IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S275 of 2013

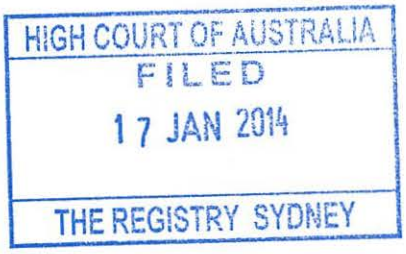
On appeal from

The Full Court of the Federal Court of Australia

BETWEEN:

WELLINGTON CAPITAL LIMITED
(ACN 114 248 458)
Appellant

AND:



AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
First Respondent

PERPETUAL NOMINEES LIMITED
(ACN 000 733 700)
Second Respondent

SUBMISSIONS OF THE FIRST RESPONDENT

Filed by the First Respondent:
Georgina Hayden
Solicitor for the
Australian Securities & Investments Commission
Level 5, 100 Market Street
SYDNEY NSW 2000

Date of document: 10 January 2014
Contact: Georgina Hayden/James Docherty
DX 653 Sydney
Phone: (02) 9911 2000
Fax: (02) 9911 2414

PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. The issues to be determined in the appeal are whether:

   2.1 clauses 13.1 and 13.2.5 of the Constitution of the Premium Income Fund (**Fund**) authorised the appellant to make an *in specie* pro-rata distribution of shares in Asset Resolution Limited (**ARL**) to all unit holders in the Fund;

   2.2 unit holders in the Fund prospectively agreed to become members of any company that might be selected for them (here ARL) for the purposes of s 231(b) of the *Corporations Act 2001* (Cth) (**Act**) by the anterior facts of subscribing for units in the Fund and thereby agreeing to abide by the Fund Constitution (which contained cll 13.1 and 13.2.5) absent any further specific agreement of individual unit holders;

   2.3 assuming the Full Court correctly decided the above issues, it nevertheless erred in exercising its discretion to make declaratory relief.

PART III JUDICIARY ACT 1903 (Cth), s 78B

3. The first respondent (**ASIC**) considers that no notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV FACTS

4. The summary of the facts at [8] – [19] of the appellant's submissions (**AS**) is accurate but incomplete. A more complete statement of the facts, particularly as underpin the issue of discretion, is as follows.

5. At the time of the transaction with ARL, the Fund had in excess of 10,000 unit holders.[1] The Fund was listed on the National Stock Exchange (**NSX**) and units in the Fund were tradeable on the exchange.[2]

6. ARL was registered as a special purpose vehicle exclusively for the purposes of the transaction.[3] ARL was unlisted.[4]

---

[1] Exhibit TJW-1 to the affidavit of Timothy James Walker dated 11 October 2012 (**Exhibit TJW-1**), tab 13 at [1]. Exhibit TJW-1 was tendered before the primary judge on 17 October 2012: Tpt 14.30.
[2] Primary judge at [3(2)]; Full Court at [1].
[3] Primary judge at [3(5)]; Full Court at [3].
[4] Full Court at [3].

7. The assets transferred to ARL constituted approximately 41% of the assets of the Fund,[5] with a publicly stated value of $90.75 million.[6]

8. On 4 September 2012, ARL issued 100% of its issued share capital to the second respondent (**Perpetual**) in its capacity as custodian of the Fund.[7] On the same date, the appellant instructed Perpetual to distribute the ARL shares to each unit holder based on their individual unit holding in the Fund as at 4 September 2012.[8] The distribution was complete by 5 September 2012.[9]

9. The appellant did not consult with unit holders in relation to the sale of 41% of the Fund's assets to ARL or the transfer to them of shares in ARL.[10] The appellant instead issued a media release to the NSX on 5 September 2012, which noted, *inter alia*:[11]

> "As a result of this transaction, the [Fund] received 830,532,768 ordinary shares in ARL, a special purpose unlisted public company. These shares have been transferred to Unitholders based on their Unitholding in the [Fund] as at 4 September 2012. Each Unitholder now owns shares in ARL on the basis of one ARL share for each Unit they hold in the [Fund]. ... Holding statements will be sent to each Unitholder shortly."

10. Unit holders were sent a holding statement setting out the ARL shares issued to them, together with a copy of the 5 September media release, by 19 September 2012.[12]

11. Accordingly, unit holders, neither individually nor through any collective mechanism sanctioned by the Fund Constitution nor the Act, consented to the transfer to them of shares in ARL or to the corresponding decrease in assets held on trust for them in the Fund.

12. It also follows that, as to a substantial part of the assets of the Fund (equivalent to 41% by value), the unit holders of the Fund went from being members of a listed managed investment scheme involving a trust operated by the appellant as responsible entity and subject to the duties imposed by Ch 5C of the Act, to being members of an unlisted company under the control of different people, and this without any specific agreement on their part or even consultation with them.[13]

13. One issue joined between the Appellant and ASIC before Jagot J, which on appeal was the sole surviving legal issue, was whether that action by the

---

[5] Full Court at [3].
[6] Primary judge at [3(4)].
[7] Primary judge at [4].
[8] Primary judge at [4].
[9] Primary judge at [4].
[10] Full Court at [56].
[11] Primary judge at [3(4) - (5)]; Full Court at [3].
[12] Primary judge at [4].
[13] Primary judge at [4]; Full Court at [56].

appellant constituted a contravention of the Act and went beyond power under the Fund Constitution.

PART V LEGISLATIVE PROVISIONS

14. ASIC agrees with the appellant's identification of applicable legislation.

PART VI ARGUMENT

SUMMARY

15. In summary, ASIC submits:

(a) clauses 13.1 and cl 13.2.5 of the Fund Constitution did not authorise the appellant to distribute ARL shares *in specie* and pro-rata to all unit holders. Both clauses proceed on the basis of a hypothetical state of affairs (absolute ownership) that is unrelated to the trustee/beneficiary relationship actually in place between the appellant and unit holders. Neither clause expressly refers to the making of distributions to unit holders. Neither clause speaks to the circumstances in which the appellant (as trustee) was entitled to make distributions of trust property to unit holders (as beneficiaries). ASIC's construction of cll 13.1 and 13.2.5 is reinforced by a consideration of the Constitution as a whole (which expressly provides for distributions to unit holders in cll 16 and 26) and by a consideration of the general law and statutory context in which the Constitution operates;

(b) the Full Court did not err in failing to hold that the unit holders to whom ARL shares were distributed agreed to become members for the purposes of s 231(b) of the Act. Even if cll 13.1 and 13.2.5 of the Fund Constitution might otherwise bear the appellant's proposed construction, the mere existence in the Fund Constitution of those plenary powers clauses was not sufficient to evidence agreement on the part of each unit holder to the receipt of shares in any company that might be selected for them in any circumstances without prior notice or consultation and absent any further specific agreement of individual unit holders;

(c) the Full Court having correctly decided the above two legal issues, did not err in declaring that the *in specie* transfer was not authorised by the Fund Constitution and that the appellant thereby contravened s 601FB of the Act. It was not necessary for ASIC separately to join all unit holders, or representatives of those unit holders, because the relief sought had, at most, an indirect effect on unit holders. The discretion of the Full Court did not otherwise miscarry.

MANAGED INVESTMENT SCHEME: NATURE AND CONTEXT

16. Before considering the three issues, it is appropriate briefly to set out relevant aspects of the legislative regime that pertains to the appellant and the Fund.

Legislative scheme in summary

17. The Fund is a "managed investment scheme" (**MIS**) registered under Ch 5C of the Act.[14] An MIS is defined in s 9 of the Act and has three principal features:[15]

    (a) people contribute money or money's worth as consideration to acquire rights to benefits produced by the scheme;

    (b) any of the contributions so made are to be pooled, or used in a common enterprise, to produce benefits to members of the scheme; and

    (c) members of the scheme do not have day to day control over the scheme's operation.

18. An MIS has no legal personality either before or after registration. As a result, an entity must operate the scheme and hold the contributions and other property that forms part of the scheme. That entity is described in the Act as the "responsible entity" (**RE**).

19. Upon registration, a number of requirements and obligations are imposed upon the RE by Ch 5C of the Act.[16] Four are presently relevant.

20. *First*, the RE must operate the MIS. Section 601FB(1) provides:

> "The responsible entity of a registered scheme is to operate the scheme and perform the functions conferred on it by the scheme's constitution and this Act."

21. In operating an MIS, an RE is permitted to appoint agents to perform some of its functions and powers.[17] An RE is also permitted to appoint a custodian to hold scheme property on its behalf.[18] However, the RE remains ultimately responsible for the scheme and its operation.[19]

22. *Secondly*, section 601FC(2) the Act provides:

> "The responsible entity holds scheme property on trust for scheme members."

23. "Scheme property" is defined in s 9 of the Act and relevantly includes property acquired, directly or indirectly, with the proceeds of contributions made by members of the scheme. It is common ground that the ARL shares issued by

---

[14] See s 601EA, Act.
[15] See Explanatory Memorandum to the *Managed Investments Bill* at [19.6].
[16] See eg *Westfield Management Limited v AMP Capital Property Nominees Limited* (2012) 247 CLR 129 at [51].
[17] See eg s 601FB(2), Act.
[18] Section 601FB(2), Act.
[19] Section 601FB(2), Act.

ARL to the Fund custodian were scheme property of the Fund prior to the distribution of the shares to unit holders.[20]

24. Section 601FC(2) has the effect of creating a trust, by force of law, of which the RE is trustee and scheme members are beneficiaries.[21] The trust relationship thereby created is of prime importance in this appeal.

25. *Thirdly*, an RE is required to create, and abide by, a scheme "constitution". The scheme constitution is a central feature of the legislative scheme. The right of a member to have the MIS administered according to the constitution of the scheme is fundamentally the most important right of membership. Without it, all other rights of membership, as well as the continuance, success and security of the scheme, would be at the whim of the RE.[22] In order to register a MIS under the Act, a person must lodge an application that contains, *inter alia*: (a) a copy of the MIS's constitution; and (b) a statement by the directors of the proposed RE that the constitution complies with ss 601GA and 601GB of the Act.[23]

26. Section 601GA prescribes the contents of the constitution. Relevantly, the constitution must make adequate provision for:

    (a) the powers of the RE in relation to making investments of, or otherwise dealing with, scheme property; and

    (b) the winding up of the scheme.[24]

27. Section 601GB requires that the constitution must be contained in a document that is legally enforceable between the members of the scheme and the RE.

28. *Fourthly*, ASIC is empowered pursuant to s 601FF of the Act to check whether the RE of a registered scheme is complying with the scheme's constitution, compliance plan and the Act. An RE and its responsible officers are required to take all reasonable steps to assist ASIC in undertaking any such check.[25]

Historical context

29. Chapter 5C was inserted into the then *Corporations Law* by the *Managed Investments Act 1998* (Cth). That Act formed the Commonwealth government's response to a joint report by the Australian Law Reform Commission and the

---

[20] See eg primary judge at [7]; Full Court at [5].
[21] *Re Investa Properties Limited and Anor* (2001) 187 ALR 462 at [14]: "[Section 601FC(2)] declares in unequivocal terms that that property is held by the responsible entity and that it is held on trust for scheme members. ... It is a case where attainment of the office of responsible entity is made by statute to bring about consequences in terms of the holding of property"; cf *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 166.
[22] *360 Capital Re Ltd v Watts (as trustees for the Watts Family Superannuation Fund) and Anor* (2012) 91 ACSR 328 at [40].
[23] Section 601EA(4)(a) and (c), Act.
[24] Section 601GA(1)(b) and (d), Act.
[25] Section 601FF(2) of the Act.

Companies and Securities Advisory Committee entitled *Collective Investments: Other people's money* (ALRC No 65, 1993) (**ALRC Report**).[26]

30. As the Court has recognised, the ALRC Report was a consequence of:[27]

> "the collapse or closure of many property trusts in the late 1980s, following a severe decline in commercial property values, which led to a loss of investor confidence. Amongst the issues which the Review addressed were the protection of investors and the termination of investment schemes."

31. The ALRC Report relevantly recommended that:

    (a) the then existing division of responsibility for prescribed interest schemes between a trustee and manager should cease. Rather, a single entity should be held responsible for the operation of the scheme;[28]

    (b) the scheme operator should owe duties directly to the members of the scheme;[29]

    (c) where the scheme operator held property of the scheme, it should do so on trust for members of the scheme;[30] and

    (d) ASIC (then the ASC) should supervise the operation of the statutory regime, approve the registration of schemes, and monitor compliance by scheme operators with the Act.[31]

32. Each of these recommendations was reflected in the *Managed Investments Act*, although different nomenclature was used in the legislation.[32]

FIRST ISSUE – PROPER CONSTRUCTION OF FUND CONSTITUTION

33. Neither cl 13.1 nor cl 13.2.5 of the Fund Constitution authorised the RE to make an *in specie* and pro-rata distribution of ARL shares to all unit holders.

Clause 13.1

34. Clause 13.1 is to be construed objectively, with due regard to its nature and purpose and to the words used in the provision, as assessed in the context of

---

[26] A detailed analysis of the background to the *Managed Investments Act (1998)* (Cth) and ALRC Report is contained in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11 at [3] – [23], [144] – [158]; see also *Westfield Management Limited v AMP Capital Property Nominees Limited* (2012) 247 CLR 129 at [10] – [11]; *ASIC v Knightsbridge Managed Funds Ltd* [2001] WASC 339 at [38] – [42].

[27] *Westfield Management Limited v AMP Capital Property Nominees Limited* (2012) 247 CLR 129 at [11] (French CJ, Crennan, Kiefel and Bell JJ).

[28] ALRC 65, Summary, at [10], [11].

[29] ALRC 65, Summary at [11].

[30] ALRC 65, Chapter 9 at [9.14].

[31] ALRC 65, Chapter 9 at [9.20]; and see also Explanatory Memorandum to the *Managed Investments Bill* at [5.1]; [8.2]; [8.23]; [8.24]; [9.8]; [10.2]-[10.6]; [11.8]; [11.11]; [19.21]-[19.25].

[32] "Managed investment scheme" rather than "collective investment scheme"; "RE" rather than "scheme operator".

the Fund Constitution as a whole and the legal framework in which the Fund operates.[33] Five main matters may be noted.

(1) Construction of the clause

35. *First*, cl 13.1 does not expressly confer a power on the appellant to make *in specie* and pro-rata distributions of scheme property to unit holders. Nor do the terms of cl 13.1 confer such a power by necessary implication.

36. The first limb of cl 13.1 seeks to confer upon the appellant all the powers in respect of the Fund that are legally possible for a natural person or corporation to have. However, a "natural person" does not, by reason of that status, have power to make *in specie* distributions of property to beneficiaries of a trust. The same position pertains to a corporation: it does not, by reason of its registration as a company, thereby enjoy a power to make *in specie* distributions to beneficiaries of a trust. The first limb of cl 13.1 does not speak to the powers that a trustee, whether in the form of a natural person or corporation, enjoys vis-à-vis the trustee's beneficiaries.

37. This construction is reinforced by the second limb of cl 13.1, which treats the appellant as though it were the absolute owner of the scheme property and acting in its personal capacity. The second limb cannot be read with the extreme literalism commended by the appellant. To do so would destroy the trust relationship mandated by s 601FC(2) of the Act by excluding the equitable interest which unit holders enjoy in the assets of the Fund as a whole.[34] Rather, the limb informs, and confines, the nature of the powers conferred by cl 13.1 to those that may be exercised by an entity that is *not* in a trustee/beneficiary relationship with unit holders. Put another way, cl 13.1, for purposes elucidated further below, proceeds on the counterfactual basis that the unit holders do *not* have any beneficial interest in scheme property and the appellant does not hold scheme property on trust for unit holders. The clause is simply not concerned with the circumstances in which the appellant *is* permitted to distribute trust assets to its own beneficiaries.

(2) Consistency with trust law principles

38. *Secondly*, the construction just posited reflects orthodox principles of trust law which underpin the relationship regulated by the Fund Constitution. The circumstances in which a trustee may distribute trust property to beneficiaries have been jealously guarded and regulated by Equity. This concern stems from the basal duty of a trustee – "perhaps the most important duty"[35] – to

---

[33] Cf *Byrnes v Kendle* (2011) 243 CLR 253 at [102] – [103], [113].

[34] See cll 2.1 and 2.2, Constitution (cf AS [24] and [34], which wrongly assume that unit holders enjoy an individual beneficial interest in each piece of scheme property). In addition, a trustee is prohibited at general law from impeaching or otherwise casting doubt on the equitable interest held by beneficiaries in trust property: *Newsome v Flowers* (1861) 30 Beav 461, 54 ER 968; *Devey v Thornton* (1851) 9 Hare 222, 68 ER 483.

[35] *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [32].

adhere rigidly to the terms of the trust, which terms necessarily require the trustee to hold the trust property for the benefit of the trust's beneficiaries. The concern also reflects the fact that the distribution of trust assets is *sui generis* to the trustee/beneficiary relationship and has special and unique features. A distribution is not a mere transfer of property for consideration. A distribution depletes the net assets of the trust and terminates the obligations of the trustee in respect of the property distributed. Depending upon the terms of the applicable trust deed, a distribution may also divest fellow unit holders of their equitable interest in that property.

39. These matters have led Equity to hold that it is not possible for a trustee to distribute trust property to beneficiaries except via one of three mechanisms: (a) under a specific power contained in the trust deed or other constituent document; (b) via a statutory power conferred on the trustee, if available; or (c) under the 'rule' in *Saunders v Vautier* (1841) 4 Beav 115 (49 ER 282).

40. Neither the second or third of these mechanisms is available, or relied upon, in the present case. So far as the second mechanism is concerned, no power under the *Trusts Act 1973* (Qld) or any other legislation authorized the *in specie* distribution in the present case. While a distribution in *specie* may, in some contexts, constitute an appropriation of trust assets under s 33(1)(l) of the *Trusts Act*, an appropriation under that power can only be made where the recipient beneficiary is "entitled" to a particular share of the trust property and notice of the intended appropriation has been given to all other beneficiaries.[36] Neither requirement was satisfied here: no unit holder was entitled to a share of the trust property[37] and no notice of the intended appropriation was given to unit holders. So far as the third mechanism is concerned, the rule in *Saunders v Vautier* is only applicable where all beneficiaries together have an absolute, vested and indefeasible interest in the capital and income of the property.[38] Even if those requirements were satisfied in the present case (a question that is not without doubt having regard to cll 2.2, 21.5, 21.6, 26.4 and 26.6 of the Fund Constitution[39]), the rule was not sought to be exercised by unit holders. Given that the requirements of neither mechanism have been satisfied, it is unnecessary for the Court to consider the extent to which either mechanism was applicable, in any event, to an MIS registered under Ch 5C of the Act.[40]

---

[36] Section 33(1)(l)(i). The Fund Constitution is governed by Queensland law: cl 30.2. The general law power of appropriation has been codified in s 33(1)(l) and its cognates in other jurisdictions: *Jacobs' Law of Trusts in Australia* (7th ed) at [2071].

[37] Clause 2.2, Constitution; cf eg *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at [36].

[38] *CPT Custodian* at [47].

[39] *CPT Custodian* at [48] – [50].

[40] For example, it is not readily apparent that unit holders had an entitlement to wind up the trust under the rule in *Saunders v Vautier* having regard to the express statutory regime for winding up in ss 601NA – 601NF, Act; cf *Don King Productions Inc v Warren* [2000] Ch 291 at 321; *CPT Custodian* at [47].

41. Absent an available statutory or general law mechanism, trust law requires the applicable trust instrument to contain a specific power to make distributions *in specie*.[41] Having regard to the matters at [38] above, one would expect that power to be expressly and clearly identified such that both the trustee and beneficiaries would be certain as to its availability and content. One would not normally read general language in cl 13 of the Fund Constitution as being intended to authorise distributions, let alone distributions *in specie*, of trust property. Rather, its subject matter is concerned with empowering the trustee to manage the trust property effectively on an ongoing basis for the benefit of unit holders. In addition, where there are specific provisions authorising the distribution of trust property to unit holders (eg cll 16 and 26 of the Fund Constitution, as to which see below), one would not readily infer that the general language of cl 13 was intended to provide an additional, unconfined power dealing with the same subject-matter.

(3) Context in the Fund Constitution – especially clauses 16 and 26

42. *Thirdly*, the appellant's construction of cl 13.1 sits uneasily with the description of the Fund as an Income Fund and the existence in the Fund Constitution of two detailed regimes for the distributions of trust property to unit holders. The efficacy and utility of those regimes would be frustrated if the appellant were permitted, pursuant to clause 13.1, to make distributions *in specie* of trust property equivalent to more than 40% of the value of the scheme property only highlights the difficulty.

43. The first regime is provided for in cl 16. Under that regime, the appellant is required to calculate an individual "Distribution Entitlement" for each unit holder, as at the Distribution Calculation Date.[42] That calculation is made after: (a) a determination of the income of the Fund in the applicable period; (b) a determination of any additional amount (including capital, previous reserves and previous provisions) to be distributed and (c) the calculation of an aggregate "Distributable Amount" from which Distribution Entitlements are to be made.[43] The amount to which each Unit Holder is entitled after these calculations are made is to be deposited into a bank account of the unit holder's choosing or is to be reinvested in the Fund or otherwise as directed by the unit holder.

44. The second regime is provided for in cl 26. Under that regime, the appellant may provide unit holders with a final distribution from the net realised proceeds of the Fund upon the Fund's winding up.

45. So drafted, each regime is predicated on cash only distributions.

---

[41] Cf *Randall v Lubrano* (1975) 72 NSWLR 621 at [3]; reported as an annexure to *McDonald v Ellis* (2007) 72 NSWLR 605.
[42] Clauses 16.2 and 16.3.
[43] Clause 16.3.1.

46. That both the appellant and unit holders would wish to make specific, and detailed, provision for the making of distributions is unsurprising. Not only does a distribution give rise to the legal consequences identified at [38] above, but it also gives rise to sometimes difficult questions of revenue law. The resolution of those questions will often require close attention to the relevant constituent document and the precise manner in which distributions are to be made to beneficiaries.[44]

47. It is also unsurprising that neither cll 16 nor 26 makes provision for *in specie* distributions.[45] There are many reasons why the beneficiaries of a trust may not wish to give the trustee in advance an ability to force upon them *in specie* distributions. While some categories of trust property will be fungible and easily distributable *in specie*, the distribution of other categories (eg land, chattels) raise difficult questions of valuation and of equality of treatment in the context of multi-beneficiary trusts. In addition, the very assets themselves may be unattractive to beneficiaries. For example, the distribution of partly paid shares to a beneficiary may result in the beneficiary having a significant personal liability to make future payments. A distribution of property in the form of debentures or charged assets may make it very difficult for the unit holders to know the true value of what they are getting and subject them to uncertain legal relationships of which they have no real control nor means of escaping. The inclusion of specific clauses concerning distribution in the Fund Constitution, and the absence in those clauses of provision for *in specie* distribution, suggests that the inability of the appellant to make *in specie* distributions was deliberate.[46]

48. The appellant's construction of cl 13.1 pays no regard to cll 16 and 26. According to the appellant, cl 13.1 necessarily operates as an independent and freestanding power to make distributions of trust property, whether *in specie* or otherwise. However, to proceed in that fashion would render cll 16 and 26 otiose; the existence of cl 13.1 would mean that a failure by the appellant to comply with cll 16 and 26 would give rise to neither a breach of trust nor non-compliance with the Fund Constitution. In addition, the operation of relevant revenue laws[47] in respect of distributions made under cl 13.1, rather than cll 16 and 26, would be unclear, both as to the whether the distribution was of capital or income, and as to whether unit holders were presently entitled to the distributions so made. These would be outcomes so undesirable as to confirm the unacceptability of the posited construction.

---

[44] See eg *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481.
[45] Cf AS [42] and [43].
[46] K Lewison and D Hughes, *The Interpretation of Contracts in Australia,* 2012 at [7.05] – [7.06]; *North Stafford Steel Iron and Coal Company (Burslem) Ltd v Ward* (1868) LR 3 Exch 172; *Prestcold (Central) Ltd v Minister of Labour* [1969] 1 WLR 89; *Aspdin v Austin* (1844) 5 QB 671; cf *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [50].
[47] See eg Pt 3 Div 6 of *Income Tax Assessment Act 1936* (Cth).

(4) Mischief or object

49. *Fourthly*, ASIC's construction is consistent with the evident mischief or object to which cl 13.1 is directed. In the absence of cl 13.1, third-parties may lack confidence that acts taken by the appellant with respect to the Fund are within power and authorised by the Fund Constitution.[48] That mischief is alleviated by deeming the appellant *not* to be a trustee in its dealings with scheme property. But that deeming must be confined to conduct by the appellant with non-beneficiaries because to do otherwise would collapse the trustee/beneficiary relationship into nothing. A construction that has that result will not be adopted where, as here, an alternative construction is available that preserves and enhances the trust relationship and the obligations of the RE to its beneficiaries.

(5) Section 601GC

50. *Fifthly*, contrary to AS [42], it does not follow that the appellant could only deal with illiquid assets by winding up the Fund or retiring as RE. Section 601GC of the Act contains two mechanisms by which a scheme constitution can be modified. In the present case, a modification to permit the appellant to make *in specie* distributions could be authorised by special resolution of unit holders under s 601GC(1)(a).[49] In addition, the Act expressly regulates the ability of members to withdraw from non-liquid schemes.[50]

51. Indeed, s 601GC illustrates the real vice of the Appellant's construction. The point is not whether the appellant breached one of its s 601FC duties by entering the transaction and engaging in the *in specie* distribution (cf AS [15], [67] and [68]). These duties control actions taken by the appellant where the subject matter is within power. Where what the appellant wishes to do is to depart from the carefully crafted provisions in the Fund Constitution for distributions to unit holders, it needs to amend the Constitution first. Unless it can lawfully form the opinion in s 601GC(1)(b), it needs a special resolution. An enhanced majority of unit holders can then bind the minority. But absent such a change, the appellant was acting beyond power.

52. *Finally*, and for the point of completeness,[51] s124(1)(d) of the Act does not support the appellant's construction. That sub-section is concerned with distributions by a company of company property amongst its members, in kind or otherwise. It is a specific statutory power provided to companies, not trustees, and falls within the description of the powers of a body corporate. The relationship between a company and its members cannot be equated to the relationship between a trustee and beneficiaries, not least because members of

---

[48] WestlawAU (online), Ford & Lee, *Law of Trusts* at [1.020].
[49] Clause 28 of the Fund Constitution incorporates the statutory mechanism in s 601GC.
[50] Sections 601KB, 601KC, 601KD, 601KE, Act.
[51] No reliance is placed on s 124 in the appellant's submissions.

a company enjoy no equitable interest in the assets of the company, whether individually or as a whole.

Clause 13.2.5

53. Four matters may be noted. *First*, cl 13.2.5 does not *expressly* confer a power to distribute trust property to unit holders, whether *in specie* or otherwise. Given the number of different types of transaction identified in cl 13.2.5 (and in cl 13.2 as a whole), that omission is significant. Nor do the terms of cl 13.2.5 confer such a power by necessary implication.

54. The expression "acquire, dispose of, exchange, mortgage, sub-mortgage, lease, sub-lease, let, grant, release or vary any right or easement" is redolent of steps taken by a trustee in the ordinary course of its management of trust property, rather than of distributions of trust property to unit holders. The expression "otherwise deal with Scheme Property" should be read in light of, and informed by, the preceding language. As the Full Court observed, the clause as a whole is inapt to capture an *in specie* distribution to unit holders.[52]

55. *Secondly*, cl 13.2.5, like cl 13.1, is directed to a different context than that existing between the appellant, as trustee, and unit holders, as beneficiaries. Clause 13.2.5 repeats the conceit that the appellant is the absolute and beneficial owner of the scheme property. That state of affairs is necessarily inconsistent with the existence of a trust. This circumstance suggests that the clause is concerned with circumstances in which the existence of a trust relationship is not relevant – namely, the interaction between the appellant and third-parties to whom it does not owe obligations as a trustee: see further at [36] – [37] above.

56. *Thirdly*, to the extent that the powers delineated in cl 13.2.5 are expressed not to be limited by, or to be construed so as to limit or be limited by the powers, authorities and discretions otherwise vested in the appellant pursuant to the Fund Constitution or by the Act, the clause is capable of two meanings. One meaning is lawful – namely that the clause does not purport to provide the appellant with powers contrary to, or inconsistent with, the duties and responsibilities stipulated in the Act and the other provisions of the Fund Constitution. The other meaning – propounded by the appellant – is inconsistent with the legislative regime because it seeks to deny the trustee/beneficiary relationship imposed by s 601FC(2). On established principles of construction, the former construction should be preferred.[53]

57. *Fourthly*, the difficulties with the appellant's construction of cl 13.1 identified at [38] – [52] above apply equally to its construction of cl 13.2.5. For the reasons there set out, cl 13.2.5 should not be construed as permitting an *in specie* distribution of scheme property to unit holders.

---

[52] Full Court at [72]; see also at [74].
[53] K Lewison and D Hughes, *The Interpretation of Contracts in Australia*, 2012 at [7.10].

SECOND ISSUE – ASSENT OF UNIT HOLDERS AND SECTION 231(b)

Disposition of the second issue

58. If the Court accepts the construction of cll 13.1 and 13.2.5 set out above, the second issue falls in favour of ASIC. This is because the only basis on which the appellant contends that assent was provided in the present case is the existence of those clauses (as construed by the appellant) in the Fund Constitution.

59. However, even if the Court accepts the appellant's construction of cll 13.1 and 13.2.5, ASIC submits that s 231(b) has not been satisfied. (What follows is therefore premised, for the purposes of argument only, on acceptance of the appellant's construction.)

Section 231(b) not satisfied in the present case

60. Whether or not s 231(b) is satisfied is a question of fact in each particular case.[54] The agreement of a member may be satisfied in a variety of ways. In some cases, s 231(b) may be satisfied by a bilateral agreement between the putative member and the company. In other cases, a bilateral agreement may not be necessary and s 231(b) will be satisfied by unilateral conduct on the part of the putative member.[55] In still other cases, agreement may be inferred from the conduct of the putative member after receipt of shares.[56] As Higgins J recognised in *Farmers' Mercantile*, to attempt to provide greater content for the statutory requirement risks undue formalism.[57] The appellant's reference to so-called "far reaching consequences" of the Full Court's decision ignores these matters.[58]

61. In the present case, the appellant contends that each unit holder agreed to accept shares in any company that might be selected for it (here ARL shares) for the purposes of s 231(b) merely by reason of the anterior facts of the existence of cll 13.1 and 13.2.5 in the Fund Constitution. That contention should not be accepted for four reasons.

62. *First*, the Constitution does not contain any power expressly providing for an *in specie* distribution of shares in a company to unit holders (at most, cll 13.1 and 13.2.5 impliedly authorise that conduct). Nor does the Constitution disclose that the powers contained in the Constitution could result in an *in specie* distribution of shares in a third-party company in lieu of a cash distribution pursuant to cl 16 of the Constitution. This is not a case in which the agreement

---

[54] *In re The Darling Downs Brewery Limited* (1899) 9 QLJ 225 at 232; *Farmers' Mercantile Union and Chaff Mills Ltd v Coade* (1921) 30 CLR 113 at 120, 125.
[55] *Re Hunter Resources Ltd* (1992) 7 ACSR 436 at 443-444; *Re Nuneaton Borough Association Football Club Ltd* (1989) 5 BCC 377 (construing s 22(2), *Companies Act 1985* (UK)).
[56] *In re The Switchback Railway and Outdoor Amusements Co Limited, Ex parte,* Haydon and Mount (1890) 16 VLR 339 at 340-1.
[57] *Farmers' Mercantile Union and Chaff Mills Ltd v Coade* (1921) 30 CLR 113 at 125.
[58] AS [49].

of members can safely be inferred from the fact that unit holders have applied for units in the Fund and have agreed to be bound by the terms of the Fund Constitution.

63. *Secondly,* the appellant's reliance on *Re Crusader Limited* (1995) 1 Qd R 117 is misplaced.[59] In that case, the constitution conferred an express power on noteholders in general meeting to pass an extraordinary resolution sanctioning the exchange of notes for shares, stock, debentures, debenture stock or other obligations. In reliance on that power, a meeting of noteholders was called and an extraordinary resolution was passed altering the constitution so as to require the exchange of notes for shares and cash. Having regard to these matters, Thomas J found that the predecessor to s 231(b) had been satisfied in respect of all noteholders, including those that voted against the resolution.

64. It is unnecessary for the Court to decide whether *Re Crusader* was correctly decided. This is because the facts of the present case are far removed from those considered by Thomas J. The Fund Constitution contains no mechanism of the type relied upon in *Re Crusader* and no steps were taken by the appellant to seek the approval of unit holders, whether in general meeting or otherwise, prior to the distribution to each of them of ARL shares.

65. *Thirdly*, the appellant's reference to capital reductions under Pt 2J.1 of the Act is misdirected.[60] That legislative regime has no application to a managed investment scheme. In any event, the existence of that regime only serves to highlight the nature of the appellant's conduct in the present case. Under Pt 2J.1, a reduction may not take place unless a general meeting of members has been called and either a general or special resolution (depending upon whether the reduction is equal or special in nature) has been passed authorising the capital reduction to take place.[61] No conduct of an analogous kind was undertaken by the appellant; it simply transferred ARL shares to unit holders without prior notice or approval.

66. Similar difficulties pertain to the appellant's reliance on the judgment of Dixon J in *Archibald Howie v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143. In the passage cited by the appellant at AS [52], his Honour emphasises the then statutory requirement that a capital reduction could only be effected if "so authorized by its articles". That requirement echoes the importance placed by Thomas J in *Re Crusader* on the existence in a constitution (whether original or as amended) of an express regime permitting the relevant *in specie* transfer to take place – a circumstance not satisfied in the present case. The appellant's submissions also ignore the fact that, at the time *Archibald Howie* was delivered, capital reductions in Australia also required court approval,

---

[59] *Contra* AS [46].
[60] Cf AS [50]ff.
[61] Section 256B(1)(c), 256C(1), (2), Act.

thereby giving disaffected shareholders a further opportunity to ventilate their concerns prior to the reduction taking place.

67. *Fourthly*, the appellant points to no circumstance other than the "plenary powers" clauses in the Constitution in support of the existence of agreement. There is no evidence that unit holders were ever apprised of the possibility that, as to a substantial part of the Fund, they could go from being unit holders in a registered scheme to being members of an unrelated and unlisted company that was not required to be operated in accordance with the Constitution or with Ch 5C of the Act and owed no equitable obligations as trustee to unit holders. The notion that they have impliedly agreed in advance to becoming members of whatever company the appellant might select for them, with whatever control and under whatever circumstances, is fanciful.

THIRD ISSUE – RELIEF

68. The Full Court made two declarations. The first declared that the *in specie* distribution of ARL shares to unit holders was beyond the power of the appellant under the Fund Constitution. The second declared that, in making the *in specie* distribution, the appellant failed to operate the Fund and perform the functions conferred upon it by the Fund Constitution, in contravention of s 601FB(1) of the Act.

69. Any consideration of the entitlement of the Court to make a declaration must consider two questions. The first is whether the proceedings were properly constituted. The second is whether the resolution of the proceedings warrants the granting of declaratory relief. The appellant's submissions wrongly elide these questions.

70. In the present case, the appellant takes no issue in its submissions with the standing of ASIC to seek declaratory relief in respect of conduct that gives rise to a contravention of s 601FB.[62] That position reflects long-standing authority that ASIC may seek purely declaratory relief in furtherance of its responsibility for the general administration of the Act.[63] Nor does the appellant contend that the proceedings were abstract or hypothetical in nature.[64] The proceedings concerned actual conduct on the part of the appellant and raised squarely for judicial consideration whether that conduct was authorised by particular clauses in the Fund Constitution and in turn by the Act.

71. Contrary to AS [63], no principle of law required ASIC to join each of the 10,000 unit holders in the Fund, or to join representatives of the units holders, in order

---

[62] See eg s 1101B(1)(a)(i), Act.

[63] *Re McDougall; Australian Securities and Investments Commission v McDougall* (2006) 229 ALR 158 at [55], citing, *inter alia*, *Australian Softwood Forests Pty Ltd v Attorney-General (NSW)* (1981) 148 CLR 121; see also s 5B of the Act, read with s 1(2) of the *Australian Securities and Investments Commission Act 2001* (Cth).

[64] Cf *Re McBain* (2002) 209 CLR 372 at [5], [242]; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-8.

for the proceedings to be properly constituted. The question of whether or not a person ought be joined to proceedings involves matters of judgment and degree, having regard to the practical realities of the case and the nature and value of any third party rights and liabilities that might be directly affected by the relief sought.[65]

72. In contrast to the position it took before the primary judge, ASIC did not ask the Full Court to set aside the *in specie* distributions made to unit holders. The declarations made by the Full Court were concerned with the conduct of the appellant alone. As non-parties to the proceedings, unit holders are not subject to the declarations and are not bound by them. The unit holders may have had an indirect interest in the outcome of the proceedings before the Full Court but their rights and interests were not directly affected by the making of the declarations sought by ASIC.

73. It is unclear whether the appellant seeks to impugn the Full Court judgment on the basis that the proceedings were not properly constituted from their commencement before Jagot J due to the non-joinder of unit holders.[66] If that submission is sought to be made, it should be rejected. At trial, ASIC sought declarations setting aside the *in specie* distributions made to each unit holder. It was in that context that Jagot J ordered several unit holders to be joined to the proceedings as representative parties. However, ASIC did not press that relief on appeal to the Full Court. In any event, no notice of contention was filed in the Full Court by the appellant contending that Jagot J's decision dismissing ASIC's proceeding ought be upheld by reason of the non-joinder of all unit holders, or a larger number of representative parties, and the contention was therefore not the subject of any consideration by the Full Court.

74. Once it is accepted that the proceedings before both the primary judge and Full Court were properly constituted, both courts had an obligation to decide the case before them and to determine appropriate relief. Having determined that the primary judge erred in her construction of the Fund Constitution and having concluded that the *in specie* distribution was not authorised, it was both permissible and orthodox for the Full Court to formally record its conclusion by way of declaratory relief. Indeed, it is relevant to ask what reasonable alternative course was open to the Full Court? To have allowed ASIC's appeal and to have set aside the orders of the primary judge, but then to have made no orders other than for costs, would not have reflected modern judicial practice, which recognises that declaratory relief may usefully record the outcome of litigation and may also serve to mark the Court's disapproval of the

---

[65] *News Limited v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 525; see also Woolf and Woolf, *Zamir & Woolf The Declaratory Judgment* (2011) at 6-16, quoted with approval in *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [18].

[66] Cf AS [57] - [63].

contravening conduct.[67] The utility of the Full Court's declarations was only heightened by the acceptance on both sides of the record that cll 13.1 and 13.2.5 of the Fund Constitution are in a form commonly used by managed investment schemes.[68] There was therefore utility in declaring that the *in specie* distributions were not authorised by clauses in those terms.

75. The various additional "factors" relied upon by the appellant do not favour a refusal of declaratory relief. Taking each 'factor' identified at AS [65] in turn:

(a) this submission ignores s 21(2) of the *Federal Court of Australia Act 1976* (Cth), which provides that a suit is not open to objection on the ground that declaratory relief alone is sought. Section 21 replicates the effect of O 25, r 5 of the *Rules of the Supreme Court for England and Wales 1883* (UK), which was described contemporaneously as an "innovation of a very important kind" that made "a great change in the law with reference to declaratory judgments".[69] Suits in which declaratory relief alone is sought are now commonplace;

(b) the fact that ASIC did not seek to impugn the *in specie* distributions on *additional* bases is not relevant to whether it ought be granted declaratory relief in relation to the basis that ASIC has proved – namely, non-compliance with the Fund Constitution;

(c) the absence of evidence of detriment proves nothing. Detriment was not a matter for consideration by either the primary judge or Full Court. The question in both courts was a different one – namely, whether the *in specie* distribution of shares to ARL unit holders complied with the Fund's Constitution. That question will be answered the same way irrespective of whether the distribution conferred a benefit or detriment on unit holders;

(d) the appellant's submission that it has "only" contravened s 601FB is an odd way of arguing against the grant of declaratory relief in respect of that contravention. The appellant's non-compliance with s 601FB cannot be characterised as *de minimis* or non-material in nature. The ARL shares transferred to unit holders constituted some 41% (by value) of the assets of the Fund.[70] The right of a member to have an MIS administered in accordance with the scheme constitution is fundamental[71] and is entrenched by ss 601GA and 601GB.

76. In summary, in formulating relief the Full Court did not act on any wrong principle, it did not take into account extraneous or irrelevant matters, it did not

---

[67] *Re McDougall; ASIC v McDougall* (2006) 229 ALR 158 at [55]; *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89.
[68] [2013] HCA Trans 281 at 4.136, 7.270.
[69] *Ellis v Duke of Bedford* [1899] 1 Ch 494 at 515 (Lindley MR); *West v Lord Sackville* [1903] 2 Ch 378 at 392-3 (Stirling LJ); see *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [9] – [11].
[70] Full Court at [3].
[71] *360 Capital Re Limited v Watts* (2012) 91 ACSR 328 at [40].

mistake the facts and did not fail to take into account some material consideration.[72] Nor did the exercise of discretion by the Full Court to grant declaratory relief stand outside the limits of a sound discretionary judgment.[73]

PART VII ESTIMATE OF TIME

77. ASIC estimates that it will require approximately 1.5 hours to present its oral argument.

Dated: 10 January 2014

Justin Gleeson
Solicitor-General of the Commonwealth
Telephone: 02 6141 4145
Facsimile: 02 6141 4149
Email: justin.gleeson@ag.gov.au

John Halley
Telephone: 02 9233 1810
Facsimile: 02 9233 3902
Email: jhalley@sixthfloor.com.au

David Thomas
Telephone: 02 9232 4478
Facsimile: 02 9232 1069
Email: dthomas@sixthfloor.com.au

Counsel for the first respondent

[72] *House v The King* (1936) 55 CLR 499 at 505.
[73] *Norbis v Norbis* (1986) 161 CLR 513 at 520.