

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

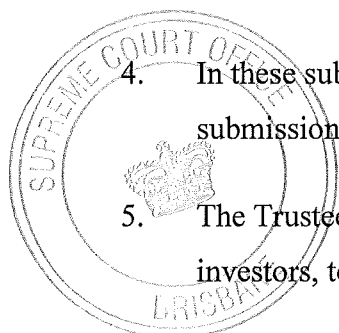
**APPLICANT'S SUPPLEMENTARY OUTLINE IN REPLY:
APPLICATION PURSUANT TO S.96 OF THE TRUSTS ACT 1973 (QLD)**

List of material

1. Affidavit of Stacey Clisby filed 26 February 2021, exhibiting further responses received from members (no Court document number yet available);
2. Affidavit of Stacey Clisby filed 26 February 2021, concerning issues raised by Mr MAB (no Court document number yet available).

Submissions

3. Pursuant to leave granted by Williams J on 9 February 2021, the applicant makes these further submissions:
 - (a) in reply to the submissions of the investor Mr MAB;
 - (b) addressing correspondence received from members of the respondent since 12 February 2021 (the date upon which the Trustee's supplementary submissions were filed).
4. In these submissions the Trustee adopts the definitions contained in its principal submissions dated 9 February 2021.
5. The Trustee has updated the schedule that summarises the responses received from investors, to today's date. That updated schedule is Annexure A to these submissions.



Reply to the submissions of Mr MAB

6. As a trustee, the Trustee does not adopt an adversarial approach to Mr MAB's submissions. The Trustee makes these submissions to assist the Court.
7. In its supplementary outline the Trustee referred to the two relevant categories of members as the Redemption and the Past Maturity members.
8. There is a distinction, in the Trustee's submission, between:
 - (a) the 435 Redemption members listed in the Trustee Redemption Schedule, whose redeemed units were removed from the register by the former trustee, and whose redemptions were recorded into account 20401;¹ and
 - (b) the approximately 600 Past Maturity members, in respect of whom no such steps were taken. The Past Maturity members remain unitholders in the MPF.²
9. LMIM removed the Redemption members' redeemed units from the register, without those members receiving the corresponding redemption payments in respect of those units, which remain recorded in account 20401.³ As LMIM had removed the redeemed units from the register before the Trustee's appointment, the Redemption members will not receive any distribution in respect of those redeemed units in the final winding up of the MPF.
10. The Past Maturity members are different. LMIM did not process any redemption requests made by these members, in that it did not:
 - (a) remove their unitholdings from the register; or

¹ Affidavit of Jarrod Villani sworn 4 December 2020 together with Exhibit JV-19 (**Villani Affidavit**), [155].

² Villani Affidavit, [176]-[177].

³ The Trustee notes that the Trustee Redemption Schedule does record some partial redemptions – that is, where some (but not all) of certain members' unitholdings were redeemed. LMIM removed the redeemed units from the register, thereby reducing those members' unit balance in the register. Of course, those persons remain members in respect of their remaining unitholdings that were not redeemed. Affidavit of Stacey Clisby sworn 26 February 2021 together with Exhibit SC-12 (**Clisby 12**), [19].

- (b) process the redemption payments by taking the accounting steps set out in the affidavit of Ms Clisby.⁴ No amounts were recorded into account 20401 in respect of these redemption requests.⁵
11. Unlike the Redemption members whose redemptions were processed by the former trustee, Mr MAB:
- (a) does not have a redemption recorded in the unitholder transaction ledger; and
- (b) has not has his unitholding reduced. He has a closing unit balance of 38,234.30 units.⁶
12. In the Trustee's submission, there is no basis from the text of the Constitution for a "deemed acceptance" mechanism to be inferred, as set out in paragraphs 20(c) to (e) of Mr MAB's submissions, or for the Court to conclude that the former trustee was obliged to notify members within a certain time period if it did not accept a redemption request.
13. The construction put forward seeks to impose obligations on the former trustee to make a decision within a certain period of time that are not set out in the text of the Constitution. It is inconsistent with the very broad discretion conferred on the trustee by clause 7.4(b)(iii), which provided that the trustee was not obliged to agree to withdrawal requests "for such periods as it in its sole discretion determines."
14. Mr MAB also relies upon a document produced by voluntary administrators appointed to the former trustee, which was exhibited to an affidavit sworn by a Mr Daniel Levy in proceeding 2869/2013. The Trustee has now obtained a copy of that exhibit, and has reviewed it.⁷
15. That document, which was said to contain details of foreign currency redemption requests made by unitholders in the MPF prior to the administrators' appointment, records that:

⁴ Clisby 12, [18].

⁵ Clisby 12, [16].

⁶ Clisby 12, [21].

⁷ Clisby 12, [24]-[27].

- (a) LMIM did not schedule Mr MAB's unitholding (£52,331.29) for repayment;⁸ and
 - (b) LMIM did schedule payment to Mr MAB of what appears to be two income distributions (£2,057.01 and £702.50) for 19 May 2013 – in the event, after the closure of the MPF.⁹
16. The Trustee maintains its submission, for the reasons set out in this outline and in its supplementary outline, that LMIM exercised its discretion not to agree to Mr MAB's redemption request, having regard to the position of the MPF from the time the request was made to the date of its closure.

Recent correspondence received from members

17. The Trustee provides these further submissions to update the Court concerning correspondence it has received from members since its supplementary submissions were filed on 12 February 2021.
18. The Trustee has received:
- (a) one further email concerning redemptions (paragraph 1(e) of the Trustee's application). This member is listed in the Trustee Redemption Schedule. The Trustee intends to pay the amount sought, if a direction to the effect sought by the Trustee is made;¹⁰
 - (b) one further email concerning switch discrepancies (i.e. inquiring why the unitholding recorded in their summary did not correspond with their record of their unitholding). The Trustee has explained the effect of the switch transaction to this member;¹¹
 - (c) one further email that potentially concerns the transactions recorded in Account 20400 that occurred prior to 1 July 2012 (paragraph 1(d) of the Trustee's application). As the member's account was set up to reinvest distributions

⁸ Clisby 12, [32].

⁹ Clisby 12, [33].

¹⁰ Affidavit of Stacey Clisby sworn 26 February 2021 together with Exhibit SC-11 (Clisby 11), [15.1].

¹¹ Clisby 11, [17.1].

payable, that member was not entitled to any distribution until the investment matured;¹²

- (d) four further emails concerning the Past Maturity investors (paragraph 1(g) of the Trustee's application), from Mr MAB and from the Matured Investor. These persons have requested that the Trustee draw their correspondence to the Court's attention, which the Trustee does. This correspondence is exhibited at pages 9-76 of the exhibits to the affidavit of Ms Clisby filed 26 February 2021, concerning investor correspondence. The Trustee relies on its submissions concerning these investors in its principal outline, its supplementary outline and this supplementary outline in reply;¹³
- (e) three further emails from members that required no response from the Trustee (for example, thanking the Trustee for the update);¹⁴
- (f) no further emails concerning global platform investors or beneficiaries. However the Trustee has exhibited one email exchange dated 2-3 February 2021, which was inadvertently omitted from its earlier affidavit;¹⁵
- (g) one further email requesting a copy of their unitholder summary. The Trustee has also identified four emails dated 31 January 2021 that were inadvertently omitted from its earlier affidavit, which are now included;¹⁶ and
- (h) 21 further emails with more general queries.¹⁷

Ms P Ahern
Counsel for the applicant
26 February 2021

¹² Clisby 11, [16.1].

¹³ Clisby 11, [18].

¹⁴ Clisby 11, [20].

¹⁵ Clisby 11, [21].

¹⁶ Clisby 11, [22].

¹⁷ Clisby 11, [24].