

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v LEWSKI & ANOR (M79/2018);
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v WOOLDRIDGE & ANOR (M80/2018);
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v BUTLER & ANOR (M81/2018);
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v JAQUES & ANOR (M82/2018);
AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v CLARKE & ANOR (M83/2018)

Court appealed from: Full Court, Federal Court of Australia
[2016] FCAFC 96 and [2017] FCAFC 171

Date of judgment: 14 July 2017 & 1 November 2017

Date special leave granted: 18 May 2018

The first respondents in each appeal were at all relevant times directors of Australian Property Custodian Holdings Limited ('APCHL'), the responsible entity ('RE') of a managed investment scheme, the Prime Retirement and Aged Care Property Trust (the 'Trust'). On 19 July 2006, the Board of APCHL resolved to amend the Trust's Constitution to provide for substantial new fees to become payable to APCHL on the occurrence of certain events, including listing on the Australian Stock Exchange ("the Listing Fee"). On 22 August 2006, the Board resolved ("the Lodgement Resolution") to lodge with the appellant ("ASIC") a consolidated Constitution incorporating the amendments so that they would become effective pursuant to s 601GC(2) of the *Corporations Act 2001* (Cth) ("the Act"). On 23 August a consolidated Constitution incorporating those amendments was lodged with ASIC. On 3 August 2007, the Trust units were officially listed on the ASX. Over the period from 26 June 2007 to 27 June 2008 the Listing Fee of about \$33 million was paid out of scheme property to APCHL and then to entities associated with Lewski (the first respondent in M79/2018).

In August 2012 ASIC commenced civil penalty proceedings against APCHL and each of the directors ('the Directors'). ASIC could not plead, or rely on, the 19 July 2006 conduct to found any contraventions under the Act because it was time-barred by s 1317K from doing so. ASIC's case contained three broad elements. The first attacked the validity of the amendments, on the basis that the RE had not formed the opinion required by s 601GC(1)(b), which would enable it to amend the constitution without allowing members the chance to vote on it by special resolution. The second part of ASIC's case alleged breaches of duty under ss 601FC and 601FD, by APCHL and the directors, in the making of the Lodgement Resolution and the various decisions to make the payments. The third part of ASIC's case invoked s 208 which provides that an RE must not give itself a benefit from scheme funds without member approval. ASIC alleged that APCHL contravened that section by payment of the Listing Fee and that each director was involved in the contravention and thereby contravened s 209(2).

The trial judge (Murphy J) found that all contraventions alleged by ASIC had been established and imposed pecuniary penalties on each director, and

disqualification orders on all of them except Clarke. Each of the directors appealed to the Full Court (Greenwood, Middleton & Foster JJ). They submitted that the trial judge had erred in concluding that the contraventions occurred in the passing of the Lodgement Resolution on 22 August 2006. Rather, the resolution to amend the Constitution made on 19 July 2006 was the conduct which bound the directors to a certain course. It therefore rendered the Lodgement Resolution on 22 August 2006 an uncontroversial act of an administrative nature, which involved no contravention of the Act.

The Full Court first observed the impact of the statutory time limit in s 1317K of the Act. As accepted by the parties, it prevented ASIC from relying solely on the conduct of the Directors on 19 July 2006 as the basis for an application for declarations or orders. The Full Court noted that the question posed on appeal was whether the trial judge had correctly characterised the nature of the conduct of the Directors on 22 August 2006. The question was to determine what the issue for decision was on 22 August 2006, and then, what considerations became relevant to the making of that decision and what responsibilities were upon each director. This enquiry depended upon an analysis of the type of transaction involved at the meeting on 22 August 2006, the context of the transaction at that meeting, and the procedure undertaken in respect of the transaction to determine the scope of the responsibilities of the directors at that time.

The Full Court noted that matters taken into consideration by the trial judge all related to 19 July 2006 considerations. The trial judge in effect ignored the fact that the Directors had in fact made a resolution on 19 July 2006, and although accepting the Directors believed on 22 August 2006 the resolutions were valid, required them to address them again. The trial judge saw the two meetings as '*part of the same course of conduct*', although each meeting had its own purpose. The importance of failing to distinguish the purpose of the two meetings led the trial judge into error by failing to consider each breach alleged in proper context. His Honour made similar errors in considering the duty to act honestly and in the best interests of the members.

The Court noted that the Directors had already considered the amendments on 19 July 2006: it was not contended otherwise by ASIC. The same consideration was not necessary on 22 August 2006. The Court considered that on 22 August 2006, the circumstances surrounding the decision to be made were very different then to those confronting the same Directors on 19 July 2006. Significantly, the Constitution had been purportedly amended, giving APCHL the mandate to pay the relevant fees. On this basis, provided APCHL acted in accordance with the purported amended Constitution (and there was no suggestion it did not), it was entitled to act in the way it did.

On the basis of the above analysis, the Full Court found that the trial judge fell into error and should not have concluded that any of the Directors breached the duties alleged by ASIC.

The grounds of the appeal include:

- The Full Court erred in finding that Part 5C.3 of the *Corporations Act 2001* (Cth) contains a concept of “interim validity” whereby, if the responsible entity of a registered scheme executes a deed purporting to modify the constitution of the scheme but fails to form the opinion necessary under s 601GC(1)(b) to give it the power to do so, the responsible entity becomes bound to lodge a copy of that modification with ASIC, and upon such lodgement the constitution of the registered scheme operates as so modified for all purposes under Part 5C.3 unless and until a Court sets the modification aside.

The second respondent (APCHL) has filed a submitting appearance in each appeal. The first respondent in M83/2018 (Clarke) has also filed a submitting appearance.

The first respondent in each appeal, save for the respondent Clarke in M83/2018, has filed a summons seeking leave to file a Notice of Contention which alleges that the Full Federal Court erred in holding that a member’s right to have a managed investment scheme administered according to its terms was a members’ right within the meaning of s 601GC(1)(b) of the *Corporations Act 2001* (Cth).