

Superannuation Case Law Update

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LAWYERS

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1. Non-lapsing binding death benefit nomination – *Application by BT Funds Management Ltd* [2017] NSWSC 45

In giving advice to a superannuation fund trustee under the *Trustee Act 1925* (NSW), the Supreme Court of NSW (Stevenson J) has held that in the circumstances, the trustee was required to treat a "Non-Lapsing Direction" (ie a non-lapsing binding death benefit nomination) as a "Request" (ie a non-binding death benefit nomination) under the trust deed of the fund, with the consequence that the trustee could exercise its discretion as to the manner of payment of the death benefit. The case is *Application by BT Funds Management Ltd* [2017] NSWSC 45.

Background

In August 2009, the member gave the trustee of his superannuation fund a "Non-Lapsing Direction" that his death benefit be paid to his wife.

In November 2012, more than 3 years later, the member died. At the time of his death, the member and his wife were permanently separated.

Following the member's death, the member's children commenced proceedings pursuant to section 59 of the *Succession Act 2006* (NSW) (see below).

Trust deed

The trust deed of the fund relevantly provided that:

- the trustee was "required" to accept a Non-Lapsing Direction to which it had given "conditional consent" (ie consent

that may be revoked on the death of the member in certain circumstances (see below)); and

- the trustee "must" give such conditional consent unless it had "actual knowledge" that the member did not understand the consequences of making the Non-Lapsing Direction.

The trust deed further provided that:

- on the death of the member, the trustee "must" consider whether to make its conditional approval absolute; and
- the trustee must form the view that its conditional consent is absolute unless, relevantly, it has "actual knowledge" that the member had "separated on a permanent basis from their Spouse or partner".

In the event that the trustee's conditional consent is revoked, the trust deed provided that the trustee must treat the Direction as a "Request".

Succession Act

Under the *Succession Act*, the court may make a family provision order in relation to property that is not part of the actual estate of the deceased person, or property that has been distributed, if it is designated as part of the deceased person's "notional estate" by court order. Such property can include the deceased person's superannuation interest.

Trustee's application

It appears from the judgment that, briefly stated, the trustee asked the court to confirm that:

- the trustee's conditional consent to the Direction was revoked on the basis that

the trustee had actual knowledge that after the member gave the Direction to the trustee, the member and his wife had separated on a permanent basis;

- the Direction was therefore to be treated as a non-binding "Request"; and
- in exercising its discretion, the trustee could pay the member's death benefit to his wife, to any other dependant, to his legal personal representative, or to any combination of these.

The court's advice

The court was satisfied that:

- the Direction was non-lapsing and the trustee would be justified in concluding that the Direction was governed by section 59(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) rather than section 59(1A) of that SIS Act;
- the trustee had given its conditional consent to the Direction;
- after the date of the Direction, the member and his wife had separated on a permanent basis; and
- the trustee had actual knowledge of this separation.

The court concluded that the Direction was to be treated as a "Request" rather than a Direction.

The Court made orders to the following effect:

- the trustee's conditional consent to the Direction was revoked on the basis that the trustee had actual knowledge that since the member gave the Direction to the trustee, the member and his wife had separated on a permanent basis;
- the Direction was therefore to be treated

- as a non-binding "Request"; and in exercising its discretion, the trustee could pay the benefit to the member's wife, to any other dependant, to the member's legal personal representative, or to any combination of these.

The court also ordered that the trustee's costs in relation to the proceedings be paid from the member's death benefit on an indemnity basis.

The result

In the result, the court ordered that the trustee treat the Direction as a "Request" because the trustee had actual knowledge that the member and his wife had permanently separated.

2. TPD claim – procedure – *Wild v FSS Trustee Corporation* [2017] NSWSC 237

In proceedings by a member of a superannuation fund claiming a total and permanent disablement (TPD) benefit against the trustee of the fund and a group life insurer of the fund, the Supreme Court of New South Wales (Stevenson J) has acceded to an application by the insurer for separate determination of the question of whether the insurer's decision to decline the claim could be vitiated. The decision is *Wild v FSS Trustee Corporation* [2017] NSWSC 237.

Background

The member worked for the New South Wales Police Force. In 2011 he was discharged on medical grounds, suffering from post-traumatic stress disorder.

He claimed a TPD benefit. In 2014 the insurer denied the claim.

In 2015 the member commenced proceedings against the trustee and the insurer.

It was common ground that in cases such as this there are two "stages" of inquiry. The first stage is to determine whether, in light of the material available to the insurer at the time the decision was made, its decision to decline indemnity can be vitiated on one or other of the available bases. The second stage, only reached if the plaintiff is successful at the first stage, is whether the plaintiff is in fact totally and permanently disabled within the meaning of the policy.

The application

The insurer filed a notice of motion seeks orders to the effect that the first stage be heard

separately and before the second stage.

The reasons proffered as to why the court should accede to the application were that:

- (1) the first stage would be a discrete inquiry focusing on material available to the insurer at the time it made its decision, which inquiry was said to be very likely to be based entirely on documentary material;
- (2) such an inquiry was likely to conclude within a day or so of court hearing time and that the likely costs of the parties for such an inquiry would be in the order of \$55,000;
- (3) otherwise, the matter will take at least another six days and the costs incurred would be many hundreds of thousands of dollars; and
- (4) if the member failed at the first stage, that would bring an end to the proceedings.

Undertakings

The insurer indicated that, were the court to accede to the insurer's application and were the member to give evidence at the hearing of the issues to be decided separately and such evidence be admitted, the insurer would undertake not to cross-examine the member on that evidence; no matter what it was.

The trustee indicated that it was prepared to give the same undertaking.

The court's decision

The court said that in view of the undertakings proffered by the insurer and the trustee, it was

prepared to make the orders sought in the notice of motion.

Counsel for the parties were invited to confer and agree on the short minutes needed to give effect to the court's reasons.

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We act for a broad range of superannuation clients located around Australia. Our clients include some of the country's largest industry, corporate and public sector schemes, with most of our client relationships going back many years. Our Superannuation team operates as a "seamless team" across our Sydney, Melbourne, Brisbane and Adelaide offices.



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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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