

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**

AMENDED STATEMENT OF FACTS

1. Pursuant to section 96 of the *Trusts Act 1973* (Qld) ("the Act"), a trustee may apply to the Court upon a written statement of facts for directions. This document sets out the facts relied upon by Mr John Park and Ms Ginette Muller in respect of their application in these proceedings filed on 5 November, 2015 ("the **s.96 Application**").

2. Mr Park and Ms Muller are the liquidators ("**Liquidators**") of LM Investment Management Limited (Receivers and Managers Appointed) (in Liquidation) ("**LMIM**"). LMIM is, and remains, the responsible entity of the LM Australian Income Fund ("**AIF**").

3. Between on or about 4 December 2001 and 12 April, 2013, LMIM was also the trustee of a trust known as the LM Managed Performance Fund ("**MPF**").

AMENDED STATEMENT OF FACTS

Filed on behalf of the Applicants

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4. 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.

5. 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 place of LMIM. Calibre Capital Limited has since purported to resign as a trustee of the MPF, leaving KordaMentha Pty Ltd the sole trustee of the MPF ("**KordaMentha**").

The directions to prosecute and defend the proceedings

6. On 19 September, 2013, the Trustees commenced proceedings by way of Originating Application filed in the Supreme Court of Queensland, being proceeding number 8792 of 2013, seeking directions from the Court pursuant to section 96 of the Act ("**the MPF Proceeding**") as to whether the Trustees would be justified in prosecuting certain proceedings against LMIM (the "**Peregian Beach Proceeding**").

7. On 19 September, 2014, the Liquidators filed an Originating Application in the Supreme Court of Queensland, being proceeding number 8884 of 2014, seeking directions pursuant to section 96 of the 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**").

8. Pursuant to section 96 of the Act, the Supreme Court of Queensland gave directions to the Liquidators and LMIM and the Trustees, respectively:

- (a) on 23 January, 2015 in the AIF Proceeding, to the effect that the Liquidators and LMIM would be justified in defending the Peregian Beach Proceeding; and

(b) on 9 February, 2015 in the MPF Proceeding, to the effect that the Trustees would be justified in prosecuting the Peregian Beach Proceeding.

9. On 9 February, 2015, the Supreme Court of Queensland ordered that the Trust Company (PTAL) Limited (“PTAL”) be added as the Second Defendant in the Peregian Beach Proceeding. PTAL is the custodian of the assets of the AIF and currently holds on trust, pursuant to an agreement between the Liquidators and KordaMentha, a sum of approximately \$1.95 million, pending the resolution of the Peregian Beach Proceedings.

Background facts and pleadings to Peregian Beach Proceeding

10. The essence of the allegations against LMIM in the Peregian Beach Proceeding is that:

- (a) LMIM, as responsible entity of the AIF, loaned approximately \$1.7 million to Peregian Beach on terms which would see that loan and its associated securities take priority over loans and securities which already existed between LMIM as trustee for the MPF (as lender) and Peregian Beach (as borrower) (the “**Transaction**”);
- (b) ultimately, Peregian Beach defaulted and LMIM sold the securities it held over the borrower’s property, albeit at a shortfall in respect of the monies repayable to both the AIF and the MPF;
- (c) in September, 2013, LMIM as responsible entity of the AIF received the sum of \$1,925,729.92, being repayment in full of its loan plus interest. By that time the MPF had lent a total of approximately \$3.2 million in respect of which it received the sum of \$429,135.04 from the sale proceeds;
- (d) KordaMentha asserts that the MPF was disadvantaged by the Transaction and, that by entering into the Transaction, LMIM acted inappropriately; and
- (e) KordaMentha seeks orders requiring LMIM to take steps such that the funds received by AIF (now held by PTAL) are paid to KordaMentha as

trustee of the MPF (together with any interest which has accrued), meaning that the MPF would receive the entire proceeds of the sale of the securities held over Peregian Beach and AIF would receive no monies in respect of the loan of approximately \$1.7 million it made to Peregian Beach.

The proposed settlement

11. The Liquidators 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.

12. The First Defendant 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 direction to the effect that they would be justified in carrying out the settlement.

13. The Liquidators intend to exhibit a copy of the most current proposed Deed of Settlement or the Deed of Settlement executed by LMIM, in either case, to an affidavit to be sworn and filed by leave at the substantive hearing of the s96. Application by Ms Kelly Anne Trenfield as a confidential exhibit. So far as is possible, the Liquidators wish to maintain the confidentiality of that document and will request that the court make an appropriate confidentiality order in that regard.

14. In essence, the terms of settlement operate such that of the funds held on trust by PTAL, being approximately \$1.95 million, 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 of the Peregian Beach Proceeding and the AIF Proceeding.

15. In the Liquidators' view, the following matters are factors to be weighed up in determining whether the First Defendant is justified in proceeding with the proposed terms of the Deed of Settlement:-

- (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 these 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 ~~the conclusion~~ and including the first day of a 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);

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- (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 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 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 ~~calendar~~ financial year;
 - (iv) the settlement removes the risks associated with litigation, including the risk of an adverse costs order against the AIF;
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- (v) the settlement obviates the ongoing costs associated with the litigation, including the costs of:
 - (vi) undertaking disclosure of potentially thousands of pages of documents, (both electronic and hard copy);
 - (vii) the costs of engaging experts;
 - (viii) the costs of obtaining witness statements;
 - (ix) the costs of subpoenas; and
 - (x) the costs of a trial which would likely involve both Senior and Junior counsel;
 - (xi) 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 Peregrin 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
 - (xii) 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.

16. Accordingly, the Liquidators have brought this application for directions as to whether the First Defendant is justified in proceeding with the proposed Deed of Settlement to resolve the Peregian Beach Proceeding.

Signed: Russells
Russells

Description: Solicitors for the First Defendant

Dated: ~~5th~~ 10th day of November, 2015