IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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No. S~~15~~ 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



## RESPONDENTS' SUBMISSIONS

### PART I. Certification re Internet Publication

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

### PART II. Issues

2. No issue of the level of generality and abstraction set out in paragraph 2 of the Appellant's Submissions ("AS" [2]) arises. The issue raised by the Notice of Appeal is not accurately captured by AS [3]. The true issue is whether it would be a breach of cl 16.2 of the Unitholders and Joint Venture Agreement ("Agreement") (AB 136.20) for a unitholder in the KSC Trust ("Scheme") to exercise voting rights or powers under Pt 5C.9 of the *Corporations Act 2001* (Cth) ("Act") if so doing would inevitably lead to a sale of the shopping centre without the written consent of all of the unitholders.

3. The Respondents' Notice of Contention raises three further issues:

   (a) *First*, the respondents contend that cl 16.2 does not exclude the right conferred by s 601NB of the Act because the statutory right is provided by law independently of the Agreement within the meaning of cl 18 of the Agreement.

   (b) *Secondly*, whether, if cl 16.2 is to be construed as the appellant contends, it is inconsistent with the statutory rights and powers conferred by the Act, and therefore to that extent unenforceable.


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(c) *Thirdly*, whether, properly construed, the requirement for the written consent of the unitholders in cl 10.1(a) of the Agreement (AB 130.21)[1] requires all unitholders individually to consent or whether it may be satisfied by consent being given by unitholders holding more than 50% of the issued units or by a resolution which is binding on all of the unitholders and which is evidenced in writing.

## PART III. Judiciary Act 1903, s 78B

4. The respondents consider that notice is not required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

## PART IV. Relevant Facts

5. The respondents accept the facts as set out in AS [10]-[15], [24]-[26] and [32]-[34]. The respondents also accept that the Agreement and the Trust Deed contain the clauses identified in the other paragraphs of AS Part V (but do not accept the argumentative characterisation of them, particularly in AS [16], [21], [23]). The Scheme holds the Karrinyup Shopping Centre ("Property"), and at present has two unitholders, but it cannot be inferred that the Scheme was always intended to be closely held (cf. AS [23]). The Trust Deed contemplates the Scheme being listed: cll 4.7(b) (AB 41.38), 4.12 (AB 45.21), 11.1(e) (AB 53.38), 13.1 (AB 56.19) of the Trust Deed.

6. The respondents also draw attention to other relevant provisions in the Trust Deed and the Agreement in the course of Argument in Parts VI and VII below. One such clause is cl 18 of the Agreement (AB 136.31) which is the subject of Ground 1 of the Notice of Contention.

## PART V. Relevant Provisions

7. The respondents consider that the whole of Chapter 5C of the *Corporations Act 2001* (Cth) is relevant to the appeal, not merely s 601NB as stated in AS Part VII. Australian Stock Exchange ("ASX") Listing Rule 1.1 as at 1 June 2000 which was in force when the Agreement was entered into is also relevant.

## Part VI. Argument

8. The appeal concerns the availability of the statutory right under s 601NB of the Act and whether its exercise without the written consent of all unitholders would breach cl 16.2 of the Agreement.

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[1] Clause 10.1(a) (AB 130.21) was the foundation of the appellant's argument below. It is inaccurately paraphrased in the Notice of Appeal.

9. Section 601NB confers on members of a registered managed investment scheme a statutory right to seek to wind up the scheme by the calling of a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme. An "extraordinary resolution" is defined by s 9, requiring that it be carried by at least 50% of the total votes that may be cast by members entitled to vote. If an extraordinary resolution under s 601NB is carried, the responsible entity must then wind up the scheme under s 601NE.

10. The respondents called a meeting to consider and vote on an extraordinary resolution for the winding up of the Scheme under ss 601NB and 601NE (AB 370).

10 11. The appellant sought and at first instance obtained an injunction to restrain the respondents from voting for the extraordinary resolution without the written consent of the appellant to the sale of the Property. The appellant sought the injunction in the Supreme Court on the basis that such an exercise of voting power by the respondents would breach their obligations under cll 10.1 and 16.2 of the Agreement (J [35], [38], [39] (AB 399-401); CA [18], [19], [43], [51] (AB 448, 459, 462)).

12. Neither of these provisions, nor any others in the Agreement, provided a sound basis for the injunction. The Court of Appeal was correct to set aside the orders of the primary judge.

*Clause 10.1 was correctly construed by all judges below*

20 13. Clause 10.1(a) (AB 130.21) is entirely removed from a winding up context. The intent of clause 10.1(a) is to constrain the responsible entity from exercising a power of sale given by the Trust Deed. Absent such a constraint, the responsible entity could exercise power under the Trust Deed as "*if it were the absolute and beneficial owner*" of the Property: cl 18.1 of the Trust Deed (AB 67.22).[2] Clause 10.1(a) was not intended to and does not constrain the responsible entity from winding up the Scheme and selling the Property following a resolution under s 601NB of the Act. In that winding up context, the responsible entity is simply acting as it is obliged to do by s 601NE.

14. Ward J at first instance held (and the Court of Appeal agreed) that cl 10.1(a) did not
30 prohibit a sale by the responsible entity of the Property in accordance with a statutory obligation arising on a winding up of the Scheme following a resolution under s 601NB of the Act: CA [44] (AB 459.35); J [47], [54], [56], [57], [127] (AB 403, 405, 406, 428). It was, as the Court of Appeal said (CA [46] (AB 460.32)), "*concerned only with a sale before a winding-up of the Trust*".

15. There is no error in the Court of Appeal's reasoning on this issue.

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[2] Subject to the other provisions of the Trust Deed, including cl 19.14 of the Trust Deed (AB 74.17).

16. The construction of cl 10.1(a) adopted by all four judges below is consistent with:

(a) the words of cl 10.1(a), which are expressed in the form of a restraint on the responsible entity ("*AMPAM, in its capacity as responsible entity... shall not sell the Property or any substantial part thereof without the written consent of the Unitholders*" (AB 130.21)).

(b) the structure of cl 10. Clause 10.1(b) (AB 130.25) contemplates a winding up to occur after a sale to which cl 10.1(a) applies and not before it, strongly suggesting that cl 10.1(a) is speaking to a period prior to the winding up of the Scheme. Clause 10.2 (AB 130.30) deals with the acquisition of additional assets by the responsible entity (again, necessarily while the Scheme is operating in the ordinary course and not in the context of a winding up); and

(c) the structure of the Agreement as a whole. Clause 10 is located among a range of other provisions constraining the powers and discretions of the responsible entity in its ongoing administration of the business of the Scheme, such as the role of the Unitholders' Committee in directing the responsible entity with respect to the management of the Scheme and the carrying out of repairs and redevelopments of the Property. Clause 10 is not located near any general provisions concerning termination or winding up.

17. Indeed, the appellant advanced no contention in the Court of Appeal to the effect that the primary judge erred in this construction of cl 10.1(a).[3] Any implicit challenge which the appellant might now seek to mount upon the correctness of the construction (eg. at AS [51]) should not be entertained.

*The clause 16.2 argument was correctly rejected by the Court of Appeal*

18. The injunction was ordered at first instance not on the basis of cl 10.1 alone but rather on the basis of cll 16.2 and 10.1 together.

19. Clause 16.2 of the Agreement is for convenience set out below (AB 136.20):

> "Each and all of the Unitholders mutually agree that they will so exercise their respective voting rights as unitholders under the Trust Deed so as to most fully and completely give effect to the intent and effect of the provisions of this Deed."

[3] Senior Counsel for the appellant accepted this construction in the course of an exchange with Meagher JA in the Court of Appeal at T24.20-27, 27.32-28.18 of the transcript on the hearing in the Court of Appeal (18 November 2011). A copy of the transcript will be provided to the Court in a Supplementary Appeal Book. In any event, the appellant (as respondent in the Court of Appeal) did not file a Notice of Contention.

20. As has been seen, cl 10.1(a) was the "*provision*" relied upon by the appellant[4] and Ward J correctly construed that clause as being inapplicable to a sale following a winding up of the Scheme: J [47], [54], [56], [57], [127] (AB 403, 406, 428). Nonetheless Ward J, when applying cl 16.2, treated the intent of cl 10.1(a) as including a prohibition of a sale in such circumstances: J [106] (AB 421.32). This error was identified by the Court of Appeal which, it is submitted, was correct in its conclusion that cl 16.2 in the particular circumstances required no more than that full and complete effect be given to cl 10.1 properly construed: CA [49]-[50] (AB 461).

21. The reasoning of the Court of Appeal (relevantly at CA [43]-[52] (AB 459-462)) was an orthodox application of well settled principles of contractual construction. The Court of Appeal said at CA [43] that the "*intent*" of a provision is its meaning determined objectively by reference to what a reasonable person in the position of the parties would have understood the language of the provision to mean (and that the "*effect*" of a provision describes the result or consequence of its operation construed in that way). The Court of Appeal needed to cite no authority for such a proposition; it is consistent with much authority from this Court.[5]

22. The appellant at AS [50] criticises the Court of Appeal for approaching the question before it without considering provisions of the Agreement other than cl 10.1(a). The criticism is unsound. The Court of Appeal recognised that regard was to be had to other provisions (CA [43]; (AB 459)) and considered numerous other provisions of the Agreement in this context: CA [45]-[46] (AB 459-460). Even had the criticism been sound factually, it would not lie in the appellant's mouth to make. At all times below, the appellant's case was simply that the exercise of statutory voting rights by the respondents would be contrary to the intent and effect of cl 10.1 of the Agreement.[6]

*The new clause 16.2 argument too should be rejected*

23. The appellant's case in this Court involves a shift. The appellant continues to urge that its written consent to the sale of the Property would be required to avoid a breach of cl 16.2 by the respondents' voting in favour of a winding up resolution: AS [38]ff. However, the assertion is now made without reference to cl 10 of the Agreement, even though that is the only provision of the Agreement which refers to the "*written consent*" of the unitholders.

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4 J [35], [38], [39] (AB 399, 400-401); CA [18], [19], [43], [51] (AB 448-449, 459, 462). This was confirmed in an exchange between Giles JA presiding in the Court of Appeal and Senior Counsel for the appellant at T26.50–27.22 of the transcript on the hearing in the Court of Appeal (18 November 2011). A copy of the transcript will be provided to the Court in a Supplementary Appeal Book.

5 *Byrnes v Kendle* (2011) 243 CLR 253 at 273 [53], 284 [98], 286 [105]; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11]; *Toll (FGCT) v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40].

6 See note 4 above.

24. It is trite, as the appellant submits at AS [40], that a court construing a contract should consider the whole of that contract.[7] The Court of Appeal recognised this immediately at CA [43] (AB 459.15). But that is not to say that a party asserting breach can be relieved from the obligation of identifying a particular provision (or provisions) of the contract and setting out with precision how it says conduct in question would breach that provision (or its intent and effect).

25. The new case of the appellant purports to rely upon all provisions of the Agreement without analysing the text of any. It would have the Court eschew consideration of the words used in the Agreement and instead divine some "*intent*" or "*commercial purpose*" independent of those words. The argument now proceeds as if, rather than referring to "*the intent and effect of the provisions of*" the Agreement, cl 16.2 referred instead to "the commercial purpose of the Agreement", or even to "the intent of the parties in entering into the Agreement".

26. The Court has repeatedly emphasised that in construing written documents, intent cannot be separated from the words the parties have used. Most recently, in *Byrnes v Kendle*, Gummow and Hayne JJ said, with reference to a number of authorities:[8]

> "The fundamental rule of interpretation ... is that the expressed intention of the parties is to be found in the answer to the question, "What is the meaning of what the parties have said?", not to the question, "What did the parties mean to say?" ..."

Heydon and Crennan JJ also stated that construction depends on "*the intention which the parties expressed, not the subjective intentions which they may have had, but did not express*"[9] and that "*the search for "intention" is only a search for the intention as revealed in the words the parties used, amplified by facts known to both parties*".[10]

27. The text of a contract may of course be considered within the context of relevant surrounding circumstances and the background knowledge of the parties.[11] The background knowledge may include matters of law and, accordingly, the proper construction may be influenced by the legal background against which a contract is made.[12]

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7 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109; *Re Media Entertainment & Arts Alliance; Ex parte Hoyts Corp Pty Ltd (No 1)* (1993) 178 CLR 379 at 386-387.

8 See *Byrnes v Kendle* (2011) 243 CLR 253 at 273 [53].

9 *Byrnes v Kendle* (2011) 243 CLR 253 at 284 [98].

10 *Byrnes v Kendle* (2011) 243 CLR 253 at 286 [105]. See also at 287-288 [108] and 290 [114]-[115].

11 *Toll (FGCT) v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11], citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 and *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350-352.

12 *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11]; *Amcor Ltd v Construction, Forestry, Mining & Energy Union* (2005) 222 CLR 241 at 249 [13], 253 [30], 258 [50],

28. Here, the legal background and knowledge includes the statutory rights in Pt 5C.9 of the Act, the availability of which was triggered by the deliberate choice to register the Scheme.[13] It follows that any intention to deny or interfere with those statutory rights would have to appear with reasonable clarity from the language used: *Duncombe v Porter*.[14]

29. The stated purpose of the Agreement and of the parties entering into the Agreement was to "*record the arrangements between them in relation to the Trust*" (cl 1.4 (AB 120.21)), and the Agreement "*constitutes the whole agreement between the parties with respect to the subject matter*" of the Agreement such that no previous negotiations, commitments or communications between the parties with respect to that subject matter have any force or effect (cl 1.5 (AB 120.25)). Matters not the subject matter of the Agreement continue to be governed by the provisions of the Trust Deed and the Act. Nothing in the Agreement purports to exclude the operation of the Act.

30. The intention and purpose was for the Scheme to hold the authorised investments from time to time in accordance with the provisions of the Trust Deed and the statute and, to the extent permitted by law, subject to the provisions of the Agreement. It puts it too highly to suggest – cf. AS [44] and [46] – that the intention and purpose was for the Scheme never to be terminated unless all unitholders consent in writing.

31. None of the provisions of the Agreement includes a prohibition or even a limitation upon a winding up of the Scheme. Nevertheless, the appellant (AS [44]-[46], [49]) argues that the purpose or intent and effect of the Agreement was to prevent a winding up absent the written consent of all of the unitholders or somehow otherwise to codify the exit rights of the unitholders to the exclusion of their statutory rights. This argument should be rejected:

    (a) The main subject of the Agreement was how the Scheme and its Property should be managed while the Scheme existed and to restrict the responsible entity's powers in relation to matters which the parties agreed were important. See, for example, the detailed provisions regarding repairs and redevelopment (cll 8-9 (AB 125.28-130.18)) and regarding the matters to be dealt with by the Unitholders Committee (cl 7, Schedule 3 (AB 124.42, 150)). The pre-emptive rights referred to at AS [46], [49] do not bear upon the question of winding up.

    (b) The absence of any provision in the Agreement dealing with winding up reveals an intention to leave those matters to be dealt with by the statute rather

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261 [64]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 166 [22].

13 It is notable that the parties chose voluntarily to register the Scheme even though the legislation did not require it to be registered: see paragraph 35 and note 17 below.

14 *Duncombe v Porter* (1953) 90 CLR 295 at 311.

than an intention to exclude the statutory rights. This is not surprising, given that the Agreement was executed in the wake of the voluntary registration of the Scheme under Chapter 5C of the Act, which (as will be referred to in further detail below) made statutory provision for winding up at the request of the members[15] in s 601NB and required the Scheme's constitution to make adequate provision for winding up (s 601GA(1)(d)). It would have been surprising for sophisticated investors to establish an investment vehicle with no available means of winding up.

(c) There are various exit mechanisms and scenarios in which the Scheme could be wound up and which could involve the Property being sold, none of which is affected in any way by any provisions of the Agreement, and certainly not by cl 16.2 because they do not depend upon the exercise of voting rights. For example, unitholders have redemption rights under cl 16 of the Trust Deed (permitted by s 601GA(4) of the Act) which could trigger a sale of the Property to fund a redemption. Unitholders also have the right to apply for an order that the scheme be wound up on just and equitable grounds under s 601ND of the Act, which would of course involve sale of the Property.

(d) Moreover, the Scheme can be terminated by the responsible entity (referred to as the "Manager" in The Trust Deed (cl 2, (AB 33.37)), simply by the giving of notice and without consulting the unitholders at all (Trust Deed, cll 17.1, 17.4 (AB 64.40, 65.20)), triggering a sale of the Property. Similarly, the Scheme could be required to be wound up under s 601NC of the Act, thereby triggering a sale of the Property, following a determination by the responsible entity that the purpose of the Scheme cannot be accomplished (or has been accomplished).

32. If the appellant's contentions as to the intent and effect of the Agreement were correct, it might be expected that the parties would include such a provision in clear and unambiguous language somewhere in the Agreement. If commercial parties intended to exclude a statutory right such as that given by s 601NB (assuming for present purposes it is possible to do so), they would not have done so using opaque and convoluted drafting which requires the reader to link a provision like cl 16.2, which makes no reference to winding up, to another provision like clause 10.1(a) which also makes no reference to winding up. In fact, the only provision the parties did include in the Agreement which speaks to the intention as to the availability of the statutory rights

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[15] It should be borne in mind that the respondents were not the only unitholder or group of unitholders controlling 50% of the units as at the date the Agreement was made. Unlike the appellant in its present situation, the other two unitholders together then held 50% of the units and thus could together have voted under s 601NB for winding up of the Scheme against the will of the respondents: See J [13]-[15] (AB 393.15), CA [13] (AB 446.38-447.15). Of course, the Agreement must be construed according to the circumstances within the background knowledge of the parties at the date the Agreement was made.

was cl 18 (AB 136.31). As will be seen below under Ground 1 of the Notice of Contention, cl 18 tells against the construction propounded by the appellant.

33. The parties chose a registered managed investment scheme as a business structure; and a valuable statutorily mandated exit mechanism from such a scheme is a winding up pursuant to members' resolution under s 601NB. The intent and effect of the provisions of the Agreement encompasses the availability of a statutory winding up under s 601NB. The commerciality of such an arrangement, which enables efficient repatriation of the net proceeds of the investment to the unitholders in their respective proportions, is readily apparent.[16] There is nothing in the provisions of the Agreement to support the view that their intent and effect was to exclude this right.

## PART VII. Argument on Notice of Contention

*The statutory right to wind up a registered scheme*

34. Section 601NB is in the following terms:

> "If members of a registered scheme want the scheme to be wound up, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme."

Part 2G.4 Div 1 enables a meeting to be called by members with at least 5% of the votes which may be cast or at least 100 members entitled to vote (s 252B(1)), and an "extraordinary resolution" is defined by s 9, requiring that it be carried by at least 50% of the total votes that may be cast by members entitled to vote. If an extraordinary resolution under s 601NB is carried, the responsible entity must then wind up the scheme under s 601NE.

35. Section 601NB is contained in Part 5C.9 ("Winding Up") of the Act, within Chapter 5C ("Managed Investment Schemes"). Chapter 5C regulates *registered* managed investment schemes. Schemes which are offered to "*retail clients*" must be registered, whereas schemes offered only to "*sophisticated investors*" or "*wholesale clients*" need not be registered (see ss 601ED, 761G, 761GA and Div 2, Pt 7.9). However any schemes not obliged to be registered (such as the Scheme) can take steps voluntarily to comply with the requirements of registration.[17] The policy behind Chapter 5C must be

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16 A unitholder willing to give fair market value could with or without others acquire the Property during the winding up process.

17 There are various potential reasons why parties may voluntarily have decided to register a scheme. For example, prior to the enactment of the *Corporations Legislation Amendment (Simpler Regulatory System) Act 2007* (Cth), which repealed s 601FC(4), that provision prohibited a responsible entity of a registered managed investment scheme from investing in another managed investment scheme unless that scheme was also registered. Historically, registration would therefore have facilitated investments from a broader section of the public, and may potentially have been convenient for any existing unitholder which was itself a responsible entity of a registered scheme and which did not qualify for the class order relief which had been granted by the ASIC. Similarly, registration was a precondition to a

taken to have been regarded by Parliament as equally capable of application to all schemes. The parties by registering voluntarily subjected themselves to everything registration entails.

36. Regardless of the scale of the scheme, Chapter 5C sets out a generally prescriptive approach to registered managed investment schemes. For example, in addition to the right to call for and vote a resolution to wind up a registered scheme, Chapter 5C also:

(a) in Part 5C.2, Div 1 makes provision for the duties of the responsible entity of such a scheme (and the duties of officers and employees of the responsible entity);

(b) in Part 5C.2, Div 2 makes provision for how the responsible entity may be changed, including conferring a statutory right on members to call a meeting to consider and vote on an extraordinary resolution to remove the responsible entity and appoint a new responsible entity (s 601FM);

(c) in Part 5C.3, makes provision for the essential contents of the constitution of a registered scheme, and also confers statutory rights on members by special resolution to modify, repeal or replace the constitution (s 601GC); and

(d) in Parts 5C.4 and Part 5C.5, makes provision for the lodgement of compliance plans, and the mandatory establishment of a compliance committee in certain circumstances, with defined functions and duties.

37. The origins of Chapter 5C of the Act reveal it is to be regarded as involving a protective purpose, entrenching certain rights of members of registered schemes. Australian legislatures have been conscious of the need to regulate arrangements (such as unit trusts) where the funds of investors, large or small, are pooled and invested collectively under the control of managers for the benefit of all of them.

(a) From 1962 under the uniform *Companies Acts*,[18] Part IV regulated interests other than shares and debentures, including unit trusts.[19] It was the custom for such schemes to have a trustee (as representative for the investors) and a management company. The trust deed was required to be lodged with and approved by the Registrar of Companies and to contain certain prescribed covenants. The prescribed interest scheme was continued in the 1981 co-

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managed investment scheme listing on the ASX: see condition 5(b) of ASX Listing Rule 1.1 as at 1 June 2000 which was in force when the Agreement was entered into. Listing the Scheme was apparently in contemplation at the time of the Agreement (see, eg. cll 4.7(b), (AB 41.38) 4.12. (AB 45.21) 11.1(e) (AB 53.38) and 13.1 (AB 56.19) of the Trust Deed). However, as the Scheme was never listed, there was no compulsion under the Listing Rules to register it at that time or at all.

18 References are to the *Companies Act 1961* (NSW).

19 The history of and contemporary regulation of unit trusts was discussed in D.J. MacDougall, "Mutual Funds and Unit Trusts", 33 *ALJ* 331.

operative regime enacted by the *Companies Code* (Part IV, Div 6), and in the 1991 co-operative regime enacted by the *Corporations Law* (Part 7.12, Div 5), essentially unchanged.

(b) In the wake of property scheme losses in the late 1980s which saw many investors unable to exit the unit trusts in which they had invested, there was a call for a review of the regulatory system. On 24 May 1991, the Attorney-General issued terms of reference to the Australian Law Reform Commission ("ALRC") concerning the adequacy of the present regulatory system for prescribed interests and collective investment schemes. The ALRC issued a Discussion Paper in October 1992[20] and a Report in September 1993.[21] The principal aim of the review (echoing the terms of reference) was described as "*to ensure adequate and effective protection for investors*", one aspect of which was adequate investor rights: R65 [2.4], [2.11]. One of the rights considered was the right to terminate the scheme: R65 [11.13]. The philosophy of the review was that the system of prescribed covenants (the other side of the coin of investors' rights) should be replaced with express legislation, it being seen as advantageous to "*eliminate the possibility that obligations considered essential for responsible entities could be eroded by being interpreted against the background of terms of the trust deed or other constituting document rather than the relevant legislation*": DP53 [5.19].

(c) The result of the review was the enactment in 1998 of the *Managed Investments Act 1998* (Cth), which repealed the prescribed interest provisions and inserted Chapter 5C into the then *Corporations Law*, including s 601NB. The new legislation adopted the broad structure recommended by the ALRC review (the Explanatory Memorandum referred to the review and to R65 expressly). In particular, it prohibited the earlier structure, under which there was a management company and a trustee, in favour of requiring there to be a single responsible entity. The new legislation also dispensed with prescribed covenants by trustees to define investor rights within the deed, and in lieu thereof introduced statutorily defined rights and powers. One significant effect of this is that the rights of members of a scheme cannot be determined simply by looking at the scheme constitution; a number of them have their source in the legislation. Under s 601GA, the scheme constitution is required to make adequate provision for a number of specifically identified matters (including the winding up of the scheme), and the Explanatory Memorandum explained at [9.2] that any such provision "*could not be inconsistent with the statutory*

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20 ALRC, Discussion Paper 53, "Collective investment schemes" ("DP53").

21 ALRC (Companies and Securities Advisory Committee), Report No 65, "Collective Investments: Other People's Money" ("R65").

*requirements*". Moreover, while rights in a constitution can be changed (by special resolution (s 601GC)), rights conferred by statute cannot. These matters bespeak a legislative intent that the rights conferred by statute be entrenched so they could not be interfered with by private arrangements.[22]

38. Taking into account the development of corporations legislation referred to above, the history of the statutory right conferred by s 601NB of the Act is, relevantly, as follows:

(a) Section 87 of the uniform *Companies Acts*, s 177 of the *Companies Code*, and s 1074 of the *Corporations Law* (as originally enacted) dealt with the winding up of schemes, but only provided for the summoning of a meeting of interest holders by the trustee where the management company was in liquidation, had ceased to carry on business or failed to comply with any provision of the Deed, to the prejudice of holders. At the meeting a resolution was to be put that the scheme be wound up, and if passed by a majority of at least three quarters in value of the holders of the interests present and voting, the trustee was obliged to apply to the Court for an order confirming the resolution. However, under this regime, investors had no specific right themselves to call a meeting to consider a resolution to wind up the scheme. Although deeds were required to contain a covenant that, if requisitioned to do so by a prescribed number of interest holders, the management company must call a meeting to give the trustee such directions as the meeting thinks proper,[23] it is doubtful whether this extended to a resolution to terminate or wind up the scheme.[24]

(b) The ALRC Report recommended that "*investors should be able to terminate a collective investment scheme, for any reason ...*" (R65 [8.5]), a question it had earlier left open in the Discussion Paper, when it had sought comments on whether investors should have a right to terminate other than in situations where the responsible entity ceased to carry on business, suspended redemption or had its licence suspended or revoked (DP53 [7.28]). The ALRC's recommendation in the 1992 discussion paper also involved requiring there to be at least 50% in value of the holders of interests to wind up the scheme. The ALRC had noted in that paper that one reason that investors

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22 The primacy of the Act over contractual provisions (and even over provisions in a scheme's constitution) has been recognised in *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* (2000) 35 ACSR 440 at 450 [45] per Austin J; *Australian Olives Holdings Pty Ltd v Huntley Management Ltd* (2010) 79 ACSR 40 at 58 ([69]-[73]) per the Full Court of the Federal Court, although those cases did not involve s 601NB.

23 A mandatory covenant: s 1069(1)(m), *Corporations Law*.

24 In *Equitable Group Ltd v Pendal Nominees Pty Ltd* (1985) 3 ACLC 546, the corresponding provision of the *Companies (NSW) Code* was interpreted as extending only to directions on matters arising out of the accounts of the trustee. Accordingly the *Corporations Law* was amended by the *Corporations (Unlisted Property Trusts) Amendment Act 1991* (Cth): see the Second Reading Speech: Parliamentary Debates (Hansard), House of Representatives, the Hon. M. Duffy, 7 November 1991, p.3071f.

needed a right to call a meeting was so that they could terminate the scheme: (DP53 [7.8]). The public policy here was to facilitate the winding up of registered schemes and the voting threshold for an extraordinary resolution was intended to be the only barrier.

(c) The *Managed Investments Act 1998* (Cth) that introduced Chapter 5C and s 601NB into the then *Corporations Law* substantially in the form in which it still appears in the Act thus differed from the previous regulatory regime because it conferred, for the first time, on members the right to terminate the scheme on their own initiative, and to do so for any reason (rather than only in the limited circumstances of insolvency, frozen redemption or default by the management company). Chapter 5C commenced full operation in 2000 after a transitional period of approximately 2 years from its introduction on 1 July 1998 during which period existing schemes were to convert.

39. The twofold right conferred by s 601NB to call a meeting to consider a resolution to wind up the scheme, and to vote on that resolution at that meeting, is a statutory right conferred on all members of a registered managed investment scheme. It ought to be regarded as one of a number of entrenched members' rights, which were intended to be irreducible as a protection for investors. The constitution is required by s 601GA(1) to make adequate provision for winding up (which can be satisfied by leaving that matter to s 601NB of the Act and making provision for the calling of meetings); it may thus be contrasted with other rights referred to in s 601GA(2)-(4) for which a constitution may, but is not required to, make provision. The winding up right was also a right that was public in nature, having regard to the fact that the very subject matter of regulation was the rights of the investing public who contributed money into pooled investment schemes.

40. It is noteworthy that in the case of the Scheme (which had been constituted in 1994), the Trust Deed was amended in 2000, and the Agreement entered into following the introduction of the new Chapter 5C of the *Corporations Law*.[25] The parties must be taken to have been conscious of the new regulatory system,[26] which they had voluntarily opted into and to have been conscious that their arrangements were made up of the rights and obligations set out in the Trust Deed and Agreement, and the rights and obligations imposed by the *Corporations Law*.

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25 See the chronology set out in the Affidavit of Peter Stuart Speed sworn 9 June 2011 at [4]-[6], [23]: AB 8.24-31, 10.23.

26 This can be inferred to have been reflected in the amendments made to the Trust Deed to remove, for example, most of the old covenants by the responsible entity (referred to as the "Manager" in the Trust Deed (cl 2)) in cll 28 and 29 (AB 90.34) (which had been required when the Scheme was a prescribed interest scheme). Similarly, the old provisions relating to buy-backs were deleted and, although not required, were replaced by modern provisions in cll 16.2 – 16.14 (AB 62.25) providing for redemptions and which were drafted in language which mirrors the new terminology in s 601KA.

*The relevance of clause 18 of the Agreement (Notice of Contention Ground 1)*

41. The parties were not only aware of the mixed sources of their rights and obligations, they were aware of the hierarchy between statutorily sourced rights and obligations and contractually sourced rights and obligations. This is the basis for Notice of Contention Ground 1.

42. An important provision of the Agreement (not referred to by the Court of Appeal in its Reasons) is clause 18 which provides (AB 136.31):

> "The rights, powers and remedies provided in this deed are cumulative with and not exclusive of the rights, powers or remedies provided by law independently of this deed."

43. The purpose of a provision such as cl 18 is to regulate the relationship of the rights for which the parties have bargained, and the rights which the law otherwise grants. Its effect is to make clear that where a party is acting pursuant to a right conferred independently by law, nothing in the Agreement limits that right. The provisions of the Agreement are "*not exclusive of*" – ie. do not exclude – the independent statutory rights. The independent statutory rights are available to unitholders in addition to (ie. "*cumulatively with*") their other rights, powers or remedies under the Agreement.[27]

44. The rights of members of a registered managed investment scheme to take action under s 601NB of the Act are rights, powers or remedies provided by law independently of the Agreement. Accordingly, cl 18 governs the situation. There is nothing in the terms of s 601NB, or the Act which provides any relevant condition on the rights sought to be exercised. The statutory right may be invoked according to its terms, with the ensuing consequences for which the Act provides.

45. Clause 16.2 ought not be construed as excluding or otherwise affecting the statutory right conferred by s 601NB, given the parties' express agreement in cl 18 that their private arrangements were not exclusive of those independent statutory rights. It is not surprising that the parties would seek to recognise expressly in cl 18 that rights conferred by law were not constrained. Indeed, given that the parties had deliberately chosen to register the Scheme, thus triggering the availability of the statutory rights in Pt 5C.9 of the Act, it would be surprising if they had intended that those rights should be excluded or limited by cl 16.2 (thereby giving up the benefits of registration, yet retaining the otherwise avoidable compliance burdens). In any event, if cl 16.2 were to be construed as excluding statutory rights under s 601NB, it would be unenforceable,

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27 Black's Law Dictionary (Eighth edition, 2004) at p 1320 defines a cumulative remedy as: "*A remedy available to a party in addition to another remedy that still remains in force*". To similar effect is the third appearing definition of cumulative in the Macquarie Dictionary (Fifth Edition, 2009): "*Law a. (of statutes) providing different remedies, penalties or punishments*".

as contended for in Ground 2 of the Notice of Contention. Accordingly, contrary to the opinion of the Court of Appeal at CA [40] (AB 458.24), there is a likely explanation as to why the parties would have agreed that s 601NB rights were not affected by the Agreement.

*The Act prevails (Notice of Contention Ground 2)*

46. In *Caltex Oil (Australia) Pty Ltd v Best*, Mason CJ, Gaudron and McHugh JJ stated that "*if the operation of a contractual provision defeats or circumvents the statutory purpose or policy, then the provision is inconsistent in the relevant sense and falls within the injunction against contracting out.*"[28] In *Miller v Miller*, the joint judgment discussed cases where the policy of the law renders contractual arrangements ineffective or void even in the absence of breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text, and emphasised the primacy of identifying the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as unenforceable.[29]

47. The statutory purpose behind s 601NB does not depend upon consideration of that section in isolation. Rather as referred to above it depends upon a proper understanding of what Parliament was intending to do when it reformed the law applicable to unit trusts. The primary judge characterised the public policy behind Chapter 5C as being to "*facilitate the winding-up of a scheme in circumstances that could include insolvency or a deadlock between members*" (J [122]; AB 426.11). The Court of Appeal took the same approach as the primary judge (CA [53]-[55]; AB 462-463). That approach was too narrow.

48. Consistently with this Court's approach, the respondents have sought to identify the relevant public policy lying behind Chapter 5C of the Act, and s 601NB in particular. That policy involves the following elements. *First*, that investors in all registered managed investment schemes should have the protection of certain rights and obligations publicly stipulated by statute, whereas other rights and obligations could be left to private arrangements in constituent documents of particular schemes (which however could not derogate from the statute), and s*econdly*, that one publicly conferred right for the protection of investors was the right to call a meeting and vote on whether

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28 *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 522. Their Honours' comments were made in the context of an express statutory prohibition against contracting out, but the same principles apply even where there is no such express provision, where the provisions of the statute read as a whole are inconsistent with a power to forego rights conferred by it: See *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 456 per Windeyer J.

29 *Miller v Miller* (2011) 242 CLR 446 at 457-460 [25]-[30] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. See also *Equuscorp Pty Ltd v Haxton* (2012) 86 ALJR 296; 286 ALR 212.

the scheme should be wound up for any reason at all,[30] if holders of at least 50% of the votes that may be cast on the issue desire to do so.

49. Section 601NB ought be understood as conferring a statutory right which Parliament regarded as fundamental for investors in registered managed investment schemes to have, and which otherwise they might not have. It is a right to seek to terminate the scheme and realise their investments; so that their money is no longer locked away in a pooled fund under the control of others. A right to call for and vote democratically on whether a scheme be wound up may not otherwise necessarily inhere in unitholders in unit trusts (let alone in other kinds of managed investment scheme which are not so formally structured or which may be illiquid).

50. Chapter 5C is a law of general application, which must be capable of being consistently and practically applied to all kinds of registered managed investment schemes in accordance with the policy of the Act. It is not relevant that this Scheme happens to be closely held between sophisticated institutions. If the appellant's argument were accepted, there would be nothing to prevent the responsible entity of a widely marketed retail unit trust imposing through pro forma application forms a requirement to accede to a pre-existing unitholders' agreement, or imposing covenants repugnant to that policy, which might conceivably include a prohibition against ever exercising the statutory right under s 601NB of the Act (or even a prohibition against ever exercising the statutory right to remove the responsible entity under s 601FM or a covenant compelling unitholders to vote in favour of any modifications to the constitution which might be proposed in future to facilitate the introduction of new or higher fees and charges). The effect would very quickly be to circumvent the statutory protections for which Chapter 5C provides.

51. If the appellant's construction of cl 16.2 be accepted, and cl 18 put to one side (contrary to Ground 1 of the Notice of Contention), the parties' bargain would be inconsistent with the public policy behind Chapter 5C, which by necessary intendment prohibits the making of private arrangements which seek to exclude the entrenched statutory right for which s 601NB provides, or to impose such fetters on it as to render

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30 See paragraph 38(c) above. The primary judge referred to the continued availability of a right to seek a winding up on a just and equitable ground under s 601ND as a reason for holding it may be permissible to fetter or exclude the s 601NB right (J [127]; AB 428.16). However, a right to apply for a winding up on a just and equitable ground is very different from a right to have a democratic vote on whether the scheme should continue. The former requires a complex and potentially expensive course of litigation and proof that either that the scheme is insolvent or that it is in the public interest to wind it up (including if the scheme has broken down or if the protection of investors requires that the scheme be wound up), or that the responsible entity is insolvent so that it cannot perform its functions but no other responsible entity can be found to replace it. The latter requires no reason at all, and just the requisite votes to call a meeting and pass an extraordinary resolution.

it a completely different right and practically incapable of exercise according to its terms.[31] If that was the parties' bargain, it was not permissible.

52. This conclusion does not mean that any agreement between unitholders as to how they might exercise their voting rights on particular matters will always be impermissible (cf. AS [61]). Clearly enough it is always possible for a unitholder to appoint a proxy under Part 2G.4 to cast the unitholder's vote for it. But that is not this case. In this case, the appellant argues that by cl 16.2 of the Agreement the unitholders[32] agreed that none of them or their transferees[33] would ever exercise the statutory right to wind up the Scheme under s 601NB without the unanimous consent of all unitholders. There may be specific matters in respect of which, if cl 16.2 is to be construed as the appellant suggests, the unitholders could be bound to vote or not to vote in a particular way.[34] That will depend upon whether the matter being voted on is one which falls within an area which Parliament has evinced a relevant public policy that a certain right should be entrenched by statute. However, cl 16.2 is not enforceable to the extent that it might be relied upon as an ouster, blanket and permanent, of a unitholder's statutory right to vote to wind up the Scheme under s 601NB of the Act.

53. It is useful to consider the issue from the other side of the coin to the investors' rights, namely the responsible entity's obligations. On the appellant's construction, there would be inconsistency between the statutory obligation of the responsible entity under s 601NE to wind up the scheme following an extraordinary resolution under s 601NB and an obligation under cl 10.1(a) of the Agreement (to which the responsible entity is also a party), if that clause in a winding up required the further condition of written consent to be satisfied before any sale could take place.

*Clause 10.1(a) does not require unanimity (Notice of Contention Ground 3)*

54. In any event, the respondents contend that both courts below erred in construing cl 10.1(a) as requiring *unanimous* written consent of the unitholders to a sale of the Property (thus granting to the appellant a right of veto over any sale). Clause 10.1(a) can be satisfied, it is submitted, by consent being given by unitholders holding more

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31 It may be noted that the primary judge acknowledged that, but for the (erroneously considered) availability of the just and equitable ground under s 601ND, such a blanket and permanent ouster would have constituted more than the waiver of a personal right and would have offended public policy (J [122]; AB 426.11).

32 The respondents were not the only unitholder or group of unitholders controlling 50% of the units as at the date the Agreement was made. Unlike the appellant in its present situation, the other two unitholders together then held 50% of the units: see note 15 above.

33 See cl 6.6 of the Agreement and the Accession Deeds executed by the appellant and the respondents (AB 124.19, 237, 256).

34 For example, at a meeting of the Unitholders Committee to consider a proposal to redevelop or refurbish the Property, cl 16.2 may validly require the Unitholders in all cases to exercise their voting rights so as to reflect their genuine view as to the desirability of the proposal, having considered the proposal on a "bona fide basis" as required by the provisions of cl 9.1 (AB 127.25).

than 50% of the issued units or by a resolution which is binding on all of the unitholders, and which is evidenced in writing.

55. It is usual in collective decision-making processes in business contexts (such as companies, associations or schemes) for decisions to be made by majority, and not with unanimity: see, eg. Schedule 2 of the Agreement which establishes a general rule that a valid resolution of the Unitholders Committee (which by cl 7.4 of the Agreement (AB 125.14) is given wide ranging powers to consider and make determinations on substantive issues with respect to the management of the Trust) requires a majority vote in excess of 50% of the total votes that may be cast (AB 148.23). In the language of commerce, to say something has to be approved by shareholders would seldom connote that every individual shareholder must subjectively indicate their assent to the proposal. Typically, subject to equitable and statutory doctrines of oppression, minorities are bound by the decision of majorities. Such a decision is no less an approval by the shareholders than if the vote had been unanimous: see, eg. Item 13 of Schedule 2 of the Agreement (AB 149.9) which provides that a valid resolution of the Unitholders' Committee shall be binding on the unitholders.

56. Clause 10.1(a) (AB 130.21) does not contain any textual indication suggesting unanimity is required:

(a) Clause 10.1(a) does not state that the "unanimous" consent of, or the consent of "all", unitholders is required. Had that been intended, the parties could have said so. Other provisions in the Agreement expressly state when unanimity between the unitholders is required (cf. cll 9.2(a), 9.2(b), 9.2(c) and 13.1(a)) (AB 128.11-30, 135.11).[35] The primary judge, at J [66] (AB 409.15) in a passage approved at CA [29] (AB 453.19), acknowledged that her finding has the effect that the use of the expression "*unanimous*" or "*all*" in other sections of the document was otiose. A construction which has the effect of rendering otiose words otherwise apparently deliberately chosen by the parties is not to be preferred.[36]

(b) The reliance placed by the primary judge (whose reasons on this issue generally were affirmed by the Court of Appeal (CA [26] (AB 451.15)) on the use of the defined term "Unitholders" was misplaced, and involved circularity of reasoning. The better view is that the definition ought be construed as identifying disjunctively the body of persons who fall into the class of Unitholders. For example, cl 31.6 of the Trust Deed provides that *"a*

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35 More broadly, where the parties intended any level of approval or consent above 50% they stipulated so expressly within individual clauses and also in Items 10 and 11 of Schedule 2 (AB 148.22-36). Items10 and 12 provide that a 50% level of approval or consent is otherwise to be applicable by default.

36 *SA Maritime et Commerciale of Geneva v Anglo Iranian Oil Co Ltd* [1954] 1 WLR 492 at 495.

*resolution by ... Unit Holders binds all Unit Holders*" (AB 99.31). To say that a number of different people are unitholders does not answer the question of what amounts to a resolution by unitholders. This is consistent with cl 30.2(e) of the Agreement, which provides that "*a reference to a group of persons is a reference to any one or more of them*" (AB 144.13). It is consistent also with other provisions in the Agreement which refer to matters being decided or determined by "*the Unitholders*" when clearly the decision or determination was not required to be made unanimously or by all of them (eg. cl 8.2(b) in light of cl 8.2(d)(ii) which specifies the relevant majority (AB 126.12, 126.20)).

57. Other aspects of the parties' Agreement suggest it is open to construe cl 10.1(a) as requiring consent of a simple majority:

(a) The parties' arrangements contemplate other ways in which the Property could be sold requiring only an ordinary resolution of unitholders. Clause 19.14 of the Trust Deed provides that any sale or disposal of the main undertaking of the Scheme shall be subject to the prior approval of the unitholders pursuant to an ordinary resolution passed at a meeting, except upon the determination of the Scheme (AB 74.17). A construction is to be preferred which results in consistency between cl 19.14 of the Trust Deed and cl 10.1(a) of the Agreement.[37]

(b) To the extent the Court of Appeal placed reliance on cl 30.4 of the Agreement for the proposition that there is no reason to assume consistency between the Agreement and the Trust Deed (CA [27] (AB 451.31), it is doubtful that in the case of a registered scheme such as the Scheme, a provision like cl 30.4 of the Agreement which purports to give effect to the provisions of the Agreement over the provisions of the Trust Deed to the extent of any inconsistency are capable of achieving that end (AB 144.39). If the constitution itself contained such a clause, seeking to give priority to a collateral document in respect of the powers of the responsible entity to deal with scheme property, such a constitution would have been refused registration by ASIC as it would mean the constitution did not itself contain adequate provision for such matters and would fail to comply with the requirements of s 601GA(1)(d) of the Act.[38] The collateral document ought not itself be permitted to have that effect.

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37 Clause 19.14 would have been inconsistent with Chapter 5C were it not for the words "Except upon the determination of the Fund". That is because winding up the Scheme via s 601NB requires an extraordinary, rather than an ordinary, resolution.

38 See ASIC Regulatory Guide 134, "Managed investments: constitutions", [134.26A], which was inserted on 4 November 1998 (prior to the registration of the Scheme and the making of the Agreement).

58. The submission of the appellant in the courts below (and maintained at AS [65]) that the fact that matters such as discretionary repairs and redevelopment required a 75% majority suggests it would be odd for a sale to be permitted with a simple majority should not be accepted. A close analysis of those provisions where a 75% majority is required reveals that they are of a different character altogether because they ultimately require the unitholders to pay money or have their holdings diluted (see eg. cl 9.2 (AB 128.10)). There is nothing at all odd in requiring a higher majority for a decision which imposes a financial obligation or results in financial prejudice to unitholders than for a decision to take a step which will result in the unitholders' existing investment being realised and returned to them.

59. There is no uncertainty as to what consent would be sufficient if unanimity is not required. A process of construction, having regard to cl 19.14 of the Trust Deed (AB 74.17), the provisions of cl 7.4 and Items 10, 11 and 13 in Schedule 2 to the Agreement (concerning resolutions of the Unitholders' Committee) (AB 125.15, 148.23) and the Act would lead the Court to discern that the intent of cl 10.1(a) is that a simple majority by value of unitholders must concur in the sale of the Property by the responsible entity.

## PART VIII. ESTIMATE

60. The Respondents estimate that they will require 2½ hours for the presentation of their oral argument.

Dated: 16 August 2012


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