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CONTENTS

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1. *Late application to increase income protection benefit – AIA Australia Ltd v Lancaster [2017] FCA 962*

The Federal Court (Allsop CJ) has upheld an appeal by an insurer from a determination of the Superannuation Complaints Tribunal (SCT) that the income protection benefit of a member of a superannuation fund was to be calculated by reference to the member's *actual increased salary*, which had not been notified to either the trustee of the fund or the insurer. The court held instead that the benefit was to be calculated by reference to the member's salary as notified to the insurer. The decision is *AIA Australia Ltd v Lancaster* [2017] FCA 962.

BACKGROUND

The trustee held an income protection policy with the insurer which provided cover in respect of fund members.

The policy provided that in the case of any salary increase of more than 30%, the member had to apply to the insurer to increase their cover. (In other words, increased cover was not automatic.)

Up until 3 September 2012, the member's annual salary was $44,849.48. This amount was notified to the insurer and was recorded by the insurer as the member's salary. At this stage, in the event of a claim the policy would pay the member a monthly benefit of 75% of his recorded salary (subject to a maximum monthly benefit of $20,000).

On 3 September 2012 the member's annual salary was increased to approximately $97,000, due to a change in the category of his employment. This salary increase – which was an increase of more than 30% – was not notified to the insurer or to the trustee by either the member or his employer at the time.

In July 2012 the trustee had written to the member and provided him with an opportunity to update his salary details. Any change was to be effective from 1 July 2012. That letter contained the following warning (at [5]):

> Please note that in the event of a claim your Income Protection benefit will be limited to 75% of the Salary we have recorded against your account, therefore it's important you advise the Fund of your correct Salary.

The trustee also sent the member an annual statement dated 10 September 2012, showing the position as at 30 June 2012. This annual statement noted that the salary recorded for the member was $44,849.48, and included a reminder that he needed to keep his salary details up to date.

In January 2013 the member suffered a back injury during the course of his work, described by his doctor as "disc prolapse and degeneration of [the] lumbar spine". On 3 May 2013 he ceased work as a result of this injury.

In June 2013 the member told the trustee that his salary had increased, and he completed a form to apply for increased income protection cover. His increased salary was shown on his annual statement as at 30 June 2013.

In September 2013 the member lodged a claim for income protection benefits under the policy. That same month the insurer and the trustee accepted his claim. His benefit was calculated by reference to an annual salary of $44,489, this being his salary notified to the insurer at the date of his disablement, ie 3 May 2013. In November 2013 the member's employer notified the trustee of the increase of the member's salary.

After two reviews, the member complained to the SCT about the decision not to pay him the higher amount of benefit.

THE SCT DETERMINATION

The SCT made a determination in favour of the member.

The SCT was of the view that it was reasonable for the member to assume that his employer would notify the trustee of new salaries of employees, and that the trustee would notify the insurer. Given that both the trustee and the insurer were aware, prior to lodgment of the member's claim, that his salary had increased, the SCT was also of the view that the insurer should have made inquiries to ascertain whether the increase effective prior to the date of disablement. The SCT said (at [26]):

> 49. The Tribunal noted that both the Fund and the Insurer were aware of [the member's] salary increase prior to the lodgement of his IP [ie income protection] claim but not the effective date. However the Tribunal is of the opinion that, once the claim was made, it should have been clear that such a large increase would have been unlikely to occur after [the member] had been injured and was on restricted duties. Therefore inquiries should have been made by the Insurer to ascertain whether the increase was effective prior to the date of disablement.
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> ...
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> 51. The Tribunal accepts the Trustee's submission that it is the responsibility of members of the Fund to update their salary information and information was provided to members in this regard. However the Tribunal is also sympathetic to [the member's] argument that, in his case there was an unusual situation as a large number of members were changing their employment status at the same time. The Tribunal is of the opinion that it was reasonable of [the member] to assume that the Employer would have notified the Fund of the new salaries and that the Fund would have notified the Insurer.

> 52. The Tribunal considered that the purpose of an IP benefit is to allow a member to be able to meet his/her normal monthly expenses while not able to work due to illness or injury. It is therefore incumbent on the provider of such a benefit to ensure income information is current for the calculation of benefits.

Accordingly (at [26]):

> 53. ... while the benefit was calculated in accordance with the Policy, the Insurer had notification of an increased salary for the [member] and it would have been fair and reasonable of the Insurer to query the effective date of this increase as it had doubled from the salary it used to calculate his benefit. Such an inquiry would have led to an increased IP benefit being paid to [the member] which better reflected his pre-injury income.

As the insurer had not made such inquiries, the SCT determined that the decisions were not fair and reasonable. The SCT set aside the decisions under review and substituted its own decision, to the effect that the income protection benefit payable to the member was to be calculated based on his increased salary effective at the date of his disablement.

The SCT also determined that compound interest was payable on the sums withheld.

THE INSURER APPEALS

The insurer appealed to the Federal Court against the member and the trustee.

The member did not appear beyond the first case management hearing. The trustee did not appear. The matter was determined on the papers.

THE COURT'S DECISION

The court allowed the insurer's appeal.

In the 2001 decision of *Retail Employees Superannuation Pty Ltd v Crocker* [2001] FCA 1330; 48 ATR 359, Allsop J (as his Honour then was) had enunciated the principle that the SCT is not entitled to make a determination reflecting its view of the rights of the parties inter se, if that view is contrary to the governing rules of the superannuation fund or the terms of the insurance policy. In *Crocker*, his Honour said (emphasis added):

> [31] The Tribunal's task is not to engage in ascertaining generally the rights of the parties, nor is it to engage in some form of judicial review of the decision of the trustee or insurer. Rather it is to form a view, from the perspective of the trustee or insurer, as to whether the decision of either was (recognising the overriding framework given by the governing rules and policy terms, respectively) unfair or unreasonable.
>
> [32] Thus, essential to the task before the Tribunal, as a consideration mandated by the terms of s 37 [of the Superannuation (Resolution of Complaints) Act 1993 (Cth)], is an inquiry as to whether the decision by the trustee or insurer was in conformity with the governing rules or the terms of the policy. If the Tribunal finds that the decision is contrary to the governing rules or the terms of the policy it may well be an easy step to conclude that it is unfair or unreasonable ... If the Tribunal finds that the decision of the trustee or the insurer is in conformity, with and required, by the governing rules or policy terms, in the sense which I have discussed above, it cannot other than find or be satisfied that the decision is fair and reasonable. If the Tribunal finds that the decision of the trustee or the insurer is in conformity with, but not required by, the governing rules on policy terms, in the sense which I have discussed above, it may proceed, in effect, to supplant the decision of the trustee or insurer with its view of the merits, bearing in mind the limitations of subs 37(4) and subs 37(5).
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> [33] *Certainly, what the Tribunal is not entitled to do is to make a determination reflecting its view of the rights of the parties inter se, if that is contrary to the terms of the governing rules or policy terms*.

Here, the same principle applied.

The policy operated so that in the case of a salary increase of more than 30%, increased cover was not automatic. Rather, the member had to apply to the insurer to increase their cover, and the insurer had to accept the application. These events had not occurred as at the date of the member's disablement.

The court went on:

> [40] It is clear, therefore, that properly construed cl 5.8(f) [of the policy] required an application to be made to the [insurer], and for that application to be accepted, before [the member's] coverage could be increased due to his increased salary. The benefit payable to him therefore fell to be determined based on the salary recorded, and accepted, by the [insurer] at the date of his disablement, this being the actual "Amount Insured". As noted above, the Tribunal itself accepted that the insurer had correctly calculated the benefit payable to [the member] in accordance with the policy when it did exactly that.
>
> [41] Accordingly, I am satisfied that the determination of the Tribunal to set aside the decisions of the insurer and [the trustee] and substitute a benefit calculated by reference to [the member's] increased salary as if the increased coverage had been accepted was inconsistent with the terms of the policy, properly construed, and

principally with cl 5.8(f). As I stated in *Crocker* [at] [31]-[33], the Tribunal cannot make a determination that is contrary to the terms of the relevant insurance policy. The decisions of the insurer and [the trustee] were consistent with the policy, and indeed were required by cl 5.8(f) of it.

The SCT had erred in making a decision that was inconsistent with the terms of the policy, properly construed (at [42]).

Other potential issues

The court noted in passing that in a case such as this one other issues under provisions of the Insurance Contracts Act 1984 (Cth) potentially arise. Here, there might be issues under s 37 (about unusual terms) and s 53 (about unilateral variation by an insurer of a contract of insurance). However, these provisions were not the subject of submissions, and it was therefore not appropriate for the court to express a concluded view as to the relevance of these provisions or the prospects of an argument based upon them being successful (at [43]-[45]).

Compound interest

The court also said, *obiter*, that interest under s 57 of the *Insurance Contracts Act* on withheld sums under contracts of insurance is simple interest, not compound interest (at [46]).

THE RESULT

In the result, the insurer's appeal was allowed. The decisions of the insurer and the trustee to reject the member's claim for the increased amount of the income protection benefit were affirmed. No order was made as to costs.

2. Removal and appointment of trustees – Perry v Nicholson [2017] QSC 163

The Queensland Supreme Court (Boddice J) has held that an individual was validly removed as a trustee of a self managed superannuation fund, and another individual was validly appointed as a trustee of that fund. The decision is *Perry v Nicholson* [2017] QSC 163.

BACKGROUND

In 2009 Colin Maurice (the member) set up a self managed superannuation fund with himself and his adult daughter (the applicant) as trustees, and himself as the only member (at [11]).

In 2010 the member began living with Jennifer Nicolson (the de facto spouse) who became his de facto spouse (at [4]).

In or around October 2015, the member and Nicholson ceased cohabitation when Nicholson removed herself from the premises.

In late 2016, the member was diagnosed with melanoma, and on 10 December 2016 he moved in with Nicholson until his admission to hospital on 4 or 5 January 2017.

On 6 January 2017, he underwent surgery for brain cancer and was rendered paralysed and unable to speak or communicate. He passed away in hospital on 7 March 2017.

THE WILL

The deceased's last will was dated 5 January 2017. The deceased had met with his solicitor on 28 December 2016 and instructed the solicitor to appoint the respondent as his enduring power of attorney and as the sole executor of his will. In doing so, he sought to leave each of his children 15% of his estate, with the respondent to receive the balance.

The deceased was notified by his solicitor that such a distribution raised the potential for his children to make a claim on his estate, and this potential issue could be avoided should he choose to leave his children a larger share. The solicitor made a file note recording the deceased's intention to leave the entire contents of his superannuation fund, which was purely in cash, to the respondent to ensure she was well looked after following his death. The deceased had indicated he had sought advice from his accountant regarding the superannuation fund and he was fearful the children may challenge the will.

On 5 January 2017, in the presence of his solicitor the deceased instructed he wanted his estate left equally between his two children and the respondent with an adjustment in favour of the applicant in response to financial assistance he had provided to his son. The Will was executed at the hospital, with a consultant neurosurgeon providing an opinion that the deceased was of sound mind to make decisions.

THE FUND

Having previously been set up in 2009 with the deceased and his daughter (the applicant) as trustees, the deceased engaged accountants in February 2015 to administer the Fund.

On 23 April 2015, the deceased arranged for the accountants to prepare documents. Among those documents were minutes of a meeting of the trustees of the Fund, which were subsequently signed by the deceased, the applicant and the respondent recording:

a) A confirmation of resignation as trustee, signed by the applicant;

b) An application to become a member, signed by the respondent; and

c) A consent to appointment as trustee, signed by the respondent.

The documents were signed and returned to the accountants, with the date 23 April 2015, inserted onto the minutes and the resignation.

On 4 January 2017, the deceased signed a binding death nomination form in which he directed the trustees of the Fund to pay 100% of the death benefit to the respondent.

In February 2017, the deceased, the applicant and the respondent signed a further document titled "Change of Trustee Deed for Self-Managed Superannuation Fund." The document was dated 23 April 2015. The applicant, respondent and the accountants have differing recollection as to how that document, prepared in February 2017, was dated 23 April 2015.

The applicant submitted that, notwithstanding the execution of the minutes, the resignation, the application and the consent, all dated 23 April 2015, the applicant remained a trustee of the Fund and further, the respondent had never been validly appointed as trustee of the Fund. The binding nomination made on 4 January 2017 was invalid, as clause 183 of the Fund trust deed required appointment and removal of a trustee to be in writing.

Conversely, the respondent submitted that the applicant was validly removed as trustee in accordance with clause 183 and the respondent had been appointed as trustee in writing.

THE COURT'S FINDINGS

The Court decided the applicant was validly removed as trustee in accordance with clause 183 of the trust deed on 23 April 2015. His honour said:

> [33] The minutes dated 23 April 2015 record that the meeting decided to remove the applicant as trustee. Under clause 183 of the deed, any removal of a trustee must be in writing. None of the documents signed on 23 April 2015 are in terms of a formal notification to the applicant of her removal as trustee. There is also no document purporting to immediately advise the other trustee of the removal of the applicant as trustee. Both are requirements of clause 183 of the trust deed.
>
> [34] However, clause 183 of the deed does not require any particular method of notification of the removal of a trustee, other than that it be in writing. The minutes of meeting, signed by the deceased, the applicant and the respondent on 23 April 2015, property read, constitute a removal of the applicant as trustee of the Fund. That removal is in writing in that it is recorded in those minutes. As the minutes are signed by the deceased, the minutes also record that the deceased as the other trustee was advised immediately.

On whether the respondent was validly appointed as trustee, the Court held there was no formal document titled "Appointment of Trustee" however the minutes of the meeting, properly read, constituted an appointment of the respondent as trustee, which satisfied the written requirement in clause 183. Further, as the deceased signed those minutes, he was advised at that time of the respondent's appointment as trustee.

Outstanding issues

The Court will hear submissions on whether notice was given to the trustees of the Fund as to the binding death nomination.

THE RESULT

In the result, the Court was satisfied the removal of the applicant as trustee of the fund and the appointment of the respondent as trustee were valid.

3. Superannuation entitlements under defined benefit schemes– FSS Trustee Corporation v Eastaugh [2017] VSCA 218

In dismissing the trustee's appeal, The Victorian Court of Appeal has held that recall payments made to a member are "roster related payments" which can form part of a member's aggregate remuneration contributing to their defined benefit superannuation entitlements. The trustee had appealed the decision of the trial judge on the basis that recall payments are not salary, and therefore not calculated as part of a member's defined benefit superannuation entitlements. The decision is *FSS Trustee Corporation v Eastaugh* [2017] VSCA 218.

BACKGROUND

Through 1986 to 2011, Dr Estaugh was employed as an anaesthetist in various public hospitals. In 1986 Dr Estaugh applied for and became a member of a defined benefits superannuation scheme called the Hospitals Superannuation Scheme.

In 2011, the Hospitals Superannuation Scheme became part of the First State Superannuation Scheme (the Fund). The Fund was governed by the First State Superannuation Trust Deed and by the rules made thereunder (the Rules).

In 2011, Dr Eastaugh retired from the Fund and applied to have the lump sum defined benefit in the Fund to which he was entitled rolled over into his self-managed superannuation fund. Calculation of the lump sum defined benefit to which a member was entitled depended on the member's "salary", a term defined at r3B.11.1 of the Rules.

Dr Eastaugh expected a defined benefit sum of approximately $1.4 million however 18 months later FSS responded to his application with an amount of approximately $900,000. The differential in their sums was explained by the different approach taken to interpret the definition of "salary" in the Rules.

Through his employment, Dr Estaugh was paid his ordinary rate of pay, payments for being rostered on call ('on call payments') and payments for being recalled to perform duties when rostered on call ('recall payments.')

In general terms, the definition of "salary" under r3B.11.1 of the Rules included 'allowances which are ordinarily payable regularly and periodically (including shift and roster related payments). The advices provided to Dr Estaugh by the trustee from time to time as to his defined benefit sum entitlement in the Fund were based on recall payments being part of "salary."

FSS now claims that recall payments are not 'salary' under the Rules.

THE DECISION AT FIRST INSTANCE

The trial judge considered the definition of salary within the meaning of r3B.11.1 of the Rules and whether recall payments would fall under "roster related payments."

Rule 3B.11.1 of the Rules stated:

> **Salary** means in respect of a defined benefit member:
>
> (b) who is not a casual employee:
>
> (ii) if there is no Superannuation Salary in respect of the member at the relevant time, the amount equal to that member's ordinary time rate of pay, plus any allowances (not of a cost-reimbursement type such as an expense of office, uniform allowance, tool allowance, reimbursement for travel or other incidental expenses) which are ordinarily payable regularly and periodically (including shift and roster related payments), including certificate/qualification allowances and higher duties allowances for at least a 52 week period, but excluding any other allowances which are ordinarily not paid over a 52 week cycle or do not flow from regular rostered duty or any higher amount advised to the Trustee by the Employer from time to time.

The trial judge determined that recall payments made to members were included in 'salary' within the meaning of r3B.11.1 of the Rules as it was considered a roster related payment. This conclusion as to the definition of salary was consistent with a practical and purposive approach to its construction.

The trial judge declined to answer questions as to the effect of salary information or advice from the employer to the trustee.

THE TRUSTEE APPEAL

FSS sought leave to appeal, contending that the trial judge erred in determining that recall payments were 'salary' within the meaning of r 3B.11.1. Eastaugh submitted the trial judge was correct and, by notice of contention, that salary information provided by employers to the trustee is a "higher amount advised" for the purposes of the definition of "salary."

On appeal, the Alfred Health filed a notice of intention not to respond or contest, and took no part in the proceeding.

THE COURT'S DECISION

The Court granted leave to appeal, however determined the appeal should be dismissed.

The Court sought to answer two questions whether recall payments paid to defined benefit member were to be included in the salary of that member being:

a) What is the meaning and function of the word "including" appearing in parenthesis before "shift and roster related payments"? and

b) Are recall payments roster related payments?

The definition of "including"

The Court of Appeal considered:

> [76] The ordinary meaning and function of the word "including" is both to expand its subject to include its object, and to clarify or render certain that its object is within its subject. There is nothing in the context of r3B.11.1(b)(ii) which dictates or indicates that the meaning of "including" is restricted or limited so that the word functions only to clarify that its object "shift and roster related payments" is within its subject "allowances…which are ordinarily payable regularly and periodically", and not also to expand its subject to include its object.
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> [77] It is relevant to consider which of the alternative constructions contended for by the parties best achieves the purpose of the Rules and a practical outcome. It is not possible to determine whether shift and roster related payments are ordinarily payable regularly and periodically without considering the individual circumstances of an employee who is a member of the Fund, including any enterprise agreement or individual contract which applies and the circumstances of that employee's employment including the pattern of work hours and duties. The Rules do not clarify what will qualify payments as being made regularly and periodically. There will be instances where shift and roster related payments are payable regularly and periodically, and instances where they are not. This will vary between employees, and possibly for an individual employee over time and between different payments.

The Court determined the construction of r3.B.11.1(b)(ii) submitted by Dr Eastaugh best aligned with the language used in the definition and provided certainty, and a practical and purposive outcome. On that basis, all shift and roster payments were included in the definition of "salary."

Recall payments as roster related payments

The operating hours of hospitals and the provision of services requires that staff perform shift work or be rostered on call and be recalled to the hospital to attend to patients as needed. A recall payment is the remuneration paid to the employee for providing the service of being at the hospital and performing the duties while rostered on call.

FSS made submissions that construing roster related payments so broadly would result in roster related payments being captured under all remuneration and allowances of whatever nature paid by a hospital to an employee. This submission was not accepted by the Court. Instead, it found its task was not to define the outer boundaries of shift and roster related payments but determine that recall payments were, based upon the evidence before the Court, within shift and roster related payments because recall payments for some members, including Dr Eastaugh, formed part of their aggregate remuneration.

The practical and purposive approach to the definition of "salary" provided greater certainty for members, employers and the Fund.

Other issues

Austin Health, Dr Eastaugh's employer, included recall payments made in the amount of his salary advised to the trustee from time to time. The question was asked on whether that advice would have the effect of bringing that amount advised under "salary" that would otherwise not meet the definition. The trial judge did not consider this question, as he was persuaded that recall payments were "salary" and the question did not require him to turn his mind to it.

The Notice of Contention filed by Eastaugh was rejected and the Court upheld the decision at first instance that there was not an adequate basis to answer the further questions relating to the effect of salary information provided by employers to the trustee from time to time.

THE RESULT

In the end the Court granted leave for the applicant to apply, and dismissed the appeal.

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