IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M79 of 2018

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

Appellant

AND

WILLIAM LIONEL LEWSKI

First Respondent

AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED ACN 095 474 436 (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) (CONTROLLERS APPOINTED)

Second Respondent

SUBMISSIONS OF THE APPELLANT IN REPLY

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Argument

Notices of Contention

2. The Court should reject the Respondents' submissions on the Notices of Contention for two broad reasons:
   (a) The Court should not accept the Respondents' invitation to overturn the decision of the Victorian Court of Appeal in *360 Capital Ltd v Watts* (2012) 36 VR 507 (Warren CJ, Buchanan and Nettle JJA) (***360 Capital***) and the decision of the Federal Court in *Premium Income Fund Action Group Inc v Wellington Capital Ltd* (2011) 84 ACSR 600 (Gordon J) (***Premium Income***).
   (b) In any event, in the present case the adverse effect upon members' rights was more fundamental and extreme than even the circumstances considered in those earlier cases.
3. As to the first matter, Mr Lewski (**LS**) at [56]-[61] and Dr Wooldridge (**WS**) at [7]-[9] assert that the "right to have the scheme managed and administered in accordance with the existing constitution" accepted by the Court of Appeal in *360 Capital Ltd* is not a "members' right" for the purposes of s 601GC(1)(b) because:

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(a) it is tantamount to a right not to have the constitution amended (at all); and

(b) to recognise such a right is to deprive s 601GC(1)(b) of utility.

4. The Respondents are urging the correctness of the approach of Barrett J in *ING Funds Management Ltd v ANZ Nominees Ltd* (2009) 228 FLR 444 (***ING Funds***) and *Re Centro Retail Ltd* (2011) 255 FLR 28 (***Centro Retail***) over that of Gordon J and the Court of Appeal. In *ING Funds*, the RE adopted amendments to the constitution that suspended the right of members to redeem their units on notice to the RE. Barrett J held that the right of redemption was a members' right within s 601GC(1)(b), but observed, *obiter* (at [98]) that in his view the right to have the scheme administered in accordance with the existing constitution was not a relevant members' right. Gordon J subsequently decided in *Premium Income* (at [32]-[42]) that a provision of the constitution that governed the price at which new units must be issued created a member's right not to have units issued at any other price; which right was affected (in her Honour's view adversely) by an amendment changing that price. Her Honour set out in her judgment (at [30]) a passage from Barrett J's decision in *ING Funds* that included paragraph [98] and highlighted the final sentence, which stated that "*the emphasis is on rights created and secured by the constitution itself.*" Her Honour found (at [34]) that the right to have new units issued only at the constitutionally mandated price was a right of that character.

5. The proposed amendment in *Centro Retail* also involved a change to the constitutional requirements as to the price at which new units would be issued. Barrett J (at [35]-[36]) opined that Gordon J had reached the wrong conclusion in *Premium Income,* and that provisions fixing the price at which the RE might issue new units did not create members' rights because: (a) whilst the members have a right to have the RE comply with the existing terms of the constitution, s 601GC(1)(b) could not be concerned with effects upon a right with that generality because it would necessarily mean the RE would never have power to amend the constitution; (b) there was a distinction between effects on *rights* which are relevant under s 601GC(1)(b) and mere effects upon the *value* or *enjoyment* of those rights which are not relevant to the exercise of power under s 601GC(1)(b).

6. His Honour appears to have drawn a distinction between provisions which regulated some aspect of the scheme that particularly related to the members (such as the right of redemption in *ING Funds*), which give rise to members' rights; and provisions which regulated the management of the scheme in general and the functions of the RE (such as the issue of new units), which do not give rise to members' rights.

7. The approach of Gordon J and the Court of Appeal rejects this distinction and correctly recognises that the right to have the scheme administered in accordance with the constitution

is, as it were, the foundational right of the members, but one which gives rise to more specific contractual rights arising from the constitution, which are relevant members' rights.[1] The focus of the inquiry for the purpose of s 601GC(1)(b) is on those more specific rights and whether the impact which the amendment will have on them is positive, negative or neutral. In this sense, the first part of Barrett J's reasoning miscarried because it threw up a straw man. As to the second part of Barrett J's reasoning, the distinction which he drew between an impact on a right and a mere impact on the value of an interest in a scheme was beside the point. In the circumstance dealt with by Gordon J and Barrett J, the correct focus was on the particular right which the members had under the existing constitution which was the right to have new units issued only in accordance with a specific formula. If the formula were to be changed in a manner which would dilute the position of existing members, that is an adverse effect upon the interests of the members.

8. The Court of Appeal in *360 Capital* was dealing with a variation of the factual situation in *ING Funds* and *Premium Income*. The present case, however, is even clearer than any of the earlier cases. Prior to the amendment:
   (a) the RE had no entitlement to take any fee except as provided by constitution;[2]
   (b) the RE could not under the constitution make any amendment in favour of itself;[3]
   (c) the Fees were defined in character and had limits and conditions attached to them;[4]
   (d) accordingly, the RE was entitled to those Fees and no more; and
   (e) the members were entitled to remove the RE without financial penalty.
9. Post the purported amendment, there was:
   (a) an increase in the Listing Fee without corresponding change in the RE's duties;
   (b) a Removal Fee which imposed a price on the exercise by the members of their existing right to remove the RE;
   (c) a Takeover Fee which imposed an increased price to be paid by the members as a whole upon the exercise (in the relevant circumstances) of their right to transfer their units.
10. As such, the Amendments affected adversely not just the *value* of the existing rights, but the *content* of those rights themselves. On any view, the rights themselves were being altered in a fashion adverse to members. Indeed, even in terms of the now discredited distinction drawn by Barrett J, the rights affected would properly have been categorised as members'

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[1] It therefore does not follow that every change to the constitution adversely affects that interest, as the Court of Appeal explained at [41]. See also *Eagle Star Trustees Ltd v Heine Management Ltd* (1990) 3 ACSR 232 at 239.
[2] Section 601GA of the Act.
[3] Clauses 34.1 and 25.1: LJ [82]-[84] [CB 50-51]; Appellant's Book of Further Materials (ABFM) 202-204, 226.
[4] Clause 24.5 provided for the fees to which the RE was entitled: LJ [65] [CB45].

rights. In sum, the Respondents have identified no error in the Court of Appeal's approach, let alone identified how in the even clearer circumstances of the present case, it is productive of error.

11. Dr Wooldridge correctly acknowledged at WS [10] the directors formed no opinion that the amendments did not adversely affect members rights. As a result, the trial judge and the Full Court correctly found that the condition in s 601GC(1)(b) was not satisfied.

Notice of Appeal Ground 1

12. Mr Lewski identifies at LS [19] three reasons to dismiss ASIC's contentions. The first, developed at [20] is that Ground 1 involves a recasting of ASIC's case. This submission is without substance. ASIC specifically pleaded (2FASC [24], [25] and [29]) (ABFM 263, 270) that the Amendments were invalid for failure to comply with s 601GC(1)(b). This formed a circumstance in which the directors' contraventions on 22 August 2006 and in subsequent years occurred. The final sentence of LS [20] is simply wrong: the Full Court said that there was a "positive mandatory obligation on the officers of the RE to attend to finalising the lodgement of [the Deed]" that arose on 19 July 2006 by the interaction between s601GC(2), s 601FD(1)(f) and cl 4 of the Deed (FC1 [177], (CB 561)).

13. The second reason, developed at LS [21]-[24] is that Ground 1 involves a misconception of the Full Court's reasons. This point is also without substance. It is correct to say that the Full Court's decision was concerned with the content of the constitution for the purposes of the Act, and ASIC's contention at AS [42] was that the Full Court's finding of "interim validity" in fact applied for all of the purposes of the Act. That interpretation of the decision is amply supported by the references given in AS footnote [39] and confirmed by the Full Court's failure to identify that a reference to the constitution of a scheme in one provision of the Act would carry a different meaning in another provision. Further, the definition of "constitution" in s 9 of the Act would be tautologous, and sections 601FC(1)(f) and 601GB rendered meaningless, if there was intended to be a difference between the constitution for the purposes of the Act and the documents defining the real, legally binding, relationship between the members and the RE.

14. The third, and principal reason, developed at LS [25] – [39] appears to be a refinement of the argument which Mr Lewski successfully persuaded the Full Court to adopt. The argument as it is now put shies away from accepting that it involves "interim validity." Rather it puts that the effect of the Act read as a whole is that the lodgement of a document as the amended constitution is a fact upon which the balance of the scheme operates to entitle and oblige the RE and its directors, and potentially others, to treat that document as the

instrument by which the scheme is to be conducted without, so it is said, clothing the document with legal effectiveness.[5] Mr Lewski asserts that any other conclusion would generate a "paradox" where a document as lodged must be treated as a nullity by default until there is positive confirmation of its validity.[6] Much of the argument in support of this case relies upon an assertion of illogical and unjust results and impossible burdens on the REs and directors that would otherwise arise.

15. That reasoning should be rejected for the following reasons. First, it proposes a construction that neither starts nor ends with the text, but rather assumes a questionable statutory purpose ("certainty") and a negative statutory intention (avoidance of the consequences of ASIC's construction) impermissibly to produce a result that would seemingly apply regardless of what the relevant text actually contained.[7]

16. Secondly, the attempt to sustain the argument by disavowal of the consequence of "interim validity" necessarily fails. The logic of the argument remains that of the Full Court: that the Act imposes a legal entitlement and obligation upon at least the RE and the directors to behave in accordance with a particular state of affairs, namely that the document lodged in fact is the one they must uphold. The argument requires that legal obligation and entitlement continue for so long as no court declares otherwise. It necessarily involves the conclusion disavowed by Mr Lewski, namely that the fact of lodgement clothes the document with legal effectiveness for that period of time.

17. Thirdly, the proposition that REs and their directors will be placed in impossible peril unless interim validity is adopted has ready answers:

    (a) the position of an RE amending under s 601GC(1)(b) is no different from that of any trustee proposing to amend a Trust Deed under a power expressed in such terms;

    (b) an RE which after full consideration of the relevant facts and circumstances remains in real doubt whether a proposed amendment is within s 601GC(1)(b) would always have the prudent option to put the amendment to the members;

    (c) further, contrary to LS [30], there is power for an RE which remains in doubt to seek a

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[5] See LS [25].
[6] See LS [25].
[7] Cf. *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 per French CJ and Hayne J at 394-5 ([40] – [41]); *Deal v Kodakkathanath* (2016) 258 CLR 281 per French CJ, Kiefel, Bell and Nettle JJ at 295 ([37]).

direction or judicial advice[8] under the State Trustee Acts,[9] or the inherent jurisdiction;[10]

(d) in addition to (c), a declaratory suit against a representative party could decide the issue as a matter of right.

18. The hollow nature of the argument put concerning "inconvenience" to REs and their directors is amply demonstrated by the facts of this case. Mr Lewski, conscious that he was attempting to achieve an amendment to the constitution that would give his company an entitlement to substantial additional fees for no additional work, manoeuvred to get the change made without putting the amendment to the members who would be adversely affected by it. He failed to cause the RE to form the opinion required by s 601GC(1)(b). The notion that the Act entitled and obliged him to act thereafter as if there had been a proper formulation of opinion would set the entire protective purposes of s 601GC(1)(b) at naught.

19. Fourthly, in response to LS [32], the resolution of the present construction question is not aided by the suggestion that interim validity is necessary to avoid the imposition of "strict or absolute liability" on "otherwise blameless persons". Giving the text of s601(GC)(1) its ordinary meaning does no more than require that the stated conditions are met before the constitution may be amended. It is an objective question whether either of those conditions is met. The first involves whether the members have passed the requisite resolution. The second involves whether the RE has formed the requisite opinion. In either case, there is a correct legal answer to whether the condition has been satisfied. If it has not been satisfied, the constitution remains in its unamended form and it is appropriate for the Court to make a declaration accordingly. If a director in a given case is able to make out the full elements of the exoneration in ss 1317S and 1318, which include both honesty and reasonableness, then the director will obtain the benefit of exoneration. The Act deals with the power and exoneration as separate questions but as part of a coherent overall scheme. There is no strict or absolute liability in the sense understood in the criminal law imposed on anyone.

20. Reference to an "indoor management" rule (LS [33]) does not advance the argument: no part of the present case is concerned with the rights of third parties arising from an incorrect representation by the RE about the content of the constitution.

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[8] The jurisdiction to give judicial advice to a responsible entity is well established: *AMP Life Ltd v AMP Capital Funds Management Ltd* (2016) 312 FLR 391 (NSWCA) (Bathurst CJ, Meagher JA and Barrett AJA) fn 3; *Re Mirvac Ltd* (1999) 32 ACSR 107 at [45]-[47]; *Centro Retail.*

[9] See eg s 63 of the *Trustee Act* 1925 (NSW); r 54.02 of the *Supreme Court (General Civil Procedure) Rules (2015) (Vic).*

21. LS [35] misstates the operation of s 1322. Application can be made under s 1322(4) in the absence of complaint. Section 1322(6)(a)(i) is one of three sub-paragraphs which are alternatives, and relief under the other sub-paragraphs is not confined to proceedings of a procedural nature.[11]

22. LS [36] misapprehends ASIC's criticism of the Full Court's analysis with reference to *Project Blue Sky*. ASIC's submission commences at AS [44] with the text of s 601GC(1)(b), the grammatical meaning of which is that the formation of the relevant opinion is an essential requirement for the existence of the power to amend. The submissions at AS [45]-[47] demonstrate that, when statutory purpose and context are considered, there is no basis to attribute a legal meaning different from the grammatical meaning. In LS [27], it is asserted without any elaboration or reference to the actual text that the provision "can be construed" as a requirement for the proper exercise of the power rather than a condition of its existence. No basis for such a departure from the grammatical meaning is shown.

23. It is further submitted at LS [27] that even if satisfaction the condition in s 601GC(1)(b) goes to the existence of the capacity to amend, the purported amendment may still be capable of having legal consequences. But those consequences, whatever else they may be, cannot by definition extend to effecting what there was no capacity to effect. The submission at LS [27] avoids confronting this problem by failing to specify what legal consequences apply in this particular case.

Notice of Appeal Ground 2

24. The Respondents' submissions on ground 2 can be grouped under three broad themes:

    (a) as a matter of law, in assessing whether at 22 August 2006, or any later date, there was a conflict between the interests of members and the interests of the RE, or indeed whether any other relevant duty existed, the directors were entitled to act on the basis that the scheme was governed by the document lodged in fact as the amended constitution, irrespective of whether it was lodged with or without power;

    (b) as a matter of law, in assessing such matters, all prior delinquencies of directors were irrelevant absent pleading and proof that they were on actual notice of prior delinquency;

    (c) in the particular circumstances and the way in which this case was pleaded and run, the delinquencies as occurring on 19 July 2006 could not be sued upon and penalised directly by reason of s 1317K; and ASIC could have no valid separate case in respect of alleged delinquencies on 22 August 2006 and subsequently in 2007 and 2008.

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[11] *Weinstock v Beck* (2013) 351 CLR 396 per French CJ at 403.

25. As to the first matter, the proposition of law is wrong for the reasons given under Ground 1. If an amendment is lodged without either of the conditions in s 601GC(1) being satisfied, the constitution remains as a matter of law in its unamended form; it is the duty of the RE and the directors to administer it in that form; and the assessment of whether there is a conflict between the interests of members and the interests of the RE is to be assessed objectively as against those legal rights and relations as they exist. Accordingly, in response to LS [47], the conflict that is correctly admitted to have existed on 19 July did not dissipate in law at 22 August or any later time merely by reason of the directors or the RE resolving to lodge and then actually lodging a document without satisfying the conditions in s 601GC.

10 26. As to the second matter, the parties are presenting starkly opposed conceptions of the operation of the Act upon the duties of directors. The Respondents' submissions are infused with a heavy subjective flavour, whereby directors can by delinquency on one occasion confine their duties when they come to a later step in the same transaction to mere "ministerial" ones, provided always they do not have actual notice of the earlier delinquency.

27. ASIC's submissions are that the Act operates with a strong objective focus on identifying the circumstances facing the directors and how a reasonable director knowing those circumstances would respond, always placing the interests of the members above the personal interest of the RE or the directors. In the present case, that means that on each of 19 July and 22 August 2006, and on the later occasions of the Payment Resolutions, the Act

20 required the directors to identify the conflicts that did exist and still existed between the interests of the RE and of the members, and to prefer the members' interests in the face of such conflict and to act with both diligence and propriety. Had the directors fulfilled their duties on 19 July, that would have been a relevant circumstance to ground their duties on the later dates. Equally, by not fulfilling those duties on 19 July, that was a relevant circumstance in which the content of their duties on 22 August and later fell to be identified.

28. In LS [47] Mr Lewski sets up a false binary, where but for s 1317K ASIC could have run and succeeded on a case based on 19 July and nothing else would have mattered, but with s 1317K ASIC's only possible case must necessarily fail. ASIC's case is that there were three separate, sequential occasions which called for performance by the directors of their

30 duties. There were separate contraventions on each separate occasion, each of which would be appropriately responded to by declarations and would be the subject of separate civil penalties. ASIC's failure to sue within time with respect to the 19 July 2006 breaches prevented it from obtaining declarations and civil penalties in respect of those breaches but had no consequence for the later breaches.

29. Mr Lewski's submission at LS [47] addresses a question which is critical to the resolution of Ground 2: at 22 August 2006, was there a conflict between the interests of the members and the interests of the RE? It is acknowledged in LS [47] that such a conflict existed at 19 July, but the conflict is said to have evaporated thereafter due to two matters – the "purported amendment to the constitution then in force" and the absence of any "allegation of knowledge of prior delinquency." Those matters cannot have operated to erase the actual conflict as at 22 August 2006 or any later time. As to the first, the purported amendments were invalid and in any case were not "in force" (other than in the beliefs of the directors). As to the second, as expressed it is no more than a pleading point, but the underlying substance of it could not be relevant to the existence of the conflict; only to its recognition. This approach is reflected in WS [28]-[30], which proposes that the obligation to prefer the interests of members is not engaged unless the conflict is known to the RE or relevant officer.

30. This construction of the scope of the duty should be rejected. It is wrong conceptually and it does not bear on the facts of this case. At the conceptual level, the obligation of an RE and its relevant officers arising from ss 601FC and 601FD is to be careful, diligent and honest in recognising conflicts between the interests of the RE and those of the members. Failure to recognise a conflict can be no excuse for failing to give priority to the members interests at the very least if the conflict was capable of being recognised by an RE or officer exercising reasonable care and diligence. On the facts of this case, the conflict was capable of being recognised by a reasonable director – it was amply so held by the trial judge at LJ [614] and [617] (CB193-195). The directors in this case did not turn their minds to that question on 22 August (LJ [616]) or on any later occasion (LJ [758]-[759], CB240).

31. It is contended at LS [43] and WS [23] that the decision to lodge the deed was merely "ministerial", based on the Full Court's view (FC1 [274], CB589) that "on its face the Lodgement Resolution ... was directed at the timing of lodgement, so that the directors can be seen as applying their collective minds only to the resolution regarding the timing of lodgement." Apart from the fact that on its face the resolution stated the purpose of the lodgement - "so as to become effective" – this finding of the Full Court is focused overly narrowly on what the directors may have thought they were doing (there was no actual evidence of this) rather than on the *consequences* of the action they were directing to be taken. The trial judge correctly focused on the *consequences* of the resolution in finding that the Lodgement Resolution was an important resolution in its own right (LJ [561], CB180). A belief by the directors that the RE had the legal power to make such amendments or that they had validly resolved to do so on an earlier occasion has no bearing on this consequence.

32. Giving priority to the interests of the members would most likely have required the directors to decide on 22 August not to lodge the Amendments; thus, for practical purposes reversing the decision made on 19 July. Contrary to the suggestions at LS [43], [46] and WS [27], this does not involve the invocation of a "duty to reconsider". The Respondents' assertions to that effect put the cart before the horse: the claim that there can be no obligation to reconsider leads to a requirement that the content of the duty must be defined to exclude the possibility.

33. Contrary to LS [46], no question of a "continuous breach" arises in this case.[12] After 22 August 2006, no act or decision of the RE relevantly affected the interests of the members until the various decisions were made in 2007 and 2008 to pay the Listing Fee. ASIC's case in this respect was quite limited: against the RE it alleged a breach of the best interests/conflicts duty and the duty to ensure that payments of scheme property were made in accordance with the constitution, and a contravention of s 208 of the Act. Against the directors it alleged a breach of the best interests/conflict duty and a breach of the duty to take all reasonable steps to ensure that the RE complied with the constitution and the Act.[13]

34. The Listing Fee payments were made in the belief by the RE and the directors that the process of amendment had been completed and that the payments were authorised by the constitution, when in fact they were not so authorised and constituted a breach of trust. The issue of mistake about the contents of the constitution thus arises more starkly on these claims. Contrary to LS [41] and WS[41], the requirement of strict adherence to the true constitution does not impose impossible burdens: it simply equates the position of an RE under the Act to that which obtains for trustees under the general law, and the Act specifically extends that position to the officers of the RE by s 601FD(1)(c).

35. As is observed in WS[33] the position is more nuanced with regard to the directors' obligation to take all reasonable steps under s 601FD(1)(f). ASIC's case on this duty did not assert a strict liability: it alleged, and the trial judge found, that the directors should have obtained clear legal advice or direction from the Court that the Amendments had been effective. This finding was not addressed by the Full Court (because of its findings about the constitution) and has not been addressed in the submissions of the Directors. ASIC submits that it is clearly justified.

Notice of Appeal Ground 3

36. The parties are at issue on Ground 3.

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[12] The question whether the best interest duty would impose a continuing obligation to correct the constitution (cf *Breen v Williams* (1996) 186 CLR 71 per Gaudron and McHugh JJ at [113]) does not arise here because the constitution was never effectively altered.

[13] There was also an allegation of involvement in the RE's contravention of s 208: see Ground 3.

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