

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 5329/15

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

AFFIDAVIT

JARROD VILLANI of Level 14, 12 Creek Street, Brisbane in the State of Queensland,
chartered accountant, states on oath:

Introduction

1. I am an Executive Director and authorised officer of KordaMentha, the accounting firm representing of KordaMentha Pty Ltd ("**Trustee**") the trustee of the LM Managed Performance Fund ("**MPF**").
2. I am duly authorised by Messrs Korda and Mentha, the directors of the Trustee, to swear this affidavit on its behalf.
3. Except where otherwise indicated, the matters deposed to in this affidavit are deposed to from my own personal knowledge of the facts and circumstances. Where I depose to matters from information and belief, I believe those matters to be true.
4. This affidavit is sworn in support of an originating application ("**S 96 Application**") by the Trustee for directions pursuant to section 96 of the *Trusts Act* 1973 (Qld) ("**Trusts Act**") as to whether it is justified in prosecuting proceedings against the LMIM (defined below).
5. The Trustee is also relying in the S 96 Application on, inter alia:

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Signed: 

AFFIDAVIT OF JARROD VILLANI

Filed on behalf of the applicant

Taken by: 

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- (a) a written statement of facts ("**First Statement of Facts**") prepared pursuant to section 96(1) of the Trusts Act for Supreme Court Proceeding S8032/14 ("**First Proceeding**");
- (b) a written statement of facts ("**Second Statement of Facts**") prepared pursuant to section 96(1) of the Trusts Act for Supreme Court Proceeding S8034/14 ("**Second Proceeding**").
6. To minimise duplication, I do not exhibit to this affidavit documents that are annexed to either statement of facts.
7. I also do not in this affidavit depose to every fact covered in the statements of fact.
8. Upon the hearing of the S 96 Application, the Trustee will seek to tender two confidential and privileged legal advices, and submit that this Honourable Court should make an appropriate confidentiality order in respect of the advices to preserve the Trustee's legal professional privilege.

Parties

9. The defendant in the First Proceeding and the Second Proceeding (together, the "**Proceedings**"), LM Investment Management Limited (Receivers and Managers appointed)(in Liquidation)(ACN 077 208 461) ("**LMIM**") was incorporated on 31 January 1997. A historical company search of LMIM obtained from the Australian Securities and Investments Commission's ("**ASIC**") electronic database on 3 March 2015 is annexed to the First Statement of Facts.
10. LMIM established a unit trust called the LM Managed Performance Fund and became trustee of that trust by deed of 4 December 2001 ("**the First Trust Deed**"). The deed was called the 'Constitution'. A true copy of the deed is annexed to the First Statement of Facts.
11. Pursuant to:
- (a) Deed of Variation dated 11 November 2002 ("**the Second Trust Deed**"), LMIM deleted all parts of the First Trust Deed other than the parties, and replaced it with the terms set out in the Second Trust Deed (Recital B of the

Second Trust Deed). A true copy of the deed is annexed to the Statement of Facts;

(b) Deed of Variation dated 25 November 2009 ("**the Third Trust Deed**"), LMIM deleted clauses 1, 2.3, 2.4 and 3 to 27 of the Second Trust Deed, and replaced it with the terms set out in the Schedule to the Third Trust Deed (clause 1 of the Third Trust Deed). A true copy of the deed is annexed to the Statement of Facts.

12. There is a further trust deed called the 'Supplemental Deed Poll' dated 23 October 2012 ("**the Fourth Trust Deed**"). Pursuant to the Fourth Trust Deed, LMIM amended clauses of the Third Trust Deed (specifically, in respect of classes of units) as set out in the Schedule to the Fourth Trust Deed. A true copy of the deed is annexed to the First Statement of Facts.
13. This is the first time of which I am aware that the Fourth Trust Deed has been included in the suite of documents that are considered to be the MPF's constitution. I do not know the reason why the Fourth Trust Deed was not identified as an MPF Constitution document prior to April 2015. The Fourth Trust Deed does not materially alter the way the MPF is to be administered.
14. The Trustee is also in possession of an undated document entitled "Consolidated Constitution" for the MPF. This document contains no signing pages. I have not been able to confirm the authenticity or effectiveness of this document so I am not relying upon it.
15. Pursuant to the First, Second, Third and Fourth Trust Deeds, LMIM agreed, among other things, to act as trustee of the scheme, and declared that it held the scheme fund and the scheme property on trust for the members.
16. LMIM remained the trustee of the MPF until it was removed and replaced by KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Ltd (ACN 108 318 985) by order of the Chief Justice of Queensland made on 12 April 2013.
17. A true copy of the Chief Justice's order of 12 April 2013 is annexed to the First Statement of Facts. Historical company searches obtained from ASIC's electronic



database on 3 March 2015 of KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Ltd (ACN 108 318 985) are annexed to the First Statement of Facts.

18. Calibre Capital Ltd ceased to be a trustee of the MPF on 5 January 2015.
19. LMIM is also, and has at all material times been, the responsible entity for the LM First Mortgage Income Fund (ARSN 089 343 288) ('FMIF'), a registered managed investment scheme.
20. LMIM is also, and has at all material times been, the responsible entity of the LM Australian Income Fund (ARSN 133 497 917), a registered managed investment scheme.
21. The Trust Company (PTAL) Limited ("PTAL") is a professional corporate trustee (formerly known as Permanent Trustee Australia Limited). Pursuant to the terms of a Custody Agreement dated 4 February 1999:
 - (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); and
 - (b) LMIM was responsible for taking all decisions in relation to the Portfolio and, subject to the Custody Agreement, PTAL was required to act on LMIM's Instructions in relation to any assets of the Portfolio (clause 4.1).
22. The Custody Agreement is annexed to the First Statement of Facts.

Trustee's principal steps in the Proceedings to date

23. On 27 August 2014, the Trustee commenced the Proceedings.
24. The claim and statement of claim in each of the Proceedings has not been served on LMIM.
25. On 29 May 2015, the Trustee applied before the Honourable Justice P Lyons for orders regarding service of its S 96 Application and the supporting material, upon the unitholders of the MPF. Annexed to the First Statement of Facts is a true copy



of his Honour's Order made on 29 May 2015. The Trustee's compliance with the orders for service will be the subject of a separate affidavit.

26. The S 96 Application is currently listed for hearing at 10.00am on 17 June 2015 but it might need to be adjourned because of circumstances explained further below in relation to litigation funding.
27. On 1 June 2015, the Trustee filed an application in each of the Proceedings seeking retrospective leave under section 500(2) of the *Corporations Act 2001* (Cth) ("S 500 Applications") in relation to the commencement of the Proceedings.
28. The S 500 Applications are also listed for hearing at 10.00am on 17 June 2015 but might also need to be adjourned for the same reasons.

Estimated Value of MPF

29. The Trustee estimates that the current net cash holdings of the MPF as at 1 June 2015, are approximately \$4,611,215.23, prior to future realisations, other recovery actions and future costs and expenses ("**Net Cash Holdings**").
30. Absent future realisations and other successful recovery actions, the Net Cash Holdings will diminish over time due to:
 - (a) the Trustee funding the prosecution of the First Proceeding or the Second Proceeding (if so directed);
 - (b) the Trustee's costs to prosecute proceeding S8792 of 2013 against LMIM ("**Peregian Beach Proceeding**");
 - (c) the Trustee's costs of its defence of proceeding S12317/14 commenced by LMIM ("**FMIF Proceeding**");
 - (d) the general need for the Trustee to fulfil its role as trustee, which includes investigating the past conduct of LMIM as trustee for the MPF.
31. The Peregian Beach proceeding and the FMIF Proceeding are described in more detail in the First Statement of Facts.

32. A total or even a significant loss in the FMIF Proceeding would likely reduce the Net Cash Holdings to nil. An adverse costs order after judgment in the Peregian Beach Proceeding would also reduce the Net Cash Holdings but not to nil. The Net Cash Holdings amount does not include any amount that might be recovered in the Peregian Beach Proceeding.
33. The Management Accounts of the MPF as at 28 February 2013, show invested funds of \$404,489,355.67 remain unpaid to unitholders. The loss to unitholders of the MPF in the absence of any return is likely to be at least this amount.

Estimated value of the assets of LMIM and the FMIF

34. LMIM is in liquidation, and the Trustee understands that LMIM will have no money to meet any judgment against it.
35. Annexed to the First Statement of Facts is a report dated 30 April 2015 (“**FMIF Report**”) by Mr David Whyte of BDO, the court appointed receiver of the FMIF.
36. The Report estimates that (as at 31 March 2015) the net amount of funds available to distribute to unitholders in the FMIF to be between \$68,567,176 and \$81,203,065.
37. This includes the amount of \$35,100,676 described as “cash at bank”.
38. The Report shows that the FMIF should have sufficient funds to satisfy a declaration that LMIM holds the sums sought in the Proceedings on constructive trust.
39. However, I have not been able to independently verify the contents of the Report in this respect.

Litigation funding

40. Funding litigation in the Proceedings will be very expensive. Further, the Trustee is currently using the Net Cash Holdings to fund the Peregian Beach Proceeding, the FMIF Proceeding and the general administration of the MPF.

41. The Trustee also has to monitor possible future liabilities of the Trustee (for example, adverse judgments or costs orders) given that the only non-contingent source of funds for the Trustee's indemnity is out of the Net Cash Holdings.
42. These issues are discussed in more detail in the First Statement of Facts.
43. Due to the relatively limited size of the Net Cash Holdings and the issues just mentioned, the Trustee is seeking litigation funding for the Proceedings. If litigation funding cannot be obtained on satisfactory terms, it is likely that the Trustee will not prosecute the Proceedings.
44. The Trustee would of course take into consideration any offer from the unitholders of the MPF to fund the Proceedings.
45. The Trustee is trying to obtain an answer in relation to litigation funding as soon as possible. However, if it does not have a satisfactory answer soon, it might be necessary to adjourn the S 96 Application and the S 500 Applications.

The Trustee's opinion

46. Subject to the Trustee being able to obtain litigation funding for the one or both of the Proceedings, it is the opinion of the Trustee that it is in the best interests of the members of the MPF, that the Trustee prosecutes the Proceedings for which it obtains funding.
47. The Trustee is of this opinion because:
 - (a) the Trustee has been advised by its lawyers that it has reasonable prospects of successfully prosecuting the Proceedings;
 - (b) if the Trustee's claim in the First Proceeding is successful, the estimated net benefit after the payment of fees and costs will be approximately \$8.68M (the amount claimed minus \$1,047,089.31, being the estimated total of the Trustee's fees and legal expenses up to and including a trial) (excluding judgment interest). This would represent a 188% increase to the current asset pool of the MPF, from approximately \$4.6M to \$13.28;



(c) if the Trustee's claim in the Second Proceeding is successful, the estimated net benefit after the payment of fees and costs will be approximately \$17.47M (the amount claimed minus \$1,080,422.62, being the estimated total of the Trustee's fees and legal expenses up to and including a trial) (excluding judgment interest). This would represent a 380% increase to the current asset pool of the MPF, from approximately \$4.6M to \$22.07;

48. This estimate assumes that the Proceedings are conducted separately. I am advised by my lawyers, that it might be possible in due course to have the Proceedings heard at the same time by one judge to reduce fees, costs and expenses.


SWORN by JARROD VILLANI on
at Brisbane

4 June 2015

in the presence of:



Deponent



Solicitor