

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: Brisbane**  
**NUMBER: 8792 of 2013**

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

AND

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

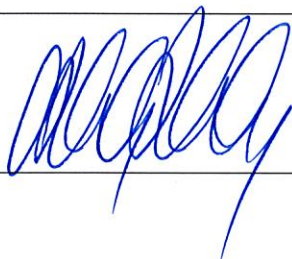
AND

Second Defendant: **TRUST COMPANY (PTAL) LIMITED  
ACN 008 412 913**

**ASHLEY JOHN TIPLADY** of Level 18, 300 Queen Street, Brisbane in the State of Queensland, Solicitor, states on oath:-

1. I am a partner of the firm Russells and have carriage of Supreme Court Proceeding Number 8792/13 on behalf of LM Investment Management Pty Ltd (in liquidation) (receivers and managers appointed) ("LMIM"), being the First Defendant to this proceeding. LMIM is the responsible entity for the LM Australian Income Fund ("the AIF")

2. By the application to be filed by leave on 5 November, 2015 ("the Application"), the First Defendant seeks:



Signed

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Solicitor/Barrister/Justice of the Peace



**AFFIDAVIT OF ASHLEY JOHN TIPLADY**

Filed on behalf of the First Defendant

Form 46 Rule 431

**Russells**  
Level 18  
300 Queen Street  
**BRISBANE 4000**  
Phone: 07 3004 8888  
Fax: 07 3004 8899

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- (a) interlocutory orders to effect service of the material in support of the final relief sought in the Application upon the members of the AIF; and
- (b) judicial advice pursuant to section 96 of the *Trusts Act 1973* (Qld) (“the Act”) with respect to the management and administration of trust property and with respect to the exercise of the power and discretion vested in the trustees of the AIF.

3. Pursuant to section 96 of the Act, the First Defendant is required to serve “all persons interested in the application” with the Application. The purpose of this Affidavit is to support an application seeking orders dispensing with the need for personal service of the Application on the members of the AIF, being persons who are interested in the Application.

4. I am informed by Kelly-Anne Trenfield, a senior managing director of FTI Consulting, the firm engaged by the liquidators of LMIM, and who oversees the day to day tasks involved in the winding up of LMIM in its capacity as the responsible entity of the AIF and verily believe that:

- (a) the AIF has in excess of 700 members;
- (b) a website (the address of which is [www.lminvestmentadministration.com](http://www.lminvestmentadministration.com)) (“the Website”) is maintained for the purpose of providing information to members of the various funds in respect of which LMIM is the responsible entity;
- (c) the normal procedure for delivery of a notice to members of a fund is to send an email to each of the member’s last known email address providing a link to the relevant section of the Website;

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Signed

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Solicitor/Barrister/Justice of the Peace

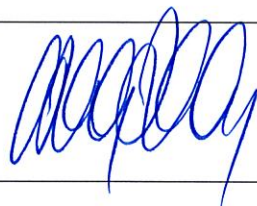


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- (d) that if notice is given to members of the AIF in the above manner, it is anticipated that such notice will come to the attention of the members within a reasonable time;
- (e) there are some members of the AIF who have not provided FTI Consulting with an email address. In the case of those few members, delivery of notices is made by post (where a postal address is known);
- (f) that service of the Application by way of personal service or by way of post to each of the more than the 700 members of the AIF would be expensive and time consuming, noting that members are located throughout Australia and in several overseas countries;
- (g) that, in total, there are 698 email addresses held for members out of a total membership of 716 and of those remaining 18 members for whom LMIM does not have an email address, LMIM holds a postal address; and
- (h) on a previous occasion when the liquidators of LMIM have caused emails to be sent to the 698 email addresses held for the AIF members, there were 16 delivery failure notices received in response.

5. The documents proposed to be served on the AIF members are:-

- (i) the Application;
- (ii) the Statement of Facts in support of the Application;
- (iii) this affidavit;
- (iv) any order made as to service upon the AIF members; and
- (v) the substantive affidavits (including all the exhibits) that the First Defendant intends to rely upon in support of the Application.

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Signed

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Solicitor/Barrister/Justice of the Peace



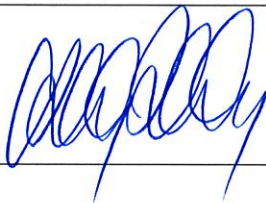
6. In addition to the above documents, it is intended to provide to the AIF members a Notice to Members which explains the substantive terms of the proposed Deed of Settlement (which is being drafted between the parties) and which provides members with information on how they may respond to the Application should they chose to do so. A copy of this Notice to Members appears at [1] to [4].

7. I also act, and have acted, on behalf of the liquidators of LMIM and LMIM in several other matters before this Honourable Court. The orders as to service sought by the Application are similar to previous orders made in proceedings such as these where parties have sought directions pursuant to s96 of the Act. By way of example, similar orders concerning service upon the members of the AIF were made in Supreme Court of Queensland Proceeding number 8884/14, being the proceeding brought by LMIM and the liquidators of LMIM pursuant to section 96 of the Act seeking directions from the Court as to the proper course that LMIM should take in relation to these proceedings ( "AIF Proceeding").

8. In the AIF Proceeding, in accordance with the orders made, the liquidators of LMIM caused notice to be sent by email to 698 members of the AIF for whom email addresses where held and posted notice to 18 members of the AIF for whom postal addresses where held. As a result of delivering those notices by email and post, the liquidators of LMIM received 6 responses. Of the 6 responses, none of the members sought to be involved in the AIF Proceeding, but rather posed queries for the liquidators of LMIM to answer.

9. All the facts and circumstances deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit.

Signed



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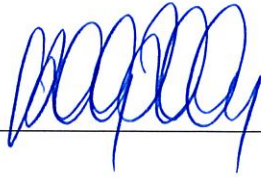


Solicitor/Barrister/Justice of the Peace



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**SWORN** by **ASHLEY JOHN TIPLADY** on 5 November, 2015 at Brisbane in the presence of:



Deponent



Solicitor/Barrister/Justice of the Peace



SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: 8792 of 2013

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AND

Second Defendant: **TRUST COMPANY (PTAL) LIMITED  
ACN 008 412 913**

Exhibit AJT-1 to the Affidavit of **ASHLEY JOHN TIPLADY** sworn  
5 November, 2015:

Deponent

Solicitor/Barrister/Justice of the Peace



**CERTIFICATE OF EXHIBIT**

Filed on behalf of the First Defendant

Form 47 Rule 435

**Russells**  
Level 18  
300 Queen Street  
**BRISBANE 4000**  
Phone: 07 3004 8888  
Fax: 07 3004 8899

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**NOTICE TO MEMBERS OF THE AIF**

**Peregian Beach litigation**

1. Members will recall that LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ("**LMIM**") in its capacity as the responsible entity of the LM Australian Income Fund (the "**AIF**") is a defendant in a proceeding brought by KordaMentha Pty Ltd ("**KordaMentha**") in its capacity as trustee of the LM Managed Performance Fund ("**MPF**") regarding certain transactions relating to loans (and associated supporting securities) provided by both the MPF and AIF to a borrower, Peregian Beach Pty Ltd ( "**Peregian Beach Proceeding**").
2. The Peregian Beach Proceeding was commenced in September, 2013 and LMIM as responsible entity of the AIF filed a defence in July, 2015. The matter has progressed through the various stages of litigation and the trial of the matter could possibly be heard in mid 2016. The parties have, however, arrived at a settlement of the dispute and wish to have the entry into the settlement agreement sanctioned by the Court.
3. LMIM has applied to the Supreme Court of Queensland for directions pursuant to s.96 of the *Trusts Act 1973* (Qld) to enter into a proposed Deed of Settlement with KordaMentha to resolve the Peregian Beach Proceedings ("**s.96 Application**").
4. The s.96 Application is to be heard in the Supreme Court of Queensland at QEII Courts of Law Complex, 415 George Street, Brisbane at 10:00am on 24 November, 2015.
5. The purpose of this communication is to:
  - (a) explain the terms of the proposed settlement to members of the AIF, including the rationale behind the matter being settled on the terms proposed; and
  - (b) provide Members with sufficient information should they wish to appear and make submissions to the Court at the hearing of the s.96 Application.
6. More fulsome information and all documents which have been or will be filed in court in respect of the s.96 Application may be found at [www.lminvestmentadministration.com](http://www.lminvestmentadministration.com).

**The proposed settlement**

7. The liquidators of LMIM have defended the Peregian Beach Proceedings on behalf of LMIM on the basis that there are good arguable defences to the claims alleged by KordaMentha. The commercial reality is, however, that some settlements may not always reflect the actual legal rights of parties. In the liquidators' view, this is a matter where a settlement based upon commercial considerations rather than strict legal rights is appropriate and desirable.

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8. LMIM and KordaMentha have reached an in-principle agreement to settle the Peregian Beach Proceedings. A proposed Deed of Settlement is being drafted between the parties but is conditional upon each of LMIM and KordaMentha receiving judicial advice to the effect that they would be justified in carrying out the settlement.
  9. In essence, the terms of settlement operate such that the monies the subject of the Peregian Beach Proceeding, which are held on trust by The Trust Company (PTAL) Limited, the custodian of the assets of the AIF, being the amount of approximately \$1.95 million, is to be split between the MPF (receiving \$675,000.00) and the AIF (receiving the balance together with all accretions, being an amount of approximately \$1.275 million).
  10. A copy of the draft proposed Deed of Settlement is a confidential exhibit to the affidavit of Kelly-Anne Lavina Trenfield sworn in support of the s.96 Application. So far as is possible, LMIM wishes to maintain the confidentiality of that document and requests that the members of the AIF keep that document confidential.
  11. The liquidators of LMIM have formed the view that it is in the best interests of members of the AIF to settle the Peregian Beach Proceeding on the proposed settlement terms by weighing up the following factors:
    - (a) the confidential legal advice they have received from Queens Counsel and Junior Counsel on prospects and the win/lose analysis in respect of the Peregian Beach Proceeding (in respect of which legal professional privilege is not waived and these advices are to remain confidential);
    - (b) the liquidators of LMIM's professional fees and costs to date in dealing with the Peregian Beach Proceeding are \$22,109.50;
    - (c) LMIM's legal costs and expenses incurred to date in defending the Peregian Beach Proceeding are approximately \$356,000.00;
    - (d) the liquidators of LMIM's future professional fees and costs in dealing with the Peregian Beach Proceeding up to the conclusion of a trial are estimated to be approximately \$44,000.00;
    - (e) LMIM's future estimated legal fees and expenses in defending the Peregian Beach Proceeding up to the conclusion of a trial are expected to be approximately \$350,000.00 (as estimated to the liquidators of LMIM by LMIM's solicitors);
    - (f) the quantum of the proposed settlement is within the range of the possible best to worst case outcomes of the Peregian Beach Proceeding should the matter proceed for determination at a trial;
    - (g) the liquidators of LMIM are cognisant of the comments made by a number of judges regarding members' funds being spent on litigation rather than there being a timely return of funds to members;
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- (h) the uncertainty which exists whether any policy or policies of insurance potentially held by LMIM will respond to any claim made by LMIM regarding the Peregian Beach Proceeding, any loss to the AIF, including as a result of the proposed settlement, and the impact of the proposed settlement upon any such claim for indemnity ; and
- (i) the commerciality of the proposed settlement of the Peregian Beach Proceeding from the point of view of the AIF members, including:
- (i) that the settlement will bring certainty to the members of the AIF;
  - (ii) the settlement will ensure that there will be a return to members of the AIF;
  - (iii) the settlement will enable the liquidators of LMIM to bring about the timely and efficient winding up of the AIF, including effecting a distribution to members (hopefully) prior to the end of the calendar year;
  - (iv) the settlement removes the risks associated with litigation, including the risk of an adverse costs order against the AIF;
  - (v) the settlement obviates the ongoing costs associated with the litigation, including the costs of:
    - A. undertaking disclosure of potentially thousands of pages of documents, (both electronic and hard copy);
    - B. the costs of engaging experts;
    - C. the costs of obtaining witness statements;
    - D. the costs of subpoenas; and
    - E. the costs of a trial which would likely involve both senior and junior counsel;
  - (vi) although LMIM has obtained an order for security for costs against the MPF in the sum of \$375,000.00 by way of a bank guarantee, if LMIM is ultimately successful at a trial and is awarded costs, it is unlikely that LMIM will recover all of the legal costs incurred, nor the liquidators fees and remuneration in running the trial; as such, the longer the Peregian Beach Proceeding continues the greater the cost to the AIF and the greater the risk that the MPF may not have sufficient funds to meet an adverse costs order; and
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- (vii) the time costs of money from the point of view of the members of the AIF and the timeliness of the payment of a dividend to AIF members.

**Information for Members of the AIF**

12. The hearing of the s.96 Application is set down before Justice Jackson in the Supreme Court of Queensland at QEII Courts of Law Complex, 415 George Street, Brisbane at 10:00am on 24 November, 2015.
13. If a member of the AIF wishes to support or oppose the s.96 Application or to argue that any different order or direction should be made, they can do so by attending before the Court on that date, either personally or by engaging a legal representative for that purpose. Any member wishing to retain lawyers should do so promptly to ensure that there is sufficient time to brief those legal representatives.
14. Alternatively, members of the AIF can send correspondence about this matter to the liquidators of LMIM addressed to [enquiries@lminvestmentadministration.com](mailto:enquiries@lminvestmentadministration.com) and the liquidators will place all of those emails before the Court at the hearing on 24 November, 2015.
15. All Court documents to be relied upon by the liquidators of LMIM in support of the s.96 Application will be posted on the website [www.lminvestmentadministration.com](http://www.lminvestmentadministration.com).

DATED: 5 November, 2015