

**WESTFIELD MANAGEMENT LTD v AMP CAPITAL PROPERTY  
NOMINEES LTD & ANOR (S181/2012)**

Court appealed from: New South Wales Court of Appeal  
[2011] NSWCA 386

Date of judgment: 14 December 2011

Special leave granted: 22 June 2012

The KSC Trust (“the Trust”) is a managed investment scheme registered under Part 5C.1 of the *Corporations Act* 2001 (Cth) (“the Act”). Its trustee is AMP Capital Investors Ltd (“AMPCI”). The Trust is solvent and its principal asset is the Karrinyup Regional Shopping Centre (“the shopping centre”) in Perth. The unitholders of the Trust are Westfield Management Ltd as trustee for the Weststart Trust (“Westfield”) and AMP Capital Property Nominees Ltd (“AMPCN”) as nominee of UniSuper Ltd as trustee for the UniSuper superannuation fund (“UniSuper”). Westfield holds one-third of the units and UniSuper holds two-thirds. AMPCI, AMPCN, UniSuper and Westfield are also parties to a joint venture agreement (“the Agreement”). Clause 10.1(a) of the Agreement provides that the shopping centre not be sold without the written consent of the unitholders. Clause 16.2 requires the unitholders to exercise their voting rights under the Trust Deed so as to most fully give effect to the Deed’s provisions. In August 2011 AMPCI (at the request of AMPCN) scheduled a meeting under s 601NB of the Act for the unitholders to vote on an extraordinary resolution for the Trust to be wound up. Under the Act, such a resolution can be passed by the votes of holders of at least 50% of the units. Westfield commenced proceedings to restrain UniSuper and AMPCN from voting on the winding-up resolution (in contravention of the Agreement).

On 1 September 2011 Justice Ward granted an injunction, ordering UniSuper and AMPCN not to vote for the extraordinary resolution without Westfield’s prior written consent. His Honour found that a winding up of the scheme would lead to the sale of the shopping centre, without the consent of all unitholders. Such a circumstance would breach clause 16.2 of the Agreement with respect to clause 10.1(a). Justice Ward held that the restrictions set out in the Agreement were not inconsistent with the policy underlying s 601NB of the Act. This was in light of AMPCN and UniSuper having other avenues by which to exit the scheme or to apply for its winding up without Westfield’s consent.

On 14 December 2011 the Court of Appeal (Giles, Campbell & Meagher JJA) unanimously allowed an appeal by UniSuper and AMPCN. Their Honours found that clause 10.1(a) of the Agreement should be construed to apply only during the life of the scheme. It does not apply to the termination of the Trust and the consequent sale of assets. The Court of Appeal therefore held that clause 16.2 did not prevent AMPCN and UniSuper from voting in favour of winding up the Trust without Westfield’s consent.

The ground of appeal is:

- The Court of Appeal erred in holding that it would not be a breach of clause 16.2 of the Agreement for a unitholder to exercise its voting power to direct a winding-up of the Trust if that would inevitably lead to a sale of the shopping centre without the written consent of all of the unitholders.

On 12 July 2012 the Respondent filed a notice of contention, the grounds of which include:

- The Court of Appeal ought to have held that the rights given to members of a registered managed investment scheme pursuant to Part 5C.9 of the Act, particularly the right conferred by s 601NB to vote in favour of a winding-up of the scheme, were rights powers and remedies which, in terms of clause 18 of the Agreement, were rights, powers and remedies provided by law independently of the Agreement, and not excluded by it.