

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 11917/15

Applicant **KORDAMENTHA PTY LTD (ACN 100 169 391) AS TRUSTEE FOR THE LM MANAGED PERFORMANCE FUND**

AND

Respondent **THE MEMBERS OF THE LM MANAGED PERFORMANCE FUND**

**APPLICANT'S OUTLINE OF SUBMISSIONS:
APPLICATION PURSUANT TO S.96 OF THE TRUSTS ACT 1973 (QLD)**

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1. As set out in more detail below, pursuant to an order of the Supreme Court of Queensland dated 12 April 2013 KordaMentha Pty Ltd (**the Trustee**) was appointed the trustee of a trust named the LM Managed Performance Fund (**the MPF**). By a further order dated 10 February 2014 this Court ordered that the Trustee wind up the MPF pursuant to its Constitution.
2. The Trustee is nearly in a position to finalise the winding-up of the affairs of the MPF, which will include making a final distribution to its beneficiaries (referred to in these submissions as **members**).
3. By the present application, the Trustee seeks a series of directions pursuant to s.96 of the *Trusts Act 1973* (Qld) (**the Act**), as to whether it is justified in taking certain steps.

Resolution of these issues will enable the Trustee to progress the winding-up of the MPF.

Background

4. LM Investment Management Ltd ACN 077 208 461 (**LMIM**) established the MPF in approximately December 2001.¹ The MPF was established as a unit trust pursuant to a trust deed, described as a Constitution.² LMIM was the trustee of the MPF, although styled as Manager.³
5. The MPF was an unregistered managed investment scheme.⁴ The Trustee's investigations indicate that it was not required to be registered as a managed investment scheme under the *Corporations Act 2001* ("**the Corporations Act**"). The MPF was designed to be offered to investors outside Australia, to global platform and portfolio investors and to institutional/wholesale investors.⁵
6. The MPF's business was to pool the capital contributed by the members of the MPF to make investments, principally in the form of loans secured by mortgages over real property.⁶

¹ Paragraph 15 of the affidavit of Jarrod Villani filed 8 December 2020 (Court document 42), hereafter referred to in this outline as "**the affidavit of Villani**".

² Paragraphs 10-12 of the affidavit of Villani.

³ Paragraph 10 of the affidavit of Villani; recital A and the definition of "Manager" in clause 1.1 of the Constitution.

⁴ Paragraph 13 of the Villani affidavit: it has never been registered as a managed investment scheme under Part 5.9 of the Corporations Act.

⁵ Paragraphs 13-14 of the affidavit of Villani. Section 601ED(2) of the Corporations Act provides that a managed investment scheme is not required to be registered if all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made.

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

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

⁶ Paragraphs 14-18 of the Villani affidavit.

7. The records of the MPF indicate that it presently has approximately 4,500 members located in 77 countries. The vast majority of these members are located overseas. The most common locations for members are as follows:

(a) the Isle of Man: 1,543;

(b) Great Britain: 589; and

(c) Malta: 545.

Only 54 members of the MPF are located in Australia.⁷

8. Pursuant to clause 23.1(b) of the Constitution, LMIM was required to resign as trustee of the MPF if, being a corporation, it became an externally administered body corporate as defined in the Corporations Act.

9. On 19 March 2013 voluntary administrators were appointed to LMIM.⁸ Consequently, LMIM was required to resign as trustee of the MPF.

10. After the administrators' appointment, the MPF was closed to new investment effective 19 March 2013.⁹

11. On 12 April 2013 de Jersey CJ made orders removing LMIM as trustee of the MPF, and appointing the Trustee and Calibre Capital Ltd ("**Calibre**") as new trustees of the MPF in its place.¹⁰

12. At the date of the Trustee's appointment the MPF was thought to have significant net assets, in that:

(a) the most recent annual report, dated 30 June 2012 (but finalised in December 2012) recorded that:

(i) the MPF held net assets of \$353,156,353 as at 30 June 2012, including \$17,287,984 in cash and cash equivalents; and

⁷ Paragraphs 102-103 of the Villani affidavit. Members reside in a further 65 countries, beyond those identified above.

⁸ Paragraph 46 of the Villani affidavit, which exhibits the ASIC company search recording this appointment.

⁹ Paragraph 47 of the Villani affidavit.

¹⁰ Paragraph 48 of the Villani affidavit and pp.421-422.

- (ii) in the 12 months prior to 30 June 2012 the MPF had net profit of \$21,361,292;¹¹ and
- (b) approximately 557 million units were on issue in the MPF with an Australian dollar value of approximately \$404 million.¹²
- 13. On 1 August 2013 the voluntary administrators were appointed liquidators of LMIM, by way of a creditors' voluntary winding-up.¹³
- 14. Upon investigation by the Trustee, the Trustee formed the view that the annual reports did not present a true and fair view of the MPF's financial position:
 - (a) of the \$299,570,308 in loans and receivables recorded in the 2012 Annual Report, the Trustee has made net recoveries of only \$8.4 million. The Trustee's view is that a number of the MPF's loans and receivables were significantly impaired and ought to have been given a significantly lower carrying value than they were attributed;
 - (b) many of the MPF's mortgage loans should have been impaired by at least 30 June 2012, and at least by 30 June 2012 it was inappropriate to record any of the interest accruing on those impaired loans as revenue;
 - (c) the Trustee has restated the financial statements for the 2012 financial year, and those restated statements show that the MPF generated no profit during the 2012 financial year.¹⁴
- 15. On 10 February 2014 Martin J ordered that the Trustee and Calibre wind up the MPF, pursuant to clause 15.2(c) of its Constitution. His Honour's amended orders are dated 18 March 2014.¹⁵
- 16. Clause 15.6 of the Constitution provides that when winding up the MPF, the Trustee is required to (inter alia):
 - (a) realise the assets of the MPF;

¹¹ Paragraph 23 of the Villani affidavit.

¹² Paragraph 27 of the Villani affidavit.

¹³ Paragraph 48 of the Villani affidavit, which exhibits the ASIC company search recording this appointment.

¹⁴ Paragraph 24 of the Villani affidavit.

¹⁵ Paragraph 50 of the Villani affidavit, and pages 423-424.

- (b) pay all its liabilities; and
 - (c) distribute the net proceeds of realisation to the members.
17. Calibre retired as trustee of the MPF effective 5 January 2015.¹⁶ Since that date the Trustee has continued as the sole trustee of the MPF.

Legal principles

18. The Trustee's application is brought pursuant to s.96 of the Act, which provides:

96 *Right of trustee to apply to court for directions*

- (1) *Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.*
 - (2) *Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.*
19. The consequence of a successful application for directions under s.96 is set out in s.97:

97 *Protection of trustees while acting under direction of court*

- (1) *Any trustee acting under any direction of the court shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the direction, notwithstanding that the order giving the direction is subsequently invalidated, overruled, set aside or otherwise rendered of no effect, or varied.*
- (2) *This section does not indemnify any trustee in respect of any act done in accordance with any direction of the court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the court making the order giving the direction.*

¹⁶ Paragraph 51 of the Villani affidavit.

20. It is clear that the Trustee is the trustee of the MPF, having been appointed by the orders of de Jersey CJ dated 12 April 2013. The MPF is constituted as a trust and was established pursuant to a trust deed, described as the MPF's Constitution. Consequently s.96 of the Act is engaged.

The MPF as a lawfully unregistered managed investment scheme

21. It is important to note the somewhat unusual circumstances of this trust. The MPF, as constituted,¹⁷ falls within subparagraph (a) of the definition of "managed investment scheme" set out in s.9 of the Corporations Act, in that it is:

(a) a scheme that has the following features:

- (i) people contribute money...as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);*
- (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce tangible benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);*
- (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).*

22. But as noted at paragraph 5 of these submissions, the MPF was not required to be registered under Part 5C of the Corporations Act. For the reasons set out in detail in footnote 5, the MPF fell within the exception set out in s.601ED(2) of the Corporations Act, which provides:

- (2) A managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made would not have required the giving*

¹⁷ As set out in paragraphs 3 to 5 above.

of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made.

23. Consequently the MPF is a lawfully unregistered managed investment scheme.
24. This has the consequence that the detailed provisions that govern registered managed investment schemes, contained in Part 5C of the Corporations Act, do not apply to the MPF. This includes the power of the Court to give directions about the winding up of a registered scheme, pursuant to s.601NF(2), which permits the Court to give directions in the nature of judicial advice.¹⁸
25. It has the further consequence that the power of the Court contained in s.601EE(2) to make any orders that it considers appropriate for the winding up of an unlawfully unregistered scheme, which also permits the Court to give directions in the nature of judicial advice,¹⁹ does not apply to the MPF.
26. Consequently the present application relies solely upon s.96 of the Act.²⁰

General principles concerning applications for judicial advice

27. In *Marley v Mutual Security Merchant Bank & Trust Co Ltd* [1991] 3 All ER 198 Lord Oliver of Aylmerton said at 201:

A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court ...

[I]n exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties.

¹⁸ *ASIC v Tasman Investment Management Ltd & Ors* (2006) 59 ACSR 113 at 118-119 ([19]-[20]).

¹⁹ *Ibid.*

²⁰ An application for directions in the nature of judicial advice, when brought in respect of a registered scheme, may rely upon multiple sources of power including s.601NF of the Corporations Act, s.96 of the Act, and (where liquidators have been appointed to the corporate trustee) s 90-15 of the *Insolvency Practice Schedule (Corporations)* to the Corporations Act, which replaces s.479(3) and s.511 of the Corporations Act (since repealed): *In the matter of Secured Mortgage Management Ltd (in liq); Fletcher & Barnett in their capacity as liquidators of Secured Mortgage Management Ltd (in liq) & Anor* [2017] QSC 254 at [16] and [18].

28. An important purpose of directions under s.96 (and analogue legislation) is the protection of the interests of the trust: *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [72]. The plurality made general points regarding such applications, including that:
- (a) there is no implied limitation on the power to give advice.²¹ “Only one jurisdictional bar exists: the applicant must point to the existence of a question respecting the management or administration of trust property or a question respecting the interpretation of the trust instrument”;²²
 - (b) there are no implied limitations on discretionary factors, including the adversarial nature of the proceedings about which the advice is sought;²³
 - (c) the procedure is summary in character;²⁴ and
 - (d) the advice is private and personal. Its function is to give personal protection to the trustee and operates as an exception to the court’s ordinary function of deciding disputes between litigants.²⁵
29. The majority noted the important relationship between applications for judicial advice, and a trustee’s entitlement to a right of indemnity from the assets of the trust for all costs and expenses properly incurred in performance of the trustee’s duties.²⁶ A successful application for judicial advice resolves doubt as to the propriety of the trustee’s actions, when the trustee acts in accordance with the advice given by the Court.
30. In *Togito Pty Ltd v Pioneer Investments (Aust) Pty Ltd* [2011] QCA 167 at [57] and [58] Chesterman JA (with whom the other members of the Court of Appeal agreed) accepted a submission to the following effect:

²¹ At [56].

²² At [58]. The terms of s.96(1) are wider still, concerning “any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.”

²³ At [59].

²⁴ At [61].

²⁵ At [64].

²⁶ At [71].

[57] ...[T]he effect of s.97 is to provide statutory protection for a trustee who might otherwise act in breach of trust so long as he acts under the court's direction. The provision does not, the submission continues, purport to extend any similar protection to other parties and, as well, directions made under s.96 do not affect the rights of a beneficiary of the trust save with respect to remedies against the trustee who acts pursuant to the court's direction. It is pointed out that it is not ordinarily appropriate on an application under s 96 for the court to determine controversies between parties to a trust: *Harrison v Mills* [1976] 1 NSWLR 42; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.

31. It is important for a trustee, wherever practicable, to “engage beneficiaries in a dialogue.”²⁷ If an application for judicial advice is made without due engagement of persons with an interest in the outcome of such an application (in particular, beneficiaries), “...the ability of the Court to provide well measured advice may be affected to the extent that it is not given the benefit of a full appreciation of what competing interests might say.”²⁸
32. The affidavit of Villani includes a Statement of Facts, as required by s.96(1)²⁹ (which requires such applications to be made “upon a written statement of facts.”)
33. A s.96 application is determined “primarily ‘upon a written statement of facts’”: *Corbiere & Monk v Dulley & Ors* [2016] QSC 134 at [29] per Burns J, although as his Honour noted, the practice has arisen of filing affidavit evidence on such applications, and (in particular) the statements of facts presented to the Court are often verified on affidavit, as has been done in the present case.³⁰
34. The Court is entitled to act on the facts stated by the trustee, even if they are contested or controversial.³¹

The approach the Court will adopt

²⁷ *Re Estate Late Chow Cho-Poon; Application for judicial advice* [2013] NSWSC 844 at [8].

²⁸ *Ibid* at [199].

²⁹ Marked “A” at the commencement of exhibit JV-19.

³⁰ A failure to provide such a statement has been criticised: *Kordamentha Pty Ltd & Anor v LM Investment Management Ltd & Anor* [2015] QSC 4 at [8] per Martin J.

³¹ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [80]-[81].

35. An analogy may be drawn with applications for directions in respect of registered and unlawfully unregistered managed investment schemes under the relevant provisions of the Corporations Act, given the breadth of the powers concerned and the factual overlap between registered and unregistered managed investment schemes.

36. The Court's power to give such directions is broad, as stated by Austin J in *ASIC v Tasman Investment Management Ltd* (2006) 59 ACSR 113 at 118:

[19] Although the winding up of a managed investment scheme proceeds within the appropriate general law framework, the statutory provisions governing the winding up of schemes give the court a great deal of flexibility. Subject to the provisions of the scheme's constitution in the case of a registered scheme, the court may use its statutory powers under Ch 5C (s 601EE(2) for an unregistered scheme, and s 601NF(2) for a registered scheme), and its general statutory and inherent powers, to make appropriate orders for the winding up of the scheme: Warne v GDK Financial Solutions Pty Ltd [2006] NSWSC 259 at [93]–[100] per Young CJ in Equity; Cumulus Wines Pty Ltd v Huntley Management Ltd (2004) 50 ACSR 58 ; [2004] NSWSC 609. ...

[20] ...The court may use its statutory and inherent powers to make orders and give directions in the course of the winding up of the scheme. For example, it may give directions in the nature of judicial advice, analogous to directions under s 479(3): see, for example, Hamilton v Piggott Wood & Baker [2003] FCA 1055; Woods v Dodge [2003] FCA 1066), or make orders approving a compromise, analogous to orders under s 477(2A) (see, for example, Cook v Law [2003] FCA 966; Australian Securities and Investments Commission v Tasman Investment Management Ltd.

37. In *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 679 McLelland J considered the effect of making directions of the type sought, stating:

'...the only binding effect of, or arising from, a direction given in pursuance of such an application...is that the liquidator, if he has made full and fair disclosure to the court of the material facts, will be protected from liability for any alleged breach of duty as liquidator to a creditor or contributory or to the company in respect of anything done by him in accordance with the direction.'

38. As Austin J stated in *ASIC v Tasman Investment Management Ltd* (2006) 59 ACSR 113 at 121 ([30]), the Court is likely to prefer making directions in such limited form, rather than determining substantive rights and entitlements. His Honour noted a number of consequences that flow from this, including:

- (a) that the rights of claimants to scheme funds distributed on winding up will be unaffected, save that a successful applicant will be protected from liability for any alleged breach of duty to a creditor or beneficiary, for anything done in accordance with the direction (at p.121, [30]);
- (b) that ‘the application may be dealt with by a relatively informal procedure analogous to the procedure on an application by a trustee for judicial advice or an application by a liquidator for directions’ (at p.121, [31]).³²

39. Approaching the application on that basis, Austin J stated at 121:

[32] ...The question is whether, on the facts presented to me, I should direct [the liquidator of the managed investment scheme] that he is justified in [paying the net funds of the scheme to the investors in a certain manner]. The answer to this question does not depend upon the court determining the rights of the investors to the scheme assets. It depends upon whether there is a reasonable basis for [the liquidator’s] proposal, sufficient to persuade the court that it is proper to exonerate him from liability for implementing the proposal; or conversely, whether there is any good reason why the liquidator should not proceed as proposed...³³

40. In *ASIC v Piggott Wood & Baker (a firm) (No 6)* [2016] FCA 672 Kerr J stated at [25]:

It is implicit that there may be contestable issues of fact or law yet such a direction nonetheless should be made: if it were otherwise, such a direction would be unnecessary.

³² In an appropriate case it may be possible to convert an application for judicial advice into a proceeding determining substantive rights, should it become necessary to do so: *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 680.

³³ The test has been framed in similar terms concerning a liquidator’s application for directions. In such cases the Court does not “rubber [stamp] whatever is put forward by the liquidator but...the court is necessarily confined in attempting to second guess the liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error in law or principle, or real and substantial grounds for doubting the prudence of the liquidator’s conduct”: *Re Spedley Securities (in liq)* (1992) 9 ACSR 83 at 85.

41. In his supporting affidavit Mr Villani has set out, in a significant degree of detail, the relevant facts and the logic behind the Trustee's approach, thereby seeking to demonstrate that each of the Trustee's proposals has a reasonable basis. The directions sought by the Trustee are its best attempts to resolve the various issues raised in the winding up of the MPF.
42. The Trustee has caused the application and all the non-confidential affidavit material to be served on members of the MPF, pursuant to substituted service orders obtained on 18 December 2020. As noted at paragraph 31 above it is important for a trustee to seek to engage beneficiaries in respect of such an application, including so that the Court may be provided with a full appreciation of what competing interests might say.
43. When service of the Application and supporting affidavit material was effected on members of the MPF, the Trustee also served each member with a summary of the unit balance contained in the records of the MPF in respect of their unitholding, in order to give members an opportunity to consider the effect of the directions sought by the Trustee on their particular unitholdings.³⁴
44. Consequently, insofar as particular members of the MPF are affected by the directions sought by the Trustee, they have been given the opportunity to consider the directions sought, take advice about their particular position and, if appropriate, oppose them.
45. If members do not oppose the directions sought, the Court would be justified in approaching the Trustee's application on the basis that those members of the MPF, having had the opportunity to consider the Trustee's material and their particular positions, have made an informed decision to accept that the Trustee is justified in proceeding in the manner the Trustee has proposed.³⁵ That is not dispositive, but it is "not irrelevant" to the Court's task of determining whether the directions proposed are reasonable and proper.³⁶
46. However any absence of a contradictor does not discharge the Court of its responsibility to be satisfied that the directions proposed are justifiable.³⁷

³⁴ Paragraph 212, affidavit of Villani.

³⁵ C.f. *ASIC v Piggott Wood & Baker (a firm) (No 6)* [2016] FCA 672 at [28].

³⁶ *Ibid.*

³⁷ *Id.* at [26].

47. The particular directions sought by the Trustee are set out below.

Paragraph 1(a): the appropriate register for the Trustee to adopt

48. Paragraph 1(a) of the Application seeks a direction that the applicant would be justified in adopting the unitholder register titled “Register 1.xlsx” as the unitholder register of the MPF, for the purposes of making a distribution to members and finalising the winding up of the MPF.

49. The factual background is set out in Part B of Mr Villani’s affidavit (paragraphs 64 to 81). A further section of that affidavit, headed “Books and Records of the MPF,” is also relevant (paragraphs 53 to 60).

50. In brief:

- (a) over the period of approximately six months following its appointment, the Trustee obtained five unitholder registers for the MPF. Three of these registers (Registers 1, 4 and 5) were received from Mr Steven Hannan, LMIM’s former Investment Services Manager; the other two (Registers 2 and 3) were included in a data room the administrators appointed to LMIM provided to the Trustee;
- (b) the Trustee’s staff have undertaken a significant amount of work to review and compare the five registers, and identify and seek to reconcile the differences between them;
- (c) a summary of the information provided in those registers is set out in the table subjoined to paragraph 65. Registers 1, 2, 4 and 5 are dated 19 March 2013,³⁸ and Register 3 is dated 12 April 2013;³⁹
- (d) the number of members varies slightly between the different registers. Register 3 contains 4,523 members; Registers 1 and 5 contain 4,525; and Registers 2 and 4 contain 4,526;
- (e) the number of accounts also varies slightly between the different registers. Register 3 contains 5,877 accounts; Registers 1 and 5 contain 5,881; and

³⁸ The date on which voluntary administrators were appointed to LMIM: paragraph 46 of the Villani affidavit.

³⁹ The date on which the Supreme Court made orders removing LMIM as trustee of the MPF, and appointing the Trustee and Calibre Capital Pty Ltd in its place: paragraph 48 of the Villani affidavit.

Registers 2 and 4 contain 5,890. 5,874 account IDs appeared on each of the registers, leaving only 19 accounts which differed across two or more of the registers;

- (f) the number of units also varies between the different registers. Register 3 has 556,326,486.21; Register 2 has 557,833,252.58; Register 4 has 557,856,510.51; and Registers 1 and 5 have 557,936,046.42.

51. The Trustee is of the view that Register 1 is the most accurate and complete unitholder register for the Trust, as:

- (a) there are 5,893 unique unitholder account IDs across all five registers. 5,874 of those account IDs appear in each of the registers, leaving only 19 that differed across two or more registers;⁴⁰
- (b) seven of those 19 account IDs appear in each version of the register, apart from Register 3. The Trustee has not seen any evidence to suggest that those unitholdings should not be recorded in the register, and the unit balances stated in Registers 1, 2, 4 and 5 are consistent with the balances recorded in the Unitholder Transaction Ledger;⁴¹
- (c) three account IDs only appear in Register 3. One of those IDs has a negative unitholding of 0.01 units, which may be a rounding issue. The other two IDs have negative balances of 4,642.82 and 14,806.98 units respectively. The Trustee does not possess enough information to determine conclusively how these negative unit balances arose, although it appears that these negative balances may relate to transactions where units were “switched out” to other accounts;⁴²
- (d) the remaining nine accounts appear in Registers 2 and 4, but not in Registers 1, 3 or 5. The Trustee considers that those accounts should each have a nil balance, because the Unitholder Transaction Ledger indicates that the relevant unit holdings were consolidated with other accounts;⁴³

⁴⁰ Paragraph 74.1 of the Villani affidavit.

⁴¹ Paragraph 74.2 of the Villani affidavit.

⁴² Paragraph 74.3 of the Villani affidavit.

⁴³ Paragraph 74.4 of the Villani affidavit.

- (e) differences in unit quantities have been identified between the various versions of the Register. In each case, the difference arose as a result of transactions prior to the closure of the Trust, which were recorded in Register 1 but not in one or more of the other versions of the Register.⁴⁴

Reconciling the 19 different account IDs in the Registers

Seven account IDs common to each register, except Register 3

52. Seven of those 19 account IDs appear on every register, except Register 3.⁴⁵ Mr Villani has identified those seven account IDs at paragraph 74 of his affidavit.
53. The Trustee has not seen any evidence to indicate that those seven unit holdings should not be recorded in the unitholder register,⁴⁶ and the unit balances stated in Registers 1, 2, 4 and 5 are consistent with the transactions recorded in the Unitholder Transaction Ledger. The Unitholder Transaction Ledger recorded all unitholder transactions concerning the MPF, including changes made to investors' unit holdings.⁴⁷
54. The extracts from the Unitholder Transaction Ledger, which record the transactions concerning these seven account IDs, are exhibited at pages 449 to 455 of the Villani affidavit. Each of these account IDs is shown as having a positive final unit balance. There is nothing in these records to indicate that a nil balance should be attributed to these seven account IDs.
55. Consequently the exclusion of these seven account IDs appears to be an error in Register 3, and indicates that that register should not be adopted. Adopting Register 3 would exclude these seven account IDs from the unitholder register, for no good reason that the Trustee has been able to identify.

Three negative account balances

⁴⁴ Paragraphs 75 and 77 of the Villani affidavit, and exhibit JV-19 pp 476 to 477.

⁴⁵ Paragraph 74 of the Villani affidavit.

⁴⁶ Paragraph 74 of the Villani affidavit.

⁴⁷ Paragraphs 69 and 74 of the Villani affidavit.

56. Three account IDs only appear in Register 3.⁴⁸ Mr Villani has identified those three account IDs at paragraph 74.3 of his affidavit. A negative unit balance is recorded in Register 3 for each of these accounts.
57. The relevant extracts from the Unitholder Transaction Ledger are exhibited at pages 456 to 458 of the Villani affidavit. Those records evidence that in each case, the negative unit balances arose because of redemptions of units that occurred in 2011 (while the MPF was under the control of LMIM).
58. As these account IDs have negative unit balances, there does not appear to be any reason to include them in the register of members.

Nine account IDs that were consolidated with other accounts

59. At paragraph 74.4 of his affidavit Mr Villani has identified nine account IDs that appear in Registers 2 and 4, but not in Registers 1, 3 or 5.
60. The Trustee considers that those accounts should each have a nil balance, because the Unitholder Transaction Ledger indicates that the relevant unit holdings were consolidated with other accounts.⁴⁹
61. The table subjoined to paragraph 74.4 of Mr Villani's affidavit analyses the information contained in the Unitholder Transaction Ledger concerning each of the nine accounts. The Unitholder Transaction Ledger (pages 459-475 of the Villani affidavit) records that each of these unitholdings was reduced to nil by account consolidation transactions. All except one of these consolidations occurred in November and December 2012; the last occurred on 6 February 2013.⁵⁰ Mr Villani has identified each of the accounts with which these Account IDs were consolidated in the table subjoined to paragraph 74.4.
62. Given these transactions recorded in the Unitholder Transaction Ledger, it seems that Registers 1, 3 and 5 (which do not record these unitholdings) are the more up to date records of the MPF.

⁴⁸ Paragraph 74.3 of the Villani affidavit.

⁴⁹ Paragraph 74.4 of the Villani affidavit; the Unitholder Transaction Ledger records are exhibited at pages 459-475 of the Villani affidavit.

⁵⁰ Page 463 of the Villani affidavit.

Transactions recorded in Register 1 and 5, but not the others

63. Registers 1 and 5 contain identical unit balances.⁵¹ The unit balances in Registers 1 and 5 are also identical to the unit balances recorded in the Unitholder Transaction Ledger, save that the Unitholder Transaction Ledger also records the three negative account balances discussed at paragraphs 56 to 58 above.⁵²
64. The Trustee has identified 106 differences in unit quantities between Registers 1 and 5 and the other registers, which the Trustee has listed in the schedule at pages 476 to 477 of the Villani affidavit.
65. The Trustee has reviewed the Unitholder Transaction Ledger to ascertain the reasons for these differences, and in each case determined that the differences arose because of transactions that were recorded in the Unitholder Transaction Ledger as occurring prior to the closure of the MPF and that were recorded in Registers 1 and 5, but not in Registers 2, 3 and 4.⁵³ Examples of those transactions are exhibited in the extracts from the Unitholder Transaction Ledger exhibited at pages 478 to 498 of the Villani affidavit.
66. Finally, Register 1 has slightly higher unit prices than the other registers, which the Trustee considers likely to be because Register 1's prices were more current as at 19 March 2013. This discrepancy will not affect the return to any unitholder by more than \$60 or 0.31% (assuming a \$4 million distribution).⁵⁴

Conclusion

67. In the Trustee's submission, its material establishes a reasonable basis for the Trustee's proposal to adopt Register 1 as the unitholder register of the MPF, as based on the Trustee's investigations Register 1 appears to be the most complete, accurate and up to date record of the transactions concerned.

Paragraphs 1(b) to 1(f): proposed treatment of transactions in certain liability accounts

68. In paragraphs 1(b) to 1(f) of the Application the Trustee seeks directions as to whether its proposed treatment of transactions recorded in certain liability accounts is justified.

⁵¹ Paragraph 76, affidavit of Villani.

⁵² Paragraph 78, affidavit of Villani.

⁵³ Paragraph 77, affidavit of Villani.

⁵⁴ Paragraph 79, affidavit of Villani.

The liability accounts were recorded in the Trial Balance of the Trust that was provided to the Trustee upon its appointment.

69. The liability accounts, and their balances as at 12 April 2013, are:
- (a) account 20003, “returned investment payments”: (\$10,874.16);
 - (b) account 20200, “funds awaiting investment”: \$1,327,937.43;
 - (c) account 20400, “distributions payable”: \$179,512.39;
 - (d) account 20401, “investor funds payable (redemptions)”: \$851,375.73;
 - (e) account 20402, “accrued interest (distributions)”: \$1,578,257.96.⁵⁵

Account 20003, returned investment payments: (\$10,874.16)

70. In paragraph 1(b) of the Application the Trustee seeks a direction that it is justified in taking no further steps concerning the transactions recorded in Account 20003 that occurred prior to 1 July 2012, as identified in paragraphs 131 and 136 of the Villani affidavit.
71. LMIM used Account 20003 to record instances where funds paid to members had been returned, presumably due to banking errors or the like.⁵⁶
72. The Trustee has reviewed the transactions recorded in account 20003, and has determined that all transactions dated on and from 1 July 2012 were cleared from the account (that is, those amounts were paid out to investors).⁵⁷ Consequently the Trustee believes that the balance of (\$10,874.16) in this account relates to transactions prior to 1 July 2012.⁵⁸
73. Given the cost that would be associated with undertaking a detailed analysis of Account 20003 prior to 1 July 2012, and the negative value held in the account, the Trustee seeks a direction that it is justified in not taking any further steps in relation to this account.⁵⁹

⁵⁵ Paragraph 131 of the Villani affidavit.

⁵⁶ Paragraph 135 of the Villani affidavit.

⁵⁷ Paragraph 136 of the Villani affidavit.

⁵⁸ Paragraph 136 of the Villani affidavit.

⁵⁹ Paragraph 137 of the Villani affidavit.

Account 20200, funds awaiting investment: \$1,327,937.43

74. In paragraph 1(c) of the Application the Trustee seeks a direction that it is justified in:
- (a) taking no further steps concerning the transactions identified in paragraph 143 of the Villani affidavit (paragraph 1(c)(i));
 - (b) returning the amounts identified in paragraph 144 of the Villani affidavit to the prospective investors who made the payments or, if the funds cannot be so returned, paying the balance to ASIC (paragraph 1(c)(ii)).
75. LMIM used Account 20200 to record the receipt of investors' funds, prior to units being issued in the Trust.⁶⁰
76. The Trustee has undertaken a detailed review of the transactions in this account on and from 1 July 2012. The Trustee has identified 26 credit transactions after that date in this account that were not reversed by the issue of units, or by other means (such as by the issue of units in another fund operated by LMIM, or by the return of the funds to the relevant investor).⁶¹
77. The 26 credit transactions identified by the Trustee total \$1,356,467, which exceeds the balance in the account as at 12 April 2013. This is because account 20200 was not reconciled for the period prior to 1 July 2012.⁶²
78. Of these 26 credit transactions:
- (a) the Trustee has identified 18 of them, totalling \$1,320,717, as "quarantined funds," which were those funds relating to applications received from investors after the Trust was closed to investment on 19 March 2013. The Trustee has returned these funds to 12 of the 18 applicants, and is still attempting to communicate with the six remaining applicants. If this is not possible, the Trustee intends to pay the balance to ASIC;⁶³

⁶⁰ Paragraph 138 of the Villani affidavit.

⁶¹ Paragraph 140 of the Villani affidavit.

⁶² Paragraph 141 of the Villani affidavit and exhibit JV-19, p. 536.

⁶³ Paragraph 142 of the Villani affidavit.

- (b) the Trustee does not propose to take any steps in relation to the following five transactions identified in paragraph 143 of the Villani affidavit, totalling \$8,157.96:
 - (i) three relate to the reversal of agent's commission, which has been recorded in a separate account;⁶⁴
 - (ii) one has a value of \$0.95. As the transaction amount is not material, the Trustee has not analysed it;⁶⁵
 - (iii) one relates to the receipt of funds in Turkish lira, which was reversed in a separate account;⁶⁶
- (c) as to the remaining three transactions in this account, identified in paragraphs 144 and 145 of the Villani affidavit:
 - (i) one relates to a redemption payment that was returned, in circumstances where the unitholder register records the redemption of all units held by the account. The Trustee proposes to pay the amount of 45,380.67 Turkish lira (approximately AUD\$8,312.50) that was returned to the (former) unitholder;⁶⁷
 - (ii) two relate to payments received in the amounts of £1,513.68 and £440.00, in respect of which no units were issued. The Trustee proposes to return these amounts to the prospective investors.⁶⁸

Account 20400, distributions payable: \$179,512.39

79. In paragraph 1(d) of the Application the Trustee seeks a direction that it is justified in:
- (a) sending a notice to all members of the MPF, requesting that any unitholder who believes that they have not received a distribution for the period prior to 1 July 2012 to come forward and provide relevant supporting documentation;

⁶⁴ Paragraph 143 of the Villani affidavit.

⁶⁵ Paragraph 143 of the Villani affidavit.

⁶⁶ Paragraph 143 of the Villani affidavit and exhibit JV-19, p. 539.

⁶⁷ Paragraph 144.1 of the Villani affidavit and exhibit JV-19, p. 540.

⁶⁸ Paragraph 143.3-144.5 and 145 of the Villani affidavit and exhibit JV-19, pp. 541 to 542.

- (b) taking no further steps concerning the transactions recorded in account 20400 that occurred prior to 1 July 2012, as identified in paragraph 147 of the Villani affidavit, apart from assessing claims received from members of the MPF in response to the applicant's notice.
80. LMIM used Account 20400 to record distributions payable to members.⁶⁹
81. The Trustee has reviewed all the transactions in this account from 1 July 2012, and has determined that all transactions recorded after 1 July 2012 have a corresponding reinvestment or payment transaction.⁷⁰
82. The Trustee therefore believes that the balance of \$179,512.39 in this account relates to unreconciled transactions prior to 1 July 2012.⁷¹
83. The Trustee has not undertaken a detailed analysis of the transactions recorded in this account prior to 1 July 2012, given the cost that would be associated with it. The Trustee has estimated that it would take in excess of 20 hours' work to manually reconcile the transactions recorded in respect of each financial year, in addition to the work that the Trustee has already undertaken to reconcile Account 20400 for the 2012 financial year, set out below.⁷²
84. The Trustee has undertaken an analysis of the transactions recorded in this account in the 2012 financial year and has sought to reconcile them, as follows:
- (a) by using the Microsoft Excel lookup function, to determine whether the transactions recorded in the account could be reconciled. That lookup function matches identical Account IDs and amounts;⁷³
- (b) of the 33,688 transactions recorded in the 2012 financial year that were characterised as distributions, approximately 3,905 could not be linked to a corresponding payment or reinvestment transaction using the lookup function;⁷⁴

⁶⁹ Paragraph 146 of the Villani affidavit.

⁷⁰ Paragraph 147 of the Villani affidavit.

⁷¹ Paragraph 147 of the Villani affidavit.

⁷² Paragraph 148 of the Villani affidavit.

⁷³ Paragraph 149 of the Villani affidavit.

⁷⁴ Paragraph 150 of the Villani affidavit.

(c) the Trustee then reviewed a sample of 17 of these transactions, and initially identified two where a distribution had not been made. However, closer review indicated that these two accounts had duplicate distribution transactions for the same period and the same account on the same date, suggesting that a distribution had been made to these two investors.⁷⁵

85. Directions may be given to the effect that a trustee is justified in taking no further steps or making no further investigations.⁷⁶ Given the time and cost associated with manually reviewing this account, the Trustee does not propose to undertake any further review of it.⁷⁷

86. The Trustee has sent a notice to members, requesting any unitholder who believes that they have not received a distribution for a period prior to 1 July 2012 to come forward and provide the relevant supporting documentation. The Trustee will assess any claims received, and seeks a direction that it is justified taking no further steps apart from assessing such claims.⁷⁸

Account 20401, investor funds payable (redemptions): \$851,375.73

87. In paragraph 1(e) of the Application the Trustee seeks a direction that it is justified in paying the amounts identified in paragraph 156 of the Villani affidavit to the members identified in the Trustee Redemption Schedule.

88. LMIM used Account 20401 as a clearing account to process redemptions prior to payment.⁷⁹

89. In paragraphs 155 and 156 and the Trustee Redemption Schedule exhibited at pages 544-553 of the Villani affidavit, the Trustee identifies 435 redemption transactions recorded in account 20401, totalling AUD \$566,620, in respect of which unit holdings were reduced, but in respect of which LMIM made no payment. The vast majority of these transactions (around 96%) occurred on or after 16 February 2013, which was approximately one month prior to the closure of the MPF and the appointment of the

⁷⁵ Paragraph 150 of the Villani affidavit.

⁷⁶ *ASIC v Tasman Investment Management Ltd* (2006) 59 ACSR 113 at 127-128 ([63]-[66]).

⁷⁷ Paragraph 151 of the Villani affidavit.

⁷⁸ Paragraph 151 of the Villani affidavit.

⁷⁹ Paragraph 152 of the Villani affidavit.

Administrators.⁸⁰ This suggests that the former trustee LMIM may not have had time to make the payments before the fund was closed and before the voluntary administrators were appointed.

90. The Trustee's review is supported by similar numbers of redemption transactions (435 and 432) that were recorded in two Redemption Schedules provided to the Trustee. Those Redemption Schedules were provided to the Trustee by the administrators appointed to LMIM, and by Mr Hannan.⁸¹
91. The Trustee proposes to pay these redemption amounts to members, as their unit holdings were reduced, but no payment was made by LMIM before the closure of the Trust.⁸²

Account 20402, accrued interest (distributions): \$1,578,257.96

92. In paragraph 1(f) of the Application the Trustee seeks a direction that it is justified in:
- (a) making the payment identified in paragraph 169 of the Villani affidavit (paragraph 1(f)(i)); and
 - (b) otherwise taking no further steps concerning the transactions recorded in Account 20402 (paragraph 1(f)(ii)).
93. LMIM used Account 20402 to record accrued distribution entitlements prior to distributions being formally processed.⁸³ Once a distribution was made, it would be recorded by clearing the relevant balance in liability account 20402 and recording the liability in account 20400.
94. Consequently the Trustee believes that this account contains accrued distributions which LMIM had not processed as at the date of the Trustees' appointment.⁸⁴

⁸⁰ Paragraph 156.2 of the Villani affidavit.

⁸¹ Paragraphs 157 and 158 of the Villani affidavit.

⁸² Paragraph 159 of the Villani affidavit.

⁸³ Paragraph 160 of the Villani affidavit.

⁸⁴ Paragraph 164 of the Villani affidavit.

95. With one exception, the Trustee does not consider it necessary to take any steps in respect of these transactions. The unit prices of all classes of units issued in the Trust, with the exception of Class A units, reflect accrued but unpaid distributions.⁸⁵
96. The one exception relates to a single unitholder account that remains a Class A account. That unitholder had selected a distribution rule of “reinvest yearly,” and the last reinvestment transaction occurred on 7 May 2012. The Trustee proposes to pay the unpaid distribution to this unitholder, as accrued but unpaid distributions are not reflected in the unit price for Class A units, and the unitholder otherwise has been deprived of the distribution that accrued between 8 May 2012 and the closure of the Trust on 19 March 2013.⁸⁶

Conclusion

97. The Trustee has put forward very detailed affidavit material, which in the Trustee’s submission establishes a reasonable basis for each of the directions sought in paragraphs 1(b) to 1(f) of the Application concerning the various liability accounts.

Unitholdings past maturity

98. In paragraph 1(g) of the Application, the Trustee seeks a direction that it is justified in not taking any steps in relation to members of the MPF whose investments expired prior to the closure of the MPF on 19 March 2013, but whose units in the MPF were not redeemed, as identified in paragraph 176.4 of the Villani affidavit.
99. Mr Villani has deposed that investments in the Trust ordinarily were made for a fixed term of between one and five years, with investors able to elect to automatically roll over their investment to a new term upon maturity, or to redeem their investment.⁸⁷
100. One investor, who to maintain his confidentiality is described in the material as the Matured Investor, submitted an application form on 27 July 2010 which provided for a two-year investment, with the investment being paid out on maturity. Some of the units held by the Matured Investor were redeemed in August 2012 and in February 2013, but

⁸⁵ Paragraphs 28 to 33 and 165 of the Villani affidavit.

⁸⁶ Paragraph 167 of the Villani affidavit and exhibit JV-19, p. 555.

⁸⁷ Paragraph 170 of the Villani affidavit.

as at the closure of the Trust on 19 March 2013 the Matured Investor still held 3,672.96 units in the Trust.⁸⁸

101. The Trustee does not know why LMIM did not cause the entirety of the Matured Investor's unitholding to be redeemed in August 2012, in accordance with the instructions provided in the application form.⁸⁹
102. The Trustee took steps to identify whether the term of other members' investments had expired (in a similar position to the Matured Investor). The Trustee has identified 600 accounts where the term of the investment appears to have expired prior to the closure of the Trust on 19 March 2013, but where the units were not redeemed.⁹⁰ Those accounts are listed (by account number) at pages 574 to 585 of the exhibits to the Villani affidavit.
103. The Trustee's evidence is to the effect that, having reviewed a sample of the 600 accounts concerned:
 - (a) in respect of some accounts, redemption documentation is held on file, but no redemption was ever processed or paid;
 - (b) in respect of some accounts, no redemption documentation has been located;
 - (c) in respect of some accounts, rollover instructions appear to have been provided but are not reflected in the unitholder register.⁹¹
104. The Trustee estimates that it would incur costs of approximately \$40,000 to \$60,000 in undertaking a full review of the documentation held for each of the 600 accounts concerned.⁹²
105. But even if the term of a member's investment was to expire, clause 7.3(d) of the Constitution required a member who wished to withdraw to provide a Withdrawal Notice to the Trustee, before the expiry of their fixed Investment Term. If the member

⁸⁸ Paragraphs 171-172 of the Villani affidavit.

⁸⁹ Paragraph 175 of the Villani affidavit.

⁹⁰ Paragraph 176 of the Villani affidavit.

⁹¹ Paragraph 176.7 of the Villani affidavit.

⁹² Paragraph 177 of the Villani affidavit.

did not do so, the member would be deemed to have elected to renew their investment (clauses 7.3(e)(i) to (iv), concerning the each of the various classes of units on issue).

106. Even if a member made a withdrawal request, clause 7.4(b)(ii) of the Constitution conferred a broad discretion on the Manager (LMIM at that time) to refuse to agree to withdrawal requests. It provides:

7.4 No obligation

...

- (b) *The Manager is not obliged to agree to any request for withdrawal of Units for such periods as it in its sole discretion determines where:*

...

- (iii) *Any other event or circumstances arises (sic) which the Manager considers in its absolute discretion may be detrimental to the interests of Members in the Scheme.*

107. As LMIM did not process any redemptions of the units concerned, it would appear that either the members did not make a Withdrawal Request within time, causing their investments to renew automatically, or that LMIM exercised its discretion not to agree to the withdrawal requests having regard to the position of the MPF at the time any such request was made.

Conclusion

108. Consequently the Trustee seeks a direction that it is justified in not taking any steps in respect of these members, as they remained members when the Trust was closed on 19 March 2013 and when the Trustees were appointed on 12 April 2013.⁹³ In the Trustee's submission the material relied upon establishes a reasonable basis for the direction sought.

Nominal unitholdings

⁹³ Paragraph 179 of the Villani affidavit.

109. In paragraph 1(h) of the Application, the Trustee seeks a direction that it is justified in not taking any steps in relation to those members of the MPF who have a unit balance of less than 40 units, as identified in paragraph 180 of the Villani affidavit.
110. Three members have a unit balance of less than 40 units.⁹⁴ None of these unitholdings have a value of more than \$AUD50.00, and any distribution to these members would be nominal.⁹⁵

Conclusion

111. In light of the costs that would be associated with contacting these members, administering the process of updating the unitholder register and making distributions, the Trustee seeks a direction that it is justified in not taking any steps to make a distribution to these members.⁹⁶ Similar directions have been made in circumstances where the sums that would be available to members are very small.⁹⁷

Returned Withholding Tax

112. In paragraph 1(i) of the Application, the Trustee seeks a direction that it is justified in including certain Returned Withholding Tax in the funds available for distribution to current members of the MPF.
113. During the 2008 to 2013 financial years LMIM in its capacity as trustee of the MPF paid withholding tax to the ATO in respect of distributions paid to members of the MPF.⁹⁸
114. The Trustee has since recovered amounts totalling \$7.9 million from the ATO, on the basis that withholding tax should not have been paid during the period. The amounts recovered can be broken down as follows:⁹⁹
- (a) \$0.41 million for the 2008 financial year;

⁹⁴ Paragraph 180 of the Villani affidavit.

⁹⁵ Paragraph 181 of the Villani affidavit.

⁹⁶ Paragraph 182 of the Villani affidavit.

⁹⁷ *ASIC v Piggott Wood & Baker (a firm) (No 6)* [2016] FCA 672 at [22].

⁹⁸ Paragraph 183 of the Villani affidavit.

⁹⁹ Paragraphs 183 and 184 of the Villani affidavit.

- (b) \$0.72 million for the 2009 financial year;
 - (c) \$1.04 million for the 2010 financial year;
 - (d) \$1.11 million for the 2011 financial year;
 - (e) \$2.98 million for the 2012 financial year; and
 - (f) \$1.63 million for the 2013 financial year.
115. All payments of withholding tax were made before the appointment of the voluntary liquidators to LMIM and the closure of the MPF on 19 March 2013,¹⁰⁰ and prior to the appointment of the new trustees on 12 April 2013.¹⁰¹
116. Although the amount refunded is relatively large, the amounts that individual members will receive are relatively small, given the large number of members and units on issue in the MPF. There are 4,500 members in the MPF, with approximately 557 million units on issue. Taking a very broad brush approach by way of an example, if the ATO refund were to be divided evenly between the members, they would each receive approximately \$1,760.

Recipient's liability to pay withholding tax

117. As set out below, although commonly described as “withholding tax,” withholding tax is in fact income tax payable on dividend, interest or royalty payments. Although the primary liability to pay withholding tax is imposed on the recipient of such payments, where the recipient is located outside Australia or the payment is to be made outside Australia, the taxation administration legislation requires the entity making the dividend, interest or royalty payments to withhold the appropriate amount of tax from such payments and pay it to the ATO.
118. Pursuant to s.128B of the *Income Tax Assessment Act 1936* (Cth) (**the Assessment Act**) a person (including a non-resident of Australia)¹⁰² deriving income to which the section applies (consisting of dividends, interest or royalties) is, subject to the exceptions set out therein, liable to pay income tax upon that income at the rate declared by Parliament

¹⁰⁰ See paragraphs 9 to 11 above.

¹⁰¹ Paragraph 183 of the Villani affidavit.

¹⁰² Section 128B(2) in respect of interest payments.

in respect of that income.¹⁰³ In particular s.128B(5) of the Assessment Act, which deals with payments of interest, provides:

(5) A person who derives income to which this section applies that consists of interest is, subject to subsections (6) and (7), liable to pay income tax upon that income at the rate declared by the Parliament in respect of income to which this subsection applies.

119. Withholding tax is due and payable by the person liable to pay the tax (that is, the recipient of such payments) at the expiration of 21 days after the end of the month in which the income to which the tax relates was derived by the person: s.128C(1) of the Assessment Act. Failure to do so attracts penalties: s.128C(2).

Payment of withholding tax by LMIM

120. Although s.128B and s.128C of the Assessment Act require the recipient of a relevant payment to pay withholding tax on it, in certain circumstances the entity making the payment is obliged to withhold the applicable income tax from the payment and remit it to the ATO.
121. Schedule 1, s.12-245 of the *Taxation Administration Act 1953* (Cth) (**the Administration Act**) provides that an entity must withhold an amount from interest it pays if:
- (a) the recipient has an address outside Australia, or
 - (b) the entity is authorised to pay the interest at a place outside Australia.
122. It is an offence to fail to withhold such amounts, or to fail to pay them to the Commissioner (s.16-25 of Schedule 1 of the Administration Act).

¹⁰³ The rates of withholding tax are set out in the *Income Tax (Dividends, Interest and Royalties Withholding Tax) Act 1974* (Cth). The income tax rate on interest payments is 10% (s.7(b), which sets the rate for the purpose of s.128B(5) of the Assessment Act). Australia has also entered into income tax treaties with many countries, which may alter the rates set out in this Act (<https://treasury.gov.au/tax-treaties/income-tax-treaties>).

The basis upon which the withholding tax was refunded

123. The Trustee sought the refund of the withholding tax paid during the 2008 to 2013 financial years on the basis that the taxpayer in fact had a nil income for tax purposes for those years, and consequently no liability to pay withholding tax arose.¹⁰⁴
124. It is clear that withholding tax paid on the basis of a mistake (either a mistake of fact or a mistake of law) can be recovered via a claim for moneys had and received.¹⁰⁵
125. The Trustee has taken advice about the merits of such a claim. That advice has been provided to the Court by way of a confidential affidavit.¹⁰⁶
126. The Trustee has notified members that it proposes to include the Returned Withholding Tax in the funds available for distribution to current members. Mr Villani has deposed that the Trustee considers this to be a reasonable approach for the following reasons:
- (a) the ATO refunded the Returned Withholding Tax on the basis that during the 2008-2013 financial years the MPF did not receive income sufficient to permit distributions to be paid, and consequently no liability to pay withholding tax arose, as no distributions should have been paid to those members who received distributions;
 - (b) if the Returned Withholding Tax was returned to those (former or current) members who had already received such distributions, they would receive a windfall benefit. Those persons who had already been paid distributions that they should not have been paid, would be paid Returned Withholding Tax that was returned for the very reason that the distribution payments should not have been made to them;
 - (c) members of the MPF were not entitled to receive distribution payments, and also amounts of withholding tax payable in respect of such payments. If the distribution payments had been properly paid, members who received these

¹⁰⁴ Paragraph 188 of the Villani affidavit.

¹⁰⁵ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 367-380.

¹⁰⁶ That confidential affidavit has not been served on any other party to this application: *Corbiere & Anor v Dulley & Ors* [2016] QSC 134 at [29].

distributions would have had no entitlement to be paid the amounts that were paid to the ATO as withholding tax, and later refunded.¹⁰⁷

Conclusion

127. In the Trustee's submission, the material it has put before the Court – in particular, its confidential legal advice – establishes a reasonable basis for the direction sought.

Foreign Currency Investors

128. In paragraph 1(j) of the Application, the Trustee seeks a direction that it is justified in calculating distributions to be made to members of the MPF who invested via currencies other than Australian dollars as follows:

- (a) by taking the value of each member's unitholding, based on the Australian dollar value for that unitholding recorded in Register 1, as at 19 March 2013 (**AUD Value of Investment**);
- (b) by calculating the amount available for distribution by dividing each member's AUD Value of Investment against the Australian dollar value of all accounts recorded in Register 1, as at 19 March 2013.

129. 19 March 2013 was the date upon which voluntary administrators were appointed to LMIM, and the MPF was closed.

130. This issue arises because the Trustee's investigations have revealed that LMIM set different unit prices for each foreign currency, when accepting investments into the MPF by way of foreign currency. The Constitution of the MPF did not provide for different unit prices to be set in this way.

131. The process adopted by LMIM, as set out below, had the effect of inflating the number of units issued to certain foreign currency investors, both when compared with persons who invested via other foreign currencies, and also when compared with persons invested the equivalent amount of Australian dollars (**AUD**).

¹⁰⁷ Paragraph 190 of the affidavit of Villani.

132. If the Trustee were to follow the process set out in the Constitution when calculating distributions to be made to these investors (in particular, clause 11.5), this would lead to returns to certain foreign currency investors being inflated both when compared with other foreign currency investors, and also when compared with AUD investors.
133. Clause 3.1 of the Constitution provides that the beneficial interest in the Scheme will be divided into Units. A Unit confers an interest in the Scheme Property as a whole: clause 3.5.
134. The Manager may, at any time, offer Units for subscription or sale, or invite persons to make offers for their subscription or sale: clause 5.1. The Manager may accept an Application for Units (clause 5.5(a)), and the number of Units to be issued will be the amount of the Application Money, rounded down to the nearest two decimal places (clause 5.8).
135. But notwithstanding clauses 5.1-5.15, clause 5.16 entitles the Manager, in its discretion, to allot Units on terms and conditions it thinks fit: clause 5.16.
136. The issue price of Units was set by clause 6. It provides:

6. *Issue Price*

The issue price of a Unit (being an A Class Unit or a B Class Unit (including each B unit subclass) shall be calculated as at the close of business on the Business Day prior to issue as follows:

$$(A - B) / C = D$$

$$(D \times E) + F = G$$

$$E$$

Where:

A = Net Fund Value excluding distributions accrued but not paid to A Class Unit holders since the Valuation Date

B = Distributions credited but not paid to all B Class Unit holders since the Valuation Date

C = Total number of all Units on issue

D = A Class Unit Issue Price

E = total number of B Class Units on issue in that subClass of B Class Unit Holders

F = Distributions credited but not paid to B Class Unit holders in that subclass since the Valuation Date

G = B Class Unit Issue Price for that subClass

The purpose of the above calculations is to reflect differential Unit Issue Prices. An A class Unit Issue Price is not intended to reflect accrued but unpaid distributions. A B class Unit Issue Price is intended to reflect accrued but unpaid distributions and adjusted for the unpaid distributions for that subclass of B class Unit holders.

137. Clause 6 did not authorise the setting of particular unit prices for particular foreign currencies.
138. The Trustee is engaged in the winding up of the MPF pursuant to clause 15 of the Constitution.
139. Clause 15.6(c) provides that the Manager must, subject to any special rights or restrictions attached to any Unit, distribute the net proceeds of realisation among the members in the same proportion specified in clause 11.4.¹⁰⁸
140. The reference to clause 11.4 in clause 15.6 appears to be a typographical error. Clause 11.4 does not specify any proportion for the distribution of capital.¹⁰⁹ In the Trustee's view clause 15.6 should refer to clause 11.5 of the Constitution, which provides for capital distributions and specifies the proportion of capital to which members are entitled.¹¹⁰
141. Clause 11.5 of the Constitution provides (relevantly):

¹⁰⁸ Paragraph 193 of the Villani affidavit and exhibit JV-19, p. 29.

¹⁰⁹ Instead it provides that subject to certain restrictions, Members on the Register will be presently entitled to the Distributable Income of the Scheme on the last day of each Distribution Period.

¹¹⁰ Paragraph 194 of the Villani affidavit and exhibit JV-19, p. 29.

11.5 Capital distributions

*The Manager may distribute capital of the Scheme to the Members. Subject to the rights, obligations and restrictions attaching to any particular Unit or Class, a Member is entitled to that proportion of the capital to be distributed as is equal to the number of Units held by that Member on a date determined by the Manager divided by the number of Units on the Register on that date. A distribution may be in cash or by way of bonus Units.*¹¹¹

142. Consequently when distributing the net proceeds of realisation among the members, the Trustee is required to distribute those proceeds in the proportion specified by clause 11.5; i.e. the number of units held by a particular member on the register, divided by the number of units on the register.
143. But the Trustee has ascertained that LMIM dealt with foreign currency investors as follows:
- (a) LMIM set different unit prices for each foreign currency;¹¹²
 - (b) when prospective members made investments in foreign currency, LMIM calculated the units to be allotted to such investors using the applicable unit price for each currency;¹¹³
 - (c) this had the effect of giving foreign currency investors more, or fewer, units than they would have received if they had invested in the equivalent amount of AUD;¹¹⁴
 - (d) but when foreign currency investments were redeemed, LMIM calculated the redemption amount using the unit price it had set for each foreign currency.¹¹⁵
144. In the unitholder register LMIM recorded the AUD value of the unitholdings in the Trust. As set out above, the Trustee proposes to adopt Register 1, which records these values as at 19 March 2013. In Register 1 LMIM calculated the AUD value of the unit

¹¹¹ Paragraph 194 of the Villani affidavit and exhibit JV-19, pp. 22 to 23.

¹¹² Paragraph 197.2 of the Villani affidavit.

¹¹³ Paragraph 197.3 of the Villani affidavit.

¹¹⁴ Paragraph 197.4 of the Villani affidavit.

¹¹⁵ Paragraph 197.5 of the Villani affidavit.

holdings by reference to the number of units held, the relevant unit price and the exchange rate between the holding currency and AUD as at 19 March 2013.¹¹⁶

145. If the Trustee were to pay distributions to foreign currency investors in accordance with the distribution methodology set out in paragraph 142 above, it would make these distributions according to the number of units currently shown on the unitholder register. But as stated above, the process LMIM adopted for foreign currency investment had the effect of issuing to foreign currency investors more, or fewer, units than they would have received if they had invested in the equivalent amount of AUD. Consequently certain currency holders would receive significantly higher distributions than others. For example, investments made via Japanese yen and Singapore dollars would receive a higher distribution than those who invested in British pounds.¹¹⁷
146. The Trustee seeks a direction that it is justified in calculating distributions to be made to members who invested via currencies other than Australian dollars by:
- (a) taking the value of each member's unit holdings, based on the AUD value recorded in Register 1, for each investor as at 19 March 2013, being the date that the fund was closed (**AUD Value of Investment**);
 - (b) dividing the amount available for distribution, by calculating the proportion of each unitholder's AUD Value of Investment against the AUD value of all accounts recorded in Register 1, as at 19 March 2013.¹¹⁸
147. As set out in paragraphs 37 to 39 above, when directions of the present type are sought, the Court does not determine substantive rights or entitlements such as the rights of the investors to the scheme assets. The question for the Court is whether there is a reasonable basis for the Trustee's proposal, sufficient to persuade the Court that the Trustee should be exonerated from liability for implementing it, or conversely whether there is any good reason why the Trustee should not proceed as proposed.¹¹⁹

¹¹⁶ Paragraph 200 of the Villani affidavit.

¹¹⁷ Paragraphs 201 to 202 of the Villani affidavit.

¹¹⁸ Paragraph 207 of the Villani affidavit.

¹¹⁹ *ASIC v Tasman Investment Management Ltd* (2006) 59 ACSR 113 at 121 ([32]).

148. However such a determination must be decided by reference to established principle, and not by broad considerations of fairness.¹²⁰ As Robson J commented in *Re Timbercorp Securities Ltd (in liq) (No 3)* (2009) 74 ACSR 626 at [80]:

...[T]here are well recognised legal principles for determining the rights of several property owners whose property is lost or converted into a common fund. The fund, if it is created, is not to be allocated between the property owners on the basis of bargaining power. The fund is not to be allocated on arbitrary measures that may appear to be a fair and reasonable division of the fund. Rather, as the authorities establish, the fund is to be divided “by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an interest in the fund.”

149. The Trustee’s proposal for dividing the net proceeds of realisation accords with this basis for dividing a fund. Because of the process adopted by LMIM, ascertaining each member’s “proportionate share of the fund” for the purpose of dividing the net proceeds of realisation requires the Trustee to adopt the AUD Value of Investment, as proposed. In the Trustee’s submission the AUD Value of Investment provides a common basis upon which to determine the proportionate share of the fund attributable to each member.

Conclusion

150. In the Trustee’s submission, its material establishes a reasonable basis for the direction sought in relation to its proposed treatment of foreign currency investors in the MPF.

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9 February 2021

¹²⁰ *In the matter of Secured Mortgage Management Ltd (in liq); Fletcher & Barnet in their capacity as liquidators of Secured Mortgage Management Ltd (in liq) & Anor* [2017] QSC 254 at [22], citing *Re Timbercorp Securities Ltd (in liq) (No 3)* (2009) 74 ACSR 626 at [80].