WELLINGTON CAPITAL LTD v AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION & ANOR (S275/2013)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 52

Date of judgment: 28 May 2013

Special leave granted: 8 November 2013

Wellington Capital Ltd ("Wellington") is the Responsible Entity of a managed investment scheme, the Premium Income Fund ("the Fund"). Such schemes are subject to the requirements of Chapter 5C of the *Corporations Act* 2001 (Cth) ("the Act"). The Fund is also governed by its own constitution ("the constitution"). Clause 13.1 of the constitution relevantly provides that the Responsible Entity has all powers legally possible for a corporation as if it were the absolute owner of the Fund's property and acting in its personal capacity. Clause 13.2.5 of the constitution relevantly provides that the Responsible Entity has power to dispose of or otherwise deal with the Fund's property as if it were the absolute and beneficial owner. Section 601FC(2) of the Act however provides that a responsible entity holds scheme property on trust for scheme members. The Fund's members are its unit holders.

In September 2012 Wellington sold 41% of the Fund's assets, receiving as payment all of the issued shares in Asset Resolution Ltd ("ARL"). Wellington then transferred those shares to the Fund's unit holders (without their consent) in proportion to their respective unit holdings ("the Transfer"). The First Respondent ("ASIC") applied to the Federal Court for declarations that the Transfer had contravened both the constitution and the Act.

On 17 October 2012 Justice Jagot dismissed ASIC's application. Her Honour found that clauses 13.1 and 13.2.5 of the constitution conferred power on Wellington to carry out the Transfer. Justice Jagot held that clause 13.1 picked up the power in s 124(1)(d) of the Act to "distribute any of the company's property among the members, in kind or otherwise". Her Honour found that because the unit holders were bound by the constitution, they could be taken to have agreed to become members of ARL for the purposes of s 231 of the Act.

On 28 May 2013 the Full Court of the Federal Court (Jacobson, Gordon & Robertson JJ) unanimously allowed ASIC's appeal. Their Honours held that the constitution must be viewed through the prism of trust law, as Wellington held the Fund's property on trust pursuant to s 601FC(2) of the Act. The Full Court found that "members" in s 124(1)(d) of the Act meant only members of a company, not members of a managed investment scheme. Their Honours held that clause 13.2.5 of the constitution addressed Wellington's power (as trustee) to deal with commercial parties in respect of the Fund's property. It did not override the Act. The Full Court then declared that Wellington, by making the Transfer, had operated the Fund in contravention of both the Act and the constitution, thereby contravening s 601FB(1) of the Act.

On 29 January 2014 the Appellant filed a summons, seeking leave to rely upon an amended notice of appeal. The grounds of that amended notice of appeal include:

- The Full Court erred in holding that clauses 13.1 and 13.2.5 of the Constitution of the Fund did not authorise the Appellant to make an in specie distribution of the shares in ARL to the unit holders of the Fund.

- The Full Court erred in failing to hold that the unit holders of the Fund to whom the ARL shares were distributed became members of ARL at that time having prospectively assented to becoming members, for the purposes of s 231(b) of the Act, by acquiring units in the Fund.