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SUPERANNUATION CASE LAW UPDATE
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1. THE SOLE PURPOSE TEST - AUSSIEGOLFA PTY LTD V COMMISSIONER OF TAXATION [2017] FCA 1525

The Federal Court of Australia (Pagone J) has dismissed an application by a trustee of a self- managed superannuation fund that an investment in that fund that leased accommodation to a related party does not breach the sole purpose test under the *Superannuation Industry (Supervision) Act 1993* (Cth) (the **SIS Act**). There may be cases where a lease to a related party would not breach the sole purpose test, however the facts of this matter did persuade the Court. The decision is A*ussiegolfa Pty Ltd v Commissioner of Taxation* [2017] FCA 1525.

BACKGROUND

The Applicant sought declarations in respect of its investment in units in a fund which the Commissioner of Taxation (the **Commissioner**) contended was in breach of the sole purpose test and the in-house asset rules in s62 and s71 of the SIS Act.

Aussiegolfa is the trustee of the Benson Family Superannuation Fund established on 20 November 2011 as a self-managed fund under the meaning of s17A(2) of the SIS Act. The sole member of the fund, Mr Christopher Benson, had been employed as the Victorian State Manager of DomaCom Australia Pty Ltd (**DomaCom**) which held an Australian Financial Services Licence issued by ASIC. DomaCom managed a fund (the **DomaCom Fund**) which was a managed investment scheme established to provide members the opportunity to invest in fractional interests in property.

On 31 March 2015, AussieGolfa completed and forwarded an application to invest in DomaCom through which DomaCom would acquire an apartment in a student accommodation complex (the **Burwood property**). The application was for a minimum of $20,000 to establish an account in the DomaCom Fund. Mr Benson acknowledged he had received a product disclosure statement and that the application for AussieGolfa to become an investor, if accepted, would "be subject to the terms and conditions of the Constitution and the Product Disclosure Statement."

AussieGolfa contributed around $28,080 to invest in the DomaCom Fund and acquired 28,080 $1 units in the Fund.

In July 2015, DomaCom completed its due diligence, contract review and valuation procedures in respect of the Burwood property and soon after issued a supplementary product disclosure statement.

On 21 July 2015, the responsible entity purchased the Burwood property for $104,000. Soon after the custodian entered into an exclusive leasing and managing authority with Student Housing Australia Pty Ltd for the leasing of the Burwood property. The first two student tenants for the Burwood property found by Student Housing Australia were unrelated to Mr Benson or the Benson Fund. The third tenant for the property however was Mr Benson's daughter. The selection of Ms Benson as the third tenant was partially (but expressly stated to be) because Mr Benson and DomaCom wanted to test the ability for residential properties held by self-managed superannuation funds to be used by related parties.

THE COURT'S DECISION

The Commissioner of Taxation was of the view that the leasing arrangement with Ms Benson caused the Benson Fund to breach the sole purpose test and the in-house asset rules in the SIS Act. The Commissioner made a determination under s71(4) of the SIS Act that the units held by AussieGolfa as trustee for the Benson Fund in the DomaCom sub-fund are to be treated as an investment in a related trust of the Benson Fund.

Aussiegolfa has continuing obligations for the Benson Fund to continue to be a complying fund including the obligation to comply with the in-house asset rules in that the proportion of "in-house" assets cannot exceed 5%, and a trustee must implement a plan to reduce the level of those assets if it exceeds 5% before the end of the following year. Aussiegolfa's investment in the DomaCom fund as at 17 April 2017 represented 7.83% of its assets.

Aussiegolfa disputed the Commissioner's assertions and plead that the relevant asset in which it had invested was DomaCom Fund rather than in the Burwood Sub-Fund and its combined investment with that of Mr Benson's mother and sister was less than 1% of the units in the DomaCom fund.

In substance, the dispute was whether the in-house asset rules had been breached and whether the identity of the investment and sub fund was to be regarded as a separate trustee.

At [21]

> The SIS Act does not provide a definition of trust which is different from its usual legal meaning. A number of the provisions of the Constitution are consistent with the DomaCom Fund being a single trust and, as mentioned, clause 4.12 expressly provides that no unit or class of units "gives rise to a distinct trust". Despite those provisions, however, the Constitution created the Burwood Sub-Fund as a separate trust in respect of which a group in relation to the Benson Fund had a fixed entitlement to more than 50% of the capital or income of the trust. Clause 5.3 of the Constitution required the application by each member of the group, including Aussiegolfa, for an interest in units in conformity with the relevant disclosure documents. Clause 5.1 permitted the responsible entity to invite applications, and both the product disclosure statement dated 24 June 2015 and the supplementary product disclosure statement dated 17 July 2015 were invitations to participate in a proposed Sub-Fund with plans to invest in the Burwood property. The supplementary product disclosure statement specifically stated, as previously mentioned, that each Sub-Fund was "a separate trust" with the assets of one Sub-Fund not being available to satisfy liabilities in another Sub-Fund. Even putting that statement aside, however, the terms of the Constitution, consistently with the product disclosure statement and the supplementary product disclosure statement (which were both contemplated by the Constitution), require the conclusion that a trust was created in respect of the Burwood property held by the responsible entity through DomaCom.

On the question of the whether the sole purpose test had been satisfied, the Court stated at [28]:

> Section 62 requires that a trustee of a regulated superannuation fund ensures that the fund be maintained solely for one or more of the core purposes specified in s 62(1)(a) or for one or more of those purposes and for one or more of the ancillary purposes specified in s 62(1)(b). The Commissioner contended that neither the core purposes nor the ancillary purposes include the provision of leased premises of an asset of a superannuation fund to a daughter of a member of a superannuation fund.

And at [29]:

> It is a question of fact whether the sole purpose test continues to be satisfied upon the grant of a lease to Ms Benson. In *Randwick Corporation v Rutledge* (1959) 102 CLR 54 Windeyer J said at 94 that when such words as "exclusively", "solely" or "only" are present in a statutory requirement it is a question of fact whether the requirement has been satisfied, and that they prevent use for any other purpose, however minor, which is collateral or independent as distinguished from incidental to the stipulated use.

The Court observed that there may be examples and cases in which a lease to a related party would not breach the sole purpose test but the evidence in the current proceeding (namely that the purpose of the investment was, in part, to provide housing to Mr Benson's daughter) did not sway the court that this was one such example. The court found the lease of the student housing accommodation was, in part, a purpose of the investment through DomaCom.

THE RESULT

The application was dismissed with costs.

2. *CLAIMS OVER OPERATION AND ENTRY INTO SUPERANNUATION SCHEMES; NEGLIGENCE; MISREPRESENTATION AND LIMITATION OF ACTIONS – INNES V AAL AVIATION LIMITED [2017] FCAFC 202*

The Full Court of the Federal Court of Australia (Tracey, Bromberg and White JJ) has dismissed an appeal of two members of superannuation schemes who claimed they were given incorrect advice and information about their ability to join a more advantageous superannuation scheme. The decision is Innes v AAL Aviation Limited [2017] FCAFC 202.

BACKGROUND

The appellants, Mr Innes and Mr Hunter, were employed by Trans-Australia Airlines (**TAA**) and then subsequently Qantas Australian Airlines Limited (**QANTAS**). Their employment was ceased by retrenchment on 18 April 2012 and 9 December 2005 respectively.

At first instance both of the appellants alleged they were given incorrect advice and information about their ability to join the advantageous superannuation schemes which had been available to TAA employees until 1 July 1980, so that their superannuation entitlements are now less than they would have been. They bought separate claims against the respondent seeking damages on the basis of multiple causes of action, including negligent misstatement, negligence, misleading and deceptive conduct, unconscionable conduct, breach of their employment contracts and deceit. Their claims as well as that of another former employee, Mr Brewer, were the subject of a single trial at which all claims failed.

Mr McInnes commenced employment with TAA shortly before 1 July 1974 as a Traffic Officer in Perth. He became an employee of QANTAS in 1994 and relocated to Melbourne in 1999.

Mr Hunter commenced with TAA on 28 July 1975 at Essendon Airport. In 1980 he transferred to Tullamarine airport and around 1992 became an employee of QANTAS.

The appellants' claim concerned three superannuation schemes which applied at different times during their TAA employment. Relevantly, they were:

1. Commonwealth Superannuation Fund (**CSF**) which was effective until 30 June 1976;
2. Commonwealth Superannuation Scheme (**CSS**) which came into operation on 1 July 1976 but which was closed to new entrants who were employees of TAA from 1 July 1980;
3. Australian Airlines General Superannuation Plan (**AAGSP**) which was open to TAA employees in 1981.

Both CSF and CSS were defined benefit schemes, and AAGSP was an accumulation scheme pursuant to which the primary benefit upon retirement was a lump sum benefit and not a pension with reversionary spouse benefit. Mr Innes became a non-contributory member of AAGSP on 1 January 1987 and Mr Hunter became a contributory member on 7 February 1986.

Mr Innes said that shortly after commencing employment with TAA in 1974 he had made enquiries about joining the CSF by speaking to a Mr Tibbs, a Sales Manager in the TAA's Perth office. Mr Innes was told Mr Tibbs handled all superannuation enquiries in Western Australia. Mr Tibbs made a comment to the effect that there were limited positions in the scheme and he would be invited upon the retirement of a member of the scheme. Mr Innes made twice yearly enquiries about joining the scheme but on each occasion was told there were no positions available. Mr Innes accepted these statements and took no further action. Mr Innes alleged the information given to him by Mr Tibbs was wrong and misleading and he had relied upon it to his detriment. His evidence was that, if he had been told by Mr Tibbs he was eligible to join the CSF he would have "taken all necessary steps to join."

Mr Hunter's evidence was that he was told by fellow employees that the "Commonwealth Superannuation" was very beneficial. In 1975 he and two other employees spoke with a Mr Kent at Essendon Airport and was told words to the effect that superannuation is by invitation only. Mr Hunter spoke with TAA's paymaster, Mr Sherburn, a few days later and was told that everyone was eligible to join the "Commonwealth Superannuation" and that what he had been told by Kent was correct but there was a method of applying through other means. On this basis Mr Hunter did not take any further steps to join the "Commonwealth Superannuation."

THE DECISION AT FIRST INSTANCE

The primary judge held neither Mr Innes nor Mr Hunter was a permanent employee of TAA and that it was improbable they would have obtained the necessary certification that their employment would continue for 7 years to gain membership to CSF. Further there were significant concerns regarding the evidence submitted by the appellants, particularly concerning was that they had failed to take a formal step towards entry into the CSF.

His Honour found the appellants could not establish the "requisite degree of knowledge or appreciation on the part of those persons whose statements they claim forestalled any further action on their part to pursue the question of entry into the Commonwealth superannuation scheme."

His Honour concluded that there was no objective support for Mr Innes' claim that Mr Tibbs was the appropriate person to approach on the question of superannuation or that he had any responsibility for superannuation. Further, Mr Innes had not actively pursued an interest in joining CSS or CSF and he had failed to sufficiently establish that but for the misleading advice of Mr Tibbs he would have pursued joining those schemes.

In relation to Mr Hunter, his Honour concluded there were inconsistencies in his evidence which coloured him as unreliable, and that he had not established he had pursued any interest in joining CSS or that conversations had occurred which had had the effect of denying him the opportunity to do so.

The appeal was brought on the basis that the primary judge erred in his conclusion in respect two of the appellants' causes of action, namely negligent misstatement and negligence generally. In addition the appellants claimed that the primary judge failed in his indication that if he had to assess damages, he would have found that each had failed to mitigate their loss by not entering into the TAA Superannuation Scheme as at 30 June 1981.

THE COURT'S DECISION

In relation to Mr Hunter's claim the Court noted at [62] and [63]:

> Counsel for Mr Hunter first sought to demonstrate error in this case by a submission that the Judge had not taken into account Mr Hunter's evidence of his discussion with the TAA paymaster, Mr Sherburn, in a conversation away from work and at a club. However, Mr Hunter had not made this conversation part of his pleaded case so that it was not necessary for the Judge to make findings concerning it. In our view, it cannot reasonably be supposed that the Judge overlooked this evidence as it was contained in the run of paragraphs in Mr Hunter's affidavit to which the Judge referred expressly in his reasons.
>
> Secondly, counsel submitted that Mr Hunter's pilot ambitions were irrelevant. This was so it was said, because there was no suggestion that TAA or the Commissioner's delegate had been aware of them and so could not have taken them into account in any decision concerning Mr Hunter's participation in the CSS. In our view, this submission misses the point. The Judge did not refer to Mr Hunter's pilot ambitions with respect to any decision to be made by TAA or the Commissioner's delegate but instead with respect to whether Mr Hunter would have pursued participation in the CSS. It was a matter bearing upon Mr Hunter's decision making and not that of TAA or the Commissioner's delegate.

Mr Hunter had not demonstrated any error which would cause the appellate court to interfere with the primary Judge's decision. As such, it was not necessary to address the other issues concerning Mr Hunter's appeal.

In relation to Mr Innes' claim the Court held at [69] that Mr Innes had failed to demonstrate on the evidence adduced in the primary proceeding that even if he had been properly informed about the CSF he would have become a participant in to before its admission to the scheme closed on 30 June 1976.

On the issue of permanent employees under the TAA

The starting point for the distinction between a permanent and a non-permanent employee was the definition in the Superannuation Act 1976 (Cth) (**1976 Act**). The definition sets out the criteria in which the person is employed rather than the categorisation of the employment by the approved authority.

The Court said at [79]:

> In particular, we consider that the emphasis for the purposes of determining the question arising under the 1976 Act should be on the circumstances of Mr Innes' employment even if, in form, his appointment for the purposes the ANA Act was classified as temporary. The formal classification of the employment by ANA of Mr Innes should not, for present purposes, control the determination of whether he was employed in a permanent capacity.

The appellate Court was unable to reach any distinction other than that Mr Innes was a permanent employee in 1974. His application form to the TAA did not discern that he was a temporary employee and the form required him to acknowledge a number of conditions of employment that were appropriate for permanent employment. Further, the letter of appoint to Mr Innes date 1 July 1974 did not suggest in any way his employment was temporary. It found that Mr Innes was a permanent employee for the purposes of the 1976 Act and therefore an "eligible employee" under the CSS scheme and as such his participation in the scheme was mandatory.

The claim in negligence

Mr Innes' claim was that TAA owed him a duty of care to avoid causing "foreseeable economic loss by reason of its acts or omissions with respect to the availability of the Commonwealth superannuation to [him] and his joinder to the available Commonwealth superannuation scheme for which he was eligible and membership of which he had sought."

The general rule of the common law is that damages are not recoverable for economic loss which is not consequential to injury on a person or property however there are instances where claims have been upheld in the past for pure economic loss.

At [151]:

> In the present case, as has already been noted, the primary Judge held that the obligations of TAA to Mr Innes were to be determined by reference to the terms of his employment contract, express and implied and, inferentially, that those terms did not require TAA to exercise reasonable care with respect to the provision to Mr Innes of information and advice about superannuation arrangements. The Judge also considered that it was no

part of TAA's function to give legal or financial advice to its employees. In both of these strands of reasoning, the Judge applied the reasoning and conclusion of Heerey J in Mulcahy, saying that he would depart from Mulcahy only if satisfied that it was "demonstrably and plainly wrong".

And [152]:

> In our respectful opinion, it was not appropriate for the Judge to have adopted the approach in Mulcahy, especially given developments in the law since it was decided in 1998.

And [157] and [158]:

> Further, and in any event, the relationship between Mr Innes and TAA in issue in the present case was not governed only by the terms of the contract of employment. TAA also had functions under both the 1922 and 1976 Acts with respect to the provision of superannuation benefits for its employees, including Mr Innes. By s 53(2) of the 1976 Act, the contributions payable by eligible employees could be deducted by TAA from their salary and paid to the Commissioner. In practice, that is how employee contributions were made. By s 11 of the 1976 Act, persons who had been a temporary employee for one year could request the Commissioner of Superannuation to direct that they be treated as eligible employees and the Commissioner could make such a direction if satisfied that the persons were (relevantly) likely to continue as a temporary employee for a period of at least three years after the request. The evidence at trial was that those powers of the Commissioner had been delegated to TAA, pursuant to s 25 of the 1976 Act. That being so, it would not be appropriate for this case to be determined on the basis that the obligations and expectations of the parties were to be found only within the four walls of their contract.
>
> Having regard to these matters we conclude, with respect, that, insofar as the conclusion of the Judge rested on the view that any remedy of Mr Innes was to be found solely in the law of contract, it was in error. Further, the appellants have shown a sufficient basis for the decision in Mulcahy on that question not to be followed.

The Court considered there was an important element of vulnerability of a plaintiff in cases of a duty of care to avoid economic loss had been found. Mr Innes was not found to have been vulnerable in the requisite sense. A study of the relevant 1976 Act would have assisted Mr Innes to identify his position under that Act rather than be in reliance to what he had been told by Mr Tibbs. Further, there were other options available to him, such as contacting the Minister for Superannuation or the Union to ascertain his position under the legislation. The absence of vulnerability was fatal to Mr Innes' appeal on the issue of negligence.

THE RESULT

The Court dismissed the appeal and ordered the appellants pay the respondent's costs of the appeal. The court did not consider the damages which the appellants would have been entitled to had they been successful at first instance.

3. *WHETHER TRUSTEE'S DECISION WAS FAIR AND REASONABLE IN THE CIRCUMSTANCES– MERCER SUPERANNUATION (AUSTRALIA) LIMITED V BILLINGHURST [2017] FCAFC 201*

The Full Court of the Federal Court of Australia (Flick, Kerr and Pagone JJ) has dismissed an appeal by the applicant from a single judge on appeal from a decision of the Superannuation Complaints Tribunal to remit a matter to the trustee for reconsideration on the basis that it was not satisfied the trustee's calculation of the lump sum payable to the member was fair and reasonable. The trustee had obligations to perform its duty and exercise its power to calculate the lump sum amounts in the best interests of the beneficiaries, which it had not done. The decision is Mercer Superannuation (Australia) Limited v Billinghurst [2017] FCAFC 201.

BACKGROUND

Mercer Superannuation (Australia) (the **Trustee**) appealed against the primary judge's dismissal of an appeal from a determination made by the Superannuation Tribunal (the **Tribunal**).

Mr Billinghurst is a former employee of Grosvenor International Australia Pty Ltd (**Grosvenor**). On 13 April 1993, he entered into a Deed with his employer, substituting new provisions for those that had previously applied to his superannuation fund. He retired in 2000. The assets and members of his original superannuation fund were transferred to a defined benefit division of a fund managed by the Trustee as from 2 May 2006.

In 2011, Grosvenor made the decision that it no longer wanted to conduct business in Australia. By that time Mr Billinghurst was receiving a pension.

On 15 November 2011, Grosvenor wrote to the Trustee to advise that it would cease to carry on business in Australia as from 31 December 2011. In that letter Grosvenor set out its understanding of what ceasing to participate in Mercer master Fund including:

1. *GAAMPL is committed to reaching a fair and equitable resolution for each member of the Plan, including the current pensioners. To this end, the GAAMPL has:*

    a. *Provided each member of the plan with access to personal financial planning advice at no personal cost to the member; and*

    b. *Intends to provide each pensioner a lump sum arrived on the basis of a fair and reasonable valuation of their current entitlement, to allow, should the pensioner wish, the purchase of an annuity, which would maintain their current stream of income*

On 9 December 2011, the Plan Actuary provided a letter to the Trustee setting out his opinion as to the appropriate basis for determining the transfer value for the current pensioners. The first was based on the assumptions used in the previous actuarial valuations of the Plan and an 'alternative valuation basis' with a lower discount rate and based on the yield of 10 year government bonds at the time.

The figures produced on the alternative basis were slightly higher and the Plan Actuary recommended that these figures be adopted. On this basis, the transfer value for Mr Billinghurst was $1,432,824.

In March 2012, Mr Billinghurst wrote to the Trustee complaining about the basis used to calculate the lump sum. His main complaints were:

a. the discount rate had been based on the yield on 10 year government bonds at 29 August 2011 (the date of the August 2011 Advice) rather than at 31 December 2011 (the date as at which the pension was to be valued);

b. no allowance had been made for future pension increases; and

c. no provision had been made for expenses that would be incurred by Mr Billinghurst in administering the lump sum.

In April 2012, the Trustee, having received further advice from the Plan Actuary, maintained that the lump sum amount was fair and reasonable. Mr Billinghurst requested that his complaint be referred to the Trustee's Claims and Complaints Committee for reconsideration. Mr Billinghurst procured an alternative actuarial assessment which value the lump sum equivalent of the pension at $1,921,000 based on a discount rate of 3.7% (based on the yield on 10 year government bonds as at 31 December 2011), an allowance for future pension increases of 2% and an allowance for expenses of administering the assets of $10,000 per year. The Committee affirmed the original decision.

In February 2013, Mr Billinghurst complained to the Superannuation Complaints Tribunal pursuant to the Superannuation (*Resolution of Complaints*) Act 1993 in relation to the Trustee's determination of the lump sum payout to him.

DECISION OF THE SUPERANNUATION COMPLAINTS TRIBUNAL

On 29 December 2015, the Tribunal determined that it was not satisfied that the Trustee's decision in relation to the calculation of the amount of the lump sum payable to Mr Billinghurst was fair and reasonable in the circumstances. The Tribunal determined to set aside the Trustee's decision and remit the matter to the Trustee for reconsideration on the basis that the Trustee should ask an independent actuary to advise what the proper calculation of the lump sum equivalent, or the commutation value of Mr Billinghurst's pension was. The Trustee was to calculate the sum payable to the complainant without acting on any directions or request of the Employer.

APPEAL FROM THE DECISION OF THE SCT

In *Mercer Superannuation (Australia) Limited v Billinghurst* [2016] FCA 1274 the primary judge dismissed the appeal by the Trustee from the Tribunal's decision.

The primary judge did not accept the Trustee's submission that if the amount distributed to Mr Billinghurst increased, the amount available for distribution to other members would be correspondingly decreased. The primary judge did not accept there was a finite pool of funds comprising the units attributable to the Plan and the additional funding commitment in the November 2011 letter. It would be open to the Trustee to seek additional funds from the Employer if the Trustee formed the view that the lump sum amount, determined on a fair value basis, is greater than that originally calculated by the Plan Actuary.

In relation to the lump sum equivalent of Mr Billinghurt's pension, the task of the Tribunal was to determine whether a decision of a trustee is fair and reasonable in the circumstances in its operation in relation to a complainant. In contrast, the task of the Trustee was to determine an amount, not merely to decide whether a figure that had been proposed by the Plan Actuary was within a range of fair and reasonable outcomes.

APPEAL FROM THE COURT

The Trustee appealed to the Full Court on a number of grounds, summarised at [15]:

The Appellant (the Trustee) contends that the judgment delivered by the primary judge (the judge) on 28 October 2016 erred as follows:

a. In respect of the first and second grounds, the Superannuation Complaints Tribunal (Tribunal) did not, "in substance", address the correct question under s 37(6) of the Superannuation (*Resolution of Complaints*) Act 1993 (Cth) (Act) but rather directed itself to determining whether the process adopted by the Trustee in calculating the lump sum payable to the Respondent (Mr Billinghurst) was unfair or unreasonable (as distinct from any unfairness or unreasonableness reflected in the decision itself).

b. In respect of the third and fourth grounds, the amount available to pay members on termination of the Plan was limited to the amount realised on redemption of the units attributable to the Plan supplemented by an additional contribution the Employer was prepared to make in the actuarial basis set out in a letter from the Employer dated 15 November 2011 (the November 2011 Letter), and the terms on which this additional contribution was offered was a relevant matter for the Trustee to consider in calculating the lump sum entitlement of pensioners including Mr Billinghurst.

Grounds one and two – Unfairness or unreasonableness in process

Mr Billinghurst submitted, in his complaint to the Tribunal, a complaint that the Trustee and the Plan Actuary, by accepting directions that had been given to them by the "fund participant" to not make any allowance for future pension increases had displayed a want of independence

from the interest of Grosvenor. The outcome arrived at was less than his entitlement and is for that reason, neither fair nor reasonable.

The Trustee had submitted in response at the Tribunal that it was fair and reasonable for it to have adopted an assumption that pensions would not increase because Grosvenor, which had the power under the rules to authorise discretionary pension increases, had specifically requested the Trustee assume that pensions would not be subject to further increases.

The Tribunal took a different view to that of the Trustee and held it was the obligation of the Trustee under s52(2)(c) of the SIS Act to perform its duty and exercise its power to calculate the lump sum amounts in the best interests of the beneficiaries including Mr Billinghurst. The Rules did not take permit the Trustee to take factors, such as the wishes of Grosvenor, into account in making its calculations. A conflict of interest had arisen with the Plan Actuary advising the Trustee because he had already advised Grosvenor in relation to the calculations and termination of the Plan.

The appellate court agreed with the primary judge's decision that the decision was 'fair and reasonable' rather than the process which led to it was fair and reasonable.

Grounds three and four – finite amount for distribution

Grounds three and four were premised on Grosvenor's letter dated 15 November 2011 being construed as it having exercised on that day its termination rights under the Plan. On the exercise of that right, it became the duty of the Trustee to "redeem all of the Units attributable to the Plan and apply the Plan's assets." The Trustee was not entitled to demand or required to seek any further funds from Grosvenor.

On that premise Grosvenor's request that the Trustee prepare calculations of the final transfer value for each member as it had proposed did not constrain the Trustee's duty to the beneficiaries. Rather it was an offer of a voluntary gift on terms that enable the Trustee to increase the value of the lump sums over that legally due to the beneficiaries.

The appellate court held that no error had been demonstrated in respect of the conclusions arrived at by the primary judge. They shared the doubts that Grosvenor would not have been obliged to put the Trustee in funds sufficient to meet any shortfall for an objectively fair valuation of the beneficiaries' entitlements on termination of the Plan.

The Court found at [55] to [57]:

> The Appellant's submission assumes that Grosvenor could have walked away as at 15 November 2017 leaving the Trustee significantly short of the funds it required to make a fair commutation to a lump sum of the pensions otherwise recurrently payable to Mr Billinghurst, and to the other pensioners.
>
> It is a most unattractive proposition that Grosvenor would have had no responsibility to ensure that the Trustee was provided with sufficient funds for that purpose.
>
> Mr Billinghurst had entered into a Deed in April of 1993 with Grosvenor as his employer for the payment of a defined benefit pension. There is no evidence that Grosvenor's obligations as expressed in that Deed had been reduced by the later arrangements Grosvenor entered into with the Trustee for the administration of its superannuation liabilities. There is no evidence that Mr Billinghurst was a party to any instrument that would have had the effect of diminishing his existing entitlements.

At the very least, the Court found no reason why a Trustee of a superannuation fund subject to the covenants imported by s52(2) of the SIS Act would not, at least, have been obliged to ask Grosvenor to make an additional voluntary contribution to allow it to commute Mr Billinghurst's pension entitlements to a lump sum if the funds available from both the redemption of units attributable to the plan and the additional contribution Grosvenor had committed to make in November 2011 were insufficient for that purpose.

THE RESULT

The appeal was dismissed with an order the appellant pay the respondent's costs to be taxed if not agreed.

4. *INVALIDITY PENSION BENEFIT – CAMPBELL V SUPERANNUATION COMPLAINTS TRIBUNAL [2017] FCA 1509*

The Federal Court of Australia (Logan J) has dismissed an appeal by the applicant regarding his dissatisfaction with the disclosure of information about his superannuation interest under the Family Law Act 1975 (Cth). The Court did not agree with the applicant's contention that the Superannuation Complaints Tribunal had any lawful authority to furnish this information. The decision is *Campbell v Superannuation Complaints Tribunal* [2017] FCA 1509.

BACKGROUND

The case was a sequel to an earlier, partially successful appeal by the applicant, Mr Campbell, against a decision of the Superannuation Complaints Tribunal (**SCT**). In that appeal the Court ordered that the SCT's decision of 1 February 2016 to treat Mr Campbell's complaint in respect of a decision of the Commonwealth Superannuation Corporation (**CSC**) as withdrawn pursuant to s22(3)(b) of the Superannuation (Resolution of Complaints) Act 1993 (Cth) (**Complaints Act**) be set aside and the matter remitted to the SCT for reconsideration of the CSC's decision.

Mr Campbell was a former member of the Australian Defence Force (**ADF**) and was discharged on medical grounds on 6 December 2007. On the basis of his medical discharge he was entitled to invalidity benefits under the Military Superannuation Benefit Scheme (**MSBS**). Mr Campbell's marriage broke down following his discharge, and he subsequently, on 18 June 2014, applied to the CSC under s90MZB of the Family Law Act 1975 (Cth) for information regarding his superannuation interest under the MSBS. He was not satisfied with the provision of information under this section and he moved his application to the Tribunal. The Tribunal's consequential decision was not to his favour and this motivated his earlier appeal to the Court under s45 of the Complaints Act.

The Tribunal determined on 11 April 2017 to set aside the CSC's response to Mr Campbell's application for information. It was to furnish information to Mr Campbell via a fresh Form 6.

Mr Campbell's grievance was the specification of an annual pension amount at item 1 in the Form 6 issued by the CSC. He contended that neither the CSC nor the Tribunal on review had any lawful authority to furnish this information. Each was subject to an express prohibition in respect of the provision of this information.

THE COURT'S DECISION

The Tribunal chose not to disturb the information furnished at item 1. This reflected the Tribunal's understanding of the Family Law Act and the Family Law (Superannuation) Regulations 2001 (**FLSR**).

Section 90MZB(3) of the Family Law Act requires a trustee to furnish information "in accordance with the regulations." The effect of reg 63 of the FLSR is to permit the Minister to vary by a determination a requirement otherwise arising under reg 63(2), or as the case may be, to provide particular information in answer to any application and instead to provide "other information" as specified in the determination about the interest. On 10 November 2016, under the FLSR reg63(6B) the Minister made amendments to the MSBS Determination by the *Family Law (Superannuation) (Provision of Information – Military Superannuation and Benefits Scheme) Amendment Determination 2016* (Cth) (**2016 Amendment Determination**).

At [17] the Court held:

> It was common ground on the appeal that the 2016 Amendment Determination was lawfully made and that the Tribunal was obliged to apply the MSBS Determination, as amended by the 2016 Amendment Determination, in reviewing the CSC's decision in accordance with the remitter order made in the earlier judgment. No point was pressed on behalf of Mr Campbell that he had an accrued right to have the Tribunal review the CSC's decision by reference to the MSBS Determination unaffected by the 2016 Amendment Determination. That makes it unnecessary to delve into the sometimes vexed question of the law to be applied in an administrative review which is pending determination at a time when statutory or subordinate legislative amendments commence, a question which notably emerged in Esber v Commonwealth (1992) 174 CLR 430.

And at [18]:

> There is no doubt that the 2016 Amendment Determination was reactive to the earlier judgment. So much is made explicit in the Explanatory Statement issued by the Minister in conjunction with the making of the 2016 Amendment Determination. It is no part of my function in exercising judicial power in this statutory appeal to question the policy value judgment which resulted in the making of the 2016 Amendment Determination. This falls outside the Court's remit, which is solely to answer such questions of law as are raised on appeal from the Tribunal. It would be antithetical to the constitutional separation of powers to approach the determination of this appeal otherwise than on this basis. Within their respective fields of constitutional legislative competence or, as the case may be, subordinate legislative competence the Parliament and members of the Executive such as a Minister are perfectly entitled to change the law in response to a judgment.

His Honour elaborated that he did not read reference in reg 63(6B(b) to "other information as absolutely prohibiting any overlap between what is specified in a determination made by the Minister and information specified in reg63(3). The evident purpose of s90MZB(3) of the Family Law Act is to facilitate courts exercising jurisdiction in matrimonial causes to make just determinations in respect of the "splitting" of superannuation interests. What the Minister had identified in the MSBS Determination in the column headed "information that must be provided" considered as a whole rather than piecemeal, went beyond what is specified in reg 63(3) of the FLSR. The Judge considered this meant the specification is of other information and it followed that the Tribunal's decision was correct on that basis.

A right to be provided with a statement of reasons under s13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) does not mean the trustee must accompany each answer to a request for information with such reasons. That may place an onerous burden on the administration of the superannuation scheme with no correlating benefit. The CSC's statement of reasons made reference to the 2016 Amendment Determination and the accompanying Explanatory Statement, which the Court found sufficient to give a general understanding of the reason why it became necessary to furnish details of the amount of the annual pension.

THE RESULT

The appeal was dismissed.

5. *WHETHER TRIBUNAL ERRED IN AFFIRMING INSURER'S DECISION TO AVOID APPLICANT'S INSURANCE - SHARMA V LGSS PTY LTD [2018] FCA 167*

The Federal Court of Australia (Gleeson J) has allowed an appeal by an applicant to set aside the decision of the Superannuation Complaints Tribunal to affirm an insurer's decision to avoid the TPD provisions in an insurance contract on the grounds of fraudulent misrepresentation/non-disclosure. The applicant was considered not to be an "insured" for the purposes of the Insurance Contracts Act and therefore the insurer did not have the power to avoid the policy under that Act. The decision is **Sharma v LGSS Pty Ltd** [2018] FCA 167.

BACKGROUND

Mr Sharma (the **Applicant**) appealed from two decisions of the Superannuation Complaints Tribunal (**SCT**) made on 18 August 2016, pursuant to s46 of the *Superannuation (Resolution of Complaints) Act* 1993 (Cth).

The two decisions under appeal were the affirmed decisions of:

1. the second respondent (**TAL**):
    a. to avoid Mr Sharma's voluntary "Death and Total and Permanent Disability cove" (**TPD cover**); and
    b. to avoid Mr Sharma's "Salary Continuance Cover Long term (to age 65 benefit period) (**SC cover**) and cease paying him salary continuance payments;

    under s29(2) of the Insurance Contracts Act 1984 (Cth) on the basis of fraudulent misrepresentation and non-disclosure by Mr Sharma; and
2. the first respondent (**Trustee**) to affirm TAL's decisions.

Mr Sharma was a former employee of the Liverpool City Council. The Local Government Super or the Local Government Superannuation Scheme (NSW) (**Fund**) was a superannuation scheme established by the Local Government Super Trust Deed. The first respondent in the proceeding is LGSS Pty Ltd, the trustee of Local Government Super.

In about April 2005, Mr Sharma became a member of Local Government Super by written application. On 22 March 2007, he completed and signed a form and applied for TPD cover in the amount of $1,080,000 and SC cover in the amount of $3,640 per month.

In 2012, Mr Sharma lodged a claim for payment of a TPD benefit based major depressive disorder with a date of onset of May 2007 and schizophrenia with a date of onset being 14 March 2008, as well as details of surgical treatment for wrist injuries sustained in a fall in 2010.

In May 2013, the trustee informed Mr Sharma his application for a TPD benefit had been approved and he was paid the sum of $68,841.73, and that TAL was still assessing the voluntary insurance component of his application.

On 16 January 2015, TAL informed the trustee it had declined the member's underwritten cover on the basis of fraudulent misrepresentation/non-disclosure in relation to a history of tachycardia and depression.

The Tribunal made its determination based on a finding that the Complainant would have been aware of these conditions and could reasonably have been expected to know that they would be relevant to the Insurer's decision on whether or not to provide him with the requested voluntary cover in 2007.

THE COURT'S DECISION

The subject matter of the Federal Court's jurisdiction under s46(1) of the *Superannuation Complaints Act* is confined to a question or questions or law to ensure that the merits of the case are dealt with not by the Federal Court but by the SCT.

On the question of whether Mr Sharma owed a duty of disclosure as a third party beneficiary and life insured under the TPD policy or the SC policy under s21 of the ICA, the SCT had referred to Mr Sharma's "duty of disclosure" detailed on the application form dated 22 March 2007. The Court found that the SCT failed to identify a legal basis upon which Mr Sharma owed a duty of disclosure under the application form or under the ICA, as he was found not to be an "insured" for the purposes of s21 of the ICA, and as such no duty was imposed upon him.

The court considered whether TAL had the power under s29(2) to "avoid the contract" however found there was no utility in addressing the scope of s29(2) as Mr Sharma was found not be to an "insured" for the purpose of s29(1)(c).

Further, the Court held that while there was no utility in addressing the operation of s29(2), a reckless (as opposed to deliberate) failure to comply with the duty of disclosure may constitute a fraudulent non-disclosure. The finding that Mr Sharma "should have known that he had a duty" to reveal matters is not sufficient to make a finding of fraud.

THE RESULT

The SCT erred in concluding that the decisions of TAL and the trustee were fair and reasonable because, on the facts established, TAL was not entitled to rely on s29(2) to refuse Mr Sharma's TPD claims. The court allowed the appeal and remitted the matter to the SCT for decision according to law.

TAL was ordered to pay Mr Sharma's costs of the appeal.

6. *SUPERANNUATION GUARANTEE CHARGE LIABILITIES - DEPUTY COMMISSIONER OF TAXATION V LAWSON [2017] VSC 789*

The Supreme Court of Victoria (Croft J) has dismissed a defendant director's defence that due to illness during his time as a director, he was not liable to pay penalties incurred as a result of failing to comply with the Superannuation Charge Guarantee requirements. The decision is *Deputy Commissioner of Taxation v Lawson* [2017] VSC 789.

BACKGROUND

On 27 June 2016, the Commissioner of Taxation (**Commissioner**) filed a writ and Statement of Claim alleging that the defendant, Mr Samuel Peregrine Lawson, was indebted to the government for $554,168.28 plus interest and costs in the proceeding (the **Debt**).

The Debt represented director penalties owed by the defendant under s269 of Schedule 1 to the Taxation Administration Act 1953 (**TAA**) referable to the Superannuation Charge Guarantee liabilities of Regent Personnel Pty Ltd (in liq) as trustee of the Regent Personnel Unit Trust that were not remitted to the plaintiff for the period 2012 to 2015.

The defendant was a director of the company at all relevant times, thus he was under the relevant obligations that a director would be during that period.

The defendant submitted three arguments in opposition to the claims of the Commissioner being:

1. That the amounts and dates pleaded in the plaintiff's claim were incorrect;
2. There was an incomplete satisfaction of the conditions precedent required by s269-20(1) of Schedule 1 of the TAA; and
3. That due to personal illness and/or for any other good reason, the defendant could not and/or did not take part in the company as he did not believe he was able to.

The Statutory Framework

Section 269 to Schedule 1 of the TAA concerns the duties of company directors to ensure that the relevant company meets its obligations to pay certain amounts to the plaintiff or is promptly placed into voluntary administration or liquidation. Penalties flow from breaches of these obligations.

Relevantly, a director may raise defences to recovery of a penalty under section 269-35 which provides:

Illness

1. You are not liable to a penalty under this Division if, because of illness or for some other good reason, it would have been unreasonable to expect you to take part, and you did not take part, in the management of the company at any time when:
    a. you were a director of the company; and.
    b. the directors were under the relevant obligations under subsection 269–15(1).

All reasonable steps

2. You are not liable to a penalty under this Division if:
    a. you took all reasonable steps to ensure that one of the following happened:
        i. the directors caused the company to comply with its obligation;
        ii. ii. the directors caused an administrator of the company to be appointed under section 436A, 436B or 436C of the Corporations Act 2001;
        iii. iii. the directors caused the company to begin to be wound up (within the meaning of that Act); or
    b. there were no reasonable steps you could have taken to ensure that any of those things happened.
3. In determining what are reasonable steps for the purposes of subsection (2), have regard
    a. when, and for how long, you were are a director and took part in the management of the company; and
    b. all other relevant circumstances.

The burden of proof falls upon the defendant raising the defence to establish its validity.

The tax related liabilities

The liabilities of the company to which the director penalty provisions of the defendant are subject of are assessments issued pursuant to the *Superannuation Guarantee (Administration) Act* 1922 (the **SGAA**).

The plaintiff submitted that:

1. The assessment was properly made; and
2. Except under proceedings under part IVC of the TAA on a review or appeal relating to the assessment, that the amounts and particulars of the assessment, declaration or notice are correct; and
3. Section 250-10 of Schedule 1 to the TAA compels a court to treat a notice of assessment of conclusive evidence that the assessment has been duly made, and that the amounts and particulars in the assessment are correct, thereby foreclosing the issue except in proceedings under Part IVC of the TAA.

THE COURT'S DECISION

The use of evidentiary certificates and other prima facie provisions in Commonwealth taxation legislation has been widely accepted by the courts.

Penalties are imposed on directors personally when they fail to comply with their obligations under the TAA. The defendant was appointed a director of the Company on 10 January 1997 and was a director since that date. While the defendant was a director of the Company, the Company failed to pay SGC amounts for the quarters ending 30 September 2013, 20 June 2014, 30 September 2014 and 31 March 2015.

The court examined the default assessment issued by the plaintiff pursuant to s36 of the SGAA of the Company's superannuation guarantee shortfall. At the end of the due

day, the defendant was in respect of each amount of SGC still under an obligation under s269-15 of Schedule 1 of the TAA to cause the company to comply with its obligations under the SGAA. As a result, the defendant became liable to pay the plaintiff the penalty of an amount equal to each unpaid amount of the SGC under s269-20 of Schedule 1 of the TAA.

Illness or some other "good reason"

The defendant led evidence that a series of unfortunate events, including being defrauded which caused mental health issues, left him unable to run things and required taking time out of the business. The defendant led evidence from a consulting psychologist that he was suffering from a contemporaneous depressive condition as at 6 October 2017, but the psychologist could not provide a conclusive view about the defendant's psychiatric state during the Relevant Period. The court found there was no persuasive evidence given by the witness that the defendant was under such a disability caused by his mental health during the Relevant Period to prove that the defendant did not participate in the management of the company for that time.

At [45]:

> The test for whether a reason for non-participation is "good" was stated by Harrison J in Deputy Commissioner of Taxation v Robertson [30] as:
>
> > The reason advanced must objectively be a good reason. For example, a total failure to participate for whatever reason should not be regarded as a 'good reason'.[31] In determining what may be a good reason for not participating in the management of a company, regard must be had to the high standards of care and skill now required of directors. The plaintiff submitted that a director who by a course of conduct is inattentive to the affairs of the company is unlikely to have the benefit of this defence. For example, it would not be sufficient if the director held a genuine view that he or she had good reason for not participating unless it were a 'good reason' when view objectively.

In June 2012, the defendant engaged others to manage the affairs of the Company on his behalf and paid little attention to what those others were doing. It was decided in late 2012 that Mr Anthony Cefala of Watermans/BPO Connect Accountants & Advisers would step into the manager role. The defendant would attend the office to sign documents from time to time, and the defendant led evidence he would sign blank superannuation contribution declarations for them to be filled out by Mr Cefala at a later date.

The court agreed with the plaintiff's submissions that the defence of non-participation due to illness or other good reason was not available to the defendant because of his participation in the management of the Company while he was under the relevant obligation.

At [59]

> The Defendant was undoubtedly aware that the Company had serious compliance problems with its obligations to the ATO whilst the Company and he were under the Relevant Obligations. The Defendant's conduct fell well short of the objective standards of conduct which applied to him in the face of what he actually knew about the Company's compliance problems with the ATO. This is especially so when he was the sole director of the Company and participated in several meetings with the ATO about an audit of the Company's compliance with its superannuation guarantee obligations. More particularly, I consider that the Defendant's evidence that he signed blank superannuation guarantee charge forms "exemplified his reckless indifference to the discharge of his duties as director".

THE RESULT

The Court found in favour of the plaintiff and ordered the claimed amount of $554,168.28 was due and payable plus interest. Additionally, the court noted with respect of the conduct of the affairs of the Company, that the reasons for the decision were to be forwarded to the Australian Securities and Exchange Commission.

7. *APPLICATION TO REMOVE THE TRUSTEE - AINSWORTH V DAVERN [2018] VSC 80*

The Supreme Court of Victoria (McMillan J) has ordered a trustee be removed from a fund and be replaced by two independent trustees to ensure the fund complied with the Superannuation Industry (Supervision) Act 1993 (Cth). The court held where there is a conflict between interest and duty, it is in the interests of all that the fund is administered by independent trustees. The decision is *Ainsworth v Davern* [2018] VSC 80.

BACKGROUND

The proceeding sought to determine two primary questions:

1. which of the trust deeds governs a superannuation fund; and
2. who should act as trustees of the fund?

On 6 April 2016, Kevin William Davern died (the deceased), leaving a will dated 14 December 2007. The plaintiff was his domestic partner, and he was survived by three children, one of which is the defendant.

On 17 September 2003, the deceased established the Davern Superannuation Fund by trust deed and he was the sole member of the fund. The trust deed named the deceased and the defendant as trustees.

On 20 June 2008, the deceased in his capacity as trustee of the fund, adopted a trust deed dated 20 June 2008 ('the 2008 deed'). The 2008 deed changed the name of the fund to the Davern Family Super Fund and named the deceased as the sole trustee of the fund.

On 18 December 2014, the deceased signed a binding death benefit nomination form that gave the whole of the deceased's death benefits to the plaintiff.

On 24 March 2017, the defendant's solicitors raised the issue that the fund did not comply with the *Superannuation Industry (Supervision)* Act 1993 (Cth) in that it had only one trustee. The defendant's solicitors further raised on the issue that the 2008 trust deed had not been validly adopted and that the death benefit nomination may be of no effect.

The plaintiff sought orders by originating motion filed 20 December 2017 that the fund validly adopted the 2008 Deed and appointed the deceased as its sole trustee on 20 June 2008 and alternatively an order pursuant to s48(1) of the Trustee Act 1948 that the defendant be removed as a trustee of the Fund and an order appointing the defendant be removed as a trustee of the Fund and an order appointing proper persons as trustees of the Fund. The plaintiff suggested that two trustees be appointed who had agreed not to charge for their services.

THE COURT'S FINDINGS

The defendant's siblings did not wish for her to be removed as trustee, however it was axiomatic that the children's interests conflicted with the interests of the plaintiff. Evidence was led that the defendant had stopped the plaintiff's recurring payment from the Fund, and that the children of the deceased wanted more money from the estate.

The Court held that where there is a conflict between interest and duty, it is in the interests of all that the fund be administered by independent trustees. The removal of the defendant as trustee did not preclude her from remaining as a defendant and defending her position in relation to the fund. This also has the effect of removing the problem of the fund not having been compliant with the governing deed, as both the 2003 and 2008 deeds required the appointment of two trustees.

The court found that the two trustees suggested by the plaintiff were suitably qualified and experienced to be appointed as trustees, they had no interest in the Fund and would not charge remuneration for their services. Such an appointment would ensure that the fund is compliant with the SIS Act and that the assets of the fund were preserved pending the determination of which trust deed is the governing trust deed of the Fund.

THE RESULT

The Court ordered that the defendant be removed as trustee of the Davern Family Super Fund and that Mr McCrory and Ms Pelka be appointed as trustees of the Fund in substitution for the defendant.

8. *APPLICATION FOR TOTAL AND PERMANENT DISABILITY – WILLIAMS V MERCER SUPERANNUATION (AUSTRALIA) LIMITED & ORS [2017] QDC 289*

The District Court of Queensland (Andrews SC DCJ) has held that the plaintiff's symptoms did not entitle her to be considered totally and permanently disabled and dismissed her claims. The plaintiff had a real chance (which may be considered less than a 50% chance) of returning to part-time, casual or other relevant work of an intermittent nature which meant she was not entitled to the TPD benefit under the policy. The decision is *Williams v Mercer Superannuation (Australia) Limited & Ors* [2017] QDC 289.

BACKGROUND

The Plaintiff was employed by a merchant bank which involved her doing administrative duties from her home via telephone and computer. This allowed her to care for her three primary school aged children. By late 2009 the plaintiff's hours had increased to around 16 hours per day which no reduction likely. The intolerable workload coupled with the attitudes of her superiors and a colleague caused a deterioration in the Plaintiff's health. Her health problems may have included fibromyalgia. She declined to transfer to Singapore or Hong Kong and she was made redundant in early 2010.

The plaintiff held a policy against total and temporary disablement and total and permanent disablement (**TPD**), with her health problems sufficient to satisfy her insurer so much so that her claim for temporary disablement in 2010 was accepted.

She returned to work helping her husband's business two hours a day for 2 days per week in 2010. In 2011 the plaintiff claimed benefits under the TPD policy. The trustee referred to the claim to the insurer. The plaintiff claimed she had a practical inability to work more than two hours per day and that she would be too unreliable for employment. The severity of the plaintiff's symptoms could not be objectively assessed (headaches, neck and body aches and lack of motivation). Opinions of medical practitioners differed, as did their opinions about the plaintiff returning to work.

In 2012, the plaintiff begun studying law receiving credits and distinctions while her claim was under review. This information was passed on to the insurer.

In December 2013, the insurer rejected the plaintiff's claim for TPD. The trustee considered her claim following the insurer's rejection and then rejected her claim in March 2014.

In 2015, the plaintiff completed her law degree with honours.

There were two hearings run concurrently, however evidence heard in one hearing was not necessarily admissible in the other.

The plaintiff demonstrated she undertook and completed a stressful degree (law) in an accelerated time in spite of illness, demands of young children and long journeys to attend classes. The defendants contrasted the intellectual and motivational requirements for her academic achievement with the intellectual and motivational obstacles of which the plaintiff complained. The conclusion was that the plaintiff had summoned commendable determination to overcome low energy and poor motivation to perform at an intellectually high standard in spite of what she regards as her poor concentration and motivation.

THE COURT'S DECISION

Issue 1.
The plaintiff contended that she was TPD under the policy if she was permanently disabled from returning to full time work. The ability to perform less than full time work does not preclude her from claiming TPD under the policy. There was no limitation within the policy that the work for reward under employment also be in a full time position. The plaintiff's ability to return to part-time work or casual or other work of an intermittent nature would disentitle her to the TPD benefit, so long as such work was "for reward in, any occupation or work for which... she is reasonably qualified by education, training or experience".

The court found the first issue against the plaintiff citing that if she has a real chance of returning to part-time, or casual or other relevant work of an intermittent nature she is not entitled to the TPD benefit under the policy. A chance of returning to such work may be real despite being less than 50% chance.

Issue 2
The second issue concerned whether the plaintiff failed to satisfy the policy's six month waiting period condition because she worked for her husband. The defendants submitted that the meaning of "participating employer"

under the policy was a reference to Deutsche Bank, and that the work undertaken by the plaintiff in her "return to work program" with her husband fell within this definition.

The judge was not satisfied the plaintiff undertook this return to work program with her husband under instruction or payment from Deutsche Bank as there was no evidence led that spoke to this arrangement. The court rejected the submission the plaintiff worked for a "participating employer" in contravention of the policy's six month waiting period.

Issue 3
Issue 3 considered whether the plaintiff failed to satisfy the policy's six month waiting list because her position became redundant. The policy required the plaintiff to prove she had been absent from her position for six months "through injury or illness."

At [181]:

> I am satisfied that the plaintiff was continuously absent from employment with her participating employer, Deutsche Australia Limited, from October 2009 for the six month waiting period required by the policy. That is not enough to satisfy the waiting period condition. Her absence must have been "through injury or illness". I interpret "through" as being akin to "caused by". It is not enough to satisfy the condition that the plaintiff be absent for 6 months while suffering an injury or illness. The absence must be "through" an injury or illness.

And at [187]:

> One cause of the plaintiff's absence from employment with a participating employer on and after 28 February 2010 was the termination of her employment due to redundancy. That is to say, the position stopped being available. The plaintiff has not satisfied her onus of proof that after 28 February 2010 her absence from employment was also caused through the injury or illness which she was then suffering. It was a regrettable coincident fact that from 1 March 2010 the plaintiff was suffering an injury or illness which probably would have prevented her working in her former position until the end of the waiting period. But that injury or illness was not proved to be the cause of her absence from employment with Deutsche Australia Limited. Termination of employment due to her position's redundancy was the only cause established for the plaintiff's absence from employment with a participation employer after 28 February 2010.

The court found the plaintiff failed to satisfy the waiting period condition of the policy. It followed that the plaintiff had not established as against the insurer she was entitled to payment for TPD because her absence from employment failed to satisfy the policy's waiting period condition.

Issue 4
Issue 4 was whether the insurer breached a duty to act reasonably in considering the plaintiff's claim. The plaintiff submitted that the insurer should have pursued a report from Dr Cai, which would have brought to attention of the insurer that fibromyalgia was the plaintiff's condition.

In considering whether there had been a breach by the insurer of their duty to act reasonably, the court compared the insurer's conduct against the standard of a reasonable insurer bound by those duties extracted from *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QSC 245. The court was not satisfied that a reasonable insurer would have followed a train of inquiry with Dr Cai, and rejected the submission that the insurer in late 2013 should have sought a report from Dr Cai.

Issue 5
Issue 5 considered whether the Court should remit the matter to the insurer or determine whether the plaintiff is totally and permanently disabled in an issue in name only.

It was submitted by counsel for the defendants and conceded by counsel for the plaintiff during oral addresses that the definition of "total and permanent disablement" appearing at page 50 of the amended outline of the defendants is to be read with the material provisions governing the obligations of the Trustee.

Clause 1.1 of the governing obligations sets out that TPD of the member, if there is a relevant policy of insurance in force, is determined by the insurer.

Issue 6
On whether the plaintiff's claim was given proper consideration by the trustee. Counsel for the plaintiff relied on Edington to further the proposition that the trustee had a duty to consider relevant information and make relevant inquiries and that the trustee's decision was so unreasonable that no reasonable trustee could make it. The trustee in the proceeding was not required to consider relevant information and make relevant inquiries or to make a determination about whether the plaintiff is TPD.

The plaintiff failed to establish that the defendants have breached a duty to the plaintiff.

Issue 7
On the question of whether the plaintiff was TPD, at [241]:

> I must consider whether the plaintiff is unlikely to ever engage in, or work for reward in, any occupation or work for which she is reasonably qualified by education, training or experience. If the plaintiff has a real chance of returning to part-time, or casual or other relevant work of an intermittent nature, she is not entitled to the benefit under the policy. A chance of returning to such work may be real, despite being less than a 50 per cent chance.

A medical practitioner report submitted to the insurer opined that "*a full-time study load was inconsistent with significant difficulties with concentration or motivation and revealed a reasonably high level of application and a capacity to focus for significant periods of time and an ability to crystallise learned material. He considered that doing a law degree was consistent with being able to do administrative work, at least part-time*."

The court held at [251]:

I am not satisfied that, as at 13 May 2016, the plaintiff was totally and permanently disabled within the meaning of those words in the policy because I am not satisfied that the plaintiff is incapacitated to such an extent as to render (her) unlikely to ever engage in, or work for reward in, any occupation or work for which... she is reasonably qualified by education, training or experience. This is because I am not satisfied that her incapacity deprives her of a real chance of working for reward in a clerical or administrative occupation on a basis which is part-time or casual or intermittent. To avoid creating doubt, I am not satisfied by the current evidence that the plaintiff's symptoms deprive her of a real chance of doing clerical or administrative work part-time.

THE RESULT

The Court found that the plaintiff's symptoms, though genuine and debilitating, do not entitle her to declarations, damages or an order against either defendant.

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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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Claire is an experienced commercial litigation specialist having practised in Victoria, New South Wales, Queensland, South Australia, Western Australia and federal jurisdictions. She has a particular expertise in SCT complaints, litigated TPD claims and general commercial matters, acting for superannuation trustees. Claire was recently acknowledged by the *Legal 500 Asia Pacific* (2018) for her work in the Dispute Resolution space.