FEDERAL COURT OF AUSTRALIA

Lewski v Australian Securities & Investments Commission

(No 2) [2017] FCAFC 171

Appeal 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:	1 November 2017
Catchwords:	**PRACTICE AND PROCEDURE** – Reopening the appeal – reconsideration of earlier reasons – form of declarations **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)
Cases cited:	*Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed)* [2014] FCA 1308 *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)* [2013] FCA 1342 *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 *Lewski v Australian Securities and Investments Commission* [2016] FCAFC 96 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 *Rudd v Bowles* [1912] 2 Ch 60 *Rudd v Bowles ASIC v Cassimatis (No 8)* [2016] FCA 1023
Date of hearing:	12-13 December 2016
Registry:	Victoria
Division:	General Division
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Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	201
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ORDERS

VID 752 of 2014

BETWEEN:	**WILLIAM LIONEL LEWSKI** Appellant
AND:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** First Respondent
	AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED ACN 095 474 436 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (CONTROLLERS APPOINTED) Second Respondent
AND BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Cross-Appellant
AND	**WILLIAM LIONEL LEWSKI** Cross-Respondent

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

DATE OF ORDER: **1 NOVEMBER 2017**

THE COURT ORDERS THAT:

1. Australian Property Custodian Holdings Limited ACN 095 474 436 (Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed) be joined as the second respondent to the appeal.
2. The appeal is allowed.
3. The cross-appeal is dismissed.
4. The orders and declarations made by the trial judge in proceeding VID 594 of 2012 (**Trial Proceeding**) dated 2 December 2014 are set aside and in lieu thereof the plaintiff's claim by originating process is dismissed.
5. The first respondent pay the costs of the defendants in the Trial Proceeding, including reserved costs.

6. The first respondent pay the costs of the appellant in the appeal and the cross-appeal, including reserved costs and the costs of and in connection with the dispute as to the form of orders.

7. The second respondent pay the costs of the appellant in the appeal proceeding of and in connection with the dispute as to the form of orders.

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

ORDERS

VID 753 of 2014

BETWEEN:	**MICHAEL RICHARD LEWIS WOOLDRIDGE** Appellant
AND:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** First Respondent
	AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED ACN 095 474 436 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (CONTROLLERS APPOINTED) Second Respondent
AND BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Cross-Appellant
AND	**MICHAEL RICHARD LEWIS WOOLDRIDGE** Cross-Respondent
JUDGES:	**GREENWOOD, MIDDLETON AND FOSTER JJ**
DATE OF ORDER:	**1 NOVEMBER 2017**

THE COURT ORDERS THAT:

1. Australian Property Custodian Holdings Limited ACN 095 474 436 (Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed) be joined as the second respondent to the appeal.
2. The appeal is allowed.
3. The cross-appeal is dismissed.
4. The orders and declarations made by the trial judge in proceeding VID 594 of 2012 (**Trial Proceeding**) dated 2 December 2014 are set aside and in lieu thereof the plaintiff's claim by originating process is dismissed.
5. The first respondent pay the costs of the defendants in the Trial Proceeding, including reserved costs.

6. The first respondent pay the costs of the appellant in the appeal and the cross-appeal, including reserved costs and the costs of and in connection with the dispute as to the form of orders.

7. The second respondent pay the costs of the appellant in the appeal proceeding of and in connection with the dispute as to the form of orders.

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

ORDERS

VID 783 of 2014

BETWEEN:	**MARK FREDRICK BUTLER** Appellant
AND:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** First Respondent
	AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED ACN 095 474 436 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (CONTROLLERS APPOINTED) Second Respondent
AND BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Cross-Appellant
AND:	**MARK FREDRICK BUTLER** Cross-Respondent
JUDGES:	**GREENWOOD, MIDDLETON AND FOSTER JJ**
DATE OF ORDER:	**1 NOVEMBER 2017**

THE COURT ORDERS THAT:

1. Australian Property Custodian Holdings Limited ACN 095 474 436 (Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed) be joined as the second respondent to the appeal.
2. The appeal is allowed.
3. The cross-appeal is dismissed.
4. The orders and declarations made by the trial judge in proceeding VID 594 of 2012 (**Trial Proceeding**) dated 2 December 2014 are set aside and in lieu thereof the plaintiff's claim by originating process is dismissed.
5. The first respondent pay the costs of the defendants in the Trial Proceeding, including reserved costs.

6. The first respondent pay the costs of the appellant in the appeal and the cross-appeal, including reserved costs and the costs of and in connection with the dispute as to the form of orders.

7. The second respondent pay the costs of the appellant in the appeal proceeding of and in connection with the dispute as to the form of orders.

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

ORDERS

VID 784 of 2014

BETWEEN:	**KIM SAMUEL JAQUES** Appellant
AND:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** First Respondent
	AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED ACN 095 474 436 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (CONTROLLERS APPOINTED) Second Respondent
AND BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Cross-Appellant
AND:	**KIM SAMUEL JAQUES** Cross-Respondent
JUDGES:	**GREENWOOD, MIDDLETON AND FOSTER JJ**
DATE OF ORDER:	**1 NOVEMBER 2017**

THE COURT ORDERS THAT:

1. Australian Property Custodian Holdings Limited ACN 095 474 436 (Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed) be joined as the second respondent to the appeal.
2. The appeal is allowed.
3. The cross-appeal is dismissed.
4. The orders and declarations made by the trial judge in proceeding VID 594 of 2012 (**Trial Proceeding**) dated 2 December 2014 are set aside and in lieu thereof the plaintiff's claim by originating process is dismissed.
5. The first respondent pay the costs of the defendants in the Trial Proceeding, including reserved costs.

6. The first respondent pay the costs of the appellant in the appeal and the cross-appeal, including reserved costs and the costs of and in connection with the dispute as to the form of orders.

7. The second respondent pay the costs of the appellant in the appeal proceeding of and in connection with the dispute as to the form of orders.

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

ORDERS

VID 795 of 2014

BETWEEN:	**PETER CLARKE** Appellant
AND:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** First Respondent
	AUSTRALIAN PROPERTY CUSTODIAN HOLDINGS LIMITED ACN 095 474 436 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (CONTROLLERS APPOINTED) Second Respondent
JUDGES:	**GREENWOOD, MIDDLETON AND FOSTER JJ**
DATE OF ORDER:	**1 NOVEMBER 2017**

THE COURT ORDERS THAT:

1. Australian Property Custodian Holdings Limited ACN 095 474 436 (Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed) be joined as the second respondent to the appeal.
2. The appeal is allowed.
3. The orders and declarations made by the trial judge in proceeding VID 594 of 2012 (**Trial Proceeding**) dated 2 December 2014 are set aside and in lieu thereof the plaintiff's claim by originating process is dismissed.
4. The first respondent pay the costs of the defendants in the Trial Proceeding, including reserved costs.
5. The first respondent pay the costs of the appellant in the appeal, including reserved costs and the costs of and in connection with the dispute as to the form of orders.
6. The second respondent pay the costs of the appellant in the appeal proceeding of and in connection with the dispute as to the form of orders.

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

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 This judgment principally concerns whether certain declarations of the trial judge that Australian Property Custodian Holdings Limited ('**APCHL**') contravened the *Corporations Act 2001* (Cth) (the '**Act**') should be set aside. Those declarations were made by the trial judge in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed)* [2014] FCA 1308 ('**Penalty Judgment**'), which followed the determination of liability 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**').

2 It is convenient to set out in full the declarations made against APCHL at this stage, although we will need to return to each declaration individually. The declarations were as follows:

> ...
>
> 1. *The first defendant, Australian Property Custodian Holdings Limited (Receivers and Managers Appointed)(In Liquidation)(Controllers Appointed) (**APCHL**), contravened s. 601FC(5) of the Corporations Act 2001 (Cth) (the Act) by reason of it having contravened s. 601FC(1)(b) of the Act, in that, in its capacity as responsible entity (the **Responsible Entity**) of the Prime Retirement and Aged Care Property Trust ARSN 097 514 746 (the **Prime Trust**), it failed to exercise the degree of care and diligence that a reasonable person would have exercised in the Responsible Entity's position, in that on 22 August 2006 its board of directors (the **Board**) passed 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**), in circumstances where a reasonable person in the Responsible Entity's position would not have attempted to cause the amendments contained in the Amended Constitution (the **Amendments**) to take effect, because the Amendments purported to create rights in APCHL the purported exercise of which would result in a diminution in the assets of the Prime Trust, without providing any, alternatively any equivalent, benefit to members of the Prime Trust (the **Members**).*
>
> 2. *The first defendant, **APCHL**, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(c) of the Act, in that, in its capacity as Responsible Entity, it failed to act in the best interests of the Members and failed to give priority to the Members' interests over its own interests, by the Board resolving on 22 August 2006 to lodge the Amended Constitution with ASIC in circumstances where:*
>
> *(a) it did not give any consideration to whether the Lodgement*

Resolution was in the best interests of the Members;

(b) the Lodgement Resolution was not in fact in the best interests of the Members;

(c) a responsible entity in the position of APCHL could not reasonably have believed that the Lodgement Resolution was 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 of the Prime Trust (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.

*3. The first defendant, **APCHL**, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(m) of the Act, in that, in its capacity as Responsible Entity, it failed to comply with the duty imposed on it by the Existing Constitution not to vary or attempt to vary the Existing Constitution in a manner that was in favour of or resulted in any benefit to APCHL, by the Board resolving to lodge the Amended Constitution with ASIC in circumstances where the Amendments were in favour of or resulted in a benefit to APCHL.*

*4. The first defendant, **APCHL**, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(c) of the Act, in that, in its capacity as Responsible Entity, it 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 it, by the Board:*

(a) passed a 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) passed a 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 (the **Listing Fee**) as units;*

in circumstances where:

(c) it did not give any consideration to whether payment of the Listing Fee was in the best interests of the Members;

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

(e) a responsible entity in the position of APCHL could not in the circumstances reasonably have believed that payment of the Listing Fee was in the best interests of the Members; and

(f) each 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.

*5. The first defendant, **APCHL**, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(k) of the Act, in that, in its capacity as Responsible Entity, it failed to ensure that all payments out of the scheme property of the Prime Trust (**Scheme Property**) were made in accordance with the constitution of the Prime Trust, by:*

*(a) on 3 August 2007, causing to be issued to itself in its personal capacity ordinary units in 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**);*

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

*(collectively, the **First Instalment**) notwithstanding that, as a matter of law, the payment of the First Instalment and each component of it was not provided for in the constitution of the Prime Trust.*

*6. The first defendant, **APCHL**, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(c) of the Act, in that, in its capacity as Responsible Entity, it 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 it:*

(a) by the Board, passed a resolution on 7 April 2008 to amend the 26 June 2007 resolution such that:

"[i]n the event of the removal of the Responsible Entity or if there is a restructure of the Responsible Entity such that interests associated with Bill Lewski cease to control the Responsible Entity (for example, by way of a stapling arrangement) prior to the end of the Deferral Period the unpaid balance will become immediately payable in cash to the Responsible Entity";

*(b) by the Board, on or about 24 April 2008, approved the execution of a document entitled "Heads of Agreement - APCHL Restructure" (the **Heads of Agreement**);*

(c) on 28 April 2008, executed the Heads of Agreement; and

*(d) by the Board, passed a resolution on 27 June 2008 approving the execution by APCHL of a 'Deed of Acknowledgement of Listing Fee Payment' (the **Deed of Acknowledgment**)*

in circumstances where:

(e) it did not give any consideration to whether payment of the Listing Fee was in the best interests of the Members;

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

(g) a responsible entity in the position of APCHL could not in the

circumstances reasonably have believed that payment of the Listing Fee was in the best interests of the Members; and

(h) each 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.

*7. The first defendant, **APCHL**, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(k) of the Act, in that, in its capacity as Responsible Entity, it failed to ensure that all payments out of Scheme Property were made in accordance with the constitution of the Prime Trust, by:*

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

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

*(collectively, the **Second Instalment**) notwithstanding that, as a matter of law, the payment of the Second Instalment and each component of it was not provided for in the constitution of the Prime Trust.*

3 The proceedings at first instance were brought by the Australian Securities and Investments Commission ('**ASIC**') against both APCHL and five of its directors, namely William Lionel Lewski, Mark Frederick Butler, Kim Samuel Jaques, Michael Richard Lewis Wooldridge and Peter John Clarke (collectively the '**Directors**' or the '**Board**'). The trial judge determined that APCHL had contravened s 208 and s 601FC of the Act, and that the Directors had contravened s 209 and s 601FD of the Act. The trial judge made declarations to this effect, and imposed pecuniary penalties (against all of the Directors) and disqualification orders (against all of the Directors except Mr Clarke).

4 The Directors (but not APCHL) subsequently appealed to this Full Court: *Lewski v Australian Securities and Investments Commission* [2016] FCAFC 96 ('**Appeal Judgment**'). The appeal was allowed on the basis that the trial judge had erred in holding that the Directors had contravened the Act.

5 However, before orders disposing of the appeal were made, the Directors contended that a further consequence of the Full Court allowing that appeal was that it also removed the foundations for the declarations made by the trial judge against APCHL. Applications to join APCHL to each appeal were made, and ASIC now seeks leave to file a notice of contention. Submissions have also been made by ASIC that this Court should reconsider its Appeal Judgment.

6 Therefore, in broad terms, the question confronting this Court is as follows: given the findings made in the Appeal Judgment and in light of the submissions of the original parties to the appeal and APCHL, what action should this Court take in respect of the outstanding declarations of the trial judge against APCHL?

PROCEDURAL MATTERS

7 Before going any further, we need to address certain procedural matters. In relation to the joinder of the APCHL to each appeal, whether this is necessary or not, it is appropriate that APCHL be joined as a party. This was not contested by any existing party to the appeal or APCHL. We propose to order that APCHL be joined as a second respondent to each appeal. All parties and APCHL participated in and had the opportunity to be heard at the hearing before the Court on the issues considered in these reasons.

8 One of the consequences of APCHL being joined as a party to each appeal is that APCHL had a right to be heard on the issue of the setting aside of the declarations, which right it exercised. APCHL made submissions that certain declarations affecting it should not be set aside. Those declarations were 5 and 7; otherwise APCHL did not oppose the setting aside of the other declarations against it.

9 ASIC took the opportunity, with the addition of APCHL as a party to each appeal, to submit that none of the declarations against APCHL should be set aside, not only on the basis of the reasons of the Full Court in the Appeal Judgment, but also by reference to additional submissions relevant to the position of APCHL. These additional submissions were in effect seeking to have this Court revisit some of its conclusions reached in the Appeal Judgment. This revisiting by this Court of certain conclusions reached by it (relevant to the Directors), could have resulted in the spectre of inconsistent findings by this Court, if we were persuaded by ASIC that our earlier conclusions in the Appeal Judgment were incorrect. We should indicate at the outset that we have not been persuaded that any error in the Appeal Judgment has been made that requires correction. Therefore the occasion for inconsistent findings does not arise.

10 However, ASIC did submit that in the event that this Court did consider it was previously in error, the Court should then reopen the appeal as far as it concerned the Directors, and correct the record accordingly. It was in this context that ASIC effectively requested this Court to re-open its consideration of the appeal brought by the Directors.

11 The approach by ASIC has required this Court to reconsider its earlier reasons in the Appeal Judgment, which we have done.

12 In many respects this has been unsatisfactory having regard to how the trial and the appeal were conducted by the parties and the knowing participation of APCHL, even though APCHL was not a party to the substantive appeals when they were heard. APCHL did not participate in the trial (although a party) and did not participate in the appeals (although fully aware of the appeals).

13 The parties at the trial (including APCHL) and the original parties to the appeals clearly treated the conduct of the Directors as that of APCHL, and any declarations against APCHL would follow upon the declarations made (or not) against the Directors. Similarly, for the purposes of the case, the trial judge and this Court treated APCHL and the Directors as effectively the same person or entity. As the Second Further Amended Statement of Claim made clear, the complaints of ASIC were directed against each director, as comprising collectively the "Board of Directors of APCHL". Therefore, all the relevant impugned conduct was that of the Directors collectively as a Board in making certain resolutions. Further, all the appeals being heard together proceeded (as did the trial) on the basis this Court was being asked to set aside all the declarations if the arguments of the Directors were accepted. The arguments relevant to the Directors were treated for the purposes of the trial and this appeal as directly applicable to the liability of the APCHL. As the trial judge stated at [645] of the Liability Judgment, "[t]he determination of APCHL's liability centres on the conduct of the Directors as a Board".

14 Not all the Notices of Appeal of the Directors sought to set aside the declarations against APCHL made by the trial judge. However, ASIC accepted that this Court should proceed as if the applications to set aside the APCHL declarations were made by all the Directors in each appeal. We have proceeded on this basis.

15 So this Court is confronting the position where the added party to each appeal (APCHL) only seeks to have two declarations (5 and 7) maintained on the basis of the findings of the Full Court, whilst ASIC seeks to re-agitate the findings of the Full Court inconsistently with the approach taken by the parties at the trial and before this Court, and by the trial judge and this Court. This all occurred with the knowing participation of APCHL at the trial, or with the knowledge of APCHL of each appeal brought by the Directors.

16 Nevertheless, this Court has considered the submissions of ASIC and APCHL on the question of the appropriate declarations, and has rejected them.

17 However, even if this were not the case, we reject the request now of both ASIC and APCHL to effectively pursue a different approach than that taken before the trial judge and in each appeal.

18 As we have indicated, all the parties at the trial (which included APCHL) treated APCHL and the Directors as in the same position. This basis did not change on appeal.

19 Whilst that may not have been an appropriate approach (especially in light of some of the arguments now presented to this Court on the nature of the specific declarations, the statutory provisions pertaining to APCHL, and APCHL's conduct) this was the stance taken by all the relevant participants in these proceedings.

20 We mention one other procedural matter. As indicated, ASIC seeks leave to rely on a notice of contention relating to the appeal brought by Mr Lewski and whether the trial judge should have considered the 'alternative case' in relation to what APCHL pleaded in paragraph [26] of the Second Further Amended Statement of Claim. This was in support of a contention that APCHL had contravened section 601FC(1)(b) of the Act and declaration 1 should not be set aside. The basis for seeking leave to rely on the notice of contention was that the "alternative" case was not considered by the trial judge and was not raised at the hearing of the appeal, as no question was raised during the hearing of the appeal as to the correctness or otherwise of declaration 1. The notice of contention sought to be relied upon stated the proposed grounds as follows:

> ...
>
> 1. *APCHL breached its duty (imposed by s. 601 FC(1)(b) of the* Corporations Act 2001 *(Cth) (the Act)) to exercise the degree of care and diligence that a reasonable person would exercise in the responsible entity's position, and so contravened s. 601 FC(5) of the Act by its Board of Directors passing the Lodgement Resolution in circumstances where a reasonable person in the responsible entity's position would not have attempted to cause the August Amendments to take effect without first having:*
>
>   *(a) made enquiries as to the reason for, the effect of, and the propriety of the August Amendments sufficient to have enabled it to reasonably consider that the August Amendments should be made;*
>
>   *(b) considered the conflict described at paragraph 21 of the Second Further Amended Statement of Claim filed in proceeding VID594/2012 and how, if at all, that conflict could be resolved in favour of the members of the Prime Trust; and*

(c) obtained and considered:

(i) legal advice that the August Amendments, if made without member approval, would comply with the Prime Trust Constitution and the Act; or

(ii) judicial advice as to whether the responsible entity would be justified in making the August Amendments without member approval.

21 Leave to rely on the notice of contention was opposed by the Directors, in the course of which argument was addressed by them in relation to the substantive contention. In our view, the contention itself is without merit (a matter to which we will return).

OVERVIEW OF THE PROCEEDINGS

22 Although we would set aside the declarations on the basis already indicated, we now turn to consider the arguments raised by ASIC and APCHL. Before doing so, it is necessary to return to the proceedings and the appeal.

23 A broad overview of the proceedings was provided by the Full Court at paragraphs [2]-[10] of the Appeal 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.

24 The Full Court also provided a more substantial overview of the background facts at paragraphs [70]-[107] of the Appeal Judgment:

[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 offing, 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* ***the 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.*

25 For convenience we adopt the short titles and definitions used above in the Appeal Judgment.

26 For the purposes of this judgment, it is now useful to set out briefly the positions that the parties have adopted in respect of appropriate orders following the delivery of the Appeal Judgment on 14 July 2016.

The declarations against APCHL

27 As already indicated, the Directors contend that the declarations in respect of APCHL, which are declarations 1 to 7 of the trial judge in the Penalty Judgment, should now be set aside as a result of the decision in the Appeal Judgment. ASIC contends that the APCHL declarations should not be set aside. ASIC also submits that this Court should contemplate reviewing and revising its Reasons in the Appeal Judgment if necessary.

28 APCHL contends that declarations 5 and 7 of the trial judge should not be set aside. APCHL has an interest in making this contention because it is making its own claims against the Directors in separate proceedings in the Supreme Court of Victoria. APCHL brought civil proceedings against Mr Lewski and others in the Supreme Court of Victoria alleging breaches of duty in respect of similar conduct and events considered in the Appeal Judgment.

APCHL's interest in maintaining the declarations against it arises because of the operation of s 1317F of the Act, which the Directors fear will be employed against them in the Supreme Court of Victoria proceedings and may prejudice their defence to the various claims brought against them. For the purposes of these appeals we do not need to consider this aspect further. We just mention this matter because it explains the position of APCHL and its desire to maintain declarations otherwise thought to be against its own interests (being declarations of wrongdoing).

29 Because the issues before this Court concern the impact of our previous findings on the declarations of the trial judge, it is now useful to set out those findings from our Appeal Judgment in further detail.

FINDINGS OF THE FULL COURT

30 The Full Court's findings in respect of the Directors' grounds of appeal were organised by reference to the three groups of contraventions pleaded by ASIC. The Full Court described the three groups of contraventions as follows:

> ***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.

31 We now outline the findings of the Full Court in respect of these three groups of contraventions.

The first group of contraventions – the findings of the Full Court

32 First, the Full Court observed the impact of the statutory time limit in s 1317K of the Act. As accepted by the parties, it prevented ASIC from relying solely on the conduct of the Directors on 19 July 2006 as the basis for an application for declarations or orders:

[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.

33 The Full Court noted that the question posed on appeal was whether the trial judge had correctly characterised the nature of the conduct of the Directors on 22 August 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.*

34 The Full Court then turned to a consideration of the scope of their enquiry:

> *[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.*
>
> *...*
>
> *[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.*

35 Next, the Full Court analysed the approach of the trial judge to the 22 August 2006 conduct:

> *[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.*

36 The Full Court determined that the trial judge had fallen into error in this characterisation of the 19 July 2006 conduct and the 22 August 2006 conduct:

> *[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.*
>
> *…*
>
> *[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.*

...

[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.*

The effectiveness of the Deed

37 The Full Court also considered the findings of the trial judge in relation to the Deed, as emphasis had been placed on the question of when the Deed became effective. The trial judge had determined that the Deed was not effective as a constitutional amendment prior to 22 August 2006. The Full Court considered that this was not the determinative question in this proceeding:

> *[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.*

38 After outlining the reasoning of the trial judge, the Full Court reached its own conclusions as the impact of the Deed:

> *[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.

39 The Full Court subsequently made further comments about the implications of these findings in respect of the Deed:

[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].

40 We now turn to consider the findings of the Full Court in respect of the second group of contraventions.

The second group of contraventions – the findings of the Full Court

41 First, the Full Court analysed the findings of the trial judge. The trial judge was satisfied that APCHL contravened s 208 as alleged by ASIC: Appeal Judgment at [307]. The Full Court then stated:

[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.*

42 In its consideration, the Full Court noted that:

> *[320] ... 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.*

43 We now turn to consider the findings of the Full Court in respect of the third group of contraventions.

The third group of contraventions – the findings of the Full Court

44 First, the Full Court set out the findings of the trial judge:

> *[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.

...

[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.*

45 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.*

46 In considering these findings of the trial judge, the Full Court first turned to the legal status of the Amended Constitution. The Full Court agreed with the trial judge that the amendments to the Constitution were effected unlawfully by APCHL: Appeal Judgment at [235], [247]. However, the trial judge additionally determined at [673] that "[h]aving been made outside power, the Amendments were never effective", and the trial judge assessed the Directors' conduct on that basis. The Full Court made the following comments on the question of validity:

> *[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.

47 The Full Court subsequently noted that:

[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.

48 The Full Court then reached the following conclusions about the Directors' conduct:

[341] ... 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.

49 For the foregoing reasons in relation to the three groups of contraventions, the Full Court determined that the trial judge should not have concluded that any of the Directors contravened the Act: Appeal Judgment at [347].

50 We now turn to a consideration of the impact of these findings in respect of declarations 1-7 against APCHL.

CONSIDERATION

Introduction

51 We would set aside declarations 1-7 of the trial judge simply on the basis of how the trial and appeals were conducted. As indicated at the outset in these reasons, the position of the parties, APCHL and the Court (both at trial and on appeal) was to regard the position of the Directors (acting as a Board) and APCHL as effectively the same. This Court has found that none of the Directors breached the Act as alleged by ASIC, and accordingly APCHL should not be subject to the declarations which related (as pleaded) to the conduct of the Directors. However, we proceed to consider to the extent necessary the substantive matters raised by ASIC and APCHL. We would also set aside declaration s 1-7 of the trial judge on the basis of the following reasons.

52 However, before turning specifically to the consideration of declarations 1-7 of the trial judge and the submissions of the parties, it is appropriate to respond to the submissions of ASIC in respect of the Deed.

The Deed

53 ASIC set out evidence and presented arguments in support of its contention that the Deed was intended to be operative from its date of 22 August 2006: ASIC Submissions at [6]-[47]. ASIC appeared to be of the impression that the date of operation of the Deed was an important question that bore significantly on the issues regarding the declarations against the Directors and APCHL. This is despite the finding of the Full Court in the Appeal Judgment that:

> *[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.*
>
> *(Emphasis added.)*

54 This finding was made specifically in the context of the declarations against the Directors. Nevertheless, it remains relevant in circumstances where many of the declarations 1-7 against APCHL stem from the same factual circumstances and similarly-worded provisions of the Act. Nevertheless, the Full Court did reach a conclusion on the date when the Deed became binding, and held that:

> *[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. ...*
>
> *[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.*

55 We turn to ASIC's of submissions in support of its contention as to the operative date of the Deed, namely 22 August 2006.

ASIC's submissions

56 First, ASIC pointed to the following inference of the trial judge in the Liability Judgment:

> *[107] Listing was in the offing and that is confirmed by the statement that the "process" (**which I infer included the Amendments** and the issue of the options) was to be reviewed by Kidder Williams.*
>
> *(Emphasis added.)*

ASIC submitted that this was an inference drawn by the trial judge in light of all the oral and documentary evidence before him in relation to the meeting on 19 July 2006, and that no error was demonstrated in respect of this inference of the trial judge. ASIC contended that this was not a case in which the Full Court was in as good a position as the trial judge in assessing the evidence and the inferences to be drawn and that, in fact, the Full Court did not refer to this inference when it made the apparently contrary finding that "Kidder Williams were to proceed on the basis that approval of the Amendments had been made by the Board": Appeal Judgment at [169].

57 Secondly, ASIC pointed to the further and apparently contrary finding of the Full Court at [272] that "[t]here 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", when the trial judge found at [125]-[126] of the Liability Judgment that:

> *[125] Dr Wooldridge said, and I accept, that at the conclusion of the 19 July meeting Deed of Variation No 7 was placed on the Boardroom table, probably by a Madgwicks solicitor, and he signed it. He said that, at his*

> *request, Mr Butler signed the Deed at that time and Mr Butler confirmed that. They did not date the Deed.*
>
> *[126] 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. Importantly, he said that he was asked at that time to leave the Deed undated because it needed to be lodged with a supplementary PDS which was not then ready.*

However, as we have already indicated, the Full Court did speculate as to the reason this occurred in its Appeal Judgment:

> *[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.*

Nevertheless, ASIC contended that the Full Court erred in finding there was no evidence as to why the Deed was left undated, and that this infected its conclusion that the Deed was operative from 19 July 2006.

58 Thirdly, ASIC referred to the email from Mr Goldberg to Mr Lewski on 18 August 2006, which included the following text:

> *I understand that you are meeting together this morning* ***to finalise the Board papers for the Board meeting on 22 August****. Following my meeting with Bill yesterday I confirm the following.*
>
> *...*
>
> ***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.***
>
> *...*
>
> ***Please let me know if you have any queries in relation to the above documents. If all approved at the 22 August Board meeting, we will need to then complete the lodgement at ASIC*** *together with an ASIC In-Use Notice for the Supplementary PDS.*
>
> *(Emphasis added.)*

ASIC submitted that this email was contextually significant – that it provided evidence of the understanding of Mr Goldberg as to how and when the Deed was to take effect, in support of the proposition that the Deed only came into effect on 22 August 2006.

59 Fourthly, ASIC pointed to the draft minutes that were pre-prepared by Madgwicks to be used at the 22 August 2006 meeting. Those minutes included the following:

> *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.)*

ASIC submitted that this provided further evidence as to the intention of the relevant parties that the Deed was to be effective from 22 August 2006.

60 Fifthly, ASIC referred to the language of the Deed itself, specifically the fact that it was dated 22 August 2006 and uses the present tense throughout. As to the date of the Deed, ASIC also submitted that there is a rebuttable presumption that a Deed is effective as of the date it bears, as held by the trial judge in the Liability Judgment at [413]:

> *[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.*

ASIC submitted that, although the Full Court referred to this finding in its Appeal Judgment (at [163]), the Full Court also appeared to make a contrary (and erroneous) presumption that the dating of the Deed on advice "was not itself indicative" of the intended date of operative effect: at [168]. Furthermore, ASIC pointed to the case of *Rudd v Bowles* [1912] 2 Ch 60 which stated that a party "is estopped from shewing that the date inserted by himself in the lease is not the date from which the demise operated".

61 Sixthly, ASIC relied upon the subsequent conduct of the Directors and Madgwicks (as agents of APCHL). This included not only conduct referred to above, but also:

(1) The minutes of APCHL's Compliance Committee Meeting on 7 September 2006, which stated:

> *BL [Lewski] informed the meeting that the compliance documents (Compliance plan,* ***constitution) were adopted by the Board of the Responsible Entity on 22 August 2006*** *...*

(Emphasis added.)

(2) A note in the approved annual financial statements on 17 October 2006, which stated:

> ***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 …*
>
> *(Emphasis added.)*

62 In respect of all of the above, ASIC submitted that it was clear, as found by the trial judge in the Liability Judgment at [430], that the Directors met and resolved on 22 August 2006 to take the necessary steps to cause the amendments to take effect as set out in the Madgwicks email of 18 August 2006, and in the pre-prepared resolution, to have the Deed made and dated by APCHL on 22 August 2006 and to then cause those amendments to take effect by the lodging of the amended Constitution in accordance with the resolution.

63 ASIC submitted that a relevant circumstance to consider was that a prudent Board would not wish to make the Deed binding until the supplementary PDS was finalised. It was contended that the period between the making of the Deed and the publishing of the supplementary PDS would expose the Board to a possible argument that the existing PDS was misleading. In other words, each Director would not want to run the risk of breaching the law.

64 Furthermore, ASIC contended that even if its submissions as to the operative date of the Deed were not accepted, that would not answer the case pleaded against APCHL, which was that the meeting of Directors on 22 August 2006 authorised and directed the completion of the Deed by its dating, and the lodging of the Deed so dated with ASIC, to cause the August Amendments to take effect. ASIC submitted that on the basis of that case, as pleaded, APCHL's failure to consider the matters the trial judge found were required to be considered by a reasonable RE on or before 22 August 2006, must succeed on the findings made in the Liability Judgment at [567]-[571] (as explained there, the failure of the Directors to consider those matters on 19 July 2006 was not a defence to failing to consider the matters at all).

65 The Directors made a number of submissions in response to ASIC's arguments about the Deed.

The Directors' submissions

66 As the first and foremost proposition, the Directors reiterated that the question of the effectiveness of the Deed had already been thoroughly argued by the parties and had in fact

been determined by the Full Court. They relied upon the previous reasoning of the Full Court in the Appeal Judgment. They also relied upon the finding of the Full Court that "the question of when the Deed became effective as a Deed is a distraction". The Directors submitted that even if the Full Court was persuaded to revisit its conclusions in this respect, any alternative conclusion would not affect the disposition of the appeals.

67 The Directors also pointed out that ASIC sought to submit that the controlling, operative and directing minds in respect of the process by which the August Amendments were to be made and take effect were not just the Directors but also Madgwicks and Mr Goldberg: ASIC submissions at [27]. The Directors argued that the intentions of Mr Goldberg (or Madgwicks) as to the effectiveness of the Deed was not part of ASIC's pleaded case, nor was ASIC's submission that APCHL's conduct was comprised of the particular conduct of Mr Goldberg or Madgwicks.

Consideration

68 We do not consider that there is any error in the conclusions reached by this Court in respect of the Deed, particularly those at [153]-[182] of the Appeal Judgment. We remain of the view that "the Deed was instantly binding on execution (19 July 2006)" (at [177]), and we also still consider that ultimately "the question of when the Deed became effective as a Deed is a distraction" (at [162]).

69 Nevertheless, this is an opportunity for the Court to clarify issues raised in the submissions of the parties.

70 We note that ASIC has referred to a comment of this Court at [272] of the Appeal Judgment that "[t]here 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", when there was this evidence given by Dr Woolridge, referred to at [126] of the Liability Judgment:

> *[126] 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. Importantly, he said that he was asked at that time to leave the Deed undated because it needed to be lodged with a supplementary PDS which was not then ready.*

71 This Court was alive to the potential reasoning behind the decision to insert the date at a later time, and indeed speculated to this effect at [180] of the Appeal Judgment. The comment at [272] is merely specific to the reasoning of Mr Goldberg behind his actions in the dating of the Deed to coincide with lodging the supplementary PDS. This Court's finding at [272]

does not detract from the conclusion at [273] that "on 19 July 2006 the Directors considered and approved the Deed as modifying the Constitution".

72 In any event, the evidence of Dr Woolridge that he was asked by Mr Goldberg to leave the Deed undated because it needed to be lodged with a supplementary PDS must be seen in the context of the other circumstances, including the fact that the Deed was actually signed on 19 July 2006 by Dr Woolridge and Mr Butler, and the Board resolved to proceed as if the Deed was binding on it.

73 Furthermore, we note that ASIC has now sought to rely upon the intention and conduct of Mr Goldberg and Madgwicks as evidence that the Deed was to be operative from 22 August 2006. Apart from the fact that this was not pleaded (as pointed out by the Directors), there is no compelling reason why this Court should equate the intentions of Mr Goldberg or Madgwicks with the intentions of the Board of APCHL. As held by this Court at [164] of the Appeal Judgment:

> *[164] ...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.*

There is no compelling evidence to suggest that Mr Goldberg or Madgwicks were authorised agents of the Board of APCHL in this respect, as distinct from just giving advice and implementing the Deed's requirements and the requirements of the Act for the Deed to become effective.

74 Even accepting their important role in the whole implementation of the modification to the Constitution, the role of Mr Goldberg (and Mr Lewski and Madgwicks) is not to be elevated to that of the guiding mind of the Board, on the important dates of 19 July 2006 and 22 August 2006.

75 ASIC contended that it is important to recognise that the controlling, operative and directive minds in respect of *the process* by which the August Amendments were to be made and to take effect, were the minds of Mr Lewski and Madgwicks, and in particular Mr Goldberg – see ASIC submissions at [27].

76 However, the relevant resolutions were made by the Directors as a Board on these dates, and this was how to parties and the Court has considered the question of when the Deed became binding.

77 This is not to say the actions of Mr Goldberg are irrelevant to the enquiry as to when the Deed became binding. ASIC relies upon a number of matters in this regard:

(1) Mr Goldberg's request to leave the Deed undated because it needed to be lodged with a supplementary PDS which was not ready;

(2) The Directors expected that Magwicks, APCHL's agent, would insert the date upon completion of certain outstanding matters, including the completion of the supplementary PDS;

(3) On 18 August 2006, Mr Goldberg sent an email which was eventually seen by all Directors (by 21 August 2006), which in terms referred to the Deed taking effect upon the date of lodgement, proposing that the Deed be dated 22 August 2006 and lodged with ASIC on that date, and saying that if all approved at the 22 August Board meeting, Magwicks will need to then complete the lodgement at ASIC;

(4) The draft minutes of the 22 August 2006 meeting also making reference to the Constitution being lodged with ASIC to become effective now the supplementary PDS has been proposed;

(5) Later documents which confirm the "date authorised" by APCHL of the modification of the Constitution being 22 August 2006, and the date of adoption or the exercise of the right to amend being similarly 22 August 2006.

78 We make this observation in addition to the comments we have already made in relation to the approach to take in considering the intention of the Directors. At the same time on 19 July 2006 that Mr Goldberg was proposing a date of 22 August 2006, the Deed was signed by the two directors and later said by the Directors to have been approved at the meeting of 19 July 2006. The proposed step of dating the Deed does not lead to the obvious inference that the Deed itself was not intended to be binding, even if other processes needed to be undertaken before lodgement and the Deed taking effect, not as a Deed but as a modification to the Constitution.

79 As referred to by ASIC a number of times, Mr Goldberg, was in control of the process and understood the need to complete the lodgement at ASIC when all the documentation was approved. The Deed was approved on 19 July 2006 – the other documentation was approved on 22 August 2006.

80 The aspects of the evidence of Mr Goldberg relied upon by ASIC lose their significance if attention is given to the resolutions of the Board, the matters actually before the Board for determination on the separate occasions of 19 July 2006 and 22 August 2006, the role of Mr Goldberg as advisor and implementer of a process put in place and understood by the Board. It is also important to give attention to the question in issue: whether the Deed became itself binding on 19 July 2006 as distinct from the date of adoption of the amendments (which is more apt to be referred to as the date when the whole process was completed, which was 22 August 2006).

81 ASIC did submit, again by reference to Mr Goldberg's actions, that he did not wish to trigger the lodgement obligation until all relevant matters referred to in the 18 August 2006 email were completed. In other words, Mr Goldberg wanted to prevent the Deed from coming into effect until these matters were resolved. Thus, on this basis, he proposed the date 22 August 2006: see ASIC submissions at [29]. As the Court suggested, it may have been a reason for Mr Goldberg leaving the Deed undated so as to not raise an issue of compliance with the Act to lodge "as soon as practicable" after the Deed was executed.

82 There is no evidence that the Directors on 19 July 2006 were aware of this reason. All Dr Woolridge was told was to leave it undated because it needed to be lodged with a supplementary PDS which was not then ready. It is not possible to treat Mr Goldberg's possible reasons or motives as being attributable to the Directors in determining their intention as to whether the Deed was binding on 19 July 2006. In our view, the evidence comes from the Director's resolution and knowledge indicating that the Deed was to be binding on 19 July 2006, even if Mr Goldberg wanted to delay the dating of the document so as to avoid any concern about the period between lodgement and execution of the Deed.

83 Then ASIC contended that this Court did not treat the date of the Deed as being a rebuttable presumption, and ignored the rule in *Rudd v Bowles* that a party is estopped from demonstrating that the date inserted by them into an instrument is not the date from which that instrument operates. The offending paragraph was said to be found in [168] of the Appeal Judgment, where this Court stated:

> *[168] 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.*

84 Contrary to ASIC's submissions, this Court did not ignore the rule that the date of the Deed is a rebuttable presumption as to the date from which it is effective. After referring to the trial judge's reasoning, which included the exposition of that rule (at [413] of the Liability Judgment), this Court stated that "[t]he principles of law to apply in relation to the delivery of a deed seem not to be in contention". Furthermore, the offending paragraph [168] (above) is not inconsistent with this rule. Whilst it is true the date of a Deed forms a rebuttable presumption as to the date of its operation, it is also true that the date of a Deed is not necessarily "indicative of the intention" of the relevant party. That question of intention, being the decisive factor in determining the operative date of a Deed, is answered not just by reference to the actual date of the Deed, but also by reference to other evidence of intention that can be discerned from the relevant circumstances. This Court engaged in this orthodox analytical process in reaching its ultimate conclusions.

85 As to the reference by ASIC to *Rudd v Bowles*, this 'rule' does not trump the ultimate question as to what was the intention of the relevant parties as to the operative date of the Deed. The date of the Deed as inserted by the parties is certainly a factor in this calculus, but it is not necessarily determinative, as already noted above.

86 As to the other contentions raised by ASIC, they must be considered in the context of all the surrounding instances as already detailed in the Appeal Judgment.

87 Without rehearsing all these circumstances, the relevant question is to determine the intention of the parties to the Deed as at 19 July 2006. It can be accepted that the Deed was expressed in the present tense. When signed on 19 July 2016 by Dr Wooldridge and Mr Butler it was (in their minds) speaking as of that date. The dating of the Deed the 22 August 2006 was later proposed by Mr Goldberg in his 18 August 2006 email, which specific date was of no concern to any of the Directors.

88 Subsequent documentation filed with ASIC made reference to 22 August 2006 as the adoption date by the Board or the exercise of the Board's right to amend. However, the significant events and chronology remain as detailed in the Appeal Judgment and such later documentation (whilst permissible to consider) did not relate to the binding date of the Deed but to the efficacy of the modification (referring to the effective change to the Constitution), or a reference to the 22 August 2006 as the date of the Deed (which it was) to indicate the completion of the legislative process of amending the Constitution. Further, in looking at the later documentation, to the extent it is a document signed by Mr Lewski, care must be taken

not to attribute any statements contained therein (even if made on behalf of the entity APCHL) as reflecting upon the intentions of all the Directors on 19 July 2006.

89 There is no suggestion in any of the resolutions of the Board that the Directors of the Board thought that after 19 July 2006 they needed to revisit the Deed. The fact that the Deed was left undated on 19 July 2006 did not imply that the Board, or any of its Directors, would need to revisit the Deed or its content. The Directors were not saying, "do not make the Deed yet we will come back to it", as suggested by ASIC. The actual dating of the Deed was not a concern of any of the Directors – this was to be dealt with at a later time by Mr Goldberg. In fact, their anticipation would have been that additional steps would have to be undertaken by management, their solicitors and their advisors to complete the legislative process. Further, looking at the resolutions and surrounding circumstances, it cannot be concluded that the Deed was authorised by the Board on 22 August 2006 as part of the Lodgement Resolution, as ASIC contends.

90 Finally, as to submissions concerning that a prudent Board would not have wanted to have risked being in breach of the law by entering into a binding Deed in 19 July 2006, but leaving the actual lodgement to a later indefinite date, we do not consider this advances the argument of ASIC. Putting aside whether there would be a breach of the law in these circumstances, the focus must be upon the intention of the Directors as at 19 July 2006, upon the authorising and signing of the Deed. There is no suggestion that the Directors had any awareness of being at risk of breaching the law in this respect, and it cannot be assumed that any of the Directors considered this as part of their reasoning process.

91 Having dealt with these issues concerning the Deed, we now turn to a consideration of the submissions of the parties in respect of declarations 1-7 against APCHL. Based on our findings above, there is no need to set out or further consider any submissions that were predicated on this Court changing its mind in respect of its conclusions as to the operative date of the Deed and its relevance to the declarations against APCHL.

Declaration 1

92 Declaration 1 was set out as follows:

> *1. The first defendant, Australian Property Custodian Holdings Limited (Receivers and Managers Appointed)(In Liquidation)(Controllers Appointed) (**APCHL**), contravened s. 601FC(5) of the* Corporations Act 2001 *(Cth) (the Act) by reason of it having contravened s. 601FC(1)(b) of the Act, in that, in its capacity as responsible entity (the **Responsible Entity**) of the Prime*

> *Retirement and Aged Care Property Trust ARSN 097 514 746 (the **Prime Trust**), it failed to exercise the degree of care and diligence that a reasonable person would have exercised in the Responsible Entity's position, in that on 22 August 2006 its board of directors (the **Board**) passed 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**), in circumstances where a reasonable person in the Responsible Entity's position would not have attempted to cause the amendments contained in the Amended Constitution (the **Amendments**) to take effect, because the Amendments purported to create rights in APCHL the purported exercise of which would result in a diminution in the assets of the Prime Trust, without providing any, alternatively any equivalent, benefit to members of the Prime Trust (the **Members**).*

93 Both ASIC and the Directors made substantive submissions in relation to this declaration.

ASIC's submissions

94 ASIC made submissions concerning the 'alternative case' it put before the trial judge regarding APCHL's alleged breach of its duty of care and diligence. As we have indicated, this was not considered by the trial judge, nor did he need to: Liability Judgment at [646(a)]. Nor, ASIC submits, has the Full Court given it sufficient regard.

95 The 'alternative case' was put as follows: the decision to lodge a consolidated Constitution incorporating the August Amendments made by the Deed dated 22 August 2006 was made without APCHL having sufficiently considered various matters, namely:

(1) whether there was a legitimate reason for the August Amendments; whether the August Amendments would comply with the Act and Constitution; the effect of the August Amendments; and whether the lodgement of the Amended Constitution involved a conflict between the interests of the members and APCHL: Second Further Amended Statement of Claim at [22]; and

(2) whether the proposed changes would adversely affect the rights of members: Second Further Amended Statement of Claim at [23].

96 ASIC contended that a reasonable responsible entity ('**RE**') in the position of APCHL would not have taken the steps to cause the August Amendments to take effect on that day without considering these aforementioned matters, and hence APCHL breached its duties of care and diligence. In support of this contention, ASIC referred to and relied upon seven points made by the trial judge: Liability Judgment at [557]-[563].

The Directors' submissions

97 In reply, the Directors contended that this 'alternative case' was not an 'alternative' case at all but rather a separate particular and that due consideration had been given to these issues by the trial judge and the Full Court.

98 More to the point, the Directors submitted that ASIC had not identified why or how APCHL could be found to have contravened its duty of care and diligence under s 601FC(1)(b) other than through the lawful actions of the now-exculpated Directors.

99 The Directors argued that the conduct the subject of this declaration against APCHL (the passing of the 22 August 2006 resolution to lodge the Amended Constitution) was inextricably linked to that conduct of the Directors. Therefore, because the Full Court held that the Directors had acted lawfully in this respect, they submitted a similar conclusion was warranted in respect of APCHL.

100 For example, the trial judge held at [645] of the Liability Judgment:

> *[645]* ***The determination of APCHL's liability centres on the conduct of the Directors acting as a Board.*** *I have already comprehensively analysed that behaviour in relation to the Directors' individual breaches and there is no need to again go over that material.* ***It follows from my findings that in passing the Lodgement Resolution the Directors breached their duty:***
>
> *(a) to exercise care and diligence;*
>
> *(b) to act in the members' best interests;*
>
> *(c) to give priority to the members' interests over APCHL's interests; and*
>
> *(d) to comply with the Constitution;*
>
> ***that APCHL did too.***

101 The Directors submitted that the reverse should also be true. Now that the Full Court has found that in passing the Lodgement Resolution the Directors did not breach their duties, it ought to follow that APCHL did not too.

102 The Directors contended that the same error that exculpated the Directors now also exculpates APCHL. The Directors pointed to the trial judge's erroneous conclusion that the date on which the Deed became effective as a deed was the critical question (with the trial judge determining that the Deed was not effective until APCHL, by its Board, determined to make it so on 22 August 2006). As already discussed in these Reasons, the Full Court determined that this was not the critical question:

> *[162] ... 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. ...*
>
> *...*
>
> *[293] ... 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.*
>
> *...*
>
> *[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. ...*
>
> *...*
>
> *[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.*

103 For the above reasons, the Directors submitted that this Court should now set aside declaration 1 against APCHL.

Consideration

104 We consider that declaration 1 should be set aside. This conclusion flows inexorably from the reasoning process adopted by this Full Court in exonerating the Directors in respect of similar declarations.

105 First, it is important to examine and compare declaration 1 against similar declarations made by the trial judge against the Directors in the Penalty Judgment.

106 In declaration 1, APCHL was said to have breached its duty in s 601FC(1)(b) to "exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position" when "on 22 August 2006 its board of directors passed the Lodgement Resolution to lodge with ASIC an amended constitution of the Prime Trust".

107 In declarations 8, 16, 24, 32 and 40, the Directors were said to have breached their duties under s 601FD(1)(b) to "exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position" when "[o]n 22 August 2006, at a meeting of the board of directors of APCHL (the Board), [each Director] 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".

108 It is apparent that the conduct the subject of those declarations is essentially identical in respect of the Directors and APCHL. The conduct of the Directors in voting in favour of the Lodgement Resolution is one and the same as that of the conduct of the Board of APCHL (being the Directors) in passing that same resolution.

109 It is also apparent that the duties of care and diligence in s 601FC(1)(b) and s 601FD(1)(c) are essentially identical (except for the reference to "officer" or "responsible entity").

110 We will refer to these similarities again shortly.

111 Secondly, at [293]-[302] of the Appeal Judgment, we articulated the following reasons why the Directors did not breach their duties of care and diligence in respect of declarations 8, 16, 24, 32, and 40:

> *[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.*
>
> *...*
>
> *[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.*
>
> ...
>
> *[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.*

112 Because of the similarities we identified above between the declarations against the Directors and APCHL, a logical consequence of this Court's finding at [302] of the Appeal Judgment (which would set aside these declarations against the Directors) is that declaration 1 against APCHL must also be set aside.

113 There are no sufficient differences in either the conduct of the Directors and APCHL or the nature of their applicable duties of care and diligence to justify a conclusion that APCHL breached those duties when we determined that the Directors did not. The same reasons that justify the setting aside of declarations 8, 16, 24, 32 and 40 against the Directors also justify setting aside declaration 1 against APCHL.

114 Furthermore, we note that ASIC's 'alternative case' (even if it is truly an alternative case) does not interfere with this finding. The considerations pleaded by ASIC at [22]-[23] of its Second Further Amended Statement of Claim are not relevant in light of this Court's reasons articulated at [293]-[302]. The characterisation by this Court of the conduct of the Directors and APCHL on 22 August 2006 is such that, in order for the Directors and APCHL to fulfil

their duties of care and diligence, it would not have been necessary for either to take into account those considerations at that point in time.

115 We observe that ASIC contends that it argued at trial that the Directors had been reckless or careless on 19 July 2016, and they had therefore failed on that date to discharge the duty under s 601FD(1)(b), which required them to exercise reasonable care and diligence on 22 August 2006 – see ASIC submissions at [55]. ASIC refers in this regard only to its closing submissions at trial. As already addressed in the Appeal Judgment, the pleaded case did not involve this allegation, nor can it be employed against APCHL in the context of s 601FD(1)(b) in considering what such an entity (effectively equated to the Board of Directors in this context at least) would be bound to do to avoid a breach of its duty when acting on 22 August 2006.

116 Therefore, we would set aside declaration 1. We now turn to consider declaration 2.

Declaration 2

117 Declaration 2 was set out as follows:

> *2. The first defendant, APCHL, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(c) of the Act, in that, in its capacity as Responsible Entity, it failed to act in the best interests of the Members and failed to give priority to the Members' interests over its own interests, by the Board resolving on 22 August 2006 to lodge the Amended Constitution with ASIC in circumstances where:*
>
> *(a) it did not give any consideration to whether the Lodgement Resolution was in the best interests of the Members;*
>
> *(b) the Lodgement Resolution was not in fact in the best interests of the Members;*
>
> *(c) a responsible entity in the position of APCHL could not reasonably have believed that the Lodgement Resolution was 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 of the Prime Trust (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.*

118 Both ASIC and the Directors made substantive submissions in relation to this declaration.

ASIC's submissions

119 ASIC accepted that the trial judge and Full Court were in agreement about the two limbs of the test to determine whether an entity has complied with the duty in s 601FC(1)(c), concerning the duty to act in the best interests of members and to give their interests priority. These limbs can be described as follows (using APCHL as the subject):

(1) Was APCHL as RE of the Prime Trust acting with undivided loyalty solely in the interests of members?

(2) Was there a conflict between the interests of APCHL and the members of the Prime Trust, and, if so, had APCHL preferred the interests of the members to its own interests?

120 ASIC contended that APCHL should not be permitted to treat the executed Deed as a *fait accompli* thus defining the extent of its duty under s 601FC(1)(c) as at 22 August 2006. Rather, ASIC submitted that the execution of the Deed created a new conflict of great significance between the interests of APCHL and those of the members, arising from the fact that APCHL had no power to make such amendments and that they conferred substantial benefits on the RE at the members' expense. This conflict was said to be particularly apparent if lodgement gave some form of interim validity to the Amended Constitution.

121 Furthermore, ASIC also contended that this Court should characterise the situation as one where this duty, having been breached on 19 July 2006, was not breached once and for all such that it was spent. Therefore APCHL would have breached that duty on 22 August 2006 and in the paying of the fees as there had not been any compliance with the duty up to that time.

The Directors' submissions

122 In reply, the Directors contended that ASIC's submissions in this respect were contradictory and involved allegations that were never pleaded. The Directors again pointed to the fact that ASIC could not identify how APCHL breached s 601FC(1)(c) in circumstances where the Directors did not.

123 The Directors also relied upon their submissions in respect of declaration 1 above.

Consideration

124 Declaration 2 must be set aside for the same reasons as we have given in respect of declaration 1. For simplicity, it is possible to rephrase our reasons in relation to declaration 1 in the context of this declaration. The central point again is that there are no sufficient differences in either the conduct of the Directors and APCHL or the nature of their applicable duties to act in the best interests of members to justify a conclusion that APCHL breached those duties when we determined that the Directors did not.

125 Again, if one is to examine and compare the relevant declarations, the similarities are apparent.

126 In declaration 2, APCHL was said to have breached its duty in s 601FC(1)(c) to "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" by "the Board resolving on 22 August 2006 to lodge the Amended Constitution with ASIC".

127 In declarations 9, 17, 25, 33 and 41, the Directors were said to have breached their duties under s 601FD(1)(c) to "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" by each Director "voting in favour of the Lodgement Resolution on 22 August 2006".

128 Again, because of these similarities, a logical consequence of this Court's finding at [302] of the Appeal Judgment (which would set aside these declarations against the Directors) is that declaration 2 against APCHL must also be set aside. The same reasons that justify the setting aside of declarations 9, 17, 25, 33 and 41 against the Directors also justify setting aside declaration 2 against APCHL.

129 Furthermore, ASIC's submissions that the execution of the Deed created of a new conflict of interest, and that such a duty was not "spent", cannot be accepted. They ignore the previous findings of this Court in the Appeal Judgment at [301] that:

> *[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.***
>
> *(Emphasis added.)*

130 Therefore, for the above reasons, we would set aside declaration 2. We now turn to consider declaration 3.

Declaration 3

131 Declaration 3 was set out as follows:

> *3. The first defendant, APCHL, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(m) of the Act, in that, in its capacity as Responsible Entity, it failed to comply with the duty imposed on it by the Existing Constitution not to vary or attempt to vary the Existing Constitution in a manner that was in favour of or resulted in any benefit to APCHL, by the Board resolving to lodge the Amended Constitution with ASIC in circumstances where the Amendments were in favour of or resulted in a benefit to APCHL.*

132 Both ASIC and the Directors made substantive submissions in relation to this declaration.

ASIC's submissions

133 ASIC contended that the duty applicable to the Directors in respect of compliance with the scheme's constitution (s 601FD(1)(f)) is materially different to that applicable to APCHL as an RE (s 601FC(1)(m)). In particular, ASIC pointed to the "all reasonable steps" requirement in s 601FD(1)(f) that is not present in s 601FC(1)(m). ASIC submitted that the Full Court has not yet considered whether APCHL in fact failed to comply with a duty imposed by the Constitution.

134 ASIC contended that the combined operation of cl 25.1 and 34.1 of the Constitution imposed a duty on APCHL not to alter the Constitution in its own favour or for its own benefit, and that the 22 August 2006 resolution to lodge the Amended Constitution was in breach of that duty.

The Directors' submissions

135 In reply, the Directors again reiterated that ASIC had not identified why or how APCHL could be found to have contravened this duty (submitted as being "of like effect" to the duty imposed on the Directors) other than through the lawful actions of the now-exculpated Directors.

136 The Directors also relied upon their submissions in respect of declaration 1 above.

Consideration

137 We consider that declaration 3 should also be set aside. However, our reasons in this respect differ from those in relation to declarations 1 and 2.

138 As indicated above, we consider that declarations 1 and 2 should be set aside because there are no sufficient differences in either the conduct of the Directors and APCHL or the nature of their applicable duties to justify a conclusion that APCHL breached those duties when we determined that the Directors did not.

139 However, in relation to declaration 3, there are no sufficiently analogous duties in respect of the Directors that are applicable to APCHL. This means that we cannot necessarily conclude that declaration 3 against APCHL should be set aside from the mere fact that we intend to set aside any of the other declarations against the Directors.

140 To explain this further, the duty of APCHL which is the subject of declaration 3 is located in s 601FC(1)(m). It is the duty to "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". The Directors submitted that this was sufficiently analogous to declarations 12, 20, 28, 36 and 44 against the Directors which this Court intends to set aside.

141 However the duty of each Director in relation to those declarations is the duty in s 601FD(1)(f) to "**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 ... (iii) the scheme's constitution …" (emphasis added). As ASIC correctly pointed out, the duty applicable to APCHL in s 601FC(1)(m) does not contain a qualifier of "reasonable steps". In this sense, it is markedly different to the duty applicable to the Directors in s 601FD(1)(f). For these reasons, this Court cannot merely rely on its findings in the Appeal Judgment in relation to the Directors' conduct.

142 As we noted above, ASIC submitted that the combined operation of cl 25.1 and 34.1 of the Constitution imposed a duty on APCHL not to alter the Constitution in its own favour or for its own benefit, and that the 22 August 2006 resolution to lodge the Amended Constitution was in breach of that duty. We accept that this duty was indeed imposed upon APCHL and that the 22 August 2006 resolution altered the Constitution in APCHL's own favour or benefit. However this duty is not consistent with the Act.

143 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.

144 Part 25 of the Constitution contained only cl 25.1, which provided:

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.)

145 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.

146 The Full Court considered the relationship between cl 25.1, cl 34.1 and the Act at [211]-[222] of the Appeal Judgment, and concluded at [218] 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.*

147 Those limitations in cl 25.1 and cl 34.1 of the Existing Constitution of APCHL are inconsistent with s 601GC. Those clauses seek to restrict any such revocation, addition or variation to the Constitution to those that are not in favour of or result in any benefit to APCHL. This is in contrast to the "text of s 601GC(1) [which] is expressed in unqualified terms" (Appeal Judgment: at [215]) and "does not have a … provision qualifying its general application" by reference to the terms of the Constitution (Appeal Judgment: at [221]).

148 Therefore, in passing the 22 August 2006 resolution, APCHL did not breach s 601FC(1)(m). Thus declaration 3 should also be set aside.

Declarations 4 and 6

149 Declarations 4 and 6 were set out as follows:

> *4. The first defendant, APCHL, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(c) of the Act, in that, in its capacity as Responsible Entity, it 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 it, by the Board:*
>
> *(a) passed a 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) passed a 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 (the **Listing Fee**) as units;*
>
> *in circumstances where:*
>
> *(c) it did not give any consideration to whether payment of the Listing Fee was in the best interests of the Members;*
>
> *(d) payment of the Listing Fee was not in fact in the best interests of the Members;*
>
> *(e) a responsible entity in the position of APCHL could not in the circumstances reasonably have believed that payment of the Listing Fee was in the best interests of the Members; and*

(f) each 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.

...

6. The first defendant, APCHL, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(c) of the Act, in that, in its capacity as Responsible Entity, it 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 it:

(a) by the Board, passed a resolution on 7 April 2008 to amend the 26 June 2007 resolution such that:

"[i]n the event of the removal of the Responsible Entity or if there is a restructure of the Responsible Entity such that interests associated with Bill Lewski cease to control the Responsible Entity (for example, by way of a stapling arrangement) prior to the end of the Deferral Period the unpaid balance will become immediately payable in cash to the Responsible Entity";

*(b) by the Board, on or about 24 April 2008, approved the execution of a document entitled "Heads of Agreement - APCHL Restructure" (the **Heads of Agreement**);*

(c) on 28 April 2008, executed the Heads of Agreement; and

*(d) by the Board, passed a resolution on 27 June 2008 approving the execution by APCHL of a 'Deed of Acknowledgement of Listing Fee Payment' (the **Deed of Acknowledgment**)*

in circumstances where:

(e) it did not give any consideration to whether payment of the Listing Fee was in the best interests of the Members;

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

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

(h) each 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.

150 Both ASIC and the Directors made substantive submissions in relation to these declarations.

ASIC's submissions

151 ASIC relied upon their submissions in respect of declaration 2 above.

The Directors' submissions

152 The Directors submitted that these declarations were founded on the erroneous predicate that the amendments to the Constitution were invalid *ab initio* and that they did not become effective on lodging. They submitted that this error led the trial judge to inevitably (but erroneously) conclude that both APCHL and the Directors failed to discharge their duties under s 601FC(1)(c) and s 601FC(1)(k). In respect of the Directors, the Full Court determined that:

> *[253] In our view ... 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.*
>
> *...*
>
> *[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.*
>
> *...*
>
> *[324] ... 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.*
>
> *...*
>
> *[341] ... 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.*
>
> *...*
>
> *[345] ... in the context of the third group of contraventions alleged ... the question is whether [the Directors] 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.*

153 The Directors contended that the same reasoning applies to APCHL's conduct. As a result they submitted that this Court should now set aside declarations 4 and 6 against APCHL.

Consideration

154 Declarations 4 and 6 must be set aside for the same reasons as were given in respect of declarations 1 and 2. We can once more rephrase our reasons in relation to declarations 1 and 2 in the context of these declarations. The central point again is that there are no sufficient differences in either the conduct of the Directors and APCHL or the nature of their applicable duties to act in the best interests of members to justify a conclusion that APCHL breached those duties when we determined that the Directors did not.

155 Again, if one is to examine the relevant declarations, the similarities are readily apparent.

156 In declaration 4, APCHL was said to have breached its duty in s 601FC(1)(c) to "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" by the Board passing resolutions on 26 June 2007 and 27 July 2007 in relation to the first payment of the Listing Fee.

157 In declaration 6, APCHL was said to have breached that same duty by the Board passing resolutions on 7 April 2008 and 27 June 2008 and approving and executing a document referred to as the "Heads of Agreement" in relation to the payment of the balance of the Listing Fee.

158 In declarations 14, 22, 30, 38 and 46, the Directors were said to have breached their duties under s 601FD(1)(c) to "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" by:

- The Directors variously voting in favour of resolutions on 26 June 2007 and 27 July 2007 in relation to the first payment of the Listing Fee.
- The Directors variously voting in favour of a resolution on 27 June 2008 and by approving or executing a document referred to as the "Heads of Agreement" in respect of the payment of the balance of the Listing Fee.

159 Because of these similarities, the Court's findings in respect of the conduct of the Directors are equally applicable to APCHL. At [341] and [346] of the Appeal Judgment, this Court held in respect of the Directors:

> *[341] ... 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.*
>
> ...
>
> *[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.*

160 Again, because of these similarities, a logical consequence of this Court's findings at [341] and [346] of the Appeal Judgment (which would set aside these declarations against the Directors) is that declarations 4 and 6 against APCHL must also be set aside. The same reasons that justify the setting aside of declarations 14, 22, 30, 38 and 416 against the Directors also justify setting aside declarations 4 and 6 against APCHL.

161 For these reasons, we would set aside declarations 4 and 6. We now turn to consider declarations 5 and 7.

Declarations 5 and 7

162 Declarations 5 and 7 were set out as follows:

> *5. The first defendant, APCHL, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(k) of the Act, in that, in its capacity as Responsible Entity, it failed to ensure that all payments out of the scheme property of the Prime Trust (**Scheme Property**) were made in accordance with the constitution of the Prime Trust, by:*
>
> *(a) on 3 August 2007, causing to be issued to itself in its personal capacity ordinary units in 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**);*
>
> *(b) on 13 March 2008, transferring $329,399 of the monies held by it as Trustee of the Prime Trust to itself in its personal capacity in respect of GST on the First Scrip Instalment,*
>
> *(collectively, the **First Instalment**) notwithstanding that, as a matter of law, the payment of the First Instalment and each component of it was not provided for in the constitution of the Prime Trust.*
>
> …
>
> *7. The first defendant, APCHL, contravened s. 601FC(5) of the Act, by reason of it having contravened s. 601FC(1)(k) of the Act, in that, in its capacity as Responsible Entity, it failed to ensure that all payments out of Scheme Property were made in accordance with the constitution of the Prime Trust, by:*

> *(a) on 27 June 2008, causing to be issued to Carey Bay Pty Ltd 9,020,386 units in the Prime Trust valued at $5,000,000; and*
>
> *(b) on 30 June 2008, transferring $27,610,548.30 of the monies held by it as trustee of the Prime Trust to itself in its personal capacity,*
>
> (collectively, the Second Instalment) notwithstanding that, as a matter of law, the payment of the Second Instalment and each component of it was not provided for in the constitution of the Prime Trust.

163 ASIC, the Directors and APCHL made substantive submissions in relation to these declarations.

ASIC's submissions

164 ASIC's submissions on this point concerned the findings of the Full Court as to the validity of the Amended Constitution. First, ASIC pointed to the explanation of the relevant law as set out by the Full Court:

> *[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'.*

165 Next, ASIC set out the critical reasoning of the Full Court on the question of validity:

> *[253] In our view ... 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.*
>
> *...*
>
> *[324] ... 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.*

166 ASIC's understanding was that the Full Court refrained from basing any of its ultimate conclusions in the Appeal Judgment on these findings. However, in the context of declarations 5 and 7, ASIC submitted that the Court must now finally determine this point.

167 ASIC submitted that if the Court remains of the view it expressed it will have misapplied the relevant legal principles it set out at [248]-[251]. Principally, ASIC picked up on the Full Court's statement that "the purported exercise of a power conferred by law remains *a thing actually done*". The "purported exercise of power" in this instance was said to be APCHL's resolution of 19 July 2006 to amend the Constitution – a finding already implicitly accepted by the Full Court at [247].

168 ASIC contended that Full Court had misidentified the "thing actually done" in respect of this purported exercise of power as being the amendment to the Constitution, rather than merely the execution of a document purporting to make such an amendment. ASIC pointed out that it would be a startling proposition if a fraudulent or otherwise wholly unauthorised purported amendment becomes an amendment by lodging. ASIC submitted there was no sufficient statutory indication in this context to conclude that such a purported amendment should be afforded interim validity.

169 Because of this, ASIC contended that the Full Court was in error at [177] to conclude that APCHL was obliged by s 601GC(2) to lodge a copy of the Deed with ASIC. ASIC submitted that s 601GC(2) only relates to a valid modification or a valid new constitution authorised by the Act, and that the Deed in these circumstances was not a valid modification to the Constitution. The necessary consequence of this conclusion was said to be that APCHL had no power to make the 'amendments' provided for in the Deed and that the Deed did not in fact make or constitute any amendment to the Constitution. Thus declarations 5 and 7 would not be set aside.

170 Finally, ASIC considered the scenario if this Court remains of the view expressed in the Appeal Judgment. If the Court were to "set aside" the invalid amendment, ASIC submitted that such an 'amendment' must be set aside by the Court *ab initio* – not merely prospectively. Otherwise, ASIC claimed, it would amount to the unauthorised amendment having been treated in the meantime as though it were authorised. The consequence of the amendments being set aside *ab initio* would be that the payments referred to in declarations 5 and 7 would not have been provided for in the Constitution, and thus those declarations ought not to be set aside.

The Directors' submissions

171 In reply, the Directors made three submissions.

172 First, the Directors contended that s 601FC(1)(k) requires an RE to "ensure" that all payments out of scheme property are made in accordance with the scheme's constitution, and the term "ensure" is qualitative – that is, it requires an RE 'to be sure', meaning that the state of mind of the RE will be highly relevant to the question of whether it had the requisite assuredness. The Directors submitted that in circumstances where the reasonableness of the Director's actions as the "corporate brain" of the Board in causing the RE to pay the Listing Fee is not in question (Appeal Judgment at [324], [341] and [349]), it is untenable to claim that APCHL paid itself the Listing Fee in breach of s 601FC(1)(k).

173 Secondly, the Directors pointed to the fact that the Full Court did conclude that, at the relevant times of the payment of the Listing Fee, the Amended Constitution was valid as a "thing actually done": Appeal Judgment at [247]. The Directors rejected arguments that the Full Court's conclusion was "tentative" in this respect.

174 Thirdly, the Directors pointed to the fact that the conduct pleaded to give rise to APCHL's breach of s 601FC(1)(k) was the same conduct providing the foundation for the allegation that the Directors had breached s 601FC(1)(f) – the implication being that if the Directors were found to have acted lawfully in this respect, so must APCHL.

175 The Directors also relied upon their submissions in respect of declaration 4 above.

APCHL's submissions

176 APCHL's submissions focussed on declarations 5 and 7, and sought to show this Court that those declarations should not be set aside. APCHL stated that, in this respect, there were two questions of statutory construction. The first question was whether the effect of s 601GC(2), or any other part of the Act, was that lodgement of an invalid amendment to a scheme's constitution gives it interim validity – that is, lodgement renders the amendment valid until it is set aside. The second question was the meaning of the word 'ensure' in s 601FC(1)(k).

177 In respect of the first question, APCHL contended that neither s 601GC(2) nor any other part of the Act operate such that lodgement of an invalid amendment to a scheme's constitution gives it interim validity.

178 APCHL submitted that s 601GC(1) sets out the conditions for any modification, repeal or replacement, and that s 601GC(2) merely provides the consequences of a failure to lodge with ASIC that modification, repeal or resolution. ASIC argued that no intention could be derived from these subsections to the effect that an invalid alteration to the Constitution, once lodged, would be effective.

179 Furthermore, APCHL contended that no support for 'interim validity' could be derived from the scheme of the Act. The legislative scheme of Part 5C was said to be almost wholly directed to the protection of the interests of members of managed investment schemes, with nothing in Part 5C suggesting an intention to give an invalid constitutional amendment a statutory 'interim validity'. In response to earlier arguments about investor certainty put forward by the Directors (see Appeal Judgment at [243]), APCHL also argued that any promotion of certainty that might be achieved through the notion of 'interim validity' should not prevail over the interests of beneficiaries of a trust, and the objective of requiring an RE to act only as authorised by the scheme's constitution and the Act.

180 APCHL also relied upon the position under the general law relating to trusts (APCHL submissions: [31]-[35]) as well as various other authorities dealing with the lodgement of an

invalid amendment (APCHL submissions: [36]-[43]), in support of its broader contention that actions taken pursuant to invalid amendments are generally treated as unauthorised.

181 APCHL concluded that the correct position is that an invalid amendment to a scheme constitution is not valid once lodged with ASIC – it remains at all times of no effect – and that such an invalid amendment could form no basis for the RE to take scheme property for itself, or transfer it to third parties, in the form of payment of the Listing Fee.

182 In respect of the second question, APCHL contended that APCHL had contravened s 601FC(1)(k), and that the finding of "honest belief" in respect of the Directors (of which it is said, according to the Appeal Judgment, exculpated them) had no relevance in respect of APCHL's contravention of that subsection.

183 APCHL particularly relied on their construction of the term "ensure" within s 601FC(1)(k). They disagreed with the Directors that it means the state of mind of 'being sure'. Rather, APCHL contended that in ordinary language "ensure" means to "make certain that (something) will occur or be the case" (The New Oxford English Dictionary, 1999, at 614), and that a duty to "ensure" is one of strict liability*: ASIC v Cassimatis (No 8)* [2016] FCA 1023 at [7], [529] (Edelman J). APCHL relied on a number of further authorities in support of this point: APCHL submissions: [51]-[53].

184 APCHL concluded that the duty imposed by s 601FC(1)(k) to 'ensure' that all payments out of scheme property are made in accordance with the scheme's constitution is a duty of strict liability. Thus it was submitted that APCHL had contravened s 601FC(1)(k) by causing itself to be paid the Listing Fee, and that declarations 5 and 7 in this respect ought not to be set aside.

Consideration

185 The submissions before this Court raise two questions for our consideration.

(1) First, what was the content of the Constitution as a matter of statutory construction after the lodgement of the purported amendment of the Constitution?

(2) Secondly, did APCHL *ensure* that all payments made out of scheme property were made in accordance with the scheme's constitution and this Act?

186 In respect of the first question, we rely upon our reasoning at [253]-[256] and [324] in support of our conclusion that amendments to a scheme constitution, once lodged with ASIC,

are ordinarily valid until set aside. This conclusion flows from an orthodox application of the principles enunciated in *Project Blue Sky* that focus on the purpose of the Act. A recent application of these principles also occurred in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 ('***Forrest***'). As the majority noted in that case:

> *[62] In* Project Blue Sky*, this Court was concerned with whether a statutory requirement that an administrative agency perform its functions in a manner consistent with Australia's obligations under any convention or international agreement to which Australia is a party was intended to invalidate an act done in breach of the requirement. The majority in* Project Blue Sky *were strongly influenced in reaching a conclusion in the negative by the consideration that the requirement in question regulated the exercise of functions already conferred on the agency, rather than imposed essential preliminaries to the exercise of those functions. Their Honours were also influenced by the circumstance that the provisions did not have "a rule like quality which [could] be easily identified and applied", many of the obligations relevant in that case being "expressed in indeterminate language". Also important to the decision was the consideration that "public inconvenience would be a result of the invalidity of the act", especially if those affected by non-compliance were neither responsible for, nor aware of, the non-compliance.*
>
> *[63] The present case is readily distinguishable. A consideration of "the language of the statute, its subject matter and objects, and the consequences for the parties of holding void" acts done in breach of the Act, reveals that ss 74(1)(ca)(ii), 74A(1) and 75(4a) imposed essential preliminaries to the exercise of the power conferred by s 71 of the Act. That this was so was made clear by both the express terms and the structure of the provisions as sequential steps in an integrated process leading to the possibility of the grant of a mining lease by the Minister. These provisions were not expressed in indeterminate terms: they imposed rules which could be easily identified and applied. In addition, any inconvenience suffered by treating the requirements of the Act as conditions precedent to the exercise of the Minister's power would enure only to those with some responsibility for the non-observance, whereas (as will be explained) the contrary view would disadvantage both the public interest and individuals who were within the protection of the Act. Finally, and importantly,* Project Blue Sky *was not concerned with a statutory regime for the making of grants of rights to exploit the resources of a State.*

187 The facts in the matter before this Court resemble those in *Project Blue Sky*, namely that:

- The requirement in s 601GC(1)(b) regulates the exercise of functions already conferred on the RE, rather than imposing essential preliminaries to the exercise of those functions.
- Section 601GC(1)(b) does not have "a rule-like quality which [could] be easily identified and applied" and is relatively "expressed in indeterminate language".

- "[P]ublic inconvenience would be a result of the invalidity of the act", especially if those affected by non-compliance were neither responsible for, nor aware of, the non-compliance.

188 In light of the submissions of the parties, we should say something more about the question of the validity of and status of the Amended Constitution. This has become a more central issue in the appeals, now that the declarations against APCHL are now under specific consideration. To the extent authorities or discourse relating to administrative law decisions have been relied upon or referred to, this has been undertaken to assist in a process of reasoning. It is not entirely helpful in the context of these appeals to talk in terms of jurisdictional error. Further, it should be acknowledged that Courts regularly treat administrative action taken contrary to law as in practice voidable, not void. This is despite the comments in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476. Further, Courts actually set aside decisions that they declare invalid. Of course, if a decision is truly invalid there is nothing to set aside, but courts regularly do so order – see the recent orders in *Forrest*.

189 We are dealing in these appeals with a specific legislative regime, and with the conduct of an RE under the Act. In addition to the matters raised before us leading to the Appeal Judgment, reference has been made by ASIC and APCHL to the provisions of the Act which provide relief to an RE in the event of certain irregularities – see eg ss 1375 and 1318. It was said that in the context of APCHL (as distinct from the Directors), these provisions indicate an intention of Parliament that, as the legislation already provides for a procedure to relieve against some irregularities, the Court should not find that Parliament intended to uphold the validity of invalid constitutional amendments until set aside by a Court. We are not persuaded this is a particularly significant factor in relation to the question of whether the amendments were null and void. The provisions allowing for relief are in this way limited in nature. More significantly, an important factor we referred to in the Appeal Judgment was that once lodged with ASIC, the Constitution as lodged will be relied upon by the public and investors.

190 We accept that the Act operates in the context of trust and corporate law, placing important obligations on an RE and directors. It can also be accepted that the obligations of trustees outside this statutory context would not authorise a trustee to act in accordance with a purportedly amended trust deed if it was invalidly amended. It can also be accepted that this

is a situation where APCHL itself was the entity which caused the Constitution to be amended. It was also the entity which paid trust money to itself upon the basis that the amendments were effective. At no stage was member approval for the amendments to the Constitution sought. Therefore, we are not dealing with a situation involving specific third parties before the Court seeking to rely upon acquired rights.

191 However, we are also not dealing with any allegation of fraud and the relevant declarations under discussion here relate to the later actions of APCHL acting on the faith of amendments made to the Constitution previously and found to have been made honestly. There is no allegation that when the conduct occurred the subject of declarations 5 and 7, APCHL knew or had reason to believe, it was acting improperly.

192 The ultimate question remains as to whether in the penalty proceedings brought by ASIC against APCHL, there has been a contravention of s 601FC(1)(k).

193 The starting point in considering the position of APCHL in the context of declarations 5 and 7 is to consider the ambit of the provision said to have been contravened.

194 The impugned conduct is the failure to ensure the relevant payments were made in accordance with the "constitution" (defined in s 9 of the Act). At the time the payments were made they were made in accordance with the document lodged at ASIC. This is not an allegation that APCHL failed to ensure the amendments to the Constitution were properly or validly made in accordance with the Act. The payments were made in accordance with the terms of the Existing Constitution, although the Constitution was not validly amended to allow for these payments.

195 We are not convinced that we should revert from our initial view that the Amended Constitution in this context would be valid until set aside. The acts of the Directors as a Board and of lodgement were historical facts. The legal consequences of those acts are affected once a court sets aside those legal consequences, but the acts of the Directors as a Board and of lodgement remain. This is not to say the act of lodgement itself gives validity to the document once lodged with ASIC; it just recognises that the document has in fact been lodged.

196 As a matter of statutory construction the reference to "constitution" in s 601FC(1)(k) refers to the constitution as purportedly amended and lodged with ASIC and acted upon by the Directors.

197 In respect of the second question, whilst we agree with the submissions of APCHL in respect of the term "ensure", the fact that the Amended Constitution was in existence when APCHL caused itself to receive the instalments of the Listing Fee means that those payments were made in accordance with the Constitution and therefore APCHL did not contravene s 601FC(1)(k) in doing so.

198 We acknowledge the difficulty of placing an effective strict liability on APCHL, and not on the Directors, when the effective organ of the APCHL to "ensure" compliance with the Constitution is the same Directors acting as a Board. Nevertheless, the legislature has made this distinction.

199 For these reasons, declarations 5 and 7 must also be set aside.

CONCLUSION

200 In view of these reasons, the Court will order in each appeal in which there is a cross-appeal as follows:

(1) Australian Property Custodian Holdings Limited ACN 095 474 436 (Receivers and Managers Appointed) (In Liquidation) (Controllers Appointed) be joined as the second respondent to the appeal.

(2) The appeal is allowed.

(3) The cross-appeal is dismissed.

(4) The orders and declarations made by the trial judge in proceeding VID 594 of 2012 (**Trial Proceeding**) dated 2 December 2014 are set aside and in lieu thereof the plaintiff's claim by originating process is dismissed.

(5) The first respondent pay the costs of the defendants in the Trial Proceeding, including reserved costs.

(6) The first respondent pay the costs of the appellant in the appeal and cross-appeal including reserved costs and the costs of and in connection with the dispute as to the form of orders.

(7) The second respondent pay the costs of the appellants in the appeal proceeding of and in connection with the dispute as to the form of orders.

201 In relation to the appeal in which no cross-appeal has been made, the same orders will be made but with the deletion of the orders concerning the cross-appeal.

I certify that the preceding two hundred and one (201) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Greenwood, Middleton and Foster.

Associate: 

Dated: 1 November 2017