THOMSON GEER
LAWYERS

Superannuation Case Law Update

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1. Amendment of trust deed – discretionary benefits – "accrued benefits" – *Commonwealth Bank Officers Superannuation v Beck* [2016] NSWCA 218

The New South Wales Court of Appeal (Bathurst CJ; Macfarlan and Gleeson JJA) has held that an amendment to the trust deed of a superannuation fund which removed discretionary benefits was not an amendment which affected "accrued benefits" within the meaning of that term in regulation 13.16 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations). The case is *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* [2016] NSWCA 218.

The Court of Appeal reversed the judgment of the trial judge (Slattery J) in *Beck v Colonial Staff Super Pty Ltd* [2015] NSWSC 723, which had been widely regarded by superannuation lawyers as inconsistent with earlier cases. (There was also a judgment dealing with relief and costs: *Beck v Colonial Staff Super Pty Ltd (No 2)* [2015] NSWSC 1360.)

The trial judge had held (among other things) that the purported amendment to the trust deed in December 1996 that removed discretionary "Leaving Service Benefits" contravened regulation 13.16 and was ultra vires and void. This meant that the clause conferring those discretionary benefits continued to be part of the trust deed. Further, that clause survived a subsequent successor fund transfer. The trustee of the "new" fund breached its duty as a trustee to give consideration to a request by a member for a discretionary benefit, and according to the trial judge that trustee was now required to give consideration to that request.

All these conclusions were reversed by the Court of Appeal.

The facts

A brief summary of the main facts follows.

Mr Beck migrates to Australia

Mr Beck (the member), an actuary by profession, was employed by Colonial Mutual Life Assurance Society Limited (Colonial Mutual). In 1987 he relocated from South Africa to Melbourne. His employment with Colonial Mutual continued, but he became a member of the Colonial Group Staff Superannuation Fund (Old Colonial Fund).

The July 1996 amendments

In July 1996 the trust deed of the Old Colonial Fund was amended.

Following these amendments, clause A11.3 of the trust deed provided a discretionary "Leaving Service Benefit" in the following terms (this was similar to the benefit provided by a previous clause) (underlining added):

> A11.3 In exceptional circumstances and usually only if the Member has had a long period of Service, the Trustees may with the approval of the Company pay to or in respect of the Member referred to in Rule 11.1 a further sum of such amount as will increase the total payment to or in in respect of such Member to an amount not exceeding the reserve value as determined by the Trustees after considering the advice of the Actuary held in the Fund in respect of such Member as at the date the Member ceases employment with the Employer.

Payment of the benefit required "the approval of the Company" (ie the employer).

Also, the amendment power was varied to read (underlining added):

> **33 AMENDMENT**
>
> 33.1 Subject to Clause 33.2, and to the Relevant Requirements, the Trustees may, with the consent of the Company, by supplemental deed or resolution, amend, add to, delete or replace (together 'amend') all or any of the provisions of the Deed including this Clause with effect from such date (whether before, on or after the date on which the supplemental deed is executed or the making of such resolution) as may be specified in that deed or that resolution. In the absence of express specification, the date of the execution of the deed or the making of the resolution shall be deemed to be specified. Each such amendment is binding on each Employer, each Member and any other person claiming under or bound by the Deed. Any amendment made by resolution shall be confirmed by supplemental deed as soon as practicable after it has been made.
>
> 33.2 Subject to Clause 33.3, no amendment shall be made whereby the value of the benefits accrued in respect of any Member prior to the effective date of the amendment is detrimentally affected without the written consent of that Member (the value of the benefits accrued being such amount as the Trustees, after considering the advice of the Actuary, determine has accrued).
>
> 33.3 Any amendment which the Trustees consider necessary or desirable for better securing taxation concessions or for ensuring conformity to the Relevant Requirements or any other present or future State or Commonwealth laws governing or regulating the operation or maintenance of superannuation funds shall be deemed not detrimentally to affect the value of the benefits accrued in respect of any Member prior to the effective date of such amendment, and may be given effect without the consent of that Member.

The December 1996 amendments

In December 1996 the trust deed of the Old Colonial Fund was further amended. By that time Colonial Staff Superannuation Pty Limited was the trustee of the fund. The trustee's in-house lawyer recommended these amendments in order to comply with Victorian anti-age discrimination legislation that was coming into force on 1 January 1997, while also advising that the amendments would have no effect on accrued benefits.

These amendments restructured and redefined members' benefits. Among other amendments, clause A11.3 – the clause that provided a discretionary Leaving Service Benefit – was deleted.

Demutualisation and reconstitution

In 1997 Colonial Mutual was demutualised and became Colonial Limited.

In 1998 the Old Colonial Fund was reconstituted. The various superannuation arrangements for different parts of the Colonial group were merged into a single superannuation fund. As part of this restructure, the assets held for the benefit of the members of the Old Colonial Fund were transferred and henceforth held for the benefit of the Colonial Group Staff Superannuation Scheme (New Colonial Fund).

The member changes employment

In 2000 the Commonwealth Bank of Australia (CBA) acquired Colonial Limited. As part of the takeover arrangements, the member was offered and accepted employment with CBA.

Before accepting employment with CBA, in mid-2000 the member had conversations with CBA executives about the terms of his employment by CBA and his superannuation benefits. In one of these conversations, the following exchange occurred:

The member:

> I won't come to CBA unless I can protect and enhance my pension that I'm entitled to under my defined benefit pension scheme. I have been a member of that scheme for many years, including my time in South Africa and I have a significant accrued pension in the fund.

CBA executive:

> Whatever your pension rights were under the Colonial Fund, we undertake to protect those going forward.

The member's subsequent written employment agreement with CBA read in part:

> Your existing superannuation arrangements will continue to apply.

Within days of accepting employment with CBA, the member was required to move from Melbourne to Sydney. His wife and 3 children remained in Melbourne. The wife had a job in Melbourne.

The CBA was keen to persuade the member and his wife to move permanently to Sydney. In mid-2001 the CBA arranged to fly the wife to Sydney for a dinner at Aria Restaurant, near the Sydney Opera House. There were 6 people present – 2 CBA executives, their partners, the member and his wife. The wife was seated between the 2 CBA executives. The following exchange occurred:

CBA executive:

> When does your contract finish and how long will you and the children stay in Melbourne?"

The wife:

> I recently signed a contract for a year but since the project is running late, I've just been asked to sign another one.

CBA executive:

> When will you and the family move to Sydney? It doesn't show commitment to the bank, if you [and the member] are living apart.

The next day the member and his wife decided to move to Sydney, which they did in early 2002 after their daughter had finished her year 12 studies.

Successor fund transfer

In 2003 the member's interest in the New Colonial Fund was transferred to the Commonwealth Bank Officers Superannuation Fund (CBOS fund) as part of a successor fund transfer. The trustee of that fund was Commonwealth Bank Officers Superannuation Corporation Pty Limited (CBOS trustee).

Termination of employment

In July 2005 the CBA terminated the member's employment. At that time he was 51 years of age.

The member's request for a benefit

In the meantime, in January 2005 the member had raised with CBA a number of possible options to try to avoid a loss of pension, if he were retrenched before age 55. Later in January 2005 he sent an email to CBA in which he alluded to

the possibility of him being paid a discretionary Leaving Service Benefit before reaching age 55.

In February 2005 the member wrote to the CBOS trustee asking for a pre-55 discretionary benefit. By letter dated 11 May 2005 the CBOS trustee replied, rejecting the request and pointing out that the clause providing the discretionary Leaving Service Benefit had been deleted from the Old Colonial Fund trust deed by the December 1996 deed of amendment.

After his employment was terminated in July 2005, the member corresponded further with the CBOS trustee and with the Superannuation Complaints Tribunal concerning his superannuation entitlements.

The proceedings

In 2011 the member commenced proceedings in the Supreme Court of New South Wales against:

- Colonial Staff Superannuation Pty Limited, the trustee of the Old Colonial Fund at the time of the December 1996 amendments. That company went into liquidation and did not appear in the proceedings;
- the CBOS trustee, the trustee of the CBOS fund to which the member had been transferred as part of a successor fund transfer in 2003 and which in 2005 had rejected his request to be paid a discretionary Leaving Service Benefit; and
- CBA, the member's employer from 2000 to 2005.

The claim against the CBOS trustee

Against the CBOS trustee, the member relied on a number of interrelated arguments.

Briefly stated, the member's main argument – which succeeded before the trial judge – was along the following lines:

(a) as at December 1996, the amendment power in clause 33 of the trust deed of the Old Colonial Fund was expressed to be subject to the "Relevant Requirements". This meant that compliance with the Relevant Requirements was a condition precedent to the valid exercise of the power to amend the trust deed;

(b) the trust deed defined "Relevant Requirements as including the *Superannuation Industry Supervision Act 1993* (Cth) (SIS Act) and the SIS Regulations;

(c) the December 1996 amendment purporting to delete clause A11.3 which provided for a discretionary Leaving Service Benefit contravened regulation 13.16 of the SIS Regulations, as it adversely altered "a beneficiary's right or claim to accrued benefits [or] the amount of those accrued benefits";

(d) that amendment also constituted a breach by the trustee of the Old Colonial Fund (Colonial Staff Superannuation Pty Limited) of the trustee covenant in section 52(2)(c) of the SIS Act to act in the "best interests" of the beneficiaries of the fund;

(e) given these contraventions of regulation 13.16 and section 52(2)(c), the amendment was ultra vires and void. Clause A11.3 remained a part of the trust deed of the Old Colonial Fund;

(f) clause A11.3 survived the successor fund transfer to the CBOS fund in 2003 (the member did not contend that the successor fund transfer itself involved any breach of regulation 6.29 of the SIS Regulations by either Colonial Staff Superannuation Pty Limited as trustee for the New Colonial Fund or the CBOS trustee); and

(g) the CBOS trustee should have considered the member's request in 2005 for a discretionary benefit.

In relation to (c), the trial judge said (among other things):

> … reg 13.16(1) prohibits adversely altering the amount of potential entitlements, or a beneficiary's claims to potential entitlements in defined benefit funds such as the Old Colonial Fund. For [the member] to seek the exercise of the Trustee's clause A11.3 discretion is to claim his potential entitlements. In my view, to delete clause A11.3 from the Old Colonial Fund in December 1996 was to contravene reg 13.16. Even though reg 13.16 was a discretionary provision, its deletion still was adverse to [the member] in removing his capacity to claim his potential entitlements.

The trial judge held that the CBOS trustee should now consider the member's request for a discretionary Leaving Service Benefit under clause A11.3.

The claim against the CBA

Against the CBA, the member also relied on a number of arguments.

The argument that succeeded before the trial judge was that the CBA was estopped from denying that it would employ the member until age 55, when he could retire and receive a pension from the CBOS fund. This estoppel was founded on the oral representations made by CBA executives in 2000 and mid-2001 (see

above) – but not the written employment agreement (see above).

The trial judge held that the member was accordingly entitled to relief against the CBA on the basis that he was entitled to a pension at age 55, subject to adjustments flowing from the fact that he had only worked till age 51, and other submissions about relief.

The appeal

The CBOS trustee and the CBA appealed to the New South Wales Court of Appeal.

The Court of Appeal decision

The Court of Appeal allowed the appeal, set aside the orders of the trial judge, and ordered that the proceedings be dismissed, with the member to pay the costs of the appeal and the trial.

Meaning of "accrued benefits"

The court rejected the proposition that the member's benefit under clause A11.3 was an "accrued benefit" within the meaning of that term regulation 13.16 of the SIS Regulations.

The member had submitted that the effect of the decision of the High Court in Finch v Telstra Super Pty Ltd [2010] HCA 36; (2010) 242 CLR 254 was that the power to give the additional benefit in clause A11.3 could not be described as discretionary. Bathurst CJ, with whom Macfarlan and Gleeson JJA agreed, rejected this, saying:

> [93] However, the nature of the benefit under consideration in Finch must be contrasted with the nature of the benefit said to be conferred by cl A11.3. As was pointed out in Finch, the trustee in that case had a duty to distribute to those who fell within the definition of total and permanent disablement and not to distribute to those who did not fall within the definition. By contrast, under cl A11.3, the trustee had to determine whether the service of the person in question was exceptional and, if so, whether a benefit should be conferred and in what amount. Even then, the benefit could not be given without the consent of the company.

Bathurst CJ continued:

> [94] Whilst it may be correct that a person who retired before attaining the age of 55 years may be entitled to consideration for such a benefit, he or she has no proprietary interest in the assets out of which the benefit is to be paid, but only a mere expectancy or hope that the power will be exercised in his or her favour …
>
> [96] In the case of cl A11.3, any benefit is at the discretion of the trustee and the company and whilst the quantum of such a benefit is capped at the level of reserves, any benefit given may be less than that amount ...
>
> [97] Further, in the case of Mr Beck, the benefit had not accrued. Mr Beck had not retired at the time of the amendment and had no right at that point of time to be considered for an early retirement benefit …
>
> [102] … An inchoate right in the process of accrual is not an accrued benefit.
>
> [103] … it is undoubtedly correct that Mr Beck, along with other members of the fund, had a right to due administration. That does not mean that any potential benefit was an accrued benefit.

It followed that the deletion of clause A11.3 was not an amendment which affected accrued benefits.

Trustee's duties

The court noted that the trustee covenant in section 52(2)(c) of the SIS Act to act in the "best interests" of the beneficiaries of the fund "did not expand the general law".

The court further noted that the trustee had exercised the power of amendment on legal advice that the amendment had no effect on accrued benefits and that it was necessary to comply with the provisions of the Victorian anti-discrimination legislation. The court went on:

> [139] In those circumstances, I do not think that it has been shown that the trustee failed to give proper consideration to whether or not the amendment was in the best interests of the beneficiaries. The fact that it may have taken away a possible right to confer a discretionary benefit on some members in the future does not, in my view, alter the position …
>
> [140] In reaching this conclusion, I am conscious of the fact that it has been commonly stated that the best interests of beneficiaries in a superannuation fund are normally their best financial interests: Cowan v Scargill [1985] Ch 270 at 287. Whether the amendment in the present case had any material effect on members' financial interests is doubtful. However, it seems to me that the trustee gave proper consideration to the issue. There was no suggestion that it did not act in good faith and, in those circumstances, it seems to me that there was no contravention of either s 52(2)(c) or the general law.

The trial judge had erred in finding such a contravention.

Successor fund transfer

The trial judge had also erred in holding that clause A11.3 had survived the successor fund transfer to the CBOS fund in 2003. On this issue, the Court of Appeal said:

> [155] … irrespective of any agreement between the trustees of the Old Colonial Fund and that of the

> New Colonial Fund, the fact is that the provision was not included in either the New Colonial Fund [trust] deed or the [CBOS fund trust] deed … [I]t does not seem to me in the present case there was an amalgamation of trusts, rather, the funds in the Old Colonial Fund were transferred to the New Colonial Fund with the members of the Old Colonial Fund having the rights and benefits conferred by the new fund. The fact that the new fund did not confer equivalent benefits may give rise to a claim against the trustee but it does not deem the new fund to contain provisions which it does not in fact have.

Estoppel

The trial judge had found that the CBA was estopped from denying that it would employ the member until age 55, when he could retire and receive a pension from the CBOS fund.

On appeal, Macfarlan and Gleeson JJA said that the trial judge's finding was inconsistent with the way the member had presented his estoppel claim before the trial judge. Therefore, the member could not seek to support that finding on appeal.

Bathurst CJ, "albeit with some hesitation", was of the view that the manner in which the case had been conducted before the trial judge provided a sufficient basis for the member to argue that the CBA was estopped from asserting an entitlement to terminate his employment prior to him attaining the age of 55 years. However, the difficulty with the trial judge's estoppel finding was that the member had neither asked for, nor been told, that to protect his pension he would not be terminated until age 55. Such a statement would, of course, have been quite inconsistent with the employment agreement entered into subsequently and the estoppel as pleaded. Gleeson JA agreed (in the alternative) that the trial judge had erred in finding that the CBA was estopped from denying that it would not exercise its rights to terminate the member's contract of employment prior to him attaining the age of 55.

The result

In the result, the appeal by the CBOS trustee and the CBA was allowed. The member's claims against the CBOS trustee and the CBA were dismissed with costs.

Take away points

Following the Court of Appeal decision, it could be said that the position has reverted to what is was prior to the judgment of the trial judge, except that that position now carries the endorsement of the Court of Appeal.

Several take away points emerge from this decision.

First, a person who is entitled to consideration under a discretionary benefit provision has no proprietary interest in the assets out of which the benefit is to be paid, but only a mere expectancy or hope that the power will be exercised in their favour. Such a mere expectancy or hope is not an "accrued benefit" within the meaning of that term in the SIS Regulations;

Second, the trustee covenant in section 52(2)(c) of the SIS Act to act in the best interests of the beneficiaries of the fund does not extend the trustee's duties under the general law. That covenant requires the trustee to give proper consideration to whether or not the relevant action is in the best interests of the beneficiaries; and

Third, the occurrence of a successor fund transfer does not mean that the trust deed of the new fund contains provisions which it does not in fact have (although the circumstances may give rise to a claim against the trustee).

2. Amendment of trust deed – validation of previous amendments – *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 121

The Supreme Court of South Australia (Blue J) has indicated that it will vary the terms of the trust deed of a superannuation fund to validate all previous amendments with prospective effect, and to substitute a new clause conferring power on the trustee to amend the deed.

In so doing, the court made extensive comments about binding death benefit nominations. The court said that sections 58 and 59 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) and regulation 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations) give rise to "ambiguities, uncertainties and potentially unintended consequences", and that it is "highly desirable" that those provisions be reviewed by the Commonwealth and recast.

The court also said that regulation 13.16 of the SIS Regulations gives rise to "issues of construction and application", and that it is "desirable" that that regulation also be reviewed and recast.

The case is *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 121 (*REST v Pain*).

Background

Over the period from 1998 to 2013 the trust deed of a superannuation fund had been amended extensively by 40 amending deeds. The trustee was concerned that some of these amendments arguably may have been beyond the amendment power conferred by clause 19 of the trust deed, and therefore invalid.

Trustee Act

Briefly stated and subject to a number of prerequisites, section 59C of the *Trustee Act 1936* (SA) provides that the Supreme Court of South Australia may, on the application of a trustee, vary the trust (ie vary the terms of the trust deed).

Two key prerequisites – which are essential to a proper understanding of the judgment – are that the court must be satisfied (emphasis added):

- "that the proposed exercise of powers *would be in the interests of beneficiaries of the Trust* and would not result in one class of beneficiaries being unfairly advantaged to the prejudice of some other class" (section 59C(3)(b)); and
- "that the proposed exercise of powers would not disturb the Trusts beyond what is necessary to give effect to the reasons justifying the exercise of the powers" (section 59C(3)(c)).

In relation to the first of these prerequisites, the court said that "the interests of beneficiaries" included both financial and non-financial interests, in the following terms:

> [171] The first limb focuses on the interests of the beneficiaries as a whole. These interests include not only financial interests but also non-financial interests such as the freedom to choose their own superannuation fund, investment options and products. The assessment whether the proposed variation is in the interests of beneficiaries is holistic, weighing together financial and non-financial interests.

The court said (at [158] and footnote 450) that the 2 prerequisites referred to above implicitly give rise to a further prerequisite, namely (emphasis added):

- that "[t]here is good reason to make the variation".

(By way of comment, the requirements that there be good reason to make the amendments and that the amendments be in the interests of beneficiaries would appear to set a higher threshold than in the usual situation where the trustee is itself exercising a power of amendment. The court took what could be described as a conservative approach to the amendments.)

The proceedings

The trustee applied to the Supreme Court of South Australia for orders under the *Trustee Act* varying the trust deed:

- to validate all previous amendments with prospective effect;
- to substitute a new clause 19 (ie the clause conferring power on the trustee to amend the deed); and
- to amend some of the substantive provisions of the deed.

A member of the fund agreed to being named as defendant, to represent the interests of beneficiaries and potential beneficiaries of the fund, as required by the *Trustee Act*.

The Australian Prudential Regulation Authority (APRA) agreed to be joined as an intervenor to assist the court.

The judgment

In a lengthy judgment running to 158 pages, the court indicated that it was satisfied that it should exercise its discretion to amend the trust deed, subject to a number of qualifications in the judgment.

This case note focuses on a number of key aspects of the judgment that are or may be of broader application or interest.

Jurisdiction

The court noted (at [183]) that as at July 2015 there were 170,000 members of the fund in South Australia with benefit entitlements of $3.3 billion. This was a "real and substantial connection" with South Australia, and there was improper purpose in the trustee bringing the application in South Australia. The application should be entertained.

Amendment power

As mentioned above, the trustee sought to substitute a new clause 19 (ie the clause conferring power on the trustee to amend the deed).

Clause 19 contained a number of limitations on the trustee's amendment power. The court accepted that a number of these contained "uncertainties". The court was satisfied that clause 19 should be substituted, subject to a number of further amendments identified in the judgment (at [613]-[708]).

The court also noted that the trustee could not itself substitute a new clause 19 to remove restrictions on the trustee's power of amendment. The court said (footnote omitted):

> [714] It is a general principle of construction of constitutions such as trust deeds that the trustee cannot utilise its power of amendment of the trust deed to remove restrictions on its power of amendment.

Creation and maintenance of investment options

The court said (at [226]-[228]) that to ensure that members make valid investment choices, the trust deed should require the trustee to publish on the fund's website the investment options available, the investment objectives of each option, the range of directions available and the circumstances in which they can be changed (including any procedural rules) and to incorporate into the form to be used by a member to select or change an investment option an acknowledgment that the member has been informed about those matters.

Further, it was in the interest of members that, concurrently with the trustee being empowered to establish and maintain different investment options, the trustee be required by the trust deed to:

1 allocate costs and charge fees in a fair and equitable manner as between members holding different investment options;

2 allocate costs and charge fees in a fair and equitable manner as between members holding different products (including as between MySuper members and non-MySuper members);

3 require the trustee at least annually to review whether costs are being allocated in a fair and equitable manner including:

(a) whether direct and indirect costs incurred by the Trust should be borne or allocated at the asset sector, investment option or product/division level;

(b) the method by which costs should be borne or allocated as between different asset sectors and investment options and as between different products/divisions;

(c) the existence, structure and amount of investment fees, switching fees, buy spreads and sell spreads; and

(d) whether costs are being borne fairly and equitably between members whose funds are invested in different investment options and as between members who change their investment options and those who do not;

and report in the annual report the result of the review; and

4 require the Trustee to publish on the Fund's website the information referred to at [225] above and incorporate into the form to be used by a member to select or change an investment option an acknowledgment that the member has been informed about those matters.

Subject to the inclusion of these provisions, there was good reason to vary the trust deed to give the Trustee power to create and maintain separate investment options.

Transfer between investment options without member consent

The court said (at [234]-[235]) that it was in the interest of members that the trustee have power

to transfer a member's benefits from one investment option to another without the member's consent where:

1 the trustee decides to close an investment option;

2 despite reasonable attempts, the trustee is unable to obtain from the member a direction concerning transfer of the member's interest to another investment option or otherwise dealing with the member's interest insofar as it is invested in the investment option to be closed; and

3 the transfer is permitted under the SIS Act and Regulations.

The power should be conditional on the trustee giving to the member at least 60 days' notice of the intended closure and transfer, including an explanation of:

1 the trustee's decision, including details of the investment option to which it is proposed that the member's interest will be transferred, how to obtain a product disclosure statement explaining alternative investment options and the proposed date of the transfer;

2 the reasons for the trustee's decision to close the investment option and to transfer the member's investment to the proposed investment option; and

3 the member's alternative rights (including to direct the trustee to transfer the member's benefits to an alternative investment option or, if so entitled, to cash the member's benefits).

Transfer to successor fund

The court said (at [408]-[409]) that it was in the interest of members that the trustee have power to transfer the benefits of the following classes of members to a successor fund without their consent in the following limited circumstances:

1 a decision by the trustee to terminate the fund (including on a merger) and transfer to a successor fund the benefits of members of the fund;

2 a decision by the trustee to terminate a product within the fund and transfer to a successor fund the benefits of members holding that product;

3 a decision by the trustee to transfer to a successor fund the benefits of members falling within a group for which the trustee determines it is unable to provide competitive benefits at a competitive cost compared to a competitor fund that qualifies as a successor fund; or

4 a decision by the trustee to transfer to a successor fund the benefits of employer-sponsored members who are employees of a participating employer which has changed or decided to change the fund to which it makes superannuation contributions from the fund to a competitor fund that qualifies as a successor fund.

The power to transfer members' benefits to a successor fund should be conditional on:

1 the trustee exercising the power so that the timing of the transfer does not cause one subset of members to be transferred to suffer a significant detriment compared to another subset;

2 the transfer not causing a significant detriment to members not to be transferred; and

3 the trustee giving to each member of the defined class at least 60 days' notice of the intended transfer of the member's benefits to the successor fund including an explanation of:

   (a) the nature and effect of the trustee's decision, including details of the successor fund and product to which it is proposed that the member's benefits be transferred, how to obtain a product disclosure statement for the relevant product in the successor fund, the proposed date of the transfer and any conditions to which the proposed transfer is subject;

   (b) the reasons for the trustee's decision;

   (c) actual and potential advantages and disadvantages of transfer for the member; and

   (d) the member's alternative rights (including to remain in the fund if applicable, to direct the trustee to transfer the member's benefits to an alternative regulated superannuation fund of the member's own choice or, if so entitled, to cash the member's benefits).

Power to interpret trust deed

The original trust deed contained a provision that, if any dispute or doubt arose as to the interpretation of the trust deed, the decision of the trustee's investment manager or administration

manager was final and conclusive against all persons.

By an amending deed made in 1988, clause 6.3 was inserted to provide that decisions as to interpretation and effect of the trust deed by the trustee shall be final.

The court said (at [435]-[437]) that clause 6.3 would enable the trustee to determine conclusively whether an amendment complied with the amendment power in clause 19 or whether the trustee had acted contrary to its obligations under the trust deed. The court continued:

> Clause 6.3 is of doubtful validity as potentially ousting the jurisdiction of the courts and as being contrary to the deemed covenants inserted by and other provisions of the SIS Act.

Therefore, it was not in the interest of members that clause 6.3 be inserted into the trust deed.

Binding death benefit nominations

The court made extensive comments about binding death benefit nominations.

The court noted (at [482]) that sections 58 and 59 of the SIS Act impose restrictions on governing rules permitting the exercise of the trustee's powers or discretions under the governing rules by or at the direction of a third party. However:

> [486] The restrictions contained in, and the drafting of, sections 58 and 59, give rise to several difficulties and uncertainties of interpretation.

First, sections 58 and 59 proceed on the assumption that a power and a discretion are mutually exclusive and they contain different exceptions for each. However, in most cases a power will encompass a discretion and vice versa (at [487]).

Second, there are many provisions of governing rules that enable members to give instructions to the trustee exercisable as of right which it cannot have been the intention of sections 58 and 59 to preclude. Examples are instructions by a member to change from one division within the fund to another (where the governing rules provide for this), to rollover their interest to another superannuation fund or, if they have reached retirement age, to cash their benefit. Literally, these instructions are directions by a person to the trustee in contravention of subsection 58(1). It cannot have been the legislature's intention that subsections 58(1) or 59(1) would apply to such instructions (at [488]).

The court went on:

> [488] … Leaving aside the provisions of subsection 59(1A) for the time being, sections 58 and 59 should be interpreted such that they do not apply when the governing rules give to a member a right and impose on the trustee a corresponding duty such that the trustee has no power or discretion not to give effect to the right.

Third, subsection 59(1A) was inserted in 1999, well after the enactment of sections 58 and 59 in 1993. Subsection 59(1A) proceeds on the assumption that a notice from a member requiring payment on death to specified beneficiaries or the legal personal representative would, but for subsection 59(1A), have been precluded by subsection 59(1) as an exercise of discretion by a person other than the trustee. The court said that "[t]his assumption is not necessarily sound" (at [489]).

The court noted (at [490]) that in *LGSS Pty Ltd v Egan* [2002] NSWSC 1171 at [87] and [89], Austin J had said:

> The law of trusts draws a distinction between a case where the trust instrument provides that the power of a trustee may be exercised only with the consent of a designated person, and a case where the trust instrument makes the exercise of the trustee's power subject to directions from a designated person. …

and:

> … where the obligation to follow directions is clearly and specifically expressed, any discretion of the trustee is wholly removed.

In *REST v Pain*, the court continued:

> [491] If a trust deed were to provide that the trustee is required to pay a member's benefits on death in accordance with an instruction given by the member, no discretion would fall to be exercised.

This comment would appear to apply equally to both lapsing and non-lapsing nominations.

Traditionally, for APRA-regulated funds a lapsing binding death benefit nomination is one which (in addition to meeting other requirements) meets the requirements specified in regulation 6.17A of the SIS Regulations. In *REST v Pain* the court extended this by saying that the governing rules could provide for a member to give a binding death benefit nomination in circumstances other than the circumstances specified in regulation 6.17A. The court said:

> [505] ... Outside the mandatory regime imposed by regulation 6.17A, the governing rules may provide for the trustee to be bound to act in accordance with a notice in additional circumstances: this is a matter for the governing rules.

This is another comment which would appear to apply equally to both lapsing and non-lapsing nominations.

The court noted that it was common ground between the parties (including APRA) that a non-lapsing binding death benefit nomination could be made under section 59(1)(a). The court said, in relation to section 59(1)(a):

> [493] … All parties accept that, if the trustee consents to the giving of such a nomination, a nomination can be given pursuant to the trustee consent exception contained in section 59(1)(a) and, if the Trust Deed gives to the Trustee no power or discretion not to pay as instructed by the member, sections 58 and 59 are not engaged.

Turning to regulation 6.17A, the court began with the observation (emphasis added):

> [495] Regulation 6.17A juxtaposes regulations made under two separate heads of power having two different operations. Subregulations (2) and (3) are expressed to be made under subsection 59(1A) to define the conditions for giving a notice. Subregulations (1) and (4) to (7) are expressed to be made under section 31 to be an operating standard applicable to regulated superannuation funds. *This results in ambiguity as to the meaning and effect of regulation 6.17A as a whole*.

The trustee and the member, on the one hand, and APRA, on the other hand, advanced competing constructions of regulation 6.17A. While not deciding the issue definitively in a way that would be binding on potential beneficiaries in the event of a future contest, the court indicated a preference for the construction advanced by the trustee and the member (at [496]-[498]).

The court said that a nomination that complied with regulation 6.17A could not be made subject to additional conditions under the governing rules: The court said (emphasis added):

> [505] On the construction advanced by the [trustee] and [the member], regulation 6.17A operates in a rational manner. There is an overarching requirement for exemption from subsection 59(1) that the requisite information be given. There is then a regime making it mandatory for a trustee to comply with a notice if the subregulation (4) to (7) conditions are satisfied. *In this respect, the governing rules cannot prescribe additional conditions: the field is covered by regulation 6.17A. For example, the governing rules could not impose an additional condition that the notice be witnessed by a justice of the peace or that a solicitor certify that the member understands the effect of the notice*.

After further discussion, the court said that if the construction advanced by APRA is correct, "it is likely that subregulation [6.17A](7) is invalid" (at [511]).

The court then advised that the drafting of the trust deed should accommodate both constructions:

> [511] … In consequence, it is in the interests of beneficiaries that the Trust Deed be drafted as far as practicable to best accommodate either construction.

In particular, the requirements in the trust deed for validity of lapsing binding death benefit nominations should be incorporated in the trust deed and "should not be dependent on the operation of the SIS Regulations given the uncertainties and ambiguities referred to above [ie in the judgment]" (at [525]).

The court called for legislative reform, in the following terms:

> [512] The structure and drafting of sections 58 and 59 of the SIS Act and regulation 6.17A of the SIS Regulations give rise to ambiguities, uncertainties and potentially unintended consequences … It is highly desirable that those provisions be reviewed by the Commonwealth and recast.

and:

> [515] One policy option would be to leave binding nominations to be governed exclusively by the governing rules of the superannuation fund, largely equating the position to that applying to wills under the general law in which (subject only to implied revocation on marriage) a will operates indefinitely until revoked. Another policy option would be to permit indefinite nominations subject to legislated manner and form requirements to ensure that a nomination is intended to be made by a member on an informed basis. Another option would be to provide that all indefinite nominations lapse on the occurrence of a legislatively defined event or events (such as marriage). Another option would be to provide that all nominations lapse on the effluxion of a legislatively defined period of time. Whichever policy option is adopted, it is desirable that it be a simple universal rule applying to all binding nominations as opposed to the current situation involving multiple alternatives adopted by superannuation fund trustees to permit their members to make fixed term or indefinite binding nominations in compliance with the legislation.
>
> [515] Whichever policy option is adopted, it would be preferable that the statutory regulation of nominations be divorced from sections 58 and 59 (which should themselves be re-cast) and be standalone, whether by statute or regulation.

Regulation 13.16

In relation to regulation 13.16 of the SIS Regulations (about accrued benefits), after referring to the judgment of the trial judge (Slattery J) in *Beck v Colonial Staff Super Pty Ltd* [2015] NSWSC 723 (which was subsequently

reversed by the New South Wales Court of Appeal in *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* [2016] NSWCA 218 – see case note above), the court said:

> [723] In its application to a defined benefit fund, regulation 13.16 gives rise to issues of construction and application as exemplified [in *Beck*]. For the reasons given … above, any formula to limit amendments in the interests of beneficiaries that is apt for an accumulation fund is not apt for a defined benefit fund and vice versa. It is desirable that regulation 13.16 be reviewed and recast by the Commonwealth

The result

In the result, the court was satisfied that it should exercise its discretion to amend the trust deed, subject to the various qualifications in the judgment. The next step was for the parties to prepare a final form of the amended Trust Deed in light of the reasons for judgment, to be the subject of the court's variation order.

Take away points

A number of key take away points emerge from this case.

First, the limitations that the fund's trust deed places on the trustee's power to amend the deed always need to be carefully considered, before the amendment power is exercised.

Second, trustees who have concerns about the validity of previous amendments may wish to consider applying to the court for an order varying the trust deed, to validate previous amendments with prospective effect.

Third, given the court's comments regarding the uncertain meaning of sections 58 and 59 and regulation 6.17A and the dubious validity of regulation 6.17A as well as the possibility that those provisions might be rewritten, it would appear prudent to avoid expressly referring to those provisions in the trust deed. In other words, it would appear prudent for the relevant provisions of the trust deed to operate on a "stand-alone" basis, and not depend on the meaning and validity of sections 58 and 59 and regulation 6.17A.

Fourth, trustees may wish to consider whether they wish to allow members to make lapsing binding death benefit nominations in circumstances outside the circumstances prescribed in regulation 6.17A.

Fifth, trustees who do not already allow fund members to make non-lapsing binding death benefit nominations may now wish to consider (or reconsider) whether they now wish to do so. If so, they will want to consider whether they will rely on section 59(1)(a) or an alternative basis for validity

3. Amendment of trust deed – power to transfer to successor fund – *Westpac Securities Administration Ltd v Cooper* [2016] SASC 122

The Supreme Court of South Australia (Blue J) has indicated that it will vary the terms of the trust deed of a superannuation fund to confer on the trustee of the fund power to transfer members' benefits in the fund to a successor fund without members' consent, in limited circumstances and subject to conditions. The case is *Westpac Securities Administration Ltd v Cooper* [2016] SASC 122.

Trustee Act

Briefly stated and subject to a number of prerequisites, section 59C of the *Trustee Act 1936* (SA) provides that the Supreme Court of South Australia may, on the application of a trustee, vary the trust.

One of the prerequisites is that in any proceedings under the section, the "the interests of all actual and potential beneficiaries of the trust must be represented": section 59C(2).

The trustee's application

The trustee of a superannuation fund applied to the Supreme Court for an order under section 59C for an order varying of fund's trust deed to confer on the trustee the power to transfer members' benefits in the fund to a successor fund without members' consent.

The trustee made the application because the trustee was contemplating merging the fund with another fund in the same group (namely, the BT Financial Group which is the funds management arm of Westpac Banking Corporation) and the

trustee was uncertain whether it had power under clause 11 of the trust deed to transfer members' benefits without their consent.

To meet the prerequisite referred to above, a member of the fund was appointed to represent the interests of beneficiaries and potential beneficiaries of the fund, and was named as the defendant in the proceedings.

The court's decision

The court noted (at [38]) that its jurisdiction and power to vary a trust is conditioned on satisfaction of the following 8 prerequisites:

1 an application is made by a trustee of a trust (or a person with a vested, future, or contingent interest in property held on trust);

2 the interests of all actual and potential beneficiaries are represented in the proceeding;

3 the application is not substantially motivated by a desire to avoid or reduce the incidence of tax;

4 there is good reason to make the proposed variation;

5 the proposed variation would be in the interests of beneficiaries;

6 the proposed variation would not result in one class of beneficiaries being unfairly advantaged to the prejudice of another class;

7 the proposed variation accords as far as reasonably practicable with the spirit of the trust; and

8 the proposed variation would not disturb the trust beyond what is necessary to give effect to the reasons justifying the exercise of the powers.

The court noted that as at February 2016 there were 11,000 members of the fund in South Australia with benefit entitlements of $270 million. There was a real and substantial connection with South Australia. There was no improper purpose in the trustee bringing the application in South Australia. The application should therefore be entertained (at [43]).

Clause 11.3 of the trust deed gave the trustee power to transfer a member to a successor fund without the person's consent if the person is a member of the fund in that person's capacity as an employee of a participating employer who has changed the fund to which it makes superannuation contributions to a competitor fund that qualifies as a successor fund if some of its employees who are members of the fund have agreed to become members of that competitor fund.

Clause 11.2(a) set out other circumstances in which the trustee could transfer a member's benefits to another fund. However, this clause contained a proviso which was ambiguous and also prejudicial and adverse to the rights of members because it empowered the trustee to transfer their benefits to a successor fund without their knowledge or consent. Accordingly, it was likely that the trustee lacked power to transfer members' benefits to a successor fund other than in the limited circumstances referred to on clause 11.3 (at [52]-[59]).

The court said (at [60]) that it was foreseeable that the trustee might wish to exercise a power to transfer a member's benefits to a successor fund without the member's consent in the future in the following circumstances:

1 upon deciding to terminate the fund – in respect of all members;

2 upon deciding to terminate a Plan or product (including the MySuper product) if members' benefits are not to be transferred to an alternative product – in respect of all members in that Plan or holding that product;

3 upon deciding that it cannot provide benefits on competitive terms for a specific group of members (eg obtain insurance for members in a specific occupation on competitive terms) and a competitor fund that qualifies as a successor fund can do so – in respect of all members of the specific group; or

4 upon an employer ceasing to be a participating employer and making its default superannuation contributions instead to a competitor fund that qualifies as a successor fund – in respect of all employees of that employer. (Clause 11.3 already provided for this scenario.)

The trustee contended that it was not possible to foresee all circumstances in which it might wish to exercise a transfer power and it is in the interest of members that it have plenary power to do so not confined to foreseeable circumstances. The trustee pointed to the definition of "successor fund" in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) that ensures that any successor fund must confer equivalent rights to those in the fund, and to the fact that it would owe a fiduciary duty to exercise a transfer power in the interest of the members. The trustee pointed to the fact that the trust deeds of several large competitor superannuation funds

give to their trustees a plenary power to transfer members to a successor fund.

However, the court was not satisfied that it would be in the interest of members that the trustee have plenary power to transfer their benefits to a successor fund without their consent. In general terms, it was in the interest of members that their interest in the fund not be transferred to a different fund other than pursuant to their request or with their consent (at [62]).

The court said that it was in the interest of members that the trustee have power to transfer the benefits of the following classes of members to a successor fund without their consent in the following limited circumstances:

1 a decision by the trustee to terminate the fund (including on a merger) and transfer to a successor fund the benefits of all members of the fund;

2 a decision by the trustee to terminate a Plan or product within the fund and transfer to a successor fund the benefits of all members in that Plan or holding that product;

3 a decision by the trustee to transfer to a successor fund the benefits of all members falling within a group for which the trustee determines it is unable to provide competitive benefits at a competitive cost compared to a competitor fund that qualifies as a successor fund; or

4 a decision by the trustee to transfer to a successor fund the benefits of employer-sponsored members who are employees of a participating employer which has changed or decided to change the fund to which it makes superannuation contributions from the fund to a competitor fund that qualifies as a successor fund.

The power to transfer members' benefits to a successor fund should be conditional on:

1 the trustee exercising the power so that the timing of the transfer does not cause one subset of the members to be transferred to suffer a significant detriment compared to another subset;

2 the transfer not causing a significant detriment to members not to be transferred; and

3 the trustee giving to each member of the defined class at least 60 days' notice of the intended transfer of the member's benefits to the successor fund including an explanation of:

   (a) the nature and effect of the trustee's decision including details of the successor fund and plan or product to which it is proposed that the member's benefits will be transferred, how to obtain a product disclosure statement for the relevant product in the successor fund, the proposed date of the transfer and any conditions to which the proposed transfer is subject;

   (b) the reasons for the trustee's decision;

   (c) actual and potential advantages and disadvantages of transfer for the member;

   (d) the member's alternative rights (including to remain in the fund if applicable, to direct the trustee to transfer the member's benefits to an alternative regulated superannuation fund of the member's own choice or, if so entitled, to cash the member's benefits).

The new clause should replace existing clauses 11.2 and 11.3.

The court said that subject to the inclusion of the provisions referred to above, there was good reason to vary the trust to give to the trustee power to transfer the benefits of members to a successor fund without their consent in the limited circumstances and subject to the conditions above. Such a variation was in the interest of members, and in accordance with the criteria in section 59C(3) (at [71]).

The matter was stood over for submissions as to the form of order to give effect to the court's reasons.

The result

In the result, the court indicated that it would vary the terms of the trust deed to confer on the trustee power to transfer members' benefits to a successor fund without their consent, in limited circumstances and subject to conditions

4. TPD claim dismissed – *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2016] QCA 247

The Queensland Court of Appeal (Gotterson JA and Dalton and Burns JJ) has dismissed an appeal by a member of a superannuation scheme claiming a total and permanent disablement (TPD) benefit. The trial judge (Bond J) had held that the member had not established that in rejecting the member's claim, the trustee of the scheme had breached its duty as alleged by the member. Nor had the member established that there was a contract of insurance between the trustee and the member. The case is *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2016] QCA 247.

Background

The background to the dispute was set out in the September 2015 issue of the Superannuation Case Law Update.

The judgments of the Supreme Court

At first instance before the Supreme Court, at the request of the parties 5 questions had been set down for separate determination.

The court noted that the member's claim involved two broad alternatives: a claim for review of a decision of the Board of Trustees of the State Public Sector Superannuation Scheme as a trustee under section 8 of the *Trusts Act 1973* (Qld), and a claim that there was a contract of insurance between the Board and the member which the Board had breached. The questions according fell into two categories: questions about the Board's decision as trustee, and questions about the claim based on a contract of insurance.

On 21 August 2015 the court answered these questions in favour of the Board: *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QSC 245.

The member filed a notice of appeal to the Queensland Court of Appeal.

Following this first judgment, the member contended that the answers to the separate questions had not dispensed entirely with his claim. The Board disagreed and filed an application that the member's claim be dismissed.

On 3 November 2015 the court delivered a supplementary judgment in which the matter was resolved in the Board's favour: *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QSC 312. The answers to the separate questions dispensed entirely with the member's claim.

The member filed a second notice of appeal to the Queensland Court of Appeal.

For more details of the judgments of 21 August and 3 November 2015, see the September and December 2015 issues of the Superannuation Case Law Update.

The appeals

The 2 appeals were heard together.

The judgment of the Court of Appeal

The Court of Appeal identified the following 3 issues on appeal:

- issue 1 – the member alleged that the Board had fallen into error in evaluating the "competing" medical reports for the purpose of making its decision concerning a relationship between the member's TPD and his pre-existing schizophrenia;
- issue 2 – the member alleged that the Board had breached its duty to afford the member natural justice by giving him a chance to address adverse information; and
- issue 3 – the member alleged that there was a contract of insurance between the Board and the member.

The Court of Appeal resolved all 3 issues in favour of the Board.

Issue 1

In relation to issue 1, the Court of Appeal held that none of the errors on the part of the trial judge alleged by the member had been made out (at [29]-[71]).

In particular, the court was not persuaded that the Board was required to make the further enquiries proposed by the member. The court said:

> [70] … I am unpersuaded that the enquiries proposed by the [member] were ones that the Board was required to make consistently with its duty to properly inform itself of relevant information. I would add that the Board had before it a very substantial amount of information. There was a clear difference of opinion between Dr Reddan and Dr De Leacy as to whether there was a relationship between the [member's] TPD and his pre-existing schizophrenia. The Board made a reasoned choice as to which opinion it preferred. The position the Board was in is analogous with that of the trustee in *Chapman v United Super Pty Ltd* [[2013] NSWSC 592] whose decision to reject a TPD claim on the basis of a choice made between competing medical opinions was unsuccessfully challenged in the Supreme Court of New South Wales.

Issue 2

In relation to issue 2, the Court of Appeal held that the options presented in the 2008 QSuper submission to the Board reflected the material before the Board. Further, the Board was entitled to accept each psychiatrist's account of what the member had told him, and was not obliged to assume a possibility that either psychiatrist may have been mistaken as to the account given to him and, on the basis of such an assumption, offer the appellant an opportunity to correct any mistake (at [76]-[77]).

The member had failed to establish a breach of duty on the part of the Board in failing to accord him natural justice (at [78]).

Issue 3

The trial judge had found that the member had failed to establish the requisite intention to create a contractual relationship between the Board and the member.

The Court of Appeal agreed, saying (footnotes omitted):

> [80] Intention is a necessary element of a contract. The relevant intention may be express or implied. Whether there is such an intention in particular circumstances is to be determined objectively from the "outward manifestations" of the parties' intentions.
>
> [81] Here, there was no expression of intention to create contractual relations. Ought such an intention be implied? That question needs to be answered in the context of the evident trustee-beneficiary relationship that did exist between the appellant and the Board, and, it may be noted, had existed between the respective trustees and claimants in *Finch* [*v Telstra Super Pty Ltd* [2010] HCA 36; (2010) 242 CLR 254] and *Alcoa* [*of Australia Retirement Plan Pty Ltd v Frost* [2012] VSCA 238; (2012) 36 VR 618]. So seen, the question can be modified to one of whether an intention to enter into a contractual relationship which would co-exist with the trust relationship, ought to be implied.
>
> [82] It is highly relevant to answering the question to inquire whether there is a basis for concluding that the parties intended their relationship to include any substantive right or obligation which was outside those rights and obligations which were incidents of the trustee-beneficiary relationship and which, it might be thought, the parties intended would be enforced on the basis of contract only. The [member] did not identify any such right or obligation. That, to my mind, is all but fatal to his contention that a shared intention to create contractual relations ought to be inferred. It strongly suggests that the question should be answered in the negative. I agree with [the trial judge's] conclusion against a concurrent contractual relationship and with his reasons for it.

The Court of Appeal went on to say that even if there had been a contract of insurance, that would not have assisted the member on any way, as he would have failed to prove any breach of contract (at [83]).

The result

In the result, the Court of Appeal said that the member's appeal must be dismissed, with the member to pay the Board's costs of the appeal on the standard basis.

5. Death benefit – de facto spousal relationship – *Ievers v Superannuation Complaints Tribunal* [2016] FCA 936

In dismissing an appeal from a determination of the Superannuation Complaints Tribunal (SCT), the Federal Court (McKerracher J) has held that the SCT was correct in finding that the member and a male person (in this case note referred to as the "boyfriend") were still in a de facto spousal relationship at the time of the member's death, despite the "disharmony, altercations and grievances" in the period immediately leading up to the death. The court upheld the SCT's determination to pay 100% of the benefit to the boyfriend, to the exclusion of the member's mother as legal personal representative. The case is *Ievers v Superannuation Complaints Tribunal* [2016] FCA 936.

Background

The member died on 22 April 2011 as a result of an attempted suicide by hanging two days earlier on 20 April 2011 which was connected to her relationship with the boyfriend.

The member was survived by the boyfriend and her mother and stepfather. She had no children.

The member had made no nomination of a preferred beneficiary of her superannuation death benefit. Nor had she made a will. The mother was granted letters of administration.

The member's death benefit was contested by the boyfriend (on the basis that at the time of the member's death he was her de facto spouse, or alternatively that at that time he was financially dependent on her) and by the mother (as the member's legal personal representative).

The background facts included the following:

- the member and the boyfriend had been in a relationship for three to five years;
- until 18 April 2011 the member and the boyfriend had lived together on a genuine domestic basis in a relationship as a couple. They lived together in a rented house;
- the relationship involved elements of escalating domestic violence which were never brought to the attention of the police;
- the member and the boyfriend had an argument (which the mother described as a "huge argument") on the night of 18 April 2011;
- the member bought a one-way ticket to fly interstate to visit her mother on 19 April 2011. She went to the airport, but she did not board the plane. The boyfriend left the airport without the member;
- the member and the boyfriend spent the night of 19 April 2011 in their rented home; and
- the text messages that the member sent the boyfriend included the following:
    - "Babe I love you so much please do not do this";
    - "I love and care for you with all my heart";
    - "Please come home";
    - "You are my rock and I can not live without you [sic]";
    - "[The boyfriend] I will kill myself if you don't come back I can't do this without you You have so many people who care about you";
    - "I will never forgive you for leaving me";
    - "I need you and want to marry you and have a little boy with you and make you proud";
    - "I love you don't leave me I will not make it past sunset if you don't come home";
    - "It is all my fault I have ruined you you are such a great person"; and
    - "That's it I don't have anything to live for don't come into the garage".

As mentioned above, on 20 April 2011 the member attempted suicide (the incident). On that date the boyfriend found her hanging from a rafter in the garage of their rented home. She died two days later as a result of her injuries, without regaining consciousness.

The mother contended that the boyfriend had terminated the relationship on or before 18 April 2011 (being the day of the argument).

The trustee's allocation

The trustee of the superannuation fund proposed paying 100% of the benefit to the mother as the legal personal representative.

This was because the trustee was of the view that the boyfriend could not be regarded as a dependant of the member, either as her de facto spouse or as a person who had been in an interdependency relationship with her at the time of her death. The boyfriend had irrevocably ended his relationship with the member prior to her attempted suicide on 20 April 2011, such that at the time of her death two days later he was no longer a dependant. As the member was survived by no known dependants, the benefit had to be paid to the legal personal representative.

The boyfriend complained to the SCT.

The SCT determination

The SCT set aside the trustee's decision and determined that the benefit should be paid 100% to the boyfriend as a spousal dependant: D14-15\227 [2015] SCTA 82.

In reaching this conclusion, the SCT said (at [37] and [44]) that as the mother and the trustee had acknowledged the existence of a previous de facto relationship of between three and five years, they had to "reasonably prove" (or "establish") that "[the boyfriend] had irrevocably terminated the relationship".

The SCT apparently accepted a submission by the boyfriend that whether there was domestic violence in a relationship is not a relevant issue in determining whether a relationship existed.

The SCT perused the boyfriend's police interview and found nothing that indicated that the boyfriend considered that the relationship had terminated, either from his perspective or from that of the member. Nor did the police investigation reports or the Coroner's investigation report support a conclusion that the relationship had terminated prior to the member's death. The Coroner's report clearly indicated that the Coroner believed the boyfriend and the member to have been in a relationship at the time of the member's death.

The SCT accepted that the member's text messages to the boyfriend at 11:43 am and 11:47 am on the morning of the incident indicated that

the member felt something was wrong with the relationship, but that did not mean that either party had ended the relationship.

It was not "fair or reasonable" for the trustee to conclude that at the time of the member's death, the boyfriend was no longer in a de facto spousal relationship with her and consequently was no longer a dependant.

The SCT concluded on the balance of probabilities that the boyfriend was still in a de facto spousal relationship with the member at the time of her death and, accordingly, was her sole dependant. It was therefore unnecessary for the SCT to determine whether an interdependency relationship also existed in the last two and half days prior to the incident. However, it had existed prior to that time, and nothing in the material before the SCT demonstrated to the SCT that it had ceased in the period immediately prior to the incident.

The SCT then dealt with the question of whether the benefit should be distributed entirely to the boyfriend or whether it should be shared with the legal personal representative. The SCT said (at [30]):

> … the [boyfriend] during the agreed relationship period … was the Deceased Member's spouse and accordingly her sole dependant. This means that if, in a hypothetical scenario … during the agreed relationship period, the Deceased Member had died of natural causes or in an accident, then the [boyfriend], as her sole dependant, would have had a legitimate expectation, having regard to the nature and purpose of superannuation, of the Trustee exercising its discretion and distributing the entirety of her superannuation benefit to him, notwithstanding the existence of an LPR [ie, legal personal representative]. This legitimate expectation would have existed, irrespective of evidence being adduced that the relationship was, arguably, an abusive one, from the Deceased Member's perspective.

The SCT concluded (at [49]) that in these circumstances where the boyfriend was the member's sole dependant and the only person, when considering the nature and purpose of superannuation, who had a right to look to her for ongoing financial support, there was "no rational basis, within the superannuation context," to award any percentage of the benefit to the legal personal representative.

The appeal to the Federal Court

The mother appealed to the Federal Court against the SCT and the boyfriend. She relied on eight grounds of appeal.

The Federal Court decision

The Federal Court upheld the SCT's determination and dismissed the mother's appeal with costs. None of the grounds of appeal were made out.

The mother's main argument was that it was beyond the power of the SCT to determine whether the boyfriend was a "dependant". In rejecting this argument, the court said:

> [45] In my view, the Tribunal did have power to determine that [the boyfriend] was the de facto spouse of the deceased member ... This is the very issue it was asked by the protagonists to decide and was the issue it necessarily had to determine to consider the reasonableness and fairness of the Trustee's decision. The Trustee and the Tribunal need to form a view as to whether a person qualifies and to make decisions about allocation of the benefits of the Fund in accordance with those views.
>
> [46] That accords with the obligations in cl 6.1(t) of the Trust Deed. The Tribunal steps into the shoes of the Trustee to consider all the evidence produced, including by [the boyfriend], being the person claiming entitlement ... Clause 6.1(t) provides that the Trustee has the power of "determining as and when the need arises, who are Dependants of a deceased Member [.]"

Another argument advanced by the mother was that even if the SCT had power or jurisdiction to form an opinion as to whether the boyfriend was a dependant, it did not have jurisdiction or power to form the opinion wrongly.

The court said that this argument in substance, sought to advance a merits review – a course that was not open. In further response to this argument, the court said (at [52], emphasis added):

> … in my view the Tribunal was correct in concluding that [the boyfriend] was a dependant at the time of death. *Despite the disharmony, altercations and grievances in the period immediately leading up to the death, they were still unfortunately very much fighting over the matters that people in a relationship may fight about, including whether or not the relationship could continue*. People do not fight about that topic if it is clear that the relationship is over.

As for the SCT's allocation of the benefit between the boyfriend and the legal personal representative, the court said:

> [71] Once the Tribunal reached the conclusion that [the boyfriend] was in a de facto relationship with [the member] and was her sole dependant at the date of her death, the direction that 100% of the superannuation benefit should be distributed to [the boyfriend] is not an error of law, but rather, it is a legitimate and sensible exercise of a discretion. It

is difficult to see that any other decision could or should have been taken.

The result

In the result, the trustee's decision to pay 100% of the benefit to the mother as legal personal representative was substituted by the SCT's determination, which was affirmed by the Federal Court, to pay 100% of the benefit to the boyfriend as the member's de facto spouse.

Take away points

Several take away points emerge from this case.

First, not all relationships are straightforward. Here, in the period immediately leading up to the member's death, the relationship was characterised by disharmony, altercations and grievances. However, that did not mean that the relationship was over. The member and the boyfriend were fighting over the matters that people in a relationship may fight about, including whether or not the relationship is to continue.

Second, where it is not disputed that a de facto spousal relationship existed previously, it could be said that the party asserting that the relationship terminated prior to the member's death bears a practical onus of showing that there was a change of circumstances that amounted to termination of the relationship.

Third, whether there was domestic violence in a relationship is not a relevant issue in determining whether a relationship existed.

Fourth, where a member dies leaving a spouse who at the time of the member's death was financially dependent on the member, and leaving no other dependants, in the SCT's view the whole of the death benefit should be paid to the spouse, to the exclusion of the legal personal representative. This of course is subject to the governing rules of the fund (which may, for example, direct payment to the legal personal representative) and the terms of any valid binding death benefit nomination.

6. Invalidity pension not a defined benefit interest – *Campbell v Superannuation Complaints Tribunal* [2016] FCA 808

In allowing an appeal from the Superannuation Complaints Tribunal (SCT), the Federal Court (Logan J) has held that an invalidity pension under the Military Superannuation Benefit Scheme is not a "defined benefit interest" within the meaning of that term in the *Family Law (Superannuation) Regulations 2001* (Cth). The case is *Campbell v Superannuation Complaints Tribunal* [2016] FCA 808.

Background

Mr Campbell (the member) was a member of the Australian Defence Force (ADF) from 1994 until 2007, when he was discharged on medical grounds. He became entitled to invalidity benefits under the Military Superannuation Benefit Scheme for which provision was made by the Military Superannuation and Benefits Trust Deed (the Deed), under the *Military Superannuation and Benefits Act 1991* (Cth).

The Commonwealth Superannuation Corporation (CSC) administered the Military Superannuation Benefit Scheme fund from which benefits were paid.

In January 2008 a delegate of the predecessor of the CSC in the administration of the fund determined that the member's classification on his discharge from the ADF was, for the purposes of the Deed, Class B (30%). As a result of this determination, the member became entitled to invalidity benefits under the Deed. More particularly, that Class B classification meant that the member became entitled to member benefits in accordance with rule 28 of the Military

Superannuation and Benefits Rules which formed part of the Deed.

Broadly, these benefits comprised a member benefit and an employer benefit. The member became entitled to a preserved benefit of his member benefit with an option of accessing a pre-1 July 1999 accrued component via a lump sum payment. He availed himself of this option.

His employer benefit was converted into an indexed, invalidity pension.

In September 2014 the member claimed payment of the balance of his preserved member benefit under the Deed.

Meanwhile, in June 2014 the member applied to the CSC under section 90MZB of the *Family Law Act 1975* (Cth) for information about his superannuation interest under the scheme, using the required form (Form 6).

(The provision of information under section 90MZB of the *Family Law Act* facilitates the making of court orders in respect of superannuation interests in matrimonial causes heard in the Family Court or the Federal Circuit Court or in the reaching of agreements concerning such interests in such causes. Under Part VIIIB of the *Family Law Act*, courts having jurisdiction in matrimonial causes are able to make orders “splitting” the superannuation interest of a member spouse.)

Later in June 2014 the CSC provided the member with two responses to his request for information. The CSC did this because, in its view, the status of his under the scheme as at the date of his request was that he had a preserved benefit in what it considered was, for family law purposes, “growth phase”; and he was separately in receipt of an invalidity pension in what it considered was, for family law purposes, “payment phase”, on the basis that the invalidity pension was a "defined benefit interest". Accordingly, the CSC considered that it was obliged to make two separate responses to the member’s application, one for each component of what it considered was his overall superannuation interest.

In September 2014 the member lodged a complaint with the CSC by which he asserted that he ought not to have been furnished, in response to his application, with information in relation to his invalidity pension benefit. The CSC responded saying that it was obliged by section 90MZB of the *Family Law Act* to provide this information.

The complaint to the SCT

In October 2014 the member lodged a complaint with the SCT under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (Complaints Act) seeking a retraction of the information provided by the CSC in respect of his invalidity pension in response to his application, on the basis that his entitlement to this pension was not a “defined benefit interest”.

In February 2016 the SCT decided to treat the member’s complaint as if it had been withdrawn on the basis that it was "misconceived", under section 22(3)(b) of the Complaints Act. That was because the SCT considered that the member’s view as to the absence of an obligation on the part of the CSC to provide information with respect to his invalidity pension benefit was wrong in law.

The appeal to the Federal Court

The member appealed to the Federal Court.

The essence of the member’s submissions was that superannuation was a benefit paid in respect of age retirement, whereas his invalidity pension benefit was paid by virtue of a medical condition which occasioned a degree of incapacity to undertake remunerative work.

The Federal Court's decision

The court held that the member's invalidity pension entitlement was a "superannuation interest" within the meaning of that term in section 90MD of the *Family Law Act 1975* (Cth), with the consequence that the CSC was obliged by section 90MZB(3) to provide him with information about that interest (at [54]).

However, that invalidity pension entitlement was not a "defined benefit Interest" within the meaning of that term in regulation 5 of the *Family Law (Superannuation) Regulations*, but an "accumulation interest" (at [54]). The entitlement should therefore have been valued on the basis that it was an accumulation interest. By valuing that entitlement on the basis that it was a defined benefit interest and in payment phase, the CSC has committed an error of law which the SCT has confirmed (at [54]).

The result

In the result, the court remitted the matter to the SCT for reconsideration on the basis that the member's invalidity pension entitlement was an accumulation interest for the purposes of the *Family Law (Superannuation) Regulations*, and not a defined benefit interest.

7. SMSF – breaches of SIS Act – monetary penalty – *Deputy Commissioner of Taxation (Superannuation) v Rodriguez* [2016] FCA 860

The Federal Court (McKerracher J) has ordered a trustee of a self managed superannuation fund (SMSF) who committed numerous unauthorised withdrawals from the SMSF, in breach of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) to pay a monetary penalty of $40,000. The case is *Deputy Commissioner of Taxation v Rodriguez* [2016] FCA 860.

Background

Mr Rodriguez and his wife were the trustees of a SMSF.

Over the period from November 2005 to January 2012 Mr Rodriguez made numerous unauthorised withdrawals from the SMSF for his personal benefit and use. The loan balance peaked at $245,155.32 in May 2011.

Mr Rodriguez made a number of repayments to the SMSF, culminating in a final repayment in February 2013 which effectively repaid all outstanding amounts withdrawn since 2005 and which in effect included an interest component amounting to $87,385.88.

The SMSF auditor issued a qualified audit report for the 2010-2011 financial year and lodged an Audit Contravention Report.

The Deputy Commissioner of Taxation (Superannuation) notified Mr Rodriguez that the SMSF had been selected for audit for the period from July 2005 to June 2011.

The Deputy Commissioner commenced a civil penalty proceeding against Mr Rodriguez in the Federal Court. Mr Rodriguez admitted the allegations. The parties agreed on $40,000 as an appropriate monetary penalty for breaches of the SIS Act.

The court's decision

The court found that Mr Rodriguez had breached the following requirements of the SIS Act:

- the "sole purpose" test in section 62;
- the prohibition in section 65(1)(b)(i) against using the financial resources of a fund to give financial assistance to a member of the fund;; and
- the "in-house asset" rules – specifically, the rules in section 83(2) and section 82.

Under section 196(3) of the SIS Act, in the case of a contravention of a civil penalty provision, the court may order a monetary penalty up to a maximum of 2,000 penalty units which was $360,000: section 196(3) read with section 4AA of the *Crimes Act 1914* (Cth).

The court noted the following principles relating to the fixing of civil penalties under section 196:

(a) a civil penalty needs to be sufficiently high to deter contravention by others, but no so high as to be oppressive;

(b) general deterrence is a significant factor; other objectives include denunciation and punishment. Contravening conduct under the SIS Act may be difficult to detect and its investigation can be complex and expensive;

(c) those who take advantage of the utilisation of an SMSF have a responsibility to manage that fund in accordance with the terms of the trust deed and the legislation. Any trustee is obliged to discharge their duty according to the terms of a governing trust deed;

(d) when setting a penalty for multiple contraventions, the court should consider a penalty for each contravention and then look at the totality;

(e) the total penalty should not exceed what is proper for the conduct of the person in respect of all the contraventions;

(f) relevant factors in determining an appropriate penalty include:

(i) the nature and extent of the contravening conduct;

(ii) the amount of any loss or damage caused;

(iii) the size of the organisation;

(iv) the deliberateness or otherwise of the contraventions;

(v) the period over which the contraventions extended;

(vi) the degree of cooperation of the person concerned, either in the investigation or the subsequent hearing;

(vii) the past record of the person;

(viii) the person's financial position;

(ix) any amounts already paid by way of compensation or legal costs;

(x) contrition; and

(xi) any public policy position applicable.

Here, no penalty could be imposed for the period before the 2008-2009 financial year.

The result

In the result, the court ordered Mr Rodriguez to pay a monetary penalty in the sum of $40,000 (this amount having been agreed between the parties). The court also ordered Mr Rodriguez to pay the Deputy Commissioner's costs fixed in the sum of $14,000.

8. TPD claim – capacity for work – *Reynolds v Sunsuper Pty Ltd* [2016] QDC 129

In dismissing a claim by a member of a superannuation fund for an insured total and permanent disablement (TPD) benefit, the District Court of Queensland (Dorney QC DCJ) found that the member, by her own admission, was capable of performing a number of occupations, subject to the proviso that her treatment regime for her skin condition be accommodated. The case is *Reynolds v Sunsuper Pty Ltd* [2016] QDC 129.

Background

The trustee of the fund held a group life insurance policy with a 3-month qualifying period for TPD claims.

The member worked as a head gardener from August 2009 to 1 December 2011, when she resigned her job, citing recurring skin "cancers" which required ongoing treatment.

The member underwent, and continued to undergo, 3 different kinds of treatment, as follows:

- the freezing of lesions (cryotherapy);
- the removal of lesions by either excision (and stitching the wound) or by curetting which leaves, initially, an open wound; and
- the application of Efudix, a chemotherapy cream.

In September 2013 the member lodged an application for a TPD benefit. In January 2014 the insurer denied the claim.

Later in 2014 the member commenced proceedings in the District Court of Queensland against the trustee and the insurer.

The court's judgment

The court was not satisfied on the balance of probabilities that as at 1 March 2012 (being the end of the 3-month qualifying period) the member was within the ambit of the definition of TPD in the policy. She was therefore not entitled to the TPD benefit.

Under cross-examination, the member had revealed that she accepted that all occupations that she was capable of doing were those which had been identified in the reports of the psychologist, Ms Cucchiaro, and the rehabilitation counsellor, Ms Bradley, with the important qualification with respect to a full-time basis being on the proviso that her treatment regime could be accommodated. Also, with respect to part-time work or regular casual work, the member attached the qualification of organising her availability to accommodate her treatment regime.

The initially identified occupations were:

- general sales assistant, provided retraining was offered to upgrade her skills;
- process worker, with retraining and upskilling of her skills as a former process worker;
- hospitality worker; and
- bar attendant.

Added to those were the following, which flowed from particular job applications that the member had made:

- casual stock replenisher (by stocking shelves,

possibly with retraining);

- indoor work in gardening sections of retail outlets;
- customer service officer (for a general retailer such as Bunnings);
- laundry attendant;
- “all rounder” at cafés such as Muffin Break, with the exception of barista duty;
- fashion consultant at an outlet such as Noni B (although she might need retraining);
- retail sales assistant at a supermarket (such as Aldi or IGA); and
- each of the other occupations the member's Job Application Document which was an exhibit in the proceedings.

When specifically cross-examined about her work as a kitchen hand, the member conceded that she would accept full-time work if her treatment regime could be accommodated and would accept part-time or regular casual work by organising her availability around her treatment regime.

The court accepted the assessment of Dr Andrews, medico-legal dermatologist, that the member had the capacity to perform the following occupations:

- night filler (in a “light” warehouse role or as a shelf filler);
- retail sales assistant, such as in a bakery;
- process worker;
- hand packer;
- general retail sales position;
- kitchen hand; and
- laundry work.

The result

In the result, the member's claim for a TPD benefit was dismissed. A supplementary judgment on costs was delivered on 5 July 2016: *Reynolds v Sunsuper Pty Ltd (No 2)* [2016] QDC 167.

9. Excess concessional contributions – *Azer and Commissioner of Taxation* [2016] AATA 472

In affirming a decision of the Commissioner of Taxation disallowing an objection by a taxpayer concerning excess concessional contributions, the Administrative Appeals Tribunal (AAT) (Senior Member FD O'Loughlin), while acknowledging that the taxpayer's motives in seeking to provide for retirement income for him and his family were admirable, said that the taxpayer's circumstances were not "special". The decision is *Azer and Commissioner of Taxation* [2016] AATA 472.

Background

The taxpayer had salary sacrifice arrangement with a number of employers.

The Commissioner assessed the taxpayer as having excess concessional contributions of $11,055.21 for the 2013-2014 financial year. The taxpayer objected to the assessment.

The Commissioner issued a notice of decision advising the taxpayer that the Commissioner had decided not to disregard or allocate to another period, any of the taxpayer’s excess concessional contributions for the 2013-14 financial year. The taxpayer lodged an objection to the Commissioner’s decision.

The Commissioner issued the taxpayer with a notice of objection decision disallowing the objection.

The taxpayer applied to the AAT for a review of the Commissioner's notice of objection decision.

The taxpayer's evidence

Before the AAT, the taxpayer gave evidence that:

- he was a full-time employee in the Victorian Public Service and did not earn a high salary;
- he worked a number of part-time, casual jobs with approximately four employers, two of which were reasonably regular;
- he salary sacrificed $100 per week of his full-time earnings into one of his superannuation funds;
- he salary sacrificed all of his casual earnings with the two more regular casual jobs into another of his superannuation funds;
- he received pay slips for his employment, which he believed included running balances;
- his casual employment was not predictable; some weeks he may have one four hour shift, others, two shifts totalling 12 hours, and some weeks, none at all;
- he was married with three children, but he and his wife were now empty nesters;
- he wanted to be able to give his children a head start in life;
- the salary sacrifice arrangements he set up were relatively routine or easy things to do by completing a form and giving it to his employer, and the same process would have applied, and it would have been relatively easy, to alter or terminate the salary sacrifice arrangements by filling in another form and giving it to his employer;
- he did not check the balances of his superannuation contributions, and, in receiving the 2013 year notice of excess contributions in January 2014, he did not then check the current balance of his 2014 year contributions, which he could have done;
- had he been aware of the balances, he would have stopped the contributions and would have received the earnings in cash; and
- he had not sought financial planning retirement advice.

Had the taxpayer been aware of the balances and stopped the contributions, the effect of receiving earnings in cash in excess of the limits would have produced the same ultimate tax bill that he had in his assessments. However the tax bill would not have been received in a lump sum. Rather, the tax liability would have been met by PAYG deductions progressively as the earnings were received.

The AAT decision

The AAT said that for excess contributions to be disregarded, the circumstances need to be "special", as that is the statutory test under s 291-465(2) of the *Income Tax Assessment Act 1997* (Cth). Neither the Commissioner nor the AAT can simply choose to disregard excess contributions because the outcome is unfortunate, or otherwise unplanned. For the circumstances to be special, they need to be unusual, uncommon or exceptional in the circumstances in which they occur. Special circumstances need to be those that distinguish an applicant's case from others, and take it out of the usual or ordinary case. Kiefel J said In *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541 at 545 Kiefel J said that the circumstances can be presumed to be special if the conclusion reached is "unjust or unfair".

Here, the Commissioner accepted that part of the taxpayer's evidence showed admirable qualities and motives in the taxpayer seeking to provide for retirement income for himself and his family.

However, while the taxpayer's circumstances were understandable, and his motives for working hard and stowing money away for retirement income were admirable, his predicament did not amount to a special circumstance. It could even be said that to waive the contributions cap, or the contributions in excess of the cap, in this case might produce an unfair result in the taxpayer's favour.

The AAT went on:

> [25] … Inadvertent mistakes are not special circumstances. The complexities of the system of taxation of retirement income and providing for retirement income are complexities the whole community has to deal with. The policy of the system is said to encourage gradual self-provision for retirement. That policy should be accepted in the context of a system that has allowed very lumpy contributions to be made from time to time.

Accordingly, the AAT concluded that there were no special circumstances that could allow the excess concessional contributions to be disregarded.

The result

In the result, the AAT affirmed the decision of the Commissioner under review. The Commissioner's assessment of the taxpayer's excess concessional contributions stood.

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Scott has comprehensive experience in the establishment, licensing, governance, administration, distribution, restructuring, investment and tax matters associated with superannuation, funds management and life insurance products. He has previously worked as an in-house counsel at Legal & General and ING. He is a regular speaker at conferences, has designed key training programs for boards and responsible managers and is a guest lecturer at UNSW law school. In 2012-2017 Scott was recognised by his peers in *Best Lawyers in Australia* in the Superannuation Law category, and in 2015-2017 in the Regulatory Practice category. In 2016 he was listed in *Who's Who Legal: Pensions & Benefits*.

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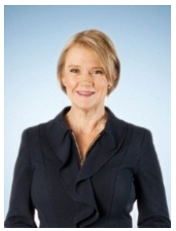

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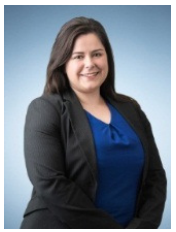

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