Australian
Superannuation Law
Bulletin

Direction in will not binding on trustee — Ioppolo v Conti

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The Western Australian Court of Appeal (Martin CJ, Buss JA and Beech J) has held that the surviving trustee of a self-managed superannuation fund (SMSF) was not required to appoint one of the deceased trustee's executors as a replacement trustee, and that the trustee had acted bona fides in exercising its discretion to pay the death benefit. The case is *Ioppolo v Conti*.[1]

The facts

In 2002 Mr and Mrs Conti set up a SMSF with themselves as trustees and members. At the same time, Mrs Conti made a binding death benefit nomination in favour of Mr Conti.[2]

In 2005 Mrs Conti made a will naming two of her children as executors and bequeathing her interest in the SMSF to her four children.[3]

In 2006 Mrs Conti made a second binding death benefit nomination in favour of Mr Conti.[4] This lapsed three years later, in 2009.

In 2010 Mrs Conti died. Probate was granted to her two children named as executors in the will.[5]

After Mrs Conti's death, Mr Conti obtained legal advice with respect to his rights and obligations as surviving trustee of the SMSF. The solicitors advised him that he could continue as sole trustee of the SMSF until six months after Mrs Conti's death. They recommended that shortly before that period expired, a second trustee or corporate trustee be appointed. They also advised that as sole trustee, in the exercise of his discretion (there being no valid binding death benefit nomination) he could pay the death benefit to himself.[6]

In 2011, acting on this advice, Mr Conti in his capacity as trustee of the SMSF determined that the death benefit be paid to him (rather than to any of the children). That same day, in his capacity as the recipient of the benefit, he elected to take the benefit in the form of a pension.[7]

The following day Mr Conti resigned as trustee of the SMSF. He was replaced by a corporate trustee of which he was the sole director.[8]

The proceedings

The executors commenced proceedings in the Supreme Court of Western Australia against Mr Conti and the corporate trustee. They claimed, among other things, that upon Mrs Conti's death, Mr Conti as trustee of the SMSF was required by s 17A of the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act) to appoint one of Mrs Conti's executors as trustee of the SMSF, in place of Mrs Conti. They further claimed that until such time, Mr Conti had no power to deal with the death benefit. Mr Conti's purported determination to pay the death benefit to himself was accordingly void. Further or alternatively, it was void because Mr Conti had acted in bad faith in making that determination, by preferring his own interests to those of the children.[9]

The judgment at first instance

The court (Master Sanderson) dismissed the executors' claim.[10]

The court held that s 17A of the SIS Act did not require Mr Conti to appoint one or other of the executors as trustee of the SMSF.[11] Further, there was no evidence that Mr Conti in his capacity as trustee had not exercised his discretion in a bona fide manner in paying the benefit to himself, instead of following the directions in the will. The court said:

> In my view the trustee was entitled to ignore the direction in the will and the mere fact he did so could not in and of itself be evidence of a lack of bona fides. There is nothing else in the evidence which suggests the trustee did not act in good faith and the plaintiffs' arguments fail.[12]

The appeal

The executors appealed to the Western Australian Court of Appeal.[13]

They challenged the following two conclusions of the court at first instance:

1. that there was no obligation under s 17A of the SIS Act to appoint one of executors as a trustee of the SMSF immediately upon the death of Mrs Conti; and
2. that there was no evidence capable of sustaining a conclusion that Mr Conti's decision to pay the benefit to himself was lacking in bona fides or vitiated by bad faith.[14]

The Court of Appeal's decision

The Court of Appeal (Martin CJ, Buss JA and Beech J) dismissed the appeal.[15]

In relation to the first point, the court said that s 17A defines the conditions that must be met if a fund is to come within the definition of "self-managed superannuation fund" for the purposes of the SIS Act. The appointment of an executor would have been permitted but it was not required.[16] The court said:

> … there are no words in s 17A(3), or any inference of legislative intention to be drawn from the operation or effect of the subsection viewed in the context of the section or in the context of the SIS Act as a whole, to suggest that a fund is obliged to utilise the opportunities for compliance provided by the subsection either within any particular time, or at all, if there are other means by which the fund can be brought into compliance.[17]

The first challenge was accordingly rejected.[18]

In relation to the second point, the court held that there was no evidence to support the executors' assertion that the exercise of Mr Conti's discretion as trustee was vitiated by a lack of bona fides.[19]

In relation to the question of the relevance of Mrs Conti's will, the court said:

> It was open to Mr Conti to consider that the subsequent execution of the binding nomination [in 2006] meant that the expression of intention in the will [made in 2005] had been superseded, and was no longer worthy of weight as an expression of the intention of the deceased member as to what should happen on her death.[20]

The second challenge was accordingly also rejected.

The result

In the result, the executors' challenge to Mr Conti's decision to pay the death benefit to himself (rather than to any of the children as specified in the will) failed.[21]

Take away points

This decision confirms two points. First, s 17A of the SIS Act does not require that upon the death of a trustee, their legal personal representative be appointed as a replacement trustee. Second, in exercising its discretion as to the manner of distribution of a death benefit, a trustee is not bound to follow a direction in the deceased member's will. A mere failure to follow a direction in the will does not of itself indicate a lack of bona fides.

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Footnotes

1. *Ioppolo v Conti* [2015] WASCA 45; BC201501250.
2. Above, n 1, at [1] and [29].
3. Above, n 1, at [32].
4. Above, n 1, at [34].
5. Above, n 1, at [35].
6. Above, n 1, at [36]–[37].
7. Above, n 1, at [40].
8. Above, n 1, at [41].
9. Above, n 1, at [48].
10. *Ioppolo and Hesford v Conti* [2013] WASC 389; BC201303434. For discussion, see N Davis "Case note: Ioppolo and Hesford v Conti" (2013) 25(3) *SLB* 91.
11. Above, n 10, at [20].
12. Above, n 10, at [53].
13. Above, n 1, at [6].
14. Above, n 1, at [55].
15. Above, n 1, at [84].
16. Above, n 1, at [59] and [71].
17. Above, n 1, at [71].
18. Above, n 1, at [73].
19. Above, n 1, at [82].
20. Above, n 1, at [81].
21. Above, n 1, at [84].