IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S39 of 2014

BETWEEN **MACARTHURCOOK FUND MANAGEMENT LIMITED**
First Appellant
SANDHURST TRUSTEES LIMITED
Second Appellant
and
TFML LIMITED
Respondent

HIGH COURT OF AUSTRALIA
FILED
21 MAR 2014
THE REGISTRY SYDNEY

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 Does a right conferred by an anterior agreement between a responsible entity of a managed investment scheme and a unitholder, pursuant to which the responsible entity binds itself to redeem the unitholder's units in specified circumstances, amount to allowing the unitholder to withdraw from the scheme within the meaning of s 601KA(3)(b) of the *Corporations Act 2001* (Cth) (**Act**)?

3 If the answer is no, did RFML breach clause 2.4 of FAT3, FAT4 and FAT5 by failing to redeem any of the subscription units held by MacarthurCook by 31 October 2008 (in the case of units subscribed for under FAT3) or 3 December 2008 (in the case of units subscribed for under FAT4 and FAT5)?

Part III: Notice under sec 78B of the *Judiciary Act 1903*

4 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: Facts

5 To the factual matters set out by the appellants should be added a reference to clause 2.6 of the facility agreements. It provided:

> RFML guarantees to MacarthurCook to purchase all Subscription Units still held by MacarthurCook at the end of the Subscription Period, at their Issue Price. Reed RE will also at the same time pay to MacarthurCook any accrued but unpaid distribution

Filed on behalf of the Respondent
ADDRESS FOR SERVICE
Piper Alderman
Level 23, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Date of filing
Tel (02) 9253 9999
Fax (02) 9253 9900
DX 10216 Sydney Stock Exchange
Ref GTG: 371170

on the Subscription Units for the period ending on the date the Subscription Units are purchased.

6 It was common ground that RFML was in breach of this provision. The Court of Appeal ordered the entry of judgment against RFML (by then called Zhaofeng Funds Management Ltd) for some $17m in damages and interest.

Part V: Legislation

7 The appellants' statement of applicable legislative provisions is accepted.

Part VI: Argument

10 ***The application of s 601KA(3)(b)***

8 TFML's argument on the issue of statutory construction can be stated briefly. The critical provision is s 601KA(3)(b). It provides that, if a registered scheme is not liquid, a responsible entity must not allow a member to withdraw from the scheme otherwise than in accordance with the scheme's constitution and ss 601KB to 601KE of the Act. It is common ground that the scheme in the present case was not liquid at any material time {CA [27]}. (A scheme is liquid if liquid assets account for at least 80% of the value of scheme property: s 601KA(4).) The question is whether the provision made by clause 2.4 of the facility agreements amounts to allowing MacarthurCook to withdraw from the scheme within the meaning of s 601KA(3)(b).

20 **9** The question must be answered yes. Clause 2.4 imposed an obligation on RFML to redeem MacarthurCook's units within a stipulated period on the happening of a particular event, being the receipt of funds as a result of accepted applications under the public offer made by RFML. Correlative to that obligation was the right of MacarthurCook to have such a redemption occur. By entering into the various facility agreements, RFML allowed MacarthurCook to withdraw from the scheme, if and to the extent that funds were received as a result of accepted applications under the public offer.

10 This was in substance the approach taken by Meagher JA (with whom the other members of the Court of Appeal agreed) at [35]-[36]. His Honour there explained that the effect of clause 2.4 of the facility agreements was to give MacarthurCook a right to have its

30 units redeemed, and to impose on RFML a correlative obligation to effect a withdrawal, on the happening of certain events. The clause amounted to allowing a member to withdraw from the scheme within the meaning of s 601KA(3)(b) for the reason that RFML had bound itself in advance to allow a redemption to occur. It followed that the procedures in ss 601KB-KE had to be followed before any redemption of MacarthurCook's units pursuant to clause 2.4 could occur.

The statutory context and purpose

11 This approach is entirely consistent with the statutory context and purpose disclosed by Part 5C.6.

12 The prohibition imposed by s 601KA(3)(b) is relaxed, relevantly, upon compliance with the provisions of ss 601KB to 601KE. Those sections lay down important safeguards which apply to withdrawals from trusts that are not liquid.

13 Section 601KB includes requirements that a withdrawal offer be made only to the extent that particular assets are available and able to be converted to money in time to satisfy withdrawal requests that members may make in response to the offer (s 601KB(1)); the offer specify the assets that will be used to satisfy withdrawal requests (s 601KB(3)(b)); the offer specify the amount of money that is expected to be available when those assets are converted to money (s 601KB(3)(c)); and the offer specify the method for dealing with withdrawal requests if the money available is insufficient to satisfy all requests (s 601KB(3)(d)).

13 Section 601KD specifies that no request made under the withdrawal offer may be satisfied while the offer is still open, and provides a formula to ensure that where there are insufficient assets to satisfy all withdrawal requests, requests are satisfied proportionately.

14 Section 601KE(2) provides that the responsible entity must cancel a withdrawal offer before it closes if it is in the best interests of members to do so.

15 Provision is made for regulatory oversight by ensuring a copy of the withdrawal offer, and any cancellation of the offer, is lodged with ASIC (s 601KB(4); s 601KE(3)).

16 The purpose served by these provisions is clear without recourse to extrinsic materials. It is to provide an ordered process for satisfaction of withdrawal requests that directs the attention of the responsible entity to the sufficiency of assets available to meet the requests that may be made, seeks to provide for equality of treatment between members, and ensures that those members who choose to withdraw are not permitted to do so at the expense of those who choose to remain. As Meagher JA explained {CA [45]}, observance of these requirements would make it less likely that the ongoing financial viability of the scheme would be threatened by the offer of an opportunity to withdraw.

17 These purposes are directly relevant to a circumstance in which a member evinces an intention to withdraw from a scheme by stipulating in advance (whether as part of the contract of issue or by some other agreement) for a right to have its units redeemed on the happening of certain future events. There is every reason why members of a scheme should be protected from possible depletion of the assets of the scheme, resulting from the responsible entity

giving effect to an agreement entered into before any offer to withdraw is made to members at large.

Legislative history

18 Part 5C.6 was introduced into the former Corporations Law (**Law**) by the *Managed Investments Act* 1998 (Cth). That Act introduced a new regime, Chapter 5C, to govern the regulation of managed investment schemes. Prior to that time, schemes of that kind were regulated as "prescribed interest schemes" pursuant to Div 5 of Part 7.12 of the Law.

19 However, even before the introduction of Chapter 5C, the Law made special provision for the regulation of withdrawals from unlisted property trusts. This was contained in Div 5A of Part 7.12, introduced into the Corporations Law in 1991. The history and background to that division is discussed by Hely J in *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65 at [3]-[6]. In short, it was introduced to address the large volume of buy back requests being received by trustees in consequence of a decline in property values at the time.

20 Relevantly, ss 1076D and 1076E laid down a mechanism which required a trustee to consider whether redeeming units pursuant to an outstanding request would be likely to have a material adverse effect on the value of the remaining units in the trust, or on the interests of holders of those units, and if satisfied that it would have that effect, to apply to the Commission to prohibit the redemption. An "outstanding request" meant a request by a unitholder with which the trustee was, or may become, required or entitled to comply, by redeeming units to which the request related (see s 1076D(2), which in turn calls up various terms defined in s 1076A). The sorts of requests encompassed by that definition would have included an insistence by a unitholder on performance by the trustee of a contractual obligation to redeem.

21 Although there is no definition of "withdraw" in Part 5C.6, it is unlikely that the scope of the protection conferred by that part is intended to be narrower than that which Div 5A of Part 7.12 previously afforded to unlisted property trusts. The introduction of Part 5C.6, like that of Div 5A of Part 7.12 before it, owes its origins to the decline in commercial property values in the late 1980s, which had led to an increase in redemption requests from unlisted property trusts: *Westfield Management v AMP Capital Property Nominees* (2012) 247 CLR 129 at [11]-[12]; Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money,* Report No 65 (19903), vol 1, para [1.5]. In an important respect, Part 5C.6 broadens the scope of legislative protection by extending it to all managed investment schemes. In the absence of a clear indication to the contrary, and having regard to the matters of context and purpose already

identified, the Court would not conclude that Part 5C.6 is incapable of applying to an arrangement of the kind which MacarthurCook entered into in the present case.

Relevant provisions of the constitution

22 The characterisation of clause 2.4 for which TFML contends is supported by an analysis of the terms of the scheme's constitution. Such an analysis is essential, because clause 2.4 is not a source of power for RFML to redeem units. Any redemption RFML could have effected in pursuance of its obligation under that clause must be a redemption which the constitution otherwise empowered it to effect. In this regard, the provision made by clauses 6 and 7 of the constitution is significant.

23 Clause 6.1 provides that units may be redeemed at a Withdrawal Price. Clause 6.2(b) states that the Withdrawal Price must be calculated, while the trust is not liquid, at the time "the withdrawal offer" closes. Read together, these provisions indicate that for the purposes of the constitution, redemption is a concept regarded as equivalent to "withdrawal" for the purposes of Part 5C.6, in the sense that it is something that requires a withdrawal offer. That conclusion is not undermined by clause 6.3, which provides that Founder Units may be redeemed at a Withdrawal Price of $1.00 each. The use of "redeemed" imports a requirement to make a withdrawal offer.

24 Further, clause 7 makes comprehensive provision for the circumstances in which a withdrawal may occur in a manner which makes it plain that it is giving effect to the requirements of Part 5C.6 and also s 601GA(4). The latter provision states that if members are to have a right to withdraw from the scheme, the scheme's constitution must, inter alia, specify the right and, if the right may be exercised while the scheme is not liquid, provide for the right to be exercised in accordance with Part 5C.6 and set out any other adequate procedures (consistent with that Part) that are to apply to making and dealing with withdrawal requests.

25 Thus, clause 7.1(b) provides that a unitholder has no right to withdraw from the Trust other than in accordance with the remainder of clause 7. Clause 7.3(b) stipulates that where the trust is not liquid, a request for withdrawal may only be made "in accordance with a withdrawal offer made by the Trustee and the Act". Although the wording is awkward, clearly what is meant is that the withdrawal offer must comply with the provisions of the Act. That is a reference, relevantly, to s 601KA(3)(b) and, through it, to ss 601KB to 601KE.

26 Clause 7.4 provides for the redeeming of units without a withdrawal request. However, it does not dispense with the requirement, imposed by clause 7.3(b), to make a withdrawal offer in accordance with the Act where the scheme is not liquid.

27 Clause 7.5 provides that the trustee may transfer assets to a unitholder, rather than pay cash, "in satisfaction of all or part of a withdrawal request, pursuant to a withdrawal offer, or in payment of a distribution". The fact that "withdrawal request" and "withdrawal offer" are separately provided for supports the proposition that there can be a withdrawal (requiring the making of a withdrawal offer) without any withdrawal request.

28 Clause 7.6 provides an important limitation on all withdrawals: they may be suspended by the trustee if it is not in the best interests of unitholders for withdrawals to be made. This reflects in part s 601KE(2).

29 Clause 7.8(a) provides that a unitholder "has no right to withdraw from the trust unless there is a withdrawal offer open for acceptance". That formulation indicates there is a right to withdraw but it is limited in the way prescribed by clause 7.8(a). The right is further limited by clause 7.8(b), which provides that the trustee is not at any time obliged to make a withdrawal offer.

30 The opening words of clause 2.4 – "Subject to compliance with any requirements under the Corporations Act and the Constitution" – call up all of these provisions. It follows that the use of "redemption" in that clause does not refer to a means of leaving the scheme that absolves the responsible entity from the need to make a withdrawal offer. Redemption under that clause confers a right on MacarthurCook to exit the scheme, but one that is regulated, like any right to withdraw, by Part 5C.6 of the Act.

The issue of construction identified by the appellants

31 The appellants' submissions proceed on that basis that the Court of Appeal's decision establishes that Part 5C.6 is a code applying to all means by which a member may exit a scheme by redemption of his or her interest in the scheme {AWS 26-28}. The Court of Appeal reached no such conclusion. Indeed, Meagher JA's formulation at CA [36] is inconsistent with any such proposition. His Honour there said: "Neither the language nor the context of s 601KA suggest that when addressing *whether* a proposed redemption would involve the responsible entity allowing a member to withdraw from the scheme, regard should be had to whether the responsible entity had bound itself to do so..." (emphasis added).

32 The position is not affected by the observations of Meagher JA at CA [28], where his Honour stated that in Part 5C.6 withdrawing "describes" exiting the collective investment scheme during its continued operation by receiving a payment of money out of the scheme funds in exchange for the extinguishment of the interest held in the scheme {cf AWS 25}. That is a statement of the bounds of the notion of withdrawal as it is used in Part 5C.6. It is not a definition or a test to be applied in determining whether any given transaction is in fact a

withdrawal within the meaning of s 601KA(3)(b). Nothing in Meagher JA's reasoning in CA [35]-[36] suggests that his Honour applied the observations in CA [28] in a manner that was determinative of the outcome in the present case.

33 Once the decision of the Court of Appeal is understood in this manner, the issue of statutory construction raised by this appeal becomes rather narrower than that which the appellants address. Indeed, if the issue were as stated in AWS 2 ("whether the procedures set out in Part 5C.6 … apply to all ways in which a member of a registered managed investment scheme might exit a scheme, or whether …it applies only where the member voluntarily seeks the return of that member's contribution to the scheme"), there would be no real controversy. TFML agrees that Part 5C.6 applies to situations where a member voluntarily seeks the return of its contribution to the scheme; albeit there may be a question, which it is not necessary for this Court to resolve, as to whether Part 5C.6 applies in other situations too. The real controversy is whether entry into an anterior agreement, specifying the conditions on which redemption must or may occur, supplies whatever element of volition is necessary to amount to a withdrawal within the meaning of s 601KA(3)(b).

Any requirement for volition is satisfied in the present case

34 Meagher JA explained at CA [35] that any element of voluntariness or volition which the statutory phrase "allow a member to withdraw from the scheme" imports was supplied in the present case by the right to redemption which clause 2.4 of the facility agreements conferred on MacarthurCook.

35 That reasoning is clearly right. It would be absurd to suggest that a party, who has extracted as an element of a commercial bargain the right to have its units redeemed, and who comes to court (as MacarthurCook does now) seeking to enforce that right, could be heard to say the redemption is occurring against its will.

36 It is wrong to describe clause 2.4, as the appellants do {AWS 38-39, 58}, as requiring a "compulsory redemption" – if by that phrase it is intended to be suggested that units are being redeemed against MacarthurCook's will. MacarthurCook exercised its volition by stipulating for the inclusion of clause 2.4 in the facility agreements in the first place. Presumably, it could exercise its volition again by declining to sue for any failure to redeem under clause 2.4. The only party whose volition is confined is RFML: subject to the Act and the constitution, it has no choice but to redeem in the circumstances stipulated in clause 2.4.

37 As a result, it does not assist the appellants to assert that "withdrawal" connotes voluntary action {AWS 34-35}; or that references to an "opportunity to withdraw" suggest a choice {AWS 37}. Nor is it significant that the "logic" of Part 5C.6, which involves a process

of the making of withdrawal offers and contemplates also withdrawal requests made in response to such offers, may be suggestive of voluntary conduct {AWS 40-41}. If voluntary action was required, it was supplied by the entry into facility agreements containing clause 2.4.

The relevance of volition

38 It should be observed that the proposition that volition is required by the statute is contestable. Despite its heading, Part 5C.6 is not directed exclusively to rights to withdraw from a scheme. This is evident from the opening provision of Part 5C.6 – s 601KA – which does not refer to a "right to withdraw" but rather to making "provision for members to withdraw" (s 601KA(1) and (2)). The prohibition in s 601KA(3) on "allowing" a member to withdraw from a scheme except in certain circumstances should not be read narrowly as applying only where the member withdraws of its own volition {cf AWS 36}. Such a reading is inconsistent with the language of ss 601KA(1) and (2) just referred to; and it does not fit easily with the breadth of the duty imposed by s 601FC(1)(k) to ensure all payments out of scheme property are made in accordance with the Act.

39 The appellants submit that the statutory procedure in Part 5C.6 could not work sensibly in the case of a compulsory redemption because a unitholder could decline to co-operate e.g. by refusing to lodge a withdrawal request {AWS 43-44}. That is not self-evident. It is notable that each of the "compulsory redemption" provisions which the appellants invoke at AWS 45 presupposes the existence of a withdrawal offer. None requires a withdrawal request.

40 Thus, both clause 33.7, dealing with compulsory divestiture of Relevant Interests, and the garnishee-style provision in clause 17.3 dealing with recovery of unpaid money from unitholders, entitle the trustee to either sell or redeem unitholders' units. Both sets of provisions stipulate how the "proceeds" of any sale or redemption of units are to be applied (cll 17.3(b) and 33.7(c)). But one cannot know how to determine what are the proceeds of a redemption of units without a mechanism for calculating a redemption price. That mechanism is provided in clause 6.1. As explained above, that clause contemplates that there will be a withdrawal offer. It follows that a compulsory redemption of the sort permitted by clauses 17.3 and 33.7 cannot occur without a withdrawal offer.

41 The appellants also refer to the need to be able to evict a member in certain circumstances {AWS 45}. Any such eviction must be pursuant to a constitutional provision enabling it to occur. The only provision in the constitution which could permit eviction at will is clause 7.4. It provides that the trustee may redeem the units of any unitholder without

the need for a "withdrawal request". That does not dispense with the requirement, recognised in clauses 7.3(b) and 7.8(a), to make a withdrawal offer if the trust is not liquid.

42 It has never been suggested that these provisions of the constitution are invalid or somehow fail to comply with the Act. The prudential concerns which Part 5C.6 addresses apply to them. For instance, in determining whether to sell or redeem under the compulsory divestiture or garnishee provisions, the responsible entity would need to consider whether there are sufficient assets available to effect a redemption.

43 However, it must be emphasised that whether these forms of compulsory redemption fall within the scope of Part 5C.6 does not need to be determined. Each of clauses 17.3, 33.7 and 7.4 (at least, where it is used to "evict" a particular member) deal with considerations remote from the facts of the present case, because they involve situations where there may be a need to divest the interests of a particular unitholder contrary to the wishes of that unitholder. The present case is different because, as already explained, it involves giving effect to the desire of a unitholder – which desire has been elevated to the form of a contractual right – to exit the scheme when a particular condition is satisfied. It is not repugnant to the statute to require that such a unitholder make a withdrawal request if it wishes to enforce that right.

There is no "charade"

44 The appellants submit that it would have been a "charade", or a "pointless exercise in formality for its own sake", for RFML to make a withdrawal offer and receive a withdrawal request in the present case {AWS 46-47}. That is not so. The submission assumes that the right to redemption MacarthurCook obtained under clause 2.4 is one to which the responsible entity was bound to give effect come what may. That is not the case if Part 5C.6 applies. The provisions of that part may preclude an offer being made (e.g. because assets may be not be available within s 601KB(1)), or require it to be cancelled (e.g. because it is in the best interests of members for that to occur under s 601KE(1)(b)).

45 The relevance of Part 5C.6 is plain when regard is had to the facts of the present case. MacarthurCook's claim was that in the events that happened it was entitled under clause 2.4 to have redeemed 12,347,079 units at a price of $1 each {CA [15]}. A redemption of that order would plainly have an effect on RFML's ability to make redemption offers to other unitholders. Additionally, such a redemption might have required RFML to have recourse to non-liquid assets if it did not retain the funds received as a result of accepted applications under the public offer.

46 Once these matters are appreciated, it is clear there is no charade but a structured process designed to ensure that the financial viability of the scheme is not undermined by the making of redemptions that the responsible entity cannot afford to make and which are made only because it has contractually bound itself to make them.

47 This is not undermined by the consideration that, under the terms of issue of the units, i.e. clause 2.4, MacarthurCook was not entitled to decline to be redeemed {AWS 47-48; 58}. Clause 2.4 is included for MacarthurCook's benefit. Its evident purpose is to ensure it will be able to exit the scheme despite the fact that the responsible entity may not otherwise be minded to make an offer to it to have its units redeemed. Even if it were correct to assert that RFML could rely on clause 2.4 to redeem MacarthurCook's units against its will, it is very difficult to conceive of a situation where RFML would wish to do so (at least while the scheme remained non-liquid). The more likely situation is one where RFML is reluctant to effect a redemption under clause 2.4 because that would leave fewer liquid assets available for satisfying redemption requests by other unitholders. One can safely assume that had MacarthurCook wished to remain a unitholder, it would have been most welcome to do so. As the appellants observe {AWS 49}, this is precisely what it did when it converted its Tranche 1 units into ordinary units in the scheme.

Prefatory materials

48 The appellants state that the concerns Part 5C.6 is directed to addressing include the need to avoid exit rules that create unrealistic expectations; accommodating situations where there are no suitable assets to be sold to meet withdrawals, and avoiding the need to sell or borrow against non-liquid assets {AWS 54}. They say the overall purpose was to avoid a "rush to the door" that would disadvantage continuing members {AWS 55}. It is uncontroversial that these are the concerns Part 5C.6 seeks to address; although it should be remembered that Part 5C.6 is not the first legislative foray into this field: see the provisions of Div 5A of Part 7.12 of the Law, discussed above.

49 The appellants rely on the prefatory materials in an attempt to demonstrate that Part 5C.6 was intended *only* to govern voluntary exits as opposed to all forms of exit from a managed investment scheme {AWS 50, 56, 61}. That proposition, even if correct, does not answer the primary question, namely, whether clause 2.4 was voluntary in the relevant sense. For present purposes it is sufficient to observe there is nothing in the prefatory materials, or the concerns identified in the previous paragraph, to suggest that Part 5C.6 is irrelevant in a case where a unitholder has stipulated in advance the circumstances in which it wishes to have its units redeemed. Although here MacarthurCook was the only unitholder in its class, if

the appellants are right there is no reason why the responsible entity could not make issues to several unitholders on terms that entitles them to have their units redeemed within a given period. Assuming any one unitholder seeks to enforce its entitlement to be redeemed at a time when available assets may be scarce, there is every reason to fear a "rush to the door" from other unitholders as well.

Anterior agreements undermining the financial security of a scheme

50 The Court of Appeal pointed out that, on the appellants' construction, the restriction and protection which s 601KA(3) seeks to provide for the financial security of the scheme might be avoided by any anterior agreement member which obliges the responsible entity to redeem it in specified circumstances {CA [36]}. As is evident from the submissions that have already been made, TFML embraces that observation. Its force is not dented by the criticisms the appellants make of it in their submissions.

51 The appellants first seek to distinguish clause 2.4 from the kind of anterior agreement with which the Court of Appeal was concerned at CA [36], on the basis that clause 2.4 is one of the "terms of issue" of the appellants' units, which "had been issued to give effect to the underwriting that was at the heart of this arrangement" {AWS 58}. The fact that clause 2.4 is one of the terms of issue of MacarthurCook's units is beside the point. Terms of issue remain subject to the Act, as the opening words of clause 2.4 acknowledge. Nor does the fact that MacarthurCook was an underwriter give it any privileged position. It is not an essential feature of an underwriting agreement that the underwriter must have its units redeemed within a given period. It is quite conceivable (and, one would think, more common) that an underwriter will receive units which are redeemable on the same terms and conditions as apply to the redemption of ordinary unitholders' units. There could be no objection to Part 5C.6 applying to such an arrangement, despite the fact that the underwriter has subscribed for units pursuant to an agreement to do so and not as a member of the public responding to a public offer. It is not obvious why an underwriter who has stipulated in advance for its units to be redeemed within a given period and in certain specified circumstances should have any stronger claim to escape the operation of the Part.

52 The appellants next seek to differentiate an agreement with an existing member that empowers the member to call for redemption at a time of the member's choosing (which agreement they say should be caught by Part 5C.6), from an agreement of the sort they made (which they say should not be so caught) {AWS 60}. There is no logic in that distinction. There can be no relevant difference between an agreement empowering a member to call for redemption at the time of its choosing, and an agreement by which a member stipulates in

advance the time at which it chooses to be redeemed. Both types of agreement involve a member exercising its volition to leave the scheme; and both involve a risk that the member may leave the scheme at a time when there may not be sufficient assets to effect redemption of the member's units, or when redemption may not be in the best interests of unitholders.

53 The appellants also point to the duties of the responsible entity under s 601FC and 601FD, which they say would prevent the responsible entity of an illiquid scheme from issuing a class of units on terms that members would be redeemed after a fixed period of time, without first considering whether such an issue would be in the best interests of members generally and consistent with the duty to treat members of different classes fairly {AWS 62-65}. So much may be accepted. However, that does not address the concerns to which Part 5C.6 is directed. That part directs attention to the state of affairs at the time that the responsible entity proposes to effect redemption, not at the time that units are issued.

54 Finally, the appellants emphasise that there was no question that it was in the interests of members for MacarthurCook to make an advance to RFML, repayable to the extent that there were monies received from the public offering, so that RFML could be put into funds to carry out the purpose of the scheme in advance of the receipt of subscription monies from investors {AWS 66}. Again, so much may be accepted. But the fact that the advance of funds by MacarthurCook was beneficial to the scheme cannot immunise MacarthurCook from the provisions of Part 5C.6. The "advance" MacarthurCook made, which in substance was a subscription for units, could hardly be more or less beneficial to the fund than the $12.3m in subscriptions RFML subsequently received from the public. Both sets of subscriptions provided the fund with money to enable it to pursue its lawful endeavours.

55 The appellants chose to underwrite RFML's public offer by subscribing for units which were redeemable on the terms and conditions provided for in clause 2.4 and which if, not so redeemed within the year-long subscription period, were required to be re-purchased pursuant to clause 2.6. Given that the appellants' objective appears to have been to have their money returned in a year in any event, the appellants did not have to structure their investment in the way that they did. They could instead have stipulated that the moneys they provided be repaid as a loan. But having chosen an investment in units in a managed investment scheme as the vehicle by which they performed their underwriting obligations, the appellants became subject to the legal framework for which Part 5C.6 provides. They could not adopt that overall structure while seeking to contract out of particular regulatory provisions which did not suit their purposes: cf *Westfield Management v AMP Capital*

Property Nominees (2012) 247 CLR 129 at [52]. Yet that is what the appellants' approach in the present case would permit.

56 It should not be overlooked that the construction for which TFML contends does not deny the appellants the benefit of the bargain they made. If clause 2.4 was not or could not be complied with, they had the benefit of RFML's promise in clause 2.6 to re-purchase their units, which promise was not constrained by the requirements of either the Act or the constitution and was given by RFML personally.

Notice of Contention

57 If, contrary to TFML's submissions, any redemption of MacarthurCook's units pursuant to clause 2.4 did not need to comply with Part 5C.6 of the Act, it will be necessary to consider TFML's Notice of Contention.

58 The consequence of Part 5C.6 of the Act not applying would be that there was no obligation on RFML to make a withdrawal offer before redeeming MacarthurCook's units. However, it does not follow that there was a breach of clause 2.4 in RFML failing to effect a redemption of MacarthurCook's units by the end of the subscription period, being 31 October 2008 in the case of FAT 3 and 3 December 2008 in the case of FAT4 and FAT5. There was no breach of clause 2.4 for the following reasons.

59 *First*, there was no breach of clause 2.4 in RFML failing to redeem MacarthurCook's units before 29 September 2008. Meagher JA made such a finding expressly at CA [62] where he said that "RFML could not have been in breach of any obligation to redeem or make an offer of withdrawal on 29 September 2008". That finding is not challenged by the appellants.

60 *Secondly*, there could have been no breach of clause 2.4 in RFML failing to redeem MacarthurCook's units after 29 September 2008. Meagher JA did not expressly make a finding to that effect; although he did say at CA [62] that after 29 September 2008 RFML "had no obligation to make a withdrawal offer because of the suspension issued on that date". That is an allusion to CA [53], where Meagher JA referred to the fact that clause 7.6 of the constitution permitted RFML to suspend withdrawals if it was not in the best interests of unitholders for withdrawals to be made; and noted that it was not suggested by MacarthurCook that the decision taken by RFML on 29 September 2008 to suspend "all withdrawals", was not justified or not a proper exercise of the clause 7.6 power.

61 The same reasoning compels the conclusion that it was not a breach of clause 2.4 for RFML to fail to redeem MacarthurCook's units after 29 September 2008. Having by then formed a view that it was in the best interests of its members to suspend withdrawals (a view

which, as Meagher JA pointed out, was never challenged below), RFML could not, consistently with its duty under s 601FC(1) of the Act to act in the best interests of unitholders, proceed to redeem MacarthurCook's units. Any obligation to redeem imposed by clause 2.4 was expressly subject to the Act and, therefore, subject to the operation of s 601FC. It was also subject to the Constitution, clause 7.6 of which empowered the trustee to suspend withdrawals for a period of time if it is not in the interests of unitholders for withdrawals to be made.

62 The only difference between the finding made by Meagher JA at CA [62] and the finding now contended for is that the former relates to the obligation to make a withdrawal offer (which is a precursor to redemption), while the latter relates to redemption simpliciter. That is not a difference of any significance. It is true that s 601KE(1)(b) contains an express obligation to cancel a withdrawal offer if it is in the best interests of members to do so; but that is simply an application to particular circumstances of the more generally expressed duty for which s 601FC(1) provides.

Availability of Notice of Contention point

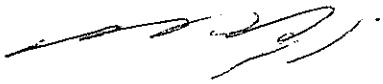
63 Contrary to AWS 29, TFML did not concede below that should the appellants succeed on the issue of construction, then the notice issued by RFML suspending withdrawals would not operate to relieve RFML of the obligation imposed on it by clause 2.4 {AWS 29}. The only concession made was that if Part 5C.6 did not apply, the constitution did not provide an alternative source of obligation to make a withdrawal offer. That is clear when the passage of transcript on which the appellants rely, transcript 5/4/13 at p 7.40, is read in its context. The relevant context includes the entirety of the exchange in transcript 5/4/13 pp 7.10 to 8.45.

64 There is accordingly no bar to TFML advancing in this Court the arguments the subject of its Notice of Contention. Those arguments were advanced in written submissions in reply in the Court of Appeal {TFML's reply submissions, dated 6 February 2013, para 21}, albeit that court did not address them specifically. The arguments were not advanced in chief, and were not the subject of the notice of appeal in the Court of Appeal, for the simple reason that Hammerschlag J had found that Part 5C.6 did apply to the redemption for which clause 2.4 provides. There was thus no cause for TFML to advance (except in response to MacarthurCook's submissions) any case that depended on the proposition that the trial judge was wrong in making that finding.

Part VII: Time estimate

65 TFML would seek no more than one hour for the presentation of its oral argument.

21 March 2014



	Bret Walker		Michael Izzo
Phone	(02) 8257 2527	Phone	(02) 9221 1977
Fax	(02) 9221 7974	Fax	(02) 9232 7626
Email	maggie.dalton@stjames.net.au	Email	mizzo@wentworthchambers.com.au

Counsel for the respondent