IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S39 of 2014

BETWEEN:

MacarthurCook Fund Management Limited
First Appellant

Sandhurst Trustees Limited
Second Appellant

and

TFML Limited (ABN 39 079 608 825)
Respondent

ANNOTATED

APPELLANTS' REPLY

Part I:

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

Part II:

2. The respondent does not advance any significant argument in support of the Court of Appeal's decision that to "withdraw" from a scheme within Part 5C.6 means exiting the collective scheme during its continued operation. The only argument against the appellants' contention that "withdraw" has a more limited meaning, appears to be that a "right to withdraw" is not mentioned in ss 601KA(1) and (2) {RWS 38}. However, the reference back to s 601GA(4) makes it absolutely clear that the subject matter of Part 5C.6, is the exercise of a member's "right to withdraw" from the scheme. There was no necessity for the legislature to repeat the phrase in s 601KA(1).

3. The respondent argues, instead, that the entry by the responsible entity into an "anterior agreement" with a member, obliging the responsible entity to redeem that member's units, would be caught by the prohibition in s 601KA(3) {RWS 2, 50 to 56}. Further, it argues that such an agreement can supply any element of volition necessary to amount to a withdrawal {RWS 33 to 37} within the meaning of Part 5C.6. These arguments are misconceived and are a distraction from the point of principle arising in this Appeal.

The present case does not involve a relevant "anterior agreement"

4. The facility agreements were not "anterior agreements" between a responsible entity and a member in which the member stipulated in advance for a right to have its units redeemed posited by the respondent {at RWS 2, 17, 33, 36, 50 to 52}. Prior to the entry into those agreements, MacarthurCook was not, relevantly, a member of the scheme. It became a member by virtue of the issue of the Subscription Units pursuant to clause 4.2(c) of the Constitution [**AB 120**]. By

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virtue of clauses 1 and 4 of the Constitution [**AB 119 – 120**], on the issue of those Subscription Units, MacarthurCook and RFML were bound by the terms set out in the Constitution subject to the particular rights and obligations attaching to those units (including clause 2.4) [**AB 7**]. The benefits and obligations under the Constitution (including the procedures set out in clause 7 [**AB 127**] to be followed when a member exercised a right to withdraw from the trust) enured to MacarthurCook as well as every other unitholder: clause 1.3 [**AB 119**]. The facility agreements are relevant because they set out the particular terms of issue that MacarthurCook seeks to enforce.

5. Numerous issues would arise if a responsible entity did enter into a "side deal" with a member, of the type contemplated by Meagher JA in [36] [**AB 216**] and referred to in the respondent's submissions. The entry into such an agreement would probably be a breach of trust by the responsible entity, a breach of the statutory duties in s 601FC of the Act and a derogation from the grant of interests to all other unitholders.[1]

6. If such an agreement was implemented, at a time when the trust was not liquid, there would be a real issue as to whether or not monies being paid out to the departing member would diminish the trust assets, given the probable breach of trust and the liability of the trustee to make restoration. However, it is not necessary to decide this question.

7. MacarthurCook was not a member with whom RFML entered into a side deal to avoid the operation of Part 5C.6. All that occurred was that it was issued units subject to particular terms. It has never been alleged that the issue of the Subscription Units to MacarthurCook, subject to the term set out in clause 2.4, was anything other than a valid exercise of the power conferred on RFML by clause 4.2 of the Constitution [**AB 120**]. The "anterior agreement" argument raises hypothetical circumstances that do not assist in the resolution of the point of statutory interpretation that arises in this Appeal.

Section 601GA and Part 5C.6 are not concerned with the issue of units to a member

8. Section 601GA and Part 5C.6 of the Act are not concerned with the means by which a member came to be a member of the scheme. They are concerned with the manner in which a member may exercise a right to withdraw from the scheme. The sections are predicated on action being taken by a person who is a member of the scheme. That must exclude from the operation of these provisions the entry into what was, in effect, a subscription agreement, by which MacarthurCook became a member of the scheme. The Act recognises that a responsible entity may create different classes of interests (for example, s 601FC(1)(d)).

9. In support of its argument that Part 5C.6 regulates the entry into "anterior agreements", the respondent emphasises the terms of s 601KA(3) {RWS 2 and 8}. However, the word "withdraw" in s 601KA(3) must have the same meaning that the term bears in s 601GA and in other sections within Part 5C.6. Sections 601KA(3) and (3A) create an offence but do not enlarge the reach of Part 5C.6.

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[1] A principle derived from the law of conveyancing but extending to other contexts: *Concrete P/L v Parramatta Design* 229 CLR 577 at 606 [100], per Kirby and Crennan JJ; *Secure Parking (WA) Pty Ltd v Wilson* 38 WAR 350 at [93] to [97] per Buss JA and *Shebelle Enterprises Ltd v The Hampstead Garden Suburb Trust Ltd* [2014] EWCA Civ 305 per Kitchin LJ at [35], quoting Nicholls LJ (as he then was) in *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264 at 267J.

No volition, in the relevant sense {RWS 34 to 37}

10. The fact that there was no "anterior agreement" with a member of the type suggested by the respondent also answers the respondent's assertion that entry into the facility agreements supplied any volition necessary for the purposes of Part 5C.6. Volition, in the sense in which it is used by the appellant, involves a member making a decision or choosing to bring about the termination of its status as a member of the scheme. As a matter of logic, that cannot apply to the process by which the person became a member of the scheme in the first place.

11. It is of no assistance to speculate what the parties wanted to achieve by the issue of the Subscription Units to MacarthurCook on terms that included clause 2.4. The Court can only assume a mutual agreement that MacarthurCook would retain those units until, and to the extent that, funds were raised from a public offer that could be applied in redeeming them. Whether this was something that MacarthurCook or RFML proposed is as speculative as it is irrelevant.

12. The only other basis on which the respondent can inject an element of choice or discretion into clause 2.4 is to assume an actual or anticipatory breach by RFML of the obligation it imposed. Any contractual term can be breached, but that does not mean that every term of a contract confers a power or discretion on the other party.

The arguments based on the terms of the Constitution {RWS 22 to 30}

13. As to clause 6 of the Constitution **[AB 127]**, the only provision relevant to the redemption of the Subscription Units is clause 6.3. The submission that, by reason of clauses 6.1 and 6.2, a redemption, including a compulsory redemption, imports a requirement to make a withdrawal offer, if relevant {RWS 23 and 40} would be rejected. It would lead to incongruous results. If the trust was liquid, a compulsory redemption would have to be preceded by a "redemption request" (see clause 6.2(a) **[AB 127]**) from the unitholder. If the trust was not liquid, a withdrawal offer would have to be made to all members of that class to which the unitholder whose units were to be redeemed, belonged. In any event, the issue as to the scope of clause 6.2 is one that the Court does not need to resolve, in the light of clause 6.3

14. As for clause 7, the respondent correctly observes {RWS 24} that it gives effect to the requirements of s 601GA(4) and Part 5C.6. The word "withdraw" when it is used in clause 7, must have the same meaning that it has in the Act. The opening words of clause 2.4 did not oblige RFML and MacarthurCook to follow the procedures applicable to "withdrawals" from the trust, set out in clause 7, any more than they operated to require compliance with Part 5C.6, unless the Court accepts the broad meaning of the term "withdraw" adopted by the Court of Appeal.

15. Some reliance is also placed on clause 7.4 {RWS 41} as permitting a compulsory redemption after a withdrawal offer. If the scheme is illiquid, it is highly doubtful that clause 7.4 can operate in the way suggested, which could be inconsistent with ss 601KB(1) and (3) and 601KD (which are predicated on the need for a request).

The purpose of Part 5C.6 {RWS 11 to 17, and 48 to 49}

16. The language used in s 601GA and Part 5C.6 and the context of these provisions point to the purpose of avoiding a "rush for the door" by members which would

threaten the viability of the scheme.[2] Contrary to the respondent's submissions {RWS 17}, the issue of a class of units by RFML that would be redeemed from an identified source of funds, when and to the extent that they were received by RFML, posed no threat to the viability of the scheme. In the event, there were assets able to be converted into money to satisfy the redemption obligation: Trial Judgment [98] [**AB 83**].

17. In any event, as the respondent observes, Part 5C.6 "*directs attention to the state of affairs at the time that the responsible entity proposes to effect redemption*": {RWS 53}. This is a cogent reason why the Court should not infer any intention on the part of the legislature to regulate conduct occurring at some other point in time, particularly if it is already regulated by other sections (such as s 601FC). Nor does the respondent identify anything in the prefatory materials that suggests that there was any wider purpose to be served by Part 5C.6.

The legislative history {RWS 18 to 21}

18. There is no relevant basis for construing s 601GA and Part 5C.6 by reference to a legislative scheme that has been wholly repealed.

The "charade" involved in the application of Part 5C.6 {RWS 44 to 47}

19. If Part 5C.6 applied to the redemption of the Subscription Units and that redemption proceeded, there would indeed have been a charade in which withdrawal offers and requests would have had to have been exchanged to effect the redemption. The respondent does not submit otherwise {RWS 44 to 47} Moreover, MacarthurCook could have thwarted the whole process by not responding to the offer with a withdrawal request. To speculate that it may have been unlikely to do so or if it did RFML would not have objected {RWS 47} is beside the point. Further, the trust in fact had assets available and able to be converted to money to satisfy any obligation to redeem MacarthurCook's units: (Trial Judgment [98]) and could not have avoided making a withdrawal offer for that reason {see RWS 44}.

The Notice of Contention {RWS 57 to 64} [AB 241]

20. The Notice of Contention raises an issue that falls within the principle in *Suttor v Gundowda* (1950) 81 CLR 418 at 437.8 – 438.8.

21. The issue was not raised in the pleadings at first instance. Evidence could have been given that would have prevented the point from succeeding. For example, the relevant decision makers within RFML at the time could have been cross examined as to the factors taken into account in deciding to suspend withdrawals [**AB 53**], with the object of establishing that such factors had no relevance to the redemption of the Subscription Units after 29 September 2008. As this issue was not addressed at all in the evidence, it cannot be said that this is a case in which the Court has before it all the facts bearing on the issue.

22. Nor was the point the subject of argument in the Court of Appeal. It was not raised in any of the grounds of appeal. There was no oral argument addressed to the point, which was raised only in passing in one paragraph of the respondent's reply submissions.

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2 This was a power that was expressly conferred on RFML by clause 4.2(b) of the RP Trust Constitution. [**AB 120**]

23. If the argument is available to the respondent, it is in any event misconceived. Its basis appears to be s 601FC(1)(c) of the Act {RWS 61}. The argument is misconceived. Section 601FC applies to the exercise of powers and the carrying out of duties by the responsible entity. That section does not confer on the responsible entity a discretion to disregard an obligation created by the terms of issue of a class of units (or any contractual obligation, for that matter). Indeed, the responsible entity had a positive duty under s 601FC(1)(m) to comply with any other duty not inconsistent with the Act, conferred upon it by the scheme's Constitution. Complying with the terms of issue of the Subscription Units would be just such a duty.

24. Further, there is no basis at all for the Court to find that a failure to redeem the Subscription Units would be justified if there had been a suspension of withdrawals pursuant to clause 7.6 of the Constitution [**AB 126**].

25. *First*, the suspension of withdrawals affected all holders of ordinary units. The redemption required under clause 2.4 was confined to the Subscription Units held by MacarthurCook.

26. *Secondly*, presumably, there was doubt in the mind of the decision makers at RFML in September 2008 as to whether assets were available to satisfy withdrawal requests from all holders of ordinary units. However the Trust had particular assets available and able to be converted to money to satisfy the obligation to redeem MacarthurCook's units: [98] Trial Judgment [**AB 83**]. There is no basis for the Court to conclude that, in the light of this fact, it would have been in the best interests of members (of which MacarthurCook was one) not to redeem the Subscription Units.

27. If the respondent is permitted to press the grounds in the Notice of Contention, they should be dismissed.

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