

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MCMURDO J

No 8999 of 2008

AUSTRALIAN SECURITIES AND INVESTMENTS Applicant
COMMISSION

and

WELLINGTON INVESTMENT MANAGEMENT First Respondent
LIMITED (ACN 101 634 146)

and

PREMIUM INCOME FUND (ACN 090 687 577) Second Respondent

BRISBANE

..DATE 17/09/2008

ORDER

HIS HONOUR: This is an application by the Australian Securities and Investments Commission to restrain the proposed business or some of the proposed business of a meeting to take place tomorrow, 18 September 2008.

1

That is to be a meeting of unit holders in the so called Premium Income Fund. The responsible entity of that fund is the respondent to this application, Wellington Investment Management Ltd. In essence the applicant's case is that in several respects the material which has been sent to unit holders for the purposes of tomorrow's meeting is misleading and deceptive or likely to mislead or deceive.

10

20

ASIC filed an originating application on the 11th of September returnable today. According to that application the relief to have been sought today was final relief to restrain the respondent from proceeding with the business of certain resolutions. This morning when the hearing commenced I allowed ASIC to file and read an interlocutory application which sought effectively the same result.

30

40

In the course of these reasons I shall return to why it was that ASIC changed course in that way. Ultimately, however, the question has become whether ASIC has demonstrated a case that the material is misleading or deceptive in certain respects and the conclusion I have reached is one I would reach on a final application.

50

It is necessary to say something by way of a brief summary of the circumstances that have led to tomorrow's meeting. The fund was originally a creature of the failed MFS Group, now known as the Octaviar Group. The present respondent was a company which was originally a member of that group but is now the subject of different ownership. The respondent is, or claims to be, a very substantial creditor of the Octaviar Group, but on any view the fund has experienced difficulties. In particular the respondent has had to exercise a right under the constitution of the fund to postpone the date for redemption of units. As matters presently stand the postponed date is in March 2009.

1

10

20

In broad terms what is proposed by this meeting is that the constitution of the fund would be changed in several respects with the objective of the fund continuing to trade as a going concern for a period in the vicinity of three to five years. The purpose of that is to return to unit holders far more than they would be likely to receive on effectively a winding up of the fund by the redemption of units in March next year. In broad terms the comparison is between an estimated 14 cents per unit in the event of a redemption in March of next year and about 45 cents in the event that the fund continues to trade, is able to conduct an orderly realisation of assets and otherwise is able to conduct its affairs over the next three to five years.

30

40

50

The respondent sent to unit holders a notice of this meeting which was accompanied by extensive documentation which set out

what was proposed. That documentation included an explanatory memorandum. Before going to that I should note that the notice of meeting itself is said to be irregular and I shall return to those suggested irregularities. But the matters most strongly argued for ASIC are the respects in which ASIC says that the explanatory memorandum is misleading or deceptive or likely to mislead or deceive.

1

10

The notice of meeting stated that the meeting has been called by the respondent for three purposes. The first is to propose a special resolution for the approval of amendments to the constitution. The second is to propose an ordinary resolution by which unit holders, it is said, would authorise and approve an off market unit buy back of units on terms set out in the explanatory memorandum. The third is so that the respondent might retire as the responsible entity of the fund and be replaced by its parent company, Wellington Capital Limited. The notice, as I have said, then referred to the explanatory memorandum to which I now turn.

20

30

On page 3 of that document there is a heading, "The three resolutions and profile of the fund at a glance." The three resolutions are there summarised.

40

The matters which appear next to that description which are the subject of ASIC's complaint, are these matters, "Up to 37.75 million units in the fund will be redeemed by the fund at 45 cents per unit by 18 September 2009", and "Cash payments totalling 3 cents per unit will be made to unit holders by 24

50

December 2008 and quarterly thereafter, with the first payment to be made in October 2008."

1

Two pages on there is a letter from the Chairperson of the respondent, Ms Hudson. It is a one page letter which is a summary of what is proposed. According to that letter, if all three resolutions are approved at the meeting, the fund will have what are said to be "the following features". There are then set out certain features. One of those relevant to the present case is the matter of the buy-back or redemption of up to 37.75 million units at 45 cents per unit. Another is the matter of "cash payments totalling 3 cents per unit" which the letter said "will be made by 24 December 2008 with the first payment to be made in October 2008, the second in December 2008" after which appear the words "and quarterly thereafter".

10

20

30

Another feature referred to in the letter is that a so-called investor advisory committee "will be" elected by unit holders and that that committee "will liaise" directly with Wellington in relation to unit holders' issues.

40

There are then within the pages that follow in the explanatory memorandum, further references to these features and others. Also within the explanatory memorandum is an explanation of the proposed amendments to the constitution. Numerous amendments are proposed. It is unnecessary here to discuss all of them. What is set out in the explanatory memorandum is a description of the effect of the proposed amendment in each case.

50

As I understand the case for ASIC there is no particular complaint as to the paraphrasing of the effect of each of these amendments. It is argued, however, that there is some deficiency in the explanatory memorandum when another document is considered which is the presently available version of the current constitution. To explain that, the explanatory memorandum informed unit holders that they could look at the entire constitution on line or by asking for a hard copy to be sent. Relatively few unit holders have taken up that offer. It is said that the present constitution is in some respects difficult to understand and to marry with the proposed amendments, so that there would be some confusion on the part of unit holders in attempting to do so. I am not persuaded about that matter. It seems to me that the proposed amendments to the constitution are sufficiently and unambiguously described within the explanatory memorandum.

10

20

30

I come now to what is one of the principal arguments for ASIC. In essence it is that the respondent has represented that if the proposed resolutions are passed at the meeting, unit holders will have a legal entitlement to certain things, when in truth that will not be the legal result of the passing of those resolutions.

40

The argument focuses upon three matters in particular. First it is said that the material represents that if the resolutions are passed, unit holders will have an entitlement to receive certain payments and, in particular, certain

50

quarterly payments as well as certain payments by Christmas 2008, when the true position is that there will be no entitlement to such payments but at the most there is an intention on the part of the respondent to make those payments.

1

10

In the same way it is argued that the material represents that if the resolutions are passed, unit holders will receive an offer for the buy-back of up to 37.75 million units at 45 cents per unit when again this would not be the legal consequence of these resolutions. Rather, again, the matter would then be a decision for the respondent rather than something which the respondent was obliged to provide to unit holders.

20

30

Thirdly, and in the same way, it is said that the material represents that the passing of these resolutions would give rise to some legal obligation on the respondent to establish the so-called investor advisory committee, when again that would not be the legal consequence of the resolutions.

40

There is the same point involved for each of these matters and it is whether the material does bear that meaning. In my view it does not. In my view unit holders should not understand the material to represent that the passing of the resolutions would have the result of giving a legal entitlement to those interim payments, a buy-back of units or the establishment of the investor advisory committee.

50

Having regard to the material as a whole, but giving weight to that part of the material which was most prominently presented to unit holders, it should be understood, as has been argued for the respondent, as indicating what the respondent proposes to do, facilitated by amendments to the constitution to be made by the proposed resolutions and facilitated also by, for example, the terms of the resolution for the buy-back.

I come now to further arguments in relation to particular components of this package as it has been presented in the explanatory memorandum.

Firstly I will discuss the complaint in relation to what has been put forward in this material about fees to be paid to the respondent or its successor as the responsible entity. This material proposes two relevant changes to such fees. The first is that the responsible entity would be paid per annum a management fee equivalent of .7 of one per cent of the funds under management. That would be a fee to which the entity would be entitled to be paid on a monthly basis. The material, and in particular the chairperson's letter, represents that this management fee would not be paid to the entity until after "the 3 per cent cash payment has been made to unit holders". That is a reference to payments totalling 3 cents per unit to be made by 24 December 2008. However, if the constitution is amended as proposed, there would be no limitation by the constitution which postponed the entity's entitlement to the management fee paid monthly until after payment of that 3 cents per unit. Recognising this, the

respondent offers an undertaking, the effect of which is that
it would not claim the management fee until after those cash
payments totalling 3 cents per unit were paid, as is proposed,
by 24 December next. So, in that respect, although the
material misstates the effect of the proposed resolutions,
with such an undertaking there would be no prejudice from that
misstatement.

The further proposed change to the constitution, in so far as
the entity's entitlement to fees is concerned, is to introduce
an entitlement to a fee of 2 per cent of the value of assets
if the entity is removed by unit holders. There is no respect
in which the proposed resolution, as it is described in the
material, is misleading by misstating the effect of that
resolution. In other words, the explanatory memorandum, when
discussing that 2 per cent fee, fairly and clearly explains
what would result and what the entitlement of the entity would
be. But what was argued was that the material sent to unit
holders was deficient because there was no reference to the 2
per cent fee within the chairperson's letter. This is an
argument which, on its face, has some substance. On one view
of the chairperson's letter it is meant to be a comprehensive
summary of what is proposed and the omission of a reference to
the 2 per cent fee might be considered to be significant.

However, that is to assume that the unit holder would read
only that letter. I am conscious of the fact that these
questions are to be approached on the basis that persons who
are not lawyers and who receive extensive documentation such

as this do not sit down and analyse them page by page as if
they were wills. But the two per cent fee is, I think,
clearly enough identified and explained within the explanatory
memorandum, and ultimately I am not persuaded to grant any
relief on the basis of the argument in relation to it. I am
somewhat fortified in that conclusion by the fact that it is a
contention which ASIC has made only today and not previously
in the correspondence between ASIC and the respondent or the
respondent's solicitors. Indeed, it was not within the
applicant's outline of submissions. That is not to say that
the point needs to be ignored but I think it is of some
significance that of the many matters which ASIC has raised in
the weeks or months leading up to today's hearing, ASIC has
not previously complained about this particular matter.

I come now to a further argument about what was said or not
said in relation to proposed cash payments to be made by the
entity. As I have mentioned, very early within the
explanatory memorandum the matter of proposed cash payments
was identified. And, as I have also mentioned, it was again
identified within the Chairperson's letter. There are many
other pages of the explanatory memorandum that also refer to
these cash payments.

The references to the cash payments differ from place to place
and of course, all of this must be read together. But the
argument for ASIC is that what was said about these cash
payments is misleading or deceptive or likely to mislead or

deceive for what is said about the so-called quarterly payments.

1

I accept that, read as a whole, this material represents that the company intends to make cash payments totalling three cents per unit by 24 December 2008, and that this three cents per unit is to be paid as to some of it, this October, and as to the rest of it, by 24 December 2008. The question is what is represented as to the payments to be made, "quarterly thereafter".

10

20

The submission for ASIC is that this material represents that the respondent proposes, and has a reasonable basis for so proposing, that quarterly after December 2008, that it or its successor will pay the equivalent of three cents per unit to unit holders.

30

Now if that is the effect of this documentation, that is if it conveys that representation, it is clear that such a representation would be false. That is clear for at least two reasons.

40

One is that the terms of the relevant resolutions of the directors of the respondent do not provide for quarterly payments of three cents per unit to be made from the first quarter in 2009 onwards. In particular at a meeting of directors on the 18th of August 2008, the directors simply resolved in these terms:

50

"Resolved to implement a return to quarterly distributions from the beginning of 2009 subject to unit holders approving the resolution set out above."

1

Nothing was said there as to the amount of quarterly distributions.

10

Secondly, there is the fact that the respondent through its counsel has argued that the intended effect of this material was to represent not that there would be quarterly payments of three cents per unit, but that there would be quarterly payments of something, which on any view, would be less than three cents per unit. At one stage, as I understood those submissions, the respondent was saying that the reference to quarterly payments should be understood by unit holders as referring to quarterly payments of the order of one and a-half cents per unit.

20

30

Alternatively, the respondent seemed to be suggesting that the document was representing that there would be quarterly payments, but was saying nothing about what they would be.

40

It would be, I think, of little moment to unit holders to be informed that they could expect quarterly payments, but that at the same time they should not expect that those quarterly payments would be of any particular amount.

50

Ultimately, as I read this material as a whole, the various references to the quarterly payments could be reasonably

understood by unit holders as references to quarterly payments
in each quarter of 3 cents per unit. In reaching that
conclusion, I have had regard also to the financial material
within this explanatory memorandum and to what is said about
the likely proceeds from the orderly realisation of assets
over a period of three to five years, because quarterly
payments of 3 cents per unit over three years, of course,
would be 36 cents per unit over three years and that has to be
read with what is said about the underlying value of the
units. Nevertheless, it seems to me that the documentation
could be reasonably understood in the way that I have
described, that is as providing for quarterly payments of 3
cents per unit.

This particular point, unfortunately, was not discussed
between the parties in the dealings leading up to this
hearing. On about 8 August 2008, ASIC was provided with
drafts of this material and since then it has, on a number of
occasions, corresponded with the respondent or its solicitors
about its contents. This point as to the quantum of the
quarterly payments has not been ventilated within that
correspondence: but the reason for that fairly appears from
ASIC's letter of last Monday, which is that ASIC has simply
assumed that any reader would read the reference to the
quarterly payments in the way which I have concluded is a
reasonable interpretation of the material, and the fact that
the respondent did not intend to make quarterly payments
necessarily of the order of 3 cents per unit, quarter by
quarter, does not appear to have emerged until this morning

when further affidavits came from the respondent's side. In particular, it was only within an affidavit sworn today that the relevant resolutions of the board of the respondent were disclosed.

1

The result of the conclusion I have reached as to what might be reasonably understood about the size of these quarterly payments is that what is said about them is, in my view, misleading or deceptive or likely to mislead or deceive. In coming to that conclusion I emphasise that this involves no assessment of the propriety of those in the respondent company. There is no attack upon their propriety.

10

20

It is simply to say that inadvertently the material is, on an objective view, misleading or deceptive.

30

Accordingly, on that ground, ASIC has made out a case. Although this was argued as an interlocutory application, because there is no factual controversy in relation to the point on which the applicant has made out that case, in effect ASIC has made out a case for final relief.

40

The question then is whether there should be an injunction and if so, upon what terms. Before going to that question, I should mention some other matters which were argued or which ASIC had proposed to argue. At the commencement of the hearing ASIC, through its counsel, foreshadowed an argument that this material was misleading or deceptive also upon another basis.

50

That involved an attempt to make out a case, not at all foreshadowed by ASIC's material or its correspondence, that the financial position of the fund was such that the respondent or its directors had no reasonable basis for representing that there would be a buy back at 45 cents per unit or that there would be interim cash payments, certainly of the order of three cents per unit paid quarterly.

10

The proposed course I was asked but declined to allow was to permit the Chairperson of the respondent, who has sworn three affidavits, to be cross-examined as to that financial capacity of the fund. As I have said, there was no canvassing of this point within the correspondence. In particular, in the letter written last Monday by ASIC to the respondent's solicitors, in which ASIC wrote that it was setting out its "main concerns", there was no concern of this kind which was expressed.

20

30

I mention also the arguments made by ASIC as to the notice of meeting itself. The first of these arguments was that within the notice, and its reference to an amendment or the amendments to the constitution which were proposed, it was said that the proposed resolution for those amendments would be an extraordinary resolution when in fact it should have said that it would be a special resolution, thereby requiring a 75 per cent majority. But within the same notice, indeed higher on the same page, that resolution is referred to as a special resolution and as to that particular irregularity I

40

50

would be prepared to accede to the respondents' application to
declare the notice as valid.

1

A further complaint about the notice was in what it says about
the proposed business of the retirement of the respondent as
trustee. According to section 601FL of the Corporations Act
2001, if the responsible entity of a registered scheme wants
to retire it must call a members meeting to explain its reason
for wanting to retire and to enable the members to vote on a
resolution to choose a company to be the new responsible
entity and the resolution must be an extraordinary resolution
if the scheme is not listed.

10

20

The notice here refers to that as an ordinary resolution.
Originally complaint was made in that respect that that point
was abandoned by ASIC. However, ASIC further argued that the
notice itself failed to comply with a requirement within
section 601FL in that it was submitted that the notice must
itself explain the entity's reason or reasons for wanting to
retire.

30

40

I am not persuaded that this is the effect of the section.
The entity must give proper notice of its proposal to retire
but I am not persuaded that the section requires the entity to
explain its reasons within the notice, as distinct from at the
meeting. In any event I am not persuaded that the explanation
which is given within this material is insufficient.
Accordingly I would not have been disposed to grant any

50

injunctive relief for the matters argued in relation to the notice of the meeting.

1

I return then to the question of what relief, if any, should be granted on the basis of the ground which is made out. It cannot be said that if the material was misleading or deceptive or likely to mislead or deceive, nevertheless this immaterial in all the circumstances. It seems to me to be likely that many unit holders would be affected in their consideration of the business proposed for tomorrow's meeting by what was proposed by way of interim payments. Of course that is not the only thing which is proposed and there are other financial considerations involved in a choice between effectively terminating the fund early next year and allowing it to trade on for three to five years, which perhaps have even more importance for investors than what they will receive by way of quarterly payments. But what is said about quarterly payments is, in my view, undoubtedly material.

10

20

30

The effect of postponing a consideration of these resolutions would firstly be the costs of adjourning the meeting which would be of the order of \$120,000. That is a substantial sum and cannot be simply disregarded. Nevertheless, it has to be seen in the context of what is involved with this fund and the size of its undertaking. It is also pointed out that a number of investors have come to Brisbane, some of them from overseas, or will be coming to Brisbane, for tomorrow morning's meeting and that they will be put to cost and

40

50

inconvenience if the meeting has to be adjourned. Of course that must be considered against everything else.

1

I was pressed with the argument that the evidence showed the likelihood that if the resolutions are allowed to be put they will be passed and I was referred to what is known as to the intentions of those who have given proxies. The problem, of course, is that all of that has occurred on the basis of this material which contains, as I have concluded, a material misrepresentation.

10

20

I am mindful also of the potential impact of a postponement of this restructure of the fund, and in particular the prospect that other circumstances might arise between now and an adjourned meeting which would make that restructure somewhat more difficult to effect. The evidence in that respect is general but the generality is not so surprising. The concern which is expressed within the Chairperson's affidavits about that has to be considered: but nevertheless I am persuaded that the materiality of what was represented as to the quarterly payments is such that on balance the relief which is sought by ASIC should be granted.

30

40

The relief which is sought by the application is that until further order the respondent by itself or its servants or agents be restrained from proceeding with the business of resolutions one, two and three in the notice of meeting dated 18 August and issued by the respondent. I will hear any

50

argument on what should be the appropriate relief consistently
with these reasons.

1

...

HIS HONOUR: It will be ordered that until further order the
respondent, by itself or its servants or agents, be restrained
from proceeding with the business of resolutions one, two and
three in the notice of meeting dated 18 August 2008 issued by
the respondent as the responsible entity of the Premium Income
Fund ARSN 090 687 577. I give liberty to apply to either
party to apply on not less than two clear days notice to the
other. The originating application will be adjourned to a
date to be fixed.

10

20

...

HIS HONOUR: There will be no order as to costs.

30

40

50