

**IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY**

No S15 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

**APPELLANT'S SUBMISSIONS**

**Part I: Certification**

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

**Part II: Issues**

*Notice of Appeal*

2 Where all the unitholders in a unit trust enter into an agreement to record the arrangements between them in relation to the trust, and the agreement contains an express provision that each unitholder promises to exercise its voting rights as a unitholder to most fully and completely give effect to the intent and effect of the provisions of the agreement, does that provision add anything to those other provisions of the agreement?

3 In this case, does such a provision prevent a unitholder voting to effect a winding up in which a sale of the primary asset of the Trust (a shopping centre) would be inevitable given the unitholder had agreed not to vote for a sale?

*Notice of Contention*

4 Do the voting rights the subject of cl 16.2 include voting rights such as those conferred by s 601NB of the *Corporations Act* 2001 (Cth) (**the Act**) or are they only those given to unitholders by the Trust Deed? (Ground 1)

5 Is cl 16.2 unenforceable? (Ground 2)

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Filed on behalf of the Appellant  
ADDRESS FOR SERVICE  
Speed and Stracey Lawyers  
Level 4, 131 Macquarie Street  
Sydney NSW 2000

27<sup>th</sup> July 2012  
Tel (02) 9251 8000  
Fax (02) 9251 5788  
DX 1003 SYDNEY  
Ref Peter Speed

6 Does the expression “*written consent of the Unitholders*” in cl 10.1 mean the consent of all of the unitholders? (Ground 3)

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

7 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

**Part IV: Citations**

8 The judgment in the New South Wales Court of Appeal has not been reported in the authorized reports, or otherwise. The decision may be cited as: *AMP Capital Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386.

9 The judgment at first instance has not been reported in the authorized reports, but has been reported in the Federal Law Reports. The decision may be cited as: *Westfield Management Ltd v AMP Capital Nominees Ltd* (2011) 255 FLR 1; [2011] NSWSC 1015.

**Part V: Facts**

*The KSC Trust*

10 On 23 March 1994 a Trust Deed was entered into for the establishment of the KSC Trust (**Trust**) and the acquisition by the Trust of a major shopping centre in Perth, Western Australia (Karrinyup Regional Shopping Centre) as its principal investment.

11 Under the Trust Deed, the trustee is given wide ranging powers to manage the assets of the Trust (cl 18) and the unitholders are precluded, unless otherwise provided therein, from interfering with the exercise of the trustee’s powers or from exercising any rights, powers or privileges in respect of any investments of the Trust (cl 8).

12 The Trust is a registered managed investment scheme under Chapter 5C of the Act. The responsible entity and trustee of the Trust is AMP Capital Investors Limited (formerly known as AMP Henderson Global Investments Limited). The appellant, Westfield Management Limited (**Westfield**), in its capacity as trustee for the Westart Trust, is the present holder of one third of the units in the Trust. The remaining two-thirds of the units in the Trust are presently held by AMP Capital Property Nominees Limited (the first respondent), in its capacity as nominee of UniSuper Limited (the second respondent).

13 The Karrinyup Shopping Centre has remained the sole investment of the Trust. The Trust is solvent with assets valued at \$545 million (as at 31 December 2009).

*The Unitholders and Joint Venture Agreement*

14 On 29 March 1994 the unitholders and the responsible entity of the Trust entered into a unitholders and joint venture agreement to record the arrangements between them in relation

to the Trust (including the management and holding of the shopping centre). This agreement (**Agreement**) was varied on 30 October 2000.

15 At that time there were three unitholders as follows:

- (1) AMP Asset Management Australia Limited owning 25% of the units;
- (2) PPS Nominees Pty Limited owning 25% of the units;
- (3) UniSuper owning 50% of the units.

16 Clause 7 of the Agreement reinforces the status of the Trust as a joint venture by providing for the establishment of a Unitholders' Committee (clause 7.1). Clause 7.4 provides:

10 "7.4 *The Unitholders' Committee must review, consider and make determinations on substantive issues with respect to the management of the Trust including:*

- (a) *all proposals and recommendations from the Asset Manager which relate to the acquisition, disposal, management or development of assets of the Property;*
- (b) *strategic matters affecting the assets of the Trust;*
- 20 (c) *those matters described in Schedule 3;*
- (d) *any other matter which a Unitholder deems important or necessary."*

17 Clause 7.5 provides that the responsible entity must act "in accordance with the valid resolutions of the Unitholders' Committee".

18 Clause 10 of the Agreement provides:

***"Sale of Premises***

30 *10.1*

- (a) *AMPAM, in its capacity as responsible entity of the Karrinyup Shopping Centre Trust, shall not sell the Property or any substantial part thereof without the written consent of the Unitholders.*
- (b) *On completion of the sale of the Property, or if part of the Property has already been sold, the completion of the sale of the remainder of the Property, AMPAM, in its capacity as responsible entity of the KSC Trust, shall thereupon determine the Trust unless otherwise directed by*  
40 *the Unitholders.*

***Acquisition of additional investments***

10.2 *AMPAM, in its capacity as responsible entity of the KSC Trust, shall not without the written consent of the Unitholders acquire any investments other than the Property or for the short-term investment of liquid funds."*

19 Clause 13 of the Agreement deals with termination, and provides:

10 *"13.1 Unless the Unitholders otherwise unanimously agree, in writing, this deed terminates on the earlier of:*

- (a) *the later of the date on which the Trust is terminated or the assets of the Trust are realised;*
- (b) *the date that a new deed is entered into with the consent of the parties in lieu of this deed; and*
- (c) *the date that any Unitholder's Group becomes the sole holder of all Units issued in the Trust."*

20 Clause 16.2 of the Agreement provides:

***"Exercise of Voting Rights***

20 *16.2 Each and all of the Unitholders mutually agree that they will so exercise their respective voting rights as unitholders under the Trust Deed as to most fully and completely give effect to the intent and effect of the provisions of this deed".*

21 Clause 30.4 of the Agreement provides that the Agreement is the paramount document governing the relationship between and rights and obligations of unitholders and the responsible entity of the Trust. That clause provides:

30 *"To the extent of any inconsistency between this deed and the Trust Deed, the provisions of this deed prevail."*

22 The Agreement also provides for:

(a) the transfer of units (clause 3), restricting sale, assignment, transfer, conveyance or other disposition of units, except as provided by:

- (i) clause 4 (which permits mortgage of units);
- (ii) clause 5 (which specifies a limited class of permitted transferees, eg. related parties); and
- (iii) clause 6 (which provides other unitholders with rights of pre-emption in the event a unitholder wishes to sell its units);

(b) repairs to the Karrinyup Shopping Centre and the circumstances in which the consent of unitholders holding at least 75% of the units on issue are needed before substantial

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repairs may be carried out (including how the cost of the repairs is to be funded from unitholders) (clause 8);

(c) when and how the redevelopment and refurbishment of the Karrinyup Shopping Centre may occur, with the consent of unitholders holding at least 75% of the units on issue, and when a unitholder is required to contribute to the funding (clause 9); and

(d) a procedure if a unitholder fails to subscribe for additional units to fund repairs, redevelopment or refurbishment (such procedure includes a forced sale of the defaulting holder's units) (clause 12).

23 The provisions of the Agreement support the conclusion that the objective intention of the parties when entering into or acceding to the arrangements embodied in the Agreement was to make provision for the regulation of a closely held unit trust business structure operating as a joint venture and designed for the ownership and operation of a major retail shopping centre: see *Westfield Management Ltd v AMP Capital Nominees Ltd* (2011) 255 FLR 1; [2011] NSWSC 1015 at [34]. Clause 30.4 of the Agreement ensures that these provisions prevail over the terms of the Trust Deed.

*Proposed Resolution to Wind-up the Trust*

24 On 10 August 2011, Westfield (the then holder of one third of the units) received a Notice of Meeting from the responsible entity convening a meeting of members of the Trust to consider a proposed extraordinary resolution in the following terms:

20 *"That, pursuant to section 601NB and 601NE of the Corporations Act 2001 (Cth), the Scheme be wound-up in accordance with the Corporations Act and the Trust Deed governing the Scheme."*

25 Section 601NB provides that if members of a registered scheme want the scheme to be wound up, they may call a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme. The term "extraordinary resolution" is defined under sec 9 of the Act to mean a resolution "passed by at least 50% of the total votes that may be cast by members entitled to vote on the resolution (including members who are not present in person or by proxy)".

30 26 UniSuper (the then holder of two thirds of the units) had requested the responsible entity to call the meeting and proposed to vote in favour of the resolution.

27 Section 601NE of the Act provides that the responsible entity of a registered scheme must ensure that that the scheme is wound up "in accordance with its constitution" if the members pass a resolution pursuant to sec 601NB (or in the circumstances envisaged by sections 601NA, 601NC or 601ND of the Act).

28 The Trust Deed, the constitution of the scheme, contains provisions concerning the nature of a unitholder's interest (cll 8, 9), the transfer of units (cl 13), withdrawal or redemption requests (cl 16), the termination of the Trust (cl 17), the management and investment of the Trust fund (cll 18-20), distributions to unitholders (cl 22), the remuneration, obligations, powers and liabilities of the responsible entity (described as "Manager") (cll 25, 28-30) and meetings of members (cl 31).

29 Clause 17 provides that the Trust may be "terminated" by the responsible entity on written notice (cl 17.1) or in "special circumstances" (cl 17.4). It also provides that the Trust "shall be terminated" in the event that the office of Manager becomes vacant and a new Manager is not appointed within a stipulated period (cl 17.2). Clause 17.5 then states:

*"Upon termination of the Fund the following provisions shall have effect:*

*(a) ...*

*(b) The Manager shall as soon as practicable realise the whole of the Fund and convert the same into money and ... shall divide the net proceeds of sale ..."*

30 30 Any sale of property and division of proceeds has to be completed "as soon as is reasonably practicable". However, the responsible entity is entitled to "postpone the sale of any asset" where it is of the view that to do so would be in the "best interests of Unit Holders": cl 17.6.

31 The consequence of these provisions and sec 601NE of the Act is that the necessary effect of a resolution directing the winding-up of the Trust is to cause a sale of the shopping centre. Accordingly, on passing the resolution the responsible entity would be required to wind up the Trust and sell the shopping centre (despite the other unitholder voting against the resolution and not consenting to the sale).

*The Proceedings Below*

30 32 Westfield Management Limited initiated proceedings on 23<sup>rd</sup> August 2011 against AMP Capital Property Nominees Limited in its capacity as nominee of UniSuper Limited (first respondent) and UniSuper Limited in its capacity as trustee of UniSuper (second respondent) seeking an order that the respondents be restrained from voting on the proposed resolution on the basis that in so voting the respondents would breach clause 16.2.

33 The matter came on before Ward J who ordered that the respondents be restrained from voting for the resolution to wind up the Trust without the consent of Westfield.

34 The respondents appealed to the Court of Appeal, which allowed the appeal and set aside the orders made by Ward J.

## **Part VI: Argument**

### *Legislative regime*

35 Part 5C.9 of the Act applies to the Trust and in particular:

(1) sec 601NA provides that the constitution of a registered scheme may provide that the scheme is to be wound up at a specified time or in specified circumstances or on the happening of a specified event;

10 (2) sec 601NB provides that the members may call a members' meeting to consider and vote on a resolution directing the responsible entity to wind-up the scheme;

(3) sec 601NC provides that if the responsible entity considers that the purpose of the scheme has been accomplished or cannot be accomplished it may take steps to wind up the scheme;

(4) sec 601ND provides that a Court may direct the responsible entity to wind up the scheme if the court thinks it just and equitable to make the order; and

(5) sec 601NE provides how the responsible entity must carry out the winding up.

### *Notice of Appeal (Ground 1)*

20 36 The arrangements embodied in the Agreement are plainly intended to regulate a closely held unit trust business structure, designed for the ownership and operation in joint venture of a major retail shopping centre, where each party has expressly agreed pursuant to clause 16.2 to exercise its voting rights as a unitholder so as to "most fully and completely give effect to the intent and effect of the provisions of" that Agreement.

37 UniSuper, as a unitholder in the Trust, had an obligation to exercise its voting rights on the proposed resolution to wind up the Trust so as to most fully and completely give effect to the intent and effect of the provisions of the Agreement.

38 UniSuper would breach clause 16.2 by voting in favour of the proposed resolution to wind up the Trust without having obtained the prior written consent of Westfield to the sale of the Karrinyup Shopping Centre.

30 39 Clause 16.2 requires first, a determination of the intent and effect of the provisions, that is all the provisions, of the Agreement, that is, as a composite or as a whole, and then a determination whether a unitholder in exercising its voting rights in favour of the proposed resolution was most fully and completely giving effect to that intent and effect.

40 The identification of the intent of the provisions of an agreement as a whole is a familiar aspect of the construction of written agreements: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109. Authorities in this Court indicate that in identifying the meaning of a contract, it is appropriate to have regard to more than “internal linguistic considerations” and to consider the circumstances with reference to which the words in question were used and, from those circumstances, to discern the objective which the parties had in view: *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289; (2002) 76 ALJR 436 at [10]. An appreciation of the “commercial purpose of a contract ... presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating”: *Royal Botanic Gardens and Domain Trust* at [10]. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40] the Court said: “The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties and the purpose and object of the transaction.” The interpretation of any clause is determined by construing the clause in light of the contract as a whole, giving due weight to the nature and object of the contract: *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510.

41 Consideration of the purpose of a unit trust is also necessary under trust law in certain contexts. The equitable doctrine of “fraud on the power” requires that a power, including powers reserved in a trust, must not be exercised for a purpose, or with an intention beyond the scope of or not justified by the instrument creating the power. The power has to be exercised bona fide, for the purpose for which it is given: *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65 at 83. In *Cachia*, Hely J at 82 referred to the authorities which suggest that a power to vary a trust deed may be held not to extend to a variation which would alter the substratum of the trust while also noting that the identification of the “substratum” in the case of a public unit trust may not be without its problems: see also *Commissioner of Taxation v Bargwanna* (2012) 286 ALR 206; (2012) 86 ALJR 406 at [13]. In *Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Ltd* (1989) 1 WAR 65, Malcolm CJ at 81 in considering the power to amend the trust deed of a unit trust stated that such power must be exercised bona fide in the interests of the unitholders as a whole, noting also that prima facie it is for the unitholders themselves to determine what is or is not for the benefit of the unitholders as a whole.



42 Clause 16.2 of the Agreement can be seen as an agreement by the unitholders to fetter the exercise of their voting rights in certain circumstances. It should properly be regarded as an express agreement by the parties that in the exercise of their voting rights they will act conformably with the commercial purpose, objective or aim of the Agreement as a whole and not in the unconstrained manner permitted by the general law: see, for example, *Pender v Lushington* (1877) LR 6 Ch D 70 at 76.

43 In the case of the Agreement, the “commercial purpose of a contract” can be readily ascertained from its provisions taken as a whole: see *Re Media Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Ltd* (1993) 178 CLR 379 at 386-387.

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44 In this case that purpose was clear. The Trust was established to acquire and hold the Karrinyup Shopping Centre as its principal investment. It is a single purpose trust and can acquire no other investment without the written consent of each unitholder. The intent and effect of the provisions of the Agreement is for the Trust to acquire the Karrinyup Shopping Centre, not for the purpose of sale, but to hold and manage it as a long term investment, unless and until each unitholder agrees in writing to a sale

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45 The Agreement contains detailed provisions as to the management and holding of the shopping centre. These include provisions as to the establishment of a Unitholders Committee to make decisions on issues with respect to the management of the Trust such as the appointment of a property manager of the shopping centre and the terms of his contract of service. The intent and effect of the provisions of the Agreement is for the management and holding of the shopping centre to occur by committee, as a joint venture, with all substantive decisions being made by the unitholders (rather than by the responsible entity or its appointees). It is significant that greater levels of consensus are required between unitholders where the level of importance of the decision at issue is greater.

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46 The Agreement sets out detailed provisions concerning the means by which a unitholder could realise its investment in the Trust if it wished to do so. A sale of units by a unitholder does not require the sale of the shopping centre nor the Trust borrowing to fund the buyback of the seller’s units. There are detailed pre-emptive rights provisions which accommodate such sales of units to the other existing unitholders (reflective of the arrangement being a joint venture) and failing which at a satisfactory price, sales to third parties (on the condition that the third parties accede to the terms of the Agreement). The intent and effect of the provisions of the Agreement is that each unitholder would realise its investment in a way not destructive of the venture, and not by a sale of the shopping centre by the Trust (unless consented to in writing by each unitholder).

47 The Agreement is silent on a range of provisions which would be expected if the intent and effect of the Agreement included the sale of the entire Karrinyup Shopping Centre. There is no provision on such critical matters as the timing of the sale, the appointment of the selling agent, the terms of its appointment (including the commission payable), the marketing program and the terms of sale (e.g. warranties in regard to leases and liabilities). It is not the intent and effect of the Agreement that such matters in respect of a sale of the shopping centre are decided by the responsible entity in winding up the Trust, but rather they should be decided by all the unitholders at the time of agreeing to a sale.

10 48 The exercise of voting power by one unitholder so as to bring about the substantive result that the entire Karrinyup Shopping Centre is sold, notwithstanding that the other unitholder has not agreed to that course, must be seen as inimical to the commercial purpose, objective or aim of the agreement as a whole.

49 It could not have been the intent of the Agreement, that for example, on 31 October 2000, the day after the Agreement was signed, Unisuper which then owned a bare 50% of units in the Trust could, on a whim, without even the “in excess of 50%” majority vote required to make all decisions on substantive issues required by clause 7 of the Agreement in respect to the management of the Trust, force the sale of the Karrinyup Shopping Centre by exercising its voting rights to wind-up the Trust. That would have denied each of the other unitholders the benefit of the Agreement and the commercial arrangement it embodied. It would also, for instance, avoid specific contractual mechanisms, such as the pre-emptive rights referred to above, which were carefully crafted to regulate how a unitholder might realise their interest in the Trust.

20 50 The Court of Appeal erred in that it did not make a determination of the “intent and effect” of the provisions of the Agreement. Rather the Court considered one clause in the Agreement, namely clause 10.1(a), and having determined that in its view the intent of that clause was not to apply to a sale of the shopping centre after a determination of the Trust by a resolution of unitholders, concluded that clause 16.2 did not prevent UniSuper from voting in favour of the proposed resolution. The Court drew no distinction between a determination of the Trust by an order of a court on the just and equitable ground, or by the action of the responsible entity or by a resolution of 50% of the unitholders. It treated all determinations of the Trust as the same in working out the intent of clause 10.1(a).

30 51 If the Court of Appeal is correct and the intent of clause 10.1(a) was not to apply to a sale of the shopping centre after a determination of the Trust by a resolution of unitholders, it does not follow that clause 16.2 does not prevent UniSuper from voting in favour of the

proposed resolution even if leading to a determination of the Trust. Just because clause 10.1 may not prevent a responsible entity from doing what it “must” do to comply with sec 601NE of the Act upon the passing of a valid resolution under sec 601NB (or winding up under sec 601ND, the “just and equitable ground”), it does not follow that a unitholder, when exercising its voting rights without the consent of the other unitholder to put the responsible entity in the position of having to wind-up the Trust (including selling the Property), is by so voting “most fully and completely “giving” effect to the intent and effect of” clause 10.1 of the Agreement, let alone “the intent and effect” of the provisions of the Agreement as a whole.

10 **52** By voting in favour of the proposed resolution, UniSuper would not be most fully and completely giving effect to that intent and effect of the provisions of the Agreement. The Court of Appeal erred in not so finding.

**53** The effect of the Court of Appeal’s decision is to deprive parties of a very useful commercial contractual expedient by rendering a provision such as clause 16.2 to the status of being of virtually no assistance. A party to a contract for a commercial venture may have several ways to protect itself against conduct by the other party destructive of the venture. The common law implied term to refrain from destructive conduct or to carry out necessary supportive acts lend themselves to dispute and the kind of uncertainty involved in assessment of reasonableness. Supposed obligations of good faith or fair dealing may be even more problematical with regard to predictability. Express terms such as clause 16.2 in this case are  
20 another and quite common expedient which, properly applied, provide flexibility and relative certainty.

*Notice of Contention (Ground 1)*

**54** By its Notice of Contention filed on 12 July 2012 (Ground 1), the respondents contend that the voting rights the subject of cl 16.2 are only those given to unitholders by the Trust Deed and do not include the voting rights conferred by sec 601NB of the Act.

**55** That argument was rejected by the trial judge (at [95]-[104]) and by the Court of Appeal (at [31]-[42]).

**56** While both the Trust Deed and Chapter 5C of the Act make express provision for the rights of unitholders to vote on specific matters (see CA at [34]-[36]), there is no apparent  
30 reason why the parties would have agreed that some only of their voting rights, being those conferred by the Trust Deed, would be the subject of cl 16.2 of the Agreement. That is particularly so given that the registered scheme is subject to the provisions of Chapter 5C of the Act (previously Chapter 5C of the Corporations Law), and the Trust Deed expressly provided by cl 31.1 that the responsible entity “must” convene a meeting to address a

particular subject “if required by the Corporations Law”. Accordingly, the exercise of voting rights at such a meeting would be based both on the Trust Deed and the relevant legislation.

57 Clause 16.2 should be construed as applying to the exercise of voting rights at a meeting called in accordance with sec 601NB of the Act.

*Notice of Contention (Ground 2)*

58 The respondents also contend that cl 16.2 is unenforceable.

59 That argument was also rejected by the trial judge (at [111]-[129]) and by the Court of Appeal (at [53]-[54]).

60 Whether or not one can contract out, or limit by contract, a statutory right, hinges on the scope and policy of the particular statute: *Admiralty Commissioners v Valverda (Owners)* [1938] AC 173 at 185. The critical question is whether the benefit conferred is personal or private on the one hand, or whether it rests upon public policy or expediency: *Brown v R* (1986) 160 CLR 171 at 208; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 424, 456, 486-487, 492-496.

61 As a matter of principle, there can be no objection to members entering into voting arrangements: *Puddephatt v Leith* [1916] 1 Ch 200; *Greenwell v Porter* [1902] 1 Ch 530; *Grimwade v Federal Commissioner of Taxation* (1949) 78 CLR 199 at 206. No different considerations of public policy arise where, as here, what exists is an agreement between all unitholders in a closely-held unit trust to restrict the exercise of their voting rights. Clause 16.2 is not unenforceable as a matter of public policy.

*Notice of Contention (Ground 3)*

62 Thirdly, the respondents contend that the expression “*written consent of the Unitholders*” in cl 10.1 does not require the consent of all of the unitholders but can 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 by reason of the provisions of the Trust Deed, the Agreement or the Act and which is evidenced in writing.

63 That argument was also rejected by the trial judge (at [58]-[70]) and by the Court of Appeal (at [26]-[30]).

64 “Unitholder” is defined in cl 30.1 of the Agreement to mean “each or any one of the Unitholders as the context may require” and “Unitholders” includes each of the specifically named parties to the Agreement “and any other person who holds units in the trust from time to time”. It follows, as the Court of Appeal observed at [36], that unless the contrary intention appears, what is required is the written consent of all of the unitholders.

65 Various provisions of the Agreement make specific provision for circumstances in which unanimous consent is not necessary for a particular matter. For example, cl 7.3 and cll 10 and 11 in Schedule 2 of the Agreement address the different majorities required for resolutions of the Unitholders' Committee depending upon the issue being addressed. Similarly, cl 8.2(d) of the Agreement provides for a determination by a 75 percent majority of unitholders with respect to the carrying out of "discretionary repairs". By way of contrast, the references to the agreement or not of "Unitholders" as to whether those repairs shall be funded by borrowings (see cll 8.2(e) and (f) of the Agreement), in the absence of contrary indication, are to be taken, as the Court of Appeal found at [29], as being to the agreement of each and all of them. Unlike the circumstances where less than unanimity is required (including for example cl 19.14 of the Trust Deed), there is no reference in clause 10.1 of the Agreement to the unitholders holding a vote or passing a resolution. It follows that where making provision for the consent or approval of only a percentage of the unitholders, the Agreement expressly stipulates for a vote to be held or a resolution to be passed and also what level of consent is necessary.

66 As the Court of Appeal stated at [27]:

*"... it would be an odd result if having provided that matters such as discretionary repairs and redevelopment or refurbishment and funding of redevelopment require a 75% majority (calculated on the basis of units held), the parties nevertheless agreed that the sale of the shopping centre could be dealt with by a simple majority. ..."*

67 Accordingly, when used in cl 10.1, the reference to "consent of the Unitholders" does not mean the consent of some of the unitholders.

#### **Part VII: Legislation**

68 Section 601NB of the *Corporations Act 2001* (Cth) is relevant to the argument in this case. It appears below in the form it took at the time of the hearings and decisions below. It has not been materially amended since then:

#### **"601NB Winding up at direction of members**

*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 VIII: Orders sought**

69 In the event that the appeal is allowed, the appellant seeks the following orders:

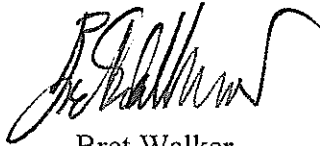
- (a) the appellant's appeal be allowed;

(b) in lieu of the Orders of the New South Wales Court of Appeal, the respondents' appeal to the New South Wales Court of Appeal be dismissed with costs;

(c) the respondents pay the costs of the appeal.

PART IX: The estimate of hours required for the presentation of the appellant's oral argument is 2 hours.

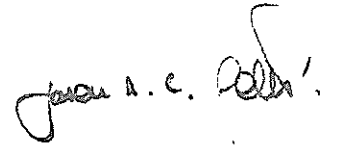
Dated: 27 July 2012



Bret Walker  
(02) 8257 2527  
(02) 9221 7974

Phone  
Fax  
Email

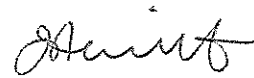
maggie.dalton@stjames.net.au



Jason Potts  
(02) 9232 0989  
(02) 9232 7740

Phone  
Fax  
Email

jpotts@eightselborne.com.au



Justin Hewitt  
Phone (02) 9232 7811  
Fax (02) 9232 7740  
Email

jhewitt@eightselborne.com.au

Counsel for the appellant