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

Part I: Publication

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

Part II: Issues arising

2. The Notices of Appeal[1] raise three questions: first, does Part 5C.3 of the *Corporations Act 2001* (Cth) (the **Act**) contain a concept of "interim validity", whereby if a responsible entity (**RE**) of a registered scheme executes a deed purporting to modify the constitution of the scheme, but fails to form the opinion necessary under s 601GC(1)(b) to give it the power to do so, the RE becomes bound to lodge a copy of that modification with ASIC, and upon such lodgement the constitution operates as so modified for all purposes under Part 5C.3 unless and until a Court sets the modification aside?

3. Secondly, is a director's subjective honest belief that the RE has amended the constitution, which is the product of a breach duty on an earlier occasion, sufficient to absolve the director and the RE of subsequent breaches of duty under ss 601FC and 601FD?

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[1] [CB800-803]; [CB822-825]; [CB847-850]; [CB869-872]; [CB891-895].

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4. Thirdly, is the matter specified in subs (3) of s 208, as modified by s 601LC, part of the total statement of obligation under s 208, upon which the onus lies on the party moving for a contravention?

5. The Notices of Contention[2] raise a further, partially anterior, question: is the concept of "members' rights" within s 601GC(1)(b) limited such that it does not include the members' existing rights under the constitution to have the RE take the fees permitted under the constitution, but no more?

6. For the following reasons, the answer to each question is "no".

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

10 7. ASIC considers that no notice need be given in compliance with this provision.

Part IV: Reasons for judgment of primary and intermediate court

8. The reasons of the primary judge on liability are *Australian Securities & Investments Commission v Australian Property Custodian Holdings Ltd (recs and mgrs apptd) (in liq)* (No 3) [2013] FCA 1342 (**LJ**). The reasons of the primary judge on penalty are *Australian Securities & Investments Commission v Australian Property Custodian Holdings Ltd (recs and mgrs apptd) (in liq)* (2014) 103 ACSR 1; [2014] FCA 1308 (**PJ**). The first set of reasons of the Full Court of the Federal Court of Australia is reported as *Lewski v Australian Securities & Investments Commission* (2016) 246 FCR 200; [2016] FCAFC 96 (**FC1**). The second set of reasons and the judgment of the Full Court of the Federal Court
20 of Australia is reported as *Lewski v Australian Securities & Investments Commission (No 2)* (2017) 352 ALR 64; [2017] FCAFC 171 (**FC2**).

Part V: Facts

APCHL and the Prime Trust

9. At all material times Australian Property Custodian Holdings Ltd (**APCHL**) was the RE of a managed investment scheme known as the Prime Retirement and Aged Care Property Trust (**Prime Trust**). Mr Lewski, several family members and an associated company owned all of the shares in APCHL.[3]

10. Prime Trust was created as a unit trust by a declaration of trust executed by APCHL on 27 December 2000 (**Prime Trust Deed**). The Prime Trust Deed made APCHL the trustee

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[2] [CB819-820]; [CB844-845]; [CB863-864]; [CB885-886].
[3] LJ [12] [CB30].

and manager of the Prime Trust. On 23 July 2001 Prime Trust was registered under s 601EA of the Act and the Prime Trust Deed as then in force became the constitution of the scheme for the purposes of Part 5C of the Act.[4]

11. At the time of registration and thereafter, the Prime Trust Deed provided that the trust would vest on 31 December 2007 if the RE had not on or before 31 July 2007 passed a resolution to seek listing of the Prime Trust units on the Australian Stock Exchange (**ASX**).[5] In May 2006 the RE informed ASIC that its objective was "to continue to move prudently and systematically towards listing of the trust before December 2007" and the likelihood at that time was that it would be listed within the following 12-18 months.[6]

10 12. As at June 2006:

(a) the Prime Trust Deed provided that APCHL would be entitled to an "Exit Fee" of 2.5% of the gross assets if the Prime Trust was terminated. It did not provide for any fee to be payable on the listing of the units in the trust or if APCHL was removed as the RE;[7]

(b) the Prime Trust Deed also provided that APCHL would be entitled to a "Takeover Fee" of 2.5% of the acquisition price paid for any units in Prime Trust by an acquirer who held or thereby obtained more than 20% of the units;[8]

(c) clause 25.1 of the Prime Trust Deed provided that APCHL could amend the deed provided the amendment was not in favour of, and would not result in, any benefit to the RE, and provided also that any amendment complied with the Act;[9]

20 (d) the Prime Trust had total assets of $568.4 million and total liabilities of $358.6 million and there were 216.7 million units on issue;[10]

(e) the APCHL board of directors (the **Board**) was concerned that a recent request for a unit register suggested that another company was considering making an offer for units in Prime Trust and decided to look into the implementation of disincentives that might discourage such an offer.[11]

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4 LJ [43], [46] [CB40-41].
5 LJ [51]-[52] [CB42].
6 LJ [57], [61] [CB44].
7 LJ [65(b)] [CB45].
8 LJ [65(d)] [CB46].
9 LJ [84] [CB51].
10 LJ [119] [CB60].
11 LJ [68] [CB47].

Amendment of the Prime Trust Deed

13. In late June and early July 2006 Mr Lewski sought advice from Madgwicks Lawyers about amending the constitution of the trust, without consulting the unitholders, to:

    (a) introduce a "Listing Fee" of 2.5% of the gross value of the assets of the Prime Trust payable on the listing of the units in the Trust on the ASX (**Listing Fee**);

    (b) introduce a "Removal Fee" of 2.5% of the gross value of the assets of the Prime Trust payable if APCHL was removed at the instigation of the members or ASIC unless the removal was due to fraud, wilful negligence or cancellation of APCHL's financial services licence (**Removal Fee**); and

    (c) increase the amount payable for the existing "Takeover Fee" from 2.5% of the consideration paid under the transaction to 2.5% of the gross value of the assets of the Prime Trust (together, the **Amendments**): LJ [73]-[74] [CB48-49].

14. This led to the preparation by Madgwicks of an advice dated 14 July 2006 (**Madgwicks Advice**) and a draft Deed of Variation (No 7) of the Prime Trust Deed (**DOV 7**).

15. The Madgwicks Advice[12] was relevantly to the effect that:

    (a) recent case law relating to s 601GC(1)(b) indicated that the Amendments would not adversely affect the members' rights for the purposes of that section;

    (b) s 601GC(1)(b) requires APCHL as RE to determine whether it considers that the Amendments would not adversely affect members' rights, but if it did reasonably so believe then it was not necessary to seek the members' approval;

    (c) clause 25.1 of the Prime Trust Deed "could potentially be interpreted" either to allow any amendment permitted by the Act, even if for the benefit of the Trustee, or alternatively to forbid such an amendment. If the Board adopted the first interpretation, then APCHL could make the amendments without member approval;

    (d) subject to certain exceptions, s 208 of the Act prohibited APCHL from giving a financial benefit to itself or a related party out of Prime Trust property without member approval. A "financial benefit" could include the issuing of units or paying a fee.

16. At a Board meeting on 19 July 2006 the directors resolved unanimously to make the Amendments (**Amendment Resolution**).[13] In doing so:

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[12] Appellant's book of further material Tab 1; see also LJ [257]-[270] [CB95 -99].
[13] LJ [105]-[108] [CB57-58]. Appellant's book of further material Tab 2.

(a) they did not determine on behalf of APCHL that it considered that the Amendments would not adversely affect members' rights: LJ [660]-[665] [CB209- 210];

(b) they gave no proper consideration to:

i. the conflict between APCHL's interest in receiving the Listing Fee and the members' interest in having listing occur without the imposition of a fee;

ii. the fact that the Board had capitulated to APCHL's interests in relation to the Listing Fee rather than giving priority to the members' interests;

iii. the conflict between APCHL's interest in receiving the Removal Fee in the event APCHL was removed as RE, and the members' interests in being able to remove the RE without paying a fee;

iv. the deleterious effects of the Amendments;

v. the fact that the additional fees provided no corresponding benefit for members;

vi. whether the Board had power to pass the Amendments; and

vii. the effect of the Amendments on the members' right to have the Scheme administered under the existing constitution: LJ [569] [CB187].

17. DOV 7 was executed by APCHL immediately after the meeting on 19 July but left undated. It was left undated at the request of APCHL's solicitor because it needed to be lodged with a supplementary Product Disclosure Statement (**SPDS**) which was not then ready.[14]

The Lodgement Resolution

18. On 21 August 2006 the directors were provided with a draft SPDS and an email dated 18 August 2006 from APCHL's solicitor which stated in relation to DOV 7:

> *... Supplemental Deed of Variation (No.7) of the Constitution (copy attached) was approved at the last Board meeting and executed. It will take effect upon the date of its lodgement with ASIC. I propose that the Deed be dated 22 August and lodged with ASIC on that date together with a Consolidated Constitution incorporating the amendments made by the Supplemental Deed of Variation. This will then coincide with the issue of the new Supplementary POS* [sic].[15]

19. A meeting of the directors was held on 22 August 2006. Draft Board minutes prepared by Madgwicks before the meeting included the following resolution (**Lodgement Resolution**):

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[14] LJ [125-126] [CB61]; LJ [390] [CB131].

[15] LJ [132] [CB62]; LJ [328] [CB114]. Appellant's book of further material Tab 3.

DEED OF VARIATION (NO 7)
At the last Board meeting, the Directors approved Deed of Variation (No. 7) to the Constitution which had not yet taken effect as it had not been lodged with ASIC because a Supplementary PDS had not yet been prepared. As a Supplementary PDS has now been prepared, the Directors resolved that the Consolidated Constitution incorporating Deed of Variation (No. 7) be lodged with ASIC to become effective.[16]

20. The Lodgement Resolution was passed by the Board with all directors (other than Mr Clarke) voting in favour of or assenting to it.[17] At the meeting the directors did not give any or any further consideration to the matters referred to in paragraph 16 above.[18]

10 21. Following the Board meeting on that day, DOV 7 was dated "22 August 2006".[19] On 23 August 2006 a consolidated version of the Prime Trust Deed was lodged with ASIC with the intent that the Amendments would become effective.[20] The Form accompanying the lodgement, signed by APCHL's solicitor, stated that the RE had modified the constitution of the Prime Trust on 22 August 2006.[21] The first page of the lodged consolidated Prime Trust Deed recorded that it was "based on the Unit Trust Deed dated 27 December 2000 and subsequent amendments to that deed ... constituted by ... [inter alia] ... Supplemental Deed of Variation No. 7 dated 22 August 2006".[22]

Payment of the Listing Fee

22. By June 2007, listing of the units of the Prime Trust on the ASX was about to take place.
20 At a Board meeting held on 26 June 2007 the directors resolved that the Listing Fee be taken as units in Prime Trust.[23] Approximately 10% was to be issued to the RE at the time of allotment and official quotation of Prime Trust's units on ASX. The balance of the Listing Fee was to be deferred and payable in the form of 50% cash and 50% units in tranches upon achievement of performance hurdles over the following 3 years, and a tranche would be waived if the hurdle for the relevant year was not met. However, the

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[16] LJ [134] [CB63]; LJ [330]-[332] [CB115-116]. Appellant's book of further material Tab 4.
[17] LJ [402] [CB132-133]. As to the director's votes, see LJ [505] [CB161](Lewski & Jaques) and [513] [CB163] (Woodridge & Butler). The trial judge's finding that Clarke also assented was overturned by the Full Court: FC1 [132] [CB546].
[18] LJ [566], [616] [CB181, 194].
[19] LJ [127] [CB61]. Appellant's book of further material Tab 5.
[20] LJ [15] [CB31]. Appellant's book of further material Tab 6.
[21] LJ [137] [CB63]. Appellant's book of further material Tab 6.
[22] Appellant's book of further material Tab 6. In October 2006, the Board approved the Annual Financial report of the Trust for the year ending 30 June 2007 which stated that "On 22 August 2006 Australian Property Custodian Holdings Limited as the Responsible Entity of the Prime Retirement & Aged Care Property Trust exercised its right to amend the original constitution...": LJ [401] [CB134].
[23] LJ [140] [CB64]. Appellant's book of further material Tab 7.

whole of the unpaid balance would be payable in cash to APCHL if it were removed as trustee.[24]

23. A report was obtained from Prime Trust's auditors calculating the amount of the Listing Fee at $32,939,947. At a Board meeting on 27 July 2007 the directors adopted the report and determined that the initial payment would be $3,293,994 and each subsequent tranche would be $9,881,984. The Board resolved to take the initial payment of the Listing Fee as units, and that 3,293,994 units be issued to APCHL in its personal capacity.[25] (This and the subsequent resolutions referred to below are the **Payment Resolutions**).

24. The Prime Trust units were officially listed on the ASX on 3 August 2007.[26] The 3,293,994 units were issued to APCHL on that day and $329,399 was paid from Prime Trust funds to APCHL on 13 March 2008 in respect of GST on the initial 10% of the Listing Fee.[27]

25. On 8 April 2008 the Board resolved to amend its resolution of 26 June 2007 so that the whole of the unpaid balance of the Listing Fee would also be payable in cash to APCHL if Mr Lewski ceased to control APCHL.[28] A transaction between Mr Lewski, APCHL and Kidder Williams (Prime Trust's corporate adviser) intended to have such an effect was finalised or close to finalisation when this resolution was passed.[29] The Board considered Heads of Agreement to implement this transaction on 21 April 2008, following which each of Wooldridge, Clarke, Jaques and Butler approved its execution.[30]

26. On 27 June 2008, at a Board meeting attended by Lewski, Clarke and Jaques, the directors resolved to execute a Deed of Acknowledgement of Listing Fee Payment providing for the payment of the balance of the Listing Fee by $24,565,953 in cash and the issue of 9,020,385 units in the trust (assigned a value for the transaction of $5 million). Pursuant to this Deed:

    (a) on 27 June 2008 APCHL issued 9,020,386 units in Prime Trust to Carey Bay Pty Ltd, a company controlled by Mr Lewski; and

    (b) on 30 June 2008 APCHL paid itself $27,610,548.30 from Prime Trust funds.[31]

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[24] LJ [141]-[142], [146] [CB64-65]; LJ [685], [686] [CB216].
[25] LJ [147], [CB66]. Appellant's book of further material Tab 8.
[26] LJ [24], [150] [CB34, 67].
[27] LJ [148] [CB66].
[28] LJ [160] [CB68]. Appellant's book of further material Tab 9.
[29] LJ [163] [CB69]. The transaction is described at See LJ [134] [CB286].
[30] LJ [170]-[171] [CB71].
[31] LJ [179] [CB73].

ASIC's proceeding

27. In August 2012 ASIC commenced civil penalty proceedings against APCHL and each of Wooldridge, Jaques, Butler, Lewski and Clarke. ASIC's case[32] contained three broad elements, matching what are now the three grounds of appeal. The first attacked the validity of the Amendments, on the basis that the RE had not formed the opinion required by s 601GC(1)(b) which would enable it to amend the constitution without allowing members the chance to vote on it by special resolution.

28. The second part of ASIC's case alleged breaches of duty under ss 601FC and 601FD, by the RE and the directors, in the making of the Lodgement Resolution and the Payment Resolutions. Four aspects of this case require noting. First, ASIC did not attack the Amendment Resolution as involving a contravention as such, given that proceedings were commenced more than six years after its passing. Second, however, ASIC did plead and rely on the Amendment Resolution, and the failures of the RE and the directors in passing it, as part of the circumstances that grounded the nature and extent of the duties of the RE and the directors on the subsequent occasions of the Lodgement Resolution and later the Payment Resolutions. Third, ASIC did not allege conscious impropriety in the RE or directors, or actual subjective knowledge at the date of the Lodgement Resolution or Payment Resolutions that they had failed to bring about a valid amendment to the constitution or that they had breached their duties at the stage of the Amendment Resolution. Fourth, ASIC's pleaded case of breach of duty against the RE and the directors included, but extended far beyond, the simple fact that the directors had caused the RE to lodge an amendment to the constitution beyond the power permitted under s 601GC(1)(b).

29. Specifically, ASIC's pleaded case was that, at the stage of the Lodgement Resolution, the directors and the RE had not then, or in the Amendment Resolution leading up to it, given any or sufficient consideration to the central questions of whether there was a good and proper reason for the constitution to be amended to give the RE a right, for the first time, to these substantial additional fees; or how such a change could possibly be considered to be in the best interests of members or to be giving priority to members' interests over the interests of the RE; or how, objectively, it could be a proper use of their position.[33]

30. Similarly, ASIC's pleaded case was that, at the stage of the Payment Resolutions, APCHL and the directors did not act in the best interests of members and give those interests priority

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[32] FC2 [36]-[50] [CB654 – 669]. Appellant's book of further material Tab 11.

[33] Appellant's book of further material Tab 11. See eg para 28 set out in FC1 [50] [CB514-517].

over the interests of APCHL. Additionally, the directors did not take reasonable steps to ensure that APCHL complied with the true constitution.

31. The third part of ASIC's case invoked s 208 which (as modified by s 601LC) provides that an RE must not give itself a benefit from scheme funds without member approval. ASIC alleged that APCHL contravened that section by payment of the Listing Fee and that each director was involved in the contravention and thereby contravened s 209(2) (**s 209 claim**).

32. For the reasons given in the LJ, the trial judge (Murphy J) found that all contraventions alleged by ASIC had been established. On 2 December 2014, the trial judge made declarations of contravention against APCHL and the directors, imposed pecuniary penalties on the directors and imposed terms of disqualification against each director save for Mr Clarke.[34]

33. Each of the directors instituted a separate appeal to the Full Court against the orders made on 2 December 2014. By its orders made on 1 November 2017, the Full Court allowed those appeals and set aside all of the declarations and orders made by the trial judge.

Part VI: Argument

Notices of Contention

34. As the issue raised by the Notices of Contention is logically anterior to parts of the Notice of Appeal, ASIC will briefly address it here, and otherwise save its submissions for reply.

35. Section 601GC(1) provides for alteration of the constitution of a registered scheme: (a) by a special resolution of the members of the scheme; or (b) by the RE if the RE reasonably considers the change will not adversely affect members' rights.

36. The trial judge found that on 19 July 2006 and thereafter, APCHL did not reasonably consider that the Amendments would not adversely affect members' rights: LJ [670] [CB212]. In doing so the trial judge relied upon a conception of "members' rights" which followed the decision of the Victorian Court of Appeal in *360 Capital Re Ltd v Watts* (2012) 36 VR 507 at [26], [40], [50], and Gordon J in *Premium Income Fund Action Group Incorporated v Wellington Capital Limited* (2011) 84 ACSR 600 at [40]-[42] in preference to arguably conflicting dicta at first instance in NSW.[35]

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[34] Declarations [CB378-425]; Pecuniary Penalties [CB425-426]; Disqualification orders [CB425];

[35] LJ [656]-[659], [668]-[670], [673] [CB208, 211-212, 213]; *ING Funds Management Ltd v ANZ Nominees Ltd* (2009) 228 FLR 444 (***ING***).

37. The Full Court agreed with the trial judge on the question of construction of s 601GC(1)(b).[36]

38. The Respondents seek to re-agitate the argument that "members' rights" in s 601GC(1)(b) is to be understood in such a highly confined fashion that the present amendment might affect the value of the members' rights, but not the rights themselves.

39. The point can be answered simply. Prior to the amendment, the members had a right, established by s 601GA(2), that the RE would not be paid any fees out of the scheme property save for those specified in the constitution. This right was enhanced by cll 25 and 34 of the constitution, which prevented the RE making amendments to benefit itself. The Amendments adversely affected the members' rights because it enabled the RE to take substantial additional fees for itself, beyond its current entitlement, and without change or addition to the services which the RE was promising to provide. Indeed, in the case of the Removal Fee, it was the imposition of a new fee for the exercise of an existing right under s 601FM of the Act and cl 22.4 of the constitution. It is hard to think of a case where members' rights would be more squarely affected, save perhaps if the RE amended the constitution to confiscate the rights altogether. The affected rights were on any view "contractual and equitable rights conferred on unitholders."[37] They went beyond a mere generalised right to have the scheme administered according to the existing constitution.[38]

40. The above means that the Madgwicks Advice was wrong, not only in saying that members' rights would not be affected, but in parcelling out as a separate issue, on which it remained agnostic, whether the Amendments complied with cl 25 of the constitution. The issues were in truth and law inseverable. Making an amendment which denied or negated the members their existing rights and protections under cl 25 was part of why the change could only be done by the members themselves under s 601GC(1)(a).

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[36] FC1 [247] [CB584]. See also FC1 [19] [228], [235] [CB501, 580, 581]; FC2 [94]; [CB680]. The Full Court also accepted that the resolution of 19 July was invalid and no decision at all (FC1 [247]; [CB584]), the deed was invalid (FC1[346]) and "the Amendments themselves could not become effective as a constitutional amendment until after APCHL itself had complied with its s 601GC(2) obligation and entered into a valid deed": FC1 [173] [CB560].

[37] *ING* at [94], citing *Smith v Permanent Trustee Australia Ltd* (1992) 10 ACLC 906 (***Smith***) at 914.

[38] Cf *Smith* at 913-914; *ING* at [92]-[98].

Notice of Appeal Ground 1

41. The result, once the Notices of Contention are dismissed, is that the trial judge correctly held that the Amendments were never effective and that the Prime Trust Deed did not at any time authorise the payment of the Listing Fee: LJ [673] [CB213].

42. The Full Court correctly accepted that the Amendment Resolution was "invalid" and "no decision at all". However, it erroneously went on to embrace a notion of "interim validity", i.e. that an amendment made by the RE beyond power under s 601GC(1)(b) – although seemingly not so under s 601GC(1)(a) – will upon lodgement with ASIC become valid for all purposes under the Act until set aside by a Court.[39]

10 43. The concept of "interim validity" should be rejected for the following reasons.

The proper construction of s 601GC

44. *Text:* The starting point must be the text of s 601GC read in the context of the Act as a whole and, in particular, Part 5C.[40] Each of subsections 601GC(1)(a) and (b) confers a power to modify the constitution and identifies the scope of the power and the requirements for its exercise. The text of subs 601GC(1)(b) makes it a precondition to the existence of, and exercise of a power by, the RE to effect an amendment to the constitution, such that the power does not exist unless the threshold condition is satisfied. Subsection 601GC(2) provides that it is necessary to lodge the modification with ASIC for it to take effect.

45. *Statutory Purpose:* There is no reason to interpret s 601GC in a manner that departs from
20 the text. The immediate statutory purpose is clear: ordinarily members by special resolution may decide if the terms of the constitution of their scheme should change. Subsection 601GC(1)(b) is a limited exception to recognise there can be cases where the change can reasonably occur without consulting members, but only if, and after, the RE has reasonably formed the requisite opinion. This restriction is patently designed to protect the members from changes made without their consent which are adverse to their rights. This protection would be subverted if a change made without that opinion being formed by the RE is nevertheless immediately effective and operates for all purposes and all time unless and until someone finds out the RE has not formed the requisite opinion and manages to get to Court (in time) and get the Court to uphold the point.

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[39] FC1 [245], [252]-[256] [CB583, 585-586]; FC2 [186], [195] [CB701-702, 704].

[40] See generally *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 92 ALJR 219 at [103] (Keane, Nettle and Gordon JJ).

46. *Immediate context:* The context[41] in which s 601GC is to be construed supports this construction. It includes the statutory trust created by s 601FC(2), and the fact that APCHL was (in any event, under the Trust Deed) a trustee. The Full Court erred in considering principles of trust law were irrelevant.[42] A construction of s 601GC that does not give effect to an RE's unauthorised amendment of a trust deed accords with orthodox principles of trust law. As this Court observed in *Youyang Pty Ltd v Minter Ellison* (2003) 212 CLR 484, "perhaps the most important duty of a trustee is to obey the terms of the trust".[43] The trust may contain powers of variation, but a purported variation without power is void.[44] Under general principles of trust law, a trustee has no authority to act upon an amendment which is made ultra vires, since that would be an act in breach of trust.[45] A construction of s 601GC that does not permit an errant trustee to give effect to an unauthorised amendment, for its own benefit, is consistent with s 601FC(2) and should be preferred. It is also consistent with the broader purpose of Part 5C, which is wholly directed to the protection of the interests of members of managed schemes.[46]

47. *Wider context:* Section 1322 provides wider but powerful context.[47] It provides the express statutory answer in a case where there is a failure to form the necessary opinion but a good reason to validate the amendment. It provides a means by which an invalid amendment could be validated by the Court, provided no substantial injustice followed. It permits the Court to validate an honest irregularity where validation would not cause substantial injustice to scheme members. The statutory scheme thus supports the conclusion that an amendment that does not comply with a statutory precondition, and is made without power, is invalid and remains invalid unless and until an order under s 1322 is made.

Errors in the Full Court's reasoning

48. In the first judgment, the reasoning of the Full Court on this question is found at FC1 [247]-[257] [CB584-586] and [324] [CB606]. At FC1 [247], the Full Court correctly accepted

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41 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225 (***Probuild***) at [34].
42 FC2 [190] [CB703]; Cf LJ [638] [CB202].
43 At 498 [32] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).
44 See eg *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84 at 93, 94, 97; *Re Brook's Settlement* [1968] 1 WLR 1661 at 1664, 1669; *Aleyn v Belchier* (1758) 1 Eden 132 at 138. See also, in relation to purported alteration of articles of association: *Gambotto v WCP Limited* (1995) 182 CLR 432 at 448, 451, 454, 455, citing *Dafen Tinplate Co v Llanelly Steel Co* [1920] 2 Ch 124. In the context of a scheme: *Harwood-Smart v Caws* [2000] PLR 101; *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 503-5, 512.
45 See *BHLSPF Pty Ltd v Brashs Pty Ltd* (2001) 8 VR 602 at [44] (Warren J).
46 See *Westfield Management v AMP Capital* (2012) 247 CLR 129 at 145 [49].
47 See *Weinstock v Beck* (2013) 251 CLR 396 at [53] -[56] (Hayne, Crennan, Kiefel JJ); [64]-[67] (Gageler J).

that the 19 July resolution was invalid and no decision at all. At that point the Full Court went wrong by regarding the invalid resolution as remaining "a thing actually done". The references which the Full Court then gave to the discussion of Gageler J in *Kable* and in *Wellington Capital* at FC1 [248] and [250] [CB584] provide no support for the "valid until set aside" doctrine in the present case. In particular, in their discussion of the observations of Gageler J in *Wellington Capital*,[48] the Full Court appears to assume incorrectly that the condition in s 601GC(1)(b) was a legal norm that governed the exercise of a legal capacity that the RE independently possesses. The Full Court had earlier correctly found that s 601GC is "...a freestanding provision providing the statutory power to modify, repeal or replace the existing constitution."[49] It is not a provision that regulates the exercise of a power that otherwise exists. The power to amend flows from the provision.

49. In FC1 [253]-[256] [CB585-586], the Full Court set out an additional basis for discerning from the structure of the Act an intention that amendments to a scheme constitution, once lodged with ASIC, would be valid until set aside. This is said to emerge as a purpose of the Act from the requirement in s 601GC(2) that amendments be lodged with ASIC (and cannot take effect until they are lodged) when considered in the context of the importance of the constitution in the scheme of Part 5C. In FC1 [324] [CB606] the Full Court referred also to the desirability of certainty (for the RE, the members and third parties) about the content of that document.

50. It was these latter paragraphs (namely [253]-[256] and [324]) that the Full Court identified at FC2 [186] [CB701] as setting out its reasoning. The Full Court said that its conclusion also flowed from "an orthodox application of the principles enunciated in *Project Blue Sky* that focus on the purpose of the Act" (FC2 [186] [CB701-702]) – the purpose being, it would appear, that amendments to a scheme constitution once lodged with ASIC are ordinarily valid until set aside. *Project Blue Sky* affirmed that the validity of an act done in breach of a condition regulating the exercise of a statutory power is to be determined by an inquiry as to whether, having regard to the language of the relevant provision and the scope and object of the whole statute, it was a purpose of the legislation that an act done in breach of the provision should be invalid.[50] In the case of s 601GC(1)(b), the power concerned is a power to effect a unilateral alteration to the terms on which the RE holds

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[48] (2014) 254 CLR 288 at [60]; FC1 [250] [CB585]; FC2 [46] [CB665].
[49] FC1 [218] [CB576]; FC2 [146] [CB691].
[50] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 (***Project Blue Sky***) at 390-91 [93].

scheme property on trust for the members. If, as ASIC submits, the provision is correctly read as defining the circumstances in which such a power exists, the conclusion that it was a purpose of the Act that an act done in the purported exercise of the power in any other circumstances would be invalid (i.e., ineffective to make such an alteration) is self-evident.

51. In its application of *Project Blue Sky*, the Full Court proceeded on the footing that the requirement in s 601GC(1)(b) "regulates the exercise of functions already conferred upon the RE rather than imposing essential preliminaries to the exercise of those functions:" FC2 [187] [CB702]. This appears to be a return to the misplaced reliance on *Wellington Capital* at FC1 [250]-[251]. There is no function conferred on the RE to alter the constitution of the scheme other than in s 601GC(1)(b). The Full Court's reading disregards the word "if" which is the textual link between the two clauses in the paragraph.

52. The Full Court's application of *Project Blue Sky* also concluded erroneously that s 601GC(1)(b) "did not have a rule like quality that could easily be identified or applied and was expressed in relatively indeterminate language": FC2 [187] [CB702]. Section 601GC(1)(b) adopts an established drafting technique for establishing essential preconditions to the existence or exercise of a power.[51] There is nothing indeterminate about the language of the condition and no difficulty in identifying and applying its requirement.

53. The third step in the Full Court's *Project Blue Sky* analysis referred to the "public inconvenience" that would result from invalidity. At FC1 [324] [CB606], the Full Court referred to "certainty" for the RE, the members and third parties, and it appears to have adopted in this respect the submission of the directors summarised at FC1 [236] and [237] [CB581-582]. Those submissions and the Full Court's conclusion disregard entirely the public inconvenience associated with holding the amendment valid: for the existing members who, as this case demonstrates, may suffer a considerable loss from an unauthorised amendment;[52] and for the public interest generally in terms of a reduction in confidence of the capacity of the scheme of regulation in Part 5C to protect investors. It was an error by the Full Court to conclude as it did in the absence of an explicit legislative statement of a purpose to confer validity of any kind on an unauthorised amendment.

54. The Full Court's conclusion also failed to recognise that the certainty said to arise is largely illusory unless "interim validity" is extended to every purported amendment that might find

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[51] *Wilkie v Commonwealth* (2017) 91 ALJR 1035 at 1053 [98].
[52] Cf *Forrest & Forrest Pty Ltd v Wilson* (2017) 91 ALJR 833 at [63].

its way onto the public register, even if not made by the RE at all: a result which the Full Court does not expressly embrace.

Consequences of success on Ground 1

55. If ASIC succeeds on Ground 1, there should, at a minimum, be a reinstatement of the Declarations 5 and 7 made by the primary judge: [CB380-382]. In addition, Declaration 3 should also be reinstated. If s 601GC(1)(b) is not the source of the power to amend the constitution, cll 25 and 34 operate to prohibit an amendment in favour of the RE and the inconsistency identified by the Full Court at FC2 [146]-[147] [CB691] falls away. In addition, the issue raised by Appeal Ground 3 then squarely arises. Further, as explained below, under Ground 2, one of the substantial planks for the Full Court's overturning of the primary judge's findings of breaches of duty against the RE and the directors will be removed.

Notice of Appeal Ground 2

Introduction

56. The trial judge made comprehensive findings that the RE and the directors breached their various duties under ss 601FC(1) and 601FD(1) as alleged by ASIC - at the stage of each of the Lodgement Resolution and Payment Resolutions - and made declarations accordingly. The critical findings and matching declarations in each case are as follows:

    (a) Lodgement Resolution:

        i. negligence: LJ [557]-[574], [585]-[605], [646][53] (Declarations 1, 8, 16, 24, 32);

        ii. conflicts: LJ [615]-[620], [646][54] (Declarations 2, 9, 17, 25, 33);

        iii. improper use: LJ [628]-[634][55] (Declarations 10, 11, 18, 19, 26, 27, 34, 35);

        iv. compliance: LJ [637]-[641], [646][56] (Declarations 3, 12, 20, 28, 36);

    (b) Payment Resolutions:

        i. conflicts: LJ [747]-[762][57] (Declarations 4, 6, 14, 22, 30, 38);

        ii. compliance: LJ [765]-[766][58] (Declarations 5, 7, 15, 23, 31, 39).

57. The Full Court reversed these findings and set aside all of the declarations. Central to the Full Court's reasoning was that the trial judge had engaged in an erroneous "conflation" of

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[53] [CB178-182]; [CB185-190]; [CB204-205].
[54] [CB193- 194]; [CB205].
[55] [CB197-199].
[56] [CB200-202]; [CB205].
[57] [CB236-240].
[58] [CB240-241].

the matters that were before the RE and the directors at the stage of the Amendment Resolution and the matters before them at the later stages of the Lodgement and Payment Resolutions. As there was no challenge to the directors' evidence that they had an honest, but mistaken, belief that they had validly amended the constitution at the July meeting, that belief confined, and defined, the scope of their duties at the later meetings. As of August, they were entitled to proceed on the basis that the only matter before them was a mechanical one of when to lodge an amendment which was already effective and binding. And as of the following years, the only question before them was whether to authorise the making of payments to the RE which were required by reason of earlier amendments which they honestly believed they had validly made.[59]

58. ASIC contends that relying on honest belief in this way to confine and define the scope of the directors' duties at the stage of the Lodgement and Payment Resolutions displays four inter-related errors of law. Those errors will be identified and addressed in general terms, before returning to each of the breaches of duty found by the trial judge and explaining why individually and collectively they survive the "honest belief" finding.

59. *Error One:* The first error is that the Full Court's erroneous conception of "interim validity" has come back, in another guise, to rescue the RE and directors from what are otherwise breaches of duty.[60] The Full Court has wrongly approached the various heads of breach of duty under ss 601FC(1) and 601FD(1) on the basis that, once the directors have resolved to amend the constitution, then, whatever excesses of power and breaches of duty were involved in that process, it becomes the RE's and their subsequent duty to go ahead and lodge the Amendments and thereafter administer the scheme on the basis of the thing lodged. Provided they "honestly believe" they have validly amended the constitution, they are bound to behave accordingly, unless and until a Court sets aside the amendment as invalid. "Honest belief" then becomes a complete defence to any claim of later breach of duty.

60. The approach can be seen very starkly from FC2 [196]. There, the Full Court acknowledges that the consequence of its reasoning on interim validity is that the reference to "constitution" in s 601FC(1)(k) – the provision that imposes a duty on the RE to ensure that all payments out of the scheme property are made in accordance with the constitution

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[59] FC1 [257], [341]-[346] [CB586, 613]; FC2 [46]-[48] [159]-[160] [CB665-669, 694-695].
[60] FC1 [298], [321], [324], [341], [346] [CB597, 601, 613]; FC2 [159], [196] [CB694-695, 704].

as well as the Act – means the constitution "as purportedly amended and lodged with ASIC and acted upon by the directors", not the one that exists in law.

61. On this approach, whenever one sees the "constitution" referred to in any provisions of ss 601FC or 601FD which establish the duties of the RE or the directors, one reads this as the thing lodged, unless and until a Court has set it aside.

62. By contrast, the trial judge, and ASIC, approach this matter from the opposite end. The constitution which the RE and the directors should be striving to uphold, and regard as the basis for establishing the members' rights and interests, to which priority must be given over the RE's interests, is the constitution which exists in law from time to time. If the RE and directors have participated in a purported amendment to the constitution which is in excess of power and otherwise the product of various breaches of duty, it does not confine or define the RE and directors' later duties to say: "we did not know we had done anything wrong". Their duties are, and remain, always measured by the true constitution in law.

63. *Error Two:* The second error arises from the way in which the Full Court has used the finding of honest belief that the amendments were effective to answer, and eviscerate, the much larger case which ASIC ran on breach of duty. As noted above, ASIC's case, which the primary judge upheld[61] was that, at the stage of passing the Lodgement Resolution, and taking into account the prior consideration that the RE and directors gave to the matter at the Amendment Resolution, neither the RE or the directors had given any or sufficient consideration to any of the wider matters which bore on the propriety and fitness of amending the scheme to allow the RE to pay itself substantial additional fees, not only for doing no additional work, but in some cases (eg the Removal Fee) as an additional cost of the members exercising an existing right. The findings of negligence, failure to act in the best interests of members or to give them priority over the interests of the RE and impropriety drew on a far wider series of facts and matters other than the mere (while very important) question of lack of power under s 601GA(1)(b).

64. Accepting that the directors sat in the August meeting with an honest belief that they had validly amended the constitution in July, subject only to lodgement, simply does not answer the fact that the directors had not, at the time of the August meeting, when they were taking the critical step which would cause the amendment to do its harm, given consideration to

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[61] See for example, LJ [568]-[574]; [CB181- 183]; cf FC1 [293] [CB597].

the range of matters which the Act required of a reasonable director at the time. They had not done so in July. They did not do so in August.

65. Sections 601FC(1) and 601FD(1) should not be interpreted in such a way that an RE or director who has failed in their duty at stage one of a transaction can thereafter say 'my duty is just blindly and mechanically to carry my breach of duty into fruition, provided only I don't realise that my previous consideration of the matter is inadequate'.

66. Were it otherwise, the more negligent a director, the more gross a director's failure to appreciate and give priority to the interests of members at stage one of a transaction, and the more obtuse he or she is to their duties under the Act, the lower the bar set for the director at later stages of the same matter.

67. *Error Three:* When the Full Court came to consider each of the ways in which the larger breach of duty claims was advanced and succeeded before the trial judge, it failed to appreciate and give force to the substantially objective elements which are central to the claims of negligence, conflict and impropriety. Those objective elements could never be answered by a simple plea that a director honestly believed that he had participated in a valid amendment to the constitution on the earlier date.

68. The correct focus on the objective elements of the various breach of duty claims is illustrated by cases in the analogous area of duties of directors of corporations or trustees. They offer no support for the notion that a person in a fiduciary or quasi-fiduciary position can, by acting in breach of duty on one occasion, confine or limit the scope of their duty in law at a subsequent stage of the same transaction, provided only that they depose to honest belief.[62]

69. *Error Four:* A further reason why the Full Court's approach does not match the Act is that it collapses the primary question of breach of duty into a different inquiry that might arise at the stage of relief. Even in the latter case, honesty is not sufficient: a director or trustee will only be entitled to relief if they have acted reasonably and ought fairly to be excused.[63]

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[62] *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62, 74; *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd* [1927] 2 KB 9 (***Shuttleworth***) at 23, 24; *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 481; *Re City Equitable Fire Ins. Co Ltd* [1925] Ch 407, 427-8. See also *Re WM Roith Ltd* [1967] 1 WLR 432; *Overend & Gurney Co v Gibb* (1872) LR 5 HL 480, 486-7.

[63] Sections 1317S and 1318 of the Act; *Re Turner* [1897] 1 Ch 536, 542; *National Trustees Co. of Australasia, Ltd v General Finance Co. of Australasia, Ltd* [1905] AC 373; *Re Stuart* (1897) 2 Ch 583; *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, 165; *Re Windsor Steam Coal Co (1901) Ltd* [1929] 1 Ch 151; *Elders Trustee & Executor Co Ltd v Higgins* (1963) 113 CLR 426; *Re Grindey* [1898] 2 Ch 593, 601.

The Full Court's construction of these duties cuts across the statutory scheme in the same way that its "interim validity" analysis cuts across s 1322.

70. We now turn to the more particular claims.

The negligence claims

71. The degree of care and diligence that is required by ss 601FC(1)(b) and 601FD(1)(b) is fixed as an objective standard by reference to the RE or officer's position.[64] The provisions require a determination of what a hypothetical reasonable person with the experience and knowledge of the relevant RE or officer would have done having regard to all of the circumstances.[65] Deficient consideration of a previous decision is a relevant circumstance in which a decision to take a step to implement that decision is made. As the trial judge found, a reasonable person would have appreciated the deficiency and would have sought to address it.[66]

72. The Full Court noted, but put aside, the trial judge's finding that a reasonable person in the position of the directors would have known that his consideration of the Amendments at the earlier meeting was quite inadequate. Instead, it reached its conclusion based upon what would have been done by a reasonable person who believed that the previous consideration of the matter was adequate. The Full Court thus based its decision on a contradiction: a hypothetical reasonable person acting under a belief that a reasonable person in that position would not hold. Such an analysis does not apply the objective test mandated by the statute and the authorities.

73. Nor can the negligence claims be dismissed on a mere pleading point basis. ASIC did not allege that the directors knew subjectively that their previous consideration of the matter was deficient. It did not need to. It was enough to allege, and prove, that neither on the previous occasion (July) nor the present occasion (August) did the directors turn their minds to the matters which the law required a reasonable person in their position to turn their minds.

74. Had there been a basis to allege a case of directors implementing a transaction consciously knowing they are already in breach of duty, that would have been a case of heightened or

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[64] *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465 at [18], [34]-[36].
[65] See generally *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103 at 119.
[66] LJ [568]-[569] [CB155-156].

aggravated breach, bordering on dishonesty. ASIC did not need to allege or prove such a case to make out objective failure to demonstrate care and diligence.

The conflict claims

75. The duty in s 601FC(1)(c) and 601FD(1)(c) has two branches. The first branch requires that the RE and directors act with undivided loyalty solely in the interests of the members.[67] This duty includes adherence to the constitution.[68] The second branch requires the RE and the directors, in any situation where there is a conflict between the interests of the members and the interests of the RE, to give priority to the interests of the members. The trial judge's analysis of the meaning of these provisions[69] was correct and the Full Court did not disagree with it. The Full Court accepted, at least "as a general proposition," that the duty to act in the best interests of the members "includes a duty that the trustee strictly adheres to the terms of a trust."[70]

76. ASIC submits that the questions of the existence of a conflict and whether the members' interests have been preferred involve factual determinations which are not dependent on whether the RE or the directors were conscious of the conflict or their subjective beliefs about its resolution.[71]

77. APCHL's design to complete the process of amendment of the constitution in its own favour without members' consent was irreconcilable with the performance of these duties. As the trial judge correctly concluded, none of the directors gave the best interests of the members any consideration: LJ [616] [CB194]. And:

> *No reasonable director in the position of each of the Directors would have seen it as in the members' interests to lodge the Amendments so as to make them effective. None of the Directors could have reasonably believed that it was in the best interests of the members to bring the Amendments into effect through the resolution.*[72]

78. The Full Court did not consider the trial judge's conclusions on the conflict claim in respect of the Lodgement Resolution in any detail. It merely said that the trial judge "had made

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[67] *Breen v Williams* (1996) 186 CLR 71 at 93, 108; *Cowan v Scargill* [1985] Ch 270 at 295. See also *Shuttleworth* at 18; *Re Manchester Royal Infirmary* (1889) 43 Ch D 420; *Re French Protestant Hospital* [1951] Ch 567; *Liverpool & District Hospital v A-G* [1981] Ch 193.

[68] *Punt v Symons & Co Ltd* [1903] 2 Ch 506 at 515-516; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 834, 837; *Re Oxford Benefit Building and Investment Society* (1886) 35 Ch D 502 at 512; *Leeds Estate Building and Investment Company v Shepherd* (1887) 36 Ch D 787 at 801, 803.

[69] LJ [454]-[490] [CB147-155].

[70] FC1 [346], FC2 [48]-[49] [CB613, 668]. See also, eg, *ASIC v AS Nominees Ltd* (1995) 62 FCR 504, 517.

[71] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558, citing *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 143-145, citing *Ex p James* (1803) 8 Ves 337, 345.

[72] LJ [617] [CB194].

similar errors in considering the duty to act honestly and in the best interests of members".[73] Insofar as FC1 [298] [CB100] relates to this claim, it appears to reflect the erroneous underlying premise of interim validity: no conflict could exist at 22 August because "the Deed (scil. "constitution") had already been amended giving APCHL the mandate to pay the relevant fees".

79. In relation to the conflict claim over the Payment Resolutions, the Full Court held that the directors were entitled to act "in accordance with the constitution which they honestly believed existed".[74] According to this formulation, the determination of whether they acted in the best interests of the members was made on the basis of their belief as to what the constitution provided.

80. These conclusions were in error. First, at the time of the August resolution the constitution had not been amended, at the least because the amendments had not been lodged with ASIC. The inherent conflict between the interests of APCHL and the members was still in existence. At the time of the Payment Resolutions, the constitution was not relevantly amended because DOV 7 was in any event ultra vires and ineffective. The members' interest in adherence to the true constitution was in conflict with APCHL's interest in receiving the Listing and like Fees. The obligation to adhere to the constitution and give priority to the members' interest is not satisfied by adherence to what the RE and the directors wrongly believed to be the constitution, honestly or not.

The improper use claims

81. Section 601FD(1)(e) covers the same ground as s 182 of the Act. A use of position is improper if it involves a breach of the standards of conduct that would be expected of someone in the position of the relevant person by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case.[75] The question in each case is what content is to be given to the standards of conduct that would be expected of the officer, having regard to the position occupied by the officer in the RE and the circumstances surrounding the impugned conduct (i.e., the commercial context).[76] The standard is objective, and conduct may be improper even if the person concerned does

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[73] FC1 [297] [CB597].
[74] FC1 [341], [346] [CB613].
[75] *R v Byrnes* (1995) 183 CLR 501 (***Byrnes***) at 514-515 (Brennan, Deane, Toohey and Gaudron JJ).
[76] *Angas Law Services v Carabelas* (2005) 226 CLR 507 (***Angas***) at 531-532.

not recognise the impropriety.[77] Where a decision by directors is impugned on the basis of improper purpose, it is necessary to identify the substantial object of the decision.

82. The trial judge correctly identified that the substantial object of the decision to make the Amendments was to advantage APCHL and Mr Lewski's interests. He found that the purpose of the Lodgement Resolution was the same as the purpose of the earlier Amendment Resolution because it was that decision which authorised and directed completion of DOV 7 and the lodgement of the consolidated constitution to put the Amendments into effect. A reasonable person in the position of the directors would not have considered it proper to pass the Lodgement Resolution.[78]

10 83. The Full Court noted the trial judge's reasons,[79] but did not otherwise specifically refer to the improper use claim. It appears to have allowed the appeal in this regard on the same basis as the related conflict claim.[80]

The compliance claims

84. The compliance claims relate to the directors' contraventions of s 601FD(1)(f), which requires an officer of an RE to take all steps that a reasonable person would take in their position to ensure that the RE complied with, inter alia, the constitution and the Act. The first claim arose from APCHL's failure to observe the duty in cl 25.1 of the constitution and consequent contravention of s 601FC(1)(m) of the Act by causing the Amendments to become effective. The second claim arose from APCHL's contravention of s 208 (as
20 modified) and s 601FC(1)(k) of the Act by paying the Listing Fee.

85. The language of s 601FD(1)(f) expressly establishes an objective test - what steps would a reasonable person take to ensure compliance? As reflected in the relevant declarations,[81] the trial judge found that a reasonable person in the position of the directors would on both occasions have taken the steps to ensure compliance set out those declarations.

86. The Full Court did not deal specifically with the first claim in determining in FC1 that the orders of the trial judge should be set aside. They must have done so for the same reasons as they set aside the conflict and improper purpose declarations relating to the Lodgement

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[77] *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 289-290; *Chew v The Queen* (1992) 173 CLR 626 at 640; *Byrnes* at 512, 514-515; *Doyle v ASIC* (2005) 227 CLR 18 at 28-29; *Angas* at 531, 533.
[78] LJ [629]-[633] [CB 198-200].
[79] FC1 [202]-[205] [CB570 – 571].
[80] FC1 [297]-[302] [CB597- 599].
[81] Declarations 12, 15, 20, 23, 28, 31, 36 and 39.

Resolution, namely that the directors were acting on the basis that the constitution had been amended. They gave this reason expressly in relation to the second claim.[82]

87. In its disposition of these claims the Full Court failed to make the objective enquiry that was required by s 601FC(1)(f). The question to be addressed was not answered by the subjective views of the directors about the content of the constitution.[83] The trial judge's findings about what a reasonable person would have done in the circumstances were not canvassed or questioned by the Full Court. Those findings were well open to the trial judge and the relevant declarations should therefore be reinstated.

Notice of Appeal Ground 3

88. It is uncontentious that in paying the Listing Fee APCHL gave a benefit to itself and a related party without member approval: LJ[28] [CB35]. The trial judge found that the RE paid the Listing Fee in breach of s 208 as modified by s 601LC, and that the directors were involved in the contravention.[84] The Full Court held that ASIC bore the onus of proving that the constitution did not permit the payments (and therefore that the directors knew this).[85] ASIC submits that the onus of proof in respect of subs 208(3) properly rests on the party seeking to rely upon it to avoid the operation of the condition in s 208(1)(a) to (d).

89. In *Waters v Mercedes Holdings Pty Ltd* (2012) 203 FCR 218, the Full Court held that "s 208(1)(a) to (d) constitutes a complete statement of the general rule" and, thus, "the total statement of the obligation" under s 208(1) (as modified).[86] The obligation is to obtain member approval prior to giving a related party a financial benefit from scheme property. The trial judge identified the same total statement of obligation in respect of s 208 (as modified): LJ [732]-[734] [CB232]. The trial judge construed the provision in accordance with the relevant principles, from the text, context and purpose, having regard to the purpose of Ch 2E as it applies to registered schemes.[87] There was no error in his approach.

90. It is not in dispute that ASIC proved that each director had actual knowledge of the facts in subs (1)(a) to (d). That is, each director knew that the fee was a financial benefit given by APCHL to itself and a related party, from scheme property, without member approval.[88]

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[82] FC1 [341] [CB613].
[83] Cf FC1[346] [CB613].
[84] LJ [720]-[735] [CB229-233].
[85] FC1[320]-[325] [CB605-606].
[86] *Waters v Mercedes Holdings Pty Ltd* (2012) 203 FCR 218 (***Waters***) at [37].
[87] LJ [717]-[731] [CB227-231]. The Full Court in *Waters* adopted the same approach: [37]-[39] (special leave refused: *Waters v Mercedes Holdings Pty Ltd* [2012] HCATrans 255). See also *Probuild* at [34].
[88] LJ [705] [CB223].

91. The High Court observed in *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520 that "in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter".

92. Subsection (3) identifies a justification for a payment to a related party: the payment is justified because it is a fee permitted to be paid to the RE by the constitution. Its effect is to deny liability for a contravention of s 208 in a particular case, where the fee is identified in the constitution, by reason of that additional or special fact.

93. In *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249, this Court observed that for the purpose of assigning onus of proof, a distinction is made between a requirement which forms part of the statement of a general rule and a statement of some matter of answer (whether by way of exception, exemption, excuse, qualification or otherwise), which serves to take a person outside the operation of a general rule. Subsection 208(3) is a qualification which takes a person outside the operation of the general rule which prohibits related party payments.

94. The Full Court set aside the trial judge's decision on the primary basis that the language and indeed the placement of subs 208(3) differed from the exclusion in subs 208(1)(e).[89] But those distinctions were no more than a reflection of the fact that s 208 was transposed into s 601LC and modified by the addition of a further exclusion appropriate to it (but not to the primary operation of s 208).[90] Further, "[a]lthough the form of language may provide assistance, ultimately the question whether some particular matter is a matter of exception is to be determined upon considerations of substance and not of form".[91]

95. A textual analysis of s 208 establishes that subs (3) identifies a circumstance that may be relied upon to exclude the operation of the general prohibition in subs (1). It is not part of the total statement of obligation. Permission in the constitution for the payment involves a new factor, which would otherwise be irrelevant to a contravention of the provision. An

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[89] FC1 [321]-[323] [CB606].

[90] The additional exclusion reflects the requirement in s 601GA(2) of the Act that any fees paid to the RE be specified in the constitution.

[91] *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 258; *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635 at 645.

orthodox application of the principle confirmed in *Vines* places the onus on the party seeking to rely upon subs (3) to avoid breaching the obligation.

96. This analysis is consistent with the purpose of Part 5C as protective of members[92] and Ch 2E (as it applies to registered schemes) as requiring member approval for related party transactions.[93] It is also consistent with principles of trust law. Equity has never permitted trustees to take anything from trust property in the absence of express permission in the trust instrument.[94] The onus of establishing an entitlement to trust property rests on a trustee, just as a trustee of a mixed fund bears the onus of distinguishing what is his own.[95]

97. If ASIC succeeds on this ground, Declarations 13, 21, 29 and 37[96] should be reinstated.

10 **Part VII: Orders sought**

98. ASIC seeks the following orders:

(a) The appeal is allowed.

(b) Orders 2-6 of the orders of the Full Court made on 1 November 2017 in proceeding VID752 of 2014 be set aside and, in their place, the following orders be made:

"*2. The appeal is dismissed.*

3. The appellant pays ASIC's costs of the appeal."

(c) The proceeding be remitted to the Full Court for determination of ASIC's cross-appeal.

(d) The First Respondent pay ASIC's costs of the appeal to the High Court.

20 **Part VIII: Length of oral argument**

99. ASIC estimates that it will require 3.5 hours in chief and 30 minutes in reply.

Date: 6 July 2018

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92 *Westfield Management v AMP Capital* (2012) 247 CLR 129 at 145 [49].
93 LJ [727] [CB229]. See also s 207 of the Act.
94 *Robinson v Pett* (1734) 40 ER 1049; *Jennings v Mather* [1902] 1 KB 1; *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, 93.
95 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 109-110; *Brady v Stapleton* (1952) 88 CLR 322 at 336.
96 [CB386-387]; [CB394-396]; [CB403-404]; [CB411-413].