FEDERAL COURT OF AUSTRALIA

Lewski v Australian Securities & Investments Commission [2016] FCAFC 96

Appeals from:	*Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)* [2013] FCA 1342 *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed)* [2014] FCA 1308
File numbers:	VID 752 of 2014 VID 753 of 2014 VID 783 of 2014 VID 784 of 2014 VID 795 of 2014
Judges:	**GREENWOOD, MIDDLETON AND FOSTER JJ**
Date of judgment:	14 July 2016
Catchwords:	**CORPORATIONS** – duties of responsible entity of managed investment scheme under s 601FC – duties of officers of responsible entity under s 601FD – statutory duty to act in best interests of members – statutory duty to exercise care and diligence – statutory duty not to make improper use of position to gain advantage – statutory duty to take all reasonable steps to comply with scheme constitution **CORPORATIONS** – members' rights – whether right to have scheme administered according to existing constitution is a "members' right" under s 601GC – failure to consider members' right to have scheme administered according to existing constitution – amendment invalid as outside power **CORPORATIONS** – related party transaction in managed investment scheme – breach of s 208 (as modified) of responsible entity – involvement of officers of responsible entity in breach of s 208 – essential elements of the prohibition in s 208 – whether s 208(3) is an exception to the prohibition – officers' honest belief that constitution contain provision allowing payment **CORPORATIONS** – company procedure –

reconsideration of earlier decisions – whether conduct amounts to or conveys assent to a resolution

CONTRACT – deeds – when does an undated deed come into effect – intention of the parties to the deed

Legislation:

Corporations Act 2001 (Cth)

Evidence Act 1995 (Cth)

Cases cited:

360 Capital Re Ltd v Watts (2012) 36 VR 507

Abacus Trust Co (Isle of Man) and Another v Barr and Others [2003] Ch 409

Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2015) 255 CLR 352

Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3) [2013] FCA 1342

Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (2014) 322 ALR 45

Avel Proprietary Limited v Multicoin Amusements Proprietary Limited and Another (1990) 171 CLR 88

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541

Compaq Computer Australia Pty Ltd v Merry and Others (1998) 157 ALR 1

Dearman v Dearman (1908) 7 CLR 549

Eagle Star Trustees Ltd v Heine Management Ltd (1990) 3 ACSR 232

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89

Fox v Percy (2003) 214 CLR 118

Gillfillan v Australian Securities and Investments Commission (2012) 92 ACSR 460

Hillsdown Holdings plc v Pensions Ombudsman [1997] 1 All ER 862

Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers [1977] 2 NSWLR 109

ING Funds Management Ltd v ANZ Nominees Ltd and Others (2009) 228 FLR 444

Jadwan Pty Ltd v Secretary, Department of Health & Aged Care (2003) 145 FCR 1

Lobo v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 132 FCR 93

Lock v Westpac Banking Corporation And Others (1991) 25 NSWLR 593

Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144

Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476

Premium Income Fund Action Group Incorporated and Another v Wellington Capital Limited and Others (2011) 84 ACSR 600

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355

R v Lawrence [1982] AC 510

Re Centro Retail Ltd (2011) 255 FLR 28

Re Macquarie Goodman Funds Management Ltd (as responsible entity for Macquarie Goodman Industrial Trust) (2004) 52 ACSR 194

Richard Brady Franks Limited v Price (1937) 58 CLR 112

Royal Brunei Sdn Bhd v Ming [1995] 2 AC 378

Segboer v AJ Richardson Properties Pty Ltd (2012) 16 BPR 31,235

Smith v Permanent Trustee Australia Ltd (1992) 10 ACLC 906

Srecko Juric-Kacunic v Stan Vaupotic (2013) 18 BPR 35,131

Short v Ambulance Victoria (2015) 249 IR 217

State of New South Wales v Kable (2013) 252 CLR 118

Stuart v Kirkland-Veenstra (2009) 237 CLR 215

Vines v Djordjevitch (1955) 91 CLR 512

Waters v Mercedes Holdings Pty Ltd (2012) 203 FCR 218

Wellington Capital Ltd v Australian Securities and Investments Commission (2014) 254 CLR 288

Xu v Jinhong Design & Constructions Pty Ltd [2011] NSWCA 277

Yorke v Lucas (1985) 158 CLR 661

Dates of hearing:	25, 26, 27 May 2015
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ORDERS

VID 752 of 2014

BETWEEN:	**WILLIAM LIONEL LEWSKI** Appellant
AND:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Respondent

VID 753 of 2014

BETWEEN:	**MICHAEL RICHARD LEWIS WOOLDRIDGE** Appellant
AND:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Respondent

VID 783 of 2014

BETWEEN:	**MARK FREDRICK BUTLER** Appellant
AND:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Respondent

VID 784 of 2014

BETWEEN:	**KIM SAMUEL JAQUES** Appellant
AND:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Respondent

VID 795 of 2014

BETWEEN:	**PETER CLARKE** Appellant
AND:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Respondent

JUDGES: **GREENWOOD, MIDDLETON AND FOSTER JJ**

DATE OF ORDER: **14 JULY 2016**

THE COURT ORDERS THAT:

1. The parties confer, and file with the Court by 4.00pm on 25 July 2016 an agreed minute of order, or in the event of disagreement, a short written submission in support of any separately proposed order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

1 These appeals are from orders of the trial judge, made on 12 December 2013 in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)* [2013] FCA 1342 ('**Liability Judgment**') and made on 2 December 2014 in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed)* (2014) 322 ALR 45 ('**Penalty Judgment**').

2 The appellants are persons who 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**') namely:

(a) William Lionel Lewski;

(b) Mark Frederick Butler;

(c) Kim Samuel Jaques;

(d) Michael Richard Lewis Wooldridge; and

(e) Peter John Clarke.

(collectively, the '**Directors**').

3 The issues for determination in each appeal broadly concern three topics, which correspond to the three 'groups of contraventions' pleaded by the Australian Securities and Investments Commission ('**ASIC**') at trial:

(a) whether the trial judge erred in finding that the conduct of the Directors in relation to the resolution to lodge the amended APCHL constitution at a board meeting on 22 August 2006 involved a contravention of duties in s 601FD of the *Corporations Act 2001* (Cth) (the '**Act**');

(b) whether conduct in relation to the payment of the 'Listing Fee' (as later defined) involved contraventions of s 208 of the Act, which involves a consideration of the rules prohibiting related party transactions by a RE; and

(c) whether the trial judge erred in finding that the making of the decision to pay the 'Listing Fee' involved contraventions of s 601FD of the Act.

4 ASIC cross-appealed in relation to the adequacy of the penalty imposed on all Directors, save for Mr Clarke. In response, Mr Lewski filed a notice of contention that the trial judge erred in not considering additional matters in imposing the penalties.

5 The alleged contraventions related to APCHL's conduct between 22 August 2006 and 27 June 2008 in its capacity as a RE of the Trust, and by the Directors as officers of APCHL in its capacity as RE. Nevertheless, the events that occurred at the 19 July 2006 meeting of the board of directors of APCHL (the '**Board**') have an important part to play in understanding the sequence of events (including the resolutions made at the meeting on 22 August 2006) directly relied upon by ASIC.

6 On 19 July 2006, the Board resolved to amend the Trust's Constitution (the '**Constitution**'). The amendments to the Constitution provided for substantial new and increased fees to become payable to APCHL (in its personal capacity) on the occurrence of certain events, namely:

(a) a new fee to be payable if the Trust was listed on the Australian Stock Exchange ('**ASX**') ('**Listing Fee**');

(b) a new fee to be payable if APCHL was removed as the RE ('**Removal Fee**'); and

(c) an increased fee to be payable if the Trust was subject to a takeover ('**Takeover Fee**')

(collectively, the '**Amendments'**).

7 However, cl 25.1(a) of the Constitution prohibited any amendment of the Constitution in favour or to the benefit of APCHL. It is uncontroversial that the Amendments were in favour of, and resulted in a benefit to APCHL. There was therefore a question as to the Board's power to pass them.

8 After this Board meeting on 19 July 2006, two of the Directors signed the Supplemental Deed of Variation (No 7) ('**Deed of Variation (No 7)**' or the '**Deed**') which contained the Amendments, but on legal advice left the Deed undated.

9 Mr Lewski, several family members and an associated company (described in these reasons as his associates) owned all the shares in APCHL. He and his associates were ultimately entitled to the benefit of the new and increased fees, but for simplicity, reference will be made in these reasons to the fees as having been payable to Mr Lewski. There is no doubt that the fees payable to Mr Lewski were substantial ($33 million), but this does not impact upon the principles to apply in each appeal, nor the approach to adopt in considering the appropriate determination of each appeal.

10 It is to be recalled that the proceeding was one involving the imposition of pecuniary penalties. This has significance in relation to matters of evidence and the application of s 140 of the *Evidence Act 1995* (Cth). It also has significance in relation to the approach to be taken in considering the effect upon later conduct (such as the making of a later resolution and payment of the Listing Fee) taken on the basis of an invalid earlier resolution. This is not a proceeding brought by a member of APCHL against the Directors, or by APCHL itself against the Directors, seeking relief based upon the passing of an invalid resolution, in which different considerations may arise as to the relief that may be granted by a court. This issue will be elaborated upon later in these reasons.

THE ALLEGED CONTRAVENTIONS AND THE LISTING

The first group of contraventions

11 ASIC pleaded three groups of contraventions. The first group of contraventions was based in the allegation that, at its meeting on 22 August 2006, the Board resolved to lodge with ASIC a consolidated Constitution incorporating the Amendments so that they would become effective pursuant to s 601GC(2) of the Act (the '**Lodgement Resolution'**).

12 It is uncontroversial that on 23 August 2006 APCHL in fact lodged a consolidated Constitution with ASIC with the intent that the Amendments would become effective.

13 The trial judge concluded that in passing the Lodgement Resolution, APCHL and each of the Directors breached their duties under ss 601FC(1) and 601FD(1).

Listing

14 On 3 August 2007, the Trust units were officially quoted on the ASX. It is uncontentious that 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 Mr Lewski.

15 The second and third groups of contraventions are based on the conduct of APCHL and the Directors on 26 June 2007, 27 July 2007, 3 August 2007, 13 March 2008, 28 April 2008 and 27 June 2008 in making the decisions to pay, and in paying the Listing Fee to APCHL (and through it to Mr Lewski).

The second group of contraventions

16 In the second group of contraventions, ASIC alleged that, in paying the Listing Fee to itself and to one of Mr Lewski's associated entities, APCHL contravened s 208 (as modified by Pt 5C.7 of the Act) which prohibits payments to a RE or to a related party without the approval of the members. Section 208(3) provides that a RE may pay itself fees from scheme property where the Constitution provides for the fees.

17 The trial judge concluded that:

(a) cl 25.1 of the Constitution operated to prohibit APCHL from making the Amendments and they were made outside power; and

(b) the statutory power of amendment in s 601GC(1)(b) of the Act was not engaged as the Board gave no consideration to the members' right to have the Trust administered for the fees provided in the existing Constitution, and the Board could not have reasonably considered that the Amendments would not adversely affect the members' rights.

18 The trial judge thus concluded that the Amendments were invalid, and did not accept the contention that, even if not validly made, the Amendments became effective upon lodgement with ASIC and that they would remain so until declared invalid.

19 It was and is uncontentious that in paying the Listing Fee, APCHL had given a benefit to itself and to a related party, and that it did not seek the members' approval to do so. Upon deciding that the Amendments were invalid and of no effect, the trial judge concluded that ASIC made out its claim that APCHL breached s 208.

20 ASIC also alleged that each of the Directors contravened s 209 by being involved in APCHL's breach of s 208. This allegation involved construing s 208 (as modified) in order to determine the essential elements of the contravention therein defined. The trial judge concluded that on the proper construction of s 208, it was for the Directors to prove that the Constitution provided for the Listing Fee, which, because the Amendments were invalid, they could not do so. The Directors' unchallenged evidence (accepted by the trial judge) was that

they honestly believed that the Constitution had been validly amended to include the Listing Fee.

The third group of contraventions

21 In the third group of contraventions, ASIC alleged that in making the decisions to pay the Listing Fee:

(a) APCHL contravened s 601FC(5) in that it breached its duty:

(i) to act in the best interests of, and give priority to the interests of the members of the Trust over the interests of APCHL, under s 601FC(1)(c); and

(ii) to ensure that all payments out of the scheme property were made in accordance with the Constitution, under s 601FC(1)(k); and

(b) each of the Directors contravened s 601FD(3) in that each of them breached his duty:

(i) to act in the best interests of, and give priority to the interests of the members of the Trust over the interests of APCHL, under s 601FD(1)(c); and

(ii) to take all steps that a reasonable person would take to ensure that APCHL complied with the Act, under s 601FD(1)(f).

22 It was and is uncontentious that APCHL made the decisions to pay the Listing Fee. The Directors' argument before the trial judge (and in each appeal) turned on their honest belief that the Amendments were valid. They denied that there could be any breach of the duties under ss 601FC(1) and 601FD(1) in making the decisions to pay the Listing Fee when the fee was (apparently) provided for in the Constitution. The trial judge concluded that contraventions had been demonstrated by ASIC.

THE LEGISLATION

23 Before going to the factual background, it is convenient to set out the main relevant statutory provisions.

24 Section 601FC sets out the duties of the RE of a registered scheme. It provides:

> ***Duties of responsible entity***
>
> *(1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:*
>
> *(a) act honestly; and*
>
> *(b) exercise the degree of care and diligence that a reasonable person*

would exercise if they were in the responsible entity's position; and

(c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and

(d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and

(e) not make use of information acquired through being the responsible entity in order to:

(i) gain an improper advantage for itself or another person; or

(ii) cause detriment to the members of the scheme; and

(f) ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB; and

(g) ensure that the scheme's compliance plan meets the requirements of section 601HA; and

(h) comply with the scheme's compliance plan; and

(i) ensure that scheme property is:

(i) clearly identified as scheme property; and

(ii) held separately from property of the responsible entity and property of any other scheme; and

(j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and

(k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act; and

(l) report to ASIC any breach of this Act that:

(i) relates to the scheme; and

(ii) has had, or is likely to have, a materially adverse effect on the interests of members;

as soon as practicable after it becomes aware of the breach; and

(m) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the responsible entity by the scheme's constitution.

(2) The responsible entity holds scheme property on trust for scheme members.

Note: Under subsection 601FB(2), the responsible entity may appoint an agent to hold scheme property separately from other property.

(3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1.

...

(5) A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection.

*Note 1: Section 79 defines **involved**.*

Note 2: Subsection (5) is a civil penalty provision (see section 1317E).

25 Section 601FD sets out the duties of the officers of a responsible entity of a managed investment scheme. It provides:

Duties of officers of responsible entity

(1) An officer of the responsible entity of a registered scheme must:

(a) act honestly; and

(b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and

(c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and

(d) not make use of information acquired through being an officer of the responsible entity in order to:

(i) gain an improper advantage for the officer or another person; or

(ii) cause detriment to the members of the scheme; and

(e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and

(f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:

(i) this Act; and

(ii) any conditions imposed on the responsible entity's Australian financial services licence; and

(iii) the scheme's constitution; and

(iv) the scheme's compliance plan.

(2) A duty of an officer of the responsible entity under subsection (1) overrides

any conflicting duty the officer has under Part 2D.1.

(3) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.

*Note 1: Section 79 defines **involved**.*

Note 2: Subsection (3) is a civil penalty provision (see section 1317E).

(4) A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1).

26 Section 601FD(1)(e) provides that an officer of a RE must:

not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme

27 Section 601GA provides:

Contents of the constitution

(1) The constitution of a registered scheme must make adequate provision for:

(a) the consideration that is to be paid to acquire an interest in the scheme; and

(b) the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property; and

(c) the method by which complaints made by members in relation to the scheme are to be dealt with; and

(d) winding up the scheme.

(2) If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:

(a) must be specified in the scheme's constitution; and

(b) must be available only in relation to the proper performance of those duties;

and any other agreement or arrangement has no effect to the extent that it purports to confer such a right.

(3) If the responsible entity is to have any powers to borrow or raise money for the purposes of the scheme:

(a) those powers must be specified in the scheme's constitution; and

(b) any other agreement or arrangement has no effect to the extent that it purports to confer such a power.

(4) If members are to have a right to withdraw from the scheme, the scheme's constitution must:

(a) specify the right; and

(b) if the right may be exercised while the scheme is liquid (as defined in section 601KA)–set out adequate procedures for making and dealing with withdrawal requests; and

(c) if the right may be exercised while the scheme is not liquid (as defined in section 601KA)–provide for the right to be exercised in accordance with Part 5C.6 and set out any other adequate procedures (consistent with that Part) that are to apply to making and dealing with withdrawal requests.

The right to withdraw, and any provisions in the constitution setting out procedures for making and dealing with withdrawal requests, must be fair to all members.

28 Section 601GB provides:

Constitution must be legally enforceable

The constitution of a registered scheme must be contained in a document that is legally enforceable as between the members and the responsible entity.

29 Section 601GC provides:

Changing the constitution

(1) The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:

(a) by special resolution of the members of the scheme; or

(b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.

(2) The responsible entity must lodge with ASIC a copy of the modification or the new constitution. The modification, or repeal and replacement, cannot take effect until the copy has been lodged.

(3) The responsible entity must lodge with ASIC a consolidated copy of the scheme's constitution if ASIC directs it to do so.

(4) The responsible entity must send a copy of the scheme's constitution to a member of the scheme within 7 days if the member:

(a) asks the responsible entity, in writing, for the copy; and

(b) pays any fee (up to the prescribed amount) required by the responsible entity.

30 Section 601LA modifies the operation of the related party transaction provisions in Ch 2E of the Act in relation to registered schemes. It provides:

Chapter 2E applies with modifications

Chapter 2E applies to a registered scheme with the modifications set out in sections 601LB to 601LE and as if:

(a) references to a public company were instead references to the responsible entity of the scheme; and

(b) references to a benefit being given to or received by a related party of a public company were instead references to a benefit being given to or received by the responsible entity or a related party; and

(c) references to a resolution of a public company were instead references to a resolution of the members of the scheme; and

(d) references to a general meeting were instead references to a members' meeting of the scheme; and

(e) references to members of a public company were instead references to members of the scheme; and

(f) references to the company's best interests were instead references to the best interests of the scheme's members.

31 Section 601LB creates a modified s 207 relating to managed investment schemes, described herein as 's 207'. It describes the purpose of the related party provisions in relation to registered schemes in the following terms:

Purpose

207 *The rules in this Chapter, as they apply to a registered scheme, are* ***designed to protect the interests of the scheme's members as a whole****, by requiring member approval for giving financial benefits to the responsible entity or its related parties that come out of scheme property or that could endanger those interests.*

(Emphasis added.)

32 Section 601LC creates a modified s 208 relating to managed investment schemes, described herein as 's 208'. It provides:

Need for member approval for financial benefit

208 *(1) If all the following conditions are satisfied in relation to a financial benefit:*

(a) the benefit is given by:

(i) the responsible entity of a registered scheme; or
(ii) an entity that the responsible entity controls; or
(iii) an agent of, or person engaged by, the responsible entity

(b) the benefit either:

(i) is given out of the scheme property; or
(ii) could endanger the scheme property

(c) the benefit is given to:

(i) the person or a related party; or
(ii) another person referred to in paragraph (a) or a related party of that person;

then, for the person referred to in paragraph (a) to give the benefit, either:

(d) the person referred to in paragraph (a) must:

(i) obtain the approval of the scheme's members in the way set out in sections 217 to 227; and
(ii) give the benefit within 15 months after the approval; or

(e) the giving of the benefit must fall within an exception set out in sections 210 to 216.

*Note: Section 228 defines **related party**, section 191 defines **entity**, section 191 defines **control** and section 229 affects the meaning of **giving a financial benefit**.*

(2) If:

(a) the giving of the benefit is required by a contract; and

(b) the making of the contract was approved in accordance with subparagraph (1)(d)(i) as a financial benefit given to the entity or related party; and

(c) the contract was made:

(i) within 15 months after that approval; or
(ii) before that approval, if the contract was conditional on the approval being obtained;

member approval for the giving of the benefit is taken to have been given and the benefit need not be given within the 15 months.

(3) Subsection (1) does not prevent the responsible entity from paying itself fees, and exercising rights to an indemnity, as provided for in the scheme's constitution under subsection 601GA(2).

33 Section 209 sets out the consequences of a breach of s 208, and extends liability to accessories to that breach. It provides

Consequences of breach

(1) If the public company or entity contravenes section 208:

(a) the contravention does not affect the validity of any contract or transaction connected with the giving of the benefit; and

(b) the public company or entity is not guilty of an offence.

Note: A Court may order an injunction to stop the company or entity giving the benefit to the related party (see section 1324).

(2) A person contravenes this subsection if they are involved in a contravention of section 208 by a public company or entity.

> *Note 1: This subsection is a civil penalty provision.*
> *Note 2: Section 79 defines* ***involved****.*
>
> *(3) A person commits an offence if they are involved in a contravention of section 208 by a public company or entity and the involvement is dishonest.*
>
> (Emphasis added.)

34 Section 79 defines 'involvement', and relevantly provides:

> ***Involvement in contraventions***
>
> *A person is involved in a contravention if, and only if, the person:*
> *…*
> *(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention…*

35 It was and is uncontroversial that before any of the Directors could be found to be involved in APCHL's contravention of s 208, ASIC had to prove that each was intentionally involved in the contravention and had knowledge of all the essential elements of the contravention: *Yorke v Lucas* (1985) 158 CLR 661('***Yorke v Lucas****')* at 667, 669-670.

THE PLEADINGS

36 There was much discussion before the Court about the pleaded case brought by ASIC and the failure of the trial judge to properly confine his consideration to the pleaded case brought against the Directors. It was also contended by the Directors that even if the trial judge did confine himself to the exact way the case against them was pleaded, the trial judge's findings went beyond the submissions made by ASIC.

37 The proceeding was conducted by the parties on the pleadings. It was not suggested by ASIC otherwise, although certain references were made to part of ASIC's submissions at trial. None of these references indicate a case was being mounted against the Directors outside the pleaded case set out in the Second Further Amended Statement of Claim.

38 The pleaded case of ASIC was relatively straight forward, based as it was on the conduct of the Directors between 22 August 2006 and 27 June 2008. It is important to appreciate that the pleading did not allege any form of dishonesty or fraud, nor any form of knowledge by the Directors that their conduct prior to this period of time was in any way wrongful, unlawful or illegal. It was not pleaded, nor part of ASIC's case, that a reasonable director in the position of the Directors would have been conscious of the failings on 19 July 2006 found by the trial judge, and so needed to re-visit the 19 July 2006 decision to amend the Trust's Constitution. It is also important to appreciate that the trial judge specifically found that the

Directors had an honest belief as to the validity of the Amendments. This is significant in determining the characterisation to give to the conduct of the Directors on and from 22 August 2006, including in the Directors deciding to pay, and paying the Listing Fee.

39 It was not alleged that the Directors were aware of earlier 'contraventions', or should have been, or that they considered (or should have considered) on 22 August 2006 that the 19 July 2006 conduct had been negligent or in breach of any of the duties which were alleged to have been contravened on and from 22 August 2006. ASIC did not allege that the relevant contravening conduct was a failure to resolve to, or otherwise, revoke the resolution approving entry into the Deed of Variation (No 7) made on 19 July 2006.

40 To determine the case made by ASIC against the Directors, it is necessary to go to the pleadings in some detail. As the pleadings were amended, where they are quoted in these reasons the underlining indicates the amendments. Any references in parentheses are to the Second Further Amended Statement of Claim and Defences (as the case may be).

41 Under the heading 'APCHL purports to grant itself the right to new fees', ASIC pleaded in its Second Further Amended Statement of Claim:

(a) At the meeting on 19 July 2006, the Board unanimously resolved to approve the relevant variations to the Constitution (paragraph 13);

(b) At the meeting on 22 August 2006, the Board resolved to lodge with ASIC the consolidated Constitution for the Trust incorporating the Amendments made by Deed of Variation (No 7) (paragraph 14);

(c) Deed of Variation (No 7) was a deed of variation dated 22 August 2006 (paragraph 15); and

(d) On 23 August 2006 lodgement occurred (paragraph 16), and by lodging an amended Constitution with ASIC, APCHL intended to trigger the operation of s 601GC(2) of the Act and so amend to the Constitution in accordance with Deed of Variation (No 7) (paragraph 17).

42 The pleading then continued to refer to the Amendments set out in the Deed, by collectively defining them as 'the August Amendments', which was a reference not to the events of 19 July 2006, but to the Lodgement Resolution.

43 Therefore, the focus of the first group of contraventions was on the Lodgement Resolution. For instance, paragraphs 20 and 21 of the Second Further Amended Statement of Claim pleaded:

> *If the Prime Trust constitution had been amended so as to give effect to the August Amendments, that variation:*
>
> *(a) would have been in favour of or resulted in a benefit to APCHL;*
>
> ***Particulars of subparagraph (a)***
>
> *ln respect of the Listing Fee Amendment and Removal Fee Amendment, the benefit was the purported right to receive payment from the Prime Trust under the August Amendments in the event the conditions for the relevant payment were satisfied. In respect of the Takeover Fee Amendment, the benefit was an increase in the fee to be paid in circumstances where the aggregate price paid for Units did not equal or exceed the Gross Asset Value of the Trust (as defined in the Prime Trust constitution).*
>
> *(b) would have disadvantaged the members of the Prime Trust; and*
>
> *(c) would not have been in the best interests of the members of the Prime Trust.*
>
> ***Particulars of subparagraphs (b) and (c)***
>
> *The August Amendments purported to create rights in APCHL as set out in paragraph 18 above that, if exercised, would result:*
>
> *(i) in respect of the Listing Fee Amendment and Removal Fee Amendment, in a diminution in the assets of the Prime Trust; and*
>
> *(ii) in respect of the Takeover Fee Amendment, in circumstances where the takeover fee would be higher as a result of the amendment, a greater diminution in the assets of the Prime Trust -*
>
> *without providing any, alternatively any equivalent, benefit to members of the Prime Trust.*
>
> *By reason of the facts set out in paragraph 20 above, the consideration by APCHL of whether or not to lodge the Amended Constitution involved a conflict between the interests of the members of the Prime Trust and the interests of APCHL.*

44 Then reference was made in the Second Further Amended Statement of Claim at paragraph 22 to each of the resolutions referred to earlier in the pleading – the 19 July 2006 resolution which was pleaded as a resolution to approve the relevant variations (paragraph 13) and the Lodgement Resolution (paragraph 14). Each resolution was alleged to have been wrongfully adopted, but only by reference to the 'August Amendments' as defined in the pleading.

45 Specifically, paragraph 22 pleaded:

> *Each of the ~~votes~~ resolutions described in paragraphs 13 and 14 above ~~took place~~was adopted without the participating directors as a board first considering or sufficiently considering:*

(a) whether there was any legitimate reason for the responsible entity to make the August Amendments;

(b) whether the August Amendments would comply with both the Act and the Prime Trust constitution;

(c) the effect of the August Amendments on:

(i) the rights and interests of the members of the Prime Trust;

(ii) the interests of APCHL; or

(iii) the interests of Lewski and his related and associated entities; or

(d) the conflict described at paragraph 21 above and how, if at all, that conflict could be resolved in favour of members of the Prime Trust.

46 Then in paragraph 23, ASIC pleaded, by reference to both the 19 July 2006 resolution and the Lodgement Resolution, that APCHL did not, on either occasion, properly consider whether the proposed changes to the Constitution would adversely affect the rights of members of the Trust.

47 This plea related only to the failure to comply with s 601GC of the Act, whether or not a special resolution of the members was required, and the need to consider the rights of the members. This is made clear by the particulars to paragraph 23(a) and the reference in paragraph 25(b) to s 601GC of the Act. The other matter to observe is that these allegations, referred in context and terms to the 'August Amendments', as is apparent from paragraphs 22, 23 (particularly the particulars to paragraphs 23(b)), 24 and 25.

48 In fact, the conclusionary paragraph in paragraph 25 pleaded that by reason of the matters referred to above, 'lodgement of the Amended Constitution with ASIC was not effective to amend the Prime Trust Constitution so as to effect the August Amendments'.

49 Under the heading 'Contraventions of the Act arising from the August Amendments', the pleading first focused on the contraventions by APCHL, being concerned solely with the Lodgement Resolution on 22 August 2006. In fact, the earlier reference to the 19 July 2006 resolution was specifically deleted in the Second Further Amended Statement of Claim.

50 Then the pleading made allegations relating to the contraventions by the Directors in paragraphs 26A to 28. It is useful to set these out in full (with the amended and substituted particulars included).

Contraventions by the directors

26A. Each of Lewski, Wooldridge, Jaques, Butler and Clarke voted in favour of, alternatively assented to at the meeting, the resolution on 22 August 2006 to

lodge the Amended Constitution.

27. *By 22 August 2006, each of Lewski, Wooldridge, Jaques, Butler and Clarke, believing that the August Amendments would be effective, knew that their purpose was to provide benefits to APCHL and that their effect would be to disadvantage the members of the Prime Trust.*

Particulars

So much must be inferred from the fact that each of them voted in favour of, alternatively assented to at the meeting, the resolution passed at the 22 August 2006 meeting, and from the knowledge of the affairs of the Prime Trust that each had obtained in preparing to undertake and in undertaking his role as a director and (in so far as is applicable) secretary, chairman and compliance officer.

So far as Butler and Wooldridge are concerned, it must also be inferred from the fact that each of them signed Deed of Variation (No. 7).

So far as Clarke is concerned, it must also be inferred from the fact that he attended, as an invitee, the meeting of board of directors of APCHL on 19 July 2006 referred to at paragraph 13 above.

Their belief as at that date is also to be inferred from their subsequent conduct as alleged in paragraphs 31, 32, 34 ,35, 37 and 38, namely:

(i) Each of Lewski, Wooldridge, Jaques, Butler and Clarke was present at the meeting of the board of directors of APCHL on 26 June 2007, and each voted in favour of, alternatively assented to at the meeting, the resolution detailed in paragraph 31;

(ii) Each of Lewski, Wooldridge, Jaques, Butler and Clarke was present at the meeting of the board of directors of APCHL on 27 July 2007 and voted in favour of, alternatively assented to at the meeting, the resolutions detailed in paragraph 32;

(iii) Each of Lewski, Wooldridge, Jaques, Butler and Clarke was present at the meeting of the board of directors of APCHL on 21 April 2008 where it was resolved that the board pass a resolution regarding the HOA (as defined in paragraph 34 below) by 23 April 2008;

(iv) On 23 and 24 April 2008 Wooldridge, Jaques, Butler and Clarke approved a resolution that APCHL execute the HOA~~The board of APCHL, on a date between 21 April 2008 and 28 April 2008 resolved to execute the HOA or otherwise approved the execution of that document by APCHL~~;

(v) On 28 April 2008:

(A) Wooldridge executed the HOA on behalf of APCHL ~~on 28 April 2008~~;

(B) Lewski executed the HOA on behalf of other parties to it;

(vi) Each of Lewski, Jaques and Clarke was present at the meeting of the board of directors of APCHL on 27 June 2008 and voted in favour of, alternatively assented to at the meeting, the resolution to execute the Deed of Acknowledgment; and

(vii) Lewski and Jaques executed the Deed of Acknowledgment on behalf of APCHL on 27 June 2008.

28. In the circumstances ~~By reason of the matters~~ set out in paragraphs 19 to 27 above, ~~and~~ by ~~reason of~~:

~~(a) his~~ voting in favour of the resolution to lodge the Amended Constitution, alternatively by assenting to it at the meeting on 22 August 2006, ~~the resolution to lodge the Amended Constitution: and~~

~~(b) his participation in the activities that culminated in that resolution~~

each of Lewski, Wooldridge, Jaques, Butler and Clarke on that date:

(c) breached his duty (imposed by s. 60JFD(1)(b) of the Act) to exercise the degree of care and diligence that a reasonable person would exercise if that person was in the relevant officer's position and so contravened s. 601FD(3) of the Act;

Particulars of subparagraph 28(c)

(i) Failing to:

(A) consider and understand; and

*(B) be satisfied that the directors of APCHL acting as a board (the **board**) had considered and understood –*

the effect of Deed of Variation (No 7);

(ii) failing to consider whether, and be satisfied that, there was a legitimate reason for the responsible entity to make the August Amendments;

(iii) failing to be satisfied that the board had considered:

(A) legal advice that the August Amendments if made without the approval of unitholders would comply with the Act and the Constitution of the Prime Trust; or

(B) judicial advice that the responsible entity would be justified in making the August Amendments without member approval;

(iv) failing to consider and be satisfied that the board had considered whether the August Amendments if made without the approval of unitholders would comply with the Act and the Constitution of the Prime Trust;

(v) failing to consider and be satisfied that the board had considered the effect of the August Amendments on the rights and interests of the members of the Prime Trust;

(vi) except in the case of Lewski, failing to consider the effect of the August amendments on the interests of APCHL;

(vii) except in the case of Lewski, failing to consider the effect of the August Amendments on the interests of Lewski and his related and associated entities;

(viii) failing to be satisfied that the board had considered the matters referred to in paragraphs (vi) and (vii) above;

(ix) failing to consider and be satisfied that the board had considered how, if at all, the conflict described in paragraph 21 could be resolved in favour of the members of Prime Trust,

when the August Amendments purported to create rights in APCHL that, if exercised, would result in a diminution of the assets of the Prime Trust without providing any, alternatively any equivalent, benefit to its members.

(d) breached his duty (imposed by s. 601FD(1)(c) of the Act) to act in the best interests of the members of the Prime Trust, and so contravened s. 601FD(3) of the Act;

Particulars of sub-paragraph 28(d)

(i) he did not give any consideration to whether making the August Amendments was in the best interests of the members of the Prime Trust;

(ii) the August Amendments were not in fact in the best interests of the members of the Prime Trust: The plaintiff repeats the particulars to paragraphs 20(b) and 20(c) above.

(iii) further or in the alternative to paragraph (ii) of these particulars, a directors of APCHL in his position could not in the circumstances have reasonably believed that the August Amendments were in the best interests of the members of the Prime Trust.

(e) breached his duty (imposed by s. 601FD(1)(c) of the Act in the circumstances described at paragraph 21 above) to give priority to the interests of the members of the Prime Trust, and so contravened s 601FD(3) of the Act;

Particulars of sub-paragraph 28(e)

The plaintiff repeats paragraph 20.

(f) breached his duty (imposed by s. 601FD(1)(e) of the Act) not to make improper use of his position as an officer of the responsible entity of the Prime Trust to provide an advantage to APCHL, and so contravened s. 601FD(3) of the Act;

Particulars of sub-paragraph 28(f)

(i) The advantage to APCHL was that the August Amendments purported to create rights in APCHL that would, if exercised, benefit APCHL.

(ii) By voting in favour of alternatively assenting to the resolution to lodge the Amended Constitution, he used his position as a director of APCHL intending to cause the August Amendments to become effective.

(iii) The use of his position was improper because a person

properly exercising the powers of a director of a trustee in the circumstances would have recognised that the August Amendments conferred benefits on APCHL and companies associated with Lewski and were detrimental to the interests of the members of Prime Trust, and refused to use his position to permit them to become effective;

(iv) In so far as Lewski is concerned, the use of his position was also improper because:

(A) the August Amendments were Lewski's idea and he wanted to amend the constitution of the Prime Trust without seeking unitholder approval; and

(B) Lewski sought and obtained advice from Madgwicks on the August Amendments and further instructed Madgwicks that the purpose of the August Amendments was to clarify anomalies in the fee arrangement for the responsible entity.

(g) breached his duty (imposed by s. 601FD(1)(e) of the Act) not to make improper use of his position as an officer of the responsible entity of the Prime Trust to provide an indirect advantage to those persons who would benefit from the fees paid pursuant to the August Amendments, and so contravened s 601FD(3) of the Act;

Particulars of sub-paragraph 28(g)

(i) The August Amendments purported to create rights in APCHL that would, if exercised, by their benefit to APCHL benefit those with an ownership interest in APCHL or rights to share in or receive a proportion of its profits or revenue, namely companies associated with Lewski.

(ii) The plaintiff relies upon and repeats the particulars in paragraphs (ii) - (iv) under paragraph 28(f).

(h) breached his duty (imposed by s. 601FD(1)(e) of the Act) not to make improper use of his position as an officer of the responsible entity of the Prime Trust to cause detriment to the members of the Prime Trust, and so contravened s. 601FD(3) of the Act; and

Particulars of sub-paragraph 28(h)

(i) The detriment to the members was that the August Amendments purported to create rights in APCHL that would, if exercised, result in a diminution of the assets of the Prime Trust, without providing any, alternatively any equivalent, benefit to its members

(ii) the plaintiff relies upon and repeats the particulars in paragraphs (ii) to (iv) under paragraph 28(f).

(i) breached his duty (imposed by s. 601FD(1)(f) of the Act) to take all steps that a reasonable person would take if that reasonable person was in his position to ensure that APCHL complied with the Prime Trust constitution and the Act, and so contravened s. 601FD(3) of the Act.

Particulars of sub-paragraph 28(i)

(i) By reason of the matters pleaded at paragraphs 19 and 20 above APCHL in purporting to make the August Amendments did not comply with the Constitution of the Prime Trust.

(ii) By reason of the matters pleaded in paragraphs 19, 20 and 26 above APCHL in purporting to make the August Amendments did not comply with section 601FC(1)(m) of the Act.

(iii) Each of them voted in favour of or alternatively assented to the resolution to lodge the Amended Constitution:

(A) intending thereby to make the August Amendments effective;

(B) without being satisfied that the board had considered legal advice that in making the August Amendments without the approval of unitholders the responsible entity would comply with the Act and the Constitution of the Prime Trust; and

(C) without taking any steps to cause APCHL to obtain judicial advice as to whether APCHL was empowered and justified to make the August Amendments without member approval.

51 A number of immediate observations can be made as to the content of the pleading as it relates to the Directors and the first group of contraventions.

52 First, it is only focused on the conduct of the Directors by voting in favour of, or assenting to the vote of the Lodgement Resolution and whether at that time and by that conduct, relevant breaches of the Act had occurred.

53 Secondly, as already mentioned, there was no allegation of an improper continuing course of conduct, or that the Directors were required to reconsider the decisions made prior to the Lodgement Resolution, or that any of the Directors knew or should have known that they had acted improperly prior to the relevant conduct directly complained of by ASIC.

54 The relevant contraventions all relate to various breaches of duty (duties imposed by the Act), breaches confined to the 'August Amendments' and the Lodgement Resolution. This is pleaded in the circumstances where the pleader accepts that the 19 July 2006 resolution involved an approval of the relevant variations (paragraph 13), although the pleading does characterise the intended amendment as occurring on 23 August 2006 upon the lodgement with ASIC of an amended Constitution (hence labelling the 'amendments set out in Deed of Variation (No 7)' as 'the August Amendments' (paragraph 18)).

55 Then, in relation to the allegations concerning the payment of the Listing Fee, paragraph 44 of the Second Further Amended Statement of Claim, after particularising the background knowledge of each Director, makes specific allegations concerning the actual conduct complained of, namely the making of certain resolutions and payments. So, for instance, in relation to the allegation that each Director failed to act in the best interests of the members of the Trust, it is particularised that by reason of his participation in certain conduct (referred to in paragraphs 31 to 41), each Director failed to give any consideration to whether payment of the Listing Fee was in the best interests of the members of the Trust (paragraph 44(f)(a)).

56 In response to these allegations, in one way or another, each Director in his Defence relied upon earlier events and conduct than that directly relied upon by ASIC. In particular, the Directors' main defence to all the allegations was that the meeting of 19 July 2006, and the events surrounding it, provided a complete answer to all the allegations brought by ASIC.

57 Effectively, the Directors were contending in the various Defences that the decisions were made on 19 July 2006, so that the Constitution was then amended, the 22 August 2006 meeting was merely procedural or administrative, and the payment of the Listing Fee followed as a matter of course: see, for example, paragraphs 22, 23, 25, 27, 28 and 44 of the Further Amended Defence of the Fifth Defendant (Dr Wooldridge).

58 In each appeal, ASIC submitted that reliance for the contraventions was only placed on conduct between 22 August 2006 and 27 June 2008, and this was the way the proceeding was conducted before the trial judge. It was various defences raised by the Directors that relied upon the earlier conduct of the Directors, in particular the events surrounding the 19 July 2006 meeting.

59 ASIC submitted that in addition to the reasons of the trial judge, the declarations of contravention made by the trial judge demonstrated that he confined himself solely to the conduct as pleaded. The declarations of contraventions set out the relevant failures and conduct of the Directors that the trial judge found gave rise to the contraventions, following upon various findings of fact made by the trial judge.

60 Taking one example, the declarations of contravention made against Mr Lewski in the Penalty Judgment were as follows:

> *[8] The second defendant,* ***William Lionel Lewski****, contravened s. 601FD(3) of the Act by reason of him having contravened s. 601FD(1)(b) of the* Corporations Act 2001 *(Cth) (the Act), in that, in his capacity as a director of*

*Australian Property Custodian Holdings Limited (Receivers and Managers Appointed)(In Liquidation)(Controllers Appointed) (**APCHL**) in its capacity as the responsible entity (the **Responsible Entity**) of the Prime Retirement and Aged Care Property Trust ARSN 097 514 746 (the **Prime Trust**), he failed to exercise the degree of care and diligence that a reasonable person would have exercised if he or she were in Mr Lewski's position, by acting as follows. On 22 August 2006, at a meeting of the board of directors of APCHL (the **Board**), Mr Lewski voted in favour of a resolution (the Lodgement Resolution) to lodge with the Australian Securities and Investments Commission (**ASIC**) an amended constitution of the Prime Trust (the **Amended Constitution**) to cause the amendments in the Amended Constitution to take effect (the **Amendments**). The Amendments that were the subject of the Lodgement Resolution purported to create rights in APCHL that, if exercised, would result in a diminution of the assets of the Prime Trust without providing any or any equivalent benefit to the Members of the Prime Trust (the Members). In so doing, Mr Lewski on 22 August 2006:*

(a) failed to consider and understand, and be satisfied that the Board had considered and understood, the effect of a deed of variation dated 22 August 2006, which contained the Amendments;

(b) failed to consider whether, and be satisfied that, there was a legitimate reason for the Responsible Entity to make the Amendments;

(c) failed to be satisfied that the Board had considered:

*(i) legal advice that the Amendments, if made without the approval of the Members, would comply with the Act and the existing constitution of Prime Trust (the **Existing Constitution**); or*

(ii) judicial advice that the Responsible Entity would be justified in making the Amendments without the approval of the Members;

(d) failed to consider, and be satisfied that the Board had considered, whether the Amendments if made without the approval of the Members would comply with the Act and the Existing Constitution;

(e) failed to consider, and be satisfied that the Board had considered, the effect of the Amendments on the rights and interests of the Members;

(f) failed to be satisfied that the Board had considered the effect of the Amendments on the interests of APCHL, Mr Lewski and entities related to and associated with Mr Lewski; and

(g) failed to consider and be satisfied that the Board had considered how, if at all, the conflict between the interests of the Members and the interests of APCHL could be resolved in favour of the Members.

*[9] The second defendant, **William Lionel Lewski**, contravened s. 601FD(3) of the Act by reason of him having contravened s. 601FD(1)(c) of the Act, in that, in his capacity as a director of the Responsible Entity, he failed to act in the best interests of the Members and failed to give priority to the interests of the Members over the interests of APCHL, in voting in favour of the Lodgement Resolution on 22 August 2006, in circumstances where:*

(a) he did not give any consideration to whether making the Amendments was in the best interests of the Members;

(b) the Amendments were not in fact in the best interests of the Members;

(c) a director of APCHL in the position of Mr Lewski could not reasonably have believed that the Amendments were in the best interests of the Members; and

(d) there was a conflict between:

(i) the interests of APCHL in being paid the additional fees provided for by the Amendments and the interests of the members in paying only the fees under the Existing Constitution; and

(ii) the interests of APCHL in being paid the additional fees and its duties to act in the Members' best interests.

*[10] The second defendant, **William Lionel Lewski**, contravened s. 601FD(3) of the Act and so contravened s. 601FD(1)(e) of the Act, in that, in his capacity as a director of the Responsible Entity, he made improper use of his position as an officer of the Responsible Entity to provide an advantage to APCHL, in voting in favour of the Lodgement Resolution on 22 August 2006, in circumstances including the following:*

(a) the Lodgement Resolution advantaged APCHL, because the Amendments purported to create rights in APCHL that would, if exercised, benefit APCHL;

(b) by voting in favour of the Lodgement Resolution, he used his position as a director of APCHL intending to cause the Amendments to become effective; and

*(c) the use of his position was improper because a person properly exercising the powers of a director of a trustee in the circumstances, which included the following (collectively, the **Five Principal Factors**):*

(i) the fees to be payable pursuant to the Amendments were payable to APCHL in its personal capacity (and through it to Mr Lewski) and were to come from property held on trust by APCHL for the members. APCHL was acting as a trustee;

(ii) consideration of the Amendments created self-evident conflicts:

(A) between APCHL's interest in becoming entitled to the additional fees through the Amendments and the Members' interests in having APCHL perform its services as Responsible Entity for the fees in the Existing Constitution; and

(B) between APCHL's interest in becoming entitled to the additional fees payable pursuant to the Amendments and its statutory duty to act in the best interests of the Members and to give priority to their interests;

(iii) the nature of the proposed additional fees was that:

(A) APCHL was given contingent rights to take multiple fees to the value of 2.5% of the gross assets of the Prime Trust out of Prime Trust funds. Absent the Amendments the Members had the right to the services of APCHL as Responsible Entity without the additional fees;

*(B) the listing fee payable pursuant to the Amendments (the **Listing Fee**) imposed a fee if the Prime Trust was listed, in circumstances where under the Existing Constitution the Members were entitled to expect listing to occur without a fee if the directors considered that listing was in the Members' best interests (as they did);*

(C) the 'removal fee' payable pursuant to the Amendments imposed a fee for the exercise of the Members' right to remove APCHL as Responsible Entity, which the Members could require without a fee under the Existing Constitution;

*(D) the 'takeover fee' payable pursuant to the Amendments (the **Takeover Fee**) substantially increased the fee payable on a third party acquiring shares over certain thresholds;*

(E) the Takeover Fee could be payable on multiple occasions; and

(F) the fees payable pursuant to the Amendments could be payable notwithstanding that another of the fees had previously been paid;

(iv) the fees payable pursuant to the Amendments were substantial, each having a value of between about $11.25 million and $21.6 million at the time of the Amendments (which was in the order of 6.7% of the net scheme property of the Prime Trust after borrowings were taken into account); and

(v) the fees payable pursuant to the Amendments were gratuitous in the sense that no, or no equivalent, countervailing benefit was provided to the Members in return for them -

could not have considered it proper to pass the Lodgement Resolution and would have refused to use his position to permit the Amendments to become effective.

*[11] The second defendant, **William Lionel Lewski**, contravened s. 601FD(3) of the Act by reason of him having contravened s. 601FD(1)(e) of the Act in that, in his capacity as a director of the Responsible Entity, he made improper use of his position as an officer of the Responsible Entity to provide an indirect advantage to those persons who would benefit from the fees payable pursuant to the Amendments, in that:*

(a) the Amendments purported to create rights in APCHL that would, if

exercised, by their benefit to APCHL benefit those with an ownership interest in APCHL or rights to share in or receive a proportion of its profits or revenue, namely Mr Lewski, several of his family members and companies associated with him;

(b) by voting in favour of the Lodgement Resolution, he used his position as a director of APCHL intending to cause the Amendments to become effective; and

(c) the use of his position was improper because a person properly exercising the powers of a director of a trustee in the circumstances, which included the Five Principal Factors, could not have considered it proper to pass the Lodgement Resolution and would have refused to use his position to permit them to become effective.

*[12] The second defendant, **William Lionel Lewski**, contravened s. 601FD(3) of the Act by reason of him having contravened s. 601FD(1)(f) of the Act in that, in his capacity as a director of the Responsible Entity, he failed to take all steps that a reasonable person would have taken if that reasonable person were in Mr Lewski's position to ensure that APCHL complied with the constitution of Prime Trust and the Act, in that:*

(a) in purporting to make the Amendments, APCHL did not comply with the Existing Constitution;

(b) in purporting to make the Amendments, APCHL did not comply with s. 601FC(1)(m) of the Act; and

(c) Mr Lewski voted in favour of the Lodgement Resolution:

(i) intending to make the Amendments effective;

(ii) without being satisfied that the Board had considered clear legal advice that in making the Amendments without the approval of the Members, the Responsible Entity would comply with the Act and the Existing Constitution;

(iii) without taking any steps to cause APCHL to obtain judicial advice as to whether APCHL was empowered to make, and justified in making, the Amendments without the approval of the Members;

(iv) without seeking the approval of the Amendments by the Members; and

(v) without giving any consideration on 22 August 2006 to the Board's power to make the amendments or the need for proper legal advice or judicial advice.

*[13] The second defendant, **William Lionel Lewski**, contravened s. 209(2) of the Act (as modified by Part 5C.7 of the Act) by being involved (as that term is used in s. 79 of the Act) in a contravention by APCHL of s. 208 of the Act as modified by Part 5C.7 of the Act, as follows:*

(a) APCHL contravened s. 208 of the Act as modified by Part 5C.7 of the Act, in that:

(i) on 3 August 2007, it caused to be issued to itself in its personal capacity ordinary units of the Prime Trust with a

*value of $3,293,994 as and by way of a 10 per cent instalment of the Listing Fee (the **First Scrip Instalment**);*

(ii) on 13 March 2008, it caused to be transferred $329,399 of the monies held by it as Trustee of Prime Trust to itself in its personal capacity in respect of GST on the First Scrip Instalment,

*(collectively, the **First Instalment**);*

(iii) on 27 June 2008, it caused to be issued to Carey Bay Pty Ltd 9,020,386 units in the Prime Trust valued at $5,000,000; and

(iv) on 30 June 2008, it transferred $27,610,548.30 of the monies held by it as trustee of Prime Trust to itself in its personal capacity,

*(collectively the **Second Instalment**),*

without obtaining the approval of the Members and notwithstanding that, as a matter of law, the First Instalment and the Second Instalment and each component of them were not provided for in the constitution of Prime Trust;

(b) Mr Lewski participated in the meetings of the Board on 26 June 2007 and 27 July 2007 and assented to the resolutions passed at those meetings that authorised the payment of the First Instalment to APCHL in circumstances where he knew that:

(i) payment of the First Instalment was "a financial benefit" (as that expression is used in s. 208(1) of the Act);

(ii) the First Instalment was given by APCHL as Responsible Entity;

*(iii) the First Instalment was given out of the scheme property of Prime Trust (**Scheme Property**);*

(iv) the First Instalment was given to APCHL itself; and

(v) APCHL did not obtain the Members' approval for the payment of the First Instalment.

(c) Mr Lewski:

(i) on 28 April 2008 executed the Heads of Agreement;

(ii) participated in the meeting of the Board on 27 June 2008 and the resolution passed at that meeting which authorised the execution on behalf of APCHL of the Deed of Acknowledgement under which APCHL agreed to pay the Second Instalment;

when he knew that:

(iii) payment of the Second Instalment was "a financial benefit" (as that expression is used within s. 208(1) of the Act);

(iv) the Second Instalment was given by APCHL as Responsible Entity;

(v) the Second Instalment was given out of Scheme Property;

(vi) the Second Instalment was given partly to APCHL itself and partly to Carey Bay which was a related party of APCHL; and

(vii) APCHL did not obtain the Members' approval for the payment of the Second Instalment.

*[14] The second defendant, **William Lionel Lewski**, contravened s. 601FD(3) of the Act by reason of him having contravened s. 601FD(1)(c) of the Act, in that, in his capacity as a director of the Responsible Entity, he failed to act in the best interests of the Members and failed to give priority to the interests of the Members over the interests of APCHL, in that he:*

(a) voted in favour of or otherwise assented to the resolution on 26 June 2007 in the following terms:

"the Listing fee be taken by the Responsible Entity as Units in the Trust of which approximately ten per cent is to be issued to the Responsible Entity at the time of allotment and official quotation of Prime Trust's units on the ASX. The balance of the listing fee will be deferred and payable in tranches"; and

(b) voted in favour of or otherwise assented to the resolution on 27 July 2007 to the effect that APCHL would take the first tranche of the Listing Fee ostensibly payable pursuant to the Amendments as units; and

(c) participated in making the decision to pay the balance of the Listing Fee by:

(i) executing the Heads of Agreement on 28 April 2008;

(ii) attending in the meeting of the Board on 27 June 2008 and joining in the resolution passed at that meeting which authorised the execution on behalf of APCHL of the Deed of Acknowledgement under which APCHL agreed to pay the Second Instalment;

*(collectively **the decisions to pay the Listing Fee**) in circumstances where:*

(d) he did not give any consideration to whether making payment of the Listing Fee gave rise to any conflict of interest;

(e) a director of APCHL in the position of Mr Lewski would have been alive to APCHL's conflict of interests and conflict of interest and duty, and would have considered and sought to resolve these conflicts in favour of the members before making a decision to pay the Listing Fee;

(f) payment of the Listing Fee was not in fact in the best interests of the Members;

(g) a director of APCHL in the position of Mr Lewski could not in the circumstances reasonably have believed that payment of the Listing Fee was in the best interests of the Members; and

(h) the proposed payment of the Listing Fee gave rise to a conflict

between the interests of APCHL and the interests of the Members which should have been resolved in favour of the Members by APCHL deciding not to make the payment.

*[15] The second defendant, **William Lionel Lewski**, contravened s. 601FD(3) of the Act by reason of him having contravened s. 601FD(1)(f) of the Act, in that, in his capacity as a director of the Responsible Entity, he failed to take all steps that a reasonable person would have taken if that reasonable person were in Mr Lewski's position to ensure that APCHL complied with the Act, in that he participated in making the decisions to pay the Listing Fee by:*

(a) voting in favour of or otherwise assenting to the resolutions on 26 June 2007 and 27 July 2007;

(b) executing the Heads of Agreement on 28 April 2008;

(c) attending the meeting of the Board on 27 June 2008 and joining in the resolution passed at that meeting which authorised the execution on behalf of APCHL of the Deed of Acknowledgement under which APCHL agreed to pay the Second Instalment;

in circumstances where:

(d) a reasonable person in his position would not have done so without obtaining:

(i) clear legal advice or a judicial direction that the Amendments had been effective, that APCHL had a right to be paid the fee under the constitution of Prime Trust and the Act, and that payment of the fee would not contravene s. 208 of the Act (as amended by s. 601LC of the Act); or

(ii) the approval of the Members for payment of the fee to be made; and

(e) he did not take any step towards obtaining further legal advice or a judicial direction as to the Amendments or towards obtaining the Members' approval for the payment of the Listing Fee.

61 By reference to these declarations of contravention, ASIC sought to demonstrate that the trial judge did make declarations in accordance with each pleaded allegation made by ASIC and went no further.

62 For instance, in relation to Mr Lewski's contravention of s 601FD(1)(b) of the Act, the allegation was (and it was sustained) that on 22 August 2006, Mr Lewski did (for example) fail to consider whether there was a legitimate reason for the RE to make the Amendments. A declaration of contravention was accordingly made in these terms by the trial judge.

63 Mr Lewski's response, and that of the other Directors, to this allegation (as with the others) was that there was no obligation on 22 August 2006 to consider whether there was a legitimate reason for the RE to make the Amendments, as the occasion for such did not arise having regard to the matters then before the Board on that date. The Directors contended that

looking at what was actually decided on 19 July 2006, and the only matter that was before the Board on 22 August 2006, the Directors fulfilled their responsibilities on 22 August 2006 and during the subsequent period.

64 The Directors did not have to contend with allegations that the failures alleged on 22 August 2006 arose from failures that occurred on 19 July 2006, as this was not pleaded against them by ASIC.

65 There was no reply by ASIC to any of the defences of the Directors, nor any suggestion that any earlier consideration by the Directors was inadequate, or that it necessitated a reconsideration, on 22 August 2006. There was no suggestion (and the trial judge found to the contrary) that the Directors knew at any time the Amendments made on 19 July 2006 were invalid.

THE BACKGROUND FACTS

66 The substantive facts as set out by the Court in the Liability Judgment, and as summarised in the Penalty Judgment, are not in dispute.

67 However, it is important to recall that the trial judge found that none of the Directors had good independent recollections of either the 19 July 2006 or 22 August 2006 meetings. The trial judge accepted this as understandable in light of the seven years that had elapsed between those meetings and the giving of evidence in the proceeding. The trial judge concluded that many recollections of events were reconstructed from the minutes of those meetings and other contemporaneous documents, and in certain instances some evidence was unreliable. In relation to Mr Lewski in particular, the trial judge reached an unfavourable view of his credibility and considered his evidence quite unreliable. This impacted upon certain conclusions of fact which the trial judge had to make about the conduct of meetings, but these factual issues are no longer in contention in each appeal. Each appeal has proceeded upon the basis that the trial judge's assessment of the evidence given by the Directors is to be accepted. However, this does not prevent this Court on appeal from considering all the evidence (as accepted by the trial judge) and characterising the events differently from the trial judge if the trial judge was in error in his approach as to what occurred at, and the purpose of the relevant meetings (principally those held on 19 July 2006 and 22 August 2006).

68 The Court, in mentioning this, is mindful of the authorities which indicate sufficient weight should be given to the advantages of the primary judge: see, for example *Dearman v Dearman* (1908) 7 CLR 549, 561; *Fox v Percy* (2003) 214 CLR 118 at [26]-[31] and *Short v Ambulance Victoria* (2015) 249 IR 217 at [99].

69 However, in this proceeding the trial judge (putting aside where he has decided matters of credit, which findings are not in dispute) carefully set out his process of reasoning to draw certain inferences based upon established facts. In the circumstances, if that process of reasoning is not sound, then it may be more readily concluded that the trial judge's conclusions based on that process of reasoning are erroneous. This would not be a case of the appeal court having a different view of the probabilities of the case, or possible nuances; but it would be an instance where an appeal court should intervene.

70 It is now convenient to set out the background to this matter substantially as described by the primary judge in the Liability Judgment without further attribution.

Ownership of APCHL

71 APCHL was the RE of a managed investment scheme, the Trust. APCHL was owned by Mr Lewski, members of his family and another company controlled by Mr Lewski and indirectly owned by Mr Lewski and related parties. Mr Jaques became a full time employee of an associated entity of Mr Lewski's, with an indirect interest in APCHL. In February 2006, Mr Butler commenced work as a full time contractor for APCHL and continued to do so throughout the relevant period.

72 The Directors were members of the Board and, with the exception of Mr Clarke who commenced as a Director on 21 August 2006, were in such positions at the 19 July 2006 Board meeting. Mr Clarke did attend the 19 July 2006 meeting, but only as an observer. Dr Wooldridge served as Chairman throughout the relevant period.

Constitution

73 APCHL, as RE, held the scheme property on trust for the members. Various amendments to the Constitution were made prior to the Board meetings on 19 July 2006 and 22 August 2006. The Constitution that applied as at the time of those Board meetings was the amended Constitution that came into effect on 30 May 2006 when APCHL lodged with ASIC Supplemental Deed of Variation No 6 of the Constitution and a consolidated Constitution.

The prohibition on amendments in favour of APCHL

74 The Constitution contained cll 34.1 and 25.1 which prohibited an amendment in favour of, or resulting in any benefit to APCHL.

75 Clause 34.1 provided:

> *34.1 **No Variation***
>
> *This Deed shall not be capable of being revoked added to or varied otherwise than as provided in Part 25.*

76 Part 25 of the Constitution contained only cl 25.1, providing:

> *25. 1 **Amendment to Trust***
>
> *(a) **Subject to clause 25.1(b)**, the Responsible Entity for the time being may at any time and from time to time by deed revoke, add to or vary all or any of the trusts, powers, conditions or provisions contained in this Deed…provided further that **any such revocation, addition or variation**:*
>
> *(i) **shall not be in favour of or result in any benefit to the Responsible Entity**;*
> *(ii) insofar as they create any new beneficial interest in the Trust Fund or any part shall be for the benefit of all or one or more of the Unitholders;*
> *(iii) shall not affect the beneficial entitlement to any amount set aside for any Unitholder prior to any such revocation, addition or variation; and*
> *(iv) shall not infringe the rule known as the Rule against Perpetuities.*
>
> *(b) **Any amendment of this Deed must comply with the Corporations Act.***
>
> [See section 601GC for power to amend. The amendment cannot take effect until a copy of the amendment is lodged with ASIC.]
>
> (Emphasis added.)

77 The Constitution contemplated the possibility that the units of the Trust might be listed on a stock exchange. Clause 1.1(uu) of the existing Constitution applying at the time of the Amendments provided:

> *"Vesting Day" means the first to occur of the following dates, namely:*
>
> *(i) if the Responsible Entity has not passed a resolution on or before 31 July 2007 to seek and apply for a listing of the Units of the Trust on an appropriate exchange – 31 December 2007; or*
>
> *…*
>
> *(iii) such date being earlier or later than the date specified in clause 1.1(uu)(i) as the Responsible Entity may with the consent of the Unitholders by special*

majority appoint subject to the same being within the Perpetuity Period.

78 APCHL informed investors of the possibility of a future public listing of the Trust in the information provided to potential investors, including the first Prospectus dated 27 July 2001, the Product Disclosure Statements ('**PDS**') dated 15 August 2003 and 30 August 2005, and a supplementary PDS dated 22 August 2006 (the '**Supplementary PDS**') which advised of the Amendments. Each of these documents warned that an investment in the Trust was likely to be illiquid in the short term because the units would not be listed on any stock market exchange, noting however that the Constitution required the Trust to be terminated by 31 December 2007 if APCHL had not passed a resolution to list the units of the Trust on an appropriate exchange on or before 31 July 2007. This was subject to the right of APCHL to fix another vesting date with the consent of a special majority of members.

The Madgwicks Advice

79 On 20 June 2006, Mr Lewski sought legal advice from Madgwicks Lawyers (who acted for APCHL) (**'Madgwicks**') in relation to amending the Constitution to provide for additional fees including the Listing Fee (the '**Madgwicks Advice**'). On 18 July 2006, Madgwicks provided three copies of the Madgwicks Advice and a draft of the Deed of Variation (No 7) for the pending Board meeting. The advice stated that if the Board approved the draft Deed, execution copies would be prepared. Once the execution copies were signed it was proposed to lodge the Deed with ASIC together with a consolidated Constitution containing the Amendments. The Madgwicks Advice was provided to each of the Directors (other than Mr Clarke) prior to the 19 July 2006 meeting.

The preamble to the advice

80 The preamble to the relevant section of the Madgwicks Advice set out that Madgwicks was instructed that the additional fees were necessary to address some 'unintended anomalies'. The trial judge found that these instructions were provided by Mr Lewski. The advice stated:

> ***2. Amendments to the Constitution***
>
> ***(a) Your instructions and proposed amendments***
>
> *You have instructed us that APCHL has recognized an anomaly in the fee arrangements for the RE. The constitution includes provision for, amongst other things, the following fees to the RE:*
>
> - *A "exit" fee on the earlier of the termination of the Trust (2.5% of the gross asset value) or the sale of all the main assets of the Trust (2.5% of the net sale proceeds – which is defined to mean total proceeds of sale less direct selling costs). That is, in both cases, the*

fee is based on the total value or sale proceeds of the assets, rather than the net equity in those assets.

- *A "takeover" fee if there is a takeover of units under chapter 6. The fee is 2.5% of the gross price paid for the units. This fee would be based on the unit value which is the net equity and doesn't include the debt.*

You have instructed us that the unintended anomalies are as follows:

- *There is no express provision for a RE fee on a successful listing of the Trust, the effect of which would extend the life of the Trust beyond 2007 without involving either a termination of the Trust or sale of all its assets that would otherwise trigger an "exit" fee.*
- *There is no express provision for a RE fee upon the RE being removed as RE either on a takeover of Units or otherwise by Unitholders.*
- *The takeover fee is based on the net equity of the Trust rather than the gross asset value, and it is the gross asset value which is the basis of calculating both the "exit" fee in 24.5(c) and the management fee in 24.5(a).*

You have instructed us that APCHL wishes to amend the Trust's Constitution to clarify the anomalies by expressly providing for the following new RE fees:

- *providing for a listing fee where APCHL is listed on the Australian Stock Exchange to be 2.5% of the gross asset value of the Fund at the time immediately before listing.*
- *providing for a removal fee where the RE is removed as Responsible Entity of the Trust (other than by reason of proven fraud, misconduct or by ASIC), which fee is to be 2.5% of the gross asset value of the Fund; and*
- *amending the takeover fee to be based on the gross asset value of the Trust.*

The advice regarding the power to amend under the Act

81 Section 2(c) of the advice provided:

(c) Corporations Law requirements for amendments

*Section 601GC(1)(b) of the Corporations Act provides that an amendment to the Constitution of a registered scheme must be approved by a resolution of the members unless the responsible entity reasonably considers that the change "*will not adversely affect members' rights*".*

Recent case law in respect of the section indicates that the proposed amendments to the Trust's Constitution under the draft Deed will not adversely affect Unitholders' rights for the purposes of section 601GC(1)(b). At most, the amendment may affect the value of the units held by the Unitholders. Case law indicates that an amendment that may change the value of the units does not, of itself, affect Unitholders' rights and provided that the amendment does not adversely affect the Unitholders' rights (which the cases refer to, as examples, being, right to distribution, voting rights and rights to receive information), the consent of the Unitholders is not required.

> *Section 601GC(1)(b) of the Corporations Act makes it clear that the test is a* subjective *one, which requires APCHL as RE to determine whether it considers that the amendment will adversely affect the Unitholders' rights. If APCHL reasonably believes that the amendment will not adversely affect the Unitholders' rights having regarding to the case law and commentary that distinguishes between "rights" and "value", APCHL will not be required to seek Unitholder approval. This provides support for APCHL to rely on its own assessment of the amendments, and without the need to seek any form of ruling from ASIC.*
>
> (Citations omitted.)

The advice regarding the power to amend under the Constitution

82 Section 2(d) of the Madgwicks Advice dealt with the prohibition on amendments in favour of or resulting in any benefit to APCHL, provided in cl 25.1 of the Constitution. It stated:

> ***(d) Constitution's requirements for amendments***
>
> *We also draw your attention to Clause 25.1(a) of the Constitution which allows the Responsible Entity to amend the powers, conditions or provisions of the Constitution provided, amongst other requirements that such amendment shall not be in favour of or result in any benefit to the Responsible Entity. However, clause 25.1(a) is expressed to be subject to clause 25.1(b), which allows the Constitution to be amended provided it complies with the requirements of the Corporations Act.*
>
> ***Clauses 25.1(a) and (b) could potentially be interpreted in the following ways:***
>
> *(i) Clause 25.1(b) overrides (a) such that the RE can make any amendment under (b) that is permitted by the Act without having to follow (a); or*
>
> *(ii) Clause 25.1(b) qualifies (a) such that the RE can only make an amendment that satisfies both (a) and (b).*
>
> ***If the APCHL Board interprets clause 25.1 under (i) above and determines that the Corporations Act does not require Unitholder approval, then APCHL could proceed to make the amendments to the Constitution without Unitholder approval.***
>
> (Emphasis added.)

83 The effect of the advice was that, if the Amendments were to be passed without obtaining the members' approval, the Directors were required:

(a) to decide that the *potentially* available interpretation of cl 25.1—that cl 25.1(b) overrode cl 25.1(a) —was to be preferred to the interpretation that the Board had no power to pass the Amendments;

and, if they reached that decision,

(b) to decide in accordance with s 601GC(1)(b) that they reasonably considered that the change would not adversely affect the members' rights.

The advice made it clear that on one construction, the Directors could not proceed without Unitholder approval. However, the advice does not inform which of the two competing interpretations Madgwicks preferred.

84 In fact, at section 3(c) of the advice under the heading 'Conclusion', Madgwicks confirmed that it was for the Directors to decide which interpretation they preferred. It stated:

> *We have prepared the draft Supplemental Deed of Variation (No.7) of Constitution and a Minute* (sic) *of APCHL Board Minute approving the amendments contained in the Deed* ***on the basis that APCHL does determine after considering the above issues that member approval is not required and will not be sought*** *for these amendments.*
>
> (Emphasis added.)

The 19 July 2006 meeting

85 The Board met on 19 July 2006, and all of the then Directors attended. The minutes of the meeting relevantly record:

> *"POISON PILLS" AND RE PROTECTION*
>
> *Bill Lewski is investigating this when looking at the transition to listing. The issue of partly paid units with voting rights is under serious consideration. Under the non-ASIC regime we can issue partly paid units in the Trust only prior to listing. The terms for issue are set as per the issue options. They will need to be fully paid within 3-5 years of their issue. They can be issued at $0.0001 per unit. They can only be issued prior to the receipt of any offer.* ***At the required change of [the] Constitution, we can also change the fee to the RE at a take-over from a fee based on Net Asset Value to one based on Gross Asset value. We could also include into the Constitution a fee for the RE as part of the fees for listing. Bill Lewski moved that the Board approve the variations to the Constitution to reflect the above changes, and this was seconded by Kim Jaques.*** *Michael Wooldridge suggested that there be an amendment that the units be partly paid for no more than 5 years, with the RE having the right to make calls on the PP units as it sees fit during that time, but in any event for not less than 99.99 cents per unit, and the units will cease to exist, if not called upon, at the end of 5 years.*
>
> ***The motion was passed unanimously***
>
> *Mark Butler moved that we issue 80 million partly paid units. Seconded by Kim Jaques, and passed unanimously.*
>
> ***The above process will be reviewed by the Trust's corporate Advisors to the proposed listing on the ASX. The review should be done as expeditiously as possible because of the proposed new PDS.***
>
> (Emphasis added.)

86 Listing was in the offering, and the 'process' referred to in the minutes was as to the issue of the options, which was to be reviewed by Kidder Williams, the Trust's corporate advisers on the listing. Whilst the trial judge regarded Kidder Williams as being involved in approving the Amendments (see [422(a)], there is no evidence of such an involvement. Kidder Williams was to review the 'process', following upon the decision made to amend the Constitution. It is also significant that there are no conditions in the minutes themselves, nor the actual resolution made on 19 July 2006, making approval of the Amendments conditional.

87 Although the minutes do not record whether Deed of Variation (No 7) which contained the Amendments was also discussed, the trial judge accepted Dr Wooldridge's evidence that it was.

88 The Amendments, which were passed at that meeting, were intended to have the effect that on the occurrence of specified events, the Listing, Removal, and Takeover Fees (each amounting to 2.5% of the gross asset value of the Trust, which the trial judge noted was approximately $21.6 million on 19 July 2006) would be payable to APCHL in its personal capacity from Trust funds. The trial judge further noted that those fees were gratuitous and could fall due repeatedly in some circumstances. The latter matter remained contentious on appeal, but it is of no real moment whether the fees were 'one-off' or could fall due repeatedly. The Directors considered that they were 'one-off', and this seems a likely view based upon the context of their payment.

89 At the conclusion of the 19 July 2006 meeting, Deed of Variation (No 7) was signed by Dr Wooldridge and Mr Butler, but was not dated, and remained so until the meeting on 22 August 2006. The trial judge noted that Dr Wooldridge said that he was asked to leave the Deed undated, probably by a Madgwicks solicitor, so that an appropriate date could be inserted later, and because the Deed needed to be lodged with the Supplementary PDS which was not then ready.

90 The Deed bears the date 22 August 2006. The Deed remained undated until it was given that date following the 22 August 2006 Board meeting. At that meeting the Supplementary PDS was approved, and the Lodgement Resolution was passed.

The 22 August 2006 meeting

91 On 18 August 2006, Madgwicks sent an email to Mr Lewski, which was forwarded to the other Directors on 21 August 2006 (the '**18 August 2006 email**'). The draft Supplementary

PDS was attached to it which had been updated to include information about the additional fees to be introduced through the Amendments. Relevantly to the Amendments, the 18 August 2006 email stated:

> ***3. Constitution Amendment No. 7*** *– I confirm that the Supplemental Deed of Variation (No. 7) of the Constitution (copy attached) was approved at the last Board meeting and executed. It will take effect upon the date of its lodgement with ASIC. I propose that the Deed be dated 22 August and lodged with ASIC on that date together with a Consolidated Constitution incorporating the amendments made by the Supplemental Deed of Variation. This will then coincide with the issue of the new Supplementary PDS.*

92 The Board met on 22 August 2006, and all of the then Directors attended, including Mr Clarke. At that meeting, the minutes of the 19 July 2006 meeting were approved as correct by the Board, and were signed by Dr Wooldridge.

93 There were two sets of minutes taken at that meeting, one of which did not include the Lodgement Resolution. However, the trial judge accepted that the minutes prepared by Madgwicks, which included the Lodgement Resolution, and which were signed by Dr Wooldridge and returned to APCHL by Madgwicks on 25 August, were accurate. They contained the following Lodgement Resolution:

> *3. DEED OF VARIATION (NO. 7)*
>
> *At the last Board meeting, the Directors approved Deed of Variation (No. 7) to the Constitution which had not yet taken effect as it had not been lodged with ASIC because a Supplementary PDS had not yet been prepared. As a Supplementary PDS has now been prepared,* ***the Directors resolved that the Consolidated Constitution incorporating Deed of Variation (No. 7) be lodged with ASIC to become effective.***
>
> (Emphasis added.)

94 The trial judge found that at the meeting on 22 August 2006, the Supplementary PDS was approved and the Lodgement Resolution was passed.

95 The trial judge noted that there did not appear to have been controversy at the time that the Board resolved to lodge the Amendments. In October 2006, the Board approved the Annual Financial Report of the Trust for the year ending 30 June 2006. In the annual report, under the heading 'Events Subsequent to Reporting Date', the following appeared:

> *On 22 August 2006 Australian Property Custodian Holdings Limited as the Responsible Entity of Prime Retirement & Aged Care Property Trust exercised its right to amend the original constitution to account for the following entitlements to fees in specific circumstances, where:*
>
> *The Responsible Entity shall be entitled to be paid a listing fee in the event of the*

units of Prime Retirement & Aged Care Property Trust being listed on the Australian Stock Exchange to the value of 2.5% of the Gross Asset Value of the Trust calculated at the date the Trust lists.

The Responsible Entity shall be entitled to be paid a removal fee if removed as the registered responsible entity of the Prime Retirement & Aged Care Property Trust at the instigation of the Unitholders or ASIC to the value of 2.5% of the Gross Asset Value of the Trust calculated at the date of removal

96 It was and is uncontroversial that on 23 August 2006 a consolidated Constitution containing the Amendments in Deed of Variation (No 7) (the '**Amended Constitution**') was lodged with ASIC. It was lodged under cover of a Form 5101 ('Notification of Change to a Managed Investment Scheme's Constitution') dated 22 August 2006 and signed by Mr Goldberg of Madgwicks. The form stated that the amendment was authorised on 22 August 2006. ASIC recorded its receipt of the form and the Amended Constitution on 23 August 2006.

The Listing Fee and associated conduct

97 As mentioned, the Listing Fee constituted an amendment to the existing Constitution. It was payable in the event that the units in the Trust were listed for quotation on the ASX.

98 On 23 January 2007, Kidder Williams wrote to the ASX on behalf of APCHL advising, amongst other things, that it was the intention of APCHL in its capacity as RE of the Trust to formally apply in 2007 for listing of the units of the Trust on the ASX.

99 By 20 March 2007 the listing process had begun, and Kidder Williams was documenting an explanatory memorandum for the members, and working on the PDS that would apply after listing.

100 The Board met on 26 June 2007, and all of the then Directors attended. At the meeting, the Board passed three relevant resolutions:

(a) a resolution to list the Trust on the ASX;

(b) a resolution to issue a large number of options (of different classes) to APCHL in its personal capacity; and

(c) a resolution dealing with the manner and timing of payment of the Listing Fee to APCHL, which was recorded as follows:

The Responsible Entity is entitled under clause 24.5(h) of the Constitution to a listing fee of 2.5% of the gross asset value of the Trust in the event that the units of the Trust are listed for quotation on the ASX ("Listing Fee").

> *IT WAS RESOLVED that t**he Listing Fee be taken by the Responsible Entity as Units in the Trust of which approximately ten percent is to be issued to the Responsible Entity at the time of allotment and official quotation of Prime Trust's units on ASX. The balance of the listing fee will be deferred and payable in tranches** to the Responsible Entity upon achievement of performance hurdles over the next three years, being FY08, FY09 and FY10 ("Deferral Period"). The performance hurdles will require the Trust to achieve a minimum cash yield of 8.5% p.a. and net asset growth of 4% each year. The deferred fee in each year will be paid 50% in cash and 50% as units issued at the 5 day weighted average price prior to the issue of the units in that year. In the event of removal of the Responsible Entity prior to the end of the Deferral Period, the unpaid balance of any outstanding fees will become payable in cash to the Responsible Entity. In the event that a performance hurdle is not achieved for any given year, the Listing Fee payable for that year will be waived by the Responsible Entity.*
>
> (Emphasis added.)

101 The trial judge explained (at [142]) that:

> *Pursuant to this resolution, instead of a single cash payment the Listing Fee was to be paid to APCHL (and through it to Mr Lewski) as follows:*
>
> *(a) 10% as units in Prime Trust to be paid on listing;*
>
> *(b) the balance to be deferred and payable in tranches of 30%, upon APCHL achieving the performance hurdles of a minimum cash yield of 8.5% and net asset growth of 4% per annum, to be paid in each of the following three financial years ending 30 June 2008, 2009 and 2010 ("the Deferral Period") payable as 50% in cash and 50% in units;*
>
> *(c) if the performance hurdles were not achieved in a particular year the tranche payable for that year would be lost; and*
>
> *(d) if APCHL were removed as the RE prior to the end of the Deferral Period, the unpaid balance of any outstanding fees would become payable in cash.*

102 Also at that meeting, the Directors approved the Listing PDS which, as the trial judge noted at [146]:

> *...advised potential investors of the additional fees and estimated the Listing Fee at approximately $33 million. The Listing PDS set out a broader basis for APCHL's entitlement to the deferred component of the Listing Fee than that provided by the Board resolution passed that day. Importantly, it provided that APCHL was entitled to the Listing Fee if there was a restructure of APCHL which meant that Mr Lewski was no longer in control.*

103 The trial judge recapped the subsequent events (at [687]) as follows:

> *(a) on 27 July 2007 the Board resolved to issue to APCHL in its personal capacity, 3,293,994 units to a value of about $3,293,994 as the first 10% tranche of the Listing Fee;*
>
> *(b) on 3 August 2007 the Board resolved to distribute 27.5 million options in APCHL to Directors and officers of APCHL and to the wholesale*

distributors of the units as part of their remuneration;

(c) on 13 March 2008 APCHL paid itself an additional $329,399 representing the GST payable on the first tranche of the Listing Fee;

(d) some time prior to 28 March 2008 Mr Lewski instructed Madgwicks that the Board resolution of 26 June 2007 was in error because it did not include a requirement to immediately pay the balance of the Listing Fee on a restructure of APCHL;

(e) on 28 March 2008, in accordance with Mr Lewski's instructions, Madgwicks advised APCHL to amend the terms of the 26 June 2007 resolution so as to include a requirement to pay the Listing Fee immediately if APCHL was restructured and interests associated with Mr Lewski ceased to control it;

(f) on 7 April 2008 the Board resolved to amend the terms of the 26 June 2007 resolution in accordance with the advice provided by Madgwicks. The Listing Fee became payable immediately upon a restructure of APCHL. At the same meeting the Board considered a restructure of APCHL which Mr Lewski was negotiating;

(g) on 11 April 2008 Madgwicks advised Mr Lewski on the effect of the draft Heads of Agreement to restructure APCHL. Madgwicks advised him that upon execution of the formal documents he would lose control of APCHL and would be entitled to immediately receive the balance of the Listing Fee;

(h) on 21 April 2008 APCHL met and considered the draft Heads of Agreement, the Blake Dawson Advice, Madgwicks advice about amending the 26 June 2007 resolution, and a memo from Kidder Williams proposing a formal resolution to authorise execution of the Heads of Agreement by APCHL;

(i) on 23 April 2008 Mr Krishnan sent the Directors (other than Mr Lewski) an email asking them to endorse their acceptance of the resolution to authorise execution of the Heads of Agreement by APCHL. By separate emails on 23 and 24 April 2008 each of the Directors (other than Mr Lewski) endorsed their approval of the resolution;

(j) on 28 April 2008 APCHL executed the binding Heads of Agreement which provided that the balance of the Listing Fee would become payable;

(k) on 27 June 2008, in a meeting attended only by Mr Lewski, Mr Jaques and Mr Clarke, the Board resolved to execute the Deed of Acknowledgement of Listing Fee Payment and to issue one K class share to Kidder Communities, giving that entity 51% of voting control at APCHL general meetings;

(l) on 27 June 2008 Mr Lewski and Mr Jaques executed the Deed of Acknowledgment on behalf of APCHL (in its personal capacity) and on behalf of APCHL (in its capacity as RE). Mr Lewski also executed the Deed of Acknowledgement on behalf of APA and Carey Bay; and

(m) on the following dates the balance of the Listing Fee was paid as follows:

(i) in accordance with an invoice dated 27 June 2008 APCHL paid to itself (in its personal capacity) $27,610,548.30 from Scheme property;

(ii) by cheque dated 27 June 2008 Mr Lewski withdrew $27,610,548.30 from the APCHL account and deposited it in an account of his

associated company, Direct Fitness; and

(iii) on 27 June 2008 APCHL issued 9,020,386 units in the Trust, valued at $5 million to Carey Bay.

Events after payment of the Listing Fee

104 With the payment of the Listing Fee balance the conduct upon which ASIC relied in the proceeding was at an end. Mr Lewski ceased to be a Director on 27 June 2008, Mr Butler ceased on 7 December 2008, Mr Clarke ceased on 2 August 2010, and Dr Wooldridge ceased on 6 July 2011.

105 The units in the Trust were floated on the ASX in August 2007 commencing at $1.00 each. On the day of listing their value increased to $1.06, but from then on they did not close at a price higher than $1.00 for the life of the Trust.

106 APCHL was placed into voluntary liquidation on 18 October 2010 and on 23 November 2011 a resolution of the creditors to wind up the company was passed. On the collapse of APCHL, the members, including at least some of the Directors, suffered serious financial losses.

107 On 21 August 2012, ASIC commenced the proceeding.

GROUNDS OF APPEAL

108 As mentioned above, the issues for determination raised by the appellants broadly fall into three categories, each of which will be addressed in turn. References to the Liability Judgment are made in square brackets as appropriate.

First group of contraventions

109 It is important to note at the outset in relation to these contraventions, that ASIC could not rely on the making of the resolution on 19 July 2006 as itself constituting any contravention of s 601FD, because reliance on such conduct to establish such contravention was statute barred by operation of s 1317K of the Act. It was and is therefore necessary for ASIC to establish that the contravening conduct occurred in the passing of the Lodgement Resolution on 22 August 2006. Nevertheless, ASIC did rely to a certain extent upon the events of and surrounding 19 July 2006 as factual background to the later conduct upon which ASIC does rely to establish the contraventions, as did the Directors.

110 In passing, reference is made to the terms of s 1317K, which provides:

Time limit for application for a declaration or order

> *Proceedings for a declaration of contravention, a pecuniary penalty order, or a compensation order, may be started no later than 6 years after the contravention.*

111 Section 1317K would not prevent reliance on conduct occurring prior to the six year period, either to put in context a later contravention amenable to the making of a declaration, or a continuing course of conduct which continued within the period of six years prior to the commencement of the proceedings for a declaration of contravention under s 1317J. ASIC could (for instance) have relied upon earlier conduct, and characterised it as being conduct that gave rise to the need on 22 August 2006 for a reconsideration of the making of the Amendments on 19 July 2006. This was not the case ASIC brought against the Directors, nor did they rely upon a continuing course of wrongful conduct commencing on 19 July 2006.

112 It was essentially submitted in each appeal by the Directors that the trial judge 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.

113 Further, it was submitted that the trial judge erred in finding (at [569]) that a reasonable director would have been concerned to consider the following matters (listed at [568]) on 22 August 2006 before passing the Lodgement Resolution:

> (*a*) *the fact that it was wrong to provide a Listing Fee payable from Scheme property to APCHL, and through it to Mr Lewski, so as to incentivise him to support listing when he was already obligated to do so;*
>
> *(b) the conflict between APCHL's interest in receiving the Listing Fee and the members' interest in having listing occur without the imposition of a fee, (at [277]-[297]);*
>
> *(c) the fact that the Board had capitulated to APCHL's conflict of interest in relation to the Listing Fee rather than giving priority to the members' interests;*
>
> *(d) the conflict between APCHL's interest in receiving the Removal Fee in the event APCHL was removed as RE, and the members' interests in being able to remove it as RE without paying a fee, (at [298]-[305]);*
>
> *(e) the deleterious effects of the Amendments, (at [309]-[310]);*
>
> *(f) the fact that the additional fees provided no corresponding benefit for the members, (at [323]-[324]);*
>
> *(g) whether the Board had power to pass the Amendments (at [312]-[322]). In particular, they gave no proper consideration to the fact that the Madgwicks Advice was unusual in advising that the Directors construe the Constitution,*

> *and uncertain in that it did not provide clear advice on a central question asked by APCHL of its lawyers; and*
>
> *(h) the effect of the Amendments on the members' rights to have the Scheme administered under the existing Constitution. The Madgwicks Advice dealt with the question of APCHL's power to pass the Amendments rather than whether the Amendments* should *be made.*

114 It was also contended on appeal that the Directors in any event gave adequate consideration to the Amendments before the 19 July 2006 meeting, and Dr Wooldridge (in particular) contended that the trial judge erred in focusing only on the deliberations at the 19 July 2006 meeting to determine whether such consideration was adequate.

Second group of contraventions

115 It was submitted by the Directors that the trial judge erred in finding that s 208, which prescribed the need for member approval for a financial benefit, was not qualified by s 208(3) as modified by s 601LC. It was therefore unnecessary for ASIC to prove that the Directors knew that the Amendments were ineffective at the time the Listing Fee was paid.

116 It was also contended that since the Listing Fee was provided for in the Amended Constitution, it was permissible to pay the Listing Fee under s 208(3): see [697].

Third group of contraventions

117 In a similar vein to the contentions in relation to the first group of contraventions, it was contended that the Directors should not have been found to have breached s 601FC(1) as the Amended Constitution provided for the Listing Fee, and the Directors held an honest belief that the Amendments were valid and had no reason to revisit or have reconsidered the Amendments.

118 The Directors contended that the trial judge erred in finding that the right to have a scheme managed in accordance with its constitution is a 'members right' (at [659]), which right was affected by the unauthorised Amendments (see [667] and [672]). They further argued that cl 25.1 of the Constitution did not qualify the statutory power of amendment under s 601GC(1)(b). Rather, they argued that the trial judge should have found that on 19 July 2006, the Directors considered that members were not adversely affected by the Amendments and validly made the Amendments.

CONSIDERATION

119 As noted above, the references in square brackets below are references to the Liability Judgment as appropriate.

First group of contraventions

Mr Clarke

120 At the outset, special mention needs to be made of Mr Clarke. Mr Clarke contended at trial (as he does on appeal) that he did not vote for, or assent to the vote for the Lodgement Resolution at the 22 August 2006 meeting. This is the only allegation made against him in relation to the events occurring on 22 August 2006. If Mr Clarke did not vote for, or assent to the vote for the Lodgement Resolution, then no contravention of the first group of contraventions can be sustained against him.

121 The trial judge made the following observations in relation to Mr Clarke:

> ***10.3 Whether Mr Clarke's conduct conveyed or amounted to a vote in favour of the resolution***
>
> *[507] Mr Clarke said he remained silent throughout the 22 August meeting, describing himself as a passive participant. As I detail at [198], he said that Dr Wooldridge informed him that if a majority of the Directors supported a particular position then that would be the outcome and there was therefore no need for him to indicate his position on a resolution or expressly abstain from voting. He said that he did not express a position on any resolution at the 22 August meeting because:*
>
> *(a) no report or issue arose at the meeting about which he had unique experience or information;*
>
> *(b) it was his first meeting as a director of APCHL;*
>
> *(c) he was a consultant to the Trust and his expertise related to planning and development issues;*
>
> *(d) he had a limited understanding of the Trust at that time, including but not limited to the fact that he had not read the Board papers for the meeting; and*
>
> *(e) the Lodgement Resolution was for the purpose of giving effect to a previous decision of the Board made at a time when he was not a Director.*
>
> *[508] Senior Counsel for Mr Clarke contended that it was not put to him in cross-examination that he affirmatively assented to the Lodgement Resolution, and that his silence is not in issue. Mr Williams denied that Mr Clarke's silence connoted assent to the resolution arguing that Dr Wooldridge's practice when putting a resolution of asking "those for" and "those against" was designed to ascertain whether there was dissent not whether there was unanimity. He argued that this process left it open for a Director to abstain*

by remaining silent, and he noted that Dr Wooldridge was not asked whether a director who intended to abstain from voting needed to announce that fact in some way.

[509] As I set out at [199], I do not accept Mr Clarke's evidence as to his conversation with Dr Wooldridge or his understanding of the Board's practice in regard to resolutions before it. I prefer Dr Wooldridge's evidence, confirmed by Mr Jaques and Mr Butler as to the practice of the Board. While, as a matter of semantics, it can be argued that Dr Wooldridge's practice left open the possibility of a Director abstaining by remaining silent, I do not see that result was at all likely. The Board was only small, Dr Wooldridge was an experienced director, and I infer from his practice that he sought to understand the position of each Director on the resolutions before the meeting.

[510] Mr Clarke's silence when the Lodgement resolution was put by Dr Wooldridge must be seen in the following light:

(a) I reject his evidence as to his conversation with Dr Wooldridge regarding Dr Wooldridge's practice in putting resolutions;

(b) no other Director gave evidence of an understanding that his silence meant he was abstaining from voting;

(c) he was in favour of bringing the Amendments into effect through lodgement with ASIC;

(d) the resolution was part of a package of resolutions recommended by Madgwicks in pre-prepared draft minutes; and

(e) he did not give evidence of any reason to reject or not follow Madgwicks' recommendation to pass the resolution.

[511] His evidence was that he sat passively in the meeting and said nothing. In my view his conduct conveyed or amounted to a vote in favour of the resolution. A reasonable observer would have concluded in all the circumstances that his silence indicated approval. It was his obligation to be cautious to express his will clearly and to ensure that it was so recorded.

122 The trial judge also said:

[581] It must be the case that in considering the Lodgement Resolution a reasonable director in Mr Clarke's position would have been careful to read and understand the resolution itself. On the face of the resolution it was to have a substantive effect and bring substantial additional fees into effect. It must also be the case that a reasonable director of a professional corporate trustee in all the circumstances would be careful to read and understand the Amendments that were to be brought into effect by the resolution.

[582] Against this:

(a) Mr Clarke did not read the Board papers, even though he had ample time to do so;

(b) he did not give evidence that he carefully considered the resolution. I infer that he did not;

(c) there is no evidence that he carefully read and considered the

> *Amendments to which the resolution referred. I infer that he did not;*
>
> *(d) he said that he was a passive participant in the meeting. I infer that he did not reach a view on the Lodgement Resolution or on the Amendments; and*
>
> *(e) he did not give evidence that he asked questions of the other Directors about the resolution or the Amendments. I infer that he did not.*
>
> *...*
>
> *[595] For Mr Clarke the situation is different. Nevertheless, on 22 August a reasonable director in his position would have given consideration to the Board's power to make the Amendments before deciding to bring them into effect. Mr Clarke's case was that he passively participated in the meeting. He did not engage with the question of the Board's power at all yet he approved the resolution. He failed to exercise reasonable care and diligence in my opinion.*

123 ASIC had the onus to prove that Mr Clarke voted for, or assented to the vote for the Lodgement Resolution. It is a question of fact. Mr Clarke gave evidence he did neither. He was not cross-examined on this evidence. No other Director (including Dr Wooldridge, the Chairman) gave evidence on this particular issue to contradict Mr Clarke's evidence. No Director, including Dr Wooldridge, gave any evidence as to whether he considered Mr Clarke voted in favour of the Lodgement Resolution. It is to be recalled that the events occurred many years prior to the proceeding being heard, and any evidence of this nature was either unavailable or unreliable.

124 The practice of a board and its chairman may be relevant to determining the fact of whether a particular director voted. But the practice of the Chairman (Dr Wooldridge) as accepted by the trial judge (and not contested on appeal) did not put any onus on Mr Clarke to positively declare a passive position. The practice of the Chairman involved not a show of hands, but if no consensus, Dr Wooldridge would ask for a vote of those in favour and those against.

125 The minutes of the meeting adopted record nothing about who voted – they simply record the passage of the Lodgement Resolution which would be consistent with a majority resolution. There was no evidence that Mr Clarke saw any prepared minutes indicating unanimous approval being contemplated, which he may have needed to positively correct or bring to Dr Wooldridge's attention.

126 The most significant matter is that the trial judge accepted and made a finding that Mr Clarke sat passively in the meeting and said nothing. The trial judge accepted that Mr Clarke was silent. As to the matters relied upon by the trial judge at [510] in support of his finding that

Mr Clarke either voted or assented to the vote, the following may be observed. The trial judge's rejection of Mr Clarke's evidence of his conversation with Dr Wooldridge regarding practice and procedure is not relevant to whether Mr Clarke abstained or not. Dr Wooldridge's evidence (as accepted) is now relied upon by Mr Clarke in his appeal. It is true no other Director gave evidence of an understanding of Mr Clarke's silence, but the onus was on ASIC to prove a vote or assent. The whole of the evidence indicated that Mr Clarke did not reach a view on the Lodgement Resolution or the Amendments, which is consistent with the other findings of the trial judge. The fact that the Lodgement Resolution was part of a package of resolutions recommended by Madgwicks in pre-prepared draft minutes is equivocal as to the actions of Mr Clarke. Finally, whilst Mr Clarke did not give direct evidence as to his reasons not to follow the recommendation to pass the Lodgement Resolution, the surrounding circumstances (known to Mr Clarke and the other Directors) were that he was not participating and remained silent, as he was unprepared having just been appointed a Director. Whilst Mr Clarke did attend the earlier 19 July 2006 meeting, he did not do so in a capacity as a director (with the responsibilities that entails).

127 It may or may not have been prudent for Mr Clarke to have expressed his abstention clearly and ensure it was recorded.

128 In *Gillfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460 there was discussion of proper company procedure regarding board decision-making. Barrett JA, with whom Beazley JA agreed at [3], said:

> *[4] I wish to make some observations about two matters of company procedure emphasised by the circumstances of this case.*
>
> *[5] The first concerns the way in which decision-making by a board of directors should be undertaken.*
>
> *[6] Section 248G of the Corporations Act 2001 (Cth) enacts replaceable rules that a resolution of the directors of a company must be passed by a majority of the votes cast by directors entitled to vote on the resolution and that the chair has a casting vote, if necessary, in addition to any deliberative vote to which he or she is entitled as a director. Experience suggests that, where articles within the company's constitution operate to the exclusion of these replaceable rules, the constitution will very likely make substantially similar provision.*
>
> *[7] Under a regime of this kind, the required method of decision-making is the passing of a resolution of the body of persons; and the passing of a resolution depends on the casting of individual votes. It follows that procedures actually adopted must be such that each member of the body who is entitled to vote and wishes to do so may communicate his or her vote and have it taken into account.*

> *[8] Value is often attached to collegiate conduct leading to consensual decision-making, with a chair saying, after discussion of a particular proposal, "I think we are all agreed on that", intending thereby to indicate that the proposal has been approved by the votes of all present.*
>
> *[9] Such practices are dangerous unless supplemented by appropriate formality.*
>
> *[10] The aim is not to consult together with a view to reaching some consensus, although it may well be, as a practical matter, that such consultation facilitates the making of the decision that is ultimately required. The aim is rather that the members of the board should consult together so that individual views may be formed and the individual will of each member may be made known in a clearly communicated way.*
>
> ***[11] The culmination of the process must be such that it possible to see (and to record) that each member, by a process of voting, actively supports the proposition before the meeting or actively opposes that proposition; or that the member refrains from both support and opposition. And it is the responsibility of an individual member to take steps to ensure that his or her will is expressed in one of those ways.***
>
> (Emphasis added.)

129 However, it is important to recall that the only allegation made against Mr Clarke is that he voted in favour of, or assented to, the vote in favour of the Lodgement Resolution, not that he otherwise acted in a way in which he failed to exercise reasonable care and diligence. It is not alleged against him any of the matters raised in [582], as separate elements of contravention.

130 There is no doubt that Mr Clarke failed to expressly indicate clearly that he was not voting. However, the finding of the trial judge was that Mr Clarke 'sat passively in the meeting and said nothing'. The trial judge accepted Mr Clarke's evidence on that issue. There was no other basis to then conclude that Mr Clarke's conduct conveyed or amounted to a vote in favour of the Lodgement Resolution. The other matters relied upon by the trial judge at [582] including that Mr Clarke did not consider carefully the Lodgement Resolution, did not read the Board papers, and did not ask questions about the Lodgement Resolution, would tend to support the position taken by Mr Clarke that he felt in no position other than to sit passively and say nothing. Whatever other criticisms can be made of Mr Clarke, his overall conduct and the circumstances of the meeting on 22 August 2006, do not demonstrate on the balance of probabilities (keeping in mind s 140 of the *Evidence Act 1995* (Cth)) that Mr Clarke voted or assented to the vote in favour of the Lodgement Resolution, or (if relevant) that he can be taken to have conveyed that position.

131 Mr Clarke also submitted that the trial judge was in error in his finding at [579] that a reasonable director in Mr Clarke's position would have seen the decision on 19 July 2006 as 'clearly wrong', and then should have engaged further at the 22 August 2006 meeting.

132 As the conclusion that is reached is that Mr Clarke did not vote for or assent to the vote for the Lodgement Resolution, it is unnecessary to deal with this issue. Nevertheless, part of our reasoning for concluding that Mr Clarke did not participate in the meeting on 22 August 2006 was based upon the objective circumstances of Mr Clarke's position. It is almost inconceivable that a reasonable director in Mr Clarke's position (having just been appointed to the Board), could have read and understood the documents on all the issues identified by the trial judge at [579]. Mr Clarke realised he could not properly participate in the meeting on 22 August 2006 (because of his inability to properly prepare for the meeting), and so abstained.

Dr Wooldridge

133 It is also necessary to make a special mention of Dr Wooldridge. Dr Wooldridge contended that the trial judge fell into error in assessing his conduct over the period of time from July 2006 until the payment of the relevant fees. ASIC in reply contended that the trial judge's findings of fact are not to be set aside, having been based upon all the evidence (including that of the Directors).

134 Relevant to this contention is the decision in *Xu v Jinhong Design & Constructions Pty Ltd* [2011] NSWCA 277, where Basten JA at [15] said:

> *In most trials, the material facts do not depend upon the assessment of a witness, based upon demeanour alone, but on the complex interaction of documentary material, elements of testimony from different witnesses and matters of emphasis, none of which readily appear from reading a transcript. This fact, sometimes referred to as the "disadvantage" suffered by the appellate court, is, of course, widely appreciated and is articulated by reference to the oft-cited passage in the speech of Lord Hoffmann in* Biogen Inc v Medeva plc *[1997] RPC 1 at 45. As explained by Gleeson CJ, Gummow and Kirby JJ in* Fox v Percy *at [41]:*
>
> > *"No judicial reasons can ever state all of the pertinent factors; nor can they express every feature of the evidence that causes a decision-maker to prefer one factual conclusion over another."*

135 In reality Dr Wooldridge attempts, by his submissions, to revisit findings made by the trial judge, which were made by him following a complete appreciation of the evidence, after hearing explanations given by the Directors (including Dr Wooldridge). Many of these explanations the trial judge did not accept, either because he was not persuaded by the

analysis or disbelieved the witness. Whilst Dr Wooldridge was regarded as an honest witness, the trial judge did not accept all of his testimony.

136 Dr Wooldridge contended that the trial judge did not focus on the commercial realities leading up to 19 July 2006, and then leading up to the payment of the relevant fees. The references made by the trial judge (as set out in these reasons) demonstrate that the trial judge did properly consider the issue of the conflicts between APCHL and the unitholders, and the various failures in that context of Dr Wooldridge (and the other Directors).

137 It was also submitted by Dr Wooldridge that the trial judge in dealing with Dr Wooldridge only focused upon his conduct at the 19 July 2006 meeting. Dr Wooldridge pointed to other instances upon which he gave consideration to the Amendments. It is true that the trial judge did put some emphasis on the lack of time spent on the issue of the Amendments at the 19 July 2006 meeting (some 10 to 15 minutes), but the trial judge did not ignore the other matters relied upon by Dr Wooldridge. Nevertheless the trial judge, in considering these matters, still considered that Dr Wooldridge did not consider the Amendments with reasonable care. This was open to the trial judge on the basis of hearing Dr Wooldridge and the other Directors, particularly where there were issues of credibility that the trial judge needed to assess in an overall appreciation of what Dr Wooldridge (and the other Directors) in fact did during the course of their own and corporate considerations.

138 There is one other matter to mention arising out of Dr Wooldridge's submissions. The trial judge, as only one basis for his findings of breach, did find that the Directors (thus, Dr Wooldridge) did not read and understand the effect of the Amendments. There is some substance in the contention of Dr Wooldridge that there was no sound factual basis for this particular conclusion. In effect, in considering this matter, the trial judge construed the Deed, and determined that various fees would be payable in circumstances which were inappropriate and provided little protection to the members. It was upon this basis that the trial judge concluded that Dr Wooldridge could not have read and understood the effect of the Amendments. Dr Wooldridge gave evidence about his understanding of the fees and their appropriateness. The rejection by the trial judge of these explanations does not lead to a conclusion that Dr Wooldridge failed to read and understand the effect of the Amendments, unless all the trial judge is saying is that Dr Wooldridge's understanding was different from that of the Court.

139 In any event, this aspect of the criticism made of Dr Wooldridge by the trial judge was not the only basis upon which the trial judge found Dr Wooldridge's conduct involved a contravention. This error does not reflect or impact on the other conclusions reached by the trial judge on Dr Wooldridge's conduct.

Five principal factors relevant to alleged breaches of duty in passing the Lodgement Resolution

140 Returning to the main contest involving all the Directors, the trial judge saw 'Five Principal Factors' as being of particular importance and kept returning to them in his reasons, namely:

> *[16] With regard to the alleged breaches of duty in passing the Lodgement Resolution, I see five factors as being of particular importance, namely:*
>
> *(a) the fees to be payable pursuant to the Amendments were payable to APCHL in its personal capacity (and through it to Mr Lewski) and were to come from property held on trust by APCHL for the members. APCHL was acting as a trustee:*
>
> *(b) consideration of the Amendments created self-evident conflicts:*
>
> *(i) between APCHL's interest in becoming entitled to the additional fees through the Amendments and the members' interests in having APCHL perform its services as RE for the fees in the existing Constitution; and*
>
> *(ii) between APCHL's interest in becoming entitled to the additional fees and its statutory duty to act in the best interests of the members and to give priority to their interests;*
>
> *(c) the nature of the proposed additional fees was that:*
>
> *(i) APCHL was given contingent rights to take multiple fees to the value of 2.5% of the gross assets of the Trust out of Trust funds. Absent the Amendments the members had the right to the services of APCHL as RE without the additional fees;*
>
> *(ii) the Listing Fee imposed a fee if the Trust was listed, in circumstances where under the existing Constitution the members were entitled to expect listing to occur without a fee if the Directors considered that listing was in the members' best interests (as they did);*
>
> *(iii) the Removal Fee imposed a fee for the exercise of the members' right to remove APCHL as RE, which the members could require without a fee under the existing Constitution;*
>
> *(iv) the Takeover Fee substantially increased the fee payable on a third party acquiring shares over certain thresholds;*
>
> *(v) the Takeover Fee could be payable on multiple occasions; and*

> *(vi) the fees could be payable notwithstanding that another of the fees had previously been paid;*
>
> *(d) the fees were substantial, each having a value of between about $11.25 million and $21.6 million at the time of the Amendments (which was in the order of 6.7% of the net Scheme property after borrowings were taken into account); and*
>
> *(e) the fees were gratuitous in the sense that no, or no equivalent, countervailing benefit was provided to the members in return for them.*
>
> *(Collectively "the Five Principal Factors").*

141 The trial judge concluded that the 'Five Principal Factors' indicated that APCHL and the Directors were required to exercise a high level of care and diligence and to be cautious in dealing with APCHL's conflicts.

142 So much can be accepted. The Five Principal Factors were important, and the standard referred to by the trial judge was appropriate. The real issue in each appeal, raised by each of the Directors and in different contexts, is whether the time for consideration of the Five Principal Factors and the exercise of care and caution was to take place on 22 August 2006.

143 As previously mentioned, ASIC could not plead or rely on the 19 July 2006 conduct to found any contraventions under the Act because it was barred by s 1317K from doing so. Nevertheless, the meeting on 19 July 2006 was an important event in the consideration of the responsibilities that were to be placed upon the Directors at a later date, and puts in context the meeting of 22 August 2006.

19 July 2006 Meeting

144 The trial judge carefully considered the events surrounding the meeting held on 19 July 2006 and the meeting itself. The trial judge focused on the inadequacy of the Board's consideration of the Amendments. In relation to Dr Wooldridge's evidence, regarded by the trial judge as the most reliable evidence of the Directors, the trial judge said as follows:

> *[242] Dr Wooldridge gave the most reliable evidence of the Directors. However, I do not accept that he has a strong recall of the relevant meetings. In particular, I do not accept his evidence that the Board's consideration of the serious issues involved in the Amendments and the Madgwicks Advice was as careful and detailed as he said. As I explain the evidence strongly points to the inference that the issues wrapped up in the Amendments to introduce the substantial additional fees were not given careful consideration. It was, in fact, impossible to carefully consider and discuss those issues in the 10 to 15 minutes which he said it took.*
>
> *[243] I do not though conclude that Dr Wooldridge was being untruthful. The 19*

July meeting was held almost 7 years before he gave his evidence, and I see his account of the Board's consideration of the Madgwicks Advice as having been largely reconstructed from re-reading the Madgwicks Advice, his annotations on it, and the minutes.

145 His Honour turned to the Directors' consideration of the Madgwicks Advice and the Amendments. The trial judge stated as follows:

> *[271] Each of the Directors (other than Mr Clarke) said that he gave consideration to the Madgwicks Advice prior to the passage of the Amendments. Dr Wooldridge said that prior to the meeting he annotated his copy of the advice so as to focus his thinking and to identify matters on which he would lead discussion. He said that each Director had a copy of the advice and that he led the Board discussion around it, which to the best of his recollection took approximately 10 to 15 minutes. He also said that during the meeting the Board was informed that 2.5% of the gross asset value of the Trust was about $21.6 million. He noted that information on his copy of the advice. I accept Dr Wooldridge's evidence in this regard.*
>
> *[272] None of the Directors said that they voiced any opposition to the passage of the Amendments.*
>
> *[273] Each of the Directors present gave an account of his consideration of the resolution to pass the Amendments and the Madgwicks Advice. I have set out my view (at [200]-[244]) that the probative value of each Director's evidence as to this meeting is minimal. Although I accept some of Dr Wooldridge's evidence I do not accept his testimony that the Board gave careful consideration to the Amendments and the Madgwicks Advice.*
>
> *...*
>
> *[274] At the 19 July meeting the Directors were required to consider a number of important matters in relation to the Amendments and the Madgwicks Advice. These included:*
>
> *(a) the conflict between APCHL's interest in receiving the additional fees and the members' interests in having APCHL's services for the existing fees;*
>
> *(b) the conflict between APCHL's interest in receiving the additional fees and its duty to give priority to the members' interests in the event of a conflict;*
>
> *(c) the fact that the additional fees were gratuitous in the sense that no, or no equivalent, countervailing benefit was to be provided to the members;*
>
> *(d) the nature of the additional fees in that:*
>
> *(i) the Listing Fee imposed a fee if the Trust was listed when the members were presently entitled to expect listing to occur without a fee;*
>
> *(ii) the Removal Fee imposed a fee for the exercise of the right to remove APCHL as RE, which right the members could presently exercise without a fee;*

> *(iii) the Takeover Fee substantially increased the fee payable on the acquisition of units over certain thresholds, which could be payable on multiple occasions; and*
>
> *(iv) the Amendments gave APCHL rights to take multiple fees of 2.5% of gross assets out of Scheme property;*
>
> *(e) which of the potentially available interpretations of the Board's power to amend under cl. 25.1 should be preferred;*
>
> *(f) the uncertain nature of the Madgwicks Advice in regard to the power to pass the Amendments under the Constitution;*
>
> *(g) the power to pass the Amendments under the Act, and whether the Amendments adversely affected members' rights; and*
>
> *(h) leaving aside any question of power, whether it was appropriate for APCHL to impose the additional fees.*
>
> *[275] It was impossible for the Board to properly consider these matters in the 10 to 15 minutes that Dr Wooldridge said that it took.*
>
> *[276] The minutes contain no record that any of these matters were discussed. I do not accept that Mr Jaques' minute taking was as careful as he contended before me, but I expect in the circumstances that if these matters were discussed the minutes would contain some note of it. While only Dr Wooldridge expressly said so, the upshot of the Directors' testimony that they discussed some of these matters must be that the minutes are deficient. Given the Five Principal Factors, Mr Jaques in preparing the minutes and the Directors in approving them, were obligated to exercise a high standard of care. The absence of any record of any discussion of these important matters tends to show that they were not, or at best scantly, discussed.*

146 The trial judge then dealt with the consideration of the Listing Fee and the failure to properly consider APCHL's conflicts and concluded that the evidence given by the Directors pointed in the same direction as their consideration of the Madgwicks Advice and the Amendments.

147 The trial judge then looked at the Directors' consideration of the Removal Fee and the Takeover Fee and considered that inadequate consideration was given by the Directors to these matters.

148 The trial judge then turned to consider the failure of the Directors to consider the effects of the Amendments. The trial judge said:

> *[309] It is axiomatic that a reasonable director would have been diligent to read and understand the effect of the Amendments before passing them. The evidence tends to show that the Directors did not do so. This may be seen in the fact that none of the Directors apparently understood:*
>
> *(a) that the Takeover Fee could be charged on multiple occasions. While this difficulty arose under the existing Constitution, the increased Takeover Fee meant that Trust funds could be seriously depleted if an acquirer purchased batches of shares above the threshold. The*

Directors' failure to apprehend this tends to show that no Director reviewed the Constitution properly before allowing the amendments;

(b) that the increased Takeover Fee or the Removal Fee could be payable notwithstanding that the Listing Fee had previously been paid. Mr Jaques and Mr Butler both expressed the view (wrongly) that the Constitution only provided for payment of one of the fees. Mr Jaques said that one of the reasons he approved the Listing Fee was because it would finalise any obligation to pay a fee of 2.5% of the Trust's gross asset value to APCHL, doing so at then current values. This again tends to show that they did not review the Constitution properly before allowing the Amendments. Dr Wooldridge conceded that he did not look at the Constitution when approving the Amendments;

(c) that the Removal Fee provided little protection for the members against low-ball offers for their units over and above that which already existed;

(d) that the increased Takeover Fee would operate to discourage not just low-ball offers for the units but also reasonable offers; and

(e) the significant impairment of the members' right to remove APCHL as RE which would result from introduction of the Removal Fee.

[310] A reasonable director would also have been diligent to ensure that the effects of the Amendments were properly discussed by the Board and understood by the other Directors. In the present case, if this had occurred, then each of these serious misunderstandings would have been apparent to the other Directors. No Director gave evidence that he was aware that another Director suffered from any of these misunderstandings and I infer that the effects of the Amendments were not considered and understood by the Directors acting as a Board.

149 The trial judge then considered that the Directors had not given adequate consideration, or any consideration, to whether the additional fees were gratuitous, the power to amend the Constitution and the Madgwicks Advice.

150 Specifically in relation to the Madgwicks Advice, the trial judge said:

[317] Given the Five Principal Factors, and particularly APCHL's manifest conflicts of interest, a reasonable director of a corporate trustee in all the circumstances would have been cautious. A reasonable director in each Director's position presented with the unusual and uncertain Madgwicks Advice would have been disquieted by Madgwicks' failure to make any clear recommendation as to the Board's power, even though that was the point of the advice. The alarm bells would have rung. Before passing the Amendments a reasonable director would have seen it as necessary, to obtain unequivocal advice from Madgwicks or another lawyer, seek a judicial direction, or at least would have sought the members' approval of the Amendments.

Other issues

151 There were a number of other issues the trial judge dealt with in considering the events of July 2006, many of which may have distracted from the main enquiry, namely the conduct of the Directors on and between 22 August 2006 and 28 June 2008. Nevertheless, it is appropriate to deal with these issues, and this shall be done in the order in which the trial judge proceeded.

152 Many of the findings of the trial judge, as can be seen from the following analysis, followed upon his views as to the Directors' failings in July, the effect of the Deed, and the invalidity of the Amendments.

153 The first issue the trial judge considered in this context was the effect of the Lodgement Resolution on Deed of Variation (No 7), the Constitution, the rights and interests of the members of the Trust, and the interests of APCHL.

154 Section 601GC provides a power to amend the constitution of a registered scheme and provides that an amendment is not effective until lodged with ASIC. It will be recalled that s 601GC states:

> ***Changing the constitution***
>
> *(1) The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:*
>
> *(a) by special resolution of the members of the scheme; or*
>
> *(b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.*
>
> *(2) The responsible entity must lodge with ASIC a copy of the modification or the new constitution. The modification, or repeal and replacement, cannot take effect until the copy has been lodged.*

155 ASIC contended that by passing the Lodgement Resolution the Directors authorised and directed completion of the Deed and lodgement of the consolidated Constitution, which operated to bring the Amendments into effect.

156 The Directors contended that the Lodgement Resolution had no effect on the Deed. They argued that if a constitution is amended it must be lodged with ASIC and upon the Deed being signed on 19 July 2006 it was instantly effective in imposing a positive and mandatory obligation to lodge the Deed with ASIC, pursuant to s 601GC(2).

157 The Directors contended that APCHL had no discretion to let the Amendments 'lay on the table'; it had to lodge them with ASIC. They pointed to the observation of Barrett J in *Re Macquarie Goodman Funds Management Ltd (as responsible entity for Macquarie Goodman Industrial Trust)* (2004) 52 ACSR 194 at [13] where his Honour said:

> *... s. 601GC(2) does not specify the actual point at which a modification, or repeal and replacement, takes effect. It merely identifies a point before which it is incapable of taking effect.*

158 They also argued that s 601FD(1)(f) created a positive duty to lodge the Amended Constitution pursuant to s 601GC(2). This section provides:

> *(1) An officer of the responsible entity of a registered scheme must:*
>
> *...*
>
> *(f) take all steps that a responsible person would take, if they were in the officer's position, to ensure that the responsible entity complies with:*
>
> *(i) this Act; and*
>
> *...*
>
> *(iii) the scheme's constitution...*

159 The Directors also relied on cl 4 of Deed of Variation (No 7) which provides:

> *4. **CONSOLIDATED CONSTITUTION TO ASIC***
>
> *(a) In accordance with Section 601GC(2) of [the Act] the Responsible Entity **will as soon as practicable after signing this Deed lodge with ASIC a copy of this Deed and a consolidated constitution** containing the consolidated governing provisions of the Original Constitution as amended by the Amendments in Schedule 1 of this Deed ("Consolidated Constitution").*
>
> *(b) The Consolidated Constitution will take effect as the governing constitution of the Trust on and from the date and time that the Responsible Entity lodges a copy of this Deed and/or the Consolidated Constitution with ASIC.*
>
> (Emphasis added.)

160 On the Directors' contention, unless there was some intervening instrument revoking the Deed or otherwise relieving APCHL of the obligation to lodge it, had the Amendments not been lodged, they would have been in breach of their positive duty under s 601FD(1)(f) and cl 4 of the Deed. They argued that the Lodgement Resolution did not serve or discharge this pre-existing obligation.

161 The trial judge first turned to answer the question as to when the Deed came into effect, as he saw this as relevant to determining the effect of the Lodgement Resolution on the Deed.

162 It should be observed that the question of when the Deed became effective as a Deed is a distraction. As will be addressed later, the real question is whether or not on 22 August 2006 the Lodgement Resolution could and should have been made and what were the considerations relevant to that decision. The answer to this question is not directly informed by whether or not APCHL was bound by the Deed before 22 August 2006.

163 Nevertheless, the trial judge in considering when the Deed came into effect said as follows:

> *[411] In determining the effect of the Lodgement Resolution on Deed of Variation No 7 it is first necessary to decide when the Deed came into effect. If there was a pre-existing obligation to lodge the Amendments as the Directors contended, it arose from the Deed. If the Deed did not come into effect when it was signed on 19 July then the obligation under cl. 4 to lodge it as soon as practicable did not arise.*
>
> *[412] I have concluded that the Deed was signed on 19 July but deliberately left undated on legal advice, and that it was dated 22 August 2006 following the passage of the Lodgement Resolution at the 22 August meeting. Given these findings, the question is when should the Deed be taken to have come into effect?*
>
> *[413] First, where a controversy arises as to the day upon which a deed comes into effect, there is a rebuttable presumption that the date of the deed is the day from which it takes effect:* Stone v Grubbam *(1614) 1 Roll Rep 3; Norton R,* A Treatise on Deeds *(2nd ed Sweet and Maxwell Ltd 1928, reprinted Wm. W. Gaunt & Sons Inc 1981) at 189. Deed of Variation No 7 provides that it "is made on 22 August 2006 by Australian Property Custodian Holdings Ltd" which points away from the contention that it took effect on 19 July. In my view the Directors failed to rebut this presumption.*
>
> *[414] Second, it is settled that a deed is not made effective solely by it being signed or fixed with a seal. If it is not the intention of the relevant parties to be immediately bound by it then the deed is not then effective. In an often quoted dictum in* Xenos v Wickham *(1866) LR 2 HL 296 at 312, Blackburn J explained:*
>
> > *...no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: "I deliver this as my deed;" but any other words or acts that sufficiently shew that it was intended to be finally executed will do as well.*
>
> *[415] Encapsulating the principle in* The Construction of Deeds *(2nd ed Sweet and Maxwell Ltd 1946 p. 6) the learned author Sir Charles Odgers states:*
>
> > *Any act of the party which shows he intended to deliver the deed as an*

instrument binding on him is enough. He must make it his deed and recognise it as presently binding on him.

[416] Where, as here, there is doubt as to the intention of the party making the deed, regard may be had to the surrounding circumstances in order to determine what the party's intention was at the time of signing or sealing the document: Poole and Another v Neely and Others *[1976] 1 NZLR 529 at 541;* Monarch Petroleum NL v Citco Australia Petroleum Ltd *[1986] WAR 310 at 356. This consideration may include conduct that occurred after the date the deed was purportedly made where, in the words of Buckly LJ, that conduct "throws a measure of retrospective light on the [party's] intention…":* Kingtson and Another v Ambrian Investments Co Ltd *[1973] 1 All ER 120 at 128. In the case of a deed that has been left undated, parol evidence is admissible to show when the deed was written and from what date it was intended to operate:* Morrell v Studd and Millington *[1913] 2 Ch 648 at 658.*

[417] As I now explain, the surrounding circumstances also indicate that the Deed was not intended to be binding on and from 19 July.

8.2.3 APCHL's intention by reference to the statutory framework and other matters

[418] APCHL's intention as to the completion of the Deed can be discerned in part from consideration of the statutory framework within which it had to act, and by reference to the outstanding matters that had to be dealt with after the 19 July meeting.

[419] As I note at [106]-[107], the first matter that required to be attended to before the Deed was brought into effect was that Kidder Williams, the Trust's corporate advisors on the listing, were to review the "process" relating to the Amendments and the issue of options. This was appropriate because there could be little question that the new Listing Fee and the issue of options might affect the planned listing. The Listing Fee would reduce net Scheme property by about 6.7% thereby reducing the value of the units on the listing.

[420] Other important matters that had to be attended to before the Deed could be brought into effect were the preparation, approval by the Board (where necessary) and execution of a new Management Agreement and new Compliance Consultancy Service Agreements. These matters were unrelated to the Amendments but they were required to be disclosed to investors and if they were not dealt with in the Supplementary PDS then another PDS would have been necessary a short time later. The evidence indicates that APCHL intended that the same Supplementary PDS include all the planned changes.

[421] The most important matter that required to be attended to before the Deed could be brought into effect was the preparation and approval of the Supplementary PDS. As I explain at [391]-[393], the Directors understood that the additional fees could only be brought into effect after the Supplementary PDS was issued.

[422] In summary, as at 19 July 2006, the date upon which the Deed might be brought into effect and the Amendments lodged with ASIC depended upon:

(a) whether Kidder Williams approved the Amendments and the proposed issue of options, and how long it took them to do so;

(b) how long it took to prepare and execute the Management Agreement

between APCHL and APCH Administrators for the provision of management and administration services for the Trust, and whether the Board approved it;

(c) how long it took to prepare and execute the Compliance Consultancy Service Agreements between APCH Administrators and Burke Bond Securities Ltd and Ian Bond, and between APCH Pty Ltd and Rees Partners Pty Ltd, for the provision of compliance consultancy services to the Trust; and

(d) how long it took to prepare the Supplementary PDS advising of these matters, of the Amendments, and whether the Board approved it.

[423] I infer that APCHL and the Directors intended that the matters in (a)-(c) above be dealt with in an orderly way and also intended to act in accordance with their obligations under the Act. I see the contention that the Directors intended that the Deed be immediately binding as quite implausible. If APCHL had lodged the Deed with ASIC at that time, as the Directors argued it was required to do, the Constitution would have provided for substantial fees payable from Scheme property which were not disclosed in the PDS. APCHL and the Directors may have been liable for breaches of the Act arising from a failure to ensure that the PDS correctly set out the fees payable. The decision not to date the Deed when it was signed on 19 July and to leave it incomplete was prudent and consistent with best practice.

[424] Nor is there anything in the Directors' contention that s 601GC itself required lodgement of the Amendments as soon as practicable after 19 July. First, as I have said, APCHL did not intend the Amendments to come into effect from that date. Second, it would be absurd to construe s 601GC(2) as requiring an RE to lodge Amendments with ASIC in circumstances where lodgement would cause the RE to breach of the Act.

8.2.4 APCHL's intention by reference to other evidence

[425] Mr Lewski said, and I accept, that he was able to direct lodgement of the Amendments with ASIC. Some Directors sought to argue that Mr Lewski impliedly instructed Madgwicks to lodge the Deed by leaving it with their receptionist. I do not accept this somewhat desperate contention. There is no evidence that Mr Lewski either expressly or impliedly instructed that lodgement occur prior to the 22 August meeting. I expect that the Deed would have been lodged had Mr Lewski provided instructions to do so and I infer that he chose not to instruct that it occur. I am reinforced in this inference by the fact that if he had instructed that the Deed be lodged APCHL would have been in breach of its statutory obligations.

[426] APCHL's intention that the Deed not come into effect on 19 July, and that it have no set commencement date, can be seen in that:

(a) the Deed was deliberately left undated on Madgwicks' advice;

(b) Kidder Williams was to conduct a review;

(c) there were several other important matters that were required to be finalised, included in the Supplementary PDS, and approved by the Board;

(d) the Supplementary PDS disclosing the additional fees and the other matters had to be prepared and approved by the Board before the

> *Amendments could be lodged;*
>
> *(e) Mr Lewski did not instruct Madgwicks or a member of APCHL's staff to lodge the Deed after it was signed on 19 July, and there was no instruction to lodge it until after the 22 August meeting;*
>
> *(f) contrary to the Directors' contention that they had a positive and mandatory duty to immediately lodge the Deed once it was signed, it was not in fact lodged for over a month. In fact they let the Deed "lie on the table" and did not lodge it until after the Lodgement Resolution was passed and the Deed was completed; and*
>
> *(g) Mr Goldberg advised in his 18 August email that the Deed would come into effect when it was dated and lodged on 22 August and it does not appear that any of the Directors took issue with that advice at the time.*
>
> *[427] Of course, the signing of a deed will often, perhaps usually, evince an intention to make it presently binding. However, in the present case the Deed was deliberately left undated, intended to be incomplete, and was not intended to be presently binding.*

164 The principles of law to apply in relation to the delivery of a deed seem not to be in contention. Delivery of a deed will occur as soon as (relevantly here) a company, by the words or conduct of the board or its authorised agent, indicates its intention that the document which it has executed as a deed is to be binding as the company's deed.

165 In *Segboer v AJ Richardson Properties Pty Ltd* (2012) 16 BPR 31,235 at [59] the Court of Appeal in New South Wales (Sackville AJA) said:

> *In* Xenos v Wickham*, it was said that the question of whether a party had evinced an intention to be bound by a deed was a question of fact for the jury: at 309 per Piggott B;* Ansett Transport Industries (Operations) Pty Ltd v Comptroller of Stamps *[1985] VR 70 at 78 per Tadgell J. Both parties in the present case accepted that the bank's intention, for the purpose of determining whether the deed had been delivered, was to be ascertained objectively by reference to the words used by and conduct of the bank and the facts attending the execution. This approach is consistent with the statements of principle in* Norton on Deeds *and in* Xenos v Wickham*, where Blackburn J emphasised the significance of the acts or words of the promisor: see also* Ansett v Comptroller *at 79, citing* Bowker v Burdekin *(1843) 11 M & W 128 at 147; 152 ER 744 at 751, per Parke B:* Monarch Petroleum NL v Citco Australia Petroleum Ltd *[1986] WAR 310 at 355 per Kennedy J.*

166 In *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109, Helsham CJ in Eq said at 118:

> *Blackburn J. in* Xenos v. Wickham*, said, as to delivery: "I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the parties sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and*

> *expressive mode of indicating such an intention is to hand it over, saying: "I deliver this as my deed;' but any other words or acts that sufficiently show that it was intended to be finally executed will do as well."*
>
> (Footnotes omitted.)

167 Looking then to the evidence in this proceeding, it is apparent that no direct evidence was available as to intention.

168 A number of indicators were relied upon by the trial judge in concluding that delivery had not occurred and there was no present intention on the part of the Board to be bound on 19 July 2006. However, particular reference was made to leaving the Deed undated (on the advice of Madgwicks) and hence concluding the Deed was 'incomplete'. The fact that a deed is undated has no consequence as a matter of law: see *Srecko Juric-Kacunic v Stan Vaupotic* (2013) 18 BPR 35,131 at [49] per Sackar J and the authorities mentioned therein. The fact that the Deed was not dated until 22 August 2006 on the advice of Madgwicks (which Madgwicks itself undertook to do after the 19 July 2006 meeting) was not itself indicative of the intention of the Board that the Deed not be binding on 19 July 2006. The Deed was signed in fact, signed immediately after the resolution authorising its execution.

169 The trial judge also considered that the involvement of Kidder Williams was a matter of some significance and one going to the issue of intention. As mentioned previously, Kidder Williams were to conduct a review of the 'process' (of listing). This review was not regarded as a condition to the approval already given by the Board on 19 July 2006 to the Amendments. Kidder Williams were to proceed on the basis that approval of the Amendments had been made by the Board.

170 The other matters relied upon by the trial judge included:

(a) the time it took to prepare and execute the management agreement between APCHL and APCHL administrators for the provision of management and administration services for the Trust, and whether the Board approved it; and

(b) the time it took to prepare and execute the Compliance Consultancy Service Agreements for the provision of compliance consultancy services of the Trust.

These matters were unrelated to the actual Amendments and were the subject of disclosure in the Supplementary PDS in any event.

171 The only important matter which was to impact on the time of lodgement was the preparation of the Supplementary PDS. This was the step that needed to be completed by management.

172 It was desirable that the Amendments not be brought into effect pursuant to s 601GC(2) of the Act until the Supplementary PDS was prepared to reflect the fact of the Amendments and other relevant matters. Contrary to the trial judge's impression at [393], there was no statutory obligation for the Supplementary PDS to be approved and issued in conjunction with the lodgement of the Amended Constitution. Clause 4 of the Deed effectively required the Supplementary PDS to be prepared, consistent with good governance, so that the Amendments could be lodged with ASIC as required by s 601GC(2) of the Act, 'as soon as practicable'.

173 Further, ASIC's submission that no obligation could be imposed on APCHL pursuant to s 601GC(2) of the Act until the Amendments became effective 'as a constitutional amendment' ignores the fact that the Amendments themselves could not become effective as a constitutional amendment until after APCHL itself had complied with its s 601GC(2) obligation and entered into a valid deed.

174 Implicit in the approval of the Amendments, made on 19 July 2006, was the anticipation that the Constitution as amended would be lodged, as required by law to be 'effective'. There is a difference between the binding effect of the Deed (as a deed (see s 601GB)) and it becoming effective as a matter of law under s 601GC(2) of the Act. The Board would not have approved the Amendments if it did not want the Amendments to be legally effective. The step required by law required no separate resolution, and could have been carried out administratively. Nevertheless, the matter did come back to the Board, but the Board's concern was timing, and the Supplementary PDS.

175 As indicated already, the Deed putting into effect the Amendment resolution of 19 July 2006, was executed on 19 July 2006 ([412]). Subclause 4(a) of the Deed, obliged the RE to lodge it and the Amended Constitution as soon as practicable after the Deed was signed, and that would be after the preparation of the Supplementary PDS.

176 The Lodgement Resolution was not a necessary precondition for the lodgement of the Amended Constitution. The necessary preconditions included signing the Deed (attended to on 19 July 2006) and the matters set out in [422]. None of those factors vitiated the effectiveness of the Deed in any respect other than as an 'effective' constitutional amendment to be lodged with ASIC.

177 In other words, the Deed was instantly binding on execution (19 July 2006)—not as a constitutional amendment under s 601GC(2)—but actually imposing a positive mandatory obligation on the officers of the RE to attend to finalising the lodgement of it. That obligation arose at that point (19 July 2006) by the interaction between s 601GC(2), s 601FD(1)(f) and cl 4 of the Deed. There is nothing in the minutes, resolutions of the 19 July 2006 meeting, or in any other documents that suggested that the Board anticipated the need for the matter to come back before the Board. The resolution made on 19 July 2006 was not in terms conditional upon any further resolution of the Board to make the Deed binding.

178 The trial judge's reasons as to the effectiveness of the Deed failed to make this distinction and instead incorrectly focused on the fact the Deed was not effective as a constitutional amendment prior to 22 August 2006.

179 That the Deed was not dated upon its signing but was dated on 22 August 2006 did not impact on the continuation of the process left to be completed prior to lodgement. The Deed was to be lodged with a supplementary PDS, and as a supplementary PDS was not ready on 19 July 2006, it needed to be prepared. That this was the context in which the Deed was later dated is clear from the 18 August 2006 email. In relation to the Amendments, the 18 August 2006 email stated:

> ***3. Constitution Amendment No 7*** *- I confirm that the Supplemental Deed of Variation (No 7) of the Constitution (copy attached) was approved at the last Board meeting and executed. It will take effect upon the date of its lodgement with ASIC. I propose that the deed be dated 22 August and lodged with ASIC on that date together with a Consolidated Constitution incorporating the amendments made by the Supplemental Deed of Variation. This will then coincide with the issue of the new Supplementary PDS.*

180 The sequence of events suggests that the exact date to be inserted was itself immaterial to the Board, the Board leaving it to their solicitor to attend to this matter and lodgement. It may be that the solicitor was concerned to date the Deed as close to lodgement so as not to raise any issue with compliance with the need to lodge 'as soon as practicable' after the Deed was executed. In any event as indicated, no evidence was otherwise before the trial judge as to the reasons for the date not being inserted as 19 July 2006.

181 Another comment may be made as to the Deed and it being valid and binding as and from 19 July 2006. On this basis, the matters for consideration on 22 August 2006 were matters of an administrative nature dealing with the formal requirements necessary for lodgement of the Amended Constitution with ASIC. There was nothing that relevantly occurred between 19

July 2006 and 22 August 2006 that suggested any reconsideration by any of the Directors of the decisions made by the Board on 19 July 2006 was necessary. No further reflection by any of the Directors was required on 22 August 2006 as to the appropriateness or otherwise of the decisions made on 19 July 2006.

182 The approach of the trial judge to the Deed not being binding as at 19 July 2006 led to the finding at [569] that on 22 August 2006, in the absence of any 'effective' Deed, the Directors should have continued to consider the matters 'inadequately' considered on 19 July 2006 before 'the point of no return' on 22 August 2006. The trial judge further found the finding at [571] that to say the Directors should have revisited their 19 July 2006 consideration was not to impose a 'counsel of perfection' as:

> *It is not a counsel of perfection to expect that before bringing amendments into effect … that the directors of a professional corporate trustee functioning as an RE would [consider, again, the matters that ought to have been considered on 19 July].*

183 It is useful to set out the trial judge's reasoning, based upon his decision that the Deed was not binding as of 19 July 2006:

> *[428] The Directors again contended that ASIC's real case was that, when the Board was considering the Lodgement Resolution, the Directors had to revisit their earlier decision to pass the Amendments and revoke Deed of Variation No 7 or otherwise formally relieve themselves of the obligation to lodge the Amendments. They again argued that there was no such duty to doubt and review earlier decisions, and there was no occasion for them to revisit their earlier decision to amend.*
>
> *[429] However, that was not ASIC's case. Its case, which I accept, is that the Deed had not come into effect in the first place. I reject the Directors' contention.*
>
> *[430] The Directors also contended that the Lodgement Resolution was unnecessary because lodgement could be performed administratively without the need for a resolution. Whether that is so is not really to the point. The Lodgement Resolution made it clear that lodgement was a matter for the Board. It provided that lodgement would occur in service of the Board's decision to lodge. It authorised and directed that the Deed be completed and the Amendments be lodged.*
>
> *[431] I see the Lodgement Resolution as an important resolution, regardless of whether the Directors revisited or reconsidered their earlier decision to amend. Lodgement was the final step in the process of amendment and by operation of s 601GC(2) the Amendments had no effect until lodged. There could be no contravention of the Act arising from the Amendments unless they were brought into effect, and they were to come into effect as a result of the Lodgement Resolution. Put another way, the 22 August meeting was the Directors' last opportunity to decide whether to complete the process of amendment that they started on 19 July and it was their last chance to ensure that when creating the additional fees their statutory duties were satisfied.*

> *[432] While it is unnecessary to deal with this argument in the present context, I note in passing that I do not accept the contention that where the Board of an RE has passed a resolution and it later considers a related matter, the directors can be under no statutory obligation to reflect upon and perhaps reconsider the earlier decision. In my view the surrounding circumstances will dictate whether in exercising their powers they are required by their statutory duties to reflect upon an earlier decision and perhaps reconsider it. I will deal with this question at [567] and following.*

184 The next question the trial judge considered was the effect of the Lodgement Resolution on the rights and interests of the members, the interests of APCHL and Mr Lewski's interests.

185 The trial judge concluded as follows:

> *[448] The Directors' contentions in relation to this issue are again based on the premise that the Lodgement Resolution was unnecessary and ineffective. They argued that the resolution merely confirmed that APCHL would abide by its pre-existing obligation to lodge the Deed, it had no impact on the rights and interests of the members or the interests of APCHL, or on the interests of Mr Lewski which were the same as APCHL itself. They reiterated their contention that ASIC's true case was that the issues the Directors considered at the 19 July meeting were required to be revisited and considered afresh on 22 August. I have previously rejected these contentions and I will not address them again.*
>
> *[449] I am satisfied that the passage of the Lodgement Resolution affected the rights and interests of the members, the interests of APCHL and the interests of Mr Lewski insofar as:*
>
> *(a) in relation to the effect on members' rights, as I explain in detail at [656] and following, in passing the Lodgement Resolution the Directors authorised and directed lodgement of the Amendments which brought them into effect. This adversely affected the members' right to have the Scheme administered in accordance with the existing constitution: see* 360 Capital Re Ltd v Watts and Another *(2012) 91 ACSR 328* ("360 Capital") *at [40] per Warren CJ, Buchanan and Nettle JJ;* Premium Income Fund Action Group Incorporated and Another v Wellington Capital Limited and Others *(2011) 84 ACSR 600 ("*Premium Income*") at [40]-[42] per Gordon J; Cf.* ING Funds Management Ltd v ANZ Nominees Ltd and Others *(2009) 228 FLR 444 ("*ING Funds Management*") at [98] per Barrett J;* Re Centro Retail *(2011) 255 FLR 28 ("*Re Centro Retail*") at [27] per Barrett J;*
>
> *(b) in relation to the members' interests I summarise the effect of the additional fees on the members' interests at [111] – [124] and I summarise my view that lodgement of the Amendments was not in the members' best interests at [491]. It is unnecessary to do so again; and*
>
> *(c) the effect of the Lodgement Resolution on the interests of APCHL and Mr Lewski is obvious. As a result of the resolution, APCHL and through it Mr Lewski became entitled to substantial additional fees.*

186 The trial judge then proceeded to consider the questions: (i) Was the Lodgement Resolution in the best interests of the members of the Trust? (ii) Did the Lodgement Resolution involve any conflict between the interests of the Trust and the interests of APCHL?

187 The trial judge set out the test for breach of s 601FC(1)(c). The test under the first limb of s 601FC(1)(c) for determining whether the passage of the Lodgement Resolution was in the best interests of the members was to ask: Was APCHL as RE of the Trust acting with undivided loyalty solely in the interests of the members?

188 The trial judge considered that the test for determining whether APCHL satisfied the second limb of s 601FC(1)(c) was to ask: Was there a conflict between the interests of APCHL in being paid the additional fees and the interests of the members in paying only the existing fees? If so, had APCHL as RE of the Trust preferred the interests of the members to its own interests?

189 The tests applied by the trial judge do not seem to be in contention. The trial judge concluded that as the Amendments were not in the members' best interests, it followed that the Lodgement Resolution to bring them into effect was not either. The trial judge said:

> *[491] In discharge of the Lodgement Resolution APCHL lodged the consolidated Constitution with ASIC to bring the Amendments into effect. I consider that the Amendments were not in the members' best interests, and it follows that the Lodgement Resolution to bring them into effect was not either. In summary this is because:*
>
> *(a) the existing Constitution did not allow APCHL to charge a Listing Fee or a Removal Fee and allowed a Takeover Fee only in a substantially lower amount;*
>
> *(b) collectively the Amendments created rights in APCHL (and through it Mr Lewski) that would likely result in it being paid substantial additional fees out of Trust funds;*
>
> *(c) the members had a right under the Constitution to have the Scheme property held on trust for them without the deduction of these additional fees;*
>
> *(d) the additional fees were substantial with each having a value at the time of between about $11.25 million to $26.1 million;*
>
> *(e) the Listing Fee imposed a fee if the Trust was listed, when the members were entitled to expect listing to occur without a fee, and listing was already in planning;*
>
> *(f) the Removal Fee imposed a fee on the members for the exercise of their right to remove APCHL where no fee existed before. It impaired the members' right to remove APCHL as the RE and operated to entrench it as the RE;*

> *(g) the increased Takeover Fee could be payable on multiple occasions and operated to discourage even a reasonable takeover offer;*
>
> *(h) the additional fees could be payable on multiple occasions;*
>
> *(i) the additional fees were gratuitous in the sense that there was no corresponding consideration nor benefit provided to the members or any corresponding increase in the scope of APCHL's obligations;*
>
> *(j) the new and increased fees largely served the interests of APCHL and Mr Lewski rather than the members. The Listing Fee was largely designed to incentivise Mr Lewski to proceed with listing when he was duty bound to support listing anyway. The Removal and Takeover Fees were largely designed to entrench APCHL as the RE and to reduce the risk that it might be removed before it received the Listing Fee; and*
>
> *(k) it is not to the point that only Mr Lewski stood to gain a personal benefit. The duties in ss 601FC(1)(c) and 601FD(1)(c) relate to any conflict between the RE's interests and the interests of the members and do not require that a director have a personal conflict of interest.*

190 The trial judge also concluded that conflicts between the members' interests and those of APCHL were self-evident. The trial judge stated:

> *[492] ... The members had an interest in receiving APCHL's services as RE for the fees provided in the existing Constitution. Against that, APCHL, and behind it Mr Lewski, had an interest in receiving the additional fees. This is seen in the fact that, amongst other things:*
>
> *(a) if listing was in their interests (as the Directors said it was) the members had an interest in having APCHL take the steps to achieve listing without having to pay the Listing Fee. Against that, APCHL and Mr Lewski had an interest in gaining a substantial fee for taking steps they were bound to take anyway;*
>
> *(b) the members had an interest in continuing to have an unfettered right to remove APCHL as RE without the imposition of a fee. Against that, APCHL had an interest in both receiving a substantial fee if removed and in creating a barrier to its removal as RE through the Removal Fee because removal would deprive it of a substantial fee on listing or vesting; and*
>
> *(c) the members had an interest in receiving reasonable takeover offers. Against that, APCHL had an interest in receiving a substantial fee if an acquirer was to acquire units over the specified thresholds, and in discouraging such offers creating a barrier to its removal as RE through the increased Takeover Fee, again because removal would deprive it of a substantial fee on listing or vesting.*

191 It was on this basis that the trial judge went on to consider the contraventions of s 601FD(3), by reference to s 601FD which sets out the duties of the officers of a RE. It is convenient to deal with these in order.

Breach of duties

Breach of the duty to exercise reasonable care and diligence – s 601FD(1)(b).

192 ASIC alleged that in passing the Lodgement Resolution each of the Directors breached their duty to exercise reasonable care and diligence under s 601FD(1)(b).

193 Each of the Directors denied that he breached his duty under s 601FD(1)(b).

194 Central to the Directors' contentions was again the proposition that the considerations relevant to their decision to pass the Amendments on 19 July 2006 were different from those that were relevant when they considered the Lodgement Resolution on 22 August 2006.

195 At the time the Lodgement Resolution was considered, the Directors said that their main consideration was APCHL's obligations under s 601GC to lodge the Amendments with ASIC. They argued that the Board had a positive obligation to lodge the Amendments as soon as practicable, and that a reasonable director would have either voted for the Lodgement Resolution or would have abstained. They contended that, irrespective of whether their honest belief in the effectiveness of the Amendments might now be considered misguided or unfounded, they had an obligation to effect the lodgement of the seemingly effective Amendments. On this argument, a vote against the Lodgement Resolution would have been contrary to their duty under s 601FD(1)(f) to ensure that APCHL complied with the Act and the Constitution (and as a consequence a breach of the duty of care under s 601FD(1)(b)).

196 The Directors again contended that the 22 August 2006 meeting was not an occasion to revisit whether the Board had power to make the Amendments and they were under no obligation to reconsider their earlier decision to amend. They argued that a finding that such a duty existed would be at odds with the authorities and would increase the duties imposed on directors beyond anything previously known.

197 The Directors contended that their conduct on 22 August 2006 must be viewed in light of the following circumstances:

(a) they had been advised prior to and at the 19 July 2006 meeting by APCHL's solicitor (by the Madgwicks Advice) that the Board had power to amend the Constitution to provide for the additional fees;

(b) APCHL was already party to the Deed executed on 19 July 2006;

(c) cl 4 of the Deed required that it be lodged with ASIC as soon as practicable;

(d) lodgement of the Deed was not conditional nor dependent on contingencies put in place at the time it was executed in July 2006;

(e) the Deed had been given in its executed form to Madgwicks on 19 July 2006 after the Board meeting;

(f) the Board had a duty under s 601FD(1)(f) to lodge the Deed with ASIC pursuant to s 601GC(2);

(g) on 18 August 2006 Mr Lewski, and on 21 August 2006 the other Directors, received the 18 August 2006 email that confirmed that the Deed had been approved and executed; and

(h) by 22 August 2006 each Director held an honest belief that the Deed was effective to vary the Constitution.

198 The trial judge concluded as follows:

> *[556] I do not accept that the surrounding circumstances are as the Directors contended.*
>
> *[557] First, I see the Five Principal Factors as central to the circumstances surrounding the Directors' consideration of the Lodgement Resolution. The Directors had to decide whether to pass a resolution which would bring the Amendments into effect, in circumstances where:*
>
> *(a) the Amendments provided for additional fees to be payable from Trust funds to APCHL in its personal capacity (and through it to one of the Directors);*
>
> *(b) consideration of the Amendments revealed APCHL's plain conflict of interest and conflict of interest and duty;*
>
> *(c) the nature of the Amendments was to impose additional fees for services that members had the right to expect without incurring a fee, to impair the members' right to have the Scheme managed for the fees set out in the existing Constitution, and to entrench APCHL as RE;*
>
> *(d) the fees could be payable on multiple occasions;*
>
> *(e) the additional fees were substantial, amounting to 6.7% of net Scheme property; and*
>
> *(f) the fees were gratuitous in the sense that there was no corresponding increase in the scope of APCHL's obligations or any countervailing benefit to the members.*
>
> *[558] Second, as I set out at [404]-[432], I do not accept that APCHL had a pre-existing obligation to lodge the Deed prior to the 22 August meeting. The Deed was incomplete and it was brought into effect by the Lodgement Resolution. It follows that I reject the contention that the Directors were bound to vote for or abstain from the Lodgement Resolution because of a*

pre-existing obligation to lodge the Amendments. There was no such obligation. At the 22 August meeting it was open (and in my view appropriate) for each of them to vote not to lodge the Amendments with ASIC.

[559] Third, as I explain at [424], I do not accept that ss 601GC(2) and 601FD(1)(f) imposed a positive duty on the Directors to lodge the Amendments as soon as practicable after the 19 July meeting. An RE acting in accordance with its obligations would not have acted to lodge the Amendments until after the Deed had been fully executed and after preparation and adoption of an up to date PDS.

[560] Fourth, as I said at [425], I do not accept that APCHL or Mr Lewski expressly or impliedly instructed Madgwicks to lodge the signed but undated Deed with ASIC prior to the passage of the Lodgement Resolution.

[561] Fifth, the Lodgement Resolution was important in its own right as it would bring substantial additional fees into effect. It provided in terms:

(a) "[a]t the last Board meeting, the Directors approved Deed of Variation (No. 7) to the Constitution which had not yet taken effect as it had not been lodged with ASIC"; and that

(b) "the Consolidated Constitution incorporating Deed of Variation (No. 7) be lodged with ASIC to become effective."

The Directors knew from the 18 August email that the Deed had not been completed. On its face, the Lodgement Resolution would operate to authorise and direct the completion of the Deed and lodgement of the Amendments with ASIC, so that the Amendments would come into effect.

[562] Sixth, while the Directors decided the content of the Amendments at the 19 July meeting I have concluded that they did not intend for the Amendments to come into effect from that date. The Directors knew that the Amendments had no effect until lodged as that was clear from s 601GC(2), the note to cl. 25.1 of the Constitution, the 18 August email, the text of the Lodgement Resolution itself, and from earlier constitutional amendments. The resolution was therefore the Directors' last opportunity to decide whether to complete the process of amendment that they started on 19 July. Put another way, it was their last chance to ensure that in creating the additional fees they satisfied their duties under s 601FD(1).

[563] Seventh, each of the Directors except for Mr Clarke had received the Madgwicks Advice. That advice was unusual, and uncertain on a central question asked by APCHL of its lawyers. As I explain (at [261]-[270] and [312]-[322]) I do not accept that the Madgwicks Advice clearly advised the Directors that they had power to pass the Amendments at the 19 July meeting or that the Directors gave that question proper consideration. I do not accept that Mr Lewski received or communicated any clarifying advice to the Board at its 19 July meeting (as I said at [209] to [212]). A reasonable director in each Director's position (except for Mr Clarke) would not have accepted the advice as satisfying him as to the power to pass the Amendments.

[564] These circumstances indicated that on 22 August each of the Directors was required to exercise a high standard of care. APCHL's conflict of interest and conflict of interest and duty were self-evident and the Directors were

required to be scrupulous in regard to the conflicts and in giving priority to the members' interests.

[565] There is little substance to the contention that it was open to APCHL to lodge the Amendments administratively. The Board was the organ of the company chosen to direct lodgement of the Amendments and the Lodgement Resolution was the step the Board took to give effect to the Amendments. The Board exercised its power in passing the resolution and in doing so the Directors were required to comply with their duty to exercise reasonable care and diligence under s 601FD(1)(b). A reasonable director in each Director's position would not have treated it as merely administrative or procedural.

[566] Taken in general there is no evidence that any of the Directors exercised reasonable care and diligence when passing the Lodgement Resolution. They denied that it was even before the 22 August meeting, but it was. The essence of their case was that it could have been performed administratively and that any resolution to lodge was only procedural. However the resolution had a substantive effect. They argued that it did not require the types of considerations particularised by ASIC, but it did. No Director gave cogent evidence that he gave proper consideration to the matters particularised in the pleading and I am satisfied that they did not. ASIC made out its claim that the Directors failed to exercise reasonable care and diligence.

199 The trial judge then dealt with these contraventions by reference to the particulars alleged at [585] to [605], which are unnecessary to repeat or traverse.

Breach of the duty to act in the best interests of members – s 601FD(1)(c)

200 ASIC alleged that each of the Directors breached his duty to act in the best interests of the members of the Trust, and to give priority to the members' interests where there was a conflict of interests. In particular it alleged that:

(a) each of the Directors failed to give consideration to whether making the Amendments was in the best interests of the members of the Trust;

(b) the Amendments were not in fact in the best interests of the members; and

(c) further or in the alternative to (b), a director of APCHL in each of the Directors' positions could not in the circumstances have reasonably believed that the Amendments were in the members' best interests.

201 The trial judge concluded that:

[615] ... In my opinion when the Directors were considering the Lodgement Resolution:

(a) the Five Principal Factors, and particularly APCHL's plain conflicts of interest, required that they take a careful and cautious approach to the resolution;

(b) on its face the resolution was to have a substantive effect, and it required to be treated accordingly rather than being treated as merely administrative or procedural. This was so without any requirement to revisit their earlier decision to amend;

(c) the Madgwicks Advice relied upon was both unusual and uncertain. It should have given rise to disquiet on the part of the Directors present at the 19 July meeting and they should have understood the necessity for unequivocal legal advice or a judicial direction before passing the resolution; and

(d) the fact that of the Directors only Mr Lewski had a personal stake in the resolution is not to the point. The duty under s 601FD(1)(c) relates to conflicts of interest between the interests of the RE and the members' interests.

[616] No Director gave evidence that he gave any consideration to whether the Lodgement Resolution was in the best interests of the members. Had they given consideration to that matter they would have been alive to the matters I summarised at [491] and they were not. I infer that none of the Directors gave the best interests of the members any consideration. Again, as above, Mr Clarke gave no consideration to this issue.

[617] The resolution was plainly not in the members' interests as I describe at [491]. No reasonable director in the position of each of the Directors would have seen it as in the members' interests to lodge the Amendments so as to make them effective. None of the Directors could have reasonably believed that it was in the best interests of the members to bring the Amendments into effect through the resolution. ASIC made out its claim.

[618] In dealing with the second limb of s 601FD(1)(c), there was a plain conflict between:

(a) the interests of APCHL in being paid the additional fees and the interests of the members in paying only the fees under the existing Constitution; and

(b) the interests of APCHL in being paid the additional fees and its duties to act in the members' best interests.

The question is whether, in voting for or otherwise assenting to the Lodgement Resolution, did each of the Directors prefer the interests of the members to those of APCHL?

[619] It is clear that the Directors did not prefer the members' interests. To prioritise the members' interests over APCHL's interests the Directors were required to have voted against the Lodgement Resolution. Its rejection would have meant that the Scheme's principal and income held on trust for the members would be applied only to the payment of APCHL's fees as specified in the existing Constitution, rather than the additional fees intended to be brought into effect. No Director took that course and each of them, therefore, breached his duty to prefer the members' interests.

Breach of the duty not to make improper use of position – s 601FD(1)(e)

202 It will be recalled that section s 601FD(1)(e) provides that an officer of a responsible entity must

> *not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme*

203 ASIC alleged that in passing the Lodgement Resolution each of the Directors breached his duty in order to provide an advantage to APCHL. ASIC did not contend that the Directors' purpose was to cause detriment to the members.

204 The Directors again made the same or similar contentions as previously. The Directors contended that:

(a) the Lodgement Resolution did not itself result in any gain, directly or indirectly to APCHL or to any other person. Any gain by any person was argued to have occurred upon signing Deed of Variation (No 7). The trial judge did not accept this. The trial judge had already decided that the Deed was not intended to, and had not, come into effect and it was the resolution that authorised and directed completion of the Deed and lodgement of the consolidated Constitution so that the Amendments came into effect;

(b) none of them had the purpose of gaining an advantage for APCHL when they passed the Lodgement Resolution. They were doing so in circumstances where the Board had already taken all of the steps required of it to effect the Amendments and the resolution itself had no effect on that course of events. The trial judge concluded that the resolution had a substantive effect;

(c) when they were considering the resolution on 22 August 2006 there was no duty to revisit and reconsider the resolution to pass the Amendments at the 19 July 2006 meeting. The trial judge had concluded that the Lodgement Resolution was important without any requirement for the Directors to revisit their earlier decision, but that further the circumstances indicated that those Directors present on 19 July 2006 should have reflected on their earlier inadequate consideration of the members' interests;

(d) apart from Mr Clarke, their evidence was that on 19 July 2006 they considered that the Amendments would not adversely affect members' rights and that it was in the members' interests to pass the Amendments to introduce the additional fees. They argued that such evidence excluded the possibility that the Directors' purpose in passing the Amendments was 'in order to' gain an advantage for APCHL. The trial

judge did not accept that the evidence showed that the Directors present on 19 July 2006 acted in the best interests of the members.

205 The trial judge finally concluded:

> *[630] I see the Directors' purpose in passing the Lodgement Resolution as the same as the purpose for the decision to amend. The resolution authorised and directed completion of the Deed and lodgement of the consolidated Constitution so as to bring the Amendments into effect. No Director present at the 19 July meeting gave evidence of having any different purpose on 22 August. Even the most rudimentary examination of the terms of the resolution and the text of the Amendments would have revealed to Mr Clarke that they provided an advantage to APCHL by giving it additional fees. I infer that this was his purpose in assenting to the resolution.*
>
> *[631] Dealing now with the question of whether the Directors' use of their positions was improper I must apply the standard for impropriety set out in* Byrnes *and* Chew. *The standard of conduct expected of the Directors is that which would be expected of a reasonable person in the same position, with knowledge of the Directors' duties, powers and authority in all the circumstances of the case. Having regard to the Five Principal Factors and in the circumstances I have previously set out, I do not accept that a reasonable person in each of the Director's positions could have considered it proper to pass the Lodgement Resolution.*
>
> *[632] Mr Lewski's impropriety on this test is an even more straightforward matter. His conduct in passing the Lodgement Resolution occurred against the following backdrop:*
>
> *(a) he actively pursued the Amendments primarily to give himself a substantial Listing Fee;*
>
> *(b) he did so even though listing was already in planning;*
>
> *(c) he pursued the fees on an urgent basis when the only urgency was personal rather than their being a business case for it;*
>
> *(d) he misleadingly described the absence of a Listing Fee as "anomalous" to Madgwicks and to the Board;*
>
> *(e) he instructed Madgwicks that the additional fees were to be achieved without seeking the approval of the members;*
>
> *(f) he was concerned to avoid the members having the opportunity of rejecting the additional fees;*
>
> *(g) he participated in passing the Amendments on 19 July even though he should have left the meeting in accordance with the Act; and*
>
> *(h) he participated in passing the Lodgement Resolution on 22 August even though he should have left that meeting too.*
>
> *In saying this I do not point to his conduct before 22 August as founding this contravention, but rather as a backdrop against which his breach of s 601FD(1)(e) occurred. I see his conduct in passing the Lodgement Resolution as falling well below the standard expected of a reasonable person in his position in all the circumstances of the case.*

Breach of the duty to take all reasonable steps to ensure compliance with the Constitution – s 601FD(1)(f)

206 ASIC alleged that each of the Directors breached his duty under s 601FD(1)(f) in that he did not take all steps that a reasonable person would take if that person was in the Director's position to ensure that APCHL complied with the Act and the Constitution.

207 ASIC particularised its claim by alleging that:

(a) by reason of the prohibition in cl 25.1 of the Constitution, APCHL did not comply with the Constitution in purporting to make the Amendments;

(b) in passing the Lodgement Resolution, APCHL did not comply with s 601FC(1)(m) which provides that a RE must carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the RE by the scheme's constitution; and

(c) each of the Directors voted in favour, of or alternatively assented to, the Lodgement Resolution:

(i) intending to make the Amendments effective;

(ii) without being satisfied that the Board had considered legal advice that in making the Amendments, without the approval of the members, APCHL would comply with the Act and the Constitution; and

(iii) without taking any steps to cause APCHL to obtain judicial advice as to whether APCHL was empowered and justified in making the Amendments without member approval.

208 The Directors again made essentially the same arguments, including:

(a) that at the time they were considering the Lodgement Resolution they had received the 18 August 2006 email confirming that Deed of Variation (No 7) had been approved and executed on 19 July 2006 and would take effect on lodgement. They contended that no occasion arose to revisit their earlier decision to amend and that no reasonable person in each Director's position would have thought it necessary to seek further legal advice or judicial advice before approving what they describe as a procedural or administrative resolution to lodge the Amendments; and

(b) the Board having resolved on 19 July 2006 to amend the Constitution, compliance with the Act and the Constitution was achieved by instructing Madgwicks to lodge the Supplementary PDS, the consolidated Constitution and the Deed with ASIC.

209 The trial judge referred to his approach in the earlier contraventions, and concluded:

> *[638] It is unarguable that the Constitution forms a contract between APCHL and the members, and that the Scheme's constitution is enforceable under both the law of trusts and contract. It is the essence of a trust that the trustee undertakes to observe the wishes of those creating the trust as articulated in the trust deed. It is uncontentious that the term "members' rights" in s 601GC(1)(b) includes the members' contractual rights provided in the constitution:* Smith v Permanent Trustee Australia Ltd *(1992) 10 ACLC 906 ("*Smith*") per Young J at 913-914;* ING Funds Management *at [94];* Premium Income *at [34].*
>
> *[639] As I explain at [649]-[653] I consider that cll. 34.1 and 25.1 of the Constitution operated to prohibit APCHL from making an amendment to the Constitution in its own favour or resulting in any benefit to it. I consider APCHL was bound by this clause not to vary, or attempt to vary, the Constitution so as to give itself a benefit without member approval. It is uncontentious that in providing substantial additional fees payable to APCHL the Amendments were in its favour.*
>
> *[640] A question that arises in this context is whether the power conferred on an RE to amend a scheme constitution by s 601GC(1)(b) can be qualified by the terms of a scheme constitution. As I explain at [674]-[683], cl. 25.1 operated to prohibit APCHL from making certain types of amendment, and s 601FC(1)(m) required APCHL to carry out or comply with any other duty,* not inconsistent *with the Act that was imposed on the RE by the Constitution. I consider that the prohibition on amendments in favour of or resulting in any benefit to APCHL is properly to be seen as complementing rather than being inconsistent with s 601GC(1)(b).*
>
> *[641] Putting to one side my view that the Amendments were invalid, I consider that in passing the Lodgement Resolution so as to complete the Deed and bring the Amendments into effect the Directors gave APCHL a benefit in breach of the Constitution. I have previously described the approach that a reasonable director in each Director's position would have taken when presented with the resolution, and I need not reiterate those views. The Directors did not take all reasonable steps to ensure that APCHL complied with the Constitution, and each Director breached s 601FD(1)(f).*

210 The trial judge then considered the question: did the Constitution of the Trust at any time between 22 August 2006 and 30 June 2008 authorise APCHL to pay itself the Listing Fee?

211 In looking at this question, it was accepted that there were two potential sources of power for APCHL to make the Amendments, namely the Constitution and s 601GC(1)(b). ASIC submitted that neither the Constitution nor s 601GC(1)(b) authorised the Amendments and

that they are therefore invalid. It contended that the Constitution did not authorise APCHL to pay itself the Listing Fee at any time from 22 August 2006.

212 The Directors argued that APCHL validly amended the Constitution pursuant to s 601GC(1)(b). They contended too that even if the Amendments were not validly made by operation of s 601GC(2), the Amendments became *prima facie* effective when lodged with ASIC on 23 August 2006, and remained effective until there was a declaration or order that they were invalid.

213 Dealing first with the power to amend contained in the Constitution, it will be recalled that cll 34.1 and 25.1 prohibited APCHL from amending the Constitution in its own favour or in any way resulting in any benefit to it. Clause 25.1(a) expressly creates a wide power of amendment subject to specific qualifications. The qualifications protect the members' interests in relation to any amendment, including in relation to amendments in favour of or resulting in any benefit to APCHL.

214 The trial judge said:

> *[652] Clause 25.1(b) is framed as a qualification that assumes the existence of a pre-existing power to amend. I construe it as qualifying cl. 25.1(a) in providing the requirement that an amendment which is authorised by cl. 25.1(a) must also comply with the Act. I say this because:*
>
> *(a) the first words of cl. 25.1(a) are "subject to clause 25.1(b)" which indicate that cl. 25(1)(a) is to be read as being qualified;*
>
> *(b) the words "any amendment of this Deed" in cl. 25.1(b) point back at the amendments that could be made under cl. 25.1(a);*
>
> *(c) Clause. 25.1(a) contains a wide power of amendment subject to four qualifications, at least three of which are aimed at protecting the members' interests. It would be a strange result if the draftsperson intended in cl. 25.1(b) to provide a separate power of amendment which was not subject to these qualifications, thereby negating the protection;*
>
> *(d) the note to cl. 25.1 refers to s 601GC simply as a pointer directing attention to the provisions of the Act; and*
>
> *(e) the requirement that an amendment to a scheme constitution must also comply with the Act is not unusual: see ss 601GA(1), 601GA(3), 601GA(4) and 601GB.*
>
> *[653] I consider that because the Amendments were in favour of or resulting in a benefit to APCHL they were made outside the constitutional power to amend.*

215 In determining the ability to rely upon s 601GC(1), it is important to look first to the legislation and consider the text and context of s 601GC(1). The relevant text of s 601GC(1)

is expressed in unqualified terms. The power to amend is granted to both the RE and to the members by the use of the common introductory words of s 601GC(1). The section, on a plain reading, confers statutory powers of amendment regardless of the current content of the constitution.

216 Further, if the opening words of s 601GC(1) are to be read down so as to import a qualification such as 'unless otherwise provided for in the scheme's constitution' or similar, then that qualification must apply both to amendments by the RE under paragraph (b), and amendments by the members under paragraph (a).

217 It can be accepted that the qualifications introduced into cl 25.1(a) are an important part of the contract between APCHL and the members. Clause 25.1(a) and the qualifications therein were included to protect members.

218 Nevertheless, it seems that the correct way to interpret s 601GC is to regard it as a freestanding provision providing the statutory power to modify, repeal or replace the existing constitution, irrespective of any limitation upon that power that may be found in the existing constitution.

219 Section 601GC does protect the members, either by empowering them to make the change by a special resolution, or limiting the powers of the RE to certain circumstances such that the change will not adversely affect members' rights (at least in the consideration of the RE). In making the legally enforceable document under the Act (see s 601GB), the members and RE would have implicitly understood that the Act provides this mechanism for changing the constitution.

220 A constitution could theoretically 'entrench' provisions by specifically providing that no change shall occur whatsoever. However, it could not be envisaged, consistently with the Act, that a RE and the members could, by the terms of the constitution, deprive themselves completely of a power to change the constitution. The inclusion of s 601GC of the Act would seem to prevent any such entrenchment.

221 Section 601GC is to be contrasted with s 136 of the Act, which provides that the company may modify and repeal its constitution by special resolution (see s 136(2) of the Act). However, specific provision is made in s 136(3) and s 136(4) of the Act for the circumstance that there may be a further requirement specified in the constitution of the company itself which limits the effect of the special resolution. It is notable that s 601GC does not have a

similar provision qualifying its general application. It would seem too that without s 136(3) and s 136(4), s 136(2) of the Act would allow for modification or repeal, which would operate independently of any limitations in the constitution.

222 For the sake of completeness, it may be observed that the requirement in cl 25.1(b) that there be compliance with the Act is simply to state the legal position in any event, that any amendment must be consistent with the Act generally.

223 We then move to the Directors' reliance on s 601GC(1)(b). The Directors contended that they reasonably considered that the Amendments would not adversely affect the members' rights, and on this basis argued that APCHL was therefore authorised to pay itself the Listing Fee.

224 It is and was uncontroversial that the term 'members' rights' in s 601GC(1)(b) includes the members' contractual and equitable rights provided in the constitution: *Smith v Permanent Trustee Australia Ltd* (1992) 10 ACLC 906 ('***Smith***') at 913-914; *ING Funds Management Ltd v ANZ Nominees Ltd and Others* (2009) 228 FLR 444 ('***ING Funds Management***') per Barrett J at [94]; *Premium Income Fund Action Group Incorporated and Another v Wellington Capital Limited and Others* (2011) 84 ACSR 600 ('***Premium Income***') per Gordon J at [34].

225 Having accepted this, the trial judge continued:

> *[657] In* Premium Income *the scheme constitution authorised the RE to issue units and cl. 3.2 of the constitution provided how the issue price of units should be determined. The RE purported to amend cl. 3.2 to alter how the issue price was determined, doing so under s 601GC(1)(b) as it "reasonably considered" that the amendment would not adversely affect the members' rights. Gordon J held that the amendment was invalid on the basis that the right to have the issue price determined in the manner provided in the existing constitution was a members' right within the meaning of s 601GC(1)(b) and that right had not been considered. I respectfully agree with her Honour's approach.*
>
> *[658] In* 360 Capital *the RE purported to amend the scheme constitution to provide for the issue of convertible notes, again doing so under s 601GC(1)(b). The RE had received legal advice to the effect that members did not have a right to have the scheme administered in accordance with the existing constitution, that the amendment only affected the value of the members' interests in the fund, and that those interests were not members' rights within s 601GC(1)(b). The Victorian Court of Appeal per Warren CJ, Buchanan and Nettle JJA at [26] rejected this approach and agreed with the reasoning of Gordon J. The Court held that the right to have a scheme managed and administered in accordance with the existing scheme constitution is a "members' right" within the meaning of s 601GC(1)(b).*

[659] As the Court explained (at [40]):

> *… the right of a member to have a managed investment scheme administered according to the constitution of the scheme is fundamentally the most important right of membership. Without it, all other rights of membership, as well as the continuance, success and security of the scheme, would be at the whim of the responsible entity.*

I respectfully agree.

[660] In the present case, the Directors were required as a first step to ascertain the rights of members created by the existing Constitution. Next, they were required to decide whether those rights, as distinct from the enjoyment of them or their value, would be changed or impinged upon by the Amendments. If they were changed or impinged upon, then the Directors were required as a third step to undertake a process of comparison and assessment in order to decide whether the impact would adversely affect members' rights: see Premium Income *at [33]*

[661] When the Amendments were before them on 19 July 2006, the Directors had been provided with the Madgwicks Advice which advised as follows:

> *Recent case law in respect of the section indicates that the proposed amendments to the Trust's Constitution under the draft Deed will not adversely affect Unitholders' rights for the purposes of section 601GC(1)(b). At most, the amendment may affect the value of the units held by the Unitholders. Case law indicates that an amendment that may change the value of the units does not, of itself, affect Unitholders' rights and provided that the amendment does not adversely affect the Unitholders' rights (which the cases refer to, as examples, being, right to distribution, voting rights and rights to receive information), the consent of the Unitholders is not required.*
>
> *In effect, the Directors were advised that they did not need to consider the members' entitlement to APCHL's services as RE for the fees provided in the existing Constitution, as these were not members' rights under s 601GC(1)(b).*

[662] On 19 July 2010 ASIC wrote to APCHL in relation to a complaint from a member of the Scheme regarding the Amendments and the payment of the Listing Fee, and made the following request:

> *To assist with our enquiries into the complaint, we request recorded evidence in the form of minutes to meetings and other available documents that evidence the Responsible Entity provided due consideration to the rights of members before the modification of the constitution was made on 22 August 2006 and formed the view the amendments would not adversely affect members' rights.*

[663] By letter dated 26 July 2010 APCHL responded and said:

> *The Board considered that the Amendment was in the nature of a corporate management decision in the context of preparing for the listing of units of the Trust on ASX. Consequently, when the Board considered the effect of the Amendment on members' rights the Board considered that the Amendment did not affect, change or otherwise contemplate the rights of members at all and therefore logically could not 'adversely' affect those rights. The Amendment may have had some effect on members' overall interests (insofar*

as it affected the operating of the Trust), but section 601GC(1)(b) does not provide for a process to consider the effect of an amendment on members' interests. Case law (including the cases you mentioned in your letter) has been quite clear that only the legal rights of members are relevant for the purposes of section 601GC(1)(b).

Accordingly, any consideration required under 601GC(1)(b) was necessarily limited as there were simply no relevant members' rights to be considered before and after the Amendment.

[664] APCHL's response tends to show that the Board acted on the Madgwicks Advice and took the view that it did not need to have regard to the members' right to have the Scheme administered according to the existing Constitution, as that was not a relevant members' right under the Act.

[665] The Directors' evidence pointed to the same conclusion:

(a) Mr Lewski deposed that he considered that the changes did not adversely affect members' rights for the reasons set out in the Madgwicks Advice, which distinguished between matters affecting the value of the units and the rights per se*;*

(b) Mr Butler deposed that he voted for the Amendments based on his consideration of the Madgwicks Advice;

(c) Mr Jaques deposed that based on the Madgwicks Advice, or on the advice and further discussions he had, he formed the view that APCHL had the power to make the Amendments;

(d) Dr Wooldridge's evidence is that he considered and annotated the Madgwicks Advice. In cross-examination he conceded that the members had a right to have the Trust managed for the fees set out in the existing Constitution. He said that he found the distinction drawn between members' rights and interests "strange" which indicates that he noticed that distinction in the advice. I infer that his view that the Amendments did not adversely affect members' rights was based on the limited scope of "members' rights" advised by Madgwicks;

(e) Mr Clarke was not a Director at the time the Amendments were passed and he gave no evidence on this subject; and

(f) No Director gave evidence that on 19 July when the Amendments were passed he considered the members' right to have APCHL provide its services as an RE for the fees provided in the existing Constitution.

I infer that having received advice that the Amendments would not affect any relevant members' right, each of the Directors other than Mr Clarke did not consider the members' right to have the Scheme administered according to its existing terms.

[666] Further, no Director gave evidence that, on 22 August when the Board passed the Lodgement Resolution, he considered this members' right. As a passive participant in the meeting I infer that Mr Clarke gave the question no consideration. I infer that none of the other Directors did either.

226 Both before the trial judge and on appeal, the Directors contended that *360 Capital Re Ltd v Watts* (2012) 36 VR 507 (‘***360 Capital**’)* (relied upon by the trial judge) was wrongly decided and that ‘members’ rights’ for the purpose of s 601GC(1)(b) did not include any right of the members to have the Trust administered according to the existing Constitution. The authorities the Directors rely on are *ING Funds Management* at [98] per Barrett J, *Re Centro Retail Ltd* (2011) 255 FLR 28 (‘***Re Centro Retail***’) at [27] per Barrett J, and *Smith* at 913-914 per Young J. As seen from the above extracts, the trial judge had preferred the reasoning in *Premium Income* and *360 Capital.*

227 The Court of Appeal in *360 Capital* expressed its preference for the approach taken by Gordon J in *Premium Income*, over the approach taken by Barrett J in *ING Funds Management* (in which it was *obiter dicta*) and reiterated in *Re Centro Retail*.

228 The Court of Appeal held that a member’s right to have a fund managed in accordance with its constitution was a ‘member’s right’ within the meaning of s 601GC(1)(b). That is, members have a right to have the scheme managed in accordance with the fund’s constitution as it stands at any point in time. Thus any proposed amendment to a scheme’s constitution would affect the ‘members’ right’ to have the scheme administered in accordance with its terms.

229 It was argued by the Directors that it follows from this that, as Barrett J suggested, every amendment would fail s 601GC(1)(b) because any amendment would assail the overarching right to have the scheme managed in accordance with the fund’s constitution as it stands at that point in time.

230 The Court of Appeal concluded that it does not follow, and illustrated its point by suggesting that an amendment to shorten the period for redemption of units would not be adverse to members’ rights, referring to comments made by JD Phillips J in *Eagle Star Trustees Ltd v Heine Management Ltd* (1990) 3 ACSR 232.

231 A difference in approach between the *360 Capital* case and the approach of Barrett J can be seen, for example, in relation to an amendment to allow the issue of scheme interests at a discount (where this was not previously permitted by the constitution). Under the approach taken by Barrett J, an amendment to the constitution to permit the issue of interests at a discount does not, without more, affect the rights of existing members. On that basis, a RE can unilaterally amend the constitution without any effect on member rights for the purposes

of s 601GC(1)(b). Under the approach taken in *360 Capital,*, on the other hand, such an amendment affects the rights of the existing members to have the scheme operated and administered on the basis of the scheme constitution as it stands.

232 In any event, whether the example given by JD Philips J and referred to in *360 Capital* is an apt one or not, it is clearly anticipated by the legislation that there may be amendments that would unequivocally not be adverse to members' rights. Further, the only sensible way to interpret the provision is to look at the position at the point in time when an amendment is to be made to determine the members' rights. The natural and ordinary meaning of the expression 'members' rights' in s 601GC(1)(b) is calculated to embrace a member's right to have the managed investment scheme managed according to its terms.

233 As the Court of Appeal correctly observed, the right of a member of a registered scheme to have a managed investment scheme administered according to the constitution of the scheme is fundamentally the most important right of membership. It does not follow from recognition that members' rights include the rights of members to have a managed investment scheme administered according to the constitution that any change to the constitution will be adverse to members' rights. As 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 as such, as opposed to the value and enjoyment of the right. The distinction (made in *ING Funds Management*) between something which affects members' rights as such and something which merely affects the value or enjoyment of members' rights, although a valid distinction in itself, has no relevance to the context under discussion.

234 The views and reasoning of the Court of Appeal seem compelling. There is certainly no reason to depart from that intermediate appellate court's interpretation of this Commonwealth legislation: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135].

235 The trial judge was correct in following the decision in *360 Capital*.

236 The Directors then argued that, even if APCHL was not lawfully entitled to bring into existence the variations to the constitution contained in Deed of Variation (No 7), nonetheless it purported to do so. It lodged with ASIC, on or about 23 August 2006, a consolidated Constitution containing those amendments. Thereafter, any person (such as an investor or

potential investor in a scheme) who wished to know the contents of the Constitution of the Trust would have had reference to that document (as did APCHL itself).

237 The Directors contended that the statutory purpose of s 601GC(2) is undermined if a person cannot rely upon the constitution lodged by a RE in accordance with s 601GC(2) as being the true constitution of the scheme. If the potential exists for the constitution as lodged to be later determined not to have ever been the repository of the rights and obligations of members, because (as in this case) a decision by a RE, based on its consideration of the impact on members' rights is found not to have been reasonable, and that determination has retrospective effect, the intended certainty which is an important element of the statutory framework becomes illusory.

238 It was contended on that basis, that until struck down by a court, the Constitution as lodged with ASIC on 23 August 2006 (that is, including the amendments effected by the Deed), was the Constitution of the Trust. It followed that when resolutions were passed and other steps taken in 2007 and 2008 to pay fees to APCHL, in accordance with the Amended Constitution, those resolutions and other steps were valid and authorised.

239 ASIC contended that the trial judge's reasons at [647]–[672] were without error and necessarily lead to the conclusion at which he arrived at [673] that the Amendments were not authorised by the Constitution nor by the Act at any time from 22 August 2006.

240 It was submitted by ASIC that the trial judge's reasons, based on the factual findings he made, necessarily lead to the conclusion he reached because:

(a) The pre-condition to the exercise of the power in s 601GC(1)(b) (assuming it existed in this case) was not satisfied with the consequence that the power has not been exercised at all: ASIC referred to *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 ('***Project Blue Sky***') at [37], [94]; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [150] per Crennan and Kiefel JJ (see also [26], [53]-[58] per French CJ; [92] per Gummow, Hayne and Heydon JJ; [123] per Crennan and Kiefel JJ); and *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at [80]-[81].

(b) The 'mistake' the trial judge found the Directors made by relying on Madgwicks Advice had the consequence that the Directors erred in law by misdirecting themselves as to the question they were required to address concerning the members'

rights and therefore must be taken to have constructively failed to exercise the power: in the same way that if a Tribunal or decision-maker misdirects itself as to the question posed for it by statute, properly construed, it falls into jurisdictional error and a decision would be a purported decision of no legal effect: see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351; *Lobo v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 93 at [43], *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [59], [256]; and

(c) A *Project Blue Sky* analysis about whether a power exercised in breach of a statutory provision is nonetheless to be taken as validly exercised does not arise where an essential statutory pre-condition for the exercise of the power has not been satisfied.

241 In addition, ASIC also made the following additional submissions.

242 The modification referred to in s 601GC(2) is plainly a reference to a modification that is authorised by the Constitution or the Act, namely one that is capable of being effective upon its lodgement. Therefore, s 601GC(2) does no more than prevent an amending deed that would otherwise take effect, from doing so until lodgement.

243 ASIC contended that the proposition put forward by the Directors that the purpose of s 601GC(2) was to provide absolute certainty as to the provisions of the Constitution at a given point of time is not supported by the language of the provision and is unwarranted. Such certainty could only be achieved at the price of giving legal force to every piece of paper lodged with ASIC purporting to contain the text of the constitution or an amendment to it regardless of its validity and of whether it was the result of a genuine but unsuccessful attempt to amend or was a complete fabrication.

244 ASIC then submitted it would be an anomalous outcome if a statutory scheme for the protection of investors could be interpreted so as to provide, by the side-wind in s 601GC(2) contended for by the Directors, for a RE to unlawfully amend the Constitution to give itself benefits out of the investors' funds merely because it lodges a document with ASIC purporting to be an amendment authorising payment of such a benefit.

245 The learned trial judge relied, at [673], on *360 Capital* at [46]–[48] and *Premium Income* at [42] for the proposition that if the amendment power under s 601GC(1)(b) was purportedly exercised, but in a way which was not in fact in accordance with that section, then the

Amendments were never effective. However, in neither of those cases was the Court called upon to consider whether the amendment may have had some interim validity prior to being struck down. In both cases no issue arose as to the validity of steps taken in conformity with what was thought to have been an effective change to the constitution. Accordingly, neither of those cases stands as authority for the learned trial judge's conclusion at [673].

246 The proper question to consider in the context of this proceeding, is the position of the Directors in the period between 22 August 2006 and 27 June 2008. It is the Directors' conduct that is in question in this proceeding, not any entitlement of APCHL or member.

247 It can be accepted that the 19 July 2006 resolution was invalid, and was 'no decision at all': see eg *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [76]. However, at the same time it must be recognised that the purported exercise of a power conferred by law remains a thing actually done.

248 As Gageler J stated in *State of New South Wales v Kable* (2013) 252 CLR 118 at [52]:

> *Yet a purported but invalid law; like a thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a "nullity" in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences.* ***The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law.*** *The factual existence of the thing might have led to the taking of some creation or extinguishment or alteration of legal rights or legal obligations, which consequences do not depend on the legal force of the thing itself.* ***For example, money might be paid in the purported discharge of an invalid statutory obligation in circumstances which make that money irrecoverable, or the exercise of a statutory power might in some circumstances be authorised by statute, even if the repository of the power acted in the mistaken belief that some other, purported but invalid exercise of power is valid.***
>
> (Footnotes omitted. Emphasis added.)

249 Further, in *Jadwan Pty Ltd v Secretary, Department of Health & Aged Care* (2003) 145 FCR 1, after referring to *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, Gray and Downes JJ said at [42]:

> *In our view,* Bhardwaj *cannot be taken to be authority for a universal proposition that jurisdictional error on the part of a decision-maker will lead to the decision having no consequences whatsoever. All that it shows is that the legal and factual consequences of the decision, if any, will depend upon the particular statute. As McHugh, Gummow, Kirby and Hayne JJ said in* Project Blue Sky Inc v Australian Broadcasting Authority *[1998] HCA 28; (1998) 194 CLR 355 at 388-389:*
>
> > *An act done in breach of a condition regulating the exercise of a statutory*

> *power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.*

250 A similar approach can be seen in *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288 (‘***Wellington Capital***’). In that case, the High Court considered the effect of certain in specie property transfers made by the RE of a managed investment scheme in breach of the scheme constitution. One issue arising was whether, in the absence of the parties to whom the property had been distributed, the Full Federal Court was correct to exercise a discretion to make declarations that the in specie distributions were beyond the RE’s power under the scheme constitution and that the RE had breached s 601FB(1) of the Act by making the distributions. Gageler J stated at [60]:

> *It is important in this respect to recognise that the reference in the declaration which the Full Court made to the in specie transfer to unit holders having been “beyond the power” of Wellington under the Scheme Constitution reflects the sense in which the word “power” is used in the Scheme Constitution and in the relevant provisions of the* Corporations Act. *The reference in the declaration is not to an absence of legal capacity, but to the breach by Wellington of a legal norm which governed the exercise of Wellington’s legal capacity as legal owner of the property transferred. To declare that the transfer was beyond the power of Wellington under the Scheme Constitution is not thereby to impugn the validity of the transfer of legal title, but merely solemnly to record that Wellington breached that legal norm in making that transfer.*
>
> (Footnote omitted.)

251 The majority of the High Court (French CJ, Crennan, Kiefel and Bell JJ) considered that difficult questions arose between the RE and transferees of the property and those questions were distinct from the issue of whether the RE had acted within power (see *Wellington Capital* at [40]). The majority of the Court did not treat the finding or declaration that the RE had acted without power as decisive of whether the transactions transferring the property had legal effect or were ‘invalid’.

252 The approach of ASIC to the issue of invalidity was to assess whether it was a purpose of the Act, including Part 5C, that an act done in breach of s 601GC(1)(b) should be invalid.

253 In our view, on this approach, the structure of the Act suggests that it was intended that amendments to a scheme constitution, once lodged with ASIC, would be valid until set aside.

254 The regulatory framework establishes a regime by which a RE is to have control of the scheme, but its powers and functions are limited by the scheme constitution and the Act. As

such, an investor, or proposed investor, can analyse the scheme constitution. Importantly, in a commercial sense, the constitution must set out what fees or benefits are payable to the RE from scheme property.

255 The rights and entitlements in the constitution are fundamental to the scheme and also to the legislative regime that regulates schemes. The RE is mandated to make payments out of the scheme property (whether by way of investment or remuneration to itself or otherwise) in accordance with, and only in accordance with, the scheme's constitution. The RE must also carry out and comply with any duty conferred on it by the constitution. A scheme member can enforce their rights arising under the constitution.

256 The rights and entitlements that exist under the constitution are not fixed, and the statutory scheme makes provision for changes to the scheme constitution. Significantly, if the constitution is 'modified, repealed or replaced' whether by a meeting of members, or by the RE, a copy of the modification or the new constitution must be lodged with ASIC and the changes do not take effect until this requirement is met.

257 On whatever analysis, the correct position is that, in considering the position of the Directors on and between 22 August 2006 and 27 June 2008 in the context of the contraventions as alleged, the Court should proceed on the basis that the resolutions made on 19 July 2006 and 22 August 2006 were made and in existence, and formed a basis for subsequent decision making by the Directors.

The position as at 22 August 2006

258 It is now necessary to come to the position the Directors were facing and the considerations they needed to take into account as at 22 August 2006.

259 The approach to take in considering the contraventions as alleged by ASIC is not the approach taken by the trial judge. The proper approach is to characterise the events that occurred at the meeting on 22 August 2006, and to consider the circumstances facing each of the Directors at that time.

260 This enquiry depends 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 at that meeting in respect of the transaction. In summary, the Court needs to look at transactional, contextual and procedural factors to determine the scope of the responsibilities of the Directors at that time. Importantly, the scrutiny undertaken by the Court is confined by

the pleadings, which does not include adjudicating on the legality or propriety of the earlier transactions occurring on 19 July 2006.

261 The failure of ASIC to commence proceedings before 23 August 2012 has been the primary cause for the complexities introduced into the proceeding, as no direct reliance could be placed upon the conduct that occurred on 19 July 2006 as establishing a contravention.

262 Then there is another aspect of the late commencement of the proceedings that also needs to be kept in mind. As alluded to already, there was a significant lapse of time since the relevant events and the trial of the proceedings. Undoubtedly, '[w]here there is delay the whole quality of justice deteriorates': *R v Lawrence* [1982] AC 510 at 517 per Lord Hailsham LC. As McHugh J commented in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551:

> *As the United States Supreme Court pointed out in* Barker v Wingo *"what has been forgotten can rarely be shown". So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now "knowing" that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.*
>
> (Footnotes omitted.)

263 The relevance of these observations to each appeal is that in considering the evidence before the trial judge, although adhering to his findings of fact, the Court should be careful not to draw inferences which are not equally open on the established facts as determined by the primary judge and that pertain to the pleaded case against the Directors. The trial judge had to adjudicate on a number of factual disputes in contention, including whether the Lodgement Resolution was passed at all. Those factual disputes are no longer in contention in each appeal, and the issues still open for determination are issues of characterisation and law. However, it is apparent that the Directors were in no position to recall all the relevant events, and this inability should not be called in aid of drawing any inferences against them.

264 ASIC contended that this Court must accept the facts as found by the trial judge. As we have already indicated in relation to Dr Wooldridge, in the context of his conduct, there is much force in the submissions (which we have accepted) that the views of the trial judge should be properly respected. However, the important issue for this Court is to properly characterise

the matter or matters that were considered by the Board in making the Lodgement Resolution on 22 August 2006.

265 Undoubtedly, the events leading up to the meeting of 22 August 2006 (including the meeting of 19 July 2006) are relevant to the consideration of the critical question as to what was the scope of the business before the Board on 22 August 2006. To a very large extent, this analysis is to be done by looking at the objective facts and the documentary evidence accepted by the trial judge. This is because, as previously mentioned, no relevant party had a recollection of the relevant meetings.

266 The events surrounding and occurring at the 19 July 2006 meeting are relevant to determining the scope of the business before the Board on 22 August 2006. The trial judge appreciated this, but treated the considerations relevantly to be undertaken by each Director as being the same on each occasion. However, there was no allegation that on 22 August 2006 any Director was aware he did anything improper by his involvement in the resolution made on 19 July 2006, or that 19 July 2006 conduct was conduct that contravened the legislative provisions relied upon by ASIC in those proceedings. There is no allegation of a 'continuing' duty upon the Directors to re-consider, on 22 August 2006, or at any other time, the decision made on 19 July 2006. This is not how ASIC pleaded and put its case in the proceeding below, nor is it how it puts its arguments on appeal.

267 One aspect of the events of 22 August 2006 that is indisputable now on the findings of the trial judge (which is not the subject of appeal although contested below by some Directors) is that the Lodgement Resolution was in fact made. The Directors had before them a resolution to lodge and to make effective the Amended Constitution. Nevertheless, whether the Lodgement Resolution was in fact necessary is relevant to determining the significance of the Lodgement Resolution.

268 The question then is to determine what was the issue for decision on 22 August 2006, and once that is determined, what considerations became relevant to the making of that decision and what responsibilities were upon each Director. This can be done by looking at the objective facts as described previously.

269 There is the agenda set out in the 18 August 2006 email for the 22 August 2006 meeting. The 18 August 2006 email confirms that the Deed (which was attached) was approved at the 19 July 2006 meeting and executed. It was proposed by Mr Goldberg that he would date the

Deed 22 August 2006 and lodge it on that date with ASIC, to coincide with the issue of the new Supplementary PDS.

270 Then the actual Lodgement Resolution itself provided that the Directors had approved the Deed at the 19 July 2006 meeting, which had not taken effect as it had not been lodged with ASIC, and this was because a supplementary PDS had not been prepared. The Directors then resolved, as the Supplementary PDS had been prepared, that the consolidated Constitution incorporating the Deed be lodged with ASIC to become effective.

271 Whilst the evidence disclosed that in addition to the preparation of the Supplementary PDS other matters needed to be dealt with by management before lodgement (with which we have previously dealt), the 18 August 2006 email and Lodgement Resolution only focused on the importance of the PDS from the Board's point of view.

272 There is no other reliable evidence available from the Directors or Mr Goldberg as to the purpose of the 22 August 2006 meeting. There is no evidence as to the reason Mr Goldberg requested that the Deed be left undated, or his later proposal to date it 22 August 2006.

273 On the basis of this evidence, putting aside any question relating to the binding nature of the Deed itself, on 19 July 2006 the Directors considered and approved the Deed as modifying the Constitution. If at that time the Supplementary PDS had been prepared, the matter would not have come back to the Board unless management considered this necessary because of a change of circumstance or other reason.

274 The Lodgement Resolution of 22 August 2006 cannot be viewed in isolation. It must be considered in conjunction with the earlier 19 July 2006 resolution (which is expressly referred to), the events that occurred since the meeting on 19 July 2006, and the purpose of the 22 August 2006 meeting. Nevertheless, on its face, the Lodgement Resolution of 22 August 2006 was directed to the timing of lodgement, so that the Directors can be seen as only applying their collective minds to the resolution regarding the timing of lodgement. The approval to change the Constitution was determined on the earlier occasion, as is clear from the 19 July 2006 resolution, the 18 August 2006 email, and the Lodgement Resolution.

275 Of course, the decision made on 19 July 2006 approving the Deed was a decision made by the then constituted Board (which did not include Mr Clarke). The addition to the Board of another member (such as in this case, Mr Clarke at the meeting of 22 August 2006) is not in itself a reason for the Board needing to re-consider an earlier resolution made by the Board,

or for that resolution not being treated as part of the history of events relevant to the making of the Lodgement Resolution. After all, one of the reasons for having comprehensive minutes is to ensure there is corporate memory and the ability to rely upon earlier decisions.

276 It is important to consider the actual terms of both resolutions, particularly the Lodgement Resolution, giving them a fair and natural meaning in their context. This was the approach taken by the High Court in *Richard Brady Franks Limited v Price* (1937) 58 CLR 112. In that case, at a meeting of a board of directors of a company on 3 November 1931 a resolution was passed for the issue of a series of debentures to certain named persons. At a further board meeting on 17 November 1931 a resolution was passed that 'the series of debentures … prepared in pursuance of resolution of 3 November 1931, be sealed and issued to the respective persons named therein'. At the meeting on 17 November 1931 a quorum of directors competent to vote was present and voted, but at the earlier meeting there was no such quorum present.

277 It was held that the resolution of 17 November 1931 was a substantive and independent exercise of the directors' power to bind the company and not a mere formal carrying out of a decision finally resolved upon at the earlier meeting, and that it contained clear authority for the issue of the debentures; therefore the validity of the debentures could not be attacked on the ground that they purported to be issued pursuant to a resolution passed at a meeting when the requisite quorum of directors was not present.

278 Chief Justice Latham at 134-5 stated:

> *The next question which arises is whether the resolution of 17th November was effective for the purpose of authorizing the issue of the debentures. The point which is taken is that the resolution in terms refers to a "series of debentures totalling £10,150 prepared in pursuance of resolution of 3rd November 1931." The resolution of 3rd November 1931, was passed at a meeting at which a competent quorum was not present, and was therefore in itself ineffective to authorize the issue of debentures on behalf of the company. It is urged that the terms of the resolution of 17th November show that the directors present were merely purporting to act in pursuance of the earlier resolution and that they did not deliberately and independently determine on that day that the debentures should be issued. Reference is made to* Cox v Dublin City Distillery [No. 2]. *In that case the resolution which authorized the making of the contracts contained in a series of debentures was passed at a meeting at which a competent quorum was not present. The facts are different in the present case.*
>
> *In my opinion the resolution of 17th November does not in any way depend upon the resolution of 3rd November. The earlier resolution was not effective to authorise the issue of any debentures, because the conditions of the debentures had not then been determined. The later resolution refers to the earlier resolution only for the purpose*

> *of describing the debentures as being "debentures prepared in pursuance" of the earlier resolution. The later resolution, which was passed by a competent meeting, contains clear authority for the issue of each of the debentures which were in fact issued. In my opinion, therefore, this objection fails.*
>
> (Footnotes omitted.)

279 Justice Rich at 137-8 stated:

> *It was next contended on behalf of the appellant that no effective resolution had been passed to authorize the issue of the debentures, firstly, because no competent quorum was present at the meeting of 3rd November; and secondly, because the resolution passed at the meeting of the 17th November was merely ancillary and incidental to that of the previous meeting. The first resolution can only be considered for the purpose of interpreting the second resolution. The second resolution so construed represents that the series of debentures has been prepared and is in order awaiting authority to issue the series and then proceeds to determine upon and authorize its issue.*

280 Justice Dixon at 141-142 stated:

> *On these facts it is said that there was no independent decision of the two directors forming the competent quorum present at the subsequent meeting of 17th November 1931, but only a resolution approving of the means adopted for carrying out a determination already arrived at, by which they conceived the matter to be settled. Reliance was placed on the decision of the Irish court of Appeal in Cox v Dublin City Distillery [No. 2]. The contention is answered by the terms of the resolution of 17th November and the inchoate nature of the resolution of 3rd November, 1931. In Cox v Dublin City Distillery [No. 2], at the earlier of two meetings, that at which there was no competent quorum, the directors made a contract which, it was held, apart from the defect would have bound the company. At the second of the meetings, that at which there was a competent quorum, no more was done than to record the fact of the sealing and issuing of the instruments fulfilling the supposed contract. This was an insufficient exercise of the authority confided to a competent quorum to contract on the company's behalf with their co-directors or make a contract in which some of the latter were interested.*
>
> *In the present case the earlier meeting resolved on nothing which would amount to a contract. In the interval the terms of the debentures were arranged, the persons to whom they were to be issued were nominated and the instruments were drawn up by the company's solicitors. By the resolution at the later meeting an express authorization was given to seal and issue the debentures in pursuance of the previous resolution. This was the contractual act and to it the two competent directors gave their assent by voting for the resolution. No contention has been advanced that the presence of the other directors at the meeting and their voting for the resolution, notwithstanding their incompetence to do so, vitiated the resolution. In my opinion the objection fails that the requirements of the articles of association were not observed.*

281 In this proceeding, the earlier resolution of 19 July 2006 did positively approve the amendment to the Constitution. There is no suggestion in the resolution itself on 19 July 2006 that there were steps to be undertaken making that approval conditional. The Lodgement Resolution did not in itself modify, confirm or re-visit what the Directors

honestly believed was a valid and effective 19 July 2006 resolution. On 22 August 2006, the Directors were turning their collective minds to one thing and one thing only – the timing to lodge (as required to do by law) the Amended Constitution. The Directors knew that lodgement was required for the amendments to be effective, but were updated as to the timing of the lodgement.

282 If then the true matter for decision making on 22 August 2006 was to resolve that the consolidated Constitution incorporating the Deed be then lodged to become effective, coinciding with the issue of the Supplementary PDS, the responsibilities upon the Directors must be viewed in that light.

283 The fact that Mr Clarke had just joined the Board, as already stated, did not require in itself a reconsideration or revisiting of the earlier 19 July 2006 resolution. The Directors knew the Amended Constitution needed to be lodged to be effective, so in itself the decision to lodge was not what the Directors were turning their minds to — their focus was on the time to so lodge and issue the updated Supplementary PDS. Section 601GC(2) did not specify a time in which the Amended Constitution need to be lodged. However, any amendment could not take effect until a copy was lodged. The Constitution required lodgement as soon as practicable after the relevant signing of the Deed (see cl 4 of the Deed), but his would depend upon the circumstances pertaining to what needed to be accomplished prior to the company being in a position to lodge.

284 The trial judge took an entirely different approach, following upon his decisions that the Deed was not binding on 19 July 2006, the resolution made on 19 July 2006 was invalid and the Directors should have realised that in view of the inadequate consideration of the issues earlier, they had a last opportunity to fulfil their responsibilities at the meeting on 22 August 2006.

285 The trial judge saw the Lodgement Resolution as an important resolution, regardless of whether the Directors revisited or reconsidered their earlier decision to amend. The trial judge said:

> *[431] ...Lodgement was the final step in the process of amendment and by operation of s 601GC(2) the Amendments had no effect until lodged. There could be no contravention of the Act arising from the Amendments unless they were brought into effect, and they were to come into effect as a result of the Lodgement Resolution. Put another way, the 22 August meeting was the Directors' last opportunity to decide whether to complete the process of amendment that they started on 19 July and it was their last chance to ensure*

that when creating the additional fees their statutory duties were satisfied.

286 The trial judge continued:

> *[432] While it is unnecessary to deal with this argument in the present context, I note in passing that I do not accept the contention that where the Board of an RE has passed a resolution and it later considers a related matter, the directors can be under no statutory obligation to reflect upon and perhaps reconsider the earlier decision. In my view the surrounding circumstances will dictate whether in exercising their powers they are required by their statutory duties to reflect upon an earlier decision and perhaps reconsider it. I will deal with this question at [567] and following.*

287 It is then important to set out precisely the trial judge's process of reasoning.

288 First, the trial judge stated at [568] that a reasonable director in each Director's position (except for Mr Clarke) would have known that his consideration of the Amendments just one month earlier was quite inadequate, as at the 19 July 2006 meeting the Directors gave no proper consideration to, amongst other things:

(a) the fact that it was wrong to provide a Listing Fee payable from scheme property to APCHL, and through it to Mr Lewski, so as to incentivise him to support listing when he was already obligated to do so;

(b) the conflict between APCHL's interest in receiving the Listing Fee and the members' interest in having listing occur without the imposition of a fee, (at [277]-[297]);

(c) the fact that the Board had capitulated to APCHL's conflict of interest in relation to the Listing Fee rather than giving priority to the members' interests;

(d) the conflict between APCHL's interest in receiving the Removal Fee in the event APCHL was removed as RE, and the members' interests in being able to remove it as RE without paying a fee, (at [298]-[305]);

(e) the deleterious effects of the Amendments, (at [309]-[310]);

(f) the fact that the additional fees provided no corresponding benefit for the members, (at [323]-[324]);

(g) whether the Board had power to pass the Amendments (at [312]-[322]); and

(h) the effect of the Amendments on the members' rights to have the scheme administered under the existing Constitution. The Madgwicks Advice dealt with the question of APCHL's power to pass the Amendments rather than whether the Amendments should be made.

289 Secondly, on 22 August 2006 a reasonable director would have been concerned to properly address these matters before passing the Lodgement Resolution.

290 Thirdly, the trial judge considered that such an approach does not impose a general duty on directors to revisit and reconsider earlier decisions, and whether a director is to be expected to reflect on an earlier decision will depend on the circumstances. The trial judge then set out these circumstances.

> *[557] First, I see the Five Principal Factors as central to the circumstances surrounding the Directors' consideration of the Lodgement Resolution. The Directors had to decide whether to pass a resolution which would bring the Amendments into effect, in circumstances where:*
>
> *(a) the Amendments provided for additional fees to be payable from Trust funds to APCHL in its personal capacity (and through it to one of the Directors);*
>
> *(b) consideration of the Amendments revealed APCHL's plain conflict of interest and conflict of interest and duty;*
>
> *(c) the nature of the Amendments was to impose additional fees for services that members had the right to expect without incurring a fee, to impair the members' right to have the Scheme managed for the fees set out in the existing Constitution, and to entrench APCHL as RE;*
>
> *(d) the fees could be payable on multiple occasions;*
>
> *(e) the additional fees were substantial, amounting to 6.7% of net Scheme property; and*
>
> *(f) the fees were gratuitous in the sense that there was no corresponding increase in the scope of APCHL's obligations or any countervailing benefit to the members.*
>
> *[558] Second, as I set out at [404]-[432], I do not accept that APCHL had a pre-existing obligation to lodge the Deed prior to the 22 August meeting. The Deed was incomplete and it was brought into effect by the Lodgement Resolution. It follows that I reject the contention that the Directors were bound to vote for or abstain from the Lodgement Resolution because of a pre-existing obligation to lodge the Amendments. There was no such obligation. At the 22 August meeting it was open (and in my view appropriate) for each of them to vote not to lodge the Amendments with ASIC.*
>
> *[559] Third, as I explain at [424], I do not accept that ss 601GC(2) and 601FD(1)(f) imposed a positive duty on the Directors to lodge the Amendments as soon as practicable after the 19 July meeting. An RE acting in accordance with its obligations would not have acted to lodge the Amendments until after the Deed had been fully executed and after preparation and adoption of an up to date PDS.*
>
> *...*

[561] Fifth, the Lodgement Resolution was important in its own right as it would bring substantial additional fees into effect. It provided in terms:

(a) "[a]t the last Board meeting, the Directors approved Deed of Variation (No. 7) to the Constitution which had not yet taken effect as it had not been lodged with ASIC"; and that

(b) "the Consolidated Constitution incorporating Deed of Variation (No. 7) be lodged with ASIC to become effective."

The Directors knew from the 18 August email that the Deed had not been completed. On its face, the Lodgement Resolution would operate to authorise and direct the completion of the Deed and lodgement of the Amendments with ASIC, so that the Amendments would come into effect.

[562] Sixth, while the Directors decided the content of the Amendments at the 19 July meeting I have concluded that they did not intend for the Amendments to come into effect from that date. The Directors knew that the Amendments had no effect until lodged as that was clear from s 601GC(2), the note to cl 25.1 of the Constitution, the 18 August email, the text of the Lodgement Resolution itself, and from earlier constitutional amendments. The resolution was therefore the Directors' last opportunity to decide whether to complete the process of amendment that they started on 19 July. Put another way, it was their last chance to ensure that in creating the additional fees they satisfied their duties under s 601FD(1).

[563] Seventh, each of the Directors except for Mr Clarke had received the Madgwicks Advice. That advice was unusual, and uncertain on a central question asked by APCHL of its lawyers. As I explain (at [261]-[270] and [312]-[322]) I do not accept that the Madgwicks Advice clearly advised the Directors that they had power to pass the Amendments at the 19 July meeting or that the Directors gave that question proper consideration. I do not accept that Mr Lewski received or communicated any clarifying advice to the Board at its 19 July meeting (as I said at [209] to [212]). A reasonable director in each Director's position (except for Mr Clarke) would not have accepted the advice as satisfying him as to the power to pass the Amendments.

[564] These circumstances indicated that on 22 August each of the Directors was required to exercise a high standard of care. APCHL's conflict of interest and conflict of interest and duty were self-evident and the Directors were required to be scrupulous in regard to the conflicts and in giving priority to the members' interests.

[565] There is little substance to the contention that it was open to APCHL to lodge the Amendments administratively. The Board was the organ of the company chosen to direct lodgement of the Amendments and the Lodgement Resolution was the step the Board took to give effect to the Amendments. The Board exercised its power in passing the resolution and in doing so the Directors were required to comply with their duty to exercise reasonable care and diligence under s 601FD(1)(b). A reasonable director in each Director's position would not have treated it as merely administrative or procedural.

291 In addition, the trial judge considered that each Director (other than Mr Clarke) would have known that his consideration of the Amendments was quite inadequate. The trial judge found

that at the 19 July 2006 meeting the Directors gave no proper consideration to a number of things set out in [568].

292 The trial judge continued as follows:

> *[569] A reasonable director in each Director's position would have understood that in failing to properly consider these matters he had failed to exercise reasonable care and caution. On 22 August a reasonable director would have been concerned to properly address these matters before passing the Lodgement Resolution. A reasonable director would have understood that the 22 August meeting was the point of no return in relation to the Amendments.*
>
> *[570] The Directors strenuously contended that to expect that, when considering the Lodgement Resolution, they should have revisited and reconsidered their deliberations of 19 July is unrealistic and a counsel of perfection. They argued that to impose such a standard would extend the directors' duty of care and diligence well beyond previous authority and make the role untenable.*
>
> *[571] I do not accept this. It is not a counsel of perfection to expect that before bringing amendments into effect that would provide substantial additional fees, payable to a trustee from trust funds, that the directors of a professional corporate trustee functioning as an RE would:*
>
> *(a) recognise the trustee's obvious conflict of interest and conflict of interest and duty;*
>
> *(b) give careful consideration to those conflicts and scrupulously prioritise the members' interests;*
>
> *(c) recognise that unusual and equivocal legal advice was not advice that should be relied upon in deciding to allow the fees;*
>
> *(d) identify and carefully consider the deleterious effects of the additional fees upon the members;*
>
> *(e) identify and carefully consider the fact that no corresponding benefit was provided to the members in return for the additional fees; and*
>
> *(f) look past the question as to the power to make the amendments and instead carefully consider whether the additional fees should be imposed.*
>
> *[572] The fact that these matters, particularly the conflicts, required careful consideration is obvious. While Mr Clarke never saw the Madgwicks Advice, the main issue that he and the other Directors missed on 22 August was APCHL's conflicts. "Blind Freddy" would have recognised these conflicts, and it was not a matter on which legal advice was necessary.*
>
> *[573] Nor, given that the Directors gave no proper consideration to these matters on 19 July, is it unrealistic to expect them to do so when the Amendments were back before them one month later. A reasonable director who attended the 19 July meeting would understand that he had failed to carefully consider and deal with these matters, and on 22 August would have been concerned to properly address them. This is particularly so when the two meetings were*

part of the same course of conduct and only one month apart.

293 It will be apparent that the matters listed at [568] 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' [573], although each meeting had its own purpose.

294 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.

295 An example can be seen at [586]:

> *As I have said, a reasonable director in each Director's position, with the knowledge that APCHL was a trustee and of the nature of the Amendments would have exercised care and been diligent to read and understand the effects of the Amendments before passing them on 19 July, and been careful to ensure that the Board also considered and understood the effects. The same must be true on 22 August. A reasonable director in each Director's position on that date would have been careful to read and understand the effects of the Amendments before resolving to lodge them.*

296 The trial judge continued throughout his reasoning in dealing with each breach relating to the failing to take reasonable care and equated the position on 19 July 2006 with that on 22 August 2006: see, eg [598] and [601].

297 The trial judge made similar errors in considering the duty to act honestly and in the best interests of the members.

298 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 standard to be applied to the conduct of a director, even if equated to a trustee, depends on the function he or she is performing and the task he or she is undertaking. The relevant enquiry is not entirely objective, but looks to the circumstances confronting the director at the time of his or her decision. This is not the same as looking at the director's subjective state of mind, but involves looking at the matter objectively taking into account the surrounding circumstances confronting the director. 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 Deed 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: see, for example *Lock v Westpac Banking Corporation And Others* (1991) 25 NSWLR 593.

299 In dealing with breach of fiduciary duties, and the meaning of acting dishonestly, in *Compaq Computer Australia Pty Ltd v Merry and Others* (1998) 157 ALR 1 at 5, Finkelstein J, citing Nicholls LJ in *Royal Brunei Sdn Bhd v Ming* [1995] 2 AC 378, said:

> *[S]imply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subject characteristics of dishonesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour ...*

300 In *Abacus Trust Co (Isle of Man) and Another v Barr and Others* [2003] Ch 409, Lightman J said (at [16]):

> *The existence of the fiduciary duty on the part of trustees governing the exercise of their fiduciary powers requires trustees to inform themselves of the matters which are relevant to the decision (see* Scott v National Trust for Places of Historic Interest or Natural Beauty *[1998] 2 All ER 705, 717) , and in arriving at their decisions whether and how to exercise their discretionary powers to take into account all relevant but no irrelevant factors: see* Edge v Pensions Ombudsman *[2000] Ch 602, 627 -628. The fiduciary duty requires trustees to follow a correct procedure in the decision-making process: see Etherton J in* Hearn v Younger *[2002] EWHC 963 (Ch) at [91] citing Staughton LJ in Stannard v Fisons Pension Trust Ltd [1991] PLR 225, 237, para 65.This duty lies at the heart of the rule, which is directed at ensuring for the protection of the beneficiaries under the trust that they are not prejudiced by any breach of such duty.*

301 No case was put by ASIC that the Directors needed to proceed other than on the basis that the breaches only occurred on 22 August 2006, and proper consideration only needed to be given to the Lodgement Resolution on the basis that the previous actions were (and were able) to be treated by the Directors as valid. In any event, a reasonable director, honestly believing the previous decisions to be adequate, would not normally re-visit such decisions. Circumstances may arise where this may be necessary, including where that is a matter raised for the meeting to rescind or revoke an earlier resolution, or where the previous conduct is otherwise

brought into question. This was not the situation confronting the Directors as pleaded or in fact.

302 On the basis of the above analysis, the trial judge fell into error and should not have concluded that any of the Directors breached the duties alleged in the first group of contraventions.

Second group of contraventions

303 The next issue was whether APCHL contravened s 208 (as modified by Part 5C.7) in relation to the payment of the Listing Fee or any part thereof.

304 ASIC alleged that in paying itself the Listing Fee (and through it Mr Lewski) APCHL breached s 208 (as modified by s 601LC) regulating related party transactions.

305 ASIC alleged that APCHL contravened s 208:

(a) on 27 July 2007 when the Board resolved to take the first tranche of the Listing Fee, and further, or alternatively, on 27 July 2007 when the first tranche of units were issued and on 13 March 2008 when the GST component was paid; and

(b) on 27 June 2008 the Board resolved to do everything necessary to give effect to the Deed of Acknowledgement of the Listing Fee payment and further, or alternatively, when on that day the Listing Fee balance was paid to APCHL by cheque and by the issue of 9,020,386 units to Carey Bay Pty Ltd (a company associated with Mr Lewski).

306 It will be recalled that s 601LC creates a modified s 208 relating to managed investment schemes, which shall be described simply as 's 208'. It provides:

> ***208 Need for member approval for financial benefit***
>
> *(1) If all the following conditions are satisfied in relation to a financial benefit:*
>
> *(a) the benefit is given by:*
>
> *(i) the responsible entity of a registered scheme; or*
>
> *(ii) an entity that the responsible entity controls; or*
>
> *(iii) an agent of, or person engaged by, the responsible entity*
>
> *(b) the benefit either:*
>
> *(i) is given out of the scheme property; or*
>
> *(ii) could endanger the scheme property*

(c) the benefit is given to:

(i) the person or a related party; or

(ii) another person referred to in paragraph (a) or a related party of that person;

then, for the person referred to in paragraph (a) to give the benefit, either:

(d) the person referred to in paragraph (a) must:

(i) obtain the approval of the scheme's members in the way set out in sections 217 to 227; and

(ii) give the benefit within 15 months after the approval; or

(e) the giving of the benefit must fall within an exception set out in sections 210 to 216.

*Note: Section 228 defines **related party**, section 191 defines **entity**, section 191 defines **control** and section 229 affects the meaning of **giving a financial benefit .***

(2) If:

(a) the giving of the benefit is required by a contract; and

(b) the making of the contract was approved in accordance with subparagraph (1)(d)(i) as a financial benefit given to the entity or related party; and

(c) the contract was made:

(i) within 15 months after that approval; or

(ii) before that approval, if the contract was conditional on the approval being obtained;

member approval for the giving of the benefit is taken to have been given and the benefit need not be given within the 15 months.

(3) Subsection (1) does not prevent the responsible entity from paying itself fees, and exercising rights to an indemnity, as provided for in the scheme's constitution under subsection 601GA(2).

307 The trial judge was satisfied that APCHL contravened s 208 as ASIC alleged.

308 Then the question arose whether any Director was knowingly concerned in any such contravention by APCHL of s 208.

309 It will be recalled that s 79 defines 'involvement', and relevantly provides:

Involvement in contraventions

A person is involved in a contravention if, and only if, the person:

...

(c) has been in any way, by act or omission, directly or indirectly, knowingly

concerned in, or party to, the contravention…

310 The words used in s 79 are employed in many Commonwealth statutes to import traditional criminal law accessorial liability concepts. It was accepted that before any of the Directors could have been found to be involved in APCHL's contravention of s 208, ASIC needed to prove that he was intentionally involved in the contravention and had knowledge of all the essential elements of the contravention: *Yorke v Lucas* at 667, 669-670.

311 On this basis the Directors contended that, to establish that they were 'involved' in APCHL's breach of s 208, ASIC was required to prove that each of them had knowledge of the facts giving rise to a conclusion that the Listing Fee was not provided for in the Constitution. It is common ground that ASIC did not do so.

312 ASIC's position was that s 208(3) is not an essential element of the contravention of s 208. It argued that it did not need to prove that the Directors had actual knowledge that the Amendments were ineffective in order to make out its allegation that the Directors were involved in APCHL's contravention.

313 The question posed by the parties is whether, on its proper construction, s 208(3) is an element of a contravention of s 208, knowledge of which must be proved by ASIC, or whether s 208(3) creates an exception to a general rule constituted by s 208(1)(a) to (d), knowledge of which is to be proved by the Directors.

314 The trial judge concluded:

> *[720] I have reached the view that on the proper construction of s 208, s 208(3) is not an essential element of the contravention. It is therefore unnecessary for ASIC to prove that the Directors had knowledge that the Amendments were invalid to establish their liability as accessories to APCHL's breach under s 209. It was for the Directors to plead and prove the facts upon which they relied to bring the case within the "exception" in s 208(3).*
>
> *[721] I have reached this view, first, in following* Waters*. I do not accept the contention that its reasoning is inapplicable to the present case. The Full Court carefully considered the construction of s 208 in its modified and unmodified forms in the context of Ch 2E of the Act and, while their Honours did not refer to s 208(3) I cannot accept that they did not turn their mind to it in construing s 208 overall. Their Honours considered it a matter of general importance to settle the correct construction of the section. The question was treated as one of importance and the Court considered it afresh because of difficulties with some of the earlier authorities:* Waters *at [35], [50]. Having done so, their Honours explained in clear words that s 208(1)(a) to (d) constitutes a complete statement of the general rule in s 208, and the total statement of the prohibition in s 208.*
>
> *[722] There can be no question that in describing s 208(1)(a) to (d) in those terms*

the Full Court was defining the essential elements of the contravention. It is significant that their Honours made no mention of s 208(3) in doing so.

[723] Second, as a matter of construction s 208(3) provides that subs (1) "does not prevent" an RE from paying itself fees that are provided for in the scheme constitution. This indicates a requirement for proof of the fact that the fees are provided in the constitution which, if established, takes a fee payment outside the ambit of the prohibition on related party transactions in s 208(1). The burden of proving that fact properly falls on the party asserting its existence.

[724] The authorities relating to the onus of proof are important in this context. As Giles JA (with whom the other two judges of the Court agreed) said in Adler v Australian Securities and Investments Commission *(2003) 46 ACSR 504 at [413]:*

> *Onus of proof is more than a question of practice and procedure and what governs a substantive question is the principle thoroughly established in Yorke v Lucas. If the burden of proving that the giving of financial assistance does not materially prejudice the interests of the company lies upon the company, upon proof of giving financial assistance and with no evidence at all on that subject, the contravention is made out. Facts showing no material prejudice are not essential facts constituting the contravention and there can be intentional participation in the contravention if there is knowledge of the giving of financial assistance without proof that the alleged participants did not know of facts negativing material prejudice.*

[725] In Waters *at [19] the Full Court said:*

> *Where "the form or structure of the legislation does not give definite guidance on the question of burden of proof", one commentator has said that "the courts will have regard to considerations of policy and convenience": CR Williams, "Burdens and Standards in Civil Litigation" (2003) 25* Sydney Law Review *165 at 179. The author there went on to observe that "[t]he fact that a matter is 'peculiarly within the knowledge of one party', or that it will be easier for that party to prove the matter than her or his opponent, may be significant".*

[726] Adopting this approach, I consider that it is easier for an RE or its directors to prove that a particular constitutional amendment was made validly rather than ASIC or a member. Some of the matters relevant to that proof will often be peculiarly within a director's knowledge. For example, it is only the directors who can give evidence as to whether they "reasonably considered" that members' rights would not be adversely affected, and in doing so it is only the directors who know which "members' rights" they considered.

[727] Third, the purpose of Chapter 2E as it applies to registered schemes (set out in s 207) is to protect the members' interests by requiring that the members approve any related party transactions. This purpose is important to understanding the proper construction of s 208(3). As ALRC Report 65 states (at 92, 97), investors in a scheme require protection against the obvious conflict between the members' interests and those of the RE in relation to fees payable to an RE from scheme property. If an RE claims that the giving of a benefit from scheme property to itself or a related party without member approval is allowed by the Constitution, the purpose of the

Act indicates that the RE or its officers should be required to show that.

315 Then the trial judge concluded:

> *[732] I am satisfied that s 208(1)(a) to (d) constitutes the essential elements of the contravention. The involvement of each of the Directors in the issue of units on 27 July 2007 and 27 June 2008 and in the cash payments on 13 March 2008 and 27 June 2008 is plain. Each of the Directors had knowledge of each element of the contravention.*
>
> *[733] Section 208(1) prohibits an RE from giving a financial benefit to itself or a related party without first obtaining the members' approval, unless the circumstances fall within one of the exceptions, including s 208(3). It was for the Directors to prove under s 208(3) that the fees were allowed under the Constitution. They did not do so. In fact proof of that fact was not possible because the Amendments were made outside power and were invalid.*
>
> *[734] ASIC made out its claim that each of the Directors contravened s 209 by being involved in APCHL's breach of s 208.*

316 Section 208(1) has been the subject of recent judicial consideration. In *Waters v Mercedes Holdings Pty Ltd* (2012) 203 FCR 218 (‘***Waters**’)*, Jacobson, Flick and Foster JJ said, in relation to s 208(1), as follows:

> *[36] Notwithstanding accepted difficulties in the construction of s 208(1) (as modified), it is considered that the legislative intent is discernible. So much, it is considered follows from:*
>
> - *the legislative statement of purpose in s 207 (as modified by s 601LB);*
> - *the terms employed in s 208(1) (as modified), including the heading to s 208 and the other headings used in Pt 5C.7 and Ch 2E (these headings are part of the* Corporations Act*: see s 13 of the* Acts Interpretation Act 1901 *(Cth));*
> - *the terms employed in s 208(1)(e) (as modified) and, in particular, the use of the term "*exception*"; and*
> - *the manner in which the remaining exceptions to s 208 (as modified) are expressed, being ss 210–216 but not ss 213 and 214 which are excluded in the context of a registered scheme by s 601LD.*
>
> *[37] The statement of purpose as the protection of "*the interests of the scheme's members as a whole, by requiring member approval*" assists considerably in arriving at the correct construction of s 208(1) (as modified). When regard is had to the purpose of Pt 2E.1 as it relates to registered schemes specified in s 207 (as modified), it is considered that s 208(1)(a) to (d) constitutes a complete statement of the general rule. To use the language of McHugh J in* Avel Pty Ltd *"*the total statement of the obligation*" is to be found within s 208(1)(a) to (d). That conclusion is reinforced by the language of s 208(1)(e) which expressly recognises that there may be an "*exception*" to what is otherwise a "*total statement of the obligation*". The use of the disjunctive "*or*" immediately after para (d)(ii) of s 208(1) (as modified) also marginally assists in reaching the same conclusion: namely, that, in the absence of*

> *member approval a financial benefit cannot be provided out of scheme property unless one or more of the available exceptions can be invoked. Again, to use the language of McHugh J in* Avel Pty Ltd*, s 208(1)(e) (as modified) provides "*an excuse or justification for not complying with the obligation*". That an available "*exception*" embraced by this subsection is truly "*an excuse or justification for not complying with the obligation*" is further reinforced by the introductory words to each of the exceptions that remain applicable, namely "*[m]ember approval is not needed to give a financial benefit*". Each exception begins with the premise that, if the benefit to be given to the related party is to be lawful, the approval of the scheme members is required.*
>
> *[38] So construed, s 208(1) (as modified) creates a prohibition upon the giving of a financial benefit to a related party of the responsible entity without first obtaining the approval of the scheme's members unless the circumstances of giving the benefit falls within an "*exception*". Differently expressed, unless one of the exceptions mentioned in s 208(1)(e) (as modified) applies, a benefit which falls within s 208(1)(a) to (c) (as modified) which has not been approved by the scheme members cannot be given to a related party. Section 208(1)(a) to (d) (as modified) is therefore a "*total statement*" of the prohibition and the onus rests upon those alleging that one or more of the exceptions apply in the circumstances of the particular case to plead and to prove the necessary facts, matters and circumstances that engage the exception or exceptions relied upon. Proof of the inapplicability of the exceptions described in s 208(1)(e) (as modified) is not a condition precedent to the imposition of the prohibition on giving the relevant benefit.*
>
> *[39] Nor is there any persuasive reason why a person who seeks to invoke one or other of the exceptions should not plead – and prove – that the facts fall within one or more of the specified exceptions. The party seeking to rely upon one or more of the exceptions is more likely to have knowledge of facts within its own store of information which will permit it to engage the relevant exceptions.*

317 There are two other significant authorities referred to both in *Waters* and by the trial judge, which usefully set out the approach to take in considering the issue under consideration.

318 In *Vines v Djordjevitch* (1955) 91 CLR 512 ('***Vines v Djordjevitch***') at 519-520 per Dixon CJ, McTiernan, Webb, Fullagar and Kitto JJ, the High Court explained some of the considerations relevant to statutory construction in this context. As the High Court said:

> *…"There is a technical distinction between a proviso and an exception, which is well understood. All the cases say, that if there be an exception in the enacting clause, it must be negatived: but if there be a separate proviso, it need not" — per* Abbott J *in* Steel v Smith*. The distinction has perhaps come to be applied in a less technical manner, and now depends not so much upon form as upon substantial considerations. In the end, of course, it is a matter of the intention that ought, in the case of a particular enactment, to be ascribed to the legislature and therefore the manner in which the legislature has expressed its will must remain of importance. But whether the form is that of a proviso or of an exception, the intrinsic character of the provision that the proviso makes and its real effect cannot be put out of consideration in determining where the burden of proof lies. When an enactment is stating the grounds of some liability that it is imposing or the conditions giving rise*

> *to some right that it is creating, it is possible that in defining the elements forming the title to the right or the basis of the liability the provision may rely upon qualifications exceptions or provisos and it may employ negative as well as positive expressions. Yet it may be sufficiently clear that the whole amounts to a statement of the complete factual situation which must be found to exist before anybody obtains a right or incurs a liability under the provision. In other words it may embody the principle which the legislature seeks to apply generally. On the other hand it may be the purpose of the enactment to lay down some principle of liability which it means to apply generally and then to provide for some special grounds of excuse, justification or exculpation depending upon new or additional facts. In the same way where conditions of general application giving rise to a right are laid down, additional facts of a special nature may be made a ground for defeating or excluding the right. For such a purpose the use of a proviso is natural. But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter.*
>
> (Citations omitted.)

319 In *Avel Proprietary Limited v Multicoin Amusements Proprietary Limited and Another* (1990) 171 CLR 88 (‘***Avel v Multicoin’***), McHugh J at 119 usefully summarised the principles and observed:

> ***When a statute imposes an obligation which is the subject of a qualification, exception or proviso, the burden of proof concerning that qualification, exception or proviso depends on whether it is part of the total statement of the obligation***. *If it is, the onus rests on the party alleging a breach of the obligation. If, however, the qualification, exception or proviso provides an excuse or justification for not complying with the obligation, the onus of proof lies on the party alleging that he falls within the qualification, excuse or proviso:* Vines v Djordjevitch. *Whatever form the statute takes, the question has to be determined as one of substance:* Vines*;* Banque Commerciale S.A.*,* en Liquidation v Akhil Holdings Ltd .
>
> (Footnotes omitted. Emphasis added.)

320 It should be noted that *Waters* establishes that an applicant bears the onus of establishing as an ‘essential element’ that a relevant financial benefit was not approved by members (s 208(1)(d)). The Full Court did not consider s 208(3). Nevertheless, it may be observed that placing the onus under s 208(3) upon a defendant may be disharmonious with the approach of the Full Court, as it would create the prospect that a plaintiff would bear the onus of establishing a lack of member approval under s 208(1)(d) and yet, in respect of the same alleged contravention, a defendant would then bear the onus under s 208(3) of establishing the existence of a constitutional entitlement to a fee which the defendant contends was approved by the members. This would not necessarily itself impact on the construction of s 208(3), but it is a relevant consideration in looking at the operation of s 208 as a whole.

321 The text of s 208 is significant. The language used in s 208(3) is 'Subsection (1) does not prevent'. The words in s 208(3) do not purport to create an exception to the operation of the liability in s 208(1), as contrasted with the language of '*must fall within an exception*' in s 208(1)(e).

322 If the Parliament had intended s 208(3) to operate as an exception to liability, it could have used the language of exception as deployed in s 208(1)(e). Rather, the language chosen by Parliament is an indicator that s 208(1) does not prevent, stop or apply to the payment of all fees to a RE payable under the constitution.

323 Then adopting the approach of the High Court in *Vines v Djordjevitch*, s 208(3) does not assume the existence of the general or primary grounds from which liability arises under s 208(1). Following McHugh J in *Avel v Multicoin,* the obligation to comply with s 208(1) is only imposed in circumstances where a fee to a RE is not provided for in the constitution. The structure of s 208 is that s 208(1) is simply not engaged if the fees are provided for in the scheme constitution.

324 Another issue was raised as to the interpretation of s 208(3), by reference to the phrase the 'scheme's constitution under subsection 601GA(2)'. It was contended that the reference to the 'scheme's constitution' was a reference to the document lodged with ASIC. We accept that the scheme of the Act would seem to indicate that for certainty (created for the RE, the members and third parties), that the lodged document should be the basis on which the RE deals with scheme property. We do not need to pursue this further. On our view, the consideration in this proceeding is to be based upon the assumption that there was in place the Lodgement Resolution and Deed, which were entitled to be regarded as objective facts that existed as a basis for decision making by the Directors.

325 On this basis, the question as to the incidence of the burden of proof may have no relevance, because the Directors would be able to show they had an honest belief in the validity of the Amendments. In any event, the parties contested at trial and on appeal the issue of the application of s 208 as indicated above.

Third group of contraventions

326 The trial judge then considered the matters that were considered or not considered by the Directors who were involved in deciding that APCHL should pay itself the Listing Fee, execute the Heads of Agreement, and execute the Deed of Acknowledgement.

327 The trial judge also considered whether any of the Directors contravened s 601FD(3).

328 There was no suggestion before the trial judge or in the pleading that any other requirement of s 601GA(2) needed to be complied with provided the fees were paid in accordance with the Deed. It was not suggested at trial that the Directors did not otherwise act in the proper performance of their duties set out in the Constitution (see for example the reference in s 601GA(2)(b)).

329 There was also no pleaded case that the Directors needed to separately consider any deferral or waiver of the fees. On appeal, reference was made by ASIC in oral submissions to cl 24.6 of the Constitution which provides as follows:

> ***Deferral or Waiver of Fees to Responsible Entity***
>
> *(a) Despite anything contained in clause 24.5 the Responsible Entity may at any time elect to accept lower fees than it is entitled to receive under clause 24.5, or may elect to defer payment or any remuneration payable to it under clause 24.5.*
>
> *(b) Any remuneration deferred under this clause shall be paid to the Responsible Entity as and when the gross income of the Fund in future Accrual Periods permits and as from time to time requested by the Responsible Entity.*

330 Whilst cl 24.6 may have been referred to in opening before the trial judge, no separate allegation was made that there was a failure to consider this matter or that in failing so to do the Directors contravened the Act. The trial judge himself makes no mention of cle 24.6.

331 ASIC alleged that by his participation in the decisions to pay the Listing Fee on 26 June and 27 July 2007, 23 and 24 April 2008 and 27 June 2008 each of the Directors breached:

(a) his duty to act in the best interests of the members of the Trust and to give priority to the members' interests over APCHL's interests, as required by s 601FD(1)(c); and

(b) his duty to take all steps that a reasonable person would take if that person was in his position to ensure that APCHL complied with the Act, as required by s 601FD(1)(f).

332 ASIC particularised the breach of the duty to act in the best interests of the members in the following terms:

(a) each of the Directors did not give any consideration to whether making payment of the Listing Fee was in the members' best interests;

(b) payment of the Listing Fee was not, in fact, in the best interests of the members because the Listing Fee was never a part of the Constitution, the payment was to be

made out of scheme property and the members were never given the opportunity to vote on it; and

(c) further or in the alternative to (b), a director of APCHL in his position could not, in the circumstances, have reasonably believed that payment of the Listing Fee was in the members' best interests.

333 Each of the Directors submitted, that:

(a) at all relevant times he believed that the Amendments were validly made and that they had taken effect on lodgement;

(b) following lodgement of the Amendments he had no reason to doubt that they were valid, and all indications were that the Amendments were effective; and

(c) he believed that APCHL was legally obliged to pay the fee.

334 The Directors relied upon the unchallenged evidence (and the findings of the trial judge) that they honestly believed that the Amendments were valid and that the Listing Fee was required to be paid. They again pointed to the following matters in support of their belief before the trial judge and on appeal:

(a) the Madgwicks Advice informed them that the Board had power to pass the Amendments, and the Board had done so on 19 July 2006;

(b) the 18 August 2006 email said that Deed would take effect on lodgement with ASIC;

(c) the pre-prepared Madgwicks Minute for the 22 August 2006 meeting said that the Deed would take effect on lodgement;

(d) lodgement of the consolidated Constitution containing the Amendments occurred on 23 August 2006;

(e) at a meeting between APCHL, its lawyers and ASIC in March 2007, albeit relating to other matters, ASIC advised that it had no further issues in relation to the RE or the Trust;

(f) the minutes pre-prepared by Madgwicks for the Board meetings on 26 June and 27 July 2007 recorded APCHL's entitlement to be paid the Listing Fee in the event that the Trust was listed;

(g) the Listing PDS approved by the Board on 26 June 2007 disclosed to potential investors APCHL's entitlement to the Listing Fee, and was not the subject of adverse comment by ASIC;

(h) the Madgwicks' letter of 11 April 2008 to Mr Lewski (provided to the Board) stated that upon the restructure of APCHL he would be entitled to the unpaid balance of the Listing Fee;

(i) the Blake Dawson Advice of 18 April 2008 referred to the existence of an obligation to pay the Listing Fee; and

(j) neither the independent compliance committee nor the compliance scheme auditor made any suggestion that the validity of the Listing Fee should be doubted.

335 Again, the Directors' case was that in these circumstances there was no requirement for them to give consideration to whether making payment of the Listing Fee was in the members' best interests. As each Director operated on the basis that the Board had a legal obligation to pay the Listing Fee, the decision to pay it did not give rise to any requirement to consider whether its payment was in the members' best interests.

336 The trial judge decided:

> *[747] I have previously detailed, at [455] and following, the content of the duty to act in the best interests of the members and I will not do so again. The duty has two limbs and the two questions to be determined are:*
>
> *(a) whether in participating in the decisions to pay the Listing Fee, did each Director act with undivided loyalty solely in the interests of the members?; and*
>
> *(b) was there a conflict between the interests of APCHL in being paid the Listing Fee and the interests of the members in avoiding that fee, and if so, in participating in the decisions, did the Directors prefer the members' interests to APCHL's interests?*
>
> *[748] In my view, in making the decisions to pay the Listing Fee each of the Directors failed to act with undivided loyalty solely in the interests of the members, and given APCHL's conflicts of interest, each of them failed to give priority to the members' interests.*
>
> *[749] I say this first, because (as I said at [472] and following) the duty to act in the best interests of the members includes a requirement that the trustee strictly adhere to the terms of the trust. In making the decisions to pay the Listing Fee the Directors were acting outside the Constitution because the Amendments were invalid and there was no provision for payment of that fee.*
>
> *[750] Because the Constitution did not provide for the Listing Fee, each time a decision was made to pay the fee to APCHL the interests of APCHL in receiving it were in conflict with the interests of the members in having the terms of the Trust adhered to and not suffering the fee. That conflict was required to be resolved by preferring the members' interests and it was not.*
>
> *[751] Because the Amendments were invalid, the decisions to pay the Listing Fee were plainly against the members' interests because payment of the fee would result in a substantial dilution of the value of the members' units, and*

a substantially diminished value in the Scheme property.

[752] Second, as I said at [485]-[488], the test for determining whether or not each of the Directors acted in the members' best interests is objective. While I must accept that the Directors honestly believed that the Amendments were valid, their duty to act in the members' best interests is not satisfied by proof that they held an honest belief in that regard: Hillsdown Holdings Plc v Pensions Ombudsman.

[753] At one level the Directors' contentions that their belief in the validity of the Amendments meant that they were acting in the members' interests is based in the suggestion that the passage of time since the Amendments were approved and lodged somehow operated to wash away their earlier failures to comply with their statutory duties. I do not accept this. Each Director's belief that the Constitution provided for the Listing Fee was the product of his failure when passing the Amendments and/or when passing the Lodgement Resolution to, amongst other things:

(a) act in the best interests of the members including by prioritising the members' interests over APCHL's interests;

(b) properly consider whether the Board had power to make the Amendments;

(c) properly consider the members' right to have the Scheme administered for the fees set out in the existing Constitution; and

(d) exercise reasonable care and diligence.

[754] It is difficult to see how it can be in the members' best interests for the Directors to decide to pay the Listing Fee because the Constitution apparently provided for it when:

(a) the Amendments were invalid as a matter of law; and

(b) the fee only appeared in the Constitution because the Directors failed to comply with their statutory duties.

[755] Third, although I must accept the Directors' unchallenged evidence of their honest belief as to the validity of the Amendments when they decided to pay the Listing Fee, I do not accept that any of the Directors were acting with competence and care solely in pursuit of the members' interests. The surrounding circumstances at that time were:

(a) the Five Principal Factors indicated that a cautious approach was required;

(b) Mr Lewski had instigated the introduction of the Listing Fee, and he had proposed and voted in favour of the Amendments;

(c) the fee was substantial (and at the time of the 26 June and 27 July 2007 resolutions was between about one third and two thirds of the $50 to $100 million expected to be raised on listing);

(d) the Directors (other than Mr Clarke) in passing the Amendments at the 19 July 2006 meeting, and the Directors (including Mr Clarke) in passing the Lodgement Resolution at the 22 August 2006 meeting:

(i) gave no consideration to APCHL's obvious conflict of

interest nor prioritised the members interests;

(ii) gave no consideration to the deleterious effects of the Amendments;

(iii) acted outside the express prohibition in cl. 25.1 of the Constitution in relation to amendments in favour of or to the benefit of APCHL; and

(iv) acted outside the statutory power of amendment as they gave no consideration to whether the Amendments would adversely affect the members' right to have the Scheme administered for the fees in the existing Constitution.

337 The trial judge continued:

[757] Despite these circumstances the evidence shows that none of the Directors:

(a) reflected on his earlier failure at the 19 July and/or 22 August 2006 meetings to properly consider:

(i) APCHL's conflict of interest and his failure to give priority to the members' interests;

(ii) the deleterious effects of the Amendments;

(iii) the Board's power to make the Amendments; or

(b) reflected on whether there was any doubt as to the validity of the Amendments.

[758] A reasonable director in each Director's position would have been alive to, at least, APCHL's conflict of interest and conflict of interest and duty. Notwithstanding that these conflicts were plain, the evidence shows that the Directors gave them no proper attention on 19 July or 22 August 2006, or when making the decisions to pay the Listing Fee. A reasonable director in each Director's position would have considered and sought to resolve these conflicts in favour of the members before making the decisions to pay $33 million from Trust funds to APCHL, and through it to one of the Directors.

[759] Dr Wooldridge conceded that APCHL's conflict of interest did not "cross his radar" when he was making the decisions to pay the Listing Fee. Mr Butler made a similar concession. No Director gave evidence that when deciding to pay the fee he considered whether there was any conflicts of interest. I infer that none of them did so. I do not see this approach as consistent with acting in the members' best interests. Had the Directors given APCHL's conflicts even a rudimentary consideration on these occasions their earlier failures to properly deal with the issue should have become apparent to them.

[760] Nor do I accept that this approach lacks any sense of reality or imposes a counsel of perfection as they contended. The main matter which each of the Directors missed when deciding to pay the Listing Fee was APCHL's conflict of interest. Of course, as the Directors contended, at those points they believed that the Constitution provided for the fee. But they knew how the Amendments were made and each of them knew (or should have known) that he had given no proper consideration to APCHL's conflicts. The expectation that each of the Directors would notice the self-evident conflicts, and then resolve them by giving priority to the members' interests does not demand

perfection.

> *[761] The Directors' argument that there was no cause for them to doubt the validity of the Amendments because APCHL's professional advisors and ASIC did not alert them also lacked substance. I say this, first, because a reasonable director in each of their positions would have questioned whether the Listing Fee should be paid. For a reasonable director in the position of each Director other than Mr Clarke, the equivocal Madgwicks Advice would have caused alarm bells and that should not have been forgotten. Second, other than Madgwicks, none of APCHL's other professional advisors were ever asked to consider the validity of the Amendments. The Blake Dawson Advice was provided in relation to the Heads of Agreement and that firm was not asked to advise on the validity of the Amendments, nor given a copy of the Madgwicks Advice. The Blake Dawson Advice proceeded on the assumption that the Amendments were valid. Third, the absence of a complaint by ASIC cannot support the Directors' argument. There is no evidence that ASIC was alive at the relevant time to any concern about the validity of the Listing Fee. In any event, a director's failure to act in accordance with his or her statutory duties is not to be excused on the basis that he or she was not alerted to the breach by ASIC. The duty is the Directors.*

338 As indicated ASIC also alleged that in making the decisions to pay the Listing Fee each of the Directors breached his duty under s 601FD(1)(f)(i) to take all steps that a reasonable person would take if they were in the Director's position to ensure that APCHL complied with the Act.

339 The Directors made essentially the same arguments as they made in relation to the breach of duty to act in the best interests of the members, and they were rejected by the trial judge for the same reasons as he had previously given.

340 The trial judge finally decided that:

> *[766] For the reasons I have previously traversed, I consider that a reasonable director in each Director's position would have taken steps to ensure that these contraventions did not occur. Again, I do not accept that this is a counsel of perfection. Amongst other things, a reasonable director in each Director's position would not have made the decisions to pay the Listing Fee without obtaining:*
>
> *(a) clear legal advice or a judicial direction that the Amendments had been effective, that APCHL had a right to be paid the fee under the Constitution and the Act, and that payment of the fee would not contravene s 208 (as amended by s 601LC); or*
>
> *(b) the approval of the members for payment of the fee to be made.*
>
> *None of the Directors took any steps towards obtaining further legal advice or a judicial direction as to the Amendments or towards obtaining the members' approval. I am satisfied that ASIC made out this allegation.*

341 For the reasons already referred to above, the trial judge failed to appreciate that the focus should have been upon the alleged wrongful conduct that occurred at the time of each alleged contravention. The Directors were entitled to act in accordance with the Constitution which they honestly believed existed, and make decisions accordingly. The trial judge, in his approach to the third group of contraventions, made the same errors as he did in considering the earlier group of contraventions.

342 We make another observation. In considering the question of the Directors' responsibilities to act in the best interests of the members, the trial judge decided that the enquiry was an objective one, relying upon *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 ('***Hillsdown Holdings***').

343 The trial judge said at [486], in reliance on *Hillsdown Holdings* as follows:

> *... Knox J accepted that the trustee had acted "perfectly honestly" in what it thought was the best interests of the members. His Honour disregarded this subjective evidence of best intention because he was satisfied that the trustee had intrinsically breached the trust and damaged the interests of members. I respectfully agree with his Honour's approach.*

344 The trial judge also referred to the duty to perform and adhere to the terms of a trust: see eg [472]. On this basis, the trial judge simply concluded that because the Deed was invalid, the Directors effectively needed to reconsider the position the Directors had already resolved in 2006.

345 However, in the context of the third group of contraventions alleged, the question is not simply whether the Directors were adhering to the terms of a trust—in this case the Constitution. The question is whether they acted in the best interests of the members in the circumstances where the Constitution envisaged the Directors would be able to decide to, and make payment of, the relevant fees.

346 The conclusion (which the trial judge reached) that the duty to act in the best interests of the members includes a duty that the trustee strictly adheres to the terms of a trust can be accepted as a general proposition. However, whilst the Deed was invalid, the Directors honestly acted on the basis it was in fact valid, and it is in that context that their responsibilities which were exercised in 2007 and 2008 must be considered.

DISPOSITION

347 For the foregoing reasons, the trial judge should not have concluded that any of the Directors contravened the Act as alleged by ASIC.

348 In light of the above conclusion, it is unnecessary and undesirable to deal with the cross-appeal and the adequacy of the penalty imposed on all the Directors based upon the various findings of the trial judge.

349 The appropriate orders to make would seem to be that each appeal be allowed, the orders of the trial judge be set aside, and that in lieu of the orders of the trial judge the proceeding be dismissed, with costs following the event.

350 However, the Court will give the parties the opportunity to consider these reasons and to confer, and provide to the Court by 4.00pm on 25 July 2016 an agreed minute of order, or in the event of disagreement, a short written submission in support of any separately proposed order.

I certify that the preceding three hundred and fifty (350) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Greenwood, Middleton and Foster.

Associate: 

Dated: 14 July 2016