

1 IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY  
ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF  
AUSTRALIA



No: M80 of 2018

BETWEEN:

**AUSTRALIAN SECURITIES &  
INVESTMENTS COMMISSION**

Appellant

and

10 **DR MICHAEL RICHARD LEWIS WOOLDRIDGE**  
First Respondent

**AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED  
ACN 095 474 436 (RECEIVERS AND MANAGERS APPOINTED)  
(IN LIQUIDATION) (CONTROLLERS APPOINTED)**  
Second Respondent

No: M81 of 2018

20 BETWEEN:

**AUSTRALIAN SECURITIES &  
INVESTMENTS COMMISSION**

Appellant

and

**MARK FEDERICK BUTLER**  
First Respondent

**AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED  
ACN 095 474 436 (RECEIVERS AND MANAGERS APPOINTED)  
(IN LIQUIDATION) (CONTROLLERS APPOINTED)**  
Second Respondent

No: M82 of 2018

30 BETWEEN:

**AUSTRALIAN SECURITIES &  
INVESTMENTS COMMISSION**

Appellant

and

**KIM SAMUEL JAQUES**  
First Respondent

40 **AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED  
ACN 095 474 436 (RECEIVERS AND MANAGERS APPOINTED)  
(IN LIQUIDATION) (CONTROLLERS APPOINTED)**  
Second Respondent

Dated: 17 October 2018

Filed on behalf of the First Respondents by:

**DLA Piper Australia** (Kim Jaques)  
140 William Street, Melbourne VIC 3000

Tel: 03 9274 5118  
Email: Jane.Coventry@dlapiper.com  
Reference: 03151246-521208

**SBA Law** (Dr Michael Wooldridge)  
Level 13, 607 Bourke Street, Melbourne  
Victoria 3000

Tel: 039614 7000  
Email: agreen@sbalaw.com  
Ref: Andrew Green

**Millens Pty Ltd** (Mark Butler)  
62 Whitehorse Road, Deepdene VIC 3103

Tel: 03 9817 6530  
Email: khanslow@millens.com.au  
Ref: KJH 141289

## FIRST RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

1

### Introductory Matters

1 Dr Wooldridge, Mr Butler and Mr Jaques adopt their written submissions and the written and oral submissions of Mr Lewski on Grounds 1 and 2. Thus, the only matters are to be addressed orally are the Notice of Contention and Ground 3.

### Notice of Contention

10

2 The rights and liabilities in the Constitution (**Book of Further Materials**<sup>1</sup> p.26), are variable depending upon the state of the Constitution from time to time.

3 The Supplemental Deed (**BFM pp.17 to 21**) did not change *any right* of, or confer *any right* upon, the unit holders.

20

4 As held by the trial judge (at [665] **Joint Appeal Book**<sup>2</sup> at p. 210) in an unchallenged finding, the directors relied on the Madgwicks advice (**BFM pp.4 to 8**) that the recent case law indicated that the Amendments would not adversely affect members' rights but at most they would affect the value of the units. As the trial judge observed (at [661] **JAB** at p. 209), this meant, in effect, that the directors were advised that they did not need to consider the members' entitlements to APCHL's services as RE for the fees provided in the existing constitution as those were not members' rights under section 601GC(1)(b).

5 Referring to and applying *360 Capital*<sup>3</sup> the trial judge (at [657]-[658] **JAB 1 p.208 to 209**) and Full Court (at [226]-[235] **JAB 2 p.580 to 581**) held that the Amendments' adversely affected the members' right to have the scheme administered according to its terms.

30

6 It is a fundamental right of each member to have the managed investment scheme administered according to the constitution of the scheme in its particular state.<sup>4</sup>

7 The proper understanding of the right is the right of the member to have the managed investment scheme managed in accordance with the constitution of the scheme *as it exists from time to time*.

8 For the directors to succeed in relation to this point, it is necessary for this Court to dissent from the view of the Court of Appeal of Victoria in *360 Capital*, which approach found favour with the Full Court below.

40

9 *360 Capital* (**JBA 1 p.156**) was incorrect insofar as it framed the issue by reference to the overarching right to have the scheme administered according to its terms.<sup>5</sup>

---

<sup>1</sup> Described hereafter as the "BFM".

<sup>2</sup> Described hereafter as the "JAB".

<sup>3</sup> *360 Capital Re Ltd v Watts* (2012) 36 VR 507 (**JBA 1, p.156**).

<sup>4</sup> See *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at 434A per Lord Brown-Wilkinson. It is a logical entailment of what this Court said in *Youyang Pty Ltd v Minter Ellison* (2003) 212 CLR 484 at [32] as perhaps the trustees most important duty – to obey the terms of the trust.

50

<sup>5</sup> The rights that were under consideration in *360 Capital* were the rights articulated specifically in clause 5 of that constitution. The proper analytical comparator in both *Premium Income* and *360 Capital* was not a global overarching right to have the scheme administered according to its terms, but the existing right that was affected in each case.

1 The correct framework for analysis was the effect of the amendment on the underlying contractual or articulated right rather than its effect on the overarching right to have the scheme administered according to its terms.<sup>6</sup> The Court of Appeal's reasoning at [45]<sup>7</sup> needs to be read in a context where the right to administration of the scheme is necessarily addressed to the state of the constitution *as it stands at the time* the Responsible Entity is evaluating an act or proposed act against it.

10 The approach adopted by Gordon J at [33] in *Premium Income*<sup>8</sup>, is correct (**JBA 2 p. 607**). Applying that staged approach, the amendments in question did not affect the rights of the members. The consequence of that conclusion is that each of the three grounds of appeal must fail.

### Ground 3

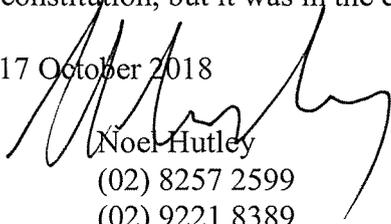
11 Section 601LC of the *Corporations Act* (**JBA 1, p.107**) seeks to ensure that the provision of financial benefits by the responsible entity are the subject of member approval. Member approval of a financial benefit can occur in one of two ways:<sup>9</sup> section 208(1)(d) or alternatively by section 208(3).

20 12 In respect of section 208(1)(d) the absence of member approval is an element of the contravention. The equivalent alternative mode of member approval - that is a statutory contract - should not be construed as giving rise to a different obligation of proof. This was recognised by the Full Court at [320] (**JAB 2 p.605**).

13 Section 208(1)(e) the field of exceptions to which the section applied. In section 208(3) the threshold language of "does not prevent" is used. The deliberate use of threshold language suggests that rather than being an exception, section 208(3) is a gateway that ASIC must pass through in order to establish the liability of APCHL and derivatively the liability of the directors.

30 14 ASIC would have this Court require the directors to go beyond the constitution as lodged so that they would not only have to establish that the fee was in the constitution, but it was in the constitution by lawful and effective means.

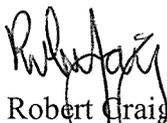
Dated: 17 October 2018

  
Noel Hutley

(02) 8257 2599

(02) 9221 8389

nhutley@stjames.net.au

  
Robert Craig

(03) 9225 8410

rcraig@vicbar.com.au

<sup>6</sup> The rights that were under consideration in *360 Capital* were the rights articulated specifically in clause 5 of that constitution. The proper analytical comparator in both *Premium Income* and *360 Capital* was not a global overarching right to have the scheme administered according to its terms, but the existing right that was affected in each case.

<sup>7</sup> "Given a member has a right to have the scheme conducted according to the scheme's constitution, a change to the constitution must inevitably change the nature and quality of that right".

<sup>8</sup> *Premium Income Fund Action Group Incorporated and Another v Wellington Capital Limited and Ors* (2011) 84 ACSR 600 (**JBA 2, p.597**).

<sup>9</sup> Unless one of the exceptions set out in section 208(1)(e) applies.