

Withdrawals under a managed investment scheme

James Willis reports on *MacarthurCook Fund Management Limited v TFML Limited* [2014] HCA 17.

In *MacarthurCook Fund Management Limited v TFML Limited* [2014] HCA 17, the High Court considered whether the redemption of certain interests in a managed investment scheme constituted ‘withdrawal’ from the scheme within the meaning of Part 5C.6 of the *Corporations Act 2001* (Cth) (the Act). The High Court held, in a unanimous decision, that a member does not ‘withdraw’ from a scheme, for the purposes of Part 5C.6 of the Act, merely by reason of the responsible entity performing an obligation to redeem, which arises under the terms of issue of a class of interests, if that obligation is required by those terms to be performed independently of any act on the part of the member.

Background

RFML Ltd (RFML) was, at the relevant time, the responsible entity of an unlisted unit trust which was a registered managed investment scheme pursuant to Chapter 5C of the Act (the trust). RFML was later replaced as the responsible entity of the trust by the respondent, TFML Limited.

In late 2007, the appellant in the proceedings (being MacarthurCook Fund Management Limited) subscribed for, and was issued, 15 million ‘subscription units’ in the trust, at an issue price of \$1 per unit. The subscription units constituted a separate class of units and the appellant was the only holder of these units. The terms of issue of the subscription units contained a provision in the following form:

Subject to compliance with any requirements under the Corporations Act and the Constitution, during the Subscription Period [being 12 months from the date of subscription], subscription units held by MacarthurCook must be redeemed by [RFML] for their Issue Price, using funds received by the trust as a result of accepted applications under the [public offer], such redemptions commencing six months from the Subscription Date.

By 29 September 2008, the trust had received funds totalling \$12,347,079 as a result of accepted applications under a public offer. On that date, RFML gave notice that it had suspended all ‘withdrawals’ from the trust until further notice (which, relevantly, purported to include the redemption of any subscription units).

The appellant brought proceedings in the New South Wales Supreme Court where it argued that Part 5C.6 of the Act, which regulates the circumstances in which a responsible entity is permitted to allow a member to ‘withdraw’ from a scheme, was not applicable as the redemption of the subscription units did not constitute a ‘withdrawal’. Both the primary judge and,

The High Court gave some guidance as to what type of conduct would and would not constitute ‘volition’ for the purpose of Part 5C.6.

on appeal, the Court of Appeal held that Part 5C.6 of the Act applied in respect of the redemption of the subscription units.

The meaning of ‘withdraw’

On appeal to the High Court, the appellant contended that the redemption of the subscription units by RFML was not a withdrawal by the appellant from the trust within the meaning of Part 5C.6 of the Act.

In discussing the operation and scope of Part 5C.6 of the Act, the High Court held that:

- Part 5C.6 regulated the exercise of a member’s ‘right to withdraw’, which is not limited to a right of a nature which would require the existence of a correlative obligation; and
- the act of ‘withdrawal’ must involve some act of ‘volition’ on the part of the member.¹

Accordingly, the High Court found that no withdrawal will occur, for the purposes of Part 5C.6, where there is no ‘volition’ on the part of the member but the responsible entity is merely exercising a power, which it was obliged to exercise under the terms of issue of an interest, to redeem the interest of a member. For this reason the court unanimously upheld the appeal on the basis that the terms of the subscription units required RFML to redeem the units and there was no exercise of a right or ‘volition’ on the part of the appellant.

In coming to this conclusion, the High Court had regard to the purpose of Part 5C.6² and found that Part 5C.6 operates to address problems associated with investors exercising choice to exit the scheme, particularly when the scheme is not liquid, rather than problems associated with investors exiting a scheme otherwise than through the exercise of choice, even when the scheme is not liquid.³

What constitutes ‘volition’?

The High Court gave some guidance as to what type of conduct would and would not constitute ‘volition’ for the purpose of Part 5C.6. Relevantly, the court held that:

- the volition necessary for there to be a withdrawal by a member is not to be found merely in the choice to

become a member by subscribing to units on the terms on which they are issued (even in circumstances where those terms were the subject of prior arrangement between the responsible entity in the putative member);⁴

- the volition relevant to withdrawal by a member could not be found merely in the choice of the member to sue or not to sue to enforce the terms of the issue of the interest in the managed investment scheme;⁵ and
- there is a ‘real difference’ between the creation of a separate contractual obligation for a responsible entity to redeem an interest, and the creation of an obligation for the responsibility to redeem as part of the terms of issue of the interest. Accordingly, it may be the case that the requisite volition can be found in the terms of a separate contractual obligation on the responsible entity.⁶

Endnotes

1. [2014] HCA 17 at [23].
2. Which the High Court noted was considered extensively by the *Australian Law Reform Commission and the Companies and Securities Advisory Committee* in a joint report published in 1993; [2014] HCA 17 at [24] – [27].
3. [2014] HCA 17 at [28].
4. [2014] HCA 17 at [31].
5. [2014] HCA 17 at [31].
6. [2014] HCA 17 at [31].

