IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S275 of 2013

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

HIGH COURT OF AUSTRALIA
FILED
31 JAN 2014
THE REGISTRY SYDNEY

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply to the first respondent's submissions filed on 17 January 2014 (*"RS"*)

First issue: Did the Constitution of the Fund authorise the appellant to distribute the shares in ARL to the unit holders of the Fund?

2 The narrow question for consideration is whether the Constitution authorised the appellant to distribute ARL shares to unit holders. The first respondent appears to accept that, if it did, then the distribution was intra vires the appellant {RS, [39]}. The other potential sources of power referred to at RS, [39] are not presently relevant. Nothing in the first respondent's recitation of the history and context of the managed investment scheme legislation {RS, [16] to [32]} materially bears on the question whether the Constitution, properly construed, authorised the appellant to distribute the ARL shares.

3 The first respondent proceeds on the basis that, even if the appellant is successful, the relevant power arises as a matter of implication and not by virtue of an express grant in the Constitution {RS, [62], [35] and [53]}. That is incorrect. The express grants of power contained in clauses 13.1 and 13.2.5, properly construed, authorised the appellant to distribute the ARL shares to unit holders. There is no need for the appellant to rely on the implication of any term. To the contrary, the construction for which the first respondent contends relies

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on an implied limitation on the broad powers granted by clauses 13.1 and 13.2.5. There is no basis for such a limitation to be implied.

Clauses 13.1 and 13.2.5

4 The first respondent appears to accept {RS, [37] and [49]} that clause 13.1 would have empowered the appellant to transfer title to the ARL shares to a third party (and the same is true of clause 13.2.5). The effect of such a transaction would have been that the transferee became absolutely entitled to the ARL shares whereas the appellant would cease to hold the legal interest and the ARL shares would cease to form part of the Scheme Property (in the whole of which each unit holder holds an undivided interest pursuant to clause 2.2.1 of the Constitution). Such a transaction would be authorised by clauses 13.1 and 13.2.5 because the hypothetical absolute owner of the shares would be able to transfer absolute title to them to the third party. Of course, the appellant was not the absolute owner of the shares and therefore the counterfactual in clauses 13.1 and 13.2.5 is necessary in order to authorise the appellant to deal with them absolutely.

5 Nothing in the text of or presumed intention behind clauses 13.1 and 13.2.5 suggests that the appellant's power to deal with the ARL shares should be limited to exclude transfers to unit holders. As the first respondent correctly identifies {RS, fn 34}, clause 2.2.2 of the Constitution provides that the unit holders, like the hypothetical third party purchaser referred to in the preceding paragraph, hold no interest in any particular part of the Scheme Property (which included the ARL shares prior to their distribution). As in the case of the hypothetical third party transaction above, the effect of the transfer of the ARL shares to unit holders was to render them absolutely entitled to ARL shares while removing the ARL shares from the Scheme Property. The only difference is that unit holders already held an undivided interest in the Scheme Property as a whole (pursuant to clause 2.2.1). It does not follow from that difference, as the first respondent submits {RS, [37]}, that the appellant, although authorised by clauses 13.1 and 13.2.5 to transfer the ARL shares to third parties, was not permitted to transfer them to unit holders. The existence of a power in the appellant to transfer title to particular parts of the Scheme Property (in which unit holders otherwise would hold no interest due to clause 2.2.2) to unit holders involves no "destruction" {RS, [37]} or "impeachment" {RS, fn 34} of the unit holders' undivided interest in the Scheme Property as a whole. The words "as though it were the absolute owner" do not, as the first respondent contends {RS, [37]}, limit the appellant's powers in this way (or at all) but, to the contrary, indicate that the appellant has the broad powers of an absolute owner (subject to the duties imposed by sec 601FC(1)) notwithstanding that it is a trustee, including the power to transfer

the beneficial interest in Scheme Property. The counterfactual is necessary in order to permit the appellant to deal with the beneficial interest in any part of the Scheme Property, including by transferring absolute title to the ARL shares to unit holders, as it did in the present case. The irrelevance of the unit holders' undivided interest in the Scheme Property as a whole is especially clear in respect of the ARL shares, which do not have individual distinguishing characteristics and are fungible. The distinction between the unit holders' undivided interest in the Scheme Property as a whole and the beneficial interest that they held in the ARL shares after the distribution is therefore highly abstract.

6 Further, it is entirely orthodox for a trust instrument to empower the trustee to distribute part or all of the trust fund to beneficiaries notwithstanding that the beneficiaries (by definition) have an existing interest in the trust fund. There is certainly nothing sinister about the so-called "destruction" of the trust relationship that occurs as a result of any such distribution. It occurs whenever a cash distribution is made pursuant to clause 16 of the Constitution out of the income or the capital of the fund. The question in the present case is whether the appellant is authorised only to distribute Scheme Property in the form of cash pursuant to clauses 16 and 26 or whether it has an additional power to make an in specie distribution of Scheme Property pursuant to clauses 13.1 and 13.2.5. The existence of the trust relationship is not itself a reason, to construe the appellant's powers as to the distribution of Scheme Property as being limited to cash distributions.

7 There is also no general principle, as the first respondent suggests {RS [38]} to [41]}, that a power conferred upon a trustee by the trust instrument to make in specie distributions has some special status requiring particularly clear language in order to be enforceable. The existence of such a power is to be determined according to the ordinary canons of construction of trust instruments. On its proper construction, clauses 13.1 empowered the appellant to convey absolute title to the ARL shares to any person, just as the absolute owner of them could have. There is no reason to exclude unit holders from the class of potential transferees. The same is true of clause 13.2.5 as the transfer by the appellant to unit holders amounted to a disposition of or dealing with Scheme Property so as to bring the distribution squarely within the language and scope of clause 13.2.5.

8 In exercising the powers of distribution conferred by clauses 13.1 and clause 13.2.5, the appellant is obliged to act consistently with the duties imposed on it by sec 601FC(1) and, in doing so, would be obliged to weigh the hypothetical difficulties raised by the first respondent at RS, [46] and [47], (to the extent they applied) against the benefits of the proposed distribution.

The relevance of clauses 16 and 26

9 The existence of clause 16 and 26 do not tend against the appellant's construction of clauses 13.1 and 13.2.5. Clause 16.2.3 requires the appellant to pay each Distribution Recipient (i.e. unit holder) its Distribution Entitlement by 10 days after the Distribution Calculation Date. That obligation exists independently of the appellant's power to distribute Scheme Property under clauses 13.1 and 13.2.5 and is not rendered otiose by it (as the first respondent suggests {RS, 48}). Rather, clause 16 requires cash distributions to be made at particular times whereas clauses 13.1 and 13.2.5 authorise additional cash or in specie distributions to be made by the appellant. Similarly, clause 26 regulates the winding up of the Fund and requires distributions to be made in accordance with its terms. The existence of separate and additional powers of distribution in clauses 13.1 and 13.2.5 does not affect the obligations imposed or powers conferred on the appellant by clause 26. Further, the appellant's position in respect of clause 13.2.5 is strengthened by the prohibition in the chapeau of the clause 13.2.5 on construing the conferral of powers in clauses 16 and 26 as limiting the broad power conferred by clause 13.2.5.

10 Indeed, the failure of clause 26 to authorise any in specie distribution supports the appellant's construction of clause 13.1 for the reasons given at the Appellant's Submissions filed on 13 December 2013, [43] to [44], namely that the Constitution would otherwise not permit unit holders to obtain the benefit of illiquid assets even in a winding up of the Fund. Section 601KB does not solve this problem as it applies only where illiquid assets constitute 20% or more of the property of the relevant scheme (sec 601KA(4)) and, in any event, would not give members the benefit of assets that were incapable of realisation into cash having regard to the formula in sec 601KD. It is submitted that the presumed intention of the drafter of the Constitution was not to ignore this problem on the basis that either a special majority of unit holders might resolve in the future to amend the Constitution in some way or that the responsible entity would form the opinion set out in sec 601GC(1)(b) {see RS, [51]}. It is submitted that the Court would presume that, rather than simply ignoring the problem of illiquid assets, the drafter of the Constitution intended to permit the appellant (obliged always to act in the best interests of unit holders) to deploy a commercial solution by exercising the broad and flexible powers conferred by clause 13.1 and 13.2.5.

Second issue: Did the unit holders of the Fund become members of ARL upon their entry in the register of ARL?

11 Once the appellant's power to transfer the ARL shares to unit holders is acknowledged, it must follow that, by acquiring their units in the Fund, unit holders, who are

bound to comply with the Constitution (see sec 601GB), prospectively assented to receive the shares. The notion {RS, [67]} that unit holders, who are investors in a managed investment scheme rather than persons under some kind of special disadvantage, required the appellant to provide them with legal advice as to the nature and effect of the Constitution in order for them now to be bound by it should be rejected. Further, the power relied upon by the appellant is express and not, as the first respondent submits {RS, [62]}, implied, although nothing turns on the distinction.

12 The first respondent asserts {RS, [62] to [66]} that something more than the acquisition of the units was required in order for the unit holders to assent to receive the ARL shares, such as a meeting or some additional consent. The holding of a meeting in *Re Crusader* or in capital reductions pursuant to Part 2J.1 of the Act plainly could not amount to the requisite assent for the purposes of sec 231(b) in respect of those members who voted against taking the shares. Rather, *Re Crusader* and Part 2J.1 show that members of the minority (despite their express failure to consent to the transfer at the time of the meeting) can be forced into membership of the relevant companies due to their assent to be bound by the trust deed (in the case of *Re Crusader*) and Part 2J.1 of the Act (in the case of capital reductions) upon the purchase of their investment. There is no relevant distinction between the resolution of a majority in meeting to accept shares in a company (such resolution binding even those who did not consent, in the meeting, to accept them) and the exercise, in the present case, of a power conferred upon the appellant to transfer shares. In each case, even those persons who may not wish to become members of the company at the time of the transfer have already assented by reason of their purchase of the relevant investment and consequent agreement to be bound by the applicable terms.

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