (No 3) [2017] NSWCA 109
Re Dion Investments Pty Ltd (2014) 87 NSWLR 753; [2014] NSWCA 367
Rinehart v Welker (2011) 93 NSWLR 311; [2011] NSWCA 403
Scott v Scott [1913] AC 417
Stein v Sybmore Holdings Pty Ltd (2006) 64 ATR 325; [2006] NSWSC 1004

Category: Procedural rulings

Parties: PP New Pty Ltd (First Plaintiff)
KordaMentha Shelf Co (APMSPSAF) Pty Ltd (Second Plaintiff)

Representation: Counsel:
S Puttick (Second Plaintiff)

Solicitors:
Norton Rose Fulbright Australia

File Number(s): 2021/00179305

Publication Restriction: Nil

JUDGMENT

- 1 **HER HONOUR:** On 2 November 2021, I heard an application, by notice of motion dated 28 October 2021, brought by the second plaintiff, KordaMentha Shelf Co (APMSPSAF) Pty Ltd, to which I will refer as the New Trustee, for relief in relation to a trust (Trust) associated with the APM Security Plan Sickness and Accident Fund NSW (Fund). The first plaintiff (PP New Pty Ltd) (PP New) did not contest the relief sought. I granted the relief, which is intended to implement the process put in place in June 2021 (see below) for the reorganisation and potential winding up of the Fund. I indicated that I would publish my reasons for so doing as soon as practicable. These are those reasons.

Background

- 2 This proceeding was commenced by summons filed by PP New and the New Trustee on 22 June 2021 in connection with the Fund.
- 3 The Fund was set up in the 1950s to provide sickness, accident and funeral benefits for workers at the Botany Paper Mill in Matraville, NSW. The Botany Paper Mill was at that time owned by Australian Paper Mills (APM). Opal Packaging Australia Pty Ltd (Opal) became the owner of the Botany Paper Mill in 2020; and at the same time, PP New became a wholly owned subsidiary of Opal.

- 4 The assets of the Fund (which were held by PP New in trust) included two properties at Point Clare on the Central Coast of NSW with an estimated value of several million dollars.
- 5 As at the time of the commencement of the proceeding (and possibly for as long as the previous 10 years) it appears that there had been no formal management or control of the Fund or the Trust. In particular, Opal appears to have had no involvement in relation to the Fund for some time (and there was evidence that the Fund had been placed in “caretaker” mode by about 2012). It is noted that the Fund has no continuing role in the context of modern industrial relations or workplace practices.
- 6 This proceeding was precipitated by a letter, which came to the attention of Opal, sent to the Fund by the Australian Taxation Office (ATO) in September 2020, advising that the Fund had not submitted income tax returns for the period 1 July 2014 to 30 June 2019.
- 7 The position was complicated by the paucity of records about the operation of the Fund or the Trust (as set out in the affidavit of the solicitor for the plaintiffs, Mr Walrut, read in June 2021 on the previous application and the affidavits read on the previous and present application, respectively, of the partner of KordaMentha ultimately appointed as the New Trustee, Ms Conneely). There is evidence that there was a Trust Deed entered into in 1965 but that document has not been able to be located; and there is uncertainty about which set of rules (Rules) regulates the activities of the Fund and the Trust. The earliest set of Rules available in respect of the Fund are those dated 1979.
- 8 It appears from a set of “minutes” of the Fund (from August 2019) that the “Committee” at that time contemplated that the Fund be wound up. However, none of the members of that “Committee” is currently an employee of the Botany Paper Mill, and there is uncertainty as to the status of the “Committee”, not least having regard to the general uncertainty about the Rules and membership generally (as set out in the affidavits of Mr Walrut and Ms Conneely).
- 9 It was against this background that the matter first came before me (sitting as duty judge) on 22 June 2021. On that occasion, PP New sought the relief set

out in the summons as the first stage in the process of a reorganisation and/or winding up of the Fund. In particular, the summons sought the replacement of PP New by the New Trustee (a special purpose trustee company established by KordaMentha) pursuant to s 70 of the *Trustee Act 1925* (NSW) (*Trustee Act*).

- 10 On 22 June 2021, after hearing submissions and considering the material then put before the Court, I made orders (the 22 June 2021 Orders), *inter alia*, replacing PP New with the New Trustee as trustee for the Fund and vesting the Trust property in the New Trustee.
- 11 I also made consequential orders granting powers to the New Trustee to take control of the affairs of the Fund and the Trust (given the absence of records); to enable assets to be secured, as well as past and present members (Members), creditors, claimants and contributories (Claimants) to be contacted; and to enable further information to be obtained about the affairs of the Fund and the Trust. For the purposes of that application, Ms Conneely had set out a Step Plan, for the undertaking of the proposed actions by the New Trustee, with it being contemplated that a subsequent application would be brought before the Court once those initial steps had been taken, and potentially interested parties had been identified.
- 12 The matter then came back before me, on exercise of the liberty to apply, for the purposes of the present application.
- 13 The New Trustee's approach, as explained in the submissions made both on the initial application and on the present application, has been in effect modelled (it being said to be analogous to and motivated by the rationale underlying) on the appointment of independent administrators under Pt 5.3A of the *Corporations Act 2001* (Cth) (*Corporations Act*). In general terms, that approach has been directed towards identifying and notifying persons with potential interests in the Fund (the Interested Persons) and taking initial steps for the reorganisation and (potentially) the winding up of the Fund.
- 14 Since the 22 June 2021 Orders, as attested to by Ms Conneely in her second affidavit, the New Trustee has: undertaken a review of some 7,357 documents comprising the books and records of the Fund (the Books and Records);

contacted and corresponded with various Interested Persons, in relation to this proceeding and more generally about the Fund; communicated with various financial institutions, including St George Bank (St George) and Bank Australia in relation to, *inter alia*, the New Trustee's appointment as trustee, access to accounts, and whether any other bank accounts in the name of the Fund are existing; sought to identify the extent of, and existence of any other, share assets held by the Fund and/or in trust, including shares in Amcor Plc and Orora Ltd, as well as assuming control over those assets (noting that the final transfer procedures in respect of these is ongoing); assumed control and maintenance of the Point Clare Property (noting that title is yet to be transferred as it has not been possible to obtain the original certificates of title due to stay-at-home orders which have been in force in Victoria over the recent time and, in addition to this, the subsequent cancellation of existing certificates of title from 11 October 2021); and engaged with the ATO in relation to the tax affairs of the Fund (noting that it now appears that the PAYG instalments made in respect of the Fund since 2012 may be in excess of any tax liability owing).

Relief now sought

- 15 The relief sought in the present application falls within the following five categories: (i) orders in relation to the First Meeting of Interested Persons; (ii) orders in respect of the opening of new bank accounts in the name of the Fund; (iii) confidentiality and non-disclosure orders; (iv) orders in relation to the rollover of term deposits; and (v) orders in relation to costs, remuneration and ongoing judicial supervision of the process. I address each in turn.
- 16 To the extent that the proposed steps to be taken by the New Trustee involve a transaction or dealing in which the New Trustee may not be empowered to engage, the New Trustee here invokes s 81 of the *Trustee Act*, which confers a broad statutory power to amend a trust instrument and/or grant further powers to a trustee where there is no power to engage in a transaction or undertake some dealing. It is noted that a transaction within the meaning of s 81(1) of the *Trustee Act* need not involve the outlay of moneys (see, for example, *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753; [2014] NSWCA 367 at [91] per Barrett JA (with whom Beazley P, as Her Excellency then was, and Gleeson JA agreed)).

17 As to the requirements to be satisfied for the application of s 81(1) (see *Stein v Sybmore Holdings Pty Ltd* (2006) 64 ATR 325; [2006] NSWSC 1004 at [37]-[44] per Campbell J), these are: first, to identify “any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction”; second, to determine whether that dealing is expedient; third, to determine whether the proposed dealing is one that cannot be effected by reason of absence of power vested in the trustees by the trust instrument; and, fourth, that there be a question that has arisen that needs to be addressed.

18 Turning then to the particular categories of relief sought, I note as follows.

(i) First Meeting of Interested Persons – prayers 2(a)-(g); 7

19 The 22 June 2021 Orders provided for the New Trustee, upon the expiry of 28 days from publication of the Notice (as defined) in *The Australian* and *The Sydney Morning Herald*, to bring a further application to the Court seeking directions for the convening of a meeting of Interested Persons to consider the Fund’s future (along with any other consequential directions to facilitate this). That time period expired on 3 August 2021.

20 What is contemplated by the orders now sought, in broad terms, (as adverted to above) is intended to mirror the process undertaken by a voluntary administrator between the first and second meeting of creditors under s 439A of the *Corporations Act*.

21 Relevantly, what is proposed involves the following steps: first, providing notice (the Second Notice) to Interested Persons of, *inter alia*, the orders made in this application and any reasons for judgment, and seeking those persons’ views on the future of the Fund and notifications of claims; second, preparing and issuing a report (via email and downloadable online) to those persons, such report to include information about the appointment of New Trustee, the New Trustee’s investigations, an outline of options concerning the future of the Fund (along with any recommendations in relation to the same), and giving notice of a meeting of Interested Persons along with providing a proxy voting form; third, holding the said meeting or, if required, adjourning that meeting (by no more than 45 business days) and issuing a supplementary report and later holding

the adjourned meeting; and, fourth, then making an application to the Court to report on the outcome of the meeting(s) and to seek directions (and, if necessary, judicial advice) for the future of the Fund. Consequential relief for the obtaining of professional representation and advice for those purposes is also sought.

- 22 By prayer 7, an order is sought that the New Trustee make such application for directions and/or advice as it may be advised within 120 days of holding the meeting(s) as here contemplated, with any Interested Persons being entitled to seek leave to appear.
- 23 In that regard, the New Trustee notes that its ongoing task is to regularise matters, including to determine for whom the Fund is held and any claims that may be made on it; which would involve making decisions as to claims by those Interested Persons who have been identified to date and decisions as to the ongoing activities of the Fund and the Trust. It is submitted that these matters are properly characterised as issues that arise in, or in relation to, the management and administration of the Trust property; and that such activities are encompassed within the notion of a “dealing”, in its general sense. It is submitted that it is expedient for the powers to be granted at the present time (particularly in circumstances where no Trust Deed has yet been located).
- 24 Alternatively, the New Trustee invokes ss 61 and 90 of the *Civil Procedure Act 2005* (NSW) (*Civil Procedure Act*) and r 2.1 and/or 36.1 of the Uniform Civil Procedure Rules 2005 (NSW) to support these prayers for relief, as giving effect to the underlying requirements of the just, quick, and cheap resolution of disputes.

(ii) Bank accounts – prayer 2(h) to (j)

- 25 The New Trustee seeks orders for the opening of new accounts with St George in the name of the Fund for each of the accounts presently held at Bank Australia, and the transferring of those funds to St George (along with the reinvesting of term deposits) (akin, for example, to the requirement on an external administration for the opening of what is commonly referred to as an administration account – see Div 65 of the Insolvency Practice Schedule (Corporations) 2016 found in Sch 2 to the *Corporations Act*).

- 26 While the signatories to the Bank Australia accounts have been updated, a difficulty has arisen in that partners and employees of KordaMentha cannot view the accounts online and the internal client accounting team cannot manage nor conduct transactions through electronic funds transfer; and there is an inefficiency in the manner in which the review, approval and payment of invoices is presently able to occur. Hence the proposal for all of the accounts to be established with St George.
- 27 As to the reinvestment of the term deposits, the New Trustee intends to reinvest funds into products with the most favourable terms and interest rates so as to maximise the return on these investments. As the 22 June 2021 Orders did not provide the New Trustee with such powers, orders have been sought to confer limited powers to accommodate these investment decisions.
- 28 To date, the New Trustee has not been able to ascertain whether moneys in the existing Fund accounts might be impressed with different beneficial interests (for example, whether persons might have interests in one account *pari passu* whereas some specified class(es) of persons might have interests in another account in priority to other persons). In order to avoid commingling funds, the New Trustee does not intend to consolidate the accounts until the possibility of any such claims has been finally determined.
- 29 Consequential relief for the obtaining of professional representation and advice for the above purposes is also sought.

(iii) Confidentiality and non-disclosure – prayer 3

- 30 A confidential exhibit was tendered on 2 November 2021, comprising evidence of correspondence which discloses lists of Interested Persons, their contact details, and information which may disclose personal information (see confidential exhibit marked “CMC-4” to the affidavit of Catherine Margaret Conneely sworn 28 October 2021). When the matter was before me in June 2021, a similar exhibit had been tendered on that application (see exhibit marked “BCW-1” to the affidavit of Bernard Colin Walrut affirmed 22 June 2021).
- 31 An order pursuant to s 7 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) is now sought that this evidence be kept confidential and not

be provided or disclosed (until further order) to any person other than the New Trustee, the officers and staff of KordaMentha and the legal advisors of the New Trustee. This order is sought on the grounds that it is necessary to prevent prejudice to the proper administration of justice and otherwise necessary in the public interest; and that that public interest in maintaining the confidentiality of this information significantly outweighs the public interest in open justice (see ss 8(1)(a) and (e)).

- 32 The New Trustee accepts that the relevant test is one of necessity and that primacy is given to the principle of open justice, such that orders should only be made in exceptional circumstances (pointing to what was said in *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403 at [27], [35] per Bathurst CJ and McColl JA; and to the observation by Earl Loreburn in *Scott v Scott* [1913] AC 417 at 446, with reference to whether the administration of justice would be rendered impracticable or the case could not be effectively tried, or whether the parties entitled to justice would otherwise “be reasonably deterred from seeking it at the hands of the Court”).
- 33 The New Trustee argues that the suppression and non-publication order here sought would only minimally interfere with open justice; and that there is no present public interest in the identities, addresses, and other personal information of the Interested Persons. It is submitted that the order sought is necessary to protect the legitimate concerns for the privacy of the Interested Persons who are not presently parties to the proceeding.

(iv) Rollover of term deposits – see prayer 4

- 34 Since the New Trustee’s appointment, three term deposits have matured and the New Trustee has reinvested those funds with the same institutions for shorter, three-month terms maturing in November (rather than withdrawing the funds and reinvesting for longer terms). The New Trustee took this course because there were no specific investment powers provided under the 22 June 2021 Orders (and having regard to the uncertainty as to which set of Rules apply and, even then, whether those Rules would confer such a power).
- 35 The New Trustee says that, as this proceeding involves a very substantial corpus of funds and there may later be dispute between potential claimants to

property having such substantial value, it is appropriate and prudent to provide protection to the New Trustee lest any of these rollovers be said to constitute breaches of trust. An order is thus sought, for the avoidance of doubt, that the New Trustee be relieved, pursuant to s 85 of the *Trustee Act*, of any liability in connection with the rollover of those term deposits.

(v) Costs, remuneration, judicial supervision – prayers 5, 6, 8

- 36 By prayers 5 and 6, the New Trustee seeks orders (pursuant to ss 93 and 59(4) of the *Trustee Act*) that its costs and expenses for this application be paid on an indemnity basis out of the assets of the Trust, and that the New Trustee's future remuneration and disbursements in connection with the above stated course of action are to be paid from the assets of the Trust on an indemnity basis.
- 37 By prayer 8, the New Trustee seeks orders, pursuant to s 90 of the *Civil Procedure Act*, relating to the supervision by the Court of the New Trustee's ongoing remuneration and disbursements (consistent with the like order made on 22 June 2021).
- 38 It is noted that ss 59(4) and 93 of the *Trustee Act* provide for a trustee to have its costs paid out of trust property in the execution of its powers, where such costs, charges, and expenses are properly and reasonably incurred (see *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Dobrijevic (No 3)* [2017] NSWCA 109 at [40] per Payne JA (with whom myself and Gleeson JA agreed)). It is submitted that this is the case here, the New Trustee noting particularly that this application is brought pursuant to the 22 June 2021 Orders.
- 39 I note that by prayer 8, the New Trustee seeks to vary order 10 of the 22 June 2021 Orders, requiring the New Trustee at least every 6 months from the date of those orders (i.e., in December) to make an application for review of its remuneration and disbursements, such that the requisite application may be made within 4 weeks after the Court determines the application (provided for in order 2(f)) as to the outcome of the meeting. The New Trustee submits that this is prudent as it allows for the New Trustee to implement the orders sought as to the preparation and holding of the meeting and for the remuneration

application to take place subsequently at the beginning of the next year (T 5).
(I agree.)

Determination

- 40 The 22 June 2021 Orders were made (in circumstances where there had been no ongoing management of the Fund for some time) on the basis that it was expedient for the affairs of the Trust and the Fund to be regularised in the interests of the potential beneficiaries and persons claiming an interest in the assets of the Trust and the Fund (including for the lodgement of tax returns and payment of any tax owing). I considered it appropriate that an independent administrator be appointed to take control of the assets, and to investigate the affairs of the Fund and the Trust, on behalf of all interested parties.
- 41 I accepted that, given the potential for significant conflict between persons claiming an interest in the assets of the Fund and the Trust, and in the absence of any copy of the Trust Deed being able to be located that defined the trustee's powers, it was impracticable to appoint a new trustee without the assistance of the Court, and it was appropriate to provide that trustee with protections in relation to its powers and rights of indemnity for the costs that would inevitably be incurred.
- 42 I was persuaded that the incorporation of the New Trustee, as an independent, special purpose trustee controlled by KordaMentha (and through which KordaMentha can be retained), would achieve the intended object of allowing potential members to be contacted, information to be gathered and appropriate reports to be undertaken; and that this process would allow all interested parties to comment upon and contribute to the resolution of the ultimate issue; namely, the future of the Fund and the Trust.
- 43 I also accepted that the proposed course of action there outlined was appropriate, noting that KordaMentha, as experienced external administrators, would have the skills and expertise to ascertain, secure and manage the assets which are the subject of the Trust.
- 44 The course of action there proposed (involving the determination of those for whom the Fund is held and in what amounts Claimants are entitled to Trust moneys; and the regularisation of the affairs of the Trust and the Fund) was in

my view properly characterised as addressing issues that arise or might arise in or in relation to the management and administration of the Trust property.

- 45 Hence the orders made at that time.
- 46 Since then, considerable steps have been taken (as referred to above) to identify Interested Persons and potential claimants on the Fund; and communications have been received from various individuals raising issues as to the future of the Fund and distributions therefrom.
- 47 I am satisfied that the relief here sought appropriately continues the necessary process of reorganisation of the Fund; and that the next steps proposed to be taken will permit the proper assessment by the New Trustee of claimants on the Fund.
- 48 As to the orders sought in relation to the bank accounts, I accept that it is expedient to remove the inefficiency of the manner in which those accounts can presently be operated; and that appropriate steps are proposed to be taken to avoid commingling of funds in respect of which there may be different beneficial interests. I also accept that it is prudent for the New Trustee to have limited powers to deal with the investment and reinvestment of term deposits, as has been sought. The steps proposed to be taken, going forward in relation to the proposed reorganisation and/or winding up of the Fund involve dealings with the Trust in the sense contemplated by s 81 of the *Trustee Act* and I make the orders pursuant to the power there conferred.
- 49 Again, in the absence of location of the Trust Deed establishing the Trust, and the ongoing uncertainty as to the Rules that apply in relation to the Fund, and for the reasons submitted by the New Trustee, it is appropriate to make the orders sought by the New Trustee conferring the powers sought and making provision to relieve the New Trustee from liability in relation to the rollover of the term deposits. Finally, I am satisfied that it is appropriate to make the usual orders in relation to costs and remuneration of the New Trustee and to vary the 22 June 2021 Orders as requested.
- 50 I consider it appropriate to make the suppression and non-publication order sought in relation to the private information contained in the confidential

exhibits tendered (as identified above), on the grounds that such an order is necessary in the public interest and that such interest significantly outweighs the interest in open justice. The order as sought is limited to an order until further order of the Court. I consider that appropriate in circumstances where at this stage those persons identified in the confidential exhibits are not yet parties to the proceeding and no public interest has yet been shown for the disclosure of their personal information.

- 51 For those reasons, on 2 November 2021, I made the orders set out in prayers 1-10 of the short minutes of order provided by Counsel for the New Trustee.

Orders

- 52 Leaving aside procedural orders, the orders so made were as follows:

2. Pursuant to s 81 of the *Trustee Act 1925* (NSW) (*Trustee Act*), and ss 61 and 90 of the *Civil Procedure Act 2005* (NSW) (*Civil Procedure Act*) and rules 2.1 and 36.1 of the Uniform Civil Procedure Rules 2005 (NSW), New Trustee is authorised to undertake the following course of action (Second Course of Action):

- (a) provide notice (Second Notice) to the current and past members of the APM Security Plan Sickness & Accident Fund ABN 57 413 197 086 (Fund), creditors, claimants and contributories or potential creditors, claimants and contributories of the Fund, and the persons who have been acting as officeholders on behalf of the Fund (together, Interested Persons): (i) of the orders made in respect of this application and any reasons for judgment; (ii) of New Trustee's intention to issue the Report (as defined in subparagraph (c) below) to Interested Persons and convene and hold a meeting (First Meeting) of Interested Persons by 31 December 2021, unless adjourned in accordance with subparagraph (e) below; (iii) seeking any additional information and documentation about the Fund and the Fund trust (Trust); (iv) seeking notification of any claims in respect of any property (Property) held on trust for the Fund under the Trust; and (v) seeking their opinion about the winding up of the Fund or any alternatives to winding up the Fund;
- (b) issue the Second Notice by: (i) sending the Second Notice to the known email addresses of the Interested Persons; (ii) sending the Second Notice to the known postal addresses of the Interested Persons; (iii) publishing the Second Notice on <https://www.kordamentha.com/creditors/apm-security-plan-sickness-accident-fund> (the New Trustee Website); and (iv)

publishing the Second Notice in The Australian, the Sydney Morning Herald and the Daily Telegraph;

- (c) prepare and issue a report to Interested Persons (Report) via email to known email addresses of Interested Persons and downloadable from the New Trustee Website, which Report is to include information about the following: (i) the appointment of New Trustee as trustee of the Fund; (ii) the Fund's history, current status, property, affairs, and financial circumstances; (iii) New Trustee's investigations into the affairs of the Fund and work undertaken since its appointment; (iv) an outline of options concerning the future of the Fund and, if and to the extent that New Trustee considers it appropriate, any recommendation(s) and the reasons for any such recommendation(s); (v) notice of the First Meeting (which must be provided not less than two weeks before the scheduled date of the First Meeting); and (vi) a proxy form to vote at the First Meeting in respect of the future of the Fund and any other resolutions that New Trustee considers appropriate for this purpose;
- (d) hold the First Meeting via video teleconference;
- (e) if required, adjourn the First Meeting (Adjourned First Meeting) for a period of no more than 45 business days and prepare and issue a supplementary report to Interested Persons (Supplementary Report), subject to the following: (i) any Supplementary Report is to be issued to Interested Persons via email to known email addresses of Interested Persons and downloadable from the New Trustee Website, and is to include: (A) notice of the Adjourned Meeting (which must be provided not less than two weeks before the scheduled date of the Adjourned Meeting); and (B) a proxy form to vote at the Adjourned Meeting in respect of the future of the Fund and any other resolutions New Trustee considers appropriate for this purpose; and (ii) the Adjourned Meeting is to be held via video teleconference;
- (f) following the First Meeting or any Adjourned Meeting, make an application to the Court to report on the outcome of the meeting(s), and seek directions and orders for the future of the Fund, further conduct of the management of the Fund, and/or the determination of any questions arising in connection with the Trust and/or the Fund;
- (g) for the purposes of the above sub-paragraphs: (i) conduct any further review of the books and records of the Fund and any additional information obtained after issuing the Second Notice; (ii) liaise with the Interested Persons, financial institutions and any other persons associated with the Fund; and (iii) identify the Property and liabilities of the Fund, including any Property held in the name of individuals or other third parties on behalf of the Fund;

- (h) open new accounts (each a New Account) in the name of the Fund with St George Bank for each of the following accounts (each a Bank Australia Account) presently held with Bank Australia in the name of the Fund: (i) transaction account 7311; (ii) term deposit 0423; (iii) term deposit 0430; (iv) term deposit 0445; (v) term deposit 0482; (vi) term deposit 1168; (vii) term deposit 1169; (viii) term deposit 1166; (ix) term deposit 1167; and (x) term deposit 0486;
- (i) transfer the funds held in each Bank Australia Account into the corresponding New Account;
- (j) in respect of the New Accounts and the following accounts in the name of the Fund presently held with St George Bank, to the extent the account is a term deposit, reinvest the term deposit as required: (i) transaction account 4771; (ii) term deposit 5349; (iii) term deposit 5671; and (iv) term deposit 4611;
- (k) obtain professional representation and advice for the purposes of sub-paragraphs (a) to (j) above.

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, the following documents (Documents):

- (i) pages 80, 223, 226, 229, 232, 233, 234, 235 and 237 of exhibit marked "BCW-1" to the affidavit of Bernard Colin Walrut affirmed 22 June 2021; and
- (ii) confidential exhibit marked "CMC-4" to the affidavit of Catherine Margaret Conneely sworn 28 October 2021, are to be marked "confidential" on the Court file and are not to be provided or disclosed to any person other than: (a) New Trustee and the officers and staff of KordaMentha; and (b) the legal advisors of the New Trustee.

4. Pursuant to section 85 of the Trustee Act, New Trustee is relieved from any personal liability for breach of trust in connection with the reinvestment of the following term deposits:

- (i) St George Bank term deposit 5349;
- (ii) St George Bank term deposit 4611; and

(iii) Bank Australia term deposit 0445.

5. Pursuant to s 93 of the *Trustee Act*, New Trustee's costs and expenses of and incidental to this application are to be paid on an indemnity basis out of the assets of the Trust.

6. Pursuant to s 59(4) of the *Trustee Act*, New Trustee's future remuneration and disbursements in connection with the Second Course of Action are to be paid from the assets of the Trust on an indemnity basis, as and when New Trustee considers appropriate, subject to order 8 below.

7. Pursuant to s 90 of the *Civil Procedure Act*, New Trustee make such application for advice and/or orders as it may be advised, within 120 days of holding the First Meeting or Adjourned First Meeting as contemplated by order 2 above, and any Interested Persons shall be entitled to seek leave to appear in any such proceeding.

8. Vary Order 10 of the orders made on 22 June 2021 to require the Second Plaintiff to make application to the Court for review of its remuneration and disbursements paid in accordance with:

(i) Order 8 of the orders made on 22 June 2021; and

(ii) Order 6 above, within four weeks after the Court determines the application referred to at Order 2(f) above.

9. Pursuant to s 90 of the *Civil Procedure Act* that, at least every six months from the date hereof until further or other order, New Trustee make an application to the Court for review of its remuneration and disbursements paid in accordance with order 6 in the prior six-month period.

10. New Trustee have leave to apply to Ward CJ in Eq in chambers on five (5) days' notice to amend or vary the terms of orders 2 and 7, or if any circumstances so require.

material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Appendix B Notice of Meeting



Notice of Meeting of Interested Persons

KordaMentha Shelf Co (APMSPSAF) Pty Ltd ('New Trustee')
ACN 642 981 799 as trustee for

APM Security Plan Sickness & Accident Fund ('Fund') trust ('Trust') ABN 57 413 197 086

Meeting Details

We give notice that a meeting of Interested Persons of the Fund will be held pursuant to an order of the Supreme Court of New South Wales made on 2 November 2021 ('the Order') on **9 December 2021** to consider the Fund's future ('the Meeting').

This will be a **virtual meeting** only. Registration for all Interested Persons will open at 9.30 am AEDT with the Meeting commencing at 10.00 am AEDT.

Meeting agenda

1. To consider the report by the New Trustee on the Fund.
2. To consider the future of the Fund.
3. Any other business properly brought before the meeting.

What do I need to do?

If you want to ensure your vote is recorded ahead of time or you are unable to attend the virtual Meeting, please complete and return the **Proposal Voting Form** by no later than 5.00 pm, 8 December 2021. A copy of this form is enclosed.

Please return the form by post to KordaMentha, GPO Box 2523, Sydney NSW 2001, to the attention of Elyse Diamond, or scan and email to botanymillfund@kordamentha.com.

If you wish to attend the virtual Meeting, please refer to the below instructions.

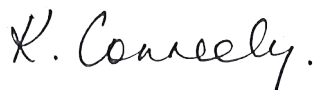
How do I attend the Meeting?

The Meeting will be held via videoconference on Microsoft Teams. No Interested Persons will be able to physically attend the Meeting.

If you wish to attend the Meeting, please send confirmation of your attendance via email to botanymillfund@kordamentha.com by 5.00 pm 8 December 2021. Once we receive your details, we will provide you with the link to access the Meeting.

If you have any queries about the meeting or registration process, please email botanymillfund@kordamentha.com or contact Elyse Diamond on (02) 8257 3014.

Dated: 24 November 2021



Kate Conneely
Director of New Trustee

KordaMentha
Level 5 Chifley Tower
2 Chifley Square
Sydney NSW 2001

Enc.

Appendix C Proposal Voting Form



24 November 2021

NOTICE OF VOTING PROPOSAL TO INTERESTED PERSONS

KordaMentha Shelf Co (APMSPSAF) Pty Ltd ('New Trustee')
ACN 642 981 799 as trustee for
APM Security Plan Sickness & Accident Fund ('Fund') trust ('Trust')
ABN 57 413 197 086

Proposal for approval

'That the APM Security Plan Sickness & Accident Fund be wound up.'

Reasons for the proposal

The New Trustee will consider all votes received from current and past members of the Fund, creditors, claimants and contributories or potential creditors, claimants and contributories, and persons who have been acting as officeholders on behalf of the Fund (together 'Interested Persons').

Enclosed with this notice is a report by the New Trustee in relation to the history, current status, property, affairs and financial circumstances of the Fund, and the options concerning the future of the Fund. As outlined in the report, **it is the New Trustee's recommendation that the Fund be wound up and the proposal be approved by the Interested Persons.**

Should Interested Persons vote to not approve the proposal, this will be taken to mean they wish for the Fund to continue in some capacity.

All Interested Persons are invited to consider the report, and independently cast their vote in respect of the future of the Fund. Upon the expiry of the voting period, the New Trustee will bring an application to the Court advising of the outcome of the vote and seeking directions for the future of the Fund.

Vote on proposal

Interested Persons have the option of approving, not approving or objecting to the proposal being resolved. Please select the appropriate Yes, No or Object box referred to below:

Yes ☐ Approved – I vote that the Fund be wound up

No ☐ Not approved – I do not vote for the Fund to be wound up. I wish for the Fund to continue in some capacity.

Object ☐ I object to the vote for the Fund to be wound up. The reasons for my objection are below:

Interested Person details

Name of Interested Person: _____

Years of membership (if applicable): _____

Address: _____

Phone: _____

Email: _____

Signature: _____

Date: _____

Certificate of witness

Please Note: This certificate is to be completed only where the person providing the vote is blind or incapable of writing.

I _____ of _____
certify that the above instrument registering a vote was completed by me in the presence of and at the request of the person providing the vote and read to him/her before he/she attached his/her signature or mark to the instrument.

Signature of witness: _____

Return of documents by 8 December 2021

Please complete this document and return with any supporting documents by no later than 8 December 2021, for your vote to be counted, by email to botanymillfund@kordamentha.com or fax to (02) 8257 3099. Should you have any questions, please call Elyse Diamond on (02) 8257 3014.

Completed forms may also be sent by post attention to Elyse Diamond at KordaMentha, GPO Box 2523 Sydney NSW 2001, although you should ensure this is sent with sufficient time to arrive by the date the vote closes, which we cannot guarantee.

Appendix D Extract of financial statements for the Fund

Profit and loss summary

	FY14	FY13	FY12
Revenue from operations			
Contributions - members	-	248	11,233
Dividends	124,356	111,342	104,112
Interest income	36,336	43,652	49,571
Booking fees	-	-	650
Total revenue	160,692	155,242	165,566
Operating expenses			
Depreciation and amortisation expense	(8,260)	(7,700)	(7,284)
Other expenses from ordinary activities	(58,053)	(71,204)	(139,500)
Total expenses	(66,313)	(78,904)	(146,784)
Profit before tax expense	94,379	76,338	18,782
Income tax expense	(37,862)	(32,811)	(32,696)
Profit after tax	56,517	43,527	(13,914)

Balance sheet

\$000	30 June 2014	30 June 2013	30 June 2012
Current assets			
Cash and cash equivalents	1,251,982	1,172,854	1,125,909
Trade and other receivables	16,391	16,375	20,328
Total current assets	1,268,373	1,189,229	1,146,237
Non current assets			
Intangible assets	-	3,174	10,163
Financial assets	3,432,327	2,937,313	2,056,217
Property, plant and equipment	1,342,071	1,349,536	1,352,536
Total non current assets	4,774,398	4,290,023	3,418,916
Total assets	6,042,771	5,479,252	4,565,153
Current liabilities			
Trade and other payables	22,129	11,322	19,893
Current tax liabilities	16,092	14,917	15,684
Total current liabilities	38,221	26,239	35,577
Non current liabilities			
Deferred tax liabilities	4,917	4,912	6,098
Total non current liabilities	4,917	4,912	6,098
Total liabilities	43,138	31,151	41,675
Net assets	5,999,633	5,448,101	4,523,478

Appendix E Receipts and payments

A summary of the receipts and payments for the period from the date of appointment of the New Trustee, being 22 June 2021 to 17 November 2021.

Summary of receipts and payments

22 June 2021 to 17 November 2021

	\$
Fund receipts	
Pre-appointment sweep (St George)	298,024
Pre-appointment sweep (Bank Australia)	873,558
Dividend received	46,070
Bank interest	154
Total Fund receipts	1,217,806
Fund payments	
Council rates	(2,240)
Essential services	(367)
Other property expenses	(2,797)
Insurance	(2,950)
Property valuation	(2,200)
Bank charges	(6)
Total Fund payments	(10,560)
Other payments	
Legal fees	(200,812)
New Trustee fees	(81,862)
New Trustee disbursements	(2,511)
Total other payments	(285,185)
Net receipts	922,061