MACARTHURCOOK FUND MANAGEMENT LIMITED & ANOR v TFML LIMITED (S39/2014)

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 291

Date of judgment: 3 September 2013

Special leave granted: 14 February 2014

The provisions of Part 5C.6 of the *Corporations Act* 2001 (Cth) ("the Act") regulate the rights of members of managed investment schemes to withdraw from a scheme. This matter is concerned with the application of those provisions to redemptions required by the terms on which units in a unit trust scheme were issued by Zhaofeng Funds Limited (then named RFML Limited) ("RFML") to MacarthurCook Fund Management Limited ("MacarthurCook"). Those terms were contained in facility agreements by which MacarthurCook underwrote a public offer of units in the scheme. The redemptions did not occur because of the increasing uncertainty in credit and real estate markets during 2008. MacarthurCook sued TFML Limited ("TFML"), as the new responsible entity of the scheme, and RFML, for damages for breach of those obligations. On 10 August 2012 Justice Hammerschlag held that MacarthurCook was entitled to damages from TFML.

By way of background, the registered managed investment scheme was known as Reed Property Trust ("the RP Trust"). RFML was the trustee and responsible entity of the RP Trust. In 2006 the RP Trust was an unlisted unit trust investing primarily in property-based assets. In October 2006 and December 2007 RFML issued Product Disclosure Statements by which it sought to raise funds by an open-ended offer of ordinary units at $1 per unit. MacarthurCook agreed to underwrite the issue of units under that offer by subscribing for 10 million fully paid units at $1. Those units were to be subscribed for by 1 November 2006 and to be redeemed out of moneys raised in the public offer. If not redeemed by 31 October 2007, they were to be purchased by RFML. The underwriting was undertaken by two facility agreements dated 27 October 2006. Those agreements were Facility Agreement Tranche 1 ("FAT1") and Facility Agreement Tranche 2 ("FAT2"). The units issued were Founder Units which could be redeemed at $1 per unit. On 1 April 2007 RFML and MacarthurCook entered into Unit Conversion Agreement Tranche 1, by which the 5 million Founder Units issued to MacarthurCook under FAT1 were converted to ordinary units in the RP Trust.

In late 2007 MacarthurCook and RFML entered into three further facility agreements by which the former subscribed for a further 15 million Founder Units in the RP Trust. Each agreement was for 5 million units. These agreements were known as Facility Agreement Tranche 3 ("FAT3"), Facility Agreements Tranche 4 ("FAT4") and Tranche 5 ("FAT5"). The units, in the case of each agreement, were held by Sandhurst Trustees Ltd ("Sandhurst") as custodian and agent for MacarthurCook. These three facility agreements contained an almost identical provision for the redemption or purchase of the units. The relevant provision in FAT3, contained in cl 2.4, was:

"Subject to compliance with any requirements under the Corporations Act and the Constitution, during the Subscription Period, Subscription Units held by MacarthurCook must be redeemed by Reed RE for their Issue Price, using funds received by the Trust as a result of accepted applications under the Offer Documents, such redemptions commencing 6 months from the Subscription Date."

On 29 September 2008 RFML gave notice that it had suspended all withdrawals from the RP Trust until further notice. RFML also did not pay MacarthurCook the conversion fee totalling $131,250 under the Unit Conversion Agreement Tranche 1.

On 3 September 2013 the Court of Appeal (McColl, Macfarlan & Meagher JJA) unanimously allowed TFML's appeal. Their Honours held that MacarthurCook failed in its claims to enforce RFML's liabilities against TFML as the new responsible entity. (These were the claims for breaches by RFML of cll 2.4 and 2.6 of the facility agreements and cl 2.4 of the Unit Conversion Agreement Tranche 1.) MacarthurCook also failed in its claim to damages against RFML for breach of cl 2.4 of the facility agreements. It succeeded however against RFML for breach of its obligations under cl 2.6 of the facility agreements and cl 2.4 of the Unit Conversion Agreement Tranche 1.

The Court of Appeal held that Part 5.6C (ss 601KA to 601KE) of the Act was a code governing all methods by which members of a managed investment scheme may exit that scheme. This had the result that that Part affected the obligations of RFML in clause 2.4 of each of FAT 3, FAT4 and FAT5.

The grounds of appeal include:

- The Court of Appeal erred in holding that Part 5C.6 of the Act was a code that governs all ways in which a member of a collective investment scheme may exit the scheme.
- The Court of Appeal erred in holding that Part 5C.6 of the Act applied to the obligation in clause 2.4 of each of the agreements to redeem MacarthurCook's Subscription Units.

On 3 March 2014 TFML filed a notice of contention, the ground of which is:

- If Part 5C.6 of the Act did not apply to the obligation in clause 2.4 of each of the agreements to redeem MacarthurCook's Subscription Units, RFML did not breach its obligations under clause 2.4 because:
    a) on its proper construction, clause 2.4 did not require RFML to redeem any of MacarthurCook's units before 29 September 2008; and
    b) in consequence of the suspension of all withdrawals on 29 September 2008, RFML was not in breach of clause 2.4 in failing to redeem any of MacarthurCook's units after 29 September 2008.