IN THE HIGH COURT OF AUSTRALIA No M79 of 2018
MELBOURNE REGISTRY
BETWEEN **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**
Appellant

AND

WILLIAM LIONEL LEWSKI
First Respondent

AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED ACN 095 474 436 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (CONTROLLERS APPOINTED)
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification

1. This outline of oral argument is in a form suitable for publication on the internet.

Part II: Outline of Propositions[1]

2. ASIC's appeal is brought in the context of idiosyncratic litigation where ASIC filed its proceeding late and was prevented by sect 1317K from relying on any conduct prior to 21st August 2006 to establish contraventions under the Act. Relevantly, ASIC did not allege "*conscious impropriety in the RE or directors...*" or that on or after 22nd August 2006 they had "*actual subjective knowledge*" of past failings {AS [28]} or that the RE or Board *should reasonably have known*, on 22nd August 2006 (or as at the 2007 and 2008 Payment Resolutions), of any prior delinquency. ASIC accepts {ARS [34]} that the directors believed the amendments authorised the payments, by mistake.

3. The Full Court examined the directors' conduct having regard to the decisions to be made by the directors on 22nd August 2006 and the 2007 and 2008 Payment Resolution dates and in light of the particular, specific facts and circumstances that confronted the directors at those times.

The status of the modified constitution (Grounds 1 and 2): "interim validity".

4. A scheme "constitution", as a matter of statutory construction, is the instrument as lodged with ASIC (but which fact of registration does not, in and of itself, clothe the document with legal effectiveness for all purposes). Ground 1 is founded on impugning a concept of "*interim validity,*" which itself played no role in the Full Court's consideration of the directors' alleged contraventions on and between 22nd August 2006 and 27 June 2008 {LS [21]-[23]}. The Full Court did not hold that the directors had breached their duties on 19 July 2006 {2AB

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[1] In this outline, the submissions filed are referred to as follows: the appellant (**ASIC**'s) submissions dated 6 July 2018 (**AS**); the submissions of the first respondent (**Lewski**) dated 1 August 2018 (**LS**); the submissions of ASIC in reply, dated 24 August 2018 (**ARS**).

587 FC1 [260]} and its determinations did not impinge on common law and equitable principles relating to the recovery of property paid out by a trustee in excess of power; it was concerned only with claims made under sect 1317E and 1317G of the Act,[2] which are relevantly fenced by an impenetrable and immovable temporal barrier of sect 1317K (unlike claims for breach of trust).

5. Section 601GC(1)(b) does not itself impose any *duty* to reasonably consider modifications. Non-satisfaction of the reasonable consideration component of sect 601GC(1)(b) does not of itself (and may not) mean there is a correlative breach of sect 601FD. Any failure to "reasonably consider" as required by sect 601GC(1)(b) will not diminish the fact of the purported modification and registration of the modified document and the significance of those facts. As set out in {LS [27]} the original act (execution of a deed of amendment) is capable of giving rise to legal consequences. The relevant 'legal consequences' include those that follow from defining the "constitution" in Part 5C.3 of the Act as being a reference not to an abstract and post hoc determined ideal (ASIC's "*true constitution*") but rather a reference to what is registered (cf. {ARS [23]}). Doing so means that invalidly amending a scheme constitution could found a contravention under sect 601FD (providing an action is brought within time and the relevant circumstances involved in purporting to amend amount to a breach of one or more of the provisions of sect 601FD), but that acts later performed in reliance on the constitution (by, for example, entirely new board members) would not found contraventions, unless the acts performed in reliance were discretely capable of founding contraventions in other ways -for example, because the directors knew they or their predecessors had been delinquent on the earlier occasion. That is not the present case.

6. This does not suggest that once the limitation period has expired, compliance with sect 601GC(1)(b) must be assumed "for all purposes" (cf. {AS [45]}). Non-compliance with the requirements of 601GC(1)(b) may still be found, as a matter of fact, regardless of whether the non-compliance occurred outside of the sect 1317K limitation period. If established, the purported amendment will lack legal efficacy, as an effective constitutional amendment. Equitable remedies (including declaratory relief) remain available {LS [37]-[39]}.

7. ASIC, by propounding a concept of a "*true constitution*" {AS [62]}, proposes an unnecessarily uncertain benchmark against which later alleged contraventions are to be assessed. The "*true constitution*" contention requires the RE and its officers to first confirm the adequacy of the 'reasonable consideration' under sect 601GC(1)(b) as an objective fact,

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[2] ASIC did not seek declaratory relief that the constitution had not been validly amended pursuant to s601GC(1)(b) or otherwise {LS [20]}.

although it is unclear how any RE, its officers, investors, members or advisors could ever be certain that the relevant scheme was being operated under such a "*true constitution*". By contending that there is a duty to administer only the "*true constitution*", where failure to do so strictly results in contravention {AS [45]}, {ARS [25]}, ASIC would impose absolute liability on RE's and its officers in respect of conduct occurring after amendment where the amendment is later found to have been invalid. That is, given the directors did not know the earlier consideration was deficient, subsequent breaches of duty would be persistent, occurring at every moment. That would amount to treating the unknown fact of invalidity as if it were a fact of which the directors were or should have been aware on the later occasions - notwithstanding no case was mounted that the directors knew or should have known of the 19th July 2006 mistake. That position is discordant with the Act, which does not impose any duty to reconsider decisions and otherwise allows for certain assumptions to be made by persons dealing with a company and which imposes limitations periods on contravening conduct. However, that is not to suggest that the 19th July 2006 modification was therefore made lawful on lodgement.

Ground 2: Scope of duties; honesty and extant objective historical facts.

8. A director's subjective honest belief that an earlier amendment satisfied s601GC(1)(b) will not excuse later contraventions and nor did the Full Court so find. Similarly (contrary to {AS [66]}), the standard of conduct required by the directors on 22nd August 2006 was not lower than would otherwise have been the case because of the deficiency in considerations on 19th July 2006. However, the conduct of the directors on 22nd August 2006 (and later) was to be judged as against the particular circumstances facing the directors on the relevant (not earlier, time barred) dates {LS [40]-[44]}. The whole of the circumstances in the instant case included that, as at the 22nd August 2006 meeting and at all material times afterwards, the directors and among others, the RE's solicitors Madgwicks, all believed that the constitution had been amended to provide for payment of the listing fee and the directors had no reason (none was pleaded) to review or doubt their earlier decisions at the time of the 22nd August meeting or the Payment Resolutions. The Full Court did not simply "rely on honest belief" of the directors to confine their duties {LS [45]}.

Ground 3: sect 208(3) is an element in contravention & Notice of Contention.

9. These matters will be addressed by Senior Counsel for Dr Wooldridge.

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Bret Walker