



HIGH COURT OF AUSTRALIA

5 November 2014

WELLINGTON CAPITAL LTD v AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION & ANOR

[2014] HCA 43

Today the High Court unanimously dismissed an appeal from a decision of the Full Court of the Federal Court of Australia. The High Court held that the responsible entity of a managed investment scheme ("Wellington") was not authorised by the scheme constitution to distribute scheme property *in specie* to unit holders.

Perpetual Nominees Ltd ("Perpetual") was the custodian of the scheme, appointed by Wellington as its agent to hold scheme property on its behalf. On 4 September 2012, Wellington sold assets of the scheme to Asset Resolution Ltd ("ARL") in consideration of the issue of 830,532,768 shares in ARL to Perpetual. The assets disposed of had a publicly stated value of \$90.75 million and represented about 41% of the value of the assets comprising the scheme property. On the same day, Wellington instructed Perpetual to transfer the ARL shares held by Perpetual to the unit holders in the scheme in proportion to the number of units held by each unit holder. That transfer was effected on the following day.

The Australian Securities and Investments Commission commenced proceedings in the Federal Court of Australia challenging the validity of the transfer. Its application was dismissed by the primary judge. The Full Court of the Federal Court allowed an appeal from that decision and made declarations that the *in specie* distribution was beyond the power of Wellington under the scheme constitution and that, by making the distribution, Wellington had contravened s 601FB(1) of the *Corporations Act 2001* (Cth). Section 601FB(1) required Wellington to operate the scheme and perform the functions conferred on it by the scheme's constitution and by the *Corporations Act*.

By grant of special leave, Wellington appealed to the High Court. The High Court dismissed the appeal, holding that the scheme constitution, properly construed, confined the return of capital to specified circumstances and did not authorise Wellington to make an *in specie* distribution of scheme property to unit holders. The High Court also held that the declarations made by the Full Court of the Federal Court were appropriate.

- *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.*