

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

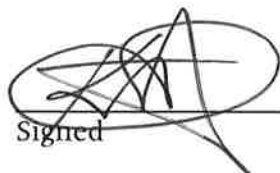
AND

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

KELLY-ANNE LAVINA TRENFIELD of c/- 22 Market Street, Brisbane,
Queensland, Official Liquidator, states on oath:-

1. I am a Senior Managing Director, in the Corporate Finance/Restructuring division, of FTI Consulting (Australia) Pty Ltd. I am also an Official Liquidator.
2. I have worked with and have provided assistance to Mr Park and Ms Muller ("**the Liquidators**") since their appointment as administrators, and subsequently as liquidators, of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 ("**LMIM**"), the First Defendant.

PAGE 1


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AFFIDAVIT OF KELLY ANNE LAVINA TRENFIELD

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

3. I have the day to day conduct and oversight of this proceeding, under the supervision of the Liquidators.

Background to Peregian Beach Proceeding

4. Since in or about 14 October, 2008, LMIM has been, and remains, the responsible entity of the LM Australian Income Fund ARSN 133 497 917 ("**AIF**"), being a managed investment scheme registered under 601EB of the *Corporations Act 2001* (Cth) ("**Corporations Act**"), and, pursuant to section 601FC of the *Corporations Act*, holds the scheme property of the AIF on trust for its members.

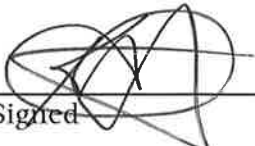
5. From on or about 4 December 2001, until its removal, LMIM was also the trustee of a trust known as the LM Managed Performance Fund ("**MPF**").

6. The business of both the MPF and AIF was to use funds obtained by investors (members) to enter into property investments and structured loan transactions for the purchase and /or development of real property in Australia for the eventual benefit of those members.

7. On 12 April, 2013, by order of the Supreme Court of Queensland, LMIM was removed as trustee of the MPF and KordaMentha Pty Ltd and Calibre Capital Limited were appointed as the trustees of the MPF ("**the Trustees**") in LMIM's place. On 5 January, 2015, Calibre Capital Limited purported to retire as a trustee of the MPF, leaving KordaMentha Pty Ltd the sole trustee of the MPF ("**KordaMentha**").

8. On 10 September, 2013, LMIM assigned a borrower's, being Peregian Beach Pty Ltd, indebtedness (and associated security rights) under certain loan agreements to a third party which resulted in proceeds from that transaction being

PAGE 2

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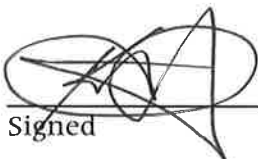
received by LMIM and held by the Trust Company (PTAL) Limited ("**PTAL**"), as the custodian of the assets of LMIM as responsible entity for the AIF, in the amount of approximately \$1.95 million ("**Fund**"). The Fund is held on trust pursuant to an agreement reached between the Liquidators and the Trustees on or about 26 August, 2013 pending resolution of disputed claims over the Fund.

9. On 19 September, 2013, the Trustees commenced this proceeding by way of an Originating Application ("**the MPF Proceeding**") seeking, *inter alia*, directions from the Court pursuant to section 96 of the *Trusts Act 1973 (Qld)* ("**the Trusts Act**") as to whether the Trustees would be justified in prosecuting, what ultimately became, these principal proceedings against LMIM for the recovery of the Fund and certain other loan draw downs (the "**Peregian Beach Proceeding**").

10. On 19 September, 2014, the Liquidators and LMIM filed an Originating Application, being proceeding number BS8884 of 2014, seeking directions pursuant to section 96 of the Trusts Act as to the proper course that LMIM should take in relation to the MPF Proceeding and the Peregian Beach Proceeding in the event that the Trustees were advised to prosecute the Peregian Beach Proceeding ("**the AIF Proceeding**").

11. Both the MPF Proceeding and the AIF Proceeding were heard in the Supreme Court of Queensland on 16 October, 2014 and, on 23 January, 2015, His Honour Justice Martin delivered judgment in both proceedings. On 23 January, 2015 Martin J made orders to the effect that the Liquidators and LMIM would be justified in defending the Peregian Beach Proceeding. Conversely, and after some dispute between the parties as to the costs of the MPF Proceeding, on 9 February, 2015, Martin J ordered that the Trustees would be justified in prosecuting the Peregian Beach Proceeding.

PAGE 3

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12. On 12 February, 2015, pursuant to the order of Martin J, the Trustees filed the Statement of Claim and this proceeding then continued as if commenced by claim (herein referred to as the Peregian Beach Proceeding) and PTAL was joined as the Second Defendant.

13. On 10 July, 2015, LMIM, being named as the First Defendant, filed a Notice of Intention to Defend together with its Defence.

14. On 20 August, 2015, KordaMentha filed a reply to LMIM's Defence.

15. On 30 September, 2015, the proceeding was placed on the Commercial List and directions concerning disclosure were made.

16. The purpose of outlining the above chronology of this proceeding in this detail is to illustrate the long history of the matter. Over the 2 years since this proceeding commenced, there has been at least six court appearances, requiring, on occasion, the need for the parties to instruct both Senior and Junior Counsel, together with some 20 affidavits, collectively, being filed by the parties across the proceeding to date.

17. The Liquidators estimate that the costs of the AIF Proceeding, the MPF Proceeding and the Peregian Beach Proceeding incurred by the AIF to date are:

- (a) in respect of the Liquidators' remuneration and disbursements, approximately \$22,109.50; and
- (b) in respect of LMIM's legal costs and expenses, approximately \$356,000.00 (as estimated to the Liquidators by Mr Ashley Tiplady, partner of the firm


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Russells engaged by the Liquidators in this litigation (“**LMIM’s solicitors**”).

18. Should the matter continue, the next step is for the parties to commence the disclosure process which will likely include undertaking searches of and reviewing thousands of pages of documents (both hard and soft copy documents).

19. Further, it is anticipated that a trial of the proceeding would take about 6 days (as estimated by LMIM’s solicitors).

20. The Liquidators estimate that the future costs to the AIF to the close of a trial of the proceeding to be:

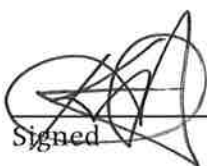
- (a) in respect of the Liquidators’ remuneration and disbursements, approximately \$44,000.00; and
- (b) in respect of LMIM’s legal costs and expenses, approximately \$485,000.00 (as estimated by LMIM’s solicitors).

The proposed settlement

21. LMIM and KordaMentha have reached agreement, in- principle, about settling the Peregian Beach Proceeding. The settlement is conditional upon LMIM and KordaMentha each receiving judicial advice to the effect that they would, separately, be justified in carrying out the proposed settlement.

22. In essence, the terms of the settlement are that the Fund be split such that the sum of \$675,000.00 is to be paid to KordaMentha and the balance with all accretions (being approximately \$1.275 million) is to be paid to the AIF, with each party to bear its own costs.

PAGE 5

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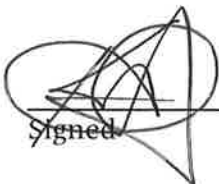
23. However, the final terms of a deed of settlement have not, at the time of swearing this affidavit, been agreed between LMIM, KordaMentha and PTAL.

Accordingly, I anticipate either of the following taking place:

- (a) if the parties agree on the terms of a deed of settlement before the substantive hearing of LMIM's application filed by leave on 5 November, 2015 ("**the s.96 Application**"), LMIM will enter into the deed and a copy of the executed deed will be exhibited to an affidavit to be sworn and filed at the hearing of the s.96 Application;
- (b) if the parties do not agree on the terms of the deed of settlement before the substantive hearing of the s.96 Application, LMIM will nevertheless proceed to seek judicial advice as to the merits of the in-principle agreement along the broad commercial terms of the most current draft deed of settlement as between the parties, a copy of which will be exhibited to an affidavit to be sworn and filed at the hearing of the s.96 Application.

24. The Liquidators on behalf of LMIM have sought confidential legal advice from Mr Peden, of Counsel concerning the proposed settlement of the Peregian Beach Proceeding for the purposes of the s.96 Application. The First Defendant will rely upon such advice at the hearing of the s.96 Application as well as advice received from LMIM's solicitors regarding the settle/win/loss and costs/benefit analysis of the Peregian Beach Proceeding.

25. In my experience as an Official Liquidator, commercial disputes are rarely resolved strictly in accordance with a party's legal rights or in a way that is exactly reflective of a party's legal rights as there are commercial considerations that effect a party's willingness to compromise a dispute that has been reached the stage of


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litigation. The dispute between AIF and MPF is such a matter where I consider that importance should be placed upon the benefits and detriments to members of the AIF in continuing the litigation rather than the strict legal position of LMIM and the AIF.

26. In order to determine whether the proposed in-principle settlement is in the best interests of the members of the AIF, I have spoken with Mr John Park and verily believe that the following factors are pertinent and they have been considered in the decision to compromise the litigation:-

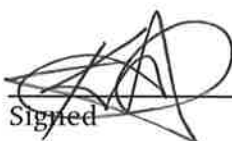
- (a) the confidential legal advice the Liquidators have received from Queens Counsel and Junior Counsel on prospects and the win/lose analysis in respect of the Peregian Beach Proceeding (in respect of which legal professional privilege is not waived and such advices are to remain confidential);
- (b) the Liquidators' 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' 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 and including the first day of trial are expected to be approximately \$350,000.00 or, up to the conclusion of a 6 day trial, approximately \$485,000.00 (as estimated to the Liquidators 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;

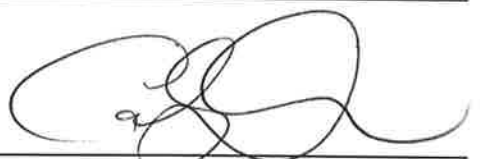
PAGE 7


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- (g) the Liquidators 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;
- (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 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 financial year;
the settlement removes the risks associated with litigation, including the risk of an adverse costs order against the AIF;
 - (iv) 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

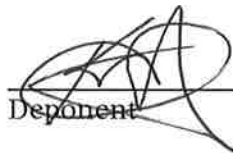

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- E. the costs of a trial which would likely involve both senior and junior counsel;
- (v) although LMIM has obtained an order for security for costs against the MPF in the sum of \$375,000.00 by way of a bank guarantee, if LMIM is ultimately successful 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
- (vi) 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.

27. 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.

SWORN by **KELLY-ANNE LAVINA TRENFIELD** on 10 November, 2015 at Brisbane in the presence of:


Deponent


-Solicitor/Barrister/Justice of the Peace

