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 (ABN 39 079 608 825)
Respondent

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APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

20 2. The issue raised by this Appeal is whether the procedures set out in Part 5C.6 of the *Corporations Act 2001* (Cth) apply to all ways in which a member of a registered managed investment scheme might exit a scheme, or whether (as the Appellant contends) it applies only where a member voluntarily seeks the return of that member's contribution to the scheme (in whole or in part).

Part III: Section 78B of the *Judiciary Act 1903*

3. The appellants have considered whether any notice should be given pursuant to section 78B of the *Judiciary Act 1903* (Cth) and concluded that no notice is required.

Filed on behalf of the appellants

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Part IV: Citations

4. The decisions below have not been reported. The medium neutral citations are:

   (a) *MacarthurCook Fund Management Limited v Zhaofeng Funds Limited* [2012] NSWSC 911

   (b) *TFML Ltd v MacarthurCook Fund Management Ltd* [2013] NSWCA 291

Part V: Facts

5. The essential facts are not in dispute.

6. In 2006, Zhaofeng Funds Limited (at the time named RFML Limited) (**RFML**) was the trustee of an unlisted unit trust, at that timed called **RP Trust**. The trust was registered under the *Corporations Act* as a managed investment scheme and RFML was the responsible entity. The trust investments were, primarily, property assets, including retail shopping centres (Appeal Judgment [4]-[5]).

7. The first appellant, is, and at all material times was, the responsible entity of the MacarthurCook Property Securities Fund, a registered managed investment scheme under the *Corporations Act*. The second appellant, Sandhurst Trustees Limited, holds as custodian for MacarthurCook all income, rights and property of the MacarthurCook Property Securities Fund (Primary Judgment [1]-[2]).

8. In October 2006, and December 2007 RFML issued Product Disclosure Statements (**PDS**) seeking to raise funds by public offering to issue ordinary units in RP Trust at $1 per unit. The funds raised were to be used in part to reduce borrowings which had financed the acquisition of property on behalf of the RP Trust. MacarthurCook agreed to underwrite the issue of units under the public offering by subscribing for 10 million fully paid units at $1. The terms of the underwriting were provided in two agreements dated 27 October 2006: Facility Agreement Tranche 1 (**FAT1**) and Facility Agreement Tranche 2 (**FAT2**). Each agreement applied to a tranche of 5 million units.

9. The facility agreements provided for the units to be subscribed for by 1 November 2006 and to be redeemed out of moneys raised in the public offering. If not redeemed by 31 October 2007, RFML was obliged to purchase the units from MacarthurCook. The units issued to MacarthurCook were described as Founder Units and were to be redeemed at $1 per unit (Appeal Judgment [5])

10. On 1 April 2007, RFML and MacarthurCook entered into a Unit Conversion Agreement by which the first tranche of 5 million Founder Units, were converted to ordinary units in the RP Trust (Appeal Judgment [6]).

11. On 1 November 2007, RFML and MacarthurCook entered into a further Facility Agreement (**FAT3**) by which FAT2 was terminated on 31 October 2007 and MacarthurCook subscribed for 5 million units on the basis that RFML would retain the $5 million subscription price for the Tranche 2 units and in consideration would issue to MacarthurCook 5 million (Tranche 3) Subscription Units (Appeal Judgment [7]).

12. On 3 December 2007, RFML and MacarthurCook entered into two further Facility Agreements (**FAT4** and **FAT5**), by which MacarthurCook subscribed for two further tranches, each of 5 million Founder Units (now called Subscription Units), paying $10 million as the subscription price (Appeal Judgment [7]).

13. RFML had the power under clause 4.2 of the Constitution to issue units of a different class from those already on issue, subject to such rights, obligations and restrictions as the Trustee determined. Under clause 4.2(c), the rights of unitholders were subject to the rights, obligations and restrictions attaching to a unit of a class which they held.

14. RFML issued the class of Subscription Units to MacarthurCook under the terms FAT3, FAT4 and FAT5. The terms of issue of those units were set out in each of the FATs.

15. One of the terms of issue of the Subscription Units was that they would be redeemed by RFML within a certain period, in a specified amount. Each of FAT3, FAT4 and FAT5 had relevantly identical redemption provisions. In FAT3, the relevant provision (for the purposes of this Appeal) was (Appeal Judgment [8]):

> **2.4 Redemption**
>
> 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.

16. The Subscription Period was defined in each agreement to be twelve months from the Subscription Date. The Subscription Date in FAT3 was 1 November 2007 and for FAT4 and FAT5 was 3 December 2007 (Appeal Judgment [9]).

17. As the Court of Appeal found, the basic transaction was an underwriting by MacarthurCook of a public offer of units in RP Trust (Appeal Judgment at [3]).

18. The Court of Appeal held that, on the true construction of clause 2.4, RFML's obligation was to redeem the units during the specified 6 month period. It did not have to begin redemptions at the commencement of the period (as the Trial Judge had decided). The period from the commencement of the FAT3 Subscription Period to the end of the FAT4 and FAT5 Subscription Period was 2 November 2007 to 4 December 2008. During this period RP Trust received $12,347,079 as a result of accepted applications under the Offer Documents (the receipts came in from 2 November 2007 to 5 September 2008).

19. RFML did not redeem the 15 million Tranche 3, 4 or 5 Subscription Units or purchase any of those units at the end of the applicable Subscription Periods

(Appeal Judgment [10]). All 15 million units remain held by Sandhurst as custodian for MacarthurCook.

20. On 29 September 2008 RFML gave notice that it had suspended all "withdrawals" from the RP Trust until further notice. The suspension remained in place for the whole of the Subscription Periods (Appeal Judgment [11]).

21. The Subscription Units issued to MacarthurCook under the FATs constituted a separate class of units. MacarthurCook was the only holder of those units.

22. On 9 May 2012, the respondent replaced RFML as responsible entity of RP Trust (now called **P-REIT**).

23. When the respondent became the responsible entity of P-REIT, it assumed the obligations and liabilities of RFML under clause 2.4 of FAT3, FAT4 and FAT5, pursuant to ss 601FS and 601FT of the *Corporations Act*.

Part VI: Argument

The issue for determination by this Court

24. This appeal raises a single question of statutory interpretation concerning the scope of Part 5C.6 of the *Corporations Act*.

25. The critical paragraph of the judgment in the NSW Court of Appeal is at Appeal Judgment [28], where the Court held that in Part 5C.6 the word "withdrawing" describes exiting a scheme by receiving a payment of money out of the scheme funds in exchange for the extinguishment of the interest held.

26. If this were correct, it would follow that Part 5C.6 is a code that applies to all means by which a member may exit a scheme by redemption of his or her interest in the scheme.

27. The proposition that the Court of Appeal's decision turned on this conclusion is clear from the first question posed at Appeal Judgment [23], namely,

whether "*any redemption of units pursuant to clause 2.4 of the facility agreements was subject to compliance with the provisions of Part 5C.6*", and from the Court's reasoning at [25]-[28].

28. The appellants contend that the Court of Appeal erred in arriving at the conclusion summarised above. They contend that the procedures in Part 5C.6 do not apply where, as in the present case, a member is liable to be forced to exit the scheme, irrespective of whether or not the member wishes to do so.

29. If the appellants' submissions are accepted, then the notice issued by RFML suspending withdrawals from the scheme did not operate to relieve RFML of the obligation imposed upon it under clause 2.4 and the appellants must succeed. The respondent so conceded in the Court below.[1]

30. In *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355. McHugh, Gummow, Kirby and Hayne JJ said, at 381 [69]:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed. (footnotes omitted)

31. Sections 601KA to 601KE, when given their ordinary meaning, in context and having regard to their purpose, apply only to voluntary exits from a scheme.

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1 Transcript of Proceedings, *TFML Limited v MacarthurCook Fund Management Limited* (New South Wales Court of Appeal, 2012/285872, McColl, Macfarlan, Meagher JJA, 4 – 5 April 2013) at 7.40.

Those provisions, which together comprise Part 5C.6 of the *Corporations Act*, are not a code governing all the ways in which a member may exit a scheme.

The language of Part 5C.6 in its context

32. The proposition that Part 5C.6 is only concerned with voluntary exits is clear from the language deliberately chosen by the drafter. Significantly, ss 601KA to 601KE use the word "withdraw" instead of, for example, "redeem".

33. For instance, ss 601KA(1) and 601KA(2) require a constitution (in certain circumstances) to make provision for "*members to withdraw from the scheme*" and s 601KB provides that (in some circumstances) the responsible entity "*may offer members an opportunity to withdraw, wholly or partly, from the scheme*".

34. The verb "withdraw" connotes a voluntary action. The ordinary meaning of "withdraw" is to "*draw back or away; take back; remove*".[2] In a banker and customer relationship, a withdrawal from an account in credit is a demand by the customer that the bank pay money that it owes to the customer.[3] When used in other parts of the *Corporations Act*, the word is plainly intended to have its ordinary meaning of "draw back" or "take back"—a voluntary process: see, for example, ss 650E, 652A, 652B and 1019G.

35. Inherent in the word "withdraw" is some action on the part of the party who is to withdraw by way of a demand or request, which action is absent when units are compulsorily redeemed. So, for example, the phrases "she withdrew her nomination" and "I withdraw my support" all involve voluntary action and not compulsion.

36. Thus, s 601KA(3) does not state that "*a member must not withdraw from a scheme otherwise than in accordance with the specified procedure*". It provides that "*the responsible entity must not allow a member to withdraw*

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2 *The Macquarie Dictionary* (5th ed) (2009).

3 *Citigroup Pty Limited v National Australia Bank Limited* [2012] NSWCA 381 at [41] per Barrett JA.

from the scheme...otherwise than in accordance with..". To "allow" something to occur is to permit that thing to occur.[4] The act of permitting someone to do something does not compel that person to do anything.

37. Similarly, s 601KB refers to the responsible entity offering members an "*opportunity to withdraw*" wholly or partly from the scheme. Again, as a matter of language, the section contemplates that members need not avail themselves of any such opportunity—they are entitled to choose not to do so.

38. By contrast, something that is compulsory does not require any exercise of will or volition by the person who is compelled. There is no exercise of any choice or opportunity. Thus, a compulsory redemption would not, as a matter of ordinary language admit of any volition on the part of the person being redeemed. Even if that person does not wish it, he or she will be redeemed. Put another way, a compulsory redemption is, in the ordinary sense of that phrase, an ejection from the scheme.

39. It is that latter process which is contemplated and required by the terms of issue of the appellants' founder units, the relevant term being encapsulated in clause 2.4 of the facility agreements. Such redemption is not apt to fall within the regime in Part 5C.6.

40. That this is so is further confirmed by the logic of Part 5C.6, sitting in the context of other relevant provisions of the *Corporations Act*. In summary:

(a) If members are to have a "*right to withdraw*" from the scheme, the constitution must specify that right: s 601GA(4)(a).

(b) If there is to be a right to withdraw that may be exercised while the scheme is liquid, the constitution must set out adequate procedures for making and dealing with "*withdrawal requests*": s 601GA(4)(b). The constitution may make provision for members to withdraw at any time: s 601KA(1).

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4 *The Macquarie Dictionary* (5th ed) (2009).

(c) If there is to be a right to withdraw that may be exercised while the scheme is not liquid, the constitution must require the right to be exercised in accordance with Part 5C.6.

(d) Section 601KB then provides that if the scheme is not liquid, the member cannot withdraw unless the responsible entity first offers all members, or all members of a class that includes that member, an opportunity to withdraw from the scheme. If such an offer is made, then the member may accept it by making a "*withdrawal request*". The responsible entity must identify the assets that are to be sold to satisfy the withdrawal requests.

(e) A withdrawal offer made under s601KB(1) must satisfy the requirements of s 601KB(2) and (3). That includes a requirement to tell members how long the offer will remain open (the minimum period being 21 days) and that, if the assets sold do not raise sufficient funds to satisfy all withdrawal requests, those requests are to be satisfied proportionately (see s 601KD).

(f) If the responsible entity decides that it is in the best interests of members to do so, it must cancel a withdrawal offer before it closes: s 601KE.

(g) Section 601KA(3) and (3A) make it an offence for a responsible entity to allow a member to withdraw other than in accordance with the requirements of the constitution or, if the scheme is not liquid, in accordance with ss 601KB to 601KE.

41. This is clearly a regime designed only to regulate voluntary withdrawals. When a responsible entity makes a withdrawal offer, each member is entitled to serve a withdrawal request in respect of all or only part of his or her interest in the scheme. But there is no compulsion to do so.

42. Construed sensibly, it is clear that the regime operates to ensure that there is no "rush for the door" where those who are quick to request redemption can gain an advantage over those who are not quick. The opportunity to apply to

withdraw must remain open for a specified period. In event of a shortfall, the members who wish to withdraw do so proportionately to their requests. There is no need for Part 5C.6 to be a code for exiting a scheme in order to give effect to this purpose.

43. Indeed, Part 5C.6 was never designed to govern compulsory redemptions. The statutory procedure for withdrawal would not work sensibly in their context:

(a) the responsible entity wishing to effect a compulsory redemption must make a withdrawal offer in writing under the constitution or (at least) to all members in the same class as the member to be ejected (s 601KB(2));

(b) the withdrawal offer must specify a period (of at least 21 days) during which the offer will remain open, the assets that will be used to satisfy the withdrawal requests, the amount of money expected to be available when those assets are converted to money, and the method for dealing with withdrawal requests if the money available is insufficient to satisfy all withdrawal requests (s 601KB(3));

(c) the member to be ejected must then make a withdrawal request in response to a withdrawal offer (s 601KB(1));

(d) the responsible entity must lodge a copy of the withdrawal offer with ASIC (s 601KB(5));

(e) in particular circumstances a withdrawal offer may or must be cancelled before it closes (s 601KE).

44. Obviously, if the member to be compulsorily redeemed declines to cooperate in the process—for instance by refusing to lodge a withdrawal request—then the process of redemption is stymied. Alternatively, the responsible entity has to sue for a mandatory injunction—a discretionary remedy. In other words, if the Court of Appeal were correct, then a responsible entity would not be able efficaciously to evict a member from a scheme.

45. Such a situation cannot have been intended by Parliament. There are many reasons why it may be in the best interests of the body of members as a whole for a responsible entity to evict a member. The responsible entity may become aware that the scheme is being used by a member for illegal purposes, such as money laundering. Less vivid examples of circumstances in which compulsory redemption would be in the interests of the scheme appear in the P-REIT Constitution: see clause 33.7(b)(i)(B) and clause 17.3.

46. In the present case, the terms of issue of the appellants' founder units required redemption to be performed during a period commencing six months after the date of subscription. Had the parties been obliged to comply with Part 5C.6:

(a) RFML would have had to go through the charade of making a withdrawal offer to MacarthurCook.

(b) MacarthurCook would then have had to go through the charade of making a withdrawal request.

(c) The parties would then have had to wait out a minimum offer period of 21 days before RFML would have been allowed to redeem the Founder Units. In the meantime a return at a (high) rate of 11.5% per annum would have continued to accrue (see eg FAT3 clause 2.3).

47. This would have been a pointless exercise in formality for its own sake. At the time of issue the parties could not have intended MacarthurCook to be able to decline to be redeemed and instead continue as a member of the scheme—it had no right to do so under the terms of issue of its founder units.

48. Nor could it have been intended that MacarthurCook would have had the right to change its mind about being redeemed and chosen to remain a member by electing (as it would have been entitled to do under Part 5C.6) not to make a withdrawal request.

49. Instead, the process by which MacarthurCook could have remained a unitholder was exemplified by the transition from FAT1 to FAT2, pursuant to

which the founder units issued under FAT1 were redeemed and the proceeds applied to subscribe for ordinary units (see paragraph 10 above).

Prefatory materials

50. The proposition that Parliament only intended Part 5C.6 to govern voluntary exits is further supported by an examination of the prefatory materials.

51. Under the former Division 5 of Part 7.12 of the *Corporations Law*, all prescribed interest schemes were required to offer a buy back facility, under which the management company was required to repurchase interests from members on request.[5]

52. Part 5C.6, which was incorporated into the legislation by the *Managed Investments Act* 1998 (Cth), was a response to the recommendations made by the Australian Law Reform Commission and the Companies and Securities Advisory Committee in Report No 65 entitled *Collective Investments: Other People's Money* (Explanatory Memorandum, Managed Investments Bill 1997 (Cth), [1.1] & [1.5]).

53. In its report, the Commission observed that the buy back obligations that existed at that time gave investors the false impression that their investments could be cashed in relatively easily. That obligation could, depending on the liquidity of the scheme, force the manager to borrow or sell the assets of the scheme, which tended to diminish the value of the assets to the disadvantage of remaining investors. The key recommendations of that report included abolition of the statutory buy back obligation and the provision of a link between the ability of investors to get their money out of the scheme and the ease with which the assets of the scheme could be sold.[6]

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5 Section 1069(1)(c), *Corporations Law.*

6 Australian Law Reform Commission and Companies and Securities Advisory Committee, Collective Investments: Other People's Money, Report No 65, (1993) Summary, at [19], [21] and [22].

54. The report made it clear that the proposed reforms were concerned with:

(a) balancing a loss of confidence by investors if investors are unable to withdraw their funds in accordance with their expectations against the need to avoid "*inappropriate or unworkable exit rules*" that may create "*false or unrealistic expectations*" ([7.3]);

(b) accommodating situations where there are no suitable assets to be sold to meet withdrawals (for example because the responsible entity would have to sell an asset of much greater value than would be necessary) without "*disadvantaging continuing investors or even possibly jeopardising the future of the scheme*" ([7.14], [7.18], [7.20]); and

(c) avoiding the circumstance of a scheme having to "*sell non-liquid assets, or borrow against non-liquid assets, to honour redemption requests in excess of the available liquidity*".

55. The report did not contemplate restricting or inhibiting compulsory exits from a scheme, whether pursuant to a constitutional power or a pre-existing arrangement. Again, the apparent overall purpose of the recommendations was to prevent a "rush to the door" that would disadvantage continuing members.

56. It is clear that Part 5C.6 of the Act was not intended by Parliament to be a code regulating all the circumstances in which a member may cease to be a member of a scheme.

The Court of Appeal's concern about floodgates

57. An element of the reasoning of the Court of Appeal is at Appeal Judgment [36]):

> If the position was otherwise, the restriction and the protection it seeks to provide for the financial security of the scheme might be avoided by any anterior agreement with a member which obliges the responsible entity to redeem it in specified circumstances.

58. Clause 2.4, however, was not an agreement of the kind about which the Court of Appeal was concerned. It was one of the terms of issue of the Subscription Units, which had been issued to give effect to the underwriting that was at the heart of this arrangement. The redemption of those units pursuant to clause 2.4 was in all relevant senses compulsory from the point of view of MacarthurCook. To the extent that funds were received by the Trust from the public offering, MacarthurCook could not have chosen to remain a unit holder, with the right to receive distributions of at least the 10.5% per annum (see clause 2.3). It had no choice but to be paid out from the funds received by the trust from members of the public subscribing for ordinary units.

59. In any event, the Court of Appeal's concern about "anterior agreements" did not justify interpreting Part 5C.6 as a code governing all the ways in which a member exits the scheme. There are three reasons why this is so.

60. First, the Court of Appeal does not articulate or define what sorts of anterior agreements might circumvent the protections. Not all anterior agreements could circumvent Part 5C.6. Logically, an anterior agreement which provides for the right voluntarily to exit a scheme would be caught by that Part. For instance, entering into a side agreement with an existing member that empowers the member to call for redemption at a time of that member's choosing would be an offence under s 601KA(3) and 601(3A). Clause 2.4 was not such an agreement.

61. Secondly, as discussed above, the purpose of Part 5C.6 was not to prevent compulsory redemptions. Structurally that Part is not apt to do so. The real purpose, as revealed by the structure of the Part itself and the prefatory materials, was to provide machinery for voluntary withdrawals from a scheme and, in the case of illiquid schemes, to prevent the harm that would be caused by a "rush for the door".

62. Thirdly, the Court of Appeal overlooked the broader regulatory context. Part 5C.6 is but one part of a wider regime for the protection of members of schemes. It sits within Part 5C, which seeks to put in place an appropriate

level of regulation adequately and effectively to protect the interests of investors.[7]

63. In particular, the Court of Appeal does not advert to the important duties imposed upon a responsible entity by s 601FC. For example, the responsible entity must:

(a) act honestly (s 601FC(a));

(b) exercise the degree of care and diligence that a reasonable person would exercise in the responsible entity's position (s 601FC(2));

(c) act in the best interests of members and prefer those interests to the interests of the responsible entity (s 601FC(c));

(d) treat members in the same class equally and members of different classes fairly (s 601FC(d));

(e) not make improper use of information acquired as responsible entity (s 601FC(e)).

64. Section 601FC(2) then provides that scheme property is held on trust for members, thus importing the full suite of general law duties owed by trustees. Section 601FC(3) provides that the duties of the responsible entity to members trump any duties owed to the responsible entity by its officers or employees. Section 601FD then imposes on officers of a responsible entity similar duties to those owed by the responsible entity to members.

65. So a responsible entity of an illiquid scheme would not be able to issue a class of units on terms that those 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. That would require the responsible entity to consider the purpose for which the units were being issued, how those

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7 *Westfield Management Limited v AMP Capital Property Nominees Limited* [2012] HCA 54 at [49].

units would be redeemed, and what benefits would flow to members in other classes from the issue. Failure to do so would (at least) constitute a potential breach by the responsible entity of s 601FC and by its officers of s 601FD.

66. That was not what occurred here. MacarthurCook provided an advance to the responsible entity of funds that the responsible entity proposed to raise from a public offering of units. "Repayment" of the advance was to take place out of moneys raised from that public offering. The responsible entity was thereby put in funds to carry out the purpose of the scheme in advance of the receipt of subscription moneys from investors—a circumstance no doubt considered by the responsible entity to be beneficial. There was no evidence (and it has not been suggested) that members would be harmed by this arrangement.

67. There is no basis for the fear expressed by the Court of Appeal at Appeal Judgment [36] such that ss 601KA-601KE should be given a strained reading which ignores the ordinary meaning of the words of that section, read as a whole, in context, and giving effect to its statutory purpose.

Part VII: Legislation

68. The applicable legislative provisions are set out in **Annexure A** to these submissions. They appear in the annexure in the form they took at the time of the hearings and decisions below. They have not been materially amended.

Part VIII: Orders sought

69. The appellants seek the following orders:

(a) The appeal be allowed

(b) Orders (1) to (4) and (6) and (7) of the Court of Appeal be set aside.

(c) In lieu of the said orders of the Court of Appeal, it be ordered that:

(i) The appeal from the orders of the primary judge be allowed in part.

(ii) Orders (1) and (2) made by the primary judge on 17 August 2012 be set aside.

(iii) In lieu of order (2) made by the primary judge, judgment for the first and second appellants, MacarthurCook Fund Management Limited and Sandhurst Trustees Limited, against the respondent, TFML Limited, in the sum of $10,809,868 plus pre judgment interest.

(iv) The appeal from the orders of the primary judge be otherwise dismissed.

10 (v) In lieu of order (1) made by the primary judge, judgment for the first and second appellants against the second respondent (Zhaofeng Fund Management Limited) in the sum of $13,263,750 plus pre judgment interest, to take effect on 17 August 2012.

(d) The respondent pay the appellants' costs in this Court and in the Courts below.

Part IX: Time estimate

70. The appellants seek one hour for the presentation of the appellant's oral argument.

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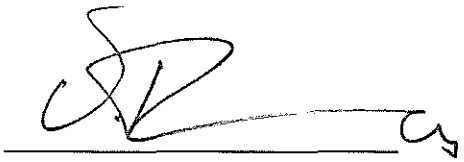

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7 March 2014

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 (ABN 39 079 608 825)
Respondent

ANNEXURE A TO APPELLANTS' SUBMISSIONS

Corporations Act 2001 (Cth) as at 26 November 2008

601FC Duties of responsible entity

(1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:

(a) act honestly; and

(b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and

(c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and

(d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and

(e) not make use of information acquired through being the responsible entity in order to:

(i) gain an improper advantage for itself or another person; or

(ii) cause detriment to the members of the scheme; and

(f) ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB; and

(g) ensure that the scheme's compliance plan meets the requirements of section 601HA; and

(h) comply with the scheme's compliance plan; and

(i) ensure that scheme property is:

(i) clearly identified as scheme property; and

(ii) held separately from property of the responsible entity and property of any other scheme; and

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(j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and

(k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act; and

(l) report to ASIC any breach of this Act that:

(i) relates to the scheme; and

(ii) has had, or is likely to have, a materially adverse effect on the interests of members;

as soon as practicable after it becomes aware of the breach; and

(m) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the responsible entity by the scheme's constitution.

(2) The responsible entity holds scheme property on trust for scheme members.

Note: Under subsection 601FB(2), the responsible entity may appoint an agent to hold scheme property separately from other property.

(3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1.

(5) A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: Subsection (5) is a civil penalty provision (see section 1317E).

(6) A person must not intentionally or recklessly be involved in a responsible entity's contravention of subsection (1).

601FD Duties of officers of responsible entity

(1) An officer of the responsible entity of a registered scheme must:

(a) act honestly; and

(b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and

(c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and

(d) not make use of information acquired through being an officer of the responsible entity in order to:

(i) gain an improper advantage for the officer or another person; or

(ii) cause detriment to the members of the scheme; and

(e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and

(f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:

(i) this Act; and
(ii) any conditions imposed on the responsible entity's Australian financial services licence; and
(iii) the scheme's constitution; and
(iv) the scheme's compliance plan.

(2) A duty of an officer of the responsible entity under subsection (1) overrides any conflicting duty the officer has under Part 2D.1.

(3) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved.***

Note 2: Subsection (3) is a civil penalty provision (see section 1317E).

(4) A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1).

601GA Contents of the constitution

(1) The constitution of a registered scheme must make adequate provision for:
(a) the consideration that is to be paid to acquire an interest in the scheme; and
(b) the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property; and
(c) the method by which complaints made by members in relation to the scheme are to be dealt with; and
(d) winding up the scheme.

(2) If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:
(a) must be specified in the scheme's constitution; and
(b) must be available only in relation to the proper performance of those duties;

and any other agreement or arrangement has no effect to the extent that it purports to confer such a right.

(3) If the responsible entity is to have any powers to borrow or raise money for the purposes of the scheme:
(a) those powers must be specified in the scheme's constitution; and
(b) any other agreement or arrangement has no effect to the extent that it purports to confer such a power.

(4) If members are to have a right to withdraw from the scheme, the scheme's constitution must:
(a) specify the right; and

(b) if the right may be exercised while the scheme is liquid (as defined in section 601KA)—set out adequate procedures for making and dealing with withdrawal requests; and

(c) if the right may be exercised while the scheme is not liquid (as defined in section 601KA)—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.

The right to withdraw, and any provisions in the constitution setting out procedures for making and dealing with withdrawal requests, must be fair to all members.

Part 5C.6—Members' rights to withdraw from a scheme

601KA Members' rights to withdraw

Withdrawal from schemes that are liquid

(1) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, at any time while the scheme is liquid (see subsection 601GA(4)).

Withdrawal from schemes that are not liquid

(2) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, in accordance with this Part while the scheme is not liquid (see subsection 601GA(4)).

Restrictions on withdrawal from schemes

(3) The responsible entity must not allow a member to withdraw from the scheme:

(a) if the scheme is liquid—otherwise than in accordance with the scheme's constitution; or

(b) if the scheme is not liquid—otherwise than in accordance with the scheme's constitution and sections 601KB to 601KE.

(3A) An offence based on subsection (3) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Liquid schemes

(4) A registered scheme is liquid if liquid assets account for at least 80% of the value of scheme property.

Liquid assets

(5) The following are liquid assets unless it is proved that the responsible entity cannot reasonably expect to realise them within the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid:

(a) money in an account or on deposit with a bank;
(b) bank accepted bills;
(c) marketable securities (as defined in section 9);
(d) property of a prescribed kind.

(6) Any other property is a liquid asset if the responsible entity reasonably expects that the property can be realised for its market value within the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid.

601KB Non-liquid schemes—offers

(1) The responsible entity of a registered scheme that is not liquid may offer members an opportunity to withdraw, wholly or partly, from the scheme 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.

(2) The withdrawal offer must be in writing and be made:
(a) if the constitution specifies procedures for making the offer—in accordance with those procedures; or
(b) otherwise—by giving a copy of the offer to all members of the scheme or to all members of a particular class.

(3) The withdrawal offer must specify:
(a) the period during which the offer will remain open (this period must last for at least 21 days after the offer is made); and
(b) the assets that will be used to satisfy withdrawal requests; and
(c) the amount of money that is expected to be available when those assets are converted to money; and
(d) the method for dealing with withdrawal requests if the money available is insufficient to satisfy all requests.

The method specified under paragraph (d) must comply with section 601KD.

(4) For joint members, a copy of the withdrawal offer need only be given to the joint member named first in the register of members.

(5) As soon as practicable after making the withdrawal offer, the responsible entity must lodge a copy of the offer with ASIC.

601KC Non-liquid schemes—only one withdrawal offer to be open at any time

Only one withdrawal offer may be open at any time in relation to a particular interest in a registered scheme that is not liquid.

601KD Non-liquid schemes—how payments are to be made

The responsible entity of a registered scheme that is not liquid must ensure that withdrawal requests made in response to a withdrawal offer

are satisfied within 21 days after the offer closes. No request made under the withdrawal offer may be satisfied while the offer is still open. If an insufficient amount of money is available from the assets specified in the offer to satisfy all requests, the requests are to be satisfied proportionately in accordance with the formula:

$$\text{Amount of money available} \times \frac{\text{Amount member requested to withdraw}}{\text{Total of all amounts members request to withdraw}}$$

601KE Non-liquid schemes—responsible entity may cancel withdrawal offer

(1) The responsible entity of a registered scheme that is not liquid:

(a) may cancel a withdrawal offer before it closes if the offer contains a material error; or

(b) must cancel a withdrawal offer before it closes if it is in the best interests of members to do so.

(2) The cancellation must be made:

(a) if the constitution specifies procedures for cancelling the withdrawal offer—in accordance with those procedures; or

(b) otherwise—by notice in writing to the members to whom the withdrawal offer was made.

(3) The responsible entity must lodge written notice of the cancellation with ASIC.

650E Right to withdraw acceptance

(1) A person who accepts an offer made under an off-market bid may withdraw their acceptance of the offer if:

(a) the bid is subject to a defeating condition; and

(b) the bidder varies the offers under the bid in a way that postpones for more than 1 month the time when the bidder has to meet their obligations under the bid; and

(c) the person is entitled to be given a notice of the variation under subsection 650D(1).

(2) To withdraw their acceptance, the person must:

(a) give the bidder notice within 1 month beginning on the day after the day on which the copy of the notice of the variation was received; and

(b) return any consideration received by the person for accepting the offer.

(3) A notice under paragraph (2)(a) must:

(a) comply with the conditions specified in regulations made for the purposes of this paragraph; or

(b) if no such regulations are made—be in writing.

(4) To return consideration that includes securities, the person must:

(a) take any actions that are specified in regulations made for the purposes of this paragraph in relation to the return of those securities; or

(b) if no such regulations are made—give the bidder any transfer documents needed to effect the return of the securities.

(5) If the person withdraws their acceptance, the bidder must:

(a) take any actions that are specified in regulations made for the purposes of this paragraph in relation to the withdrawal of acceptance; and

(b) return any documents that the person sent the bidder with the acceptance of the offer;

within 14 days after:

(c) if the person does the things referred to in subsection (2) on the same day—that day; or

(d) if the person does those things on different days—the last of those days.

(6) If under this section a person returns to a company any certificates (together with any necessary transfer documents) in respect of the securities issued by the company, the company must cancel those securities as soon as possible. Any reduction in share capital is authorised by this subsection.

(7) An offence based on subsection (5) or (6) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

652A Withdrawal of unaccepted offers under takeover bid

Unaccepted offers under a takeover bid may only be withdrawn under section 652B or 652C.

652B Withdrawal of takeover offers with ASIC consent

Unaccepted offers under a takeover bid may be withdrawn with the written consent of ASIC. ASIC may consent subject to conditions.

1019G Duration and withdrawal of offers

(1) An offer to which this Division applies cannot remain open more than 12 months after the date of offer.

(2) The offer may be withdrawn by the offeror at any time, but not within 1 month of the date of offer.

(3) The offer may only be withdrawn by the offeror by sending a withdrawal document in printed or electronic form to the offeree in accordance with paragraphs 1019E(1)(a) and (b). The withdrawal document must identify the offeror and be dated.

(4) A purported withdrawal of the offer contrary to subsection (2) or (3) is ineffective.