

SUPREME COURT OF QUEENSLAND

CITATION: *KordaMentha & Anor v Members of the LM Managed Performance Fund & Ors* [2013] QSC 133

PARTIES: **KORDAMENTHA PTY LTD (ACN 100 169 391) AND CALIBRE CAPITAL LTD (ABN 66 108 318 985) IN THEIR CAPACITY AS TRUSTEES FOR THE LM MANAGED PERFORMANCE FUND**

Applicants

and

THE MEMBERS OF THE LM MANAGED PERFORMANCE FUND

First Respondents

and

JOHN RICHARD PARK AND GINETTE DAWN MULLER IN THEIR CAPACITY AS JOINT AND SEVERAL ADMINISTRATORS OF LM INVESTMENT MANGEMENT LIMITED (ADMINISTRATORS APPOINTED) AND LM ADMINISTRATION LIMITED (ADMINISTRATORS APPOINTED)

Second Respondents

and

TRUST COMPANY (PTAL) LIMITED (ACN 008 412 913)

Third Respondent

FILE NO/S: SC 3691 of 2013
SC 2869 of 2013

DIVISION: Trial Division

PROCEEDING: Civil Application

DELIVERED ON: 23 May 2013

DELIVERED AT: Brisbane

HEARING DATE: 10 May 2013 and 13 May 2013 (with subsequent written submissions)

JUDGE: Chief Justice

COUNSEL: P Morrison QC and P Ahern for the applicants
Dr S Derrington for certain of the first respondents
D Tucker (*sol*) for certain of the first respondents
P Dunning QC and J Peden for the second respondents
J Williams for the third respondents

SOLICITORS: Piper Alderman for the applicants
Holman Webb for certain of the first respondents

Tucker & Cowen for certain of the first respondents
Russells for the second respondents
DLA Piper for the third respondents

JUDGMENT AS TO VESTING ORDERS AND COSTS

- [1] I propose to order in terms of the draft as to vesting orders advanced by the applicants, save for para 6. I mark that draft “A”.
- [2] I made an order as to the third respondent’s costs (cf para 6) on the last occasion (13 May 2013), with the costs, on the indemnity basis, to be paid from the trust fund.
- [3] I will accordingly order now, on the undertaking there recorded, in terms of paras 1 to 5 of that draft “A”.
- [4] As to the submissions for the administrators, my order of 12 April 2013 respected any lien in favour of the second respondents. I made no other determination in relation to that – existence or amount.
- [5] I should not make an order now which crystallizes the amount or priority of any entitlement in that regard.
- [6] I am satisfied the order I am making will not prejudice the second respondents in the enforcement of any lien they may have.
- [7] As to the costs of the application for vesting orders (3691/13), although those orders could perhaps have been sought when I appointed the new trustees on 12 April 2013, it was not unreasonable for the new trustees to defer seeking such orders until after they gained more familiarity with the affairs of the Performance Fund and reached a clear conviction as to the need for such orders.
- [8] There will therefore be an order that Korda Mentha and Calibre recover their costs, assessed as necessary on the indemnity basis, from the trust fund.
- [9] Mr Park and Ms Muller’s lien gave them an interest in monitoring the progress of the application for the vesting orders, and they acted reasonably.

- [10] There will therefore be an order that Korda Mentha and Calibre pay the costs of the administrators on the indemnity basis, and that the amount of those costs form part of the costs for which Korda Mentha and Calibre may reimburse themselves from the trust fund.
- [11] The unit holder respondents represented by Mr Tucker, save for Paul and Martin Rowe, seek their costs of responding to the vesting order application. I order that their costs, assessed as necessary on the indemnity basis, be paid from the trust fund.
- [12] As to the costs of the application in 2869/13 to set aside the order appointing the new trustees, which was unsuccessful, the reality of the situation was that the administrators of LMIM, having failed on 12 April 2013 to secure their own appointment (through LMIM) as receivers or trustees of the Performance Fund, effectively sought the removal of the new trustees and, via their written material, the appointment of another in lieu.
- [13] They contend that they brought the application for the benefit of the members. In the result it has not benefited the members.
- [14] The administrators say that they brought the application “as outgoing trustee”. When they brought and pursued the application, LMIM was no longer trustee in any sense. It was formally removed on 12 April. In *O’Brien v Tracy* (1907) WN(NSW) 44, the costs which were awarded were awarded in favour of a serving trustee.
- [15] The instant application was an unhelpful intrusion by the former trustee into the new trustee regime. While the administrators did not seek their own appointment in lieu of Korda Mentha and Calibre, their application was not apparently motivated by a wish to support the trust estate. While they sought the appointment of another independent trustee, they proposed a cooperative regime where they would retain the assets (in LMIM). See para 29 of Counsel’s outline of 10 May 2013. They were in that way pursuing an agenda of their own, and consistently with the observation of Latham CJ in *Miller v Cameron* (1936) 54 CLR 572, 579, there should be an order that the second respondents (the administrators of LMIM) pay the costs of the applicants and the seven natural person respondents, members of the

fund (Appleby, Boutell, Farrimond, Hoolahan, Lewis, Nicoll and Oxley) for whom Mr Morrison and Ms Ahern appeared.

- [16] The question arises whether there should be indemnity costs.
- [17] The new trustees would, I consider, be entitled to indemnify themselves for their costs and expenses from the trust fund, to the extent to which they may not be recoverable from the second defendants. Notwithstanding Dr Derrington's submission, they would in my view be costs which relate to the administration of the estate. I note that the trustee in *Miller v Cameron*, prior to removal, had unreasonably refused to resign (p 579). But I cannot accept that trustees who are validly appointed – indeed here, by the court, are not acting in support of the trust where they take reasonable steps to defend their position against external attack. By doing so, they seek to preserve the stable management of the trust fund.
- [18] One asks why the unit holders should in that event have to bear the margin between that amount, and standard costs recoverable from LMIM and the administrators.
- [19] In any case, the conclusion that the second respondents were pursuing their own agenda itself justifies indemnity costs.
- [20] There will therefore be an order that the costs be assessed, as necessary, on the indemnity basis. To remove any doubt, there will be a direction that the second respondents may not recover the amount of the costs so payable from the trust fund.
- [21] Dr Derrington's clients have failed to seek the relief they urged, although they did not formally apply for that relief. Their approach, I should add, was reasonable and limited. Their having failed to secure a new trustee, I do not think that the fund should be burdened with their costs (and such an order was not sought), but the administrators should have to pay those costs. There will therefore be an order that the second respondents pay the costs, assessed as necessary on the indemnity basis, of the respondent unit holders represented by Dr Derrington.
- [22] Mr Tucker's unit holder clients supported the new trustees' opposition to the application. There will be an order that the second respondents pay the costs, assessed as necessary on the indemnity basis, of the respondent unit holders represented by Mr Tucker save for Paul and Martin Rowe (who asked to be

excepted). While those unit holders secured the result for which they contended, I do not in the end consider that I should treat them differently from Dr Derrington's clients. I have treated the seven unit holders represented by Mr Morrison and Ms Ahern differently because their representation was the same as that of the applicants, and their additional costs should have been minimal.

[23] I have already ordered that the third respondent's (indemnity) costs be paid from the trust fund. The second respondents should not have to pay those costs. The making of the vesting orders was an appropriate concomitant of the appointment of new trustees.

[24] It remains to deal with the subpoena costs. The administrators caused the service of subpoenas on Korda Mentha and Piper Alderman on 9 May 2013. On 10 May those parties foreshadowed an application to set aside the subpoenas. On 7 May P Lyons J had held that categories of documents sought by the subpoenas were not relevant. Yet the subpoenas served two days later sought those documents. Then at the hearing on 10 May, the administrators did not call on the subpoenas.

[25] For the administrators, it is contended that the exercise was the result of the applicants' non-compliance with the Uniform Civil Procedure Rules, as to filing an address for service, and the delivery of a document nominating a Sydney address. But the fact is that the administrators chose to pursue the subpoenas contrary to the ruling of P Lyons J, and then effectively abandoned them at the hearing.

[26] I will therefore order that the second respondents pay the applicants' costs of and incidental to the subpoenas served on Korda Mentha and Piper Alderman on 9 May 2013, to be assessed as necessary on the standard basis. (I appreciate that indemnity costs were claimed, but I do not consider they are warranted.)

[27] I have had to deal with quite an array of costs claims. If I have missed any claim, it should be drawn to my attention.

[28] These are the formal orders now made.

[29] In relation to the applicants' application in 3691/2013:

1. Upon the applicants undertaking, by their counsel, that until further order of the court, or without first giving the second respondents by their solicitors seven days advance written notice they will not:

- (a) deal with the assets of the LM Managed Performance Fund (Trust), or increase the liabilities of the Trust, other than carrying on the ordinary business of the Trust (except insofar as they consider it necessary to make any applications to the court in respect of the Trust or their appointment as trustees; and for the avoidance of any doubt, carrying on the ordinary course of business of the Trust includes any action to enforce and recover any loan, guarantee or security); or
- (b) make any distribution to unit holders of the Trust or any payment by way of redemption of units;

the order of the court is that, without prejudicing any lien or charge or any right of indemnity that:

- (1) LM Investment Management Limited, as former trustee; or
- (2) the second respondents

may have against the assets of the Trust:

- (i) pursuant to sections 82 and 90 of the *Trusts Act 1973*, the choses in action, in Schedule 1 to these orders, of LM Investment Management Limited ACN 077 208 461 (Administrators Appointed) (LMIM) in its former capacity as trustee of the Trust, vest in the applicants in their capacity as joint and several trustees of the Trust.
- (ii) For the avoidance of doubt, order 1 does not operate to vest in the applicants any of the Trust property held by the third respondent in its capacity as custodian trustee of the Trust.

- (iii) Within 14 days of the date of these orders, LMIM and the second respondents will provide the applicants with a written breakdown of the fees, costs, expenses and other liabilities which are known to them and which are the subject of any lien, charge or right of indemnity claimed by LMIM or the second respondents over the Trust's assets.
- (iv) Upon the books and records of the Trust and written details of any such lien, charge or right of indemnity being provided to the applicants, the applicants and the second respondents will work co-operatively with each other to agree upon a process which allows the applicants and the second respondents to determine any quantum and any priority with respect to any such lien, charge or right of indemnity.
- (v) The applicants will hold the amount of \$1,364,299 from the balance of the Trust's assets on account of the liens claimed by LMIM and the second respondents but without prejudice to the quantum and priority of those liens, which will be resolved pursuant to orders (iii) and (iv) or by the court. The amount of \$1,364,299 will not be applied by the applicants until resolution of the second respondents' lien.

Schedule 1

Those choses in action vested in LMIM pursuant to:

1. any loan agreements and any deeds of variation to those agreements executed by or on behalf of LMIM as Trustee or Manager of the Trust;

2. any charges or mortgages or other security interests granted to LMIM as Trustee or Manager of the Trust;
 3. any deeds or contracts of guarantee and indemnity entered into in favour of LMIM as Trustee or Manager of the Trust;
 4. any agreements which confer on LMIM any rights or entitlements in respect of the Trust, or any powers of management in respect of the above documents in respect of the Trust, but without vesting any of the obligations or liabilities under those agreements in the applicants.
2. that the applicants recover their costs of and incidental to the application, assessed as necessary on the indemnity basis, from LM Managed Performance Fund;
 3. that the applicants pay the second respondents' costs of and incidental to the application, assessed as necessary on the indemnity basis, and that the amount of those costs form part of the costs for which the applicants may reimburse themselves from LM Managed Performance Fund;
 4. that the costs of two of the respondent unit holders represented by Mr Tucker, namely Frazer Scott Kennedy and Georgina Symons Kennedy, of and incidental to the application, assessed as necessary on the indemnity basis, be paid from LM Managed Performance Fund.

In relation to the second respondents' application in 2869/2013:

5. that the second respondents pay the costs of and incidental to the application, to be assessed as necessary on the indemnity basis, of the applicants and of the respondent unit holders represented by Mr Morrison QC and Ms Ahern, namely, the unit holders with the surnames Appleby, Boutell, Farrimond, Hoolahan, Lewis, Nicoll and Oxley;

6. that the second respondents may not recover the costs so payable from the LM Managed Performance Fund;
7. that the second respondents pay the costs of and incidental to the application, to be assessed as necessary on the indemnity basis, of the respondent unit holders represented by Dr Derrington, namely Fraser William Boyd Jamieson, Constance Louise Van der Schatte Olivier, Andrew Schreiber, Simon Litster, Alison Pockett, Magellan Tressider Tuohy Ltd, Financial Partners Ltd, Mondial (Dubai) LLC, Imperium Capital Group, Wealth Management Group and Intertrust Private Partners KK;
8. that the second respondents pay the costs of and incidental to the application, to be assessed as necessary on the indemnity basis, of two of the respondent unit holders represented by Mr Tucker, namely Frazer Scott Kennedy and Georgina Symons Kennedy;
9. that the second respondents pay the applicants' costs of and incidental to the subpoenas served on the applicant Korda Mentha Pty Ltd and the solicitors Piper Alderman on 9 May 2013, to be assessed as necessary on the standard basis.