IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S181 of 2012

BETWEEN

Westfield Management Limited as trustee for the Westart Trust
Appellant

And

AMP Capital Property Nominees Limited as nominee of Unisuper Limited in its capacity as trustee of the complying Superannuation Fund known as Unisuper
First Respondent

Unisuper Limited in its capacity as trustee of the complying Superannuation Fund known as Unisuper
Second Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply Argument

Relevant Facts

2 At [5] of the Respondents' Submissions (**RS**), the respondents submit that it cannot be inferred that the Scheme was always intended to be closely held. However, both Ward J at first instance at [34] (AB 398.30-399.10) and the Court of Appeal at [51] (AB 462.12-13), correctly held that the Unitholders and Joint Venture Agreement (**the Agreement**) (which was entered into after the Scheme was established) was intended to regulate a "closely held unit trust business structure".

Notice of Appeal

3 At RS [8] and following, the respondents state that the appeal "concerns the availability of the statutory right under s 601NB of the [Corporations] Act". Framing the issue in that way is an error. While under the Notice of Contention the respondents question the enforceability of cl 16.2 of the Agreement, the issue raised under the Notice of Appeal is the proper construction of cl 16.2.

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4 At RS [13]-[17], the respondents make submissions as to the construction of cl 10.1(a) of the Agreement. However, the appellant does not take issue with the construction affirmed by the Court of Appeal that cl 10.1(a) does not "prohibit a sale by the responsible entity of the property in accordance with an obligation arising on a winding up of the scheme following a resolution by members directing that the scheme be wound up": see Court of Appeal at [44] (AB 459.35-39) and Court of Appeal transcript of 18 November 2011 (Respondents' Supplementary Appeal Book (**RSAB**) 47:20-36). The issue is the Court of Appeal's construction of cl 16.2.

5 At RS [22], the respondents incorrectly submit that the appellant's case below was "[a]t all times" that the exercise of voting rights by the respondents "would be contrary to the intent and effect of cl 10.1 of the Agreement". On the contrary, counsel for the appellant made the following submission orally (with written submissions to the same effect) in relation to cl 16.2 (RSAB 48:38-46) (see also the Court of Appeal transcript at RSAB 52:36-41):

> *"The third matter to draw attention to is the last five words [of 16.2], "the provisions of this deed." That is, one takes the provisions together. It's not a question of simply isolating one particular provision, reading that in isolation and saying that doesn't apply after a winding up has commenced and therefore we can indirectly bring about a sale after a winding up by using our voting power to make sure there's a winding up. One reads the deed together and the deed read together is all about the ownership and operation of a shopping centre with expressly limited rights for the sale and for that matter expressly limited rights for the acquisition of other property."*

6 There is no "new case" or shift in the appellant's case as the respondents assert at RS [23]-[25]. The appellant's argument in this Court is in substance the argument set forth in the preceding paragraph. That argument was addressed by the respondents in the Court of Appeal (RSAB 59:15-24) and considered and rejected by the Court of Appeal at [51] (AB 462:11-18). The appellant contends that the Court of Appeal erred in doing so. The argument is not made "without reference to cl 10 of the Agreement" as the respondents assert at RS [23]: see Appellant's Submissions (**AS**) at [18], [44] and [46]. Contrary to RS [24], the provisions relied upon by the appellant (including cl 10) are identified: see AS [16]-[22], [44]-[46]. The requirement in cl 10 that the shopping centre not be sold "without the written consent of the Unitholders" is of prime importance in ascertaining "the intent and effect of the provisions of [the Agreement]" in the context of the respondents' attempts to bring about a sale of the shopping centre without unanimous consent. But cl 16.2 requires a determination of the intent and effect of the provisions of the Agreement as a composite or as a whole: see AS [39]. The Court of Appeal put it back to front at [49] in concluding that cl 16.2 "does not require any more than that full and complete effect be given to cl 10.1(a)": AB461:31.

7 At RS [25], the respondents submit rhetorically that the appellant's argument proceeds as if "the intent and effect of the provisions of" the Agreement referred instead to "the commercial purpose of the Agreement". The unstated premise is that it would be absurd or impossible for a court to discern the purpose of an agreement. As noted at AS [40] and [41] courts, in other contexts, are asked to give effect to the commercial purpose of an agreement or the purpose of a trust or the purpose of a scheme (for example, under s 601NC of the Act). There is nothing problematic about parties to a joint venture agreement expressly agreeing to exercise voting rights so as to most fully and completely give effect to the intent of the provisions of the agreement. "Intent" in this context refers to the objective intent not the subjective motives or intentions of the parties: see *Ermogenous v Greek Orthodox Community* (2002) 209 CLR 95 at 105-106. The appellant does not submit otherwise, contrary to the suggestion at RS [25].

8 In response to RS [28], cl 16.2 of the Agreement plainly evinces an intention to qualify or restrict the exercise of statutory voting rights in certain circumstances. The enforceability of cl 16.2 is considered in addressing Ground 2 of the Notice of Contention.

9 In response to RS [29], the construction of cl 16.2 advanced by the appellant would not "exclude the operation" of the Act.

10 Contrary to RS [30]-[31], the appellant does not submit that the Trust could never be terminated or wound up unless all unitholders consent in writing. The appellant does submit that if voting rights are to be exercised in relation to a resolution leading to a wind up of the Trust, then those voting rights must be exercised by a unitholder in conformity with cl 16.2. (The totality of those voting rights were identified by the Court of Appeal at [34]-[35] (AB 455:30-456:20) and were limited in number.) However, there are mechanisms available to wind up the Trust which would not require the exercise of voting rights. Section 601NC provides for winding up where the purpose of the scheme is accomplished and s 601ND permits winding up if the Court considers it is just and equitable.

11 Contrary to RS [32] and [33], the appellant's construction of cl 16.2 does not amount to any exclusion of a statutory voting right.

Notice of Contention

12 RS [34]-[40] contains statutory history that does not advance matters. It demonstrates no more than that the legislature was concerned to protect unitholders from misfeasance by managers or trustees, rather than circumscribing agreements that might be reached among unitholders.

13 The winding up right conferred by section 601NB of the Corporations Act is a right conferred for the personal benefit of investors in registered managed investment schemes. It

should not be seen as serving any wider public need or purpose. The legislative history of the provision does not reveal a public policy that investors possessed of that right should be constrained in their ability to agree by private arrangement how that the right should be exercised. Indeed if the respondents' position were valid, there would be an unwarranted and undesirable intrusion into ordinary commercial arrangements and an erosion of the ability of parties to those arrangements to freely contract which is itself an important public policy principle. For example, an investor in a registered managed investment scheme might enter into a contract to sell its interests in the scheme to another party with deferred settlement pending payment of the agreed purchase price. Unremarkably the purchaser would seek to have incorporated in the contract various measures to protect its position pending completion such as covenants or undertakings from the vendor that in the period pending completion it would not exercise its voting rights to remove or replace the responsible entity, or to vary the scheme constitution in a manner inimical to the purchaser's interests, or to wind up the scheme. These are common and unremarkable yet necessary features of such contractual arrangements intended to protect the purchaser's legitimate commercial interests. If the respondents' contention is correct, namely that these rights are immutable - i.e. "entrenched" or "irreducible" in the sense that a private arrangement in relation to the exercise of voting rights should not be countenanced - then these ordinary, unremarkable (but necessary) commercial arrangements would be jeopardized. There is no discernible public policy reason that this should be so.

Notice of Contention (Ground 1)

14 The focus of this contention now appears to be clause 18 of the Agreement (RS [42]ff). Clause 18 by its terms deals with "rights, power and remedies provided in this deed". Clause 16.2 is relevantly a restriction on the unitholders as to the manner in which they may exercise their voting rights. That is not the subject matter of clause 18. The respondents' paraphrasing of clause 18 at RS [45] is inaccurate. The clause, upon a proper construction, does not advance the respondents' case.

Notice of Contention (Ground 2)

16 The respondents criticise the Court of Appeal for adopting an approach which was too narrow, by focusing on s 601NB. None of the matters to which the respondents draw attention undermine the correctness of the approach of both courts below.

17 There is nothing inimical to public policy in unitholders, between themselves, agreeing to stipulate the way in which they will exercise a right like that conferred by s 601NB. Such arrangements are commonplace between shareholders in companies. There is no reason in the

terms of the Act or in principle why a different position should obtain in the case of a unit trust. A review of the legislative history of Chapter 5C of the Act does not indicate otherwise.

Notice of Contention (Ground 3)

18 The respondents persist in an argument rejected by all judges below that the Agreement does not mean what it says, namely that "Unitholders" – a defined term (AB 143) – does not mean all unitholders. RS [56] submits that clause 10.1(a) does not contain any textual indication suggesting unanimity is required. The plain words used in cl 10.1(a) and the defined term "Unitholders" provide all the textual indication that is required. That conclusion is reinforced by the various provisions of the Agreement which specify circumstances in which unanimous consent is not necessary for particular matters: see AS [65].

19 RS [57] suggests that a construction should be preferred which results in consistency between the Trust Deed and the Agreement. That cannot be so in light of the fact the Agreement seeks to adapt that Trust Deed so that it is a suitable joint venture vehicle. The Agreement expressly contemplates the possibility of inconsistency in clause 30.4 and provides a mechanism to resolve it by giving paramount effect to the Agreement.

20 RS [57(b)] suggests for the first time that if clause 30.4 means what it says, it would be ineffective.

21 The submissions at RS [58] that the clauses requiring greater than 50% approval were of a different character, as they required a unitholder to pay money or have their holdings diluted, ignores the commercial realities of the situation, and the fact that, on any objective measure, the disposal of the Property and destruction of the joint venture through the winding up of the scheme was a matter of far greater seriousness.

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