FEDERAL COURT OF AUSTRALIA

Sandalwood Properties Ltd (Subject to a Deed of Company Arrangement) v Huntley Management Ltd [2018] FCA 1502

File number:	WAD 367 of 2018
Judge:	**COLVIN J**
Date of judgment:	8 October 2018
Catchwords:	**CORPORATIONS** - application by responsible entity of registered managed investment scheme - whether resolution appointing new responsible entity valid - where passing of two resolutions expressed as 'subject to and conditional upon' passing of another resolution - consideration of principles to be applied in construing statutory licence - where new responsible entity did not hold a valid Australian financial services licence to operate scheme at time of resolution to appoint the entity - consideration of provisions relating to Australian financial services licences under *Corporations Act 2001* (Cth) - whether new responsible entity must hold Australian financial services licence to operate scheme at time of resolution to appoint the entity - consideration of provisions concerning removal of responsible entity - resolutions held to be invalid **CORPORATIONS** - whether chair of members' meeting validly appointed - where responsible entity was excluded from vote on appointment of chair - whether chair acting as interim chair presided over own election - whether any substantive consequence of presiding over the declaration of the result of resolution to elect chair - chair not validly appointed - members' meeting invalid
Legislation:	*Corporations Act 2001* (Cth) ss 252S, 253B, 253E, 253G, 601FA, 601FK, 601FL, 601FM, 601FN, 601FP, 601FQ, 601FR, 601FS, 601FT, 601NE, 601NF, 762C, 763A, 766A, 911A, 912A, 913A, 913B, 914A, 916A, 917A, 917D, 1311, Sch 3 item 262C *Corporations Regulations 2001* (Cth) regs 7.6.03(f), 7.6.04
Cases cited:	*Allandale Blue Metal Pty Ltd v Roads and Maritime Services* [2013] NSWCA 103 *Australian Olives Limited v Stout* [2007] FCA 1958 *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2011] FCAFC 114; (2011) 195 FCR 485

	Bardsley-Smith v Penrith City Council [2013] NSWCA 200 *City Pacific Limited, in the matter of City Pacific Limited v Bacon (No 2)* [2009] FCA 772; (2009) 178 FCR 81 *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59; (2004) 220 CLR 472 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 *Huntley Management Limited v Australian Olives Limited* [2010] FCAFC 98; (2010) 186 FCR 430 *Link Agricultural Pty Ltd v Shanahan* [1998] VSCA 3; [1999] 1 VR 466 *National Australia Bank Ltd v Market Holdings Pty Ltd* [2001] NSWSC 253; (2001) 161 FLR 1 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 *Trump International Golf Club Scotland Ltd v The Scottish Ministers* [2015] UKSC 74 *VAW (Kurri Kurri) Pty Ltd v Scientific Committee* [2003] NSWCA 297; (2003) 58 NSWLR 631 *Weston Aluminium Pty Ltd v Environment Protection Authority* [2007] HCA 50 *Winn v Director General of National Parks and Wildlife* [2001] NSWCA 17
Date of hearing:	2 October 2018
Registry:	Western Australia
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	115
Counsel for the Plaintiff:	Mr SK Dharmananda SC with Ms RR Joseph
Solicitor for the Plaintiff:	Allens
Counsel for the First and Second Defendants:	The First and Second Defendants filed a submitting notice save as to costs
Counsel for the Third Defendant:	Mr JM Healy

Solicitor for the Third Defendant:	Robson Legal

ORDERS

WAD 367 of 2018

BETWEEN:	**SANDALWOOD PROPERTIES LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT) (RECEIVERS & MANAGERS APPOINTED) (ACN 093 330 977)** Plaintiff
AND:	**HUNTLEY MANGEMENT LTD (ACN 089 240 513)** First Defendant
	SANDALWOOD GROWERS CO-OP LTD (REGISTRATION NUMBER C2017002B) Second Defendant
	GRAEME ERIC SCOTT Third Defendant

JUDGE:	**COLVIN J**
DATE OF ORDER:	**8 OCTOBER 2018**

THE COURT ORDERS THAT:

1. It is declared that each of the resolutions considered at the meeting of members of the TFS Sandalwood Project 2003 (ARSN 104 124 414) held on 23 July 2018 at Dalkeith Hall is invalid and of no effect.
2. The third defendant do pay the plaintiff's costs of the application to be assessed if not agreed.
3. There be liberty to the plaintiff to apply for further declaratory relief based upon the reasons of the Court if such further declaratory relief is considered necessary.
4. There be liberty to the plaintiff to apply for orders in relation to the indemnification of the plaintiff for the costs and expenses of the application out of the assets of the TFS Sandalwood Project 2003.

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

REASONS FOR JUDGMENT

COLVIN J:

1 The TFS Sandalwood Project 2003 (**Project**) is being conducted as a registered managed investment scheme. Sandalwood Properties Ltd (Subject to Deed of Company Arrangement) (Receivers and Managers Appointed) (**SPL**) is the responsible entity of the scheme and the manager of the Project.

2 A meeting of members of the scheme was held on 23 July 2018. It is claimed that at that meeting Mr Graeme Scott was appointed as chair and he properly declared three resolutions to have been passed (**Resolutions**). First, a resolution to remove SPL as the responsible entity (**Resolution A**). Second, a resolution appointing Huntley Management Ltd (**Huntley**) as the new responsible entity with effect from the time of removal of SPL (**Resolution B**). Third, a resolution appointing Sandalwood Growers Co-op Ltd (**SGCL**) as the new manager of the Project (**Resolution C**). Resolution A was expressed to be 'subject to and conditional upon' Resolution B being passed which, in turn, was expressed to be conditional upon Resolution A being passed. Resolution C was expressed to be conditional upon both Resolutions A and B being passed.

3 SPL says that Resolution B was invalid because at the time of the meeting Huntley did not hold an Australian financial services licence (**AFSL**) authorising it to operate the Project. It is then said that, as a consequence, Resolution A and Resolution C could not take effect because they were each conditional upon Resolution B being passed as a valid resolution. SPL also says that each of the Resolutions is invalid for the separate reason that Mr Scott was not validly elected as chair of the members' meeting. It seeks declaratory relief.

4 Huntley and SGCL were joined as defendants. Each has filed submitting appearances. The relief sought is opposed by the third defendant, Mr Scott. The Australian Securities and Investments Commission (**ASIC**) was given notice of the proceedings. At its request, certain matters stated in an email from ASIC to the receivers and managers of SPL dated 24 August 2018 were drawn to the attention of the Court. They were advanced to correct certain factual matters stated in the materials filed in support of the application. The corrections were not disputed. Otherwise, ASIC has not sought to appear.

5 For the following reasons each of the Resolutions was invalid and declaratory relief of the kind sought should be granted.

The first basis for the claim of invalidity: Huntley's AFSL

6 The first claim advanced by SPL as to why the Resolutions are invalid depends upon the following propositions:

(1) Resolution B purported to choose Huntley as the responsible entity for the Project;

(2) under the *Corporations Act 2001* (Cth) a company cannot be chosen as the responsible entity for a registered scheme unless it holds an AFSL authorising it to operate the scheme;

(3) the AFSL held by Huntley at the time of the Resolutions did not authorise it to operate the Project;

(4) therefore, Resolution B was invalid because it purported to appoint Huntley as the responsible entity for the Project contrary to the *Corporations Act*; and

(5) as Resolutions A and C were contingent upon Resolution B being validly passed, they did not take effect.

The AFSL provisions of the *Corporations Act*

7 Section 911A(1) provides that a person who carries on a financial services business must hold an AFSL 'covering the provision of the financial services'. There are many different types of activities that fall within the concept of providing a financial service. Relevantly for present purposes, a person who operates a registered scheme provides a financial service: s 766A(1)(d). The requirement is that the AFSL *covers* the particular financial services that are being provided by the person.

8 A person may apply for an AFSL by lodging with ASIC an application that includes information required by regulations made for that purpose: s 913A. The required information includes 'a description of the financial services that the person proposes to provide': reg 7.6.03(f) of the *Corporations Regulations 2001* (Cth).

9 ASIC must grant an AFSL if (and must not grant an AFSL unless) certain specified matters pertain: s 913B. Those matters include that the applicant meets any requirements prescribed by regulations: s 913B(1)(d). ASIC may grant an AFSL subject to conditions: s 914A.

10 Importantly, ASIC must ensure that the AFSL is subject to a condition 'that specifies the particular financial services or class of financial services that the licensee is authorised to provide': s 914A(6). So, the *Corporations Act* imposes an obligation upon ASIC to identify

by way of condition the particular financial services or class of services that are the subject of the license. In addition, s 914A(7) states expressly that the financial services or class of financial services may be specified 'by reference to particular financial products or classes of financial products'. Therefore, an AFSL may be granted for particular services in respect of a particular product. A financial product is a facility through which a person makes a financial investment, manages a financial risk or makes non-cash payments: s 763A. Facility includes intangible property or an arrangement or a term of an arrangement: s 762C. Therefore, for present purposes, a licence can cover only the operation of a particular managed investment scheme.

11 Each AFSL is also issued subject to such other conditions as are prescribed by regulations and ASIC cannot vary or revoke those conditions: s 914A(8). Conditions have been prescribed by reg 7.6.04 of the *Corporations Regulations*.

12 There are various provisions in the *Corporations Act* and the *Corporations Regulations* that apply to the extent that financial services are covered by the licence. For example, there is an obligation on a licensee to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly: s 912A(1). A licensee may authorise a representative to provide some or all of the financial services covered by the licensee's AFSL: s 916A(2). An authorisation of a representative is void to the extent that it purports to authorise a person to provide a financial service that is not covered by the AFSL: s 916A(3). In certain cases, provisions as to the liability of representatives of licensees are confined to conduct within the scope of the authority given by the licensee (which is confined by the scope of the AFSL): s 917A(2) and s 917D.

13 Therefore, the specification of the services covered by an AFSL assumes considerable significance for other parts of the regulatory scheme.

14 Finally, a breach of s 911A(1) is an offence that may carry a fine of 200 penalty units or imprisonment for two years or both: s 1311 and Sch 3 item 262C.

15 Therefore, not only is there an obligation to obtain a licence to cover the particular financial services to be provided but there is considerable importance given to the scope of those services being specified in the licence. In that context, it is to be expected that there would be precision in the identification of the services covered by a particular licence when ASIC performs its statutory obligation to specify the services covered by an AFSL.

ASIC Regulatory Guides

16 ASIC publishes 'regulatory guides' concerning applications for Australian financial services licences, particularly:

(1) RG 1 AFS Licensing Kit: Part 1 - Appling for and varying AFS licence;

(2) RG 2 AFS Licensing Kit: Part 2 - Preparing your AFS licence; and

(3) RG 105 Licensing: Organisational Competence.

17 ASIC has also published a form of electronic application described as FS01. The application is tailored to ask questions about the particular type of financial services and products that are the subject of each application: RG 1.18.

18 RG 2 has information to assist in the completion of an application. In relation to the operation of registered schemes, the guidance provided at RG 2.82 is as follows:

> At A4.4.1 you will be asked to select whether you want to be licensed to operate:
>
> (a) Named scheme(s)–these are specific schemes that will be named on your licence; and/or
>
> (b) Scheme(s) of a particular asset kind(s)–if you select this authorisation, what will appear on your AFS licence is not the individual scheme name(s) but the particular kind(s) of asset or business they invest in. You can be authorised to operate more than one kind of scheme.

19 At RG 2.83 there is the following further guidance:

> If you select scheme(s) of a particular asset kind you won't have to apply to vary your AFS licence every time you want to register a scheme of that kind. However, you should only apply for this authorisation if you can demonstrate that you have the organisational competence and the capacity (e.g. systems and resources) to operate schemes with assets or businesses of that type: see Section D of Regulatory Guide 105 *Licensing: Organisational competence* (RG 105). Otherwise, you should apply to operate a named scheme.

20 Then at RG 2.84 the guidance given is:

> At A4.4.2 you will be asked to select what kind(s) of scheme you want to operate. Even if you apply to operate a named scheme, you still need to select what kind of scheme that named scheme is.

21 I note that the guidance indicates that inquiries will be made of applicants concerning the 'kind of scheme' that is to be operated and that such an inquiry will be required to be answered even where the licence sought is only to operate a named scheme.

22 The same type of approach is reflected in the guidance provided in RG 105 which contains the following in RG 105.91 to RG 105.93:

> If you want to operate a registered managed investment scheme or an investor-directed portfolio service (IDPS), you can either apply for a narrow authorisation–that is, a 'named scheme' or 'named IDPS'–or apply for the broad 'schemes of a particular kind' authorisation or IDPS authorisation.
>
> The narrow authorisation will only permit you to operate the particular registered scheme or IDPS named on your AFS licence. The broad authorisation will allow you to operate more registered schemes of the same asset kind, or more IDPSs, without varying your licence. However, you must ensure that you have the organisational competence for the extra schemes or IDPSs before you start operating them.
>
> Before we can grant you a broad authorisation, you must first be able to demonstrate that you have the organisational competence and capacity (e.g. systems and resources) to operate multiple schemes of the same asset kind, or more IDPSs. You can generally demonstrate this if you have been operating two or more registered schemes or IDPSs for at least the past two years. If you are a first-time applicant, we will consider granting you a broad authorisation if you can show that you have the same level of competence and capacity as an experienced licensee.

The terms of Huntley's AFSL

23 It is common ground that at the time of the meeting of members of the Project convened to consider the Resolutions, Huntley held an AFSL. However, there is a dispute between the parties as to what was authorised by the licence.

24 Huntley's AFSL was issued in terms that were 'effective 2 July 2018'. The ASIC guidelines to which I have referred were all in effect prior to that date. The licence was expressed to authorise the licensee:

> to carry on a financial services business to:
>
> (a) provide general financial advice only, for the following classes of financial products ...
>
> (b) deal in a financial product by …
>
> (c) operate the following kinds of registered managed investment scheme (including the holding of any incidental property) in its capacity as a responsible entity …
>
> (d) provide the following custodial or depository services …

25 After the opening words of para (c) quoted above, the licence then listed 13 specific managed investment schemes, one of which was stated to be:

> (x) "Tfs Sandalwood Project 2002" scheme (ARSN: 099 022 170),
>
> (A) a scheme that is promoted to raise funds solely to finance primary

> production ventures as an active commercial enterprise limited to:
>
> (1) forestry;

26 Significantly, the list of 13 schemes was not a description of a class or group or category of managed investment schemes to which the licence applied. Rather, the opening words 'operate the following kinds of registered management scheme' was simply followed by the list of specific named schemes. There is an evident disconnection between the introductory words 'operate the following kinds of registered managed investment scheme' and the list which follows which does not describe a kind of scheme at all, but rather lists specific schemes by name.

27 It was contended for Mr Scott that, in context, the licence authorised Huntley to operate any other registered scheme that could be said to be 'of a kind' with any of the specific listed schemes. The submission raises an issue as to the proper construction of the licence as a statutory instrument.

Principles to be applied in construing Huntley's AFSL

28 In construing the terms of an AFSL, a construction which promotes the regulatory purpose for which the licence is issued is to be preferred: *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2011] FCAFC 114; (2011) 195 FCR 485 at [120]. The purpose and object of the licence may be gleaned from regulatory guidance notes applied by ASIC in considering matters relating to the issue of an AFSL: at [129].

29 Resort to guidance notes (being documents of general application) is to be distinguished from considering particular documents that may have formed part of an individual application or communications with ASIC in relation to a particular AFSL application. Regard to specific contextual matters may not be appropriate in construing public documents that are of a kind that both provide authority for future dealings and are intended to operate according to their terms. As was said by Spigelman CJ in *Winn v Director General of National Parks and Wildlife* [2001] NSWCA 17 at [4] (Powell JA agreeing):

> A public document, such as a development consent, constitutes a unilateral act on the part of the consent authority expressed in a formal manner, required and intended to operate in accordance with its own terms. It has…an inherent quality that it will be used to the benefit of subsequent owners and occupiers. It is also a document intended to be relied upon by many persons dealing with the original grantee, or assignees of the grantee, in such contexts as the provision of security. In some respects it is equivalent to a document of title. It must be construed in accordance with its enduring functions.

30 In *Allandale Blue Metal Pty Ltd v Roads and Maritime Services* [2013] NSWCA 103 where the Court was concerned with the construction of a development consent. Meagher JA at [42]-[43] summarised the principles to be applied in undertaking that task in the following was (citations omitted):

> The task is to construe the document constituting the consent mindful of the fact that the approval is a unilateral act of the consent authority which has an enduring function. The consent is not the result of a bargaining process between two or more parties, and is not personal to the applicant but enures for the benefit of subsequent owners and occupiers. Its meaning must be determined objectively, having regard to these matters which do not focus on the circumstances in which the consent was given by reference to what was known both to the applicant and the consent authority. To that extent, the principles of construction appropriate to contracts, which provide that in the case of ambiguity or uncertainty reference may be made to surrounding circumstances known to the relevant parties, do not apply.
>
> The extrinsic evidence to which reference legitimately may be made when construing a public document, such as a development consent, is more limited. Reference may be made to documents other than the consent itself if those documents, or parts of them, are incorporated into the consent expressly or by necessary implication.

31 So, in the case of a development consent, it has been held that documents that may have accompanied the development application should only be considered if they have been incorporated expressly or by necessary implication: *Bardsley-Smith v Penrith City Council* [2013] NSWCA 200 at [66].

32 However, in *Weston Aluminium Pty Ltd v Environment Protection Authority* [2007] HCA 50, a case dealing with a development consent, the High Court at [17] found it 'not necessary … to consider what reference may be made to the development application to which the consent responds'; but, compare *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59; (2004) 220 CLR 472 at [29].

33 A majority of the Supreme Court of the United Kingdom has expressed the view that there is only limited scope for the use of extrinsic materials in the interpretation of a public document such as a planning permission or a statutory consent (relevantly, in that case, a consent to the construction of wind turbines): *Trump International Golf Club Scotland Ltd v The Scottish Ministers* [2015] UKSC 74 at [33]. Particular reference was made to instances where a failure to comply with a condition of a consent constituted a criminal offence. It was observed that the possible criminal sanction called for clarity and precision in the drafting of conditions. Lord Hodge (Lords Neuberger, Mance, Reed and Carnwath agreeing) said at [34]:

> When the court is concerned with the interpretation of words in a condition in a public

> document … it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other provisions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting.

34 I note for completeness that where there is an issue as to validity of a statutory instrument that requires a consideration of the process that has been followed in issuing a particular instrument then different issues arise and there may be regard to those events that relate to the particular case. Further, it may be appropriate for an ambiguity in a legislative instrument to be resolved by adopting a construction which supports the legality of the instrument. Issues of that kind do not arise in the present case.

35 I proceed on the basis that a valid public instrument is to be construed according to its text and purpose as evident from the document itself and public documents that govern the relevant consent or approval process in all cases. Both parties advanced submissions as to the construction to be adopted for Huntley's AFSL by reference to the regulatory guides issued by ASIC. I am satisfied that it is appropriate to have regard to those instruments in determining the scope of the provisions in the AFSL issued to Huntley that apply to the operation of registered schemes.

36 In *Australian Olives Limited v Stout* [2007] FCA 1958, Greenwood J considered an application for an injunction to restrain the convening of meetings to remove the responsible entity of two managed investment schemes. The application was brought on the basis that the notice of meeting in each case was misleading because it included the names of members who did not wish to call the meeting: at [30]. However, issues were also raised as to whether the members could lawfully convene the meeting. In particular, it was contended that it was proposed to pass a resolution (interdependent with the resolution to remove the responsible entity) that sought to appoint a new responsible entity that was prohibited from acting because the AFSL held by the proposed new responsible entity did not authorise it to operate the schemes: at [37]. This is, in substance, the same point that SPL advances in this case.

37 Like the AFSL of Huntley in this case, the AFSL of the proposed new responsible entity in *Australian Olives Limited v Stout* authorised it to 'operate the following kinds of registered

managed investment schemes' and then listed specific schemes (in that instance, seven separate schemes): at [38]-[39].

38 Argument in *Australian Olives Limited v Stout* appears to have proceeded on the basis that the AFSL of the proposed new entity may authorise the licensee to operate the schemes identified in the list, but the authority also extended to 'operating schemes of the *kind* identified' in the AFSL (emphasis added): at [40]. It was noted that there was no evidence as to whether the schemes to which the proposed new entity was to be appointed were of the kind recited in the licence. It was also noted that schemes may exhibit entirely different organisational structures, call for different levels of horticultural expertise and may be differentiated by reason of a range of other factors: at [40]. That is, the fact that the listed schemes and the schemes the subject of the proposed resolutions may all be horticultural schemes did not mean they were schemes of the same kind.

39 Greenwood J dealt with the application 'on the footing' that the proposed new responsible entity did not have a licence to operate the two schemes. His Honour then held at [41]:

> The possibility or prospect that the meeting might pass inter-dependent resolutions that result in a contended appointment of a responsible entity other than in conformity of Part 5C is not a proper basis for exercising the discretion in favour of restraining the respondent members from holding a meeting of scheme members. If the meeting resolves in a way which is thought to be inconsistent with the statutory provisions, that resolution will give rise to other consideration.

40 Therefore, the issues raised by the present application were not decided in *Australian Olives Limited v Stout*.

Huntley's AFSL does not authorise it to operate the Project

41 For the following reasons, the AFSL issued to Huntley did not authorise it to operate the Project.

42 First, the AFSL lists 13 schemes but does not describe the characteristics of a class or group of managed investment schemes to which the licence extends. In particular, it does not state in terms that Huntley is authorised to operate schemes that are similar to the schemes named in the list. It is to be expected, having regard to its character, that if the licence was intended to take that form then there would have been an explicit description of the characteristics of the kind of scheme to which it applied rather than a list of specific named schemes.

43 Second, to construe the licence as extending to other schemes that were of the same kind as those listed would introduce considerable uncertainty as to the scope of the licence.

44 Third, in issuing the AFSL, ASIC had a statutory obligation under s 914A(6) to ensure that the AFSL specified 'the particular financial services or the class of financial services' that Huntley was authorised to provide. In that legislative context, the evident purpose is to fulfil that obligation. The purpose would not be advanced by an uncertain formulation as to the scope of the licence that depended upon a full understanding of the nature of a scheme named in the license. For that reason, it should be construed as applying to the operation of the listed schemes only.

45 Fourth, having regard to the legislative scheme where the operation of a number of provisions depend upon the scope of the licence it is unlikely that ASIC intended to grant a licence the scope of which depended upon knowing both the characteristics of each of the listed schemes and the characteristics of another scheme and then comparing those characteristics without any guidance as to the specific characteristics that were to have importance in determining the kind of scheme covered by the licence.

46 Fifth, the reference in the AFSL to operating 'the following kinds' of registered schemes should be read in the context of the regulatory guides which require an applicant for an AFSL in respect of the operation of managed investment schemes to specify the kind of licence that is sought, particularly a licence for a named scheme or a scheme for a particular asset kind. Of significance in that regard is RG 2.84 which requires an applicant for a licence to select what kind of scheme that named scheme is operating even if the application is to operate a named scheme. These matters indicate a standard form in which the opening words in the licence referring to operating a scheme of the following kind are used both in the case of a licence to operate a named scheme and where the licence is to operate a particular class of scheme.

47 In that regard, it is significant that the evidence discloses that since the Resolutions were passed, Huntley has been taking steps to amend its AFSL to include specific reference to the Project and there is no evidence advanced to the effect that the application that was made by Huntley was for a licence that applied to a class of schemes rather than a named scheme.

The *Corporations Act* provisions concerning removal of a responsible entity

48 Section 601FM of the *Corporations Act* provides a mechanism by which the members of a registered scheme may remove the responsible entity. It states:

> (1) If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity. The resolutions must be extraordinary resolutions if the scheme is not listed.
>
> (2) If the members vote to remove the responsible entity and, at the same meeting, choose a company to be the new responsible entity that consents, in writing, to becoming the scheme's responsible entity:
>
> (a) as soon as practicable and in any event within 2 business days after the resolution is passed, the current responsible entity must lodge a notice with ASIC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity; and
>
> (b) if the current responsible entity does not lodge the notice required by paragraph (a), the company chosen by the members to be the new responsible entity may lodge that notice; and
>
> (c) ASIC must comply with the notice when it is lodged.
>
> (3) A person must not lodge a notice under subsection (2) unless the consent referred to in that subsection has been given before the notice is lodged.

49 Significantly, it provides for the calling of a members meeting to consider and vote on a resolution to remove and a resolution choosing a new company. It has been held that conditional resolutions of the kind proposed to members in this case meet the requirements of s 601FM(1): *City Pacific Limited, in the matter of City Pacific Limited v Bacon (No 2)* [2009] FCA 772; (2009) 178 FCR 81 at [30].

50 Generally, a body corporate may pass a resolution that is conditional: *VAW (Kurri Kurri) Pty Ltd v Scientific Committee* [2003] NSWCA 297; (2003) 58 NSWLR 631 at [124]. However, it is to be noted that the *Corporations Act* contemplates that the members of a registered scheme may pass a resolution removing the responsible entity whilst not, at the same meeting, passing a resolution 'choosing a company to be the new responsible entity', in which case the responsible entity must ensure the scheme is wound up: s 601NE(1)(d). Therefore, it must be intended that there could be a resolution to remove a responsible entity without a resolution to choose a new responsible entity being considered and not passed. That is to say, resolutions that have conditionality of the kind expressed in the Resolutions are not required by the *Corporations Act*. Therefore, it is not the case that there must be a choice of a new responsible entity in order for there to be a valid resolution to remove.

51 The somewhat strange requirement expressed in s 601NE(1)(d) to the effect that where a responsible entity has been removed without replacement the responsible entity must apply to

wind-up the scheme sits somewhat uncomfortably with other provisions concerning appointment of a temporary responsible entity, convening meetings by that temporary responsible entity for the purpose of 'choosing' a new responsible entity and appointing a person to be responsible for winding up: s 601FN, s 601FQ and s 601NF. In that context, it is not clear whether the responsible entity that is to apply to wind up is the removed responsible entity or an entity that has been appointed as a temporary responsible entity.

52 Nevertheless, the terms of s 601NE(1)(d) may explain why particular care was taken to propose conditional resolutions. They are a reason why care must be taken before concluding that Resolution A could have operative effect if Resolution B is found to be contrary to the requirements of the *Corporations Act*.

53 The important point to note for present purposes is the requirement that a resolution is required to be put to members 'choosing' the new responsible entity.

54 The same language is to be found in s 601FL which deals with retirement by a responsible entity. It provides that a responsible entity may retire by convening a meeting of members to explain its reasons for wanting to retire and to enable the members to vote on a resolution to choose a new responsible entity: s 601FL(1). If the members choose a new responsible entity then the notice procedure requesting ASIC to alter the record of the scheme's registration must be followed: s 601FL(2). If the members do not choose a new responsible entity then the current responsible entity may apply for appointment of a temporary entity: s 601FL(3) and s 601FP.

55 So, it is in a context where a number of provisions refer to *choosing* a responsible entity that the language used in s 601FK is to be considered. It provides that a company 'cannot be chosen or appointed as the responsible entity or temporary responsible entity of a registered scheme unless it meets the requirements of s 601FA'. In context, the reference to 'chosen' must encompass the choice made by members by a resolution.

56 Section 601FA provides that the responsible entity of a managed investment scheme must be a public company that holds an AFSL authorising it 'to operate a managed investment scheme'.

57 For reasons I have given, Huntley's AFSL does not authorise it to operate the Project. The fact that Huntley is authorised to operate 'a managed investment scheme', but not the scheme in question does not meet the requirements of s 601FK.

58 The language used in s 601FA must be read in the context of the detailed provisions concerning application for and grant of an AFSL. As I have noted, they require the licence to be granted with a condition that specifies the particular financial products or classes of financial products to which it applies and the licence may apply to a specific managed investment scheme. In that context, it would defeat the detailed provisions concerning AFSLs if the singular authority to operate a named scheme was sufficient to satisfy the requirements of s 601FA in respect of a different scheme on the basis that the responsible entity was licensed to operate 'a managed investment scheme'. Properly understood, the requirement of s 601FA is that the responsible entity be the holder of an AFSL that authorises the operation of a managed investment scheme of the requisite kind, namely the particular scheme that the entity is operating (or is chosen to operate).

59 It was argued for Mr Scott that the requirements of s 601FK would be met if, by the time Huntley came to be included on the record of the scheme's registration, its AFSL covered the Project. Support was sought to be obtained from the fact that it is not until the record is changed that any removal of SPL will take effect: *Huntley Management Limited v Australian Olives Limited* [2010] FCAFC 98; (2010) 186 FCR 430 at [63].

60 However, the submission advanced ignores the express requirement that *both* at the time the responsible entity is chosen and when it is appointed that it must meet the requirements of s 601FA. So, if it does not do so it can neither be chosen nor appointed. There is logic in the legislative scheme requiring the licence to be held at the time the resolution is presented to members to consider choosing the proposed new responsible entity. It would pose difficulties for members if they could be required to vote for a new responsible entity in circumstances where they could not know with certainty whether the proposed new responsible entity would obtain the requisite licence and if so how long that may take.

61 Notably, s 601FM(2) requires the removed responsible entity as soon as practicable and in any event within two business days to lodge a notice asking ASIC to alter the register to name the chosen company as the scheme's responsible entity. This provision does not contemplate an extended hiatus.

62 It follows that at the time when Resolution B was considered at the meeting on 23 July 2018 (assuming for present purposes that it was a valid meeting of members), it was a resolution to choose Huntley as the responsible entity at a time when s 601FK provided that Huntley could

not be chosen. The resolution purported to make a choice that was prohibited by the terms of the *Corporations Act*.

63 Further, it was a resolution which, if passed, would require SPL to proceed as soon as practicable and in any event within two business days to lodge with ASIC a notice asking it to alter the record of the scheme's registration if the consent of Huntley was forthcoming. If SPL does not lodge the notice as required, then Huntley may do so (assuming it has been validly chosen): s 601FM(2)(b). Otherwise, if there is no consent from Huntley then by operation of s 601FM(3) the notice must not be lodged with ASIC.

64 SPL has not lodged the notice because it takes the view that the Resolutions were invalid and has commenced these proceedings. Huntley has not lodged the notice because it is still seeking to amend its AFSL to include the Project in the list of managed investment schemes in its licence that it may operate. In that regard it appears that Huntley is not relying upon the contention advanced by Mr Scott to the effect that it is authorised by its AFSL to operate the Project (a contention I have not accepted).

65 In an affidavit relied upon by Mr Scott, Mr Foxall (an employee of Huntley) says that on 24 January 2018 Huntley lodged an application to vary its AFSL to include the TFS Sandalwood Project 2002 and approval was obtained on 7 June 2018. He then says that after 7 June 2018 (both before and after the meeting on 23 July 2018), Huntley lodged an application to include other TFS Sandalwood projects including the Project. ASIC has asked Huntley to provide further information and Huntley has provided that information and Huntley is 'waiting for the Approval to be granted'.

66 Mr Foxall also says that in his experience which he says includes dealing with at least 40 managed investment schemes it is ASIC's practice that it does not issue variations to AFSLs enabling a responsible entity to become a new responsible entity until after the relevant resolutions have been passed by members of the scheme. Submissions were advanced relying upon that evidence. There was no attempt to engage support from ASIC in that submission which is significant given that ASIC was notified of the application and did not seek to appear. If the orders sought were fundamentally opposed to a practice followed by ASIC which ASIC sought to maintain then it would be expected the submissions to that effect would be advanced by ASIC.

67 However, even if that evidence is accepted, the practice adopted by ASIC concerning applications for licences though relevant to the interpretation of the licences themselves (in the manner I have described above concerning the regulatory guides) is not a matter to be brought to account when interpreting s 601FK.

68 As I have noted, for Mr Scott, reliance was placed upon the decision in *Huntley Management Ltd v Australian Olives Ltd*. In that decision, the Court made the following observation at [65] concerning the process for changing a responsible entity:

> The legislation envisages four steps: the passing of the resolution by the members of the scheme; the lodgement of a request with ASIC that it alter its record in order to give effect to that resolution; ASIC's consideration of that request; and the alteration by ASIC of its record in order to give effect to the request.

69 The issue before the Court in that case concerned the precise point in time when the changeover of a responsible entity for a registered scheme becomes effective. The Court held that it did not become effective unless and until the ASIC record is relevantly altered: at [66]. However, that conclusion does not bear upon the resolution of the present question as to what is required as part of the first step, namely the passing of the resolution and the consequences that follow if a resolution is purportedly passed in a manner that does not meet that requirement.

70 For reasons I have given, the requirement was not met in this case because at the time that the Resolution was purportedly passed Huntley did not have an AFSL that covered the operation of the Project as a registered scheme.

Effect of breach of s 601FK upon the validity of the Resolutions

71 In the above circumstances, assuming at this point of my reasons that Resolution B was otherwise passed as a valid resolution of members of the Project, the resolution was a choice made contrary to s 601FK.

72 A breach of s 601FK is not an offence: s 1311 and Sch 3. Nevertheless, the statutory prohibition is directed expressly against the choosing of a responsible entity that does not have the required AFSL. In the circumstances of this case, the act of choosing was to be undertaken by a resolution of members. The making of the resolution was the very thing prohibited by s 601FK.

73 As I have noted, s 601FM confers a statutory power upon the members of a registered managed investment scheme to remove a responsible entity and to choose a new responsible entity and

to do so by resolution at a meeting convened for that purpose. Section 601FK regulates the exercise of that power by prohibiting the choice of a company that does not have the requisite AFSL. There is no penalty or consequence specified for a breach of s 601FK. Where, as here, the question is whether the choice has validity prior to a change to the record of the scheme's registration, no issue arises as to possible consequences for the parties of finding that the appointment is void. Further, the evident purpose of s 601FK in the context of the detailed regulation requiring an AFSL would be frustrated if a choice made in breach of the provision could have legal effect.

74 In those circumstances, applying the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [91]-[93] as explained in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 at [61]-[63] and having regard to the language of the provision and its statutory context, the purpose is that there should be invalidity as to a choice made in contravention of s 601FK.

75 Therefore, the choice of Huntley purportedly made by Resolution B was invalid and had no legal effect.

76 I express no view as to whether the same conclusion would be reached if the matter had proceeded to a stage where ASIC had changed the record of the scheme's registration. Upon that further step being taken, there will be a 'change' in the responsible entity. The *Corporation Act* has a number of provisions that deal with the consequences that flow from a 'change' in the responsible entity: see s 601FR, s 601FS and s 601FT.

77 Resolutions A and C were expressed to be conditional upon Resolution B. Given the terms in which they are expressed (and the possible consequence that the passing of Resolution A without Resolution B may require the Project to be wound up), Resolutions A and C should not be construed as meaning that they should take effect in circumstances where Resolution B was invalid.

The second basis for the claim of invalidity: Mr Scott as chair of the meeting of members

78 SPL claimed that the Resolutions were invalid for the further reason that Mr Scott was not validly appointed as chair of the meeting of members convened on 23 July 2018.

79 The responsible entity had not appointed an individual to chair the members meeting and no chair had been previously appointed so it was necessary for the members present to elect a chair: s 252S.

80 SPL held interests in the Project for an unrelated third party institutional investor. They accounted for a 37.35% interest in the Project. SPL is recorded as a grower in the register for the Project. The Constitution for the Project provides that notice of any trust in respect of an interest in the Project is not required to be entered on the register.

81 SPL appointed Mr Fraser, one of the receivers and managers of SPL, as its corporate representative under s 253B.

82 At the time of the meeting on 23 July 2018, an issue was raised as to whether certain votes held by SPL could be voted on the motion to appoint the chair. When the vote was taken to appoint Mr Scott as chair the votes of SPL were excluded. SPL accepted that by reason of its position as responsible entity it had an interest in each of the Resolutions. However, the position that SPL proposed to take at the meeting was that the meeting should be adjourned because it was not appropriate to consider the Resolutions because Huntley did not hold the requisite AFSL. It was not able to move a motion to adjourn the meeting because its votes were excluded at all stages of the meeting.

83 SPL claimed that Mr Scott had acted as interim chair for the purposes of consideration of the resolution to appoint the chair and in that capacity he had ruled that SPL could not vote. It said that Mr Scott made that ruling on a resolution to appoint himself as chair and therefore he was not validly appointed as chair because he presided over his own election. Further, SPL claimed that the ruling was a substantive irregularity because as a matter of law SPL was entitled to vote on the resolution to appoint the chair of the meeting.

84 In oral submissions, the matters raised on behalf of Mr Scott in answer to the claims by SPL reduced to two contentions. First, Mr Scott did not act as interim chair for the purposes of considering the motion to appoint him as chair and did not rule on whether SPL could vote. Rather, it was a Mr Teague Czislowski who was the interim chair. Second, there could be no substantive irregularity because SPL was not entitled to vote on the resolution to appoint the chair because of its interest in the Resolutions to be considered at the meeting.

85 For the following reasons, I do not accept either of those contentions.

The identity of the interim chair

86 Mr Fraser deposed to the events at the meeting. He produced a set of notes taken by Ms Cummings at the meeting on 23 July 2018. Ms Cummings is a solicitor from Allens (a

firm of solicitors acting for the receivers and managers of SPL). Mr Fraser who was also at the meeting said that the notes accurately recorded the events of the meeting.

87 According to the notes, Mr Scott and Mr Czislowski sat at a desk at the front of the room where those attending assembled.

88 The notes of Ms Cummings record Mr Scott as GS, Mr Czislowski as TC and Mr Fraser as SF. Relevantly for present purposes, her notes record the following:

> TC - Thank you for attending this meeting, sorry that we are running a little late. GS has some issues reading so he is likely to be asking me to assist with reading the run sheet.
>
> GS - I'm a grower, I've been asked to act as chairman if elected.
>
> TC - I note that a quorum is present and meeting is open at 4:13pm.
>
> GS - I am taking the temporary chair role and invite motions for a chair at this meeting which is to vote on whether to replace RE of 2003 Project
>
> MW - I move that SF be appointed as chair.
>
> TC - Is there a seconder?
>
> David - I second it.
>
> TC - Any other nominations?
>
> FW - I nominate GS.
>
> Unknown female - I second that.
>
> TC - Let's put it straight to a vote.
>
> GS -We'll do it in order of nomination - SF was nominated first- raise your hands those in favour who can vote.
>
> …
>
> TC - There's been a query from floor. What is the capacity to call a poll for chairman vote?
>
> …
>
> TC - Ok, please complete voting forms. The rest of the proxies are already with us. Please complete the forms and bring forward.
>
> …
>
> GS - I'll ask TC to make the announcement.
>
> TC -We have received [127] votes for resolution to appoint SF as chair. 102 votes had been excluded for having no written authority from the beneficiaries of the trusts. SPL because it acts as bare trustee for entities needs written authorities from the beneficiaries.
>
> [The votes of SPL were then excluded. A question was raised as to why the votes of SPL were excluded]

…

GS - Next motion to appoint me as chairman. Those in favour?

Show of hands - 9 in favour.

GS - Those against?

Show of hands - 3 against

GS - The result is 9 for, 3 against.

MW -We call for a poll again.

Forms are handed out and collected.

TC - The results are very similar. For appointment of GS as chair, 111 votes counted in favour of the resolution and 24 counted against the resolution. 102 votes were excluded.

SF - We object to this treatment. There's clearly an issue that needs to be resolved. We think we should go and get some advice on this issue and we propose adjourning the meeting.

GS - No I propose proceeding with the meeting. I declare motion carried and that I am the chair.

89 Significantly, the notes record Mr Scott as saying that he was taking the temporary chair role. They record that Mr Scott invited motions for appointment of the chair and invited Mr Czislowski to declare each poll on the resolutions for appointment of the chair on the basis that the votes of SPL were excluded. They also record that Mr Scott declared the motion appointing himself as chair to be carried.

90 After the meeting, Mr Czislowski emailed to Mr Scott a copy of minutes that he had prepared. Relevantly, those minutes stated:

Temporary Chair (Grower Graeme Scott)	The Temporary Chairman opened the meeting at 4.12pm and a quorum was declared present. The Temporary Chair apologised that his eyesight was poor and for that reason asked an assistant to read from the run sheet on his behalf.

Election of Chair of Meeting

Temporary Chair	The Temporary Chair addressed the first matter of the meeting to invite motions for the election of a Grower to the Chair for the meeting to replace the responsible entity. Matthew Whittle a proxy for a Grower moved a motion that Shaun Fraser be the Chair.

Temporary Chair

The Temporary Chair confirmed the motion was seconded by David Renton a proxy holder for Growers.

Frank Wilson a proxy for a Grower also moved a motion that Graeme Scott take the chair.

Temporary Chair

The Temporary Chair confirmed that motion was seconded by Natasha Daniels a Grower.

The Temporary Chair resolved to address each motion in the order of the motions and proceeded to put the first motion to a vote on a show of hands for Shaun Fraser to take the chair for the meeting to replace the responsible entity' to a show of hands. [sic]

The votes were counted as three votes for the resolution and nine against however a poll was demanded by Matthew Whittle.

The Temporary Chair then conducted a poll for the motion to appoint Shaun Fraser as Chair. Some discussion ensued as to who was eligible to vote. An authority was provided by Sandalwood Properties Ltd (SPL) for the appointment of Shaun Fraser as the corporate representative dated 23 July 2018. This was purported by Mr Fraser to give him the right to vote the interests of the Kingston Rest sub trusts (beneficially held by ADIC) in the Project for which SPL is the bare trustee. Mr Fraser and others revealed that they were not in possession of any document electronic or paper copy which would indicate the manner in which the beneficiary had directed its voting and valid reasons were put to the Temporary Chair as to why it would be unlikely that the beneficiary would want to exercise their voting power to influence the outcome of the meeting, and amongst other reasons and in the absence of any evidence of written directions from the beneficiary of the bare trust to its trustee it was decided that the beneficiary's votes were not authorised to be exercised by Mr Fraser. In addition it was noted by the Temporary Chair that Sandalwood Properties Ltd as trustee for the Kingston Rest sub trusts had purported to appoint Robert Brauer as its proxy and Mr Brauer was not in attendance.

A poll was then conducted and the result of the poll was announced as 111 votes against and 24 votes for the resolution and the Temporary Chairman excluded the 102 votes of SPL as Trustee for the Kingston Rest trusts.

The Temporary Chairman declared the motion defeated and an objection on behalf of SPL was noted by the Temporary Chairman before proceeding to the next motion.

The Temporary Chair then put the motion that Graeme Scott take the chair for the meeting to replace the responsible entity to a show of hands and votes were counted with 9 votes for and 3 against.

A poll was demanded and the motion put to a poll with

> 111 votes for the motion with 24 votes counted against the motion and 102 votes excluded for the reasons noted above.
>
> The Temporary Chair declared the motion carried and proceeded as Chair.
>
> Shaun Fraser raised a further objection and reserved rights to challenge the appointment of chair which was noted by the Chair.

91 There is an evident consistency between the two records. Further, after the meeting, Mr Czislowski emailed the minutes that he had prepared to Mr Scott. Mr Scott read them and told Mr Czislowski that he could use his (Mr Scott's) electronic signature on the minutes as they appeared to him to record the business of the meeting. Mr Scott now says that he does not agree with the description in the minutes that he acted as interim chair.

92 It was contended for Mr Scott that the minutes do not have any statutory status because it is the responsible entity who is required to produce minutes of the members meeting. However, the fact that the minutes were prepared by Mr Czislowski and signed electronically by Mr Scott as being correct is conduct that has evidentiary significance irrespective of whether the minutes were given a particular status by the *Corporations Act*.

93 The two records are also consistent with the terms of a running sheet that was prepared by Mr Czislowski and provided to Mr Scott before the meeting. Mr Scott had problems with his eyesight and was not able to read from the running sheet so he asked Mr Czislowski to read from the sheet. It provided for Mr Scott to act as temporary chair and to convene the meeting and declare that a quorum was present and invite motions for the election of the chair.

94 There was evidence that it was Mr Czislowski that counted the votes when the poll was taken on the two resolutions concerning the appointment of the chair. Mr Czislowski also says that he was the one who counted the votes and excluded those of SPL. These matters are explicable by the acknowledged fact that Mr Scott had difficulty reading without a torch illuminating the page and had asked Mr Czislowski to assist him with reading documents at the meeting. However, Mr Scott was aware that the votes of SPL were not counted in the poll and the basis on which that occurred.

95 Despite these contemporaneous documents, counsel for Mr Scott advanced an argument that Mr Scott had not acted as interim chair and it was Mr Czislowski who did so. He relied upon accounts by each of Mr Czislowski and Mr Scott as to what they did at the meeting. However,

he expressly disavowed any submission that the notes of Ms Cummings were incorrect. Rather, the submission was that even if Mr Scott said at the meeting that he was acting as interim chair, based on what he said and did he was not so acting. Even taking that submission at face value, what was said and done is to be considered in the context of the evidence that Mr Scott was not able to read from the running sheet and invited Mr Czislowski to do so. Therefore, Mr Czislowski became the eyes of Mr Scott and read out what was in various documents on behalf of Mr Scott. However, that did not make Mr Czislowski the interim chair.

96 There was no cross-examination of the deponents. In those circumstances, I prefer the account recorded in the contemporaneous records to the extent that there is inconsistency with the oral evidence.

97 A case that if Mr Scott was interim chair then the meeting may be found to be regular on the basis that someone other than Mr Scott ruled on whether SPL could vote on the resolutions concerning the appointment of the chair was expressly disavowed by counsel for Mr Scott. Given that s 253G required any challenge to a right to vote at a members meeting to be made at the meeting and determined by the chair (whose decision is final) it is difficult to see how any such argument could have been advanced. It is a matter for the chair to rule on whether particular votes should be counted. A returning officer may undertake the count, but the officer must act upon rulings from the chair: *Link Agricultural Pty Ltd v Shanahan* [1998] VSCA 3; [1999] 1 VR 466 at [38].

98 I find that Mr Scott was the interim chair. It is not to the point that Mr Czislowski may have attended to matters relating to the count of votes.

99 Counsel for Mr Scott accepted that if he was the interim chair then the meeting was not validly held. He was correct to do so. In *National Australia Bank Ltd v Market Holdings Pty Ltd* [2001] NSWSC 253; (2001) 161 FLR 1 at [100] it was held that the person who it was claimed had been elected chair could not be a nominee for chair and also act as interim chair and make a determination as to the result of the meeting's vote as to who was to preside at the meeting. Further, as it was necessary for the validity of a meeting for there to be a chair and as there was no chair there was no valid meeting and no valid resolutions could be passed: at [173].

100 It follows that the members meeting was invalid for the reason that Mr Scott, as interim chair, presided over the determination of the vote on the resolution to appoint him as chair.

SPL's entitlement to vote

101 It was common ground that SPL could not vote on the Resolutions. Given that position, it was contended for Mr Scott that as the Resolutions were the only business of the meeting, it followed that SPL could not vote on the appointment of the chair. Therefore, it was said, even if it was to be found that Mr Scott acted as interim chair any issue with the members meeting was procedural only because SPL could not have voted on the appointment of the chair in any event.

102 The proposition that SPL could not vote at all at the meeting was advanced based upon the terms of s 253E which provides that the responsible entity and its associates were not entitled to vote their interest on a resolution as a members meeting 'if they have an interest in the resolution or matter other than as a member'. (The scheme in this case was not listed so the qualifying second sentence did not apply).

103 Notably, s 253E does not provide for an inability to vote at a meeting as a whole. Instead, it reflects common practice that eligibility to vote is to be determined in respect of each resolution to be considered at a meeting.

104 The submissions advanced for Mr Scott identified no particular interest identified that the responsible entity would have in the resolutions as to the appointment of the chair or the adjournment resolution that it proposed to put. On those resolutions it had no interest other than its interest as a member.

105 Therefore, I do not accept the submission that there was no substantive consequence in Mr Scott presiding over the declaration of the result on the resolution to appoint him as chair.

Other matters

106 SPL advanced a further argument that if the meeting was not invalid for reasons associated with Mr Scott acting as interim chair then it was entitled to challenge the ruling made to disallow the votes of SPL on the resolution to appoint the chair of the meeting. It was said that the disallowance involved an error of law and the votes should have been counted and had they been counted then the resolution to appoint Mr Fraser as chair would have been carried.

107 For Mr Scott no oral submissions were advanced to support the basis upon which the votes of SPL had been disallowed. The evidence was to the effect that the disallowance was on the basis that the relevant interest in the Project was held by SPL as bare trustee and a bare trustee

had no right to vote unless there was some evidence of a direction as to how to vote having been provided by the beneficiary. No authority was cited to support the basis for the ruling.

108 However, for Mr Scott reliance was placed upon the limited circumstances in which the court may intervene to consider whether a ruling by a chair concerning the process for counting of votes. The authorities were considered by Kenny JA (Batt JA and Buchanan J agreeing) in *Link Agricultural Pty Ltd v Shanahan*. Her Honour found that the ruling by the chair of a shareholders meeting was invalid and the court could declare the results of an election of an officer of the company on the basis of what would have occurred if the correct ruling had been made: at [46]. The cases reviewed included authorities to the effect that the approach of the court was the same as where the court was invited to review the exercise of a statutory power. In Australia, there has been considerable development in the law as to the circumstances in which the court may review the exercise of a statutory power entrusted to a particular repository: see, most recently, *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34. Nice questions may arise as to whether these developments are to be applied when it comes to consideration of a ruling made by a chair of a meeting of a company (or the members of a registered scheme).

109 In the present case, the error alleged is not one of improper purpose or unreasonableness. Rather, it is said to be a legal error and reviewable for that reason.

110 I was not taken to the constitution of the Project or any other constituent documents for the purposes of the argument advanced for Mr Scott. Those documents may be relevant to forming an understanding of the nature and extent of the power entrusted to the chair. Nor was any argument directed to the proper construction of s 253G.

111 It is not necessary to decide whether a ruling by a chair on whether to accept a vote on a poll can be challenged on the basis of what is characterised an error of law.

112 In those circumstances, it is neither necessary nor appropriate to decide the question.

113 Finally, objections to certain paragraphs in the affidavits of Mr Scott (dated 27 September 2018), Mr Czislowski (dated 27 September 2018) and Mr Foxall (dated 29 September 2018) were notified. I ruled against the objection to para 29 of the affidavit of Mr Scott. The balance of the objections raise matters that go to relevance or matters that would bear upon the weight to be afforded to the evidence. None of the paragraphs the subject of objections raised matters that are decisive for the purposes of the application. I have dealt with the evidence of Mr Foxall

that was objected to and found that even if it is accepted it does not bear upon the issues for determination. For these reasons it is not necessary to rule on the objections in order to deal with the substance of the matters raised on the application.

Conclusion and relief

114 It follows that there should be declaratory relief as to the invalidity of the Resolutions. As SPL has been successful and Mr Scott opposed the relief sought on a substantive basis, he should bear the costs of the application.

115 SPL also seeks a declaration that it has a right of indemnity out of the scheme property of the Project for the costs and expenses of these proceedings. There is no evidence before me concerning those costs. The order sought, if made, will may affect parties other than those in the current proceedings. No submissions were advanced as to why declaratory relief of the kind sought in relation to the plaintiff's claimed right to an indemnity was necessary. Nevertheless, I will reserve liberty to apply in that regard.

I certify that the preceding one hundred and fifteen (115) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Colvin.

Associate: 

Dated: 8 October 2018