

SUPREME COURT OF QUEENSLAND

REGISTRY
NUMBER

Brisbane

12716/15

Plaintiff:

**KORDAMENTHA PTY LTD (ACN 100 169 391) IN ITS
CAPACITY AS TRUSTEE OF THE LM MANAGED
PERFORMANCE FUND**

AND

Defendant:

**LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) (ACN 077 208 461)**

CLAIM

The plaintiff claims:

1. Equitable compensation calculated as follows:

Payments pursuant to the AIIS Loan of	\$11,385,581.62
<u>Less</u> receipts applied to principal of	\$3,609,648.53
Net Loss	\$7,775,633.09
<u>Plus</u> lost opportunity interest	\$9,044,723.21
Equitable compensation:	<u>\$16,820,356.30</u>

2. A declaration that the defendant as trustee for the LM First Mortgage Income Fund ("FMIF") holds the amount of \$3,905,721.81 on constructive trust for the plaintiff, in its capacity as trustee of the LM Managed Performance Fund ("MPF");

3. A declaration that:

- (a) the plaintiff is entitled to be indemnified out of the assets of the FMIF in respect of the defendant's liability to the plaintiff in this proceeding, in respect of the amount of \$3,905,721.81;



CLAIM

Filed on behalf of the plaintiff

Form 2 Rule 22

MINTERELLISON

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1 Eagle Street
BRISBANE QLD 4000
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Reference DOB 407747963

- (b) the plaintiff has a lien or charge over the assets and undertaking of the FMIF in respect of the defendant's liability to the plaintiff in this proceeding, in respect of the amount of \$3,905,721.81;
 - (c) the plaintiff is entitled to be subrogated to the rights of the defendant in respect of the assets of the FMIF, in respect of the amount of \$3,905,721.81;
4. Interest pursuant to s.58 of the *Civil Proceedings Act* 2011 (Qld) but excluding interest on so much of the claim for equitable compensation as includes the lost opportunity to earn interest;
 5. Costs;
 6. Such further or other order as the Court sees fit.

The plaintiff makes this claim in reliance on the facts alleged in the attached Statement of Claim.

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND

And filed in the Brisbane Registry on

16th December 2015

Registrar



To the defendant: TAKE NOTICE that you are being sued by the plaintiff in the Court. If you intend to dispute this claim or wish to raise any counterclaim against the plaintiff, you must within 28 days of the service upon you of this claim file a Notice of Intention to Defend in this Registry. If you do not comply with this requirement judgment may be given against you for the relief claimed and costs without further notice to you. The Notice should be in Form 6 to the Uniform Civil Procedure Rules. You must serve a sealed copy of it at the plaintiff's address for service shown in this claim as soon as possible.

Address of Registry: QEII Courts of Law Complex
415 George Street
Brisbane QLD 4000

If you assert that this Court does not have jurisdiction in this matter or assert any irregularity you must file a Conditional Notice of Intention to Defend in Form 7 under Rule 144, and apply for an order under Rule 16 within 14 days of filing that Notice.

PARTICULARS OF THE PLAINTIFF:

Name: KordaMentha Pty Ltd (ACN 100 169 391) in its capacity as trustee of the LM Managed Performance Fund

Plaintiff's residential or business address: Level 14, 12 Creek Street, Brisbane QLD 4000, Australia

Plaintiff's solicitors name: David Thomas O'Brien

and firm name: Minter Ellison

Solicitor's business address: Waterfront Place, 1 Eagle Street, BRISBANE QLD 4000

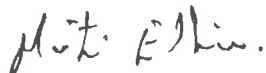
Address for Service: Waterfront Place, 1 Eagle Street, BRISBANE QLD 4000

DX: 102 BRISBANE

Telephone: (07) 3119 6000

Fax: (07) 3119 1000

Email address: david.obrien@minterellison.com

Signed: 

Description: MINTER ELLISON
Solicitors for the plaintiff

Dated: 15 December 2015

This claim is to be served on: LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 077 208 461)

of: FTI CONSULTING, 'CORPORATE CENTRE ONE'
LEVEL 9, 2 CORPORATE COURT, BUNDALL, QLD,
4217

and of: BDO, LEVEL 10, 12 CREEK STREET, BRISBANE,
QLD, 4000

and of: McGRATHNICOL, LEVEL 7, 175 EAGLE STREET,
BRISBANE, QLD, 4000

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER:

Plaintiff: **KORDAMENTHA PTY LTD (ACN 100 169 391) IN ITS CAPACITY AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND**

AND

Defendant: **LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 077 208 461)**

STATEMENT OF CLAIM

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STATEMENT OF CLAIM

Filed on behalf of the plaintiff

Form 2 Rule 22

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This claim in this proceeding is made in reliance on the following facts:

1. The plaintiff:
 - (a) is a company duly incorporated according to law;
 - (b) is capable of suing in its corporate name; and
 - (c) in the premises pleaded in paragraphs 4 to 11 below, has been with Calibre Capital Ltd ACN 108 318 985 (“**Calibre**”) a trustee of a trust named the LM Managed Performance Fund (“**the MPF**”) since 12 April 2013 and the sole trustee of the MPF since on or about 5 January 2015.

2. The defendant:

- (a) is a company duly incorporated according to law;
- (b) is, subject to the plaintiff obtaining leave to proceed against the defendant pursuant to s.500 of the *Corporations Act* 2001 (Cth), capable of being sued in its corporate name;
- (c) since at least 1999, has carried on business as a professional trustee for reward, in which capacity it created and managed investment schemes;
- (d) in the premises pleaded in paragraphs 4 to 11 below, was the trustee of the MPF from in or about December 2001 until 12 April 2013; and
- (e) in the premises pleaded in paragraphs 15 and 16 below, has been the responsible entity of a registered managed investment scheme named the LM First Mortgage Income Fund (“**the FMIF**”) since 28 September 1999.

3. In this pleading:

- (a) the defendant, when acting in its capacity as the trustee of the MPF, is referred to as “the defendant ATF the MPF”;
- (b) the defendant, when acting in its capacity as the responsible entity of the FMIF, is referred to as “the defendant ATF the FMIF.”

The LM Managed Performance Fund

4. By a trust deed dated 4 December 2001 (“**the First Trust Deed**”), the defendant:

- (a) established a unit trust named The LM Managed Performance Fund (“**the MPF**”); and
- (b) became trustee of the MPF.

5. By a Deed of Variation dated 11 November 2002 (“**the Second Trust Deed**”), the defendant ATF the MPF deleted all parts of the First Trust Deed other than the parties, and replaced them with the terms set out in the Second Trust Deed (Recital B of the Second Trust Deed).

6. By a Deed of Variation dated 25 November 2009 ("**the Third Trust Deed**"), the defendant ATF the MPF deleted clauses 1, 2.3, 2.4 and 3 to 27 of the Second Trust Deed, and replaced them with the terms set out in the Schedule to the Third Trust Deed (clause 1 of the Third Trust Deed).
7. By a Supplemental Deed Poll dated 23 October 2012 ("**the Fourth Trust Deed**") the defendant ATF MPF amended the Third Trust Deed in the way set out in the Schedule to the Fourth Trust Deed (clause 2 of the Fourth Trust Deed).
8. Relevantly, the following were terms of the First, Second, Third and Fourth Trust Deeds:
 - (a) the defendant was the Manager (clause 1.1 of each Deed);
 - (b) the Constitution was the Trust Deed including any Schedule, Annexure or Amendments to it (clause 1.1 of each Deed);
 - (c) the Scheme was the trust created by the Deed to be known as the LM Managed Performance Fund (clause 1.1 of each Deed);
 - (d) the assets of the Scheme were:
 - (i) the Scheme Fund (clauses 1.1 of the First and Second Trust Deeds); subsequently
 - (ii) the Scheme Property (clause 1.1 of the Third Trust Deed);
 - (e) the Manager agreed to act as trustee of the Scheme (clause 2.1 of each Deed);
 - (f) the Manager declared that it held:
 - (i) the Scheme Fund (clauses 2.2 of the First and Second Deeds); subsequently
 - (ii) the Scheme Property (clause 2.2 of the Third Trust Deed);
 on trust for the Members;

- (g) the name of the Scheme was:
 - (i) The LM Managed Performance Fund (clause 2.3 of the First Trust Deed); subsequently
 - (ii) The LM Managed Performance Fund or any other name that the Manager may determine from time to time (clauses 2.3 of the Second and Third Trust Deeds);
 - (h) the beneficial interest in the Scheme Fund would be divided into Units (clause 3.1 of each Deed);
 - (i) the Constitution might be modified or repealed or replaced with a new Constitution by the Manager if the Manager reasonably considered that the change would not adversely affect Members' rights or was deemed necessary to conduct the affairs of the Scheme (clauses 24.1 of the First and Third Trust Deeds; clause 18.1 of the Second Trust Deed);
 - (j) the Manager must resign if (being a corporation) it became an externally-administered body corporate as defined in the *Corporations Act 2001* (clauses 23.1(b)(ii) of the First and Third Trust Deeds; clause 17.1(b)(ii) of the Second Trust Deed).
9. On or about 19 March 2013, John Richard Park and Ginette Dawn Muller were appointed voluntary administrators of the defendant.
 10. In the premises, pursuant to clause 23.1(b)(ii) of the Third Trust Deed the defendant was required to resign as Manager of the MPF.
 11. By order of this Honourable Court made on 12 April 2013:
 - (a) the defendant was removed as trustee of the MPF; and
 - (b) the plaintiff, and Calibre, were appointed jointly and severally as trustees of the MPF.
 12. On or about 1 August 2013, the defendant's creditors resolved to place the defendant into liquidation, and Mr Park and Ms Muller were appointed its liquidators.

13. On or about 5 January 2015, Calibre retired as trustee of the MPF.
14. In the premises, the plaintiff is the sole trustee and Manager of the MPF.

The LM First Mortgage Income Fund

15. On or about 28 September 1999, the defendant established the LM First Mortgage Income Fund (“**the FMIF**”).
16. Since on or about 28 September 1999:
 - (a) the FMIF has been, and remains, a registered managed investment scheme, pursuant to s.601EB of the *Corporations Act* 2001 (Cth).
 - (b) the defendant has been, and remains, the Responsible Entity of the FMIF;
 - (c) the defendant has held, and continues to hold, the property of the FMIF on trust for its members, pursuant to s.601FC of the *Corporations Act* 2001 (Cth).
17. Pursuant to the terms of a Custody Agreement dated 4 February 1999, between the defendant and Permanent Trustee Australia Ltd ACN 008 412 913 (later re-named The Trust Company (PTAL) Ltd) (“**PTAL**”):
 - (a) PTAL agreed to custodially hold the Portfolio and Title Documents as agent for the defendant in relation to (inter alia) the FMIF (clause 2.1 and Schedule 2);
 - (b) the defendant was responsible for taking all decisions in relation to the Portfolio and, subject to the Custody Agreement, PTAL was required to act on the defendant’s Instructions in relation to any assets of the Portfolio (clause 4.1);
 - (c) the plaintiffs will rely upon the full terms of the Custody Agreement at the hearing of this proceeding.
18. In this pleading:
 - (a) PTAL, when acting in its capacity as the custodian trustee of the FMIF, is referred to as “PTAL ACF the FMIF”; and

- (b) PTAL, when acting in its capacity as the custodian trustee of the MPF, is referred to as “PTAL ACF the MPF.”

Duties owed by the defendant ATF the MPF

19. At all material times, the defendant ATF the MPF owed a fiduciary duty to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty.
20. At all material times, the defendant ATF the MPF owed a duty to the beneficiaries of the MPF to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.
21. At all material times, the defendant ATF the MPF owed duties to the beneficiaries of the MPF:
 - (a) pursuant to s.22 of the *Trusts Act* 1973 (Qld), (“**the Trusts Act**”) to exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, when exercising a power of investment; and
 - (b) pursuant to s.24 of the *Trusts Act* to take into account, inter alia, the following matters, when exercising a power of investment:
 - (i) the risk of capital or income loss or depreciation (s.24(e));
 - (ii) the likely income return and the timing of income return (s.24(g));
 - (iii) the length of the term of the proposed investment (s.24(h));
 - (iv) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment (s.24(j)); and
 - (v) the cost (including commissions, fees, charges and duties payable) of making the proposed investment (s.24(n)).

Incorporation of Australian International Investment Services Pty Ltd

22. On or about 29 September 2002, Australian International Investment Services Pty Ltd ACN 102 261 898 (“**AIIS**”) was registered as a company.
23. At all material times:
 - (a) the sole director and secretary of AIIS was Mr Peter Drake; and
 - (b) Mr Drake was a director of the defendant; and
 - (c) Mr Drake was the Chairman and Chief Executive Officer of the defendant.
24. On a date that is unknown to the plaintiff, but which was not later than 21 December 2004, LMIM acquired all the shares of AIIS, in its capacity as trustee of the MPF.

Particulars

An ASIC company search for AIIS records that document number 1E0549876, effective 21 December 2004, was received and processed on 23 December 2004.

25. In the premises, at all material times after 21 December 2004:
 - (a) AIIS was a wholly-owned subsidiary of LMIM ATF the MPF; and
 - (b) LMIM ATF the MPF controlled the actions of AIIS.

Acquisition by AIIS of a lease over land located in Canberra, ACT

26. On a date that is unknown to the plaintiff, but which occurred after AIIS was incorporated on 29 September 2002, AIIS acquired a leasehold interest in land situated at 7 Irving Street, Phillip, Australian Capital Territory; more particularly described as Block 1, Section 22, Division of Phillip, Volume 1541 in Folio 73, Deposit Plan 2329 (“**the Land**”).
27. Insofar as they are known to the plaintiff, the terms of the lease over the Land were:

- (a) the lease was granted on 11 December 1998; and
- (b) the term of the lease was 99 years.

The MPF's loan to AIIS ("the AIIS Loan")

28. On or about 19 January 2005:

- (a) the defendant ATF the MPF, as Lender; and
- (b) AIIS as Borrower,

entered into a Loan Agreement ("**the AIIS Loan**").

29. Relevantly, the following were terms of the AIIS Loan:

- (a) the Borrower had requested the AIIS Loan from the Lender (Recital A);
- (b) the Lender had agreed to make the Loan available to the Borrower on the terms and conditions of the Loan Agreement (Recital B);
- (c) the "Loan" was \$1,140,000.00 (item 8, schedule);
- (d) the "Approved Purpose" was "purchase and development of [the Land]" (item 1, schedule);
- (e) the "Commencement Date" was 23 December 2004 (item 4, schedule);
- (f) the "Expiry Date" was 22 December 2008 (item 5, schedule);
- (g) the Interest Rate was 10% per annum (item 6, schedule);
- (h) no securities were taken as security for the performance of AIIS's obligations under the AIIS Loan; and
- (i) the Lender was to provide the Loan to the Borrower "on or after the Commencement Date" (clause 2).

The FMIF's loan to AIIS ("the FMIF Loan")

30. On a date that is unknown to the plaintiff, but which the plaintiff believes occurred on or about 8 April 2005, parties including:

- (a) the defendant ATF the FMIF; and
- (b) PTAL ACF the FMIF; and
- (c) AIIS,

entered into a Loan Agreement (“**the FMIF Loan**”), by which the defendant ATF the FMIF, or in the alternative PTAL ACF the FMIF, loaned money to AIIS.

Particulars

- (i) On or about 30 November 2008:

- A. PTAL ACF the FMIF;
- B. the defendant ATF the FMIF (as First Lender);
- C. the defendant ATF the MPF (as Second Lender); and
- D. AIIS as Mortgagor,

executed a Priority Deed. Item 4(a) of the Schedule to the Priority Deed states that the First Lender’s Security included a Loan Agreement with AIIS, dated 8 April 2005.

- 31. On or about 12 April 2005, the defendant ATF the FMIF caused PTAL ACF the FMIF to take a mortgage over the Land, as security for the performance of AIIS’s obligations under the FMIF Loan.

Particulars

- (i) Mortgage 1416794, registered on 27 April 2005.
- (ii) Item 4(b) of the Schedule to the Priority Deed dated 30 November 2008.

- 32. On 27 April 2005, the mortgage granted to the defendant ATF the FMIF was registered over the Land, as first registered mortgage 1416794.
- 33. The Principal Sum secured by registered mortgage 1416794 was \$1,690,000.00.

Particulars

- (i) Item 7 of registered mortgage 1416794;
 - (ii) Clause 2 of the Memorandum of Provisions registered as document 1200308.
34. Other than as pleaded in paragraphs 30 to 33 above, the terms of the FMIF Loan are presently unknown to the plaintiff.
35. The FMIF Loan was subsequently varied by:
- (a) a Deed of Variation dated 19 June 2007;
 - (b) a Deed of Variation dated 12 December 2007;
 - (c) a Letter of Variation dated 14 April 2008; and
 - (d) a Letter of Variation/Deed of Variation, dated November 2008.

Particulars

Stated in item 4(a) of the Schedule to the Priority Deed dated 30 November 2008.

36. Other than as pleaded in paragraph 35 above, the terms upon which the FMIF Loan was varied are unknown to the plaintiff.

First Deed of Variation of the AIIS Loan

37. On or about 11 April 2005:
- (a) the defendant ATF the MPF, as Lender; and
 - (b) AIIS as the Borrower,
- entered into a Deed of Variation of the AIIS Loan (**“the First Deed of Variation of the AIIS Loan”**).
38. Relevantly, the following were terms of the First Deed of Variation of the AIIS Loan:

- (a) the Principal Security was defined as the AIIS Loan (item 4, Schedule);
 - (b) the Principal Security was varied as follows:
 - (i) the Loan Amount was increased to \$4,200,000.00; and
 - (ii) the variation to the Principal Security contained in the First Deed of Variation of the AIIS Loan would be effective as and from 11 April 2005;
- (item 6, Schedule).

Second Deed of Variation of the AIIS Loan

39. On or about 30 November 2008:

- (a) the defendant ATF the MPF, as Lender; and
- (b) AIIS as the Borrower;

entered into a Deed of Variation of the AIIS Loan (**“the Second Deed of Variation of the AIIS Loan”**).

40. Relevantly, the following were terms of the Second Deed of Variation of the AIIS Loan:

- (a) the Principal Security was defined as the AIIS Loan, as varied by the First Deed of Variation of the AIIS Loan (item 4, Schedule);
- (b) the Principal Security was varied as follows:
 - (i) the Expiry Date was extended from 22 December 2008 to 1 May 2009;
 - (ii) AIIS was required to provide additional security, including a second registered mortgage over the Land;
 - (iii) the variation to the Principal Security contained in the Second Deed of Variation of the AIIS Loan would be effective as and from 22 December 2008;

(item 6, Schedule).

41. On 30 November 2008, the mortgage granted to the defendant ATF the MPF was registered over the Land, as second registered mortgage 1611828.

Priority Deed

42. On or about 30 November 2008:

- (a) PTAL ACF the FMIF, as First Lender or Custodian;
- (b) LMIM ATF the FMIF;
- (c) LMIM ATF the MPF, as Second Lender; and
- (d) AIIS as Mortgagor,

entered into a Priority Deed.

43. Relevantly, the Priority Deed provided that:

- (a) the First Lender's Security, including:
 - (i) the FMIF Loan, as varied by Deeds of Variation dated 19 June 2007 and 12 December 2007, a Letter of Variation dated 14 April 2008, and a Letter of Variation/Deed of Variation dated November 2008; and
 - (ii) the first registered mortgage number 1416794 over the Land,

had the first priority to the extent of all money secured by it, up to a total of \$7,800,000.00, plus interest and costs (clause 3.1 and Schedule, items 4 and 5);
- (b) the Second Lender's Security, including:
 - (iii) the AIIS Loan, as varied by the First and Second Deeds of Variation; and
 - (iv) the second registered mortgage over the Land,

had the second priority to the extent of all money secured by it, up to a total of \$4,200,000.00, plus interest and costs (clause 3.1 and Schedule, items 6 and 7);

- (c) the First Lender's Security had the third priority, to the extent of all money secured by it in excess of \$7,800,000.00, plus interest and costs (clause 3.1 and Schedule, items 4 and 5); and
- (d) the Second Lender's Security had the fourth priority, to the extent of all money secured by it in excess of \$4,200,000.00, plus interest and costs (clause 3.1 and Schedule, items 6 and 7).

Internal approvals for the Third Deed of Variation of the AIIS Loan

44. On 6 August 2009, Ms Shelley Chalmers, of the defendant's Commercial Lending section, sent an email with the subject: "For consideration – Canberra JA MPF term ext & loan increase" to the following recipients:

- (a) recipients described as "321 MPF Investment Committee";
- (b) Mr David Monaghan, a director of the defendant;
- (c) Mr Eghard van der Hoven;
- (d) Mr Nick Daking; and
- (e) Ms Lisa Darcy, a director of the defendant.

45. The email dated 6 August 2009, had attached to it a document entitled "Credit Committee Synopsis – Managed Performance Fund – Variation," dated 5 August 2009 ("**the Synopsis**").

46. By the Synopsis, approval was sought from the persons listed in subparagraphs 44(b) to 44(e) above, together with Ms Chalmers, for the AIIS Loan to be varied on the following basis:

- (a) the term of the AIIS Loan would be extended for one year, to 1 May 2010;
- (b) the maximum approved loan amount would be increased to \$5.5 million;

- (c) the reason for increasing the maximum approved loan amount to \$5.5 million was stated to be:

“...to allow rollover fee and interest capitalization for both MPF and FMIF loans during the extension”;

- (d) an updated valuation was not to be obtained; and
- (e) the reason for not obtaining an updated valuation was stated to be:

“...as site is “commercial” in nature and 2 year valuation rule applies.”

47. Relevantly, the Synopsis stated that:

- (a) the existing development approval for the Land had been issued on 19 May 2008;
- (b) the existing development approval was for a commercial project;
- (c) the Land had last been valued in February 2008, by CBRE Canberra;
- (d) that valuation had valued the Land at \$11.85 million;
- (e) the valuation had been conducted on the following basis:
 - (i) “as is”; and
 - (ii) before the development approval had been obtained;
- (f) the current balance of the AIIS Loan was \$4.064 million;
- (g) the balance of the FMIF Loan was approximately \$7.7 million;
- (h) “total exposure” across both the FMIF and the MPF was approximately \$11.8 million;
- (i) interest from the AIIS Loan and the FMIF Loan “capitalise[d]” to the AIIS Loan; and
- (j) the term of the MPF Loan had expired.

48. In response, on or about 6 August 2009, the persons listed in subparagraphs 44(b) to 44(e) above, together with Ms Chalmers, responded that they approved the proposed transaction.

Third Deed of Variation of the AIIS Loan

49. In accordance with the internal approvals obtained, as pleaded in paragraphs 44 to 48 above, on or about 22 December 2009:

- (a) LMIM ATF the MPF; and
- (b) AIIS,

entered into a Deed of Variation of the AIIS Loan (**“the Third Deed of Variation of the AIIS Loan”**).

50. Relevantly, the following were terms of the Third Deed of Variation of the AIIS Loan:

- (a) the Principal Security was defined as the AIIS Loan, as varied from time to time (item 4, Schedule);
 - (b) the Principal Security was varied as follows:
 - (i) the Expiry Date was varied from 1 May 2009 to 1 May 2010;
 - (ii) the Loan Amount was increased to \$5,500,000.00; and
 - (iii) the variation to the Principal Security contained in the Third Deed of Variation of the AIIS Loan would be effective as and from 22 December 2009,
- (item 6, Schedule).

Second Priority Deed

51. On or about 22 December 2009:

- (a) PTAL ACF the FMIF, as First Lender or Custodian;
- (b) LMIM ATF the FMIF;

(c) LMIM ATF the MPF, as Second Lender; and

(d) AIIS as Mortgagor;

entered into a Priority Deed (“**the Second Priority Deed**”).

52. Relevantly, the Second Priority Deed provided that:

- (a) the First Lender’s Security, as pleaded in paragraph 43(a) above, had the first priority to the extent of all money secured by it, up to a total of \$7,800,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (b) the Second Lender’s Security, as pleaded in paragraph 43(b) above, had the second priority to the extent of all money secured by it, up to a total of \$5,500,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7); and
- (c) the First Lender’s Security, as pleaded in paragraph 43(c) above, had the fourth priority to the extent of all money secured by it in excess of \$7,800,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (d) the Second Lender’s Security, as pleaded in paragraph 43(d) above, had the fourth priority to the extent of all money secured by it in excess of \$5,500,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7).

Internal approvals for the Fourth Deed of Variation of the AIIS Loan

53. On 1 September 2010, Ms Shauna Larkin, of the defendant’s Client Relations – Treasury Services section, sent an email with the subject: “Increase and term extension to AIIS MPF. Voting require please” to the following recipients:

- (a) recipients described as “321 MPF Investment Committee”;
- (b) Mr Greg McDonald;
- (c) Mr Eghard van der Hoven, a director of the defendant;

- (d) Ms Lisa Darcy, a director of the defendant; and
 - (e) Ms Shelley Chalmers.
54. The email dated 1 September 2010, had attached to it a document entitled “Credit Committee Synopsis – Managed Performance Fund – Variation” (“**the Synopsis**”).
55. By the Synopsis, approval was sought from the persons listed in subparagraphs 53(b) to 53(e) above for the AIIS Loan to be varied on the following basis:
- (a) the amount of the AIIS Loan would be increased, from \$5,500,000.00 to \$7,500,000.00;
 - (b) the term of the AIIS Loan would be extended from 1 May 2010 to 1 May 2011;
 - (c) the interest rate would be raised from 10% to 12% per annum;
 - (d) the reason for increasing the maximum approved loan amount to \$7.5 million was stated to be:

“...to accommodate FMIF and MPF interest capitalisation and consultancy costs in order to achieve the residential approval”;
 - (e) the MPF would rely upon any valuation obtained by the FMIF; and
 - (f) the LVR would increase to 130%.
56. Relevantly, the Synopsis stated that:
- (a) the Land had last been valued in February 2008, by CBRE Canberra;
 - (b) in that valuation, CBRE Canberra had valued the Land at \$11.85 million;
 - (c) the valuation had been conducted on the following basis:
 - (i) “as is”; and
 - (ii) before development approval had been obtained;

- (d) a commercial development was no longer considered feasible;
 - (e) the development approval obtained for a commercial development had lapsed;
 - (f) a residential development was considered highly likely;
 - (g) a development approval for residential purposes was being pursued;
 - (h) no updated valuation was required;
 - (i) the current balance of the AIIS Loan was \$5,150,000.00;
 - (j) the “total exposure” for the AIIS Loan and the FMIF Loan was approximately \$13 million;
 - (k) interest from the AIIS Loan and the FMIF Loan “capitalise[d]” to the AIIS Loan; and
 - (l) the term of the MPF Loan had expired.
57. In response, on or about 1 September 2010 the persons listed in subparagraphs 53(b) to 53(e) above responded that they approved the proposed transaction.
58. At an MPF Credit Committee meeting on 2 September 2010 the Credit Committee resolved to approve the proposed transaction.

Fourth Deed of Variation of the AIIS Loan

59. In accordance with the internal approvals obtained, as pleaded in paragraphs 53 to 58 above, on or about 6 October 2010:
- (a) LMIM ATF the MPF; and
 - (b) AIIS,
- entered into a Deed of Variation of the AIIS Loan (“**the Fourth Deed of Variation of the AIIS Loan**”).
60. Relevantly, the terms of the Fourth Deed of Variation of the AIIS Loan were:

- (a) the AIIS Loan was amended with effect at and from the Effective Date, to read as set out in Annexure A (clause 3.1);
- (b) the Effective Date was the date of the Deed (clause 1.1);
- (c) the date of the Deed was 6 October 2010 (page 1);
- (d) the document was executed as a Deed on 6 October 2010 (page 5);
- (e) a document entitled “Loan Agreement” was annexed to the Fourth Deed of Variation of the AIIS Loan, as Annexure A;
- (f) relevantly, the terms of the “Loan Agreement” that was Annexure A to the Fourth Deed of Variation of the AIIS Loan were:
 - (i) the Borrower had requested the Loan from the Lender (Recital A);
 - (ii) the Lender had agreed to make the Loan available to the Borrower on the terms and conditions of the Loan Agreement (Recital B);
 - (iii) the “Loan” was \$7,500,000.00 (item 8, schedule);
 - (iv) the “Approved Purpose” was “purchase and development of [the Land]” (item 1, schedule);
 - (v) the “Commencement Date” was 23 December 2004 (item 4, schedule);
 - (vi) the “Expiry Date” was 1 May 2011 (item 5, schedule);
 - (vii) the Interest Rate was 10% per annum, increasing to 12% per annum with effect from 23 August 2010 (item 6, schedule).

Third Priority Deed

61. On or about 12 December 2010:

- (a) PTAL ACF the FMIF, as First Lender or Custodian;
- (b) LMIM ATF the FMIF;

(c) LMIM ATF the MPF, as Second Lender; and

(d) AIIS as Mortgagor;

entered into a Priority Deed (“**the Third Priority Deed**”).

62. Relevantly, the Third Priority Deed provided that:

- (a) the First Lender’s Security, as pleaded in paragraph 43(a) above, had the first priority to the extent of all money secured by it, up to a total of \$7,920,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (b) the Second Lender’s Security, as pleaded in paragraph 43(b) above, had the second priority to the extent of all money secured by it, up to a total of \$7,500,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7);
- (c) the First Lender’s Security, as pleaded in paragraph 43(c) above, had the fourth priority to the extent of all money secured by it in excess of \$7,920,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (d) the Second Lender’s Security, as pleaded in paragraph 43(d) above, had the fourth priority to the extent of all money secured by it in excess of \$7,500,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7).

Internal approvals for the Extension Letter for the AIIS Loan

63. By an MPF Credit Committee Synopsis dated 10 May 2011, approval was sought to extend the term of the AIIS Loan from 1 May 2011 to 1 May 2012.

64. Relevantly, the Synopsis stated that:

- (a) AIIS wished to “*progress the development approval process for a residential development on the site*”;
- (b) the Land had last been valued in February 2008, by CBRE Canberra;

- (c) in that valuation, CBRE Canberra had valued the Land at \$11.85 million;
 - (d) the valuation had been conducted on the following basis:
 - (i) “as is”; and
 - (ii) before development approval had been obtained;
 - (e) an updated valuation was to be obtained once development approval was obtained;
 - (f) the current balance of the AIIS Loan was \$6,495,000.00;
 - (g) the “total exposure” for the AIIS Loan and the FMIF Loan was approximately \$14.4 million; and
 - (h) interest from the AIIS Loan and the FMIF Loan “capitalise[d]” to the AIIS Loan.
65. In response, the following persons approved the proposed transaction:
- (a) Mr Grant Fisher, by email dated 22 May 2011;
 - (b) Ms Francene Mulder, a director of the defendant, by email dated 23 May 2011;
 - (c) Mr Simon Tickner, a director of the defendant, by email dated 23 May 2011;
 - (d) Ms Lisa Darcy, a director of the defendant, by email dated 3 June 2011.
66. Further, at an MPF Credit Committee meeting on 16 May 2011, the Credit Committee resolved to approve the proposed transaction.

Extension Letter for the AIIS Loan

67. In accordance with the internal approvals obtained, as pleaded in paragraphs 63 to 66 above, by letter dated 27 May 2011 the defendant notified AIIS that the Credit Committee had approved an extension of the AIIS Loan, on the following basis:

- (a) the term of the AIIS Loan was extended to 1 May 2012; and
- (b) the defendant did not require an updated valuation for the Land.

Particulars

Letter from Ms Shelley Chalmers of the defendant's Property Asset Management Department, to AIIS care of Mr Peter Drake, dated 27 May 2011.

68. AIIS accepted the extension of the AIIS Loan on these terms, by an Acceptance Form executed by Mr Peter Drake, the sole director of AIIS, dated 3 June 2011.

Incorporation of Aalto Apartments Pty Ltd

69. On or about 4 August 2011, Aalto Apartments Pty Ltd ACN 152 486 630 ("Aalto") was registered as a company.

Appointment of PTAL as custodian trustee of the MPF, and assignment of the securities for the AIIS Loan

70. On or about 1 November 2011:

- (a) LMIM ATF the MPF; and
- (b) PTAL,

entered into a Deed of Assignment.

71. Recitals C and D to the Deed of Assignment stated:

C. PTAL and LM have agreed that PTAL will assume the role and responsibilities of custodian of the Fund in accordance with the terms of the Custody Agreement which will require LM to transfer the legal interest in the securities to PTAL.

D. PTAL and LM wish to enter into this document to record the basis upon which the legal interest in the Securities will be transferred to PTAL.

72. Relevantly, the Deed of Assignment provided that:

- (a) with effect from the Commencement Date, PTAL would become the legal owner of certain Assets and Securities (clause 2.1);

- (b) the Commencement Date was 1 November 2011 (clause 1.1); and
 - (c) the Securities were the securities, agreements and other documents described in Schedule 2 to the Deed (clause 1.1), which included:
 - (i) the AIIS Loan;
 - (ii) the First, Second, Third and Fourth Deeds of Variation;
 - (iii) the Extension Letter;
 - (iv) the First and Second Priority Deeds; and
 - (v) registered mortgage 1611828.
73. On or about 1 November 2011, registered mortgage 1611828 was transferred from LMIM ATF the MPF to PTAL ACF the MPF, pursuant to clause 2.1 of the Assignment Deed.
74. The transfer of registered mortgage 1611828 from LMIM ATF the MPF to PTAL ACF the MPF was registered on 3 February 2012.

Internal approval for Fifth Deed of Variation of the AIIS Loan, and Land Availability Agreement between AIIS and Aalto

75. By an MPF Credit Committee Synopsis dated 14 November 2011, approval was sought for the following variation to the AIIS Loan:
- (a) to increase the Maximum Approved Loan Amount of the AIIS Loan from \$7,500,000.00 to \$16,800,000.00;
 - (b) for the interest rate of 12% per annum to remain unchanged; and
 - (c) for an updated valuation to be obtained once development approval was obtained.
76. Relevantly, the Synopsis stated that:
- (a) the highest and best use for the Land was residential;

- (b) AIIS had entered into an agreement with Aalto to develop a residential scheme called “Aalto Apartments”, which would include 278 residential units and a 67-place childcare centre;
- (c) the latest financial update, dated 1 November 2011, contained the following financial analysis for the project:

<i>Net Sales Revenue (after GST paid)</i>			<i>\$126.53m</i>
<i>Built Form Cost</i>	<i>\$85.00</i>		
<i>Contingency (5%)</i>	<i><u>\$ 4.25</u></i>	<i>\$89.25m</i>	
<i>Professional Fees</i>		<i>\$ 3.99m</i>	
<i>Statutory Fees</i>		<i>\$ 3.05m</i>	
<i>Misc</i>		<i>\$ 0.20m</i>	
<i>Holding Costs</i>		<i>\$ 0.06m</i>	
<i>Finance Charges</i>		<i>\$ 0.89m</i>	
<i>Interest Expense</i>	<i><u>\$ 14.29m</u></i>		<i>\$111.73m</i>
<i>Add – back GST reclaimed</i>			<i><u>\$ 8.92m</u></i>
<i>Net Development Profit</i>			<i>\$ 23.72m</i>
<i>Less Combined Loans to FMIF and MPF (at 8.11.11)</i>			<i>\$ 16.05m</i>
<i>Less FMIF/MPF Interest @ 12% for project life of 41mths</i>			<i><u>\$ 7.59m</u></i>
<i>Residual Balance</i>			<i>\$ 0.08m</i>

- (d) the increase to the AIIS Loan Amount was sought to pay certain costs until 31 March 2012, the date on which a development approval was expected, at which point a new valuation would be sought based on the DA, and on an “as-complete” basis;
- (e) as at 21 October 2011, the balance of the FMIF Loan was \$7,849,504;
- (f) as at 8 November 2011, the balance of the AIIS Loan was \$8,194,253;
- (g) a sale of the Land “as is” would be likely to result in a sale price of about \$3 million, which would result in the MPF writing off its investment of approximately \$8.2 million.

77. At an MPF Credit Committee meeting on 16 November 2011, the following persons approved the proposed transaction:

- (a) Ms Lisa Darcy (Chair and Executive Director), a director of the defendant;

- (b) Mr Peter Drake (Chief Executive Officer), a director of the defendant;
 - (c) Mr Eghard van der Hoven (Executive Director), a director of the defendant;
 - (d) Ms Francene Mulder (Executive Director), a director of the defendant;
 - (e) Mr Grant Fischer (Chief Financial Officer); and
 - (f) Scott King (Development Manager).
78. A document entitled “Land Availability Agreement AIIS Pty Ltd and Aalto Apartments Pty Ltd” was annexed to the MPF Credit Committee Synopsis dated 14 November 2011.
79. The document entitled “Land Availability Agreement AIIS Pty Ltd and Aalto Apartments Pty Ltd” set out the following “AIIS Entitlement Calculation as at 30.6.11”:

<i>FMIF Loan Balance as at 30.6.11</i>	<i>\$7,849,604</i>	<i>(Item 1)</i>
<i>FMIF Interest (12%) over the Life of the Project</i>	<i>\$4,156,870</i>	<i>(Item 2)</i>
<i>MPF Loan Balance as at 30.6.11</i>	<i>\$6,987,755</i>	<i>(Item 3)</i>
<i>MPF Interest (12%) over the Life of the Project</i>	<i>\$3,946,759</i>	<i>(Item 4)</i>
<i>MPF Interest (12%) on funded Development Costs over the Life of the Project</i>	<i><u>\$3,639,808</u></i>	<i>(Item 5)</i>
<i><u>TOTAL AIIS Pty Ltd Entitlement</u></i>	<i><u>\$26,580,796</u></i>	

Land Availability Agreement between AIIS and Aalto

80. On a date which is unknown to the plaintiff, but which it believes occurred before 14 November 2011, AIIS and Aalto entered into a Land Availability Agreement.
81. Relevantly, the terms of the Land Availability Agreement were:
- (a) AIIS was the registered proprietor of the Land (Recital A);
 - (b) AIIS wished to sell the Land, in order to recover its indebtedness to the financier that held a registered mortgage over the Land (Recital B);
 - (c) Aalto had identified the Land as being appropriate for development and sale (Recital C);

- (d) AIIS did not wish to develop the Land itself (Recital D);
- (e) AIIS had agreed to make the Land available to Aalto to enable Aalto to develop the Land at Aalto's risk and for its own benefit (Recital E);
- (f) AIIS was required to make the Land available to Aalto to enable Aalto to develop the Land (clause 2.1);
- (g) Aalto was:
 - (i) required to use its best endeavours to obtain Development Borrowings from a third party financier (clause 7.1);
 - (ii) authorised to provide a real property mortgage over the Land, for this purpose (clause 8);
 - (iii) required to market and sell the units (clause 10);
 - (iv) required to pay any Development Income in the following order of priority (clause 9):
 - A. payment of the costs of sale of the units (including GST, sales commissions, mortgagee costs, legal fees and adjustments);
 - B. repayment of any amount owed to an External Lender;
 - C. payment of any unpaid Development Costs;
 - D. repayment of any unpaid Development Costs paid by Aalto;
 - E. repayment of any Development Costs paid by an LM Lender after 30 June 2011;
 - F. payment of the AIIS Entitlement, which was defined to be \$26,580,796 (clause 1.1); and
 - G. the balance to Aalto.

Jones Lange LaSalle Valuation Report

82. LMIM obtained a valuation report for the Land from Jones Lang LaSalle valuers, dated 12 April 2012.
83. The valuer assessed the market value of the Land as follows:
- (a) as is, described as current market land value with development approval: \$8.5 million (GST exclusive); and
 - (b) as if the Aalto Apartments development was complete: \$141,615,800 as a gross realisations value (GST inclusive).
84. The report also stated that:
- (a) it was prepared for LMIM for internal reporting purposes only (“valuation purpose,” page 3);
 - (b) the valuation was current as at the date of valuation only, being 12 April 2012 (page 4);
 - (c) the valuation was based on the following critical assumptions, conditions and limitations (page 2):
 - *The valuation is current as at the date of valuation only, being 12 April 2012. The value assessed herein may change significantly and unexpectedly over a relatively short period (including as a result of general market movements or factors specific to the particular property).*
 - *We do not accept liability for losses arising from such subsequent changes in value. Without limiting this statement, we do not accept any liability where this valuation is relied upon more than three months after the date of valuation, or earlier if you become aware of any factors that may have any effect on the valuation.*
 - *This report is relevant at the date of valuation and to the circumstances prevailing at that time. However, within a changing economic environment experiencing fluctuations in interest rates, inflation levels, rents and global economic circumstances, acceptable returns on investment may, as a consequence, be susceptible to future variation. We therefore strongly recommend that before any action is taken involving an acquisition, disposal, shareholding restructure or*

other transaction more than three months after the date of this report, you consult the Valuer.

Internal approvals for the Fifth Deed of Variation of the AIIS Loan

85. On 8 May 2012, Ms Ann McCallum, of the defendant's Property Asset Management section, sent an email with the subject: "AIIS and Aalto – redocumentation following Land Availability Agreement" to recipients described as "321 MPF Investment Committee."
86. The email dated 8 May 2012, sought approval (relevantly) for the term of the AIIS Loan to be extended to 1 September 2012.
87. Relevantly, the email stated that:
 - (a) as at 30 June 2011 the balance of the AIIS Loan totalled \$14,574,322.07;
 - (b) no further funds would be advanced to AIIS under the AIIS Loan, except for interest and fees relating to the first mortgage facility from the FMIF;
 - (c) on this basis, the balance of the AIIS Loan as at 31 March 2012, was \$15,086,480.07.
88. In response, the following persons approved the proposed transaction:
 - (a) Mr Andrew Petrik, by email dated 8 May 2012;
 - (b) Mr Grant Fischer, by email dated 8 May 2012;
 - (c) Mr Eghard van der Hoven, a director of the defendant, by email dated 8 May 2012;
 - (d) Mr Simon Tickner, by email dated 9 May 2012;
 - (e) Mr Scott King, by email dated 17 May 2012; and
 - (f) Ms Lisa Darcy, a director of the defendant, by email dated 17 May 2012.

Fifth Deed of Variation of the AIIS Loan

89. In accordance with the internal approvals obtained, as pleaded in paragraphs 85 to 88 above, on or about 14 August 2012:

- (a) PTAL as Lender;
- (b) LMIM ATF the MPF; and
- (c) AIIS as the Borrower,

entered into a Deed of Variation of the AIIS Loan (**“the Fifth Deed of Variation of the AIIS Loan”**).

90. Relevantly, the terms of the Fifth Deed of Variation of the AIIS Loan were:

- (a) the AIIS Loan was amended with effect at and from the Effective Date, to read as set out in Annexure A (clause 4.1);
- (b) the Effective Date was 1 July 2011 (clause 1.1);
- (c) relevantly, the terms of the “Loan Agreement” that was Annexure A to the Fourth Deed of Variation of the AIIS Loan were:
 - (i) the Borrower had requested the Loan from the Lender (Recital A);
 - (ii) the Lender had agreed to make the Loan available to the Borrower on the terms and conditions of the Loan Agreement (Recital B);
 - (iii) the “Loan” was \$16,800,000.00 (item 8, schedule);
 - (iv) the “Approved Purpose” was (item 1, schedule):
 - A. purchase and development of the Land;
 - B. payment of interest on the AIIS Loan;
 - C. payment of interest on the FMIF Loan; and
 - D. towards payment of the AIIS Entitlement, as defined in the Land Availability Agreement;

- (v) the “Commencement Date” was 23 December 2004 (item 4, schedule);
- (vi) the “Expiry Date” was 1 September 2012 (item 5, schedule);
- (vii) the Interest Rate was nil (item 6, schedule).

Fourth Priority Deed

91. On or about 14 August 2012:

- (a) PTAL ACF the FMIF, as First Lender or Custodian;
- (b) LMIM ATF the FMIF;
- (c) LMIM ATF the MPF, as Second Lender; and
- (d) AIIS as Mortgagor,

entered into a Priority Deed (“**the Fourth Priority Deed**”).

92. Relevantly, the Fourth Priority Deed provided that:

- (a) the First Lender’s Security, as pleaded in paragraph 43(a) above, had the first priority to the extent of all money secured by it, up to a total of \$8,295,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (b) the Second Lender’s Security, as pleaded in paragraph 43(b) above, had the second priority to the extent of all money secured by it, up to a total of \$18,800,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7);
- (c) the First Lender’s Security, as pleaded in paragraph 43(c) above, had the fourth priority to the extent of all money secured by it in excess of \$8,295,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (d) the Second Lender’s Security, as pleaded in paragraph 43(d) above, had the fourth priority to the extent of all money secured by it in excess of

\$18,800,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7).

Sixth Deed of Variation of the AIIS Loan

93. On or about 1 February 2013:

- (a) PTAL as Lender;
- (b) LMIM ATF the MPF; and
- (c) AIIS as the Borrower;

entered into a Deed of Variation of the AIIS Loan (**“the Sixth Deed of Variation of the AIIS Loan”**).

94. Relevantly, the terms of the Sixth Deed of Variation of the AIIS Loan were:

- (a) the AIIS Loan was amended with effect at and from the Effective Date, to read as set out in Annexure A (clause 4.1);
- (b) the Effective Date was 1 December 2012 (clause 1.1);
- (c) relevantly, the terms of the “Loan Agreement” that was Annexure A to the Sixth Deed of Variation of the AIIS Loan were:
 - (i) the Borrower had requested the Loan from the Lender (Recital A);
 - (ii) the Lender had agreed to make the Loan available to the Borrower on the terms and conditions of the Loan Agreement (Recital B);
 - (iii) the “Loan” was \$24,000,000.00 (item 8, schedule);
 - (iv) the “Approved Purpose” was (item 1, schedule):
 - A. purchase and development of the Land;
 - B. payment of interest on the AIIS Loan;
 - C. payment of interest on the FMIF Loan; and

- D. towards payment of the AIIS Entitlement, as defined in the Land Availability Agreement;
- (v) the “Commencement Date” was 23 December 2004 (item 4, schedule);
- (vi) the “Expiry Date” was 1 September 2013 (item 5, schedule);
- (vii) the Interest Rate was nil (item 6, schedule; clause 4 of the Loan Agreement).

Appointment of administrators to the defendant, and sale of the Land

- 95. The plaintiff repeats and relies upon the matters pleaded in paragraphs 9 to 14 above.
- 96. On a date that is unknown to the plaintiff, but which the plaintiff believes occurred in or about October 2013, the Land was sold.
- 97. The plaintiff and Calibre, in their then capacity as the trustees of the MPF, did not receive any money from the sale of the Land.

The defendant’s breaches of duty

Equitable duty of care

Third Deed of Variation of the AIIS Loan

- 98. In the premises pleaded in paragraphs 44 to 50 above, the defendant ATF the MPF entered into the Third Deed of Variation of the AIIS Loan, notwithstanding that the defendant knew, or ought to have known, that:

Combined loan to value ratio of 111.4%

- (a) by reason of the matters pleaded in paragraphs 31, 32, 41, 46(c), 47(i) and 52 above:
 - (i) interest on the FMIF Loan was capitalised to, and paid from, the AIIS Loan;

- (ii) the second registered mortgage that the defendant ATF the MPF held over the Land was the only security for the AIIS Loan of any value; and
 - (iii) the defendant ATF the MPF would not recover any moneys from the sale of the Land, while any amount above \$7,800,000.00 plus interest and costs remained owing to the defendant ATF the FMIF;
- (b) the Third Deed of Variation of the AIIS Loan increased the loan to value ratio of the FMIF and AIIS Loans to 111.4%, in that:
- (i) the increase to the Loan Amount of the AIIS Loan by the Third Deed of Variation of the AIIS Loan increased the total balance of the FMIF and AIIS Loans to \$13.2 million; and
 - (ii) the most recent valuation that had been obtained for the Land, which was the CBRE Valuation, had valued the Land at \$11.85 million;
- (c) in the premises, LMIM ATF the MPF failed to assess whether the security obtained for the AIIS Loan was adequate, in light of the increase to the Loan Amount of the AIIS Loan by the Third Deed of Variation of the AIIS Loan;

Reliance upon CBRE Valuation

- (d) the defendant ATF the MPF relied upon the CBRE Valuation in entering into the Third Deed of Variation of the AIIS Loan on or about 22 December 2009, in circumstances where:
- (i) the CBRE Valuation had been obtained in or about February 2008;
 - (ii) the defendant ATF the MPF failed to obtain an up to date valuation of the Land, before entering into the Third Deed of Variation of the AIIS Loan;
 - (iii) the CBRE Valuation had been performed on an “as is” basis, without taking any development approval into account;

- (iv) when LMIM ATF the MPF entered into the Third Deed of Variation of the AIIS Loan, a development approval had been obtained for commercial development of the Land;
- (v) notwithstanding the matters pleaded in subparagraph 98(d)(iii) and (iv) above, LMIM ATF the MPF did not obtain a valuation of the Land for commercial development purposes, before entering into the Third Deed of Variation of the AIIS Loan.

Fourth Deed of Variation of the AIIS Loan

99. In the premises pleaded in paragraphs 53 to 60 above, the defendant ATF the MPF entered into the Fourth Deed of Variation of the AIIS Loan, notwithstanding that the defendant knew, or ought to have known, that:

Combined loan to value ratio of 130%

- (a) by reason of the matters pleaded in paragraphs 31, 32, 41, 52, 55(d) and 56(k) above:
 - (i) interest on the FMIF Loan was capitalised to, and paid from, the AIIS Loan;
 - (ii) the second registered mortgage that the defendant ATF the MPF held over the Land was the only security for the AIIS Loan of any value; and
 - (iii) the defendant ATF the MPF would not recover any moneys from the sale of the Land, while any amount above \$7,800,000.00 plus interest and costs remained owing to the defendant ATF the FMIF;
- (b) the Fourth Deed of Variation of the AIIS Loan increased the loan to value ratio of the FMIF and AIIS Loans to 130%, in that:
 - (i) the increase to the Loan Amount of the AIIS Loan by the Fourth Deed of Variation of the AIIS Loan increased the total balance of the FMIF and AIIS Loans to \$15.3 million; and

- (ii) the most recent valuation that had been obtained for the Land, which was the CBRE Valuation, had valued the Land at \$11.85 million;
- (c) in the premises, LMIM ATF the MPF failed to assess whether the security obtained for the AIIS Loan was adequate, in light of the increase to the Loan Amount of the AIIS Loan by the Fourth Deed of Variation of the AIIS Loan;

Reliance upon CBRE Valuation

- (d) the defendant ATF the MPF relied upon the CBRE Valuation in entering into the Fourth Deed of Variation of the AIIS Loan on or about 6 October 2010, in circumstances where:
 - (i) the CBRE Valuation had been obtained in or about February 2008;
 - (ii) in the premises, the defendant ATF the MPF failed to obtain an up to date valuation of the Land, before entering into the Fourth Deed of Variation of the AIIS Loan;
 - (iii) the CBRE Valuation had been performed on an “as is” basis, without taking any development approval into account;
 - (iv) when LMIM ATF the MPF entered into the Fourth Deed of Variation of the AIIS Loan, AIIS intended to undertake a residential development of the Land;
 - (v) notwithstanding the matters pleaded in subparagraph 99(d)(iv) above, LMIM ATF the MPF did not obtain a valuation of the Land for residential development purposes, before entering into the Fourth Deed of Variation of the AIIS Loan.

Extension Letter for the AIIS Loan

100. In the premises pleaded in paragraphs 63 to 68 above, the defendant ATF the MPF entered into the Extension Letter, notwithstanding that the defendant knew, or ought to have known, that:

Combined loan to value ratio of 130%

- (a) by reason of the matters pleaded in paragraphs 31, 32, 41, 61, 62, 55(d) and 64(h) above:
 - (i) interest on the FMIF Loan was capitalised to, and paid from, the AIIS Loan;
 - (ii) the second registered mortgage that the defendant ATF the MPF held over the Land was the only security for the AIIS Loan of any value; and
 - (iii) the defendant ATF the MPF would not recover any moneys from the sale of the Land, while any amount above \$7,920,000.00 plus interest and costs remained owing to the defendant ATF the FMIF;
- (b) the matters pleaded in paragraphs 99(b) and 99(c) above, upon which the plaintiff repeats and relies;

Reliance upon CBRE Valuation

- (c) the defendant ATF the MPF relied upon the CBRE Valuation in entering into the Extension Letter on or about 27 May 2011, in circumstances where:
 - (i) the CBRE Valuation had been obtained in or about February 2008;
 - (ii) in the premises, the defendant ATF the MPF failed to obtain an up to date valuation of the Land, before entering into the Extension Letter;
 - (iii) the CBRE Valuation had been performed on an “as is” basis, without taking any development approval into account;
 - (iv) when LMIM ATF the MPF entered into the Extension Letter, AIIS intended to undertake a residential development of the Land;
 - (v) notwithstanding the matters pleaded in subparagraph 100(c)(iv) above, LMIM ATF the MPF did not obtain a valuation of the Land

for residential development purposes, before entering into the Extension Letter.

Fifth Deed of Variation of the AIIS Loan

101. In the premises pleaded in paragraphs 85 to 88 above, the defendant ATF the MPF entered into the Fifth Deed of Variation of the AIIS Loan, notwithstanding that the defendant knew, or ought to have known, that:

Feasibility fails to include interest accruing on development costs

- (a) AIIS had entered into the Land Availability Agreement, as pleaded in paragraphs 80 and 81 above;
- (b) as pleaded in paragraph 81(g)(iv)(F) above, the maximum amount that AIIS was entitled to receive pursuant to the terms of the Land Availability Agreement was the “AIIS Entitlement” of \$26,580,796;
- (c) the AIIS Entitlement was calculated in the manner pleaded in paragraph 79 above; that is, by calculating:
 - (i) the amounts owing under the FMIF and AIIS Loans as at 30 June 2011; and
 - (ii) the interest that would accrue on the FMIF and AIIS Loans over the life of the Aalto Apartments development; and
 - (iii) interest that would accrue to LMIM ATF the MPF, on funded development costs over the life of the project;
- (d) the MPF Credit Committee approval for the Fifth Deed of Variation of the AIIS Loan, was provided on the basis of the feasibility for the Aalto Apartments development, pleaded in paragraph 76(c) above;
- (e) the feasibility for the Aalto Apartments development was calculated based on the following costs totalling \$23.64 million, over the life of the Aalto Apartments development:

- (i) a combined loan balance of \$16.05 million for the FMIF and AIIS Loans, as at 8 November 2011; and
 - (ii) interest totalling \$7.59 million on the FMIF and AIIS Loans, for a project life of 41 months;
- (f) the feasibility the defendant prepared for the Aalto Apartments development did not take into account the additional amount of \$2,940,796.00 in interest that would accrue to the MPF over the life of the project, as included in the AIIS Entitlement;

Particulars

\$2,940,796.00 is the difference between the AIIS Entitlement of \$26,580,796, and the amount of \$23.64 million included for principal and interest in the defendant's feasibility for the Aalto Apartments development and pleaded in paragraph 101(e) above;

- (g) in the premises, if LMIM ATF the MPF had included in its feasibility for the Aalto Apartments development the additional amount of \$2,940,796.00 in interest that would accrue to the MPF over the life of the project, as included in the AIIS Entitlement, the defendant's feasibility for the Aalto Apartments development would have predicted a shortfall;

Reliance upon Jones Lang LaSalle Valuation

- (h) the defendant ATF the MPF relied upon the Jones Lang LaSalle valuation dated 12 April 2012, in entering into the Fifth Deed of Variation of the AIIS Loan on or about 14 August 2012, in circumstances where:
- (i) that valuation had been prepared for the defendant for internal reporting purposes only, as pleaded at paragraph 84(a) above;
 - (ii) that valuation was valid at the date of valuation only, as pleaded at paragraph 84(c) above; and

- (iii) Jones Lang LaSalle did not accept any liability where the valuation was relied upon more than three months after the date of valuation, as pleaded at paragraph 84(c) above;

FMIF and AIIS Loans exceed the amount allowed for in the feasibility

- (i) the plaintiff repeats and relies upon paragraph 101(e) above;
- (j) by no later than 1 May 2012, the defendant ATF the MPF was aware that:
 - (i) the balance of the FMIF Loan was \$8,126,000.00, as at 31 March 2012;
 - (ii) the balance of the AIIS Loan was \$15,989,000 as at 3 April 2012; and
 - (iii) the maximum approved Loan Amount of the FMIF Loan was \$8,295,000 as at 31 March 2012;

Particulars

Recorded in a project summary for the Aalto Apartments dated 30 April 2012, attached to an email from Ms Shelley Chalmers of the defendant to the MPF Investment Committee, dated 1 May 2012;

- (k) in the premises:
 - (i) as at 3 April 2012, the combined balances of the FMIF Loan and the AIIS Loan totalled \$24,115,000.00;
 - (ii) as at 3 April 2012, the combined balances of the FMIF Loan and the AIIS Loan exceeded the amount of \$23.64 million allowed for these costs in the feasibility LMIM ATF the MPF had prepared for the Aalto Apartments development, as pleaded at paragraph 101(e) above;

(iii) upon execution of the Fifth Deed of Variation of the AIIS Loan, the combined Loan Amounts of the FMIF Loan and the AIIS Loan totalled \$25.095 million, comprising:

A. the Loan Amount of \$16.8 million for the AIIS Loan, provided for by the Fifth Deed of Variation of the AIIS Loan; and

B. the Loan Amount of \$8,295,000 for the FMIF Loan, as pleaded at paragraph 101(j)(iii) above; and

(iv) in the premises, the increase to the Loan Amount of the AIIS Loan by the Fifth Deed of Variation of the AIIS Loan permitted the combined Loan Amounts of the FMIF and AIIS Loans to exceed the amount of \$23.64 million LMIM ATF the MPF had allowed for these costs in the feasibility it had prepared for the Aalto Apartments development, as pleaded at paragraph 101(e) above.

Sixth Deed of Variation of the AIIS Loan

102. In the premises pleaded in paragraphs 93 and 94 above, the defendant ATF the MPF entered into the Sixth Deed of Variation of the AIIS Loan, notwithstanding the defendant knew, or ought to have known, that:

No internal approvals

(a) the defendant ATF the MPF did not prepare any Synopsis in respect of the Sixth Deed of Variation of the AIIS Loan;

(b) the Sixth Deed of Variation of the AIIS Loan was not approved by the MPF Credit Committee or the MPF Investment Committee;

(c) in the premises the defendant ATF the MPF failed to assess whether the security obtained for the AIIS Loan was adequate, in light of the increase to the Loan Amount of the AIIS Loan by the Sixth Deed of Variation of the AIIS Loan;

Feasibility fails to include interest accruing on development costs

- (d) the matters pleaded in paragraphs 101(a) to 101(g) above, upon which the plaintiff repeats and relies;

Reliance upon Jones Lang LaSalle Valuation

- (e) the defendant ATF the MPF relied upon the Jones Lang LaSalle valuation dated 12 April 2012 in entering into the Sixth Deed of Variation of the AIIS Loan on or about 1 February 2013, in circumstances where:
 - (i) that valuation had been prepared for the defendant for internal reporting purposes only, as pleaded at paragraph 84(a) above;
 - (ii) that valuation was valid at the date of valuation only, as pleaded at paragraph 84(c) above; and
 - (iii) Jones Lang LaSalle did not accept any liability where the valuation was relied upon more than three months after the date of valuation, as pleaded at paragraph 84(c) above;

FMIF and AIIS Loans exceed the amount allowed for in the feasibility

- (f) upon execution of the Sixth Deed of Variation of the AIIS Loan, the combined Loan Amounts of the FMIF Loan and the AIIS Loan totalled at least \$32,295,000, comprising:
 - (i) the Loan Amount of \$24 million for the AIIS Loan, provided for by the Sixth Deed of Variation of the AIIS Loan; and
 - (ii) the Loan Amount of \$8,295,000 for the FMIF Loan, as pleaded at paragraph 101(j)(iii) above; and
- (g) in the premises, the increase to the Loan Amount of the AIIS Loan by the Sixth Deed of Variation of the AIIS Loan permitted the combined Loan Amounts of the FMIF and AIIS Loans to exceed the amount of \$23.64 million LMIM ATF the MPF had allowed for these costs in the feasibility it had prepared for the Aalto Apartments development, as pleaded at paragraph 101(e) above;

FMIF and AIIS Loans exceed the AIIS Entitlement

- (h) the plaintiff repeats and relies upon paragraphs 101(a), 101(b) and 102(f) above;
- (i) in the premises, by the execution of the Sixth Deed of Variation of the AIIS Loan, the combined Loan Amounts of the FMIF and AIIS Loans exceeded the amount AIIS was entitled to recover pursuant to the AIIS Entitlement.

Breach of duty

103. In the premises pleaded in:

- (a) paragraphs 98(a) to 98(c) above, by entering into the Third Deed of Variation of the AIIS Loan;
- (b) paragraphs 99(a) to 99(c) above, by entering into the Fourth Deed of Variation of the AIIS Loan;
- (c) paragraphs 100(a) and 100(b) above, by entering into the Extension Letter for the AIIS Loan;
- (d) paragraphs 101(i) to 101(k) above, by entering into the Fifth Deed of Variation of the AIIS Loan; and
- (e) paragraphs 102(f) to 102(i) above, by entering into the Sixth Deed of Variation of the AIIS Loan,

the defendant breached the duty that it owed to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty, in that the duties that it owed to the beneficiaries of the MPF conflicted with the duties that it owed to the beneficiaries of the FMIF.

104. In the premises pleaded in paragraphs 98 to 102 above, by entering into the Third, Fourth, Fifth and Sixth Deeds of Variation of the AIIS Loan and the Extension Letter, and by performing the terms of these Deeds and the Extension Letter, the defendant breached the duty it owed to the beneficiaries of the MPF

to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.

Duties under the *Trusts Act 1973 (Qld)*

105. In the premises pleaded in paragraphs 98 to 102 above, by entering into the Third, Fourth, Fifth and Sixth Deeds of Variation of the AIIS Loan and the Extension Letter, and by performing the terms of these Deeds and the Extension Letter, the defendant breached the duty it owed pursuant to s.22 of the *Trusts Act 1973 (Qld)*, to exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, when exercising a power of investment.
106. The defendant breached the duty that it owed pursuant to s.24(e) of the *Trusts Act 1973 (Qld)* to take into account the risk of capital or income loss or depreciation when exercising its power of investment:
 - (a) by entering into the Third Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 98 above;
 - (b) by entering into the Fourth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 99 above;
 - (c) by entering into the Extension Letter and by performing the terms of the Extension Letter, in the premises pleaded in paragraph 100 above;
 - (d) by entering into the Fifth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 101 above; and
 - (e) by entering into the Sixth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 102 above.

107. The defendant breached the duty that it owed pursuant to s.24(g) of the *Trusts Act* 1973 (Qld) to take into account the likely income return and the timing of income return:

- (a) by entering into the Third Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 98 above;
- (b) by entering into the Fourth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 99 above;
- (c) by entering into the Extension Letter and by performing the terms of the Extension Letter, in the premises pleaded in paragraph 100 above;
- (d) by entering into the Fifth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 101 above; and
- (e) by entering into the Sixth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 102 above.

108. The defendant breached the duty that it owed pursuant to s.24(h) of the *Trusts Act* 1973 (Qld) to take into account the length of the term of the proposed investment:

- (a) by entering into the Third Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 98 above;
- (b) by entering into the Fourth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 99 above;
- (c) by entering into the Extension Letter and by performing the terms of the Extension Letter, in the premises pleaded in paragraph 100 above;

- (d) by entering into the Fifth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 101 above; and
 - (e) by entering into the Sixth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 102 above.
109. The defendant breached the duty that it owed pursuant to s.24(j) of the *Trusts Act* 1973 (Qld) to take into account the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment:
- (a) by entering into the Third Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 98 above;
 - (b) by entering into the Fourth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 99 above;
 - (c) by entering into the Extension Letter and by performing the terms of the Extension Letter, in the premises pleaded in paragraph 100 above;
 - (d) by entering into the Fifth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 101 above; and
 - (e) by entering into the Sixth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 102 above.
110. The defendant breached the duty that it owed pursuant to s.24(n) of the *Trusts Act* 1973 (Qld) to take into account the cost of making the proposed investment:
- (a) by entering into the Third Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 98 above;

- (b) by entering into the Fourth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 99 above;
- (c) by entering into the Extension Letter and by performing the terms of the Extension Letter, in the premises pleaded in paragraph 100 above;
- (d) by entering into the Fifth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 101 above; and
- (e) by entering into the Sixth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 102 above.

Loss suffered by the MPF

111. In consequence of the defendant's breaches of duty:

- (a) the defendant ATF the MPF caused amounts totalling \$11,385,581.62 to be paid to AIIS, or to be paid at the direction of AIIS, pursuant to the terms of the AIIS Loan;
- (b) the defendant ATF the MPF received payments in respect of the AIIS Loan totalling \$4,228,314.36, which:
 - (i) are first applied to the interest of \$618,365.83 that had accrued on the AIIS Loan, at the time of receiving these payments;
 - (ii) the balance of \$3,609,948.53 is applied to the amounts paid to, or at the direction of AIIS, as pleaded in paragraph 111(a);
 - (iii) in the premises, the assets of the defendant ATF the MPF were depleted by a net amount of \$7,775,633.09;
- (c) the defendant ATF the MPF caused the payments pleaded in paragraph 111(a) to be made, in circumstances where the only real property security that the defendant ATF the MPF held for the AIIS Loan was the second registered mortgage over the Land;

- (d) when the Land was sold, as pleaded in paragraphs 96 and 97 above, the plaintiff and Calibre ATF the MPF did not receive any money from the sale of the Land;
- (e) in the premises, by reason of the defendant's breaches of duty:
 - (i) the assets of the defendant ATF the MPF were depleted by the amount of \$11,385,581.62 paid to AIIS, or paid at the direction of AIIS, less the \$3,609,948.53 of payments received and applied to that amount; resulting in the assets of the defendant ATF the MPF being depleted by the net amount of \$7,775,633.09 and
 - (ii) the plaintiff ATF the MPF has lost the amount of \$11,385,581.62 paid to AIIS, or paid at the direction of AIIS, less the \$3,609,948.53 of payments received and applied to that amount; resulting in a net loss of \$7,775,633.09;
 - (iii) the defendant ATF the MPF lost the opportunity to lend the money paid to AIIS to a different borrower, and thereby recover the amount advanced, and earn interest on the money advanced.

Particulars

The best particulars that the plaintiff presently can provide are that the defendant ATF the MPF would have earned interest approximately equal to the amount of interest that accrued on the AIIS Loan, but which (in the premises pleaded in paragraphs 96 and 97 above) was never recovered by the defendant ATF the MPF.

The best particulars that the plaintiff presently can provide of the amount of interest that accrued on the AIIS Loan, but which was not recovered by the defendant ATF the MPF, are that an account statement for the AIIS Loan dated 22 November 2011 records that \$9,044,723.21 in interest accrued up to 22 November 2011, and which included interest that was pre-booked up to 31 March 2015.

Interest paid on the FMIF Loan

112. The plaintiff repeats paragraphs 22 to 25 above.

113. Up to 2 January 2013 AIIS, or the defendant ATF the MPF, paid \$3,905,721.81 to the defendant ATF the FMIF, or alternatively to PTAL as Custodian of the FMIF, in interest accruing on the FMIF Loan.

114. In the premises pleaded in paragraphs 46(c), 47(i), 55(d), 56(k), 64(h), 87(b), 90(c)(iv)(C) and 94(c)(iv)(C) above, the payments pleaded in paragraph 113 were made from the amounts LMIM ATF the MPF advanced to AIIS pursuant to the AIIS Loan.

Constructive trust

115. The defendant was:

- (a) in the premises pleaded in paragraphs 4 to 8 above, aware that it, ATF the MPF, held the assets of the MPF on trust for the beneficiaries of the MPF;
- (b) in the premises pleaded in paragraphs 44 to 48, 53 to 58, 63 to 66, 85 to 88 and 98 to 110 above, aware that the payments to itself ATF the FMIF, or alternatively to PTAL as Custodian of the FMIF, of \$3,905,721.81 were made in breach of trust.

116. Insofar as PTAL may hold in its capacity as Custodian of the FMIF:

- (a) the amount of \$3,905,721.81, as pleaded in paragraph 113 above, it holds that amount as agent for the defendant ATF the FMIF pursuant to clause 2.1 of the Custody Agreement;
- (b) assets representing the value it received from the payments of \$3,905,721.81, as pleaded in paragraph 113 above, it holds those assets as agent for the defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement.

117. In the premises, the defendant ATF the FMIF holds the amount of \$3,905,721.81, as pleaded in paragraph 113 above, on a constructive trust for the plaintiff, in its capacity as trustee of the MPF.

Right of subrogation

118. The plaintiff repeats paragraphs 112 to 114 above.
119. The payments totalling \$3,905,721.81 pleaded in paragraph 113 above delivered value to the defendant ATF the FMIF in relation to which the plaintiff is entitled to trace.
120. The defendant is insolvent.
121. In the premises:
- (a) the defendant received the interest payments accruing on the FMIF Loan totalling \$3,905,721.81, in its capacity as trustee of the FMIF;
 - (b) as a former trustee of the FMIF, the defendant has a right of indemnity out of the assets of the FMIF, in respect of the defendant's liability in this proceeding regarding the interest payments totalling \$3,905,721.81.
122. Any right of indemnity of the defendant ATF the FMIF operates as an equitable lien or charge over the assets of the FMIF.
123. The defendant ATF the FMIF holds the assets of the FMIF subject to any right of indemnity charge and lien of the defendant over those assets.
124. By reason of the matters pleaded in paragraphs 112 to 114, and 118 to 123 above, the plaintiff is entitled to be subrogated to the defendant's right of indemnity and lien or charge, in respect of the defendant's liability in this proceeding regarding the payments totalling \$3,905,721.81 pleaded in paragraph 113.

The plaintiff claims the following relief:

1. Equitable compensation calculated as follows:

Payments pursuant to the AIIS Loan of	\$11,385,581.62
<u>Less</u> receipts applied to principal of	\$3,609,648.53
Net Loss	\$7,775,633.09
<u>Plus</u> lost opportunity interest	<u>\$9,044,723.21</u>
Equitable compensation:	<u>\$16,820,356.30;</u>

2. A declaration that the defendant ATF the FMIF holds the amount of \$3,905,721.81 on constructive trust for the plaintiff, in its capacity as trustee of the MPF;
3. A declaration that:
 - (a) the plaintiff is entitled to be indemnified out of the assets of the FMIF in respect of the defendant's liability to the plaintiff in this proceeding, in respect of the amount of \$3,905,721.81;
 - (b) the plaintiff has a lien or charge over the assets and undertaking of the FMIF in respect of the defendant's liability to the plaintiff in this proceeding, in respect of the amount of \$3,905,721.81;
 - (c) the plaintiff is entitled to be subrogated to the rights of the defendant in respect of the assets of the FMIF, in respect of the amount of \$3,905,721.81;
4. Interest pursuant to s.58 of the *Civil Proceedings Act* 2011 (Qld) but excluding interest on so much of the claim for equitable compensation as includes the lost opportunity to earn interest;
5. Costs;
6. Such further or other order as the Court sees fit.

Signed:

Mick Elin.

Description:

SOLICITOR FOR THE PLAINTIFF.

This pleading was settled by Andrew Crowe QC and Ms Ahern of Counsel.

NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.