HIGH COURT OF AUSTRALIA

FRENCH CJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

WESTFIELD MANAGEMENT LIMITED AS
TRUSTEE FOR THE WESTART TRUST APPELLANT

AND

AMP CAPITAL PROPERTY NOMINEES LIMITED
AS NOMINEE OF UNISUPER LIMITED IN ITS
CAPACITY AS TRUSTEE OF THE COMPLYING
SUPERANNUATION FUND KNOWN AS
UNISUPER & ANOR RESPONDENTS

Westfield Management Limited v AMP Capital Property Nominees Limited
[2012] HCA 54
5 December 2012
S181/2012

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with J Potts and J Hewitt for the appellant (instructed by Speed and Stracey Lawyers)

D F Jackson QC with M I Borsky and W A D Edwards for the respondents (instructed by Allens Lawyers)

CATCHWORDS

Westfield Management Limited v AMP Capital Property Nominees Limited

Contract law – Interpretation – Unitholders' agreement prohibited sale of trust property without unitholders' prior written consent – Whether prohibition on sale without consent fettered unitholder's right to vote for extraordinary resolution to wind up managed investment scheme under s 601NB of the *Corporations Act* 2001 (Cth).

Corporations law – Managed investment scheme – Trust registered as managed investment scheme under Ch 5C of the *Corporations Act* – Injunction obtained restraining majority unitholder from voting for extraordinary resolution to direct winding up of managed investment scheme under s 601NB of the *Corporations Act* without minority unitholder's consent – Minority unitholder alleged vote would contravene prohibition in unitholders' agreement – Whether unitholder's statutory right to vote under s 601NB can be fettered by contractual agreement.

Words and phrases – "extraordinary resolution directing the responsible entity to wind up the scheme", "managed investment scheme", "wind up".

Corporations Act 2001 (Cth), Ch 5C, s 601NB.

1 FRENCH CJ, CRENNAN, KIEFEL AND BELL JJ. The KSC Trust ("the Trust") is a managed investment scheme which is registered under Ch 5C of the *Corporations Act* 2001 (Cth). AMP Capital Investors Limited ("AMPCI") (formerly AMP Henderson Global Investors Limited) is the responsible entity of the scheme and the trustee of the Trust, which was constituted under a trust deed dated 23 March 1994 ("the Trust Deed"). The appellant, Westfield Management Limited ("Westfield") (in its capacity as trustee for the Westart Trust), and the first respondent, AMP Capital Property Nominees Limited ("AMPCN") (as nominee of the second respondent, UniSuper Limited), are unitholders of the Trust and members of the registered scheme[1]. Westfield holds one-third of the units and AMPCN the remaining two-thirds.

2 On 29 March 1994, the initial unitholders and the responsible entity entered into a Unitholders' and Joint Venture Agreement ("the Agreement"), which was varied on 30 October 2000[2]. The focus of this appeal is upon the terms of the Agreement.

3 On 10 August 2011, AMPCI as the responsible entity issued a notice of meeting of the unitholders of the Trust to consider a proposed extraordinary resolution directing the responsible entity to wind up the scheme. The notice followed a request made by AMPCN for the calling of that meeting. Section 601NB of the *Corporations Act* provides:

> "If members of a registered scheme want the scheme to be wound up, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme."

4 A responsible entity is obliged to call and arrange to hold a meeting of the members of a scheme to consider and vote on a proposed extraordinary resolution at the request of, inter alia, members having at least five per cent of the votes that may be cast on the resolution[3]. For the resolution to pass, at least

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1 In these reasons the terms "unitholders" and "members" are used interchangeably.

2 In 1994 and 2000, the unitholders were entities other than Westfield and AMPCN. When these companies later became unitholders, they both acceded to the terms of the Agreement by deeds dated 30 January 2008.

3 *Corporations Act* 2001 (Cth), s 252B(1).

50 per cent of the members who are entitled to vote on the resolution must vote in favour of it[4].

5 AMPCN would be in a position to carry the resolution at such a meeting due to the size of its unitholding. The effect of the winding up of the scheme and subsequent termination of the Trust, pursuant to the Trust Deed (cl 17.5), is that its property would be sold. The sole property held by the Trust is the Karrinyup Shopping Centre in Perth, Western Australia ("the Property"[5]).

6 Westfield sought and obtained an injunction from the Supreme Court of New South Wales, in terms preventing the respondents from voting for the extraordinary resolution notified, without the prior consent of Westfield to the sale of the Property[6]. Two key provisions of the Agreement that were identified by Westfield in connection with its application for an injunction are cll 10.1(a) and 16.2:

> "10.1
>
> (a) [AMPCI], in its capacity as responsible entity of the KSC Trust, shall not sell the Property or any substantial part thereof, without the written consent of the Unitholders."
>
> "16.2 Each and all of the Unitholders mutually agree that they will so exercise their respective voting rights as unitholders under the Trust Deed so as to most fully and completely give effect to the intent and effect of the provisions of this deed."

7 Westfield argued that the Agreement, properly construed, precludes a unilateral winding up of the Trust because this would result in a sale of the Property without the consent of all unitholders, contrary to cl 10.1(a). Clause 16.2, read in conjunction with cl 10.1(a), was said to operate to preclude a unitholder from voting for a winding up if it would cause a sale lacking that consent.

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4 *Corporations Act* 2001, s 9 (par (b) of the definition of "extraordinary resolution").

5 The Agreement, cl 30.1, also defines the "Property" to include the Karrinyup Shopping Centre.

6 *Westfield Management Ltd v AMP Capital Nominees Ltd* (2011) 255 FLR 1 at 27 [133] per Ward J.

8 The primary judge, Ward J, held that an exercise by AMPCN of its voting rights in favour of the proposed extraordinary resolution would be a breach of cl 16.2[7]. The Court of Appeal allowed an appeal from her Honour's decision. Meagher JA, with whom Giles and Campbell JJA concurred[8], agreed with the primary judge that the terms of cl 10.1(a) do not prohibit a sale by the responsible entity of the Property in accordance with an obligation arising on a winding up of the scheme following a resolution of scheme members[9]. However, Meagher JA held that cl 16.2, read in conjunction with cl 10.1(a), did not prevent AMPCN from exercising its voting rights in favour of a resolution to wind up the Trust. Clause 16.2 requires only that effect be given to cl 10.1(a)[10].

The issues

9 Westfield argues that the Court of Appeal fell into error in focusing upon cl 10.1(a) because to construe the "intent and effect of the provisions of [the Agreement]", to which unitholders are required to give effect under cl 16.2, requires consideration of the Agreement as a whole. The Agreement is said to reveal purposes which are opposed to the sale of the Property and to the exercise by members of the scheme of their voting rights under s 601NB where it has that result. The respondents, by notice of contention, contend that if that be the correct construction of the Agreement, then cl 16.2 is unenforceable as being inconsistent with Ch 5C of the *Corporations Act*, in particular, s 601NB.

Chapter 5C – its history

10 The *Managed Investments Act* 1998 (Cth) was enacted following a review by the Australian Law Reform Commission and the Companies and Securities Advisory Committee ("the Review") of the legal framework for prescribed

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7 *Westfield Management Ltd v AMP Capital Nominees Ltd* (2011) 255 FLR 1 at 26 [132].

8 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [1]-[2].

9 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [44].

10 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [49], [52].

interests and collective investment schemes[11]. The prescribed interest provisions were contained in the *Companies Act* 1981 (Cth)[12] and were maintained in 1991 in the Corporations Law[13].

11 The background to the Review was the collapse or closure of many property trusts in the late 1980s, following a severe decline in commercial property values, which led to a loss of investor confidence[14]. Amongst the issues which the Review addressed were the protection of investors and the termination of investment schemes. The Review recommended that "[i]f a sufficient majority of investors wish to terminate a scheme, they should be able to do so" and that investors should be able to terminate a collective investment scheme for any reason[15]. It noted that under the law then current, only a trustee could convene a meeting at which investors could consider whether a scheme should be wound up and then only if one of three events had occurred[16]. It is not necessary to detail them. Further, a winding up required the approval of a court[17].

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11 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report No 65, (1993).

12 Part IV, Div 6, applying in the Australian Capital Territory of its own force, and in the States and the Northern Territory by the *Companies (New South Wales) Code*, *Companies (Victoria) Code*, *Companies (South Australia) Code*, *Companies (Queensland) Code*, *Companies (Western Australia) Code*, *Companies (Tasmania) Code* and *Companies (Northern Territory) Code*.

13 Part 7.12, Div 5 of the Corporations Law, contained in s 82 of the *Corporations Act* 1989 (Cth).

14 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report No 65, (1993), vol 1 at [1.5].

15 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report No 65, (1993), vol 1 at [8.5].

16 Corporations Law, s 1074.

17 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report No 65, (1993), vol 1 at [8.2].

12 The *Managed Investments Act* repealed the pre-existing prescribed interest provisions and inserted Ch 5C into the Corporations Law. The abovementioned recommendation of the Review was taken up in s 601NB, which is now s 601NB of the *Corporations Act*. The section, it will be observed, does not require that a ground for winding up be shown by a scheme member who initiates the call for a meeting. It provides simply that a scheme may be wound up following the resolution of scheme members.

13 Section 601GA(1)(d), in Ch 5C of the *Corporations Act*, provides that the constitution of a registered scheme must make adequate provision for winding up the scheme. By s 601NA, the constitution of a registered scheme may provide that it is to be wound up at a specified time or in specified circumstances or on the happening of a specified event, with the qualification that a provision which purports to provide that a scheme is to be wound up if a particular company ceases to be a responsible entity is of no effect.

14 Two further provisions of Pt 5C.9 should be mentioned. Section 601NC provides that a responsible entity may, on notice to the members of the scheme and the Australian Securities and Investments Commission, take steps to wind up the scheme if it considers that the purpose of the scheme has been accomplished or cannot be accomplished. Section 601ND(1) provides that a court may direct a responsible entity to wind up a scheme if: (a) the court thinks it is just and equitable to make the order; or (b) execution or other process is issued on a judgment in favour of a scheme creditor and it is returned unsatisfied within a certain time. Circumstances which are comprehended by sub-s (1)(a) may include those where a scheme is being conducted in a manner oppressive to the interests of some unitholders, or where the scheme is not able to operate; whereas sub-s (1)(b) would apply in a case of potential insolvency. Section 601NB, it may further be observed, does not require the involvement of a court.

15 The respondents contend that the right conferred by s 601NB is twofold: to have a meeting called to consider a resolution to wind up the scheme and then to vote on that resolution at the meeting. It is said that it is a statutory right conferred on all members of a registered scheme and that it ought to be regarded as one of a number of members' rights which the *Corporations Act* entrenches. The respondents point to the purpose of Ch 5C as protective of investors and to the further policy of s 601NB of facilitating the winding up of registered schemes by providing a simple and economical path to termination.

The Agreement

16 The recitals to the Agreement acknowledge that the Trust is a managed investment scheme under the Corporations Law. The purpose of the Agreement

is said to be to record the arrangements between the unitholders in relation to the Trust (cl 1.4). The Agreement constitutes the whole agreement between the parties (cl 1.5). In the event of any inconsistency between the Trust Deed and the Agreement, the latter is to prevail (cl 30.4).

17 The Agreement makes provision for the transfer of units and restricts the sale, assignment, transfer, conveyance or other disposition of units in the Trust except as authorised by the three clauses which follow (cl 3). In particular, there is a limited class of approved transferees specified to whom a unitholder may transfer units as of right (cl 5.1). The Agreement provides rights of pre-emption to the other unitholders (cl 6.1). It requires that for any transfer to an outsider to be effective, the transferee must have agreed to assume all the obligations of the transferor under the Agreement and to have covenanted in writing with the other unitholders to that effect (cl 6.6(a)). Westfield relies upon such provisions, among others, as disclosing an objective intention, on the part of the unitholders, to regulate a closely held unit trust business structure, a proposition with which the Court of Appeal agreed[18].

18 A unitholders' committee is established under the Agreement (cl 7.1). It is required to conduct meetings in accordance with Sched 2 to the Agreement (cl 7.3), which provides, inter alia, that committee members are entitled to vote on any resolution considered by the committee. The percentage of the total vote required for the passing of a resolution depends upon the subject matter of the resolution. A valid resolution of the unitholders' committee is said to be binding on all unitholders (Sched 2, par 13). The responsible entity is obliged to act in accordance with resolutions of the committee (cl 7.5).

19 The unitholders' committee has the responsibility of making determinations on substantive issues concerning the management of the Trust, including proposals and recommendations concerning the acquisition, disposal, management or development of the Property (cl 7.4). The "Property" is defined as the Karrinyup Shopping Centre, including any land subsequently acquired by the Trust and intended to be held and used as part of the Property from time to time. This was seen by the primary judge as supporting Westfield's submission

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18 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [51].

that the purpose of the scheme was the acquisition and operation of the shopping centre[19].

20 Clause 9 is lengthy and deals with the redevelopment and refurbishment of the Property. It recognises that it may be difficult to determine in advance when it may be in the interests of unitholders to redevelop or refurbish the Property (cl 9.1). One of the circumstances in which the unitholders and the responsible entity are to consider the desirability of redevelopment or refurbishment is when the responsible entity forms the reasonable opinion that the Property has ceased to be economically advantageous. Westfield points to provisions such as this as suggesting an intention that the Trust continue for a lengthy period.

21 Clause 10 is entitled "Sale of Property and acquisition of additional investments". Clause 10.1(a) is set out above[20]. It is directed to the responsible entity and prohibits it from selling the Property without the written consent of the unitholders. Clause 10.1(b) provides that on completion of the sale of the Property, or any remaining part of it, the responsible entity is to determine the Trust unless otherwise directed by the unitholders. Clause 10.2 is also directed to the responsible entity. It provides that the responsible entity shall not acquire any investments other than the Property, or for the short term investment of funds, without the written consent of the unitholders.

22 Westfield referred in its submissions to aspects of cl 12, which deals with the consequences of the failure of a unitholder to subscribe for units when obliged by the terms of the Agreement to do so (cl 12.1(a)). In particular, cl 12.5 provides that the unitholders not in default may determine whether the Property should be sold (cl 12.5(a)(i)). If they do decide that the Property is to be sold, the responsible entity is then to determine the Trust (cl 12.5(b)(i)). Westfield identifies the power given to the innocent unitholders by cl 12.5 as something of an exception to the prohibition upon sale absent the written consent of all unitholders in cl 10.1(a) and in that sense, Westfield supports cl 10.1(a) as a general prohibition.

23 Clause 13 of the Agreement provides for events of termination. It provides that unless the unitholders otherwise unanimously agree, the Agreement terminates on the earlier of: (a) the later of the date on which the Trust is

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19 *Westfield Management Ltd v AMP Capital Nominees Ltd* (2011) 255 FLR 1 at 5 [16].

20 At [6].

terminated or the assets of the Trust are realised; (b) the date that a new deed is entered into in lieu of the Agreement; and (c) the date that any unitholder's group becomes the sole holder of all units issued in the Trust.

24 For their part, the respondents refer to cl 18 of the Agreement, which, they say, makes it difficult to conclude that it was intended by the parties to the Agreement to exclude or control rights given by s 601NB. Clause 18 provides:

> "The rights, powers and remedies provided in this deed are cumulative with and not exclusive of the rights, powers or remedies provided by law independently of this deed."

The construction of the Agreement

25 Clause 16.2 in its terms obliges unitholders to exercise their voting rights in a way which would give effect "to the intent and effect of the provisions of [the Agreement]". The only provision of the Agreement identified by Westfield as directly referable to the voting rights sought to be exercised by AMPCN is cl 10.1(a), which Westfield construes as a general prohibition on sale, absent the consent of all unitholders.

26 Westfield acknowledges that it must of necessity rely upon cl 10.1(a) to give context to the obligation in cl 16.2 and that it must, in effect, synthesise those provisions. But its argument on the appeal travels beyond cl 10.1(a). It looks to the broader scope of the Agreement in an attempt to find a purpose to which it may be said these provisions, and cl 10.1(a) in particular, are directed. However, Westfield eschews an approach which would imply a term in either provision obliging unitholders to vote against a sale, or a winding up which would result in a sale. Rather, its search is said to be, by a process of construction, for "the intent and effect" of the Agreement, which may further elucidate cl 10.1(a).

27 Westfield submits that more is required than a consideration of the terms of cl 10.1(a) itself and that the Court of Appeal was wrong to focus attention upon that provision. The duty of a court in construing a written contract is to endeavour to discover the intention of the parties from its words and this requires consideration of the whole of the agreement between them[21].

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21 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 per Gibbs J; [1973] HCA 36.

28 Clause 16.2, Westfield submits, is an express agreement by the unitholders that, in the exercise of their voting rights, they will act conformably with the commercial purpose of the Agreement. The commercial purpose of the Agreement, it submits, can readily be ascertained from its provisions.

29 Westfield repeats its submission, made to the Court of Appeal, that the joint venture may be seen to provide for a closely held unit trust designed for the ownership and operation of a major retail centre. So much may be accepted. The Agreement contains provisions, referred to above, restricting the transfer of units, providing for rights of pre-emption and obliging any new unitholder to accept obligations arising under the terms of the Agreement. The Trust's only asset is the Property and the Agreement makes detailed provision for its management, control and operation, through the unitholders' committee. But, as the Court of Appeal observed, acceptance of these facts does not answer the question as to the construction of cll 10.1(a) and 16.2 and their operation in the situation of a proposed resolution under s 601NB[22].

30 The intention which Westfield strives to discover amongst the provisions of the Agreement is one that the Property be held, and the Trust endure, for a long time[23]. To this end it relies upon the abovementioned provisions by which a unitholder can realise an investment in the Trust, should it wish to do so. It says that it may be discerned that the intent and effect of the Agreement is that each unitholder will realise its investment in a way not destructive of the venture and not by the sale of the Property unless agreed to by all the unitholders. Westfield also points to the extensive provisions concerning the management and holding of the Property through the unitholders' committee and, in particular, to the provisions relating to the redevelopment and refurbishment of the Property at some time in the future, as indicating that it was intended that the Property be held for a long time.

31 Provisions such as those in the Agreement may be taken to reflect an understanding that the Property might be held, and the Trust endure, for a lengthy

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22 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [51].

23 A trust cannot continue indefinitely: *Corporations Act* 2001, s 1346. The Review's recommendation (Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report No 65, (1993), vol 1 at [8.3]) that the rule against perpetuities not apply to schemes was not taken up.

period. That may have been thought likely at the time the Agreement was drawn. In any event, it was prudent that provision be made for refurbishment and redevelopment in that eventuality. But it is a long step from that understanding to a conclusion that the unitholders intended to bind themselves to retain the Property and preserve the Trust for an indefinite period. Particularly is this so when the Agreement makes no mention of any restriction on the unitholders' rights to bring about a termination of the Trust.

32 Westfield points out that the Agreement is silent as to what is to occur in the event of a sale. Had a sale of the Property been contemplated as a possibility, Westfield says, one would have expected to see provisions as to its timing, the terms of the appointment of a selling agent and the like. However, any such provisions would be mere machinery provisions. Their absence says nothing about the subject of sale, let alone anything about a restriction upon a unitholder's right to vote for the termination of the scheme, which would bring about a sale.

33 Westfield also points to provisions of the Agreement which permit innocent unitholders to sell the Property when a unitholder is in default. As previously mentioned, Westfield sought to characterise this power to sell as an exception to cl 10.1(a), but that rather assumes as correct the construction of cl 10.1(a) for which Westfield contends, namely that it operates as a general prohibition on sale.

34 Westfield submits that it may be seen from these provisions that the unitholders had given consideration to the circumstances in which any premature sale would be undertaken. But these provisions do not permit an inference that the property could only be sold as a result of the action of innocent unitholders in the event of default. They do not speak to the question of a sale following the termination of the scheme.

35 More to the point, the Agreement does not contain any provision seeking to exclude or limit the statutory rights given by s 601NB or to in any way limit what unitholders may do in relation to the winding up of the scheme. Moreover, Westfield does not suggest that the Agreement operates to prevent unitholders from seeking a winding up of the Trust on other grounds, such as the just and equitable ground. Its argument is limited to the exercise by a unitholder of the statutory right to call a meeting for that purpose, which does not require that a ground for winding up be shown.

36 Whether it is possible to bargain away these statutory rights, as Westfield contends, may presently be put to one side. Interpretation of a written agreement

may involve consideration of the background knowledge available to the parties at the time of the contract, which may include matters of law[24] including relevant legislation[25]. Here it may be taken that the Agreement was drafted with the knowledge that the scheme was governed by the provisions of Ch 5C. Its recitals acknowledge that it is a scheme for the purposes of the Corporations Law. No provision of the Agreement can be seen to exclude the possibility of the scheme being brought to an end by the exercise of voting rights under s 601NB. To the contrary, cl 18 would appear to intend to preserve rights such as those given by s 601NB.

37 Westfield accepts that cl 18 confirms as available to a unitholder the right given by s 601NB. However, it argues that cl 16.2 operates upon that right. In its submission, cl 16.2 does not deny the right to vote; rather, it binds a unitholder to vote in a particular way, which is to say against a winding up. Westfield points out that there is nothing in Ch 5C of the *Corporations Act* which says a scheme member cannot take its contractual obligations into account when casting a vote.

38 If cl 16.2 operated in the way contended for by Westfield, a unitholder would be denied a right contemplated by s 601NB: to vote for the winding up of a scheme. It could hardly have been intended that a scheme member be denied the right to vote upon the resolution which it is able to put to a meeting of scheme members.

39 It may be strictly correct that cl 16.2 does not purport to deny the right altogether, but it would restrict its operation so that it is effectively lost. The submission of Westfield, that Ch 5C does not contain an express provision prohibiting a scheme member from agreeing not to exercise a right provided by s 601NB, calls into question the purpose and policy of the *Corporations Act* in the provision of that right. It also raises the question whether the courts would enforce such a contractual provision in light of that purpose and policy. However, this appeal falls to be determined upon the construction of the Agreement.

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24 *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11]; [2001] HCA 70.

25 *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at 255 [41], 261 [64]; [2005] HCA 10; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 132 [32]; [2007] HCA 61.

40 Westfield's argument does not depend upon cl 16.2 alone. It depends, critically, upon the obligation in cl 16.2 attaching to the prohibition in cl 10.1(a) upon sale of the Property without the unitholders' consent. The insurmountable hurdle for Westfield is that cl 10.1(a) has no operation in the circumstances of this case.

41 Westfield's argument proceeds upon the basis that cl 10.1(a) operates as a general prohibition upon the sale of the Property, absent the consent of all unitholders. In fact it does not. It is directed to the exercise by the responsible entity of its powers and it has regard to a sale during the currency of the Trust, as will be further explained. There is nothing to be gleaned from other provisions of the Agreement as suggesting that cl 10.1(a) has some other purpose.

42 It has already been observed that cl 10 is not directed to the unitholders and any exercise by them of their rights[26]. It is not expressed in terms of a general prohibition, contrary to what Westfield argues. It is directed to the responsible entity and operates as a restraint upon the exercise of its powers. Clause 18.1 of the Trust Deed gives the responsible entity all the powers of a beneficial owner, which would include a power of sale. It is to such powers, it may be inferred, that cl 10 is directed. It is here that cl 30.4 of the Agreement[27] may operate to give primacy to cl 10.1(a).

43 The prohibition expressed in cl 10.1(a) is not, in any event, directed to a sale following a termination of a registered scheme. It is directed, as the Court of Appeal held[28], to a sale of the Property during the continuance of the Trust and before it is wound up. That is evident from cl 10.1(b), which speaks of a termination of the Trust occurring after the sale of the Property. Consistently, the prohibition upon acquisition of other assets in cl 10.2 could only operate whilst the Trust continues. The prohibition in cl 10.1(a) and that in cl 10.2 are otiose in a situation where the Trust has been terminated.

44 Clause 10.1(a), properly construed, does not apply to the situation which would arise where a resolution is passed by scheme members, at a meeting called under s 601NB, that the scheme be wound up. In the circumstances of this case,

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26 At [21].

27 Referred to at [16] of these reasons.

28 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [46].

such a resolution would mean the Property must be sold. Clause 10.1(a) does not purport to prohibit such a sale.

Section 601NB and unenforceability

45 On the view we have taken as to the construction of the Agreement, it is not necessary to answer the question whether the rights given by s 601NB may be bargained away, as Westfield contends. It was not necessary for the Court of Appeal to deal with that question, but it did so for completeness and it did so shortly[29]. The Court of Appeal expressed agreement with the primary judge that cl 16.2 is not unenforceable in light of s 601NB[30]. It is therefore necessary to say something about that matter.

46 The fact that Ch 5C does not contain any express prohibition against a unitholder contracting not to exercise the right given by s 601NB[31] does not conclude the question as to the enforceability of such an agreement between scheme members and a responsible entity. Windeyer J observed in *Brooks v Burns Philp Trustee Co Ltd*[32] that a person upon whom a statute confers a right may waive or renounce his or her rights unless it would be contrary to the statute to do so. It will be contrary to the statute where the statute contains an express prohibition against "contracting out" of rights. In addition, the provisions of a statute, read as a whole, might be inconsistent with a power, on the part of a person, to forego statutory rights. It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a

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29 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [53].

30 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [54].

31 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [54].

32 (1969) 121 CLR 432 at 456; [1969] HCA 4.

breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text[33].

47 The right given by s 601NB is clearly of benefit to each scheme member. It provides a direct, simple and inexpensive method of requiring a vote upon a member's resolution to wind up the scheme. There may be a number of reasons for which a member of a scheme may wish to terminate it and force a realisation of the assets in the scheme. But as has previously been mentioned, s 601NB does not require a ground to be identified[34]. The Court of Appeal[35] and the primary judge[36] considered it to be of some importance that cl 16.2, construed in the way for which Westfield contended, did not prevent access to another method of winding up, by the just and equitable ground provided by s 601ND(1)(a). However, such a procedure involves litigation, and is likely to be costly and perhaps protracted. It was clearly intended that an alternative to it be provided by s 601NB.

48 The primary judge[37] drew the distinction, which Westfield continues to press, between a scheme member's right to initiate a meeting and its right to vote at that meeting. The Court of Appeal agreed with this approach[38]. It is said that there is no restraint effected upon the former right and no denial of a right to vote, but only an obligation imposed to vote in a particular way. Such an

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33 *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522; [1990] HCA 53; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227; [1997] HCA 17; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 179 [71]; [2008] HCA 3; *Miller v Miller* (2011) 242 CLR 446 at 457-458 [25]; [2011] HCA 9; *Equuscorp Pty Ltd v Haxton* (2012) 86 ALJR 296 at 305-306 [23]; 286 ALR 12 at 21-22; [2012] HCA 7.

34 At [35].

35 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [55].

36 *Westfield Management Ltd v AMP Capital Nominees Ltd* (2011) 255 FLR 1 at 24 [122].

37 *Westfield Management Ltd v AMP Capital Nominees Ltd* (2011) 255 FLR 1 at 25 [127].

38 *AMP Capital Property Nominees Ltd v Westfield Management Ltd* [2011] NSWCA 386 at [54].

approach treats the rights conferred by s 601NB as divisible but the section should not be viewed in that way. The right to have a meeting called and a resolution put to wind up the scheme is clearly intended to facilitate voting by the scheme member to initiate the winding up process on that resolution. In reality that right would be lost were the distinction contended for maintained.

49 The respondents referred to the stated policy aim of the Review, to ensure adequate and effective protection for investors[39], as relevant to discerning the purposes of Ch 5C of the *Corporations Act*. The Attorney-General's reference had noted the need to ensure that there was a proper legal framework for prescribed interests which provided an appropriate level of regulation to adequately and effectively protect the interests of investors[40]. As managed investment schemes comprise many different kinds of investors, ranging from small unsophisticated investors to large commercial entities, it may be taken that the recommendations in the Review were developed in order to cater for and protect the interests of them all.

50 Some statutes may, by their nature and purpose, more readily suggest inconsistency with an individual's liberty to forego statutory rights. Some statutes which have a regulatory and protective purpose may fall into this category.

51 There are a number of aspects to Ch 5C's regulation of managed investment schemes. It prescribes requirements for the content of the constitution of schemes; it imposes obligations upon responsible entities; and, importantly for present purposes, it grants rights to members which may be exercised in protection of their own interests as necessary. One such right given to scheme members is that under s 601NB, which allows a member to put the matter of termination to a vote of members at any time during the life of the scheme. It is true that the right is in the nature of a benefit to individual scheme members, but the evident intention of the legislature is that it is in the public interest that scheme members be provided this right. Section 601NB offers a

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39 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report No 65, (1993), vol 1 at [2.4].

40 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report No 65, (1993), vol 1 at xv.

means of terminating a scheme as part of the regulatory framework of Ch 5C and reflects a legislative policy that the means be available.

52 The unitholders here adopted a managed investment scheme as the vehicle through which to pursue their commercial interests. Consequently, the scheme is subject to the legal framework provided by Ch 5C of the *Corporations Act* with all that it entails. Westfield's position is that, while the overall structure of a Ch 5C managed investment scheme suits the unitholders' commercial purposes, particular regulatory provisions do not. However, the selection of a managed investment scheme brings with it the very protections that, on Westfield's construction of the Agreement, the unitholders bargained away. An agreement between the members of a scheme and the responsible entity which purports to deprive members of the rights given by Ch 5C would be prejudicial to their interests and contrary to the protective purposes which inform the regulatory scheme of Ch 5C.

53 *In re Peveril Gold Mines Ltd*[41] may be considered pertinent to this case. There, the articles of association of a company purported to limit members' statutory rights. At that time, s 82 of the *Companies Act* 1862 (UK) gave members the right to present a petition for the winding up of the company. Byrne J, at first instance, observed that the articles could be regarded as a contract between the company and a prospective shareholder and that the company had no right to remove a safeguard provided by the Act as part of that contract[42]. In the Court of Appeal, Lindley MR said that registered limited companies are incorporated on certain conditions, including s 82[43]. Any article which, contrary to that section, limited the right of a contributory to petition for a winding up would be at variance with the statutory condition and invalid. Although the judgments do not refer, in terms, to the policy of the Act, it is evident that it was that to which the Court considered it was giving effect.

Conclusion and orders

54 The Agreement does not operate so as to prevent AMPCN voting in favour of a winding up of the scheme constituted by the Trust at a meeting called to consider a resolution to that effect.

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41 [1898] 1 Ch 122.

42 *In re Peveril Gold Mines Ltd* [1898] 1 Ch 122 at 125-126.

43 *In re Peveril Gold Mines Ltd* [1898] 1 Ch 122 at 131.

55 The appeal should be dismissed with costs.

56 HEYDON J. The Karrinyup Regional Shopping Centre is the principal asset of the KSC Trust. The KSC Trust is a unit trust. It is a managed investment scheme registered under Ch 5C of the *Corporations Act* 2001 (Cth) ("the Act"). AMP Capital Investors Ltd ("AMPCI") is the trustee of the KSC Trust, and the responsible entity of the scheme. One-third of the units in the KSC Trust are held by the appellant, Westfield Management Limited. Two-thirds are held by the first respondent, AMP Capital Property Nominees Limited, in its capacity as nominee of the second respondent, UniSuper Limited. The first respondent wants the unitholders to pass a resolution under s 601NB of the Act directing AMPCI, as the responsible entity, to wind up the scheme[44]. If the scheme were wound up, the Karrinyup Regional Shopping Centre would be sold and the proceeds would be distributed among the unitholders. The appellant opposes the resolution, and seeks to restrain the respondents from voting for it without the prior written consent of the appellant.

57 The outcome of this appeal turns entirely on the terms of the Unitholders' and Joint Venture Agreement ("the Agreement"). AMPCI, the appellant and the respondents are bound by the Agreement. Clause 10.1 of the Agreement provides:

> "(a) [AMPCI], in its capacity as responsible entity of the KSC Trust, shall not sell the [Karrinyup Regional Shopping Centre] or any substantial part thereof, without the written consent of the Unitholders.
>
> (b) On completion of the sale of the [Karrinyup Regional Shopping Centre], or if part of the [Karrinyup Regional Shopping Centre] has already been sold, the completion of the sale of the remainder of the [Karrinyup Regional Shopping Centre], [AMPCI], in its capacity as responsible entity of the KSC Trust, shall thereupon determine the Trust unless otherwise directed by the Unitholders."

Clause 10.2 of the Agreement provides:

> "[AMPCI], in its capacity as responsible entity of the KSC Trust, shall not without the written consent of the Unitholders acquire any investments other than the [Karrinyup Regional Shopping Centre] or for the short-term investment of liquid funds."

Clause 16.2 of the Agreement provides:

> "Each and all of the Unitholders mutually agree that they will so exercise their respective voting rights as unitholders under the Trust Deed so as to

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44 For s 601NB, see above at [3].

most fully and completely give effect to the intent and effect of the provisions of this deed."

58 The central question is whether a unitholder who exercised voting rights under s 601NB of the Act would contravene cl 16.2 of the Agreement if that exercise would result in the sale of the Karrinyup Regional Shopping Centre without the written consent of all the unitholders. That result will flow because if the resolution passes, the Trust will be terminated. Pursuant to cl 17.5(b) of the Deed which governs the KSC Trust, AMPCI will be obliged to sell the Trust assets, namely the Karrinyup Regional Shopping Centre. The appellant argues that it would be a breach of cl 16.2 for the respondents to exercise their voting rights under s 601NB in the present circumstances.

59 However, the argument fails. It fails because, as the respondents put it succinctly, it "gives [cl] 16.2 an operation which … can be derived, if it is to be derived at all, from no provision of the [A]greement other than [cl] 10.1(a), but it suffers from the difficulty that the present circumstances are ones where [cl] 10.1(a) has no operation."

60 So far as the appellant's argument turns on cl 10.1(a), cl 16.2 requires only that the unitholders give effect to the "intent and effect" of cl 10.1(a) on its true construction. On that construction, cl 10.1(a) does not prohibit a sale of the Karrinyup Regional Shopping Centre once the KSC Trust has been terminated under the general law pursuant to s 601NB of the Act. Clause 10.1(a) applies to an attempted sale before that time. Clearly, cl 10.2 applies only to acquisitions of investments while the Trust is on foot, not after its termination. The same is true of cl 10.1(b). It requires AMPCI to determine the Trust once the Karrinyup Regional Shopping Centre has been sold. Hence it applies to a sale of the Karrinyup Regional Shopping Centre while the KSC Trust is on foot. The "sale", the completion of which is referred to in cl 10.1(b), is a "sale" within the meaning of cl 10.1(a). That is a "sale" with "the written consent of the Unitholders." A sale of that description can take place only before the KSC Trust is terminated. After termination, there are no unitholders. Hence, cl 10.1(a) only applies to a sale of the Karrinyup Regional Shopping Centre *before* the Trust comes to an end. Clause 10.1(a) does not apply to a sale of the Karrinyup Regional Shopping Centre *after* the unitholders, by majority, have resolved to vote in favour of directing the responsible entity to wind up the scheme pursuant to s 601NB of the Act.

61 The appellant's other arguments did not depend on cl 10.1(a).

62 One argument attempted to escape the inadequacy of cl 10.1(a) for the appellant's purpose by much vaguer appeals to the Agreement "as a composite or as a whole", and to the Agreement's "purpose", "intention", "objective" or "aim". But the appellant pointed to no language in the Agreement sufficiently specific to suit its ends.

63 The appellant also argued that from the terms of the Agreement could be inferred an "expectation of the parties that [the Agreement would] endure for quite a long time." There were powers permitting it to endure. There may have been an expectation that it would endure. But there was no duty on the unitholders to ensure that it did endure for any specified time. And there was no duty on the unitholders to ensure that it endured despite s 601NB.

64 The appellant then pointed out that the Agreement contained no provisions about how a sale of the Karrinyup Regional Shopping Centre would be conducted. The appellant argued that from this it could be inferred that the intent and effect of the Agreement was that this sale was not possible. However, the mode by which any sale was to be conducted was a minor matter beside the question of whether a sale could be conducted at all. The suggested inference cannot be drawn.

65 Finally, the appellant pointed to detailed provisions in the Agreement permitting unitholders to realise their investments by selling their units to other unitholders or third parties, and to the absence of provisions referring to realisation by sale of the Karrinyup Regional Shopping Centre. But pre-emptive arrangements between unitholders have no necessary relevance to the question whether triggering a general law provision which may bring about a winding up is permissible.

66 The appeal accordingly fails. The issues raised by the respondents' Notice of Contention do not arise. The appeal should be dismissed with costs.