HIGH COURT OF AUSTRALIA

13 December 2018

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v LEWSKI & ANOR;
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v WOOLDRIDGE & ANOR;
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v BUTLER & ANOR;
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v JAQUES & ANOR;
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v CLARKE & ANOR
[2018] HCA 63

Today the High Court unanimously allowed, in part, four appeals from a decision of the Full Court of the Federal Court of Australia. The High Court reinstated declarations, made by the primary judge, that the respondent director in each of the four appeals ("the four directors") had contravened the *Corporations Act 2001* (Cth), and remitted those matters to the Full Court for determination of penalties, disqualification orders, costs, and a cross-appeal to that Court. The orders of the Full Court in relation to Mr Clarke, the director in the fifth appeal, were not in dispute.

Each of the four directors was a director of the second respondent, Australian Property Custodian Holdings Ltd ("APCHL"), the responsible entity of a managed investment scheme. On 19 July 2006, the four directors resolved to amend the scheme's constitution (without member approval) to introduce, without corresponding benefit to the members of the scheme, substantial new fees payable to APCHL ("the Amendment Resolution"). One of the new fees was a "Listing Fee" payable upon listing of the scheme's units on the Australian Securities Exchange. On 22 August 2006, all five directors resolved to lodge the amended constitution with the Australian Securities & Investments Commission ("ASIC") ("the Lodgement Resolution"). The amended constitution was lodged the next day and would have taken effect then if valid. In 2007, the directors acted to cause the Listing Fee to be paid to companies associated with one of the directors ("the Payment Resolutions").

Since more than six years had elapsed since 19 July 2006, ASIC was time-barred from bringing proceedings alleging breaches of the *Corporations Act* in relation to the Amendment Resolution. Instead, ASIC commenced proceedings in the Federal Court of Australia alleging breaches of duties concerning the Lodgement and Payment Resolutions, and contraventions of related party transactions provisions (ss 208 and 209(2)) of the *Corporations Act* by payment of the Listing Fee. The primary judge held that the Amendment Resolution was invalid for non-compliance with s 601GC(1)(b) of the *Corporations Act*, and that the contraventions alleged by ASIC were established. His Honour disqualified each of the four directors from managing corporations and ordered pecuniary penalties against all five directors. On appeal, the Full Court set aside the orders and declarations made by the primary judge. The Full Court held that although the Amendment Resolution was invalid the lodged amendments were valid until set aside, and the directors were entitled to act in accordance with the amended constitution that they honestly believed existed. The Full Court did not need to consider ASIC's cross-appeal in relation to the adequacy of the pecuniary penalties and disqualifications imposed on the directors.

On appeal, the High Court held that each of the Lodgement Resolution and Payment Resolutions was invalid. Those resolutions adversely affected members' rights, so the amendments did not

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comply with s 601GC(1) of the *Corporations Act*. The concept of interim validity relied upon by the Full Court is not supported by the text or protective purpose of s 601GC. The Court held that the duties of APCHL and the directors were not satisfied by an honest or reasonable belief in the validity of the amendments and that each of the alleged breaches had occurred, with the exception of the alleged contravention of s 209. ASIC could not prove that the directors knew that the Listing Fee was unauthorised. This meant that an essential element of the contravention of s 209 was absent.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*