

SUPREME COURT OF QUEENSLAND

CITATION: *Kordamentha Pty Ltd v LM Investment Management Limited (Receivers & Managers Appointed); Re: Kordamentha Pty Ltd* [2015] QSC 376

PARTIES: **In 5329 of 2015:**

KORDAMENTHA PTY LTD AS TRUSTEE FOR THE LM MANAGED PERFORMANCE FUND
(applicant)

DAVID WHYTE IN HIS CAPACITY AS COURT-APPOINTED RECEIVER OF THE PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND
(not a party to the application)

In 8032 of 2014 and 8034 of 2014:

KORDAMENTHA PTY LTD AS TRUSTEE OF THE LM MANAGED PERFORMANCE TRUST
(plaintiff/applicant)

v

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461
(defendant/respondent)

FILE NO/S: 8032 of 2014

8034 of 2014

5329 of 2015

DIVISION: Trial Division

PROCEEDING: Civil Hearing

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 26 August 2015 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 18 August 2015; written submissions on 20 August 2015

JUDGE: Daubney J

ORDER: **1. Subject to Order 2:**

1.1. Pursuant to section 96 of the *Trusts Act 1973* (Qld) (“Trusts Act”), the Applicant is directed that it would be justified in prosecuting proceedings against the defendant, LM Investment Management Limited (Receivers and Managers

Appointed) (In Liquidation) (ACN 077 208 461) (“LMIM”) for the relief claimed in the Claim and Statement of Claim filed in the Supreme Court of Queensland proceeding number 8032/14 (“First Proceeding”).

- 1.2. Pursuant to section 96 of the *Trusts Act*, the Applicant is directed that it would be justified in prosecuting proceedings against the defendant, LMIM for the relief claimed in the Claim and Statement of Claim filed in the Supreme Court of Queensland proceeding number 8034/14 (“Second Proceeding”).**
- 2. Each of Orders 1.1 and 1.2 is conditional upon there being filed in each of the First Proceeding and the Second Proceeding respectively a Deed Poll executed by IMF Bentham Limited (“IMF”) by which IMF agrees to pay adverse costs orders made against the Applicant in each proceeding during the term of a litigation funding agreement made between the Applicant and IMF and to give the defendant(s) in each proceeding written notice of any termination of the litigation funding agreement within 7 days of such termination.**
- 3. The Applicant serve the Claim and Statement of Claim in the First Proceeding within 14 days of this order.**
- 4. The Applicant serve the Claim and Statement of Claim in the Second Proceeding within 14 days of this order.**
- 5. The costs and expenses of and incidental to the application (including any reserved costs) of each of the Applicant, the Respondent Liquidators of LMIM and the Respondent David Whyte (receiver of the property of the LM First Mortgage Income Fund and the person appointed to take responsibility for the winding up of that fund) be paid on the indemnity basis out of the LM Managed Performance Fund.**
- 6. The following documents handed up to the Court be placed in a sealed envelope marked “Not to be opened without an order of a Judge of this Court”:**
 - (a) the joint memorandum of advice of Counsel in the First Proceeding;**
 - (b) the joint memorandum of advice of Counsel in the Second Proceeding;**

- (c) **the confidential submissions on the merits;**
- (d) **the confidential summary of the main commercial terms of the proposed funding agreement;**
- (e) **the confidential draft of the proposed funding agreement.**

7. The affidavit of Ashley John Tiplady sworn 23 July 2015 and filed by leave on 18 August 2015 be placed in a sealed envelope marked “Not to be opened without an order of a Judge of this Court”.

AND IT IS FURTHER DIRECTED that the Applicant forthwith make application for each of the First Proceeding and Second Proceeding to be placed on the Commercial List.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION FOR SUMMONS OR ADVICE – GENERALLY – where there is an application for directions with respect to whether or not a proceeding should be brought against the respondents – where the statement of facts gives rise to a justiciable case – where the likely legal costs of the proceedings are significant – where there is a litigation funder – where the litigation funder will effectively assume liability for adverse costs orders made against the trustee – whether the proceedings should be pursued in the best interests of the trust estate – whether the liquidators should be indemnified out of the trust estate in respect of costs incurred on the application under s 96 of the *Trusts Act 1973*

PROCEDURE – COMMENCING PROCEEDINGS – where the defendant is subject to voluntary liquidation – where leave to proceed against a company in liquidation was not obtained at the time that proceedings were instituted – whether leave to proceed under s 500 of the *Corporations Act 2001* should be granted

Trusts Act 1973 (Qld), s 96

Corporations Act 2001 (Cth), s 500

Federal Republic of Brazil v Durant International Corporation [2015] UKPC 35

Glasscock v The Trust Company (Aust) Pty Ltd [2012] QSC 15

Coore v Coore [2013] QSC 196

KordaMentha Pty Ltd & Calibre Capital Ltd v LM Investment Management Ltd (in liquidation) & Anor [2015] QSC 4

Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand (2008) 249 ALR 250

COUNSEL: In 5329 of 2015:

A Crowe QC with E Goodwin for the applicant
M Luchich for David Whyte in his capacity as court-appointed receiver of the property of the LM First Mortgage Income Fund

In 8032 of 2014 and 8034 of 2014:

A Crowe QC with E Goodwin for the applicant
J Peden for the respondent

SOLICITORS: In 5329 of 2015:

Minter Ellison for the applicant
Tucker & Cowan for David Whyte in his capacity as court-appointed receiver of the property of the LM First Mortgage Income Fund

In 8032 of 2014 and 8034 of 2014:

Minter Ellison for the applicant
Russells for the respondent

- [1] Until the 12th of April 2013, LM Investment Management Ltd, (Receivers and Managers Appointed) (In Liquidation) (“LMIM”) was the trustee of a unit trust called the LM Managed Performance Fund (“MPF”). On that date de Jersey CJ ordered that the present applicant, KordaMentha Pty Ltd (“the Trustee”) replace LMIM as trustee of the MPF.
- [2] LMIM was placed into voluntary administration on the 23rd of March 2013, and since the 1st of August 2013, has been administered under a voluntary winding up with Mr Park and Ms Muller (“the liquidators”) as liquidators.
- [3] LMIM also was (and remains) the responsible entity for a particular registered managed investment scheme called LM First Mortgage Income Fund (“FMIF”). On 21 August 2013, Mr David Whyte (“Mr Whyte”) was appointed, *inter alia*, as Court appointed receiver to the FMIF.
- [4] Relevant for present purposes is the fact that the Trustee has issued two sets of proceedings against LMIM. In respect of each proceeding, the Trustee seeks directions under s 96 of the *Trusts Act* as to whether it would be justified in prosecuting each proceeding. Moreover, leave to proceed against a company in liquidation was not obtained at the time that proceedings were instituted, and an application is now made for the necessary orders under s 500 of the *Corporations Act*.

- [5] For quite a number of years, LMIM carried on business as a professional trustee for reward, in which capacity it created and managed both registered and unregistered investment schemes. It has been the responsible entity of the FMIF since 28 September 1999. FMIF is registered under s 601EB of the *Corporations Act*, and LMIM holds the property of the FMIF on trust for its members.
- [6] The trust company PTAL Ltd (“PTAL”) (formerly known as Permanent Trustee Australia Limited) is a professional corporate trustee which, under the terms of the custody agreement dated 4 February 1999:
- (a) custodially holds the portfolio of title documents as agent for LMIM in relation to, amongst others, the FMIF;
 - (b) was required to act on LMIM’s instructions in relation to any assets of the portfolio (including the assets of the FMIF).
- [7] Whilst PTAL held legal title to various assets, it did not carry out any discretionary management functions.
- [8] In argument before me, the two relevant proceedings were referred to as “the first proceeding” (being proceeding S8032 of 2014), and “the second proceeding” (being proceeding S8034 of 2014). Both proceedings were filed on 27 August 2014. It is convenient to adopt that terminology for present purposes.
- [9] The following summary of the nature of each of the first proceeding and the second proceeding, as set out in the trustee’s written submissions, was uncontroversial:

Nature of the First Proceeding.

22. *The business of both LMIM ATF the MPF and LMIM ATF the FMIF was to use funds obtained from members by entering into property investment and structured loan transactions for the purchase and/or development of Australian real property for the eventual benefit of members.*
23. *The essence of the trustee’s complaint is that LMIM ATF the MPF entered into a deed of assignment pursuant to which PTAL, in its capacity as Custodian of the FMIF, assigned existing loans and securities to LMIM ATF the MPF in exchange for payment of a settlement sum, in circumstances where the value of the securities received were significantly less than settlement sum paid.*
24. *The trustee’s complaint is that, by entering into the deed of assignment (and subsequent deeds of variation), LMIM:*
- (a) *breached the duty that it owed to the beneficiaries (i.e., unitholders of the MPF) not to place itself in a position of conflict of duty, in that the duties that it owed to the beneficiaries of the MPF conflicted with the duties it owed to the beneficiaries of FMIF; and*

(b) *breached the duty it owed pursuant to s 22 of the Trusts Act to exercise the care, diligence and skill a prudent person engaged in that profession, business, or employment would exercise in managing the affairs of other persons when exercising a power of investment.*

25. *The principal relief claimed in the first proceeding is:*

(a) *equitable compensation;*

(b) *a declaration that LMIM ATF the FMIF holds the amount of \$9,731,662.76 paid as the settlement sum pursuant to the Assignment Deed as varied on constructive trust of the trustee.*

26. *However, the final quantum awarded after a successful trial will likely be affected by a number of other factors mentioned further below.*

Nature of the second proceeding

27. *The essence of the Trustee's complaint is that LMIM ATF the MPF entered into a Deed of Assignment pursuant to which PTAL, in its capacity as custodian of the FMIF, assigned an existing loan and securities to LMIM ATF the MPF in consideration for a Settlement Sum where the value of the securities received were, at the date of the assignment deed, and will be at the time of the proposed proceeding, significantly less than the Settlement Sum paid pursuant to the deed.*

28. *The trustee's complaint is that by entering into the Deed of Assignment and subsequent Deeds of Variation, LMIM:*

(a) *breached the duty that it owed to the beneficiaries of the MPF not to place itself in a position of conflict of duty, in that the duties that it owed to the beneficiaries of the MPF conflicted with the duties it owed to the beneficiaries of the FMIF; and*

(b) *breached the duty it owed pursuant to s 22 of the Trusts Act to exercise the care, diligence, and skill a prudent person engaged in that profession, business, or employment would exercise in managing the affairs of other persons when exercising a power of investment.*

29. *The principal relief proposed to be claimed in the proceeding is:*

(a) *equitable compensation; and*

(b) *a declaration that LMIM holds the amount of \$19,551,800.65 paid as a Settlement Sum pursuant to the Assignment Deed (as varied) on constructive trust of the Trustee.*

30. *As with the first proceeding, the final quantum awarded after a successful trial will likely be affected by a number of other factors mentioned further below.*

- [10] Whilst, as is apparent from this summary, and indeed as is apparent from a review of the statement of claim in each of the first proceeding and the second proceeding, the claims are presently framed to seek equitable compensation and relief of a proprietary nature, it became clear from argument that the trustee also proposes pursuing a tracing claim in each proceeding. In so doing, it will be seeking to identify not merely specific assets still held by LMIM over which it has a direct proprietary claim, but also will seek to trace (if it can) the value of its claim into other assets of LMIM. In pursuing its tracing remedy in that regard by seeking to follow value, and not just cash, the Trustee drew support from the very recent advice of the Privy Council in *Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35.
- [11] The bulk of the argument before me was directed to the applications under s 96 of the *Trusts Act*. That section relevantly provides for the Court, in effect, to give private judicial advice to a trustee. The consequence of giving such advice is that personal protection is afforded to the trustee in pursuing a proceeding and the giving of the advice operates to protect the interests of the trust. The principles relevant to consideration of an application under s 96 have recently been essayed by Boddice J in *Glasscock v The Trust Company (Aust) Pty Ltd* [2012] QSC 15 and by Atkinson J in *Coore v Coore* [2013] QSC 196. The relevant passages of those judgments were set out at length in the judgment of Martin J in *KordaMentha Pty Ltd & Calibre Capital Ltd v LM Investment Management Ltd (in liquidation) & Anor* [2015] QSC 4. I respectfully adopt those statements of principle without setting them out at length.
- [12] It was not in issue before me that Mr Whyte was a proper interested party to be heard on the present applications. Mr Whyte's attitude was that he did not oppose the directions sought by the Trustee, but considered it appropriate to put before the Court some matters which went to the Court's consideration as to the appropriateness of making the directions. In particular, the information provided by Mr Whyte went to the Court's consideration of the likely return if the Trustee as successful in the proceedings.
- [13] For the liquidators, it was properly conceded that the information before the Court demonstrated in each proceedings that there is a *prima facie* legal case underpinning each proceeding. Arguments advanced on behalf of the liquidators in opposing the making of the directions went to questioning the true value of the claims, particularly in the context of the cost of pursuing each proceeding.
- [14] Counsel for the liquidators accepted that if there were an insurance policy that responded to the claims, then the liquidators would accept that the proceedings could be justified. The situation, on the material before me, is that an insurer has declined to respond in respect of the claims which are the subject of the first proceeding and the second proceeding. I was informed by counsel for the liquidators that his current instructions from the liquidators are that LMIM does not presently intend to challenge the refusal of coverage; counsel for the liquidators further informed me that this was not to be taken to be a concession that there was no policy, nor an assertion that the liquidators abandoned any claim on such policy.
- [15] Apart from a significant quantity of material filed in open court in respect of each of the claims made in the first proceeding and the second proceeding, I was provided, as is conventional on applications of this sort, with material on a confidential basis. That

material included advices by counsel and confidential submissions by counsel for the Trustee, which were directed particularly to the benefits of prosecuting the first proceeding and the second proceeding. I was also provided, on a confidential basis, with details of the proposed funding arrangements for the first proceeding and the second proceeding from a litigation funder, IMF Bentham. Subject to one matter to which I will refer specifically later, it is not appropriate for me to refer in any detail to those funding arrangements, save to record that I have had regard to the terms of the currently proposed funding agreement for the purposes of forming a view as to the appropriateness or otherwise of giving directions under s 96.

- [16] Moreover, in response to particular concerns raised on behalf of the liquidators, an affidavit has now been filed on behalf of the Trustee which confirms that the litigation funder has been informed that the insurer has declined cover in respect of the claims made in the first proceeding and the second proceeding, and the litigation funder has also been provided with copies of the material put before me which raised questions as to the availability of assets to meet the claims made in the first proceeding and the second proceeding. The affidavit confirms that, at the present time, the offer of litigation funding remains open, and further that the litigation funder is still reviewing the documentation filed before me which went to the question of the availability of assets to meet the claims made in the proceedings.
- [17] In reaching my conclusion with respect to the appropriateness of making directions under s 96, I expressly do so on the basis that litigation funding will be provided on terms which are identical to those put before me in the confidential information. Should that situation change, and it be the case that the litigation funder will only provide funding on terms different from those put before me, then I consider that this would be a circumstance which would require the legal advisers for the Trustee, in proper discharge of their obligations as officers of the Court, to bring these matters back before the Court for further consideration.
- [18] After counsel for the Trustee informed the Court of the information which had been provided to the litigation funder, counsel for the liquidators took instructions as to the liquidators' attitude with respect to the application under s 96. Counsel for the liquidators was then able to advise the Court to the effect that if, on receiving the confidential information, I was satisfied as to the appropriateness of the litigation funding arrangements proposed to be entered into then, as with their attitude with respect to insurance, the liquidators would properly concede that this would be an issue which would be taken into account in justifying the making of directions under s 96.
- [19] I turn then to the matters with which I need to be concerned on the applications under s 96.
- [20] First, I note that each application has been made "upon a written statement of facts". As I have already noted, there was no real issue before me that the facts, as stated, give rise to justiciable cases to be pursued in the first proceeding and the second proceeding.

- [21] Secondly, I am satisfied that service has been effected on “all persons interested in the application”. In that regard, on 29 May 2015 an order was obtained from Peter Lyons J regarding the mode of service on the approximately 4,500 unitholders of MPF. There was no issue that service has been effected in accordance with that order.
- [22] The real issue in respect of whether I ought accede to the applications for directions came down to, in effect, an assessment of the likely costs to be incurred in the proceedings, and the prospective benefit to be obtained for MPF from the proceedings.
- [23] Each of the first proceeding and the second proceeding is a significant piece of litigation. The estimate put before me was that the Trustee’s total legal costs of separately prosecuting both proceedings will be in the order of \$1.8 million. As was said by counsel for the Trustee, it ought be possible to reduce those costs if the first proceeding and the second proceeding are tried at the same time, or at least sequentially, by the same judge. Be that as it may, there will undoubtedly be significant costs and outlays incurred in prosecuting the proceedings.
- [24] As against that, questions are being raised, particularly by Mr Whyte, as to the quantum of monies which actually would be available to meet any judgments obtained in the proceedings. So, for example, the Trustee points to a large value (approximately \$40 million) which it contends was transferred from the MPF to the FMIF and which, it would argue, represents value into which it can trace for the purposes of recovery on its claim. Mr Whyte, however, points to facts which would call into question whether such transfers, or transfers of that value, actually occurred. He says, for example, that within that alleged transfer of value of some \$40 million, there were cash payments only amounting to some \$9.5 million, and of those cash payments at least 40 per cent were not attributable to the transactions which are the subject of the first proceeding and the second proceeding. Indeed, Mr Whyte says that, as at the date of appointment of voluntary administrators, the only amount which then remained in FMIF over which any constructive trust might be declared for the benefit of MPF was in the order of \$1.6 million.
- [25] Despite having properly raised these questions, Mr Whyte also properly acknowledged the relevance to my consideration of the details of the litigation funding (details of which remained confidential).
- [26] Counsel for the liquidators was also anxious to ensure that I had regard to the serious questions which had been raised as to the availability of assets to meet the potential claims under the first proceeding and the second proceeding, and also assisted considerably by pointing me to particular matters which might be of relevance when considering the terms of the proposed litigation funding agreement.
- [27] It is, of course, neither appropriate nor possible on an application such as the present to descend into making findings as to the true quantum and extent of the assets which will properly be available to meet any judgment in the proceedings. It is, however, completely appropriate for me to have cognisance of the issues which have been raised on behalf of Mr Whyte and the liquidators, acknowledging also that the issues that they have raised will inevitably contribute to the complexity (and cost) of the litigation to be pursued. It cannot, I think, be said on any fair reading of the material before me

that either the first proceeding or the second proceeding would be fruitless. On the other hand, it can equally be said that it is apparent that pursuit of the proceedings will be costly for all parties concerned. That is why it has been particularly relevant for me to have regard to the terms of the proposed litigation funding agreement.

- [28] As I have said, the terms of that proposed litigation funding agreement are confidential, and, save for one respect, it is inappropriate for the details of that proposed agreement to be publicised in this judgment. It is sufficient to record that the terms of the proposed litigation funding agreement have been put before me, and, having reviewed those terms and considered those in the commercial context of the relief claimed in each proceeding and also the prospective limitations on recovery which have been flagged by counsel to the liquidators and counsel for Mr Whyte, I have reached the view that it is in the best interests of the trust estate of MPF that, with the proposed litigation funding agreement in place, each of the first proceeding and the second proceeding should be pursued.
- [29] The one particular matter which arises out of the proposed funding agreement is this, namely that in each of the first proceeding and the second proceeding, the litigation funder will be required to file in Court a deed poll (in the form provided to me on a confidential basis) the effect of which will be that the litigation funder effectively assumes liability for adverse cost orders made against the Trustee in those proceedings. In view of the complexities of the litigation to which I have already referred, and the limitations on the MPF funds for recourse in the event of adverse costs orders being made, it seems to me that the provision of such a deed poll in each of the first proceeding and the second proceeding is necessary. Indeed, the approval I give under s 96 in respect of each of the proceedings will be conditioned on such a deed poll being filed in each of the proceedings.
- [30] It is also necessary for me to deal with the applications which have been made under s 500 of the *Corporations Act*. LMIM is subject to voluntary liquidation. The relief sought in each of the proceedings is outside the scope of the usual proof of debt procedure – this is particularly the case insofar as proprietary claims are pursued. It seems to me to be clearly appropriate for there to be leave to proceed in each case under s 500, and such leave shall be granted *nunc pro tunc*.
- [31] As to the costs of the s 96 application, I accept, as was said by Martin J in his *KordaMentha* judgment at [28], that in applications of this type the Trustee's costs are ordinarily ordered to be paid out of the trust estate on the indemnity basis.
- [32] The Trustee, however, resisted orders that the liquidators and Mr Whyte be similarly indemnified. It was argued that it would be inappropriate for either of those parties, effectively representing the interest of LMIM as they do, to have their costs now in circumstances where each of the first proceeding and the second proceeding is founded on allegations of breach of trust by LMIM. It was contended that an allegedly defaulting trustee should only have its costs out of a trust fund after the proceeding has been resolved in its favour.
- [33] In the present case, however, there are a number of considerations to be taken into account.

- [34] First, an application under s 96 is not a regular adversarial proceeding. Rather, it is the procedure by which a trustee obtains advice from the Court in relation to the management or administration of trust property. An important legal and a practical consequence of an order being made is that a trustee who acts on the direction of the Court is taken, as regards its own liability, to have discharged its duty as trustee so long as the trustee, has not been guilty of fraud, wilful concealment or misrepresentation in obtaining the direction – see *Coore v Coore* [2013] QSC 196 at [6]. The making of an order is important for the trust, because the Court would necessarily have had regard to the proper use of the trust assets, and it is important for the Trustee, because of the practical protection which the making of the order provides for the trustee. So the nature of an application under s 96 is quite different – as has been said by the High Court in the *Macedonian Church* case, it represents an exception to the Court’s ordinary function of deciding disputes between competing litigants.¹
- [35] Secondly and consequentially, it was appropriate in the present case to hear from the liquidators and Mr Whyte. Moreover, the liquidators and Mr Whyte provided the Court with information and assistance which was highly relevant to my considerations as to whether or not to make the orders sought. That assistance particularly went to the questions concerning the availability of assets to meet any prospective judgment in the first proceeding and the second proceeding, and also relevant issues to which I needed to turn my mind when considering the appropriateness or otherwise of the litigation funding agreement.
- [36] In all of the circumstances, I have decided that it is appropriate, in this particular case, for each of the liquidators and Mr Whyte to be indemnified out of the MPF in respect of the costs they have incurred on the present application under s 96.
- [37] The costs incurred in respect of the applications under s 500 of the *Corporations Act*, in my view, fall into a different category. Given the circumstances of the present case, and the particular nature of the allegations made, it seems to me that those are costs which should abide the event. Accordingly, the parties’ costs in respect of the applications under s 500 shall be reserved costs in the first proceeding and the second proceeding respectively.
- [38] Finally, it became clear in the course of argument that there will be issues which will need to be addressed early in the course of each of the proceedings. Not the least of these will be to identify the parties which will have carriage of the defences for LMIM. In any event, each proceeding is patently of such complexity as to warrant active case management. Accordingly, I will be directing the applicant to move immediately to have each proceeding placed on the commercial list.

¹ See *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 249 ALR 250 at [64].