IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

No. M79 of 2018

BETWEEN: **Australian Securities & Investments Commission**
Appellant
-and-
William Lionel Lewski
First Respondent
Australian Property Custodian Holdings Limited ACN 095 474 436
(Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed)
Second Respondent

No. M80 of 2018

BETWEEN: **Australian Securities & Investments Commission**
Appellant
-and-
Michael Richard Lewis Wooldridge
First Respondent
Australian Property Custodian Holdings Limited ACN 095 474 436
(Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed)
Second Respondent

No. M81 of 2018

BETWEEN: **Australian Securities & Investments Commission**
Appellant
-and-
Mark Frederick Butler
First Respondent
Australian Property Custodian Holdings Limited ACN 095 474 436
(Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed)
Second Respondent

No. M82 of 2018

BETWEEN: **Australian Securities & Investments Commission**
Appellant

-and-
Kim Samuel Jaques
First Respondent
Australian Property Custodian Holdings Limited ACN 095 474 436
(Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed)
Second Respondent

No. M83 of 2018

BETWEEN: **Australian Securities & Investments Commission**
Appellant
-and-
Peter Clarke
First Respondent
Australian Property Custodian Holdings Limited ACN 095 474 436
(Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed)
Second Respondent

APPELLANT'S JOINT OUTLINE OF ORAL SUBMISSIONS

Australian Securities & Investments Commission
Level 7, 120 Collins Street, Melbourne VIC 3000

Telephone: 03 9280 3442
Fax: 03 9280 3402
Email: savas.miriklis@asic.gov.au
Ref: Savas Miriklis

PART I PUBLICATION

This outline is in a form suitable for publication on the internet.

PART II OUTLINE OF PROPOSITIONS

Notice of Contention – "member's rights"

1. Under s 601GC(1)(b) of the *Corporations Act* 2001, one of the "members' rights" is the right to receive the services of the responsible entity (**RE**) for the fees stipulated in the existing constitution and no more; or expressed differently, the right not to have the trust fund diminished by payments save for those authorised by the existing constitution.

2. An additional, more specific, "members' right" in this case was the right under s 601FM to vote by majority to remove the RE without the sanction of an additional fee to the RE.

3. If these were relevant members' rights, it is agreed that neither the RE nor its directors gave any consideration to whether they were affected, adversely or otherwise, by the amendments to the constitution reflected in the deed of variation (**DOV 7**). The RE did not form the opinion required under s 601GC(1)(b) to give it the power to amend.

4. If necessary to decide, the Court should prefer the statements of principle concerning "members' rights" in *360 Capital Ltd v Watts* (2012) 36 VR 507 (Warren CJ, Buchanan and Nettle JJA) and *Premium Income Fund Action Group Inc v Wellington Capital Ltd* (2011) 84 ACSR 600 (Gordon J) to the views expressed in first instance NSW decisions.

5. In particular, the NSW cases were wrong to draw a tight analogy between "members' rights" under s 601GC(1)(b) and the provisions for varying or cancelling rights attached to a class of shares under Part 2F.2 of the Act: **AS [34]-[40]; Reply [2]-[11]**

Appeal Ground 1 – "interim validity"

6. Since the RE failed to form the opinion necessary to bring into existence of the power in s 601GC(1)(b), each of the resolutions on 19 July and 22 August 2006 were nullities, as was the act of lodgement of DOV 7 with ASIC. All references to "the constitution" in Part 5C.3 of the Act on and after 22 August remained references to the constitution in its unchanged form. The constitution did not authorise the payment of the fees in 2007/2008.

7. The Full Court's concept of "interim validity": (a) finds no support in the language of Part 5C.3; (b) undermines the protective purposes of Part 5C.3; (c) creates incoherence with the relieving provisions of s 1322; (d) is inconsistent with wider trust law principles; (e) cannot be justified by appeals to "certainty"; (f) is not reflected in the analogous case of a company amending its constitution under Part 2B.4: **AS [44]-[55];**

Reply [12]-[23]

Appeal Ground 2 - breach of duty

8. The question before the RE and its directors on 22 August was whether to authorise the lodgement with ASIC of DOV 7 which was signed but undated and ineffective to amend the constitution unless and until lodgement occurred. The decision was a binary one: lodgement v non-lodgment would have very different legal consequences for both the members and the RE.

9. The directors were under the duties in s 601FD(1)(b), (c), (e) and (f) in respect of that decision. The RE was under corresponding duties in s 601FC.

10. Whilst the duty in s 601FD(1)(b) is similar to the corresponding directors' duty, the other duties in s 601FD are strongly influenced by the trust relationship. They are stricter, and more objective, than the ordinary duties of directors.

11. As to s 601FD(1)(c), it requires the director to act with the undivided loyalty of a trustee. On 22 August, the position remained the same as at 19 July. It was not in the best interests of members for a change to be made to the constitution, without their consent, which would see the trust fund diminished in favour of the RE for no additional services, and a new price placed on members' existing right to vote to remove the RE. There was a clear conflict between the member's interest (that such a change not occur) and the RE's interest (that it did). Giving priority to the members' interests required voting not to lodge DOV 7: **AS [75]-[80]** and **Reply [29]-[32]**

12. As to s 601FD(1)(d), a reasonable person in the position of each director on 22 August, armed with knowledge of what had happened at the 19 July meeting, would have appreciated that the board had not yet turned its mind to the full range of considerations bearing on the members' rights and interests. Such reasonable person would have made 22 August the occasion for such consideration and following such consideration could only have voted against lodgement: **AS [71]-[74]**

13. As to s 601FD(1)(e), "impropriety" is judged objectively under the standard of s 182 and *R v Byrnes* (1995) 183 CLR 501 at 514-515. A reasonable person, equipped with the knowledge of the facts and the directors' duties, powers and authorities, could only have concluded that lodgement would advantage the RE and Mr Lewski and disadvantage members. With Mr Lewski, the case for impropriety is even clearer: **AS [81]-[83]**

14. As to s 601FD(1)(f), a reasonable person in the position of the directors would have voted against lodgement to prevent the RE breaching cl 25.1 by amending the constitution for its own benefit. Even if s 601GC(1)(b) contains a freestanding power of amendment, the preconditions to it not being met meant that clause 25 operated in full: **AS [84]-[87]**.

15. The Full Court did not dispute that the primary judge was entitled to find that, as at 19 July, the directors and the RE had comprehensively failed in their duties under ss 601FC and 601FD. It erroneously allowed the fact of the earlier resolution, combined with the directors' absence of subjective knowledge of their failures on that date, to limit the scope of the considerations to which they were obliged to attend on 22 August.

16. The Full Court's approach: (a) is inconsistent with the text of ss 601FC and 601FD, by collapsing all the duties into the first-stated duty of honesty; (b) inconsistent with the protective purposes of Part 5C.2 and broader trust law principles; (c) creates incoherence with the relieving provisions of s 1317S and 1318; (d) carries over the erroneous "interim validity" proposition; (e) effectively means whatever the RE and directors think is "good enough" becomes "good enough" in law: **AS [59]- [69]**

17. With the Payment Resolutions, the relevant duties which were breached were s 601FD(1)(c) and (f): **AS [79]-[80], [84]-[87]** and **Reply [33]-[34]**.

Ground 3 - Section 208 as modified by s 601LC

18. For the purpose of pleading and assigning onus of proof, a distinction is made between a (a) requirement which forms part of the statement of a general rule; and (b) statement of some matter of answer (whether by way of exception, exemption, excuse, qualification or otherwise) which serves to take a person outside the operation of a general rule: *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249: **AS [93]**

19. The general rule created by the unmodified s 208 is that a financial benefit given by a public company to a related party needs bespoke approval of members. Sections 210 - 216 identify a series of cases which take the benefit outside the general rule, such that the onus lies on the defendant who seeks to rely on them to make them out.

20. Modified s 208 tailors the general rule to the circumstances of a registered scheme. It then adjusts the matters of answer, which take the person outside the general rule, in like fashion. Two of the answers are regarded as not apposite (s 213 and 214) and one further answer is added, appropriate to a registered scheme (modified s208(3)).

21. Functionally and substantively, modified s 208(3) is of the same character as ss 210-216. The language "does not prevent" does the same work as saying "member approval is not needed if...": **AS [88]-[97]**.

22. ASIC proved the necessary elements of modified s 208(1)(a)-(d). The directors failed to make out the defence under modified s 208(3).

Dated: 17 October 2018

JUSTIN GLEESON SC **ROBERT STRONG** **CARYN VAN PROCTOR**