

20 November 2024

UPDATE TO INVESTORS - DIVERSIFIED PROPERTY FUND ARSN 60 941 654

Dear Investor

Purpose of update

- 1 The purpose of this letter is to provide investors with an update on the status of the Supreme Court of South Australia proceeding number CIV-23-002352 (**SASC Proceeding**) commenced by Raptis Properties Pty Ltd (**Raptis**).
- 2 As previously noted in our update issued on 1 November 2024, One Managed Investment Funds Limited (**OMIFL**) as the responsible entity of the Diversified Property Fund ARSN 610 941 654 (**Fund**) filed an Application (**Advice Application**) in the Supreme Court of New South Wales (**Court**) for judicial advice in relation to the SASC Proceeding. The Application was heard by His Honour Justice Lindsay AM on 31 October 2024.
- 3 On 8 November 2024, a directions hearing was held before The Honourable Associate Justice Bochner in the SASC Proceeding. Justice Bochner made, amongst others, orders requiring OMIFL to file and serve its defence and cross-claims.
- 4 OMIFL confirms that it has filed and served:
 - (a) Defence dated 14 November 2024;
 - (b) Statement of Cross-Claim against Capital and Mr Kerr dated 14 November 2024;
 - (c) Statement of Cross-Claim against HFW dated 15 November 2024.
- 5 We set out below a summary of the Defence and each of the Statement of Cross-Claims against Capital and Mr Kerr and HFW to provide investors with an understanding of the approach taken in those documents. Investors should refer to the full documents, copies of which are available on the investor portal.

Defence

- 6 As investors are aware, the claim by Raptis is in relation to alleged breaches by OMIFL of the Contract of Sale dated 25 November 2022 (**Contract**) in respect of the property located at 63 Pirie Street, Adelaide, South Australia. Raptis alleges that:
 - (a) the Contract was due to complete on 27 February 2023 but, in breach of the Contract, OMIFL did not complete the Contract;
 - (b) Raptis and OMIFL continued to treat the Contract as remaining on foot while without prejudice negotiations occurred. Those negotiations were unsuccessful;
 - (c) In June 2024, Raptis served a notice on OMIFL to complete the purchase on 3 July 2024. In breach of the Contract, OMIFL did not complete the purchase on that date; and
 - (d) On 5 July 2024, Raptis terminated the Contract.



- 7 In essence, the defence filed by OMIFL on behalf of the Fund is as follows:
- (a) Capital and/or HFW confirmed the finance condition under the Contract had been satisfied without OMIFL's authority, and therefore it is not bound to complete the Contract.
 - (b) Even if OMIFL was bound to complete the Contract, **Raptis cannot recover any damages from the Fund's assets** because Capital's actions in relation to the Contract (discussed further below) mean OMIFL is not entitled to be indemnified from the Fund.
- 8 This is the defence OMIFL put before the Court in the Advice Application. To the extent investors may have been told OMIFL had an ulterior motive for filing the Advice Application in order to seek approval for indemnification from the Fund's assets, that is **incorrect**. OMIFL confirms in March 2023 it notified its insurers of Raptis's claim.
- 9 A more detailed explanation of the defence follows below:
- (a) HFW did not have OMIFL's permission to confirm:
 - (i) it had obtained a loan or other financial accommodation in accordance with Special Condition 30.1 of the Contract;
 - (ii) the finance condition had been satisfied pursuant to Special Condition 30.5 of the Contract;
 - (b) as a result of HFW not having OMIFL's permission to confirm satisfaction of Special Condition 30.1 of the Contract, the Contract was not and did not become unconditional on and from 7 December 2022;
 - (c) OMIFL did not breach the Contract and was not required to complete the sale as a result of the actions of HFW Lawyers and/or Capital because those actions were not permitted by OMIFL;
 - (d) OMIFL entered into the Contract in its capacity as Responsible Entity of the Fund and its obligations under the Contract were trustee liabilities;
 - (e) under Special Condition 17.1(c)(i) of the Contract, Raptis can only enforce a trustee liability against OMIFL to the extent it is actually indemnified out of the assets of the Fund;
 - (f) while the Fund is a Registered Scheme (and in accordance with subsection 601GA(2) of the *Corporations Act 2001* (Cth) (**Act**)), OMIFL is entitled to be indemnified out of the Fund's Assets for liabilities or expenses incurred in proper performance of its duties under the Constitution or the Act;
 - (g) however, that indemnity does not apply with respect to a liability to the extent that OMIFL has acted negligently, fraudulently, or in breach of trust;
 - (h) Capital was negligent in exercising its functions under the Investment Management Agreement entered into between OMIFL and Capital (**IMA**). The ways in which OMIFL alleges Capital was negligent are discussed further below in relation to the cross-claim against Capital and Mr Kerr;
 - (i) under s601FB of the Act, Capital's negligence is taken to be OMIFL's negligence;



- (j) therefore, because of Capital's conduct, OMIFL:
 - (i) cannot be said to have been acting in proper performance of its duties under either the Act or the Constitution; and
 - (ii) as a consequence, is not entitled to be indemnified from the Fund's assets.

Cross-claims against Capital and Mr Kerr

10 As set out above, OMIFL denies the Fund is liable to Raptis. However, to the extent OMIFL is found to be liable to Raptis, it alleges:

- (a) that liability arises because of the actions of Capital and Mr Kerr; and
- (b) Capital and/or Mr Kerr are liable for any loss suffered by OMIFL as a result of their negligence, breach of contract and/or misleading or deceptive conduct.

11 In summary, as against Capital and Mr Kerr, the cross-claim alleges:

Negligence

- (a) Capital, together with HFW, negotiated the terms of the Contract;
- (b) HFW dealt with Capital in relation to the sale. However, HFW dealt with OMIFL in relation to executing the Contract;
- (c) on 25 November 2022, prior to the execution of the Contract, Capital recommended to OMIFL that it approve and sign the Contract and pay a deposit of \$1,100,000 (**Manager Recommendation**);
- (d) in the Manager Recommendation, Mr Kerr and Capital represented, amongst other matters, that the obligations and undertakings of OMIFL under the Contract could be completed or could be complied with at the relevant dates under the Contract;
- (e) as at the time of entering into the Contract, Capital and Mr Kerr knew or ought to have known that:
 - (i) OMIFL did not have sufficient finance to support the completion of the Contract if sufficient funds could not be raised from investors; and
 - (ii) Capital had raised no more than \$3,000,000 from prospective and current investors for the purposes of the acquisition of the property
 - (iii) OMIFL would not be able to complete the Contract if it did not have cash an unconditional loan, or investor funds sufficient to enable the completion of the Contract; and
 - (iv) OMIFL would be in breach of the Contract if it gave notice the finance condition had been satisfied, but then failed to complete the Contract;
- (f) Capital owed a duty of care to OMIFL and/or the Members under the IMA in negotiating and advising OMIFL in relation to the Contract;
- (g) Capital breached its duty of care by:



- (i) failing to adequately negotiate the Contract and advise OMIFL in relation to the negotiation of the Contract;
 - (ii) making the Manager Recommendation;
 - (iii) failing to, or failing to adequately, procure sufficient funds to enable completion of the Contract;
 - (iv) instructing HFW to give notice that the Finance Condition had been satisfied without OMIFL's authority and in circumstances where it hadn't procured sufficient funds to enable completion of the Contract; and
 - (v) failing to recommend that OMIFL terminate the Contract;
- (h) OMIFL has suffered, and may suffer additional, loss and damage as a result of Capital's breaches of duty including a potential liability to pay damages for loss and damage allegedly suffered by Raptis for breach of contract;

Breach of contract

- (i) Clause 3.1 of the IM required Capital to (among other things), act honestly, efficiently and fairly, act in the best interests of investors and exercise its functions and duties under the IMA with the degree of care, diligence and skill as could be reasonably expected by a professional manager in dealing with a fund.
- (j) Capital breached clause 3.1 of the IMA and/or implied warranties by issuing the Manager Recommendation;

Misleading and deceptive conduct

- (k) Capital engaged in misleading and deceptive conduct by making the Manager Recommendation (and the associated representations);
- (l) Further or in the alternative, Mr Kerr engaged in misleading and deceptive conduct by making the Manager Recommendation (and the associated representations);
- (m) Mr Kerr was an executive director of Capital, he prepared and signed the Manager Recommendation and caused it to be issued to OMIFL;
- (n) Contrary to the representations made in the Manager Recommendation (amongst other things):
 - (i) Capital had no reasonable grounds to represent that OMIFL could complete and/or comply with its obligations under the Contract;
 - (ii) Capital had no reasonable grounds to represent that Capital would take any necessary action to ensure OMIFL could complete and/or comply with its obligations under the Contract;
- (o) OMIFL relied on the Manager Recommendation in entering into the Contract.



Cross-claim against HFW

- 12 Further or in the alternative to the cross-claims brought against Capital and Mr Kerr, OMIFL has also filed a cross-claim against HFW which alleges that to the extent OMIFL is found to be liable to Raptis:
- (a) it is because of the actions of HFW; and
 - (b) HFW is liable for any loss suffered by OMIFL as a result of HFW's negligence, breach of contract, breach of fiduciary duty and/or misleading conduct in relation to its engagement to act on OMIFL's behalf.
- 13 In summary, the cross-claim alleges:

Negligence and breach of contract

- (a) on 25 November 2022, prior to execution of the Contract, HFW sent a letter to OMIFL (**Advice Letter**) identifying the Finance Condition and stating, amongst other things, that:
 - (i) execution of the Contract was within the power of OMIFL as trustee;
 - (ii) the Contract did not impose any unduly onerous obligations on OMIFL;
 - (iii) the Contract was in a form suitable for execution by OMIFL; and
 - (iv) the Contract was conditional upon (in summary) a financial institution agreeing to grant OMIFL a loan on terms required by OMIFL to enable OMIFL to complete the purchase; and
 - (v) the opinion contained in the Advice Letter may be relied on by the persons to whom it is addressed and its officers and employees;
- (b) HFW owed OMIFL duties in contract to exercise the reasonable care and skill of a competent solicitor in advising OMIFL in respect of the Contract and carrying out OMIFL's instructions;
- (c) HFW owed a duty of care to OMIFL and/or to investors to exercise the degree of care and diligence that a reasonable solicitor would exercise in HFW's position in advising OMIFL in respect of the Contract and carrying out OMIFL's instructions;
- (d) In breach of its duties, HFW:
 - (i) did not ascertain or attempt to ascertain the nature or scope of Mr Kerr or Capital's authority to provide instructions on behalf of OMIFL or to bind OMIFL;
 - (ii) did not enquire as to the status of Capital's or OMIFL's attempts to raise the balance of the purchase price under the Contract;
 - (iii) did not advise OMIFL on the consequences of confirming satisfaction of the Finance Condition or whether doing so was prudent considering OMIFL still needed to raise funds in the order of \$28 million prior to the scheduled settlement;



- (iv) did not obtain OMIFL's instructions or consent to confirm satisfaction of the Finance Condition;
- (v) did not have OMIFL's authority to bind it to complete the Contract; and
- (vi) confirmed satisfaction of the Finance Condition on the basis that OMIFL had arranged a loan but knowing that the Facility term sheet had not been issued and the proposed Facility was not in OMIFL's name (but was in the name of Equity Trustees Limited).

Misleading or deceptive conduct

- (e) HFW engaged in misleading and deceptive conduct by issuing the Advice Letter and making the associated representations, which included an incorrect summary of the terms of the finance condition;
- (f) OMIFL relied on the Advice Letter and/or the associated representations in entering into the Contract.

Next steps in the SASC Proceeding

- 14 Raptis is required to file any reply to the defence by 29 November 2024.
- 15 Capital, Kerr and HFW are required to file their defences to the cross-claims by 13 December 2024.
- 16 The matter is next listed for directions on 17 December 2024 in the Supreme Court of South Australia. OMIFL expects the Court will make procedural orders for the next steps in the SASC Proceedings on that date, which will likely include the parties undertaking discovery, and filing evidence.

You do not have to take any action in relation to this email. This update has been provided to you for information purposes only and to keep investors updated.

Should you have any questions in relation to this update or the Fund, please contact capital@oneinvestment.com.au.