



HIGH COURT OF AUSTRALIA

14 May 2014

MACARTHURCOOK FUND MANAGEMENT LIMITED & ANOR v TFML LIMITED

[2014] HCA 17

Today the High Court unanimously allowed an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales. The High Court held that redemption of certain interests in a managed investment scheme did not constitute a withdrawal from that scheme within the meaning of Part 5C.6 of the *Corporations Act* 2001 (Cth) ("the Act").

RFML Ltd ("RFML") (subsequently replaced by the respondent, TFML Ltd) was the responsible entity of an unlisted unit trust ("the Trust") which was a registered scheme. The constitution of the Trust complemented s 601KA(3)(b) of the Act by providing that a unitholder had no right to withdraw when the Trust was not liquid, unless there was a withdrawal offer currently open for acceptance by unitholders. The trustee was given power to suspend withdrawals if it was not in the best interests of unitholders for withdrawals to be made.

In October 2006 and December 2007, RFML sought to raise funds by an open-ended public offer of ordinary units in the Trust. Through a series of facility agreements, the first appellant, MacarthurCook Fund Management Ltd ("MacarthurCook") underwrote the public offer by subscribing for units in the Trust. One of the terms of the facility agreements was that "[s]ubject to compliance with any requirements under the Corporations Act and the Constitution, during the Subscription Period, Subscription Units held by MacarthurCook must be redeemed by [RFML] for their Issue Price". On 29 September 2008, RFML gave notice that it had suspended all "withdrawals" from the Trust until further notice. MacarthurCook instituted proceedings in the Supreme Court of New South Wales on the basis of RFML's failure to redeem Subscription Units in accordance with the relevant term of their issue.

The Court of Appeal held that RFML's redemption would have constituted a withdrawal within the meaning of Pt 5C.6 of the Act. However, as RFML had not complied with the requirements prescribed by the Act, and because the relevant term of issue of the Subscription Units expressed RFML's obligation to redeem to be subject to compliance with the Act, RFML was not in breach. By special leave, MacarthurCook appealed to the High Court.

The High Court held that a member does not withdraw from a scheme merely by reason of a responsible entity performing an obligation (or exercising a power compulsorily) to redeem the interest of the member. The Court held that the withdrawal by a member that is regulated by Pt 5C.6 of the Act involves some act of volition on the part of the member. It followed that RFML had breached its obligation to redeem the Subscription Units as s 601KA(3)(b) had no application in this case.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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