SUPREME COURT OF QUEENSLAND

CITATION:	*Macquarie Capital Advisers Ltd & Anor v Brisconnections Management Co Ltd (as responsible entity for the Brisconnections Investment Trust & the Brisconnections Holding Trust) & Ors* [2009] QSC 82
PARTIES:	**MACQUARIE CAPITAL ADVISERS LIMITED** ABN 79 123 199 548 **(**first plaintiff) **MACQUARIE BANK LIMITED** ABN 46 008 583 542 (second plaintiff) **ACN 136 024 970 PTY LTD** ACN 136 024 970 (third plaintiff) **v** **BRISCONNECTIONS MANAGEMENT COMPANY LTD (AS RESPONSIBLE ENTITY FOR THE BRISCONNECTIONS INVESTMENT TRUST AND THE BRISCONNECTIONS HOLDING TRUST)** ABN 67 128 614 291 (first defendant) **AUSTRALIAN STYLE INVESTMENT PTY LTD** ACN 109 510 198 (second defendant) **DEUTSCHE BANK AG** ABN 13 064 165 162 (third defendant)
FILE NO/S:	3323/09
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	8, 9 April 2009
JUDGE:	Dutney J
ORDER:	**1 Claims numbered 1, 8 and 11 in the further amended claim are dismissed.** **2 I declare that the first defendant did not commit a fraud on the power conferred on it by the constitutions of the BrisConnections Investment Trust or the BrisConnections Unit Trust by entering into the Underwriting Agreement with the first plaintiff or the**

IPO Equity Bridge with the second defendant.
3 The remaining claims and the balance of the second defendant's counterclaim are adjourned to a date to be fixed.

CATCHWORDS: **CORPORATIONS – Managed Investment Scheme – Unit Trusts – where unit holder proposing resolutions which would put Responsible Entity in breach of contracts with third parties - where statutory right to propose resolutions**

CONTRACT – whether injunction lies to prevent knowingly causing breach of contract – where alleged statutory right – whether superior right to benefit of contract

EQUITY - INJUNCTIONS – whether damages an adequate remedy

Corporations Act 2001(Cwth) ss 252B, 252C, 252L, 601GB, 601GC, 601ND, 601NE
Corporations regulations 2001 ss 7.11.15, 7.11.27

Allen v Gold Reefs of West Africa [1900] 1 Ch 656
Anders Utkilens Rederi AIS v OIY Lorisa Stevedoring Co AIB [1985] 2 All ER 669 at 674.
Associated Portland CementManufacturers Ltd v Teigland Shipping AIS ("The Oakworth") [1975] 1 Lloyd's Rep 581
Re Australian Style Investments [2009] VSC 128
Cumbrian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co Ltd [1987] 1 Ch 1
Isle of Wight Railway Co v Tahourdin (1883) 25 Ch D 320
Queensland Press Limited v Academy Investment No 3 Pty Ltd [1988] 2 Qd R 575
Ron Kingham Real Estate v Edgar [1999] 2 Qd R 439
Southern Foundaries (1926) Ltd v Shirlaw [1940] AC 701
Tauman v Corporate West Management (unreported – VSC – 17/3/1988)
Turner v Berner [1978]1 NSWLR 66
Windsor v National Mutual Life Association of Australasia Limited (1992) 34 FCR 580
Zhu v Treasurer of the State of New South Wales (2004) 218 CLR 530

Austin & Ramsay, *Ford's Principles of Corporation Law*, 13th ed, 2007, Lexis Nexis
Meagher, Heydon & Leeming, *Meagher, Gummow & Lehane, Equity: Doctrines and Remedies*, 4th ed, 2002, Lexis Nexis

COUNSEL:	PL O'Shea SC with D. Clothier for the plaintiffs JG Santamaria QC with CM Muir for the first defendant G. Bigmore QC with S Rubenstein for the second defendant JWJ Stevenson SC with R Glasson for the third defendant R. Derrington SC with C Upton for the Australian Securities and Investment Commission
SOLICITORS:	Freehills for the plaintiffs Corrs Chamber Westgarth for the first defendant Macdonnells Law as town agents for Landers and Rogers for the second defendant Mallesons Stephen Jacques for the third defendant

The Present Action

[1] The First Defendant (**BCM**) is the responsible entity of two trusts that comprise a listed managed investment scheme. The First Plaintiff (**MCAL**) and the Second Plaintiff (**MBL**) have contracted with BCM to provide bridging finance (**the IPO Equity Bridge**) to the scheme pending payment of the further instalments due in respect of the partly paid units in the scheme and to partly underwrite the unit holders' obligation to pay those instalments (**the Underwriting Agreement**). The Third Plaintiff (**ACN**) and the Second Defendant (**ASI**) are substantial unit holders in the trusts and members of the scheme. The third defendant (**Deutsche Bank**) is also an underwriter of the unit holders' obligation to pay the further instalments payable on their units.

[2] MCAL and MBL seek orders designed to enforce their contractual rights and prevent alleged breaches of BCM's contractual obligations. They do so in circumstances where, at the instigation of ASI, BCM has called a meeting of unit holders to be held later today to vote on resolutions that the plaintiffs allege, if passed and implemented, will place BCM in breach of its contracts.

[3] The further amended claim seeks a variety of relief but the only relief it is necessary to finally determine prior to the meeting of unit holders are the claims in paragraphs 1, 8 and 11. Claim 1 seeks specific performance of negative covenants contained in the Underwriting Agreement and the IPO Equity Bridge which passing the foreshadowed resolutions would breach. Resolution 8 seeks an injunction restraining BCM from putting the resolutions and ASI from voting in favour of them. Claim 11 is concerned with the immediate impact of a resolution to wind up the scheme or a resolution the effect of which is that the scheme be wound up. The balance of the claims concerns the consequences of resolutions being passed by the meeting. I do not consider those claims to be urgent or that it is appropriate to determine them in advance of the outcome of any meeting. I have also been asked to consider the allegation in ASI's counterclaim that in entering into the Underwriting Agreement and the IPO Equity Bridge BCM has committed a fraud on its power as trustee.

The facts

[4] The background to the dispute is set out in the reasons for judgment of Robson J in a related decision in the Supreme Court of Victoria in *Re Australian Style Investments*[1].

[5] Insofar as they are necessary for the determination of the issues before me, the relevant facts appear to be uncontroversial.

[6] The scheme is comprised of stapled units in the BrisConnections Investment Trust and the BrisConnections Holding Trust. BCM is the trustee of the trusts and the responsible entity of the scheme. The trusts are governed by constitutions that are in relevantly identical terms.

[7] The BrisConnections Group has been awarded a concession to design, construct, operate, maintain and finance the Airport Link project in Brisbane and to receive toll revenue for a period of 45 years. The project is the single biggest infrastructure project presently underway in Australia. As at 9 December 2008, it was estimated that the project would employ up to 10,000 people across South East Queensland and elsewhere.

[8] BCM engaged in an initial public offering on about 24 June 2008. It did so by issuing a product disclosure statement (PDS). The PDS:

- enclosed an application form by which applicants for stapled units agreed to be bound by the constitutions and the terms and conditions of the offer;
- stated that the issue price for units was $3 and that unit holders were required to pay $1 on application, $1 nine months after the allotment date and $1 eighteen months after the allotment date. The existence of the Underwriting Agreement was disclosed in connection with these obligations but the terms of that agreement on which MCAL now relies were not disclosed;
- Identified that working capital would be provided by, amongst other things, debt finance, including the IPO Equity Bridge. The IPO Equity Bridge (which was listed under the heading Material Document – Main debt financing documents) was described as providing bridging finance pending the payment of the second and final instalments. It was also disclosed that the second and final instalments were to be used to repay it. Again, the specific contractual provisions on which the plaintiffs rely were not identified in the PDS.

[9] The Underwriting Agreement is dated 28 May 2008. MCAL is the underwriter. In summary, BCM as responsible entity of the trusts agreed:

- to conduct the calls for the second and final instalments as indicated in the PDS and not defer the payment of the calls without the consent of each underwriter;
- not to vary the constitutions or permit them to be varied without the prior written consent of the underwriters.

[10] The IPO Equity Bridge is dated 2 June 2008. MBL, the lender, to date has advanced approximately $324 million under it. In summary, BCM as Responsible Entity of the trusts agreed:

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[1] [2009] VSC 128

- to conduct the calls for the second and final instalments as indicated in the PDS, not to vary the calls or extend the call payment dates and to apply the proceeds towards repayment of the debt;
- not to vary the constitutions without consent;
- not to cease or materially change its business or do or permit anything to be done which would entitle termination of the Underwriting Agreement or the IPO Equity Bridge;
- to provide for various Events of Default, including the winding up of the trusts.

[11] The stapled units commenced official quotation on the ASX on 30 July 2008.

[12] In November 2008 ASI became a substantial unit holder in the trusts. It holds a little less than 20% of the units.

[13] On about 12 February 2009, ASI requisitioned BCM under s 252B of the *Corporations Act* 2001 (Cwth) (***The Corporations Act***) to call a meeting of members to consider and vote on a special resolution to wind up the trusts.

[14] On about 20 February 2009, ASI requisitioned BCM to call further a meeting of members to consider and vote on six further resolutions in the event the winding up resolution is not passed. The resolutions propose amendments to the constitutions without the consent of MCAL or MBL.

[15] To avoid confusion, with resolution 1 of the first requisition I will refer to the resolutions in the second requisition as if they were numbered from resolution 2.

[16] Resolution 2 seeks by special resolution to amend the constitution of the trusts to include a clause 9.4A requiring payment of a dividend referred to in the PDS but subsequently deferred.

[17] Resolution 3 seeks by special resolution to amend the constitution of the trusts to require BCM to exercise its power to defer or cancel calls for the second or final instalments at the direction of the unit holders expressed by resolution.

[18] Resolution 4 is a direction to BCM to defer the first call until January 2010.

[19] Resolution 5 seeks by special resolution to amend the constitutions to deprive BCM of the power to ignore constitutional obligations, compliance with which would result in BCM being in breach the Underwriting Agreement and the IPO Equity Bridge.

[20] Resolution 6 seeks the removal of BCM as Responsible Entity. The significance of this resolution is that under s 601NE (1)(d) of the *Corporations Act*, the removal of the existing Responsible Entity without a replacement Responsible Entity being appointed at the same meeting results in an automatic winding up of the scheme.

[21] Resolution 7 seeks the appointment of a new Responsible Entity but without any alternative nominated.

[22] The validity of the resolutions, if passed, was not in issue in the present proceedings.

[23] BCM called for the payment of the second instalment on 2 March 2009. It is due to be paid on 29 April 2009.

[24] The next day (3 March 2009) BCM commenced proceedings in the Supreme Court of Victoria seeking, *inter alia*, orders declaring that ASI's requisitions were invalid and that it was not required to call the requested meeting. At the same time BCM commenced proceedings to wind up ASI.

[25] Pursuant to s 252B of the *Corporations Act*, BCM had issued a notice of meeting to be held on 9 April 2009 in Brisbane to consider the resolution to wind up the scheme. Pursuant to s 252C of the *Corporations Act*, ASI had issued a notice of meeting to be held on 14 April 2009 in Melbourne to consider the six further resolutions. The notice of meeting issued by ASI was accompanied by a statement revealing a principal purpose of the resolutions is to defer the obligation to pay the second instalment.

[26] The Victorian proceedings were heard over a period of time and were dismissed on 3 April 2009. Consequent upon the dismissal of the proceedings, the meetings scheduled for 9 and 14 April 2009 have been adjourned by the Court to a date to be fixed subject to BCM undertaking to call a new meeting on 14 April 2009 in Brisbane to consider the same 7 resolutions. That is the meeting due to commence later this morning.

[27] Both the Underwriting Agreement and the IPO Equity Bridge were entered into before the initial public offering of units in the scheme. The existence of both is acknowledged in the constitutions of the trusts, which authorise BCM to enter into them.

[28] Both the Underwriting Agreement and the IPO Equity Bridge are designed to provide finance for the initial stages of the scheme. The IPO Equity Bridge provides bridging finance until unit holders pay the balance of the purchase price for their units.

Inability to put BCM in breach of contract

[29] In *Re Australian Style Investments Pty Ltd, supra* Robson J determined that each of the resolutions proposed could be put to the meeting. Of course, the present plaintiffs were not parties to that action. In any event, the arguments advanced before me do not seek to contradict anything determined by Robson J. The present plaintiffs are seeking to enjoin potential breaches of contract by BCM and to prevent ASI from voting at the meeting and thereby knowingly causing BCM to breach its contracts with MBL and MCAL. It is thus unnecessary to determine an argument advanced on behalf of ASI that the decision of Robson J was a decision *in rem* insofar as it concerned the validity of the resolutions.

[30] It was submitted by the plaintiffs that the statutory power contained in s 601GC of the *Corporations Act* to amend the constitutions of the trusts by special resolution did not apply where the amendments would result in the first defendant being in breach of its contracts with MBL and MCAL. It was further submitted that an injunction could be granted to restrain those breaches.

[31] Reliance was placed on the dicta of Lord Porter in *Southern Foundries (1926) Ltd v Shirlaw*[2]. At 739, Lord Porter said:

> "However this may be, in my view, unless the articles were altered the company, except in certain specified cases could not dismiss the respondent nor the respondent leave the company for ten years without being liable to be sued for breach of contract. This was, in my view the position when the contract was entered into. What then was the effect of the arrangement with the Federated company and the alteration of the articles? It is common ground and indeed long-established law that a company cannot forgo its right to alter its articles, but it does not follow that the alteration may not result in a breach of contract."

[32] Further, after referring to *Allen v Gold Reefs of West Africa*[3] Lord Porter continued at 740-741:

> "The general principle therefore may, I think, be thus stated. A company cannot be precluded from altering its articles, thereby giving itself power to act upon the provisions of the altered articles – but so to act may nevertheless be breach of contract if it is contrary to a stipulation in a contract validly made before the alteration.
>
> Nor can an injunction be granted to prevent the adoption of the new articles and in that sense they are binding on all and sundry, but for the company to act upon them will nonetheless render it liable in damages if such is contrary to the previous engagements of the company. If, therefore, the altered articles had provided for the dismissal without notice of a managing director previously appointed, the dismissal would be intra vires the company but would nevertheless expose the company to an action for damages if the appointment had been for a term of (say) ten years and he were dismissed in less."

[33] For the purposes of the present hearing, it was accepted by the plaintiffs that if the resolutions were passed, BMC would have to give effect to them and that they would be limited to claims in damages against BMC as trustee of the trusts. For this reason, it was submitted that an injunction should lie in advance of the meeting preventing the trustee being placed in that position.

[34] Reference was made to *Turner v Berner*[4], *Queensland Press Limited v Academy Investment No 3 Pty Ltd*[5] and *Windsor v National Mutual Life Association of Australasia Limited.*[6] These decisions were all examples of the application of the principle discussed in *Isle of Wight Railway Co v Tahourdin*[7] where (at 334) Fry LJ said:

> "If the object of a requisition to call a meeting were such that in no manner and by no machinery could it be legally carried into effect, the directors

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[2] [1940] AC 701 at 739-741
[3] [1900] 1 Ch 656
[4] [1978]1 NSWLR 66
[5] [1988] 2 Qd R 575 at 578
[6] (1992) 34 FCR 580 at 590-591.
[7] (1883) 25 Ch D 320

> would be justified in refusing to act upon it. But if the object stated in the requisition be such that by any form of resolution or by any machinery sanctioned by the Act it can be carried into effect, then it is the bounden duty of the directors to call the meeting."

[35] I am not satisfied that such a principle can be stretched to encompass a resolution, the passing of which would render the trustee in breach of a contract previously entered into and which might give rise to a claim for damages.

[36] Stronger support for the plaintiffs position can be derived from a decision of Scott J in *Cumbrian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co Ltd*[8] where, citing the passage from Lord Porter set out above he said:

> "First, it is, in my view, as I have already stated, well-established that a company cannot, by contract, deprive its members of their rights to alter the articles by special resolution … Second, if a company does contract that its articles will not be altered, nonetheless its members are entitled to requisition a meeting and pass a special resolution altering the articles. Third, if the articles are validly altered, the company cannot be prevented from acting on the altered articles, even though so to act may involve it in breach of its contract … Fourth, where a company has contracted that its articles will not be altered, I can see no reason why it should not, in a suitable case, be injuncted from initiating the calling of a general meeting with a view to the alteration of its articles. But the injunction could not, in my view, be properly granted so as to prevent the company from discharging its statutory duties in respect of convening of meetings."

[37] The qualification on the propriety of granting an injunction is, in my view, a proper one. Where unit holders have a statutory right under s 252B to requisition a meeting and have resolutions put and voted on, it would only be in extraordinary cases, such as those described in *Tarhourdin*, that a Court could or should intervene to interfere with the respective statutory rights and obligations of the members and the company.

[38] In my opinion, the principles relied upon do not support the relief the plaintiffs seek in this case.

[39] There appears to be no reason to distinguish between the principles as they apply to shareholders in a company and unit holders in a unit trust in relation to these matters. A similar observation was made by Beech J in Victoria in *Tauman v Corporate West Management.*[9] Applying the principles to the position of a unit trust rather than to shareholders in a company, the contracts entered into by BMC with the plaintiffs do not deprive the unit holders of the rights given to them by s 601GC(1) of the Corporations Act or by clause 22.1 of the constitutions to vary the constitutions of the trusts. Neither does the contract between BCM and the plaintiffs prevent the requisitioning of a meeting or the unit holders voting on the resolutions. If an amending resolution is passed, the trustee must act in accordance with the constitution as amended or modified.

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[8] [1987] 1 Ch 1 at 24

[9] unreported – VSC - 17/3/1988

[40] The limitation on the right to an injunction identified by Scott J is that the injunction must not prevent the company discharging its statutory obligations. In this case, that obligation is the obligation under s 252B of the *Corporations Act* to call a meeting when properly requisitioned and to put the special or extraordinary resolutions proposed in the requisition.

[41] This limitation covers the special resolution to wind up the trusts contained in the requisition dated 12 February 2009 and resolutions 2, 3 and 5 of the requisition dated 20 February 2009.

[42] Since the first defendant has a statutory obligation to call the meeting and to permit the special and extraordinary resolutions to be put and voted upon, I am not persuaded that an injunction lies to restrain the first defendant from allowing unit holders to vote on those resolutions. For the same reason I do not consider that specific performance can be granted of the negative covenant in The Underwriting Agreement and the IPO Equity Bridge not to amend the constitution without consent.

[43] Resolutions 4, 6 and 7 are proposed as ordinary resolutions. Whether an injunction lies to restrain a vote upon these resolutions at the meeting requires further consideration.

[44] In the case of resolutions 6 and 7, s 252L of the *Corporations Act* requires the putting of ordinary resolutions to remove a Responsible Entity or appoint a new Responsible Entity at a meeting of the scheme members subject to formal requirements of the notice, which do not concern me here. The same statutory obligation to have the resolutions put and voted on as exists in the case of the special resolutions exists in relation to resolutions 6 and 7.

[45] Although conditional on the passing of resolution 3, resolution 4 defers payment of the first call until January 2010. While it has no express statutory recognition the compelling reason not to enjoin the first defendant from allowing the resolution to be voted on is that the first defendant is not doing so voluntarily but pursuant to an undertaking given to the Supreme Court in Victoria extracted as the price of adjourning the originally requisitioned meetings in Brisbane and Melbourne and consolidating them into a single meeting in Brisbane. The injunctions contemplated by Scott J and by the line of cases following *Tarhourdin* are against the company, in the present context, BCM. Unless the unit holders themselves can be restrained, it is not appropriate to grant an injunction the practical effect of which is to relieve BCM from an undertaking given to a court of equivalent jurisdiction to this one.

Tortious interference with contractual relations

[46] The plaintiffs submit that an injunction should issue restraining ASI from interfering with the first defendant's contractual arrangements with MCAL and MBL.

[47] The principles on which such an injunction might be granted have been the subject of discussion in the High Court in *Zhu v Treasurer of the State of New South Wales*[10]. The existence of a right to an injunction to restrain another's tortious

[10] (2004) 218 CLR 530

interference in contractual rights can be traced back to the decision in *Lumley v Gye*[11].

[48] In *Zhu* at 575 in the joint judgment, the following passage appears:

> "[129] A fourth factor suggesting that the plaintiff's right to contractual performance from another contracting party is protectable against third parties in a quasi-proprietary manner is the nature of injunctive relief. In days when lawyers insisted more commonly than they do now that, negative covenants apart, injunctions could not be granted in the auxiliary jurisdiction of equity unless in aid of a proprietary right, it was common for injunctions, interlocutory and final, to be granted against interference with contract…"

[49] ASI does not dispute the principle. Rather, it relies on the absence of knowledge of the plaintiffs' contractual rights or, alternatively, justification for its conduct in requisitioning meetings, moving resolutions and voting in favour of those resolutions, knowing that a favourable outcome will place BCM in breach of its contracts with MCAL and MBL.

[50] The issue of knowledge is easily disposed of. It can be accepted for present purposes that ASI has not been shown to have had access to a copy of the Underwriting Agreement or the IPO Equity Bridge at the time it requisitioned the meetings. Nonetheless, it was well aware that the effect of the resolutions, particularly of resolution 4, was to put BCM in breach of its contractual obligations with MBL. The statement accompanying the requisition for the second meeting states of resolution 4:

> "Resolution 4, if passed, will remove BCM's ability to prevent Members passing valid resolutions which serve the best interests of Members where those resolutions put BCM in breach of agreements with third parties … BCM will simply be able to say to Members that it can't give effect to the wishes of those Members because of agreements that were put in place before Units were allotted to, or acquired by, members."

[51] It therefore remains to consider whether ASI's conduct can be justified.

[52] What is required to justify conduct that would otherwise be a tortious interference with another's contractual right is the protection of a superior right.

[53] In *Zhu*, the discussion of the nature of justification from 578 is illuminating:

> "[138] *Independent Oil Industries Ltd v Shell Co of Australia Ltd* does, however, contain a valuable analysis of the defence of justification which has been much neglected by both judge and jurist. Jordan CJ (Long Innes CJ in Eq and Davidson J concurring) cited Lord Lindley's reference to 'cases in which a person, whose rights will be violated if a contract is performed, is justified in endeavouring to procure a breach of such contract'. Jordan CJ said justification in that sense rested on the principle that 'an act which would in itself be wrongful as infringing some legal right of another person may be justified if shown to be no more than reasonably necessary for the protection of some actually existing superior legal right in the doer of the act' … [139]

[11] (1853) 2 El & Bl 216 at 227 (118 ER 749 at 753)

> It appears to follow that by 'actually existing superior legal right' Jordan CJ meant a right in real or personal property, not merely a right to contractual performance. The former type of right may be seen as superior to the latter because the former is proprietary, while the latter is at most quasi-proprietary, in the sense which Kitto J appeared to be employing. Two competing rights to contractual performance involving no proprietary right would be equal rights, neither being superior to the other; but Jordan CJ did not mention the protection of an equal right as a form of justification … [144] In short, Jordan CJ's reference to the statements of Buckley LJ and Darling J supports the view that an 'actually existing superior legal right' is required, and that such superiority is not established by priority between merely contractual rights. Superiority is conferred by the proprietary nature of the right, or as in *James v The Commonwealth*[12], must be found in statute."

[54] In this case the superior right relied upon is the right afforded by ss 252B and 252L of the *Corporations Act* to exercise control over the actions of the responsible entity by resort to the members in general meeting. As a statutory right given to a member of a managed investment scheme, this right is superior to the quasi-proprietary rights MCAL and MBL have to the enforcement of their contractual rights. To the extent that ASI has a statutory entitlement to act in the manner it has and proposes to, an injunction does not lie at the suit of MCAL or MBL to prevent it. Again, for the reasons already discussed, the right to requisition a meeting and have resolutions put and voted on (with the exception of resolution 4) is statutory.

[55] In relation to resolution 4, the only right ASI has to vote in favour of a position that might cause BCM to breach its contracts with the first and second plaintiffs is its right under the constitution to vote on a resolution directing BMC in relation to the cancellation or deferral of a call for payment of an instalment. This right only arises on the passing of resolution 3 and is in the nature of a contractual right. As such, it is equal to, but not superior to, the rights of the plaintiffs. Whether an injunction will lie to prevent ASI voting on the resolution will depend on discretionary factors.

Subrogation

[56] Anticipating the difficulties the *Corporations Act* posed for the relief claimed, the plaintiffs sought to establish a separate contractual obligation on ASI to maintain the integrity of the scheme set up and described in the PDS.

[57] As drafted, the making of an application for units in the scheme constituted an agreement to be bound by "the constitutions of the BrisConnections Investment Trust and BrisConnections Holding Trust and the terms and conditions of the offer."

[58] The plaintiffs submitted that the acknowledgment that the applicant for units was bound by the conditions of the offer resulted in the PDS taking effect as a contract between the applicant and BCM (**PDS Contract**) which could be enforced by the plaintiffs pursuant to a right of subrogation to the rights of BCM against unit holders. Even though ASI was not an original applicant for units, regulations 7.11.15 or 7.11.27 of the *Corporations Regulations* bind ASI to the same contractual provisions which bound the transferor at the time of transfer. It is

[12] (1939) 62 CLR 339 at 373

unnecessary to identify whether the units in this case are Division 3 assets or Division 4 assets.

[59] I am not satisfied that there is any PDS Contract.

[60] The PDS is not in the nature of a contractual document. It comprises a description of the proposed scheme, an identification of risks for investors who choose to apply for units, identification of benefits to unit holders from the scheme and provides answers to questions potential investors might wish to ask about the scheme.

[61] The PDS is referred to as such in a number of places in the application form itself. If the reference in the acknowledgement to being bound by the terms of the offer was meant to be a reference to the PDS, it follows that it would have said so. In other words, the investor would acknowledge being bound by the PDS and the constitutions. That is not what the form says. I can see no reason to conclude that the words "PDS" and "terms of the offer" are interchangeable.

[62] On the evidence before me, the terms of the offer, insofar as they are not to be found in the constitutions of the trust, are limited to the acknowledgements and obligations contained in the application itself. None of these are presently relevant. Therefore, the only relevant contract for present purposes is the contract contained in the constitutions. This is consistent with s 601GB of the *Corporations Act*, which requires the constitution of a registered scheme to be contained in a document which is legally enforceable as between the members and the Responsible Entity.

[63] Clause 2.1 of the constitutions identifies the terms of the constitutions as governing the trusts on which the trust property is held. Little room is left for the imposition of any other contract between the members and the Responsible Entity.

[64] The constitutions themselves contain a number of relevant provisions:

- (by clause 4.6) the date for payment of instalments may be revoked or postponed by the manager.
- (by clause 12.2) the manager must retire as manager of the trust when required by law.
- (by clause 15.18) resolutions passed by members are binding on all unit holders.
- (by clause 22.1) the constitution may be amended by resolution passed at a meeting of members.
- (by clause 32.1) the winding up commencement date is the date determined by the members by special resolution

[65] Thus, it seems to me that the proposed resolutions cannot constitute a breach of the contract, if it is properly so described, between the ASI and BCM. All the resolutions are within the contemplation of the constitutions of the trusts. The consequences of them putting BCM in breach of its contracts with the plaintiffs are determined in accordance with the principles I have already discussed under the heading "inability to put BCM in breach of contract".

[66] The plaintiffs claim, as creditors, a right to be subrogated to the rights of the trustee against the members of the trusts. That such a right exists in relation to the trustee's claim to an indemnity out of trust assets cannot be doubted: see *Ron Kingham Real Estate v Edgar*[13] at 443. It is more doubtful whether it exists as a separate basis to enable the creditor to obtain an injunction restraining conduct by a beneficiary, which will put the trustee in breach of contract. In any event, having regard to the terms of the constitutions, the decision of Robson J and the undertaking given to the Supreme Court in Victoria, BCM has no right to restrain the conduct to which right the plaintiffs could be subrogated.

[67] Having dealt with what I understand to be the principal arguments advanced by the plaintiffs, I am left in the position where an injunction may be available as a remedy only in relation to resolution 4. It is thus necessary to consider discretionary grounds in relation to whether an injunction should lie in relation to that resolution.

Does a winding up of the scheme relieve unit holders of the obligation to pay the unpaid instalments?

[68] Senior counsel for Deutsche Bank submitted that I should not express any view as to whether unit holders would be required to pay the second and final instalments of the purchase price of their units in the event that the scheme was would up. It seems to me, however, to be relevant to the discretion whether or not to grant equitable relief, to consider what assets are available to discharge the scheme debts in the event the scheme is wound up.

[69] Whether, even if an injunction lay to prevent the putting of and voting on any of the resolutions, an injunction should be refused, may not only depend on whether damages would be an adequate remedy in the abstract sense. It may depend to at least some degree on the likelihood of any damages being paid.[14]

[70] In relation to this issue, senior counsel for the plaintiffs submitted that an examination of the accounts of the trusts shows a deficiency of assets from which to meet existing liabilities in the absence of an ability to make the call for the payment of the second and third instalments.

[71] While the reliability of the accounts for this purpose has been called into question, the challenge was to the overstatement of the liabilities rather than to their understatement. What is apparent is that if the second instalment was paid, BCM would have sufficient current assets in the trusts to discharge all of its liabilities other than something described in the notes to the accounts as "non current value of derivative liability". No attempt was made by the plaintiffs to explain the nature of this liability or to indicate whether it would continue to exist after the repayment of borrowings and termination of the scheme. It appears to relate to hedging risks. I infer from the failure to address the item that it is in the nature of a provision against a contingent liability and would not in fact require payment if MBL is repaid and the trusts would up.

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[13] [1999] 2 Qd R 439

[14] cf. *Associated Portland CementManufacturers Ltd v Teigland Shipping AIS ("The Oakworth")* [1975] 1 Lloyd's Rep 581 at 583*; Anders Utkilens Rederi AIS v OIY Lorisa Stevedoring Co AIB* [1985] 2 All ER 669 at 674.

[72] I accept that the second instalment, or a substantial part of it, is required to meet BCM's obligations. I do not accept BCM will be deprived of access to the second instalment in the context of a winding up resolution being passed at the meeting today.

[73] The only arguments advanced by any party as to why unit holders would cease to be required to pay the second instalment, were that it was excluded from the definition of assets in the constitutions of the trusts or that the amount might not be needed at all.

[74] Since, prima facie, any surplus after meeting the responsible entity's obligations must be distributed to the unit holders, unit holders might be entitled to the return of some part of the capital contributed. That conclusion does not detract from the obligation of the unit holders to meet the call or from the responsible entity's right to enforce payment against the unit holders personally. There was a suggestion from the bar table that there were other agreements which might prevent the return of surplus assets to the unit holders but no such agreement was put before me despite my indication that this was a relevant issue in the proceedings. In any case, it can hardly be a reason to deprive the scheme of a valuable asset otherwise available in a winding up that it might turn out to be surplus to requirements.

[75] The argument concerning the definition of assets in the constitutions has no merit. "Assets" are defined clause 32.1 of the constitutions as meaning:

> "… all the property, rights and income of the trust, <u>but not application money or property in respect of which Units have not yet been issued</u>, proceeds of redemption which have not yet been paid or any amount in the distribution account." (my underlining)

[76] Clause 21.1 of the constitutions dealing with winding up requires the manager to "sell, collect, call in and realise the Assets of the trust."

[77] The argument that unpaid instalments for which a call has been made and in relation to which the time for payment would pass during the winding up period depends upon reading the definition of assets as if the word "or" was deleted and a comma placed between "money" and "property" in the underlined portion of the definition. To do that is to torture beyond endurance an otherwise plain English sentence. It seems to me to be abundantly clear that what is intended to be excluded from the definition of assets is anything by way of consideration for units which have not yet issued. The rights of investors depend upon the holding of units (eg see clause 3.2). Such rights accrue on the issue of the units, rather than on the payment of the initial instalment. The intending investor pays the application fee when applying for units, but until the application is accepted by the issuing of units, the application fee cannot be included in the trust assets.

[78] No other issue being raised in relation to it, I am satisfied that the right to payment of the second instalment or final instalment is not lost or defeated by reason of any winding up of the scheme or the trusts.

[79] Unpaid instalments of the purchase price of units remain an asset of the trusts, which can be called upon in the winding up. This is clear from clause 18.1 of the constitutions which provides that:

> "(a) Subject to articles 18.2 and 18.3 the liability of a Member is limited to the amount if any which remains unpaid in relation to the Member's subscription for their units."

[80] I can see no reason why either remaining instalment is not an asset of the trust available in the winding up.

[81] I am therefore satisfied that BCM's right of indemnity against trust assets is valuable and, in all probability, sufficient to meet BCM's obligations to MBL.

Damages an adequate remedy

[82] It was conceded by senior counsel for the plaintiffs that only MBL has any material risk of damage to its interests by the passing of the resolutions beyond the loss of the potential profit from participating in the investment.

[83] Neither MBL nor MCAL has demonstrated any interest in the completion of the project itself. They are merely a lender and an underwriter for specific transactions.

[84] Despite this, it is far from clear that specific performance or an injunction is not available as a remedy in an appropriate case.

[85] In Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies*, 4th ed, 2002, Lexis Nexis at [20-050] the authors, discussing the availability of specific performance in relation to a contract to lend said:

> "The authorities in this field are founded not upon philosophical objection to ordering the mere payment of money but upon the proposition that damages are an adequate remedy; if it will be extremely difficult, albeit not impossible, to assess damages with reasonable accuracy, so that it would be an unjust imposition to leave the plaintiff to the remedy at law, specific performance may be decreed of an agreement to lend money … In *Corpers (No 664) Pty Ltd v NZI Scurities Australia Ltd* (1989) ANZ Conv R 548 at 556 Young J said that while ordinarily specific performance would not be granted, it might be where 'special factors' existed: he instanced 'the case where an agreement is fully performed on one side' and 'where the plaintiff's whole enterprise will be lost if the defendant does not fulfil its promise.'"

[86] This is hardly one of those cases where 'special factors' exist. The measure of MBL's damages is the same as the amount advanced and any interest or charges on that amount. Since it has no interest in BCM's business, the failure of that business will affect MBL only to the extent that it makes recovery of the loan more difficult.

[87] MCAL's position is not materially different from that of MBL.

[88] ACN's interest is the same as that of any other unit holder. It is limited to an interest in BCM acting in accordance with the *Corporations* Act and the constitutions of the trusts and to its right to vote with other unit holders in general meeting.

[89] It follows that if damages are an adequate remedy, they are adequate, not only for any breach of contract by BCM, but also for the consequences of any interference by ACI in the contracts between BCM, MBL and MCAL. The adequacy of

damages as a remedy where the only right is the receipt of money does not necessarily depend on the capacity of the defendant to pay, but might depend solely on the ability of the Court to accurately assess damages. Despite this, it is obviously material whether there are likely to be sufficient funds available to pay that to which MBL is entitled, particularly where the second and final instalments are in the nature of security for repayment[15]. If the likelihood is that MBL will be repaid what it is owed whatever the outcome of the meeting, the discretionary arguments against granting the injunction are strengthened.

[90] Senior counsel for the plaintiffs was unable to identify any loss MCAL would suffer by reason of the resolutions being passed. If unit holders were not required to pay the unpaid instalments, MCAL would not be required to meet any underwriting commitment. Any equitable relief in the nature of declarations, injunctions or specific performance is thus only in aid of the recovery of money lent by MBL.

[91] MBL is a lender. Upon an event of default it would be entitled to make demand for repayment of the amount advanced. Its potential loss is thus limited to the risk of not being repaid

[92] The real risk to MBL is if the date for payment of the second instalment is postponed. In that circumstance BCM will not be able to repay the loan as early as was anticipated.

[93] If resolution 3 is passed, the unit holders will be entitled to direct BCM to defer the payment of the second instalment instalment. If resolution 3 or 4 is passed, MBL has the option of terminating the IPO Equity Bridge under clause 19. Absent an ability on the part of BCM to make a call on members for the unpaid instalments, if MBL chose to call up its loan, the scheme would be likely to be insolvent. In those circumstances, even if the scheme is not wound up as a result of the passing of resolution 1 or 6, it is probable that the court would order the winding up of the scheme under s 601ND of the *Corporations Act.* For the reasons I have indicated, I am satisfied that the unpaid instalments would constitute assets in the winding up that the entity conducting the winding up could pursue.

[94] Taking all of the above considerations into account, in the exercise of my discretion, I refuse to order specific performance of the Underwriting Agreement or the IPO Equity Bridge in the respects sought or to restrain BCM or ASI from proceeding with the meeting and respectively putting and voting upon the resolutions.

The effect of clause 11.3 of the constitution on a resolution to wind up

[95] The plaintiffs seek a declaration that, in the event of a resolution for the winding up of the trust being passed, clause 11.3 of the constitutions entitles BCM to refuse to give effect to that winding up.

[96] Clause 11.3 provides:

> "… Subject to the *Corporations Act,* the Manager shall not be obliged to perform any obligation under this constitution if it would result in:
>
> (a) …

[15] See *Anders Utkilens Rederi AIS v OIY Lorisa Stevedoring Co AIB* [1985] 2 All ER 669 at 674.

(b) a breach by the Manager of an obligation under any of the transaction documents; or

(c) the occurrence of an event of default under any of the transaction documents."

[97] Transaction documents are defined to include the Underwriting Agreement and the IPO Equity Bridge.

[98] Once a resolution for winding up has been passed or the Responsible Entity has been removed by a resolution of the members without a replacement having been appointed, the Responsible Entity is directed by s 601NE of the *Corporations Act* to wind up the scheme. Since this is a requirement of the legislation, it overrides the power given by the trust constitutions to decline to perform an obligation if it would place BCM in breach of its obligations under the Underwriting Agreement or the IPO Equity Bridge. In the event of a winding up, either by a special resolution or in default of the appointment of a new Responsible Entity, BCM must wind up the scheme.

Counterclaim of Second Defendant

[99] I turn now to consider that part of the second defendant's counterclaim described by senior counsel for the second defendant as the "fraud on a power argument".

[100] The argument advanced in support of this claim was that to the extent that the Underwriting Agreement or the IPO Equity Bridge abrogated the second defendant's statutory rights or rights under the constitutions to propose and vote on resolutions, the entry into those agreements by BCM was contrary to the interests of members and thus a fraud on the power.[16]

[101] There are two short answers to this submission. First, the only resolution in relation to which I have not found the members' rights to vote take precedence is resolution 4. As there is no competing statutory right of members to defer the calls or any right to that effect in the existing constitutions, the entry into of the agreements cannot be said to be a fraud on the power in the way submitted.

[102] Second, the constitutions, by clause 11.3, expressly authorise BCM to enter into the Underwriting Agreement and the IPO Equity Bridge. No authority has been cited that supports the submission that it can be a fraud on the power to enter into a transaction, which the trust deed expressly authorises.

Orders

[103] That part of ASI's counterclaim which relies on BCM committing a fraud on the power by entering into the Underwriting Agreement and the IPO Equity Bridge is dismissed.

[104] The counterclaim for damages was ordered to be tried separately from the present proceedings.

[105] For the reasons I have set out, I order that the plaintiffs' claims numbered 1, 8 and 11 in the further amended claim be dismissed.

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[16] Austin, Ramsay, *Ford's Principles of Corporation Law*, 13th ed, 2007, Lexis Nexis at paragraph [8.200]

[106] I adjourn the hearing of the balance of the plaintiffs' claims and the second defendant's counterclaim to a date to be fixed.