

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

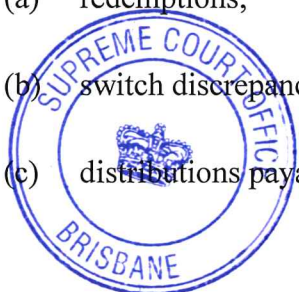
**APPLICANT'S SUPPLEMENTARY OUTLINE OF SUBMISSIONS:
APPLICATION PURSUANT TO S.96 OF THE TRUSTS ACT 1973 (QLD)**

List of material

1. Affidavit of Stacey Clisby filed 9 February 2021, exhibiting responses received from members (no Court document number available);
2. Affidavit of David Johnstone, sworn 12 February 2021 (by leave).

Submissions

3. Pursuant to leave granted by Williams J on 9 February 2021, the applicant makes these further submissions addressing the responses received from members of the respondent, exhibited to the affidavit of Ms Stacey Clisby filed by leave on 9 February 2021.
4. In these submissions the Trustee adopts the definitions contained in its principal submissions dated 9 February 2021.
5. In her affidavit filed 9 February 2021 Ms Clisby divided the responses received from investors into the following categories:
 - (a) redemptions;
 - (b) switch discrepancies;
 - (c) distributions payable;



- (d) unitholders past maturity;
 - (e) global platform investors or beneficiaries;
 - (f) unitholder summaries;
 - (g) no action required;
 - (h) other (more general queries).
6. The Trustee has prepared a schedule summarising the responses received. That schedule is Annexure A to these submissions.
7. The Trustee has also prepared a further affidavit sworn by Mr David Johnstone, a director and authorised officer of the Trustee.
8. Mr Johnstone's affidavit exhibits correspondence received since the hearing on Tuesday 9 February 2021.

Redemptions: paragraph 1(e) of the Trustee's application

9. This relates to the relief sought paragraph 1(e) of the Trustee's application, which seeks a direction that the Trustee is justified in paying the amounts identified in paragraph 156¹ of the Villani affidavit to the members identified in the Trustee Redemption Schedule.
10. This issue was addressed at paragraphs 87 to 91 of the Trustee's principal submissions dated 9 February 2021.
11. The Trustee has received three emails from members whose unitholdings had been reduced by the former trustee, but to whom no payment had been made:
- (a) the first two emails are exhibited at pages 1 to 8 of the affidavit of Clisby;
 - (b) the last email received is exhibited at pages 1 to 7 of the affidavit of Johnstone.

¹ As raised by the Court at the hearing on 9 February 2021, the reference to paragraph 156 is a typographical error; the correct reference is paragraph 155 of the Villani affidavit.

12. The transactions concerning these three investors are listed on the Trustee Redemption Schedule prepared by LMIM.²
13. Consequently, should the Trustee receive a direction to the effect sought, the Trustee intends to pay the amounts sought by these three investors, for the reasons set out in the Trustee's principal submissions.

Switch discrepancies

14. When the Trustee served members of the respondent with the application and supporting material, the Trustee provided members with personalised unitholder summaries.
15. The Trustee received 17 emails from members who inquired why the unitholdings recorded in their summaries did not correspond with their records of their unitholdings:
 - (a) the first sixteen emails are exhibited at pages 9 to 94 of the affidavit of Clisby;
 - (b) the last email received is exhibited at pages 8 to 11 of the affidavit of Johnstone.
16. These members were affected by the "switch" transaction set out at paragraphs 29 to 30 and 32 of the Villani affidavit. In effect, the former trustee switched A class units to B class units, and thereafter processed distributions of income to those members as redemptions. A distribution thereby decreased the number of units held by that particular member.³
17. The Trustee has explained the effect of the switch transaction to these investors, and provided extracts from the Unitholder Transaction Ledger⁴ showing the transactions concerning their units. No further issues have been raised concerning these members' unitholdings.

² Paragraph 11 of the Clisby affidavit and paragraph 10 of the Johnstone affidavit.

³ In particular, see paragraph 32.3 of the Villani affidavit.

⁴ As stated in paragraph 69 of the Villani affidavit, that ledger was maintained by LMIM and records unitholder transactions, including changes to unit holdings. A full copy of the ledger is included in confidential exhibit JV-20 (the USB).

Distributions payable: paragraph 1(d) of the Trustee's application

18. This relates to the relief sought in paragraph 1(d) of the Trustee's application, which seeks a direction that the Trustee is justified in 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 investors in response to a notice sent by the Trustee.
19. This issue was addressed at paragraphs 79 to 86 of the Trustee's principal submissions.
20. LMIM used account 20400 to record distributions payable to members. The direction sought concerns a balance of \$179,512.39 in that account, which the Trustee considers must relate to unreconciled transactions in that account prior to 1 July 2012.
21. The Trustee has received 12 emails in response to the notice it has sent, which concern missed payments or distributions:
 - (a) the first 11 emails received are exhibited at pages 95 to 128 of the affidavit of Clisby;
 - (b) the last email received is exhibited at pages 12 to 15 of the affidavit of Johnstone.
22. The Trustee's view is that the correspondence it has received to date does not establish an entitlement by any person to support a distribution of income in respect of the period prior to 1 July 2012.⁵ The Trustee will proceed to finalise its assessment of the claims it receives, including claims that may yet be received.
23. The direction presently sought by the Trustee does not concern the correctness of any assessment the Trustee may make in respect of any claim.

Past maturity: paragraph 1(g) of the Trustee's application

24. This relates to the relief sought in paragraph 1(g) of the Trustee's application, which seeks a direction that the Trustee 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

⁵ Paragraph 15 of the affidavit of Clisby; paragraph 14 of the affidavit of Johnstone.

March 2013, but whose units in the MPF were not redeemed, as identified at paragraph 176.4 of the Villani affidavit.

25. This issue was addressed at paragraphs 98 to 108 of the Trustee's principal submissions.
26. The Trustee has received 12 emails concerning this issue:
 - (a) the first 15 are exhibited at pages 129 to 383 of the affidavit of Clisby;
 - (b) the last email received is exhibited at pages 16 to 20 of the affidavit of Johnstone.
27. Each of these members state that they made a redemption request prior to the closure of the MPF, which the former trustee LMIM never acted upon.
28. For the reasons set out in the Trustee's principal submissions, the Trustee is of the view that either:
 - (a) LMIM must have determined that Withdrawal Requests had not been made within time and consequently the members were deemed to have elected to renew their investments, pursuant to clause 7.3(e) of the Constitution; or
 - (b) LMIM must have 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, pursuant to clause 7.4(b)(iii) of the Constitution.
29. The position of these members (**the Past Maturity members**) is different from the position of those members identified in the Trustee Redemption Schedule, in respect of whom the Trustee seeks a direction authorising the payment of redemptions (see paragraph 1(e) of the application, and paragraphs 9 to 13 above) (**the Redemption members**).

The position of the Redemption members

30. As stated at paragraph 89 of the principal submissions:
 - (a) the Trustee has identified 435 redemption transactions totalling \$566,620 in account 20401;

- (b) the former trustee LMIM used account 20401 as a clearing account to process redemptions prior to payment;
 - (c) LMIM reduced the unitholdings of the Redemption members, but did not pay the money held in clearing account 20401 to these members;
 - (d) it would appear that LMIM ran out of time to make these payments before the closure of the Fund.
31. It seems that LMIM accepted the redemption requests made by the Redemption members, and was engaged in processing the redemption transactions. It did so by reducing these members' unitholdings in the MPF, paying the redemption payments into account 20401, and recording details of the units reduced and amounts payable in the Trustee Redemption Schedule.

The position of the Past Maturity members

32. The position with the Past Maturity members is different.
33. So far as the Trustee can determine, LMIM did not accept the Past Maturity members' redemption requests. It did not take any steps to process redemption transactions concerning these members, as their unitholdings were not reduced, and no amounts were paid into clearing account 20401 concerning them.
34. Consequently the Trustee is of the view that the former trustee LMIM must have reached the determination set out in paragraph 28 above in respect of the Past Maturity members.

The affidavit of Mr MAB

35. This refers to an affidavit provided to the Court by a member of the respondent, sworn 25 January 2021. It has not yet been filed in this proceeding.
36. Although that member did not seek any confidentiality orders in respect of his affidavit, the Trustee is conscious that these submissions will be made available to all the members of the respondent. Consequently in these submissions the Trustee will refer to him by his initials, MAB.

37. Mr MAB's affidavit exhibits correspondence he received from LMIM.

38. In the Trustee's submission, the correspondence exhibited to Mr MAB's affidavit makes clear that LMIM exercised its discretion not to agree to his redemption request, having regard to the position of the MPF at the time:

(a) the redemption request was made in an email from Mr MAB dated 6 May 2012 (page 5);

(b) in a response dated 8 May 2012, Ms Shauna Larkin of LMIM states (page 6):

At the moment, I can't confirm a timeframe for the withdrawal of your capital. In the current tight credit conditions the fund needs to manage cashflow to best protect the fund. This is a protective mechanism common in funds such as this with property based assets and means we are taking longer to meet the withdrawals the (sic) are lodged.

(c) in a further email dated 9 May 2012 Ms Larkin gave a "broad indication" that the wait would be "months, not weeks," and said (page 11):

In funds of this type with property based assets there can be delays in meting redemptions to best manage cashflow and this protective mechanism is covered in the Information Memorandum for the funds.

(d) following a further query from Mr MAB on 18 August 2012 (page 13), Ms Larkin stated on 22 August 2012 (page 12):

I'm sorry not to be able to come back to you with something definite, but providing timeframes for payment in the current environment remains challenging.

...At this stage though, it is unlikely your redemption will be paid this year.

...

...The current cash-flow restraints are not a reflection on the quality of the assets of the fund, it is due to external factors brought about by the ongoing Global Financial Crisis, all of which is out of our control...

Seeing that these cashflow requirements are met is prudent and offers the best outcome for all investors in the fund, preservation of capital and income generation.

Slowing of redemption payments is a measure that protects Fund performance and value for investors. We appreciate the delay in any kind of payment is an inconvenience and can cause distress however, we hope that you will understand we are working in the best interests of all investors to ensure capital is protected...

39. Mr MAB's affidavit also raises the following issues:

- (a) that Mr MAB's redemption request was listed in an affidavit sworn by a Mr Daniel Levy on behalf of the liquidators of LMIM, which set out details of foreign currency redemption requests made by members of the MPF prior to the appointment of voluntary administrators.⁶

The Trustee does not dispute that Mr MAB made a request to redeem his units in the MPF. But as stated above, LMIM was not obliged to agree to such redemption requests and, in Mr MAB's case, appears to have exercised its discretion not to permit the redemption sought;

- (b) that Mr MAB's redemption requests are not listed in the Trustee Redemption Schedule prepared by LMIM.⁷

In the Trustee's view, the reason for that is likely to be that the Trustee Redemption Schedule lists redemption transactions that LMIM had been engaged in processing (see paragraphs 29 to 32 above). However LMIM appears to have exercised its right not to process Mr MAB redemption request.

⁶ Paragraphs 18-19 of the affidavit of MAB.

⁷ Paragraph 26 of the affidavit of MAB.

The correspondence received from the Matured Investor

40. The correspondence received from the Matured Investor⁸ is exhibited at pages 135 to 234 of Ms Clisby's affidavit. To maintain his confidentiality he will not be referred to by name in these submissions.
41. The Matured Investor's position has already been addressed in the Trustee's principal submissions (paragraphs 100 and 101).
42. The Trustee's evidence is to the effect that the Matured Investor's application form contained instructions for a two year investment, to be paid out on maturity.⁹ The units were due to mature on 19 August 2012.¹⁰
43. The Matured Investor contends that his units matured on 12 August 2012.¹¹ This discrepancy appears immaterial.
44. Whatever the date of maturity, LMIM only caused a small number of the Matured Investor's units to be redeemed thereafter. These redemptions were made on 20 August 2012 and 20 February 2013.¹²
45. As at the closure of the MPF on 19 March 2013 the Matured Investor still held 3,672.96 units in the MPF.¹³
46. For the reasons set out in paragraphs 98 to 108 of the principal submissions, the Trustee is of the view that LMIM must have exercised the broad discretion conferred by the Constitution not to agree to the Matured Investor's withdrawal request, having regard to the position of the MPF at the time any such request was made.

Global platform investors or beneficiaries

47. Mr Johnstone has deposed that:

⁸ See paragraphs 171 to 175 of the Villani affidavit and the confidential exhibit to the affidavit of Villani filed 8 December 2021 (Court document 39).

⁹ Paragraph 172.1 of the Villani affidavit.

¹⁰ Paragraphs 172.2 of the Villani affidavit.

¹¹ For example, pages 135, 143, 145 of the Clisby affidavit.

¹² Paragraphs 172.4 and 172.5 of the Villani affidavit.

¹³ Paragraph 172.6 of the Villani affidavit.

Global platform investors or beneficiaries, also referred to as institutional investors are those investors who operate global investment platforms, global portfolio bonds, investment trusts and other institutions, who invested the funds of their clients or members in the MPF (see paragraph 26.2 of JV19). The global platform holders are members of the MPF, not their clients or members on whose behalf they invest.¹⁴

48. The Trustee has received 14 emails from persons who appeared to have invested in the MPF through a global platform or a global portfolio bond, or from advisers contacting the Trustee on behalf of those investors.
49. This correspondence appears at pages 384 to 426 of the affidavit of Clisby.
50. The Trustee suggested that these persons contact the operator of their global platform holder to update their details, obtain further information in relation to their distribution, etc.

Unitholder summaries

51. The Trustee has received 32 emails from members requesting either a copy of their unitholder summary, or a confirmation of their units held:
 - (a) the first 28 emails are exhibited at pages 427 to 513 of the affidavit of Clisby;
 - (b) the last four emails received are exhibited at pages 21 to 37 of the affidavit of Johnstone.
52. No particular concerns are raised in this correspondence.

No action

53. The Trustee has received 11 emails from members that required no response from the Trustee (for example, thanking the Trustee for the update):
 - (a) the first 10 emails appear at pages 514 to 536 of the affidavit of Clisby;
 - (b) the last email is exhibited at pages 38 to 41 of the affidavit of Johnstone.

¹⁴ Paragraph 16 of the Johnstone affidavit.

Other

54. The Trustee has received 83 emails from members with more general queries, such as the timing of the distribution, the quantum of the distribution, or the documentation required to participate:
- (a) the first 78 emails are exhibited at pages 537 to 734 of the affidavit of Clisby;
 - (b) the last five emails received are exhibited at pages 42 to 56 of the affidavit of Johnstone.
55. This category includes:
- (a) an email exchange with one investor who had made a redemption request on 10 April 2013 (pages 547-553 of the Clisby affidavit). This request could not be processed as it was made after the closure of the MPF;
 - (b) email exchanges with an investor who had sought a redemption in 2011, before the expiry of his investment term.¹⁵ This investor asked why the redemption had not been processed. Clause 7.3(c) of the Constitution conferred an “absolute discretion” on the Manager as to whether to agree to a redemption request made during a member’s fixed term,¹⁶ so LMIM was not obliged to accept this redemption request. Further, the correspondence LMIM sent to this investor makes it clear that LMIM sought to exercise the absolute discretion conferred on it by clause 7.4(b)(iii) of the Constitution,¹⁷ “to protect liquidity for the fund”.¹⁸
56. Otherwise, there are no issues to be addressed in this category.

Ms P Ahern
Counsel for the applicant
12 February 2021

¹⁵ Paragraph 24 of the affidavit of Johnstone and pages 57-58 of the exhibits.

¹⁶ Clause 7.3(c) of the Constitution, page 15 of the Villani affidavit.

¹⁷ See paragraph 28(b) above.

¹⁸ Email dated 4 May 2011, p.88 of the Johnstone affidavit.