

Funds Management & Financial Services Alert

High Court rules against contracting out of scheme members' statutory rights

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In *Westfield Management Limited v AMP Capital Property Nominees Limited* [2012] HCA 54 the High Court has said agreements which seek to deprive members of registered managed investment schemes of certain statutory protections will be unenforceable.

UniSuper and Westfield JV

The case concerned the KSC Trust (**Trust**), a registered managed investment scheme which was established to acquire the Karrinyup Shopping Centre in Perth. The shopping centre is the Trust's primary asset.

The Trust is a joint venture between AMP Capital Property Nominees Limited as nominee for UniSuper Limited (**UniSuper**), which holds two-thirds of the units, and Westfield Management Limited (**Westfield**), which holds the remaining one-third. AMP Capital Investors Limited (**AMP**) is the responsible entity of the Trust.

A history of disputes

Westfield and UniSuper appear to have been at loggerheads over the operation of the Trust for some time. For example, in 2010 Westfield brought a separate action in New South Wales against AMP, UniSuper and David Jones Limited alleging that AMP failed to keep Westfield informed about its negotiations with David Jones and deliberately entered into agreements for lease with little or

no prior notice. Westfield also disputed the validity of two resolutions of the unitholders of the Trust pursuant to which the entering of the lease agreements was approved.

Notice of meeting to terminate the trust

In the matter before the High Court, the joint venture agreement stated that the responsible entity (AMP) was prohibited from selling the shopping centre without the written consent of the unitholders.

At the request of UniSuper, AMP issued a notice of meeting of the unitholders of the Trust to consider a proposed extraordinary resolution directing the responsible entity to wind up the scheme. Section 601NB of the *Corporations Act 2001* (Cth) (**Corporations Act**) grants members the right to take action to call such a meeting.

UniSuper's two-third unitholding would allow it to carry the resolution alone (50 percent of all members entitled to vote was required). The effect of the winding up would be that the trust property, the Karrinyup Shopping Centre, would be sold without Westfield's consent.

Westfield opposed the resolution and obtained an injunction from the Supreme Court of New South Wales preventing UniSuper from voting in favour of it without the prior consent of Westfield. UniSuper appealed this decision to the NSW Court of Appeal and the injunction was set aside.

Westfield appealed by special leave to the High Court. Westfield argued that the joint venture agreement

precluded a unilateral winding up of the scheme in accordance with section 601NB.

The decision: you cannot contract out of statutory rights

Having dismissed the appeal on the grounds of construction of the joint venture agreement, it was not necessary for the High Court to consider whether the statutory rights given to members by the Corporations Act to call a meeting of members to wind up a scheme could be bargained away. However, as both the primary judge and the Court of Appeal found that a provision in the joint venture agreement was not unenforceable in light of section 601NB, the High Court felt it necessary to comment on this point.

The High Court noted that contractual arrangements that defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for individual benefit, will not be enforced and will be treated by the courts as ineffective or void.

Section 601NB allows a member to put the matter of termination of a scheme to a vote of members at any time during the life of the scheme. The right is clearly beneficial to individual scheme members. However, the High Court also found that the evident intention to the legislature is that it is in the public interest that scheme members be provided this right. That is, you cannot contract out of it.

Consequences for those investing in funds

- Review any agreements relating to interests in registered schemes to which you are a party and determine if any of the provisions seek to contract out

of a statutory right. These provisions are likely to be unenforceable. Consider whether the agreement can operate effectively without these provisions, and if not, seek to get it varied.

- If you are intending to co-invest in a fund with other entities, then consider whether the fund needs to be registered (or whether you should invest in a registered fund if you want some control over the disposal of its assets). Unregistered funds provide less statutory protection for their members and can be much more flexible in how they operate than registered schemes. It is likely that the Trust was registered even though it only had two wholesale investors because of the pre-2007 ban on registered schemes investing in unregistered schemes or because UniSuper's investment criteria may have precluded investments in unregistered schemes.
- Other statutory rights of members of registered managed investments schemes that cannot be waived are likely to include:
 - Rights requiring member approval for related party transactions.
 - Rights of scheme members to make an application to the court to wind up a scheme.
 - Rights of members with at least 5% of the votes to request a meeting of the scheme's members to consider and vote on a proposed special or extraordinary resolution.

Thomsons Lawyers can assist you structure and document joint ventures and co-investments in registered schemes and undertake due diligence on scheme investments.

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