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SUPERANNUATION CASE LAW UPDATE
SEPTEMBER 2018

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Thomson Geer thanks Scott Charaneka (Head of Superannuation and Wealth Management), Stanley Drummond (Adjunct Head of Superannuation and Wealth Management), Claire Gitsham (Partner), Tate Du Plessis (Lawyer) and Michael Tuohy (Law Clerk) for their assistance in preparing this publication.

1. THE SOLE PURPOSE TEST - *AUSSIEGOLFA PTY LTD V COMMISSIONER OF TAXATION* [2018] FCAFC 122

The Full Federal Court (Besanko, Moshinsky and Steward JJ) has held that the sole purpose test in section 62 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) had not been breached in circumstances where a self managed superannuation fund (SMSF) had invested into a managed investment scheme which acquired an apartment in a student accommodation complex and later leased the apartment to the student daughter of the sole member of the SMSF at market rent. The case is *Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation* [2018] FCAFC 122.

BACKGROUND

Aussiegolfa Pty Ltd (Aussiegolfa) was the trustee of an SMSF, of which Mr Christopher Benson was the sole member.

Benson Fund. The issues raised by these proceedings relate to an investment by Aussiegolfa (in its capacity as trustee of the Benson Fund) in a managed investment scheme known as the DomaCom Fund (the DomaCom Fund).

In July and August 2015, Aussiegolfa acquired units of a particular class in in a managed investment scheme known as the DomaCom Fund. The class of units was associated with the acquisition, by the responsible entity of the DomaCom Fund, of a property in Burwood, Victoria (the Burwood Property). The units of this class were referred to in contemporaneous documents as units in the "Burwood Sub-Fund", being a sub-fund of the DomaCom Fund (the Burwood Sub-Fund). The units of the class were held: as to 25% by Aussiegolfa; as to 50% by Mr Benson's mother; and as to 25% by a superannuation fund of Mr Benson's sister and her husband.

The custodian of the DomaCom Fund entered into an exclusive leasing and managing authority with Student Housing Australia Pty Ltd (Student Housing Australia) for the leasing of the Burwood Property. The first two tenants of the property were persons unknown, and unrelated, to Mr Benson, or to the SMSF. In April 2017, Student Housing Australia agreed to lease the apartment to Mr Benson's daughter (Ms Benson), with the lease commencing in February 2018 at the same monthly rental as had been paid by the first two tenants.

Mr Benson submitted the application for lease on Ms Benson's behalf, and agreed to act as guarantor of her obligations under the lease.

The SMSF was eligible for concessional tax treatment under Division 295 of the Income Tax Assessment Act 1997 (Cth) provided that it was a "complying superannuation fund". The requirements for a complying superannuation fund were set out in the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act). The requirements relevantly included:

a. that the fund complied with the in-house asset rules, in section 84 of the SIS Act; and

b. that the fund satisfied the sole purpose test, in section 62 of the SIS Act.

Aussiegolfa's units in the DomaCom Fund (or the Burwood Sub-Fund) constituted 7.83% of its assets (that is, the assets of the SMSF). The in-house asset rules effectively limited investments in in-house assets to a maximum of 5% of the market value of all assets in the fund. An issue therefore arose as to whether Aussiegolfa's units constituted an "in-house asset". The expression "in-house asset" was defined in section 71(1) of the SIS Act as meaning (among other things) "an investment in a related trust of the fund", but did not include "an investment in a widely held unit trust".

Further, section 71(4) of the SIS Act provided that, if an asset of a fund consisted of an investment "other than an in-house asset", the regulator (ie the Commissioner of Taxation) could make a determination that the asset was to be treated "as if the asset were … an investment in … a specified … related trust of the fund". Here, on 3 July 2017 the Commissioner made a determination that the units held by Aussiegolfa in the Burwood Sub-Fund were to be treated as an investment in a related trust of the SMSF (the Determination).

Briefly stated, the sole purpose test required Aussiegolfa, as the trustee of the SMSF, to ensure that the SMSF was maintained solely for one or more of certain prescribed purposes, including the provision of benefits on or after the retirement of members of the fund.

Aussiegolfa commenced a proceeding in the Federal Court of Australia seeking declaratory relief (the Federal Court proceeding). In broad terms, Aussiegolfa sought declarations to the effect that: its units in the DomaCom Fund did not constitute an in-house asset; and the leasing of the Burwood Property to Mr Benson's daughter would not cause Aussiegolfa to breach the sole purpose test.

Aussiegolfa also commenced a proceeding in the Administrative Appeals Tribunal (AAT) by which it sought review of the Determination (the AAT proceeding). The AAT proceeding was heard immediately after the hearing of the Federal Court proceeding, and the evidence in the Federal Court proceeding was evidence also in the AAT proceeding. The AAT was constituted by the judge who heard the Federal Court proceeding, sitting as a Deputy President of the AAT.

In the Federal Court proceeding, the primary judge, Pagone J, decided that the units held by Aussiegolfa in the DomaCom Fund (or the Burwood Sub-Fund) did constitute an in-house asset; and that leasing the Burwood Property to Mr Benson's daughter would cause Aussiegolfa to breach the sole purpose test: *Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation* [2017] FCA 1525. Pagone J therefore declined to make the declarations sought by Aussiegolfa and dismissed the proceeding.

In the AAT proceeding, the AAT set aside the Determination on the basis that the units held by Aussiegolfa had been found to be an in-house asset. Accordingly, the condition for exercising the power in section 71(4) (namely, that the asset was not an in-house asset) was absent.

THE APPEALS TO THE FULL FEDERAL COURT

Aussiegolfa appealed to the Full Federal Court from the judgment of the primary judge, Pagone J, in the Federal Court proceeding (the Federal Court Appeal).

The Commissioner of Taxation "appealed" on a question of law under section 44 of the A*dministrative Appeals Tribunal Act 1975* (Cth) from the decision of the AAT (the AAT Appeal). The AAT Appeal, which was in the original jurisdiction of the Full Federal Court, was effectively contingent on Aussiegolfa succeeding on the in-house asset issues in the Federal Court Appeal. The two appeals were heard together.

In summary, the issues raised by the Federal Court Appeal were:

a. whether the primary judge had erred in concluding that the units held by Aussiegolfa in the DomaCom Fund (or

the Burwood Sub-Fund) constituted an investment in a "related trust" of the SMSF for the purposes of Part 8 of the SIS Act (the Related Trust Issue);

b. whether the primary judge had erred in concluding that the units did not constitute an investment in a widely held unit trust (the Widely Held Trust Issue); and

c. whether the primary judge had erred in concluding that the leasing of the Burwood Property to Mr Benson's daughter would cause Aussiegolfa to breach the sole purpose test (the Sole Purpose Issue).

THE DECISION OF THE FULL FEDERAL COURT

The Full Federal Court (Besanko, Moshinsky and Steward JJ) concluded that:

a. the primary judge had been correct to conclude that the units held by Aussiegolfa in the DomaCom Fund (or the Burwood Sub-Fund) constituted an investment in a "related trust" of the SMSF;

b. the primary judge had been correct to conclude that the units did not constitute an investment in a widely held unit trust; and

c. the primary judge had erred in concluding that the leasing of the Burwood Property to Mr Benson's daughter caused Aussiegolfa to breach the sole purpose test.

The Federal Court Appeal was therefore allowed in part. Given that the AAT Appeal was effectively contingent on Aussiegolfa succeeding on the in-house asset issues in the Federal Court Appeal, it followed from the rejection of the grounds of appeal relating to those issues that the AAT Appeal had to be dismissed.

THE SOLE PURPOSE TEST

Moshinsky J, with whom Besanko J agreed, noted that the lease of the Burwood Property to Mr Benson's daughter had been at market rent. His Honour said (at [177]):

> Applying the principles discussed above to the present case, in my view the Benson Fund would not be maintained for a purpose other than the core purposes and the ancillary purposes set out in s 62 upon the leasing of the Burwood Property to Ms Benson. Importantly, in the present case, although the Burwood Property, being the underlying property associated with the Burwood Sub-Fund units held by Aussiegolfa, would be leased to the daughter of the sole member of the Benson Fund, the lease would be at market rent. In these circumstances, there does not appear to be any financial or other non-incidental benefit to be obtained by Ms Benson by leasing this property rather than another; nor does there appear to be any financial or other non-incidental benefit to be obtained by Mr Benson by the property being leased to his daughter rather than another tenant. It is true that Ms Benson would obtain a benefit in the sense that she obtains accommodation. But in circumstances where this is obtained at market rent, it does not appear to be a relevant benefit for present purposes. If and to the extent that there may be some comfort or convenience – from the perspective of Ms Benson or Mr Benson or both – from the arrangement, I would regard these matters as merely incidental benefits in the circumstances of the present case (including, in particular, the fact that the lease was at market rent). I do not consider the fact that Mr Benson submitted the application for lease on Ms Benson's behalf, or agreed to act as guarantor of Ms Benson's obligations under the lease, to suggest otherwise. These matters do not provide a basis to infer that either Ms Benson or Mr Benson would obtain a benefit from the arrangement other than, perhaps, some comfort or convenience. ... I conclude that the fund would be maintained solely for the core purposes, or the core purposes and the ancillary purposes, set out in s 62 upon the leasing of the Burwood Property to Ms Benson.

The primary judge had therefore erred in concluding that Aussiegolfa had breached the sole purpose test (at [179]).

Steward J stated the following legal propositions concerning the sole purpose test in section 62 of the SIS Act (at [230]):

> a. First, s 62 requires a fund to be maintained solely for a series of core and ancillary purposes. It is a question of fact for consideration in each year of income whether a fund is or is not so maintained. In this proceeding, the finding made below was an inference made by the judge from objective material. This is not a case where the primary judge's finding depended upon an evaluation of the credit of any witness.
>
> b. Secondly, the purpose here is that of Aussiegolfa and not that of Mr Benson, save in his capacity as a director and controller of that entity...
>
> c. Thirdly, the subjective motivation of a controlling director is not to be confused with the purpose of the corporation he or she may control.
>
> d. Fourthly, purpose in the context of s 62 looks to the object of acts of maintenance of a fund on a yearly basis. If those acts have the sole object of achieving the core purposes and/or ancillary purposes, the provision is satisfied...
>
> e. Fifthly, the word "solely" may not add much to the statutory scheme. As Gibbs ACJ (as his Honour then was) observed in Ryde Municipal Council v Macquarie University (1978) 139 CLR 633 at 644: "[t]he word 'solely' may do no more than add emphasis, or perhaps precision".
>
> f. Sixthly, there is no necessary dichotomy between the maintenance of a fund for core and/or ancillary purposes and the receipt by a related person or entity of a benefit. In some cases, the conferral of a benefit may reveal the presence of a purpose which is collateral to the core and ancillary purposes defined by s 62. Investing directly in rental property which is leased to a relative for a peppercorn rent would justify an inference that there existed a collateral purpose. But if the rent paid is market value, and if the property otherwise constitutes a prudent investment, the personality of the tenant may not justify a similar inference. In such a case, the income and the assets of the fund are enhanced, or at least preserved, and the capacity of the fund to provide benefits to members in the future is not affected. Whether such an investment might otherwise be an in-house asset would require separate consideration.

...

h. Seventhly, I do not think that it is necessarily of assistance to describe the criteria in s 62 as imposing a "strict standard" or a "high standard". The provision does not adopt such language. There is a danger that such descriptions can unduly influence the construction of a provision or its application to the facts.

Here, the decision to invest in property through the DomaCom Fund was made in 2015. At that time, it could not be inferred that there existed a collateral purpose of conferring a benefit on a relative of Mr Benson. There was no plan at that stage to lease the Burwood Property to the daughter. Nor is there any reason to doubt that the investment was otherwise prudent, and was well suited to the provision of membership benefits in the future (at [232]-[233]).

The property was initially leased to a student unknown to Mr Benson from 8 January 2016 until 23 January 2017. She paid a monthly rental of $869. It was not suggested that this was anything other than an arm's length sum. A second tenant, unknown to Mr Benson, leased the premises from 20 February 2017 until 15 February 2018. He paid the same rent. At this point in the evidence, again, it could not be inferred that there existed a collateral purpose of conferring a benefit on a relative of Mr Benson (at [234]).

Mr Benson's daughter became the third tenant from February 2018. She contracted to pay the same rent of $869. She was a student. The property was conveniently located for the purpose of her travelling to University. There was nothing to suggest, and it was not suggested, that there is something about the daughter that rendered her an unsuitable tenant. Throughout all this time, DomaCom, acting through agents, and not Aussiegolfa or Mr Benson, was responsible for letting out the Burwood Property (at [236]).

At this final point in the narrative, it could not be inferred that there existed a collateral purpose of conferring a benefit on a relative of Mr Benson. The SMSF continued to be maintained for core and ancillary purposes, as defined. It remained invested in a suitable property from which it continued to receive an appropriate return for the purposes of funding the provision of membership benefits into the future. Here, the personality of the tenant was irrelevant to the SMSF's ability to meet its core and ancillary purposes, as defined by section 62 of the SIS Act (at [237]).

Moshinsky J said (at [241]):

> When a [superannuation] fund is established to invest for the purposes of providing superannuation benefits for its members in the future, the concern is with the protection of that fund from dissipation so that the fund fulfils its function and purpose. Thus, when a benefit is conferred which imperils a fund so exclusively dedicated, the presence of a collateral purpose is likely to exist. Generally speaking, this is the type of benefit with which s 62 is concerned. Here, the continued payment by the daughter of market rent did not diminish or threaten the capacity of the [SMSF] to provide superannuation benefits to its members in the future. It continued to receive the same return from this investment.

Aussiegolfa had not breached the sole purpose test.

THE RESULT

In the result, the Commissioner's determination that the units held by Aussiegolfa in the DomaCom Fund (or the Burwood Sub-Fund) constituted an investment in a related trust of the SMSF (so as to constitute an in-house asset) stood. However, Aussiegolfa was entitled to a declaration that it had not breached the sole purpose test (at [182]).

2. SELF MANAGED SUPERANNUATION FUND - BINDING DEATH BENEFIT NOMINATIONS - ENDURING POWER OF ATTORNEY - *RE NARUMON PTY LTD* [2018] QSC 185

The Queensland Supreme Court (Bowskill J) has declared the validity of a document, executed by attorneys acting under an enduring power of attorney, which confirmed and extended for 3 years a binding death benefit nomination made by a member of a self managed superannuation fund. On the other hand, the court declined to declare the validity of a binding death benefit nomination executed by those same attorneys which varied the percentage shares in the death benefit by a total of 5%. The case is *Re Narumon Pty Ltd* [2018] QSC 185.

BACKGROUND

Mr Giles, a member of a self managed superannuation fund, made a series of binding death benefit nominations, as follows:

- a nomination in 2010;
- a nomination in 2012;
- a nomination in 2013;
- a nomination in April 2013; and
- a nomination dated 5 June 2013. This nomination stated that it would cease to have effect 3 years after the date it was signed (which would be 5 June 2016) (at [22]).

The binding death benefit nomination dated 5 June 2013 provided for the death benefit to be distributed as follows:

- to the member's wife Mrs Giles – 47.5%;
- to the member's minor son Nicolas Giles – 47.5%; and
- to the member's sister Mrs Keenan – 5%. She was not a "dependant" within the meaning of that term in the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) (at [22] and [25]).

Also on 5 June 2013, the member executed an enduring power of attorney by which he appointed Mrs Giles and Mrs Keenan jointly as his attorneys for financial and personal/health matters. The document specified the time when the attorneys' power to make decisions about financial

matters was to begin (which was when the member was assessed by a medical professional with at least 10 years' experience as being incapable of making his own decisions). The document did not otherwise specify any terms for the power given to the attorneys (at [65]).

In November 2013 the member was medically assessed as being totally incapable of making financial, health and lifestyle decisions. From that time, Mrs Giles and Mrs Keenan acted as his attorneys (at [7]).

In early 2016 Mrs Giles discussed with the fund's accounting adviser and also with Mrs Keenan whether Mrs Giles and Mrs Keenan would, in their capacity as the member's attorneys, take steps to extend the binding death benefit nomination dated 5 June 2013. They agreed that they should do so because, in their view, those were still the member's wishes" (at [23]).

Accordingly, on 16 March 2016 Mrs Giles and Mrs Keenan, in their capacity as the attorneys for the member, signed a document entitled "extension of binding death benefit nomination", by which the binding death benefit nomination dated 5 June 2013 was confirmed and extended for a further three year period (at [24]).

Also on 16 March 2016, Mrs Giles and Mrs Keenan, again in their capacity as the attorneys for the member, signed a replacement binding death benefit nomination which provided for the death benefit to be distributed as follows:

- to the member's wife Mrs Giles – 50%; and
- to the member's minor son Nicolas Giles – 50% (at [25]).

This effectively reallocated the 5% share of Mrs Keenan, who was not a dependant, between Mrs Giles and Nicholas Giles, who were dependants (at [25]).

In any event, in June 2018 Mrs Keenan expressly disclaimed her interest and right to the 5% proportion of the benefit payable to her under the 2013 binding death benefit nomination, or the 2016 extension (at [26]).

The member died in June 2017. He left an accumulation account of about $1 million and a lifetime complying pension with a value of about $3 million (at [1] and [5]).

The trustee of the fund applied to the Queensland Supreme Court for declarations and orders in relation to the administration of the fund, to resolve a number of uncertainties that had arisen, including uncertainties about the binding death benefit nominations (at [3]).

The application was not opposed. Mrs Giles was present at court, but was not separately represented. Nicholas Giles appeared at the hearing by his litigation guardian and did not oppose the relief sought in the application. The member had also left 4 adult children from his previous marriage. They were each served with the application and supporting material, but did not appear or seek to be heard in relation to it. The administrator of the member's estate indicated she would abide the order of the court. The matter therefore proceeded on the basis of the material filed by the applicant trustee, and the submissions on its behalf (at [10]).

THE COURT'S DECISION

While the court also dealt with other issues including what the current terms of the fund were, and missing documentation establishing the member's pension, the court's rulings regarding the binding death benefit nominations are of particular interest.

The binding death benefit nomination dated 5 June 2013

The court held that the binding death benefit nomination dated 5 June 2013 was valid (at [46]).

Clause 12 of the fund's trust deed provided for a member to give the trustee a binding death benefit nomination (at [28]). Clause 12.5 provided that the notice "may" be in a certain form (at [29]):

> 12.5 A binding death benefit notice may be in the form set out in Schedule E to this Deed or some other form that complies with the Superannuation Law.

The court held that:

- following *Munro v Munro* [2015] QSC 61; (2015) 306 FLR 93, section 59(1A) of the SIS Act does not apply to a self managed superannuation fund, and so regulation 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations), which sets out the conditions for the purposes of section 59(1A) for the payment of a death benefit after the death of a member, also does not apply to a self managed superannuation fund (at [34]-[35]);
- as a matter of construction of the terms of the trust deed, regulation 6.17A was not "imported" into the deed (at [34]-[45]); and
- the use of the word "may" in clause 12.5 of the trust deed (see above) suggested that, objectively, the intention of the parties to the deed was that strict compliance with a particular form was not required (at [46]).

The court considered whether the fact that the binding death benefit nomination provided for the member's sister, Mrs Keenan, who was not a "dependant", to receive 5% of the benefit invalidated the whole of the nomination. The court held that the nomination was valid to the extent that the nominated beneficiaries were a dependant or legal personal representative. The court said:

> [49] The one issue that arises in relation to the nomination signed by Mr Giles in June 2013 is that Mrs Keenan is not, and was not at the time of the 2013 nomination, a dependant of Mr Giles. The applicant submits that this does not affect the validity of the nomination as a whole. She was, of course, one of Mr Giles' legal personal representatives (being one of the executors of Mr Giles' estate), but the nomination was not of her in this capacity. Having regard to reg 6.22 [of the SIS Regulations] and clauses 12.1 and 12.2 of the 2004 [trust] deed, the applicant's submission seems to me to be correct. The scope of the power of a member to require the trustee to pay the member's benefits, following the member's death, is limited to requiring payment to persons who are the member's dependants or their legal personal representative. If a member gives a notice to the trustee, nominating a person who is not a dependant, or legal personal representative, the nomination is to that extent of no effect – the member is not authorised to nominate such a person, and the trustee is not authorised to pay a benefit to such a person.

> [50] Although it could be open to construe clause 12.2(i) [of the trust deed] as having the effect that a notice given by a member is not binding on the trustee if any person nominated in it is not a dependant or (nominated in the capacity of) legal personal representative, in my view adopting a practical and purposive approach, the preferable construction of clause 12.2(i) is that the notice is binding on the trustee to the extent that the person(s) nominated in it is the deceased member's dependant or legal personal representative.

In other words, the binding death benefit nomination dated 5 June 2013 was valid to the extent that it directed the trustee to distribute 47.5% of the benefit to the member's wife Mrs Giles and 47.5% to the member's minor son Nicholas Giles – a total of 95% of the benefit.

The extension document dated 16 March 2016

The court declared that the document executed by the attorneys on 16 March 2016 which confirmed and extended for a further 3 years the member's binding death benefit nomination dated 5 June 2013 was valid (at [88]).

In 2014 the terms of the trust deed had been varied by replacing all of its provisions with a new set of provisions. Clauses 31.2 to 31.5 enabled a member to give the trustee a binding death benefit nomination. There was no express power to "confirm" or "extend" a nomination. Therefore, the validity of the "extension" document depended (along with other considerations) on it complying with the requirements for a binding death benefit nomination in clauses 31.2 to 32.4 of the trust deed (at [14]-[15] and [56-[58]).

Clause 5.4 of the trust deed provided for any power or right given to a member to be exercised by a person holding an enduring power of attorney. Clause 5.4 read (at [56]):

> Any power or right given to a Member, a Pensioner or Beneficiary in this deed (including, without limiting this clause, powers and rights given to a Member under clauses 10 and 14) can be exercised by:
>
> ...
>
> b. if the person is under a legal disability, the trustee of the estate of the person, or any person who holds an enduring power of attorney from the person (in accordance with the terms of the appointment); and
>
> c. any person who holds an enduring power of attorney from the person (in accordance with the terms of the appointment).

The court noted that there was nothing in the trust deed itself that would prevent an attorney signing a nomination for the member. On the contrary, clause 5.4(b) of the trust deed expressly contemplated that any power or right given to a member could, if the member was under a legal disability, be exercised by a person holding an enduring power of attorney from the member, in accordance with the terms of the appointment (at [59]).

Nor was there any restriction in the SIS Act or SIS Regulations that would prevent an attorney, under an enduring power of attorney, from executing a binding death benefit nomination for the member (at [60]).

The court considered the construction of the relevant provisions of the *Powers of Attorney Act 1998* (Qld). Section 33 of the Act provided for a person (the principal) to appoint an attorney (at [62]):

> ... to do anything in relation to 1 or more financial matters or personal matters for the principal that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised ...

A non-exhaustive list of examples of "financial matters" was set out in section 1 of schedule 2 to the Act. This list did not include giving a binding death benefit nomination. But the list was not exhaustive, and in the court's view, giving a binding death benefit nomination fell within the meaning of the term "financial matter". The court said (at [69], footnotes omitted):

> But the examples given are not exhaustive and do not limit the meaning of the provision. It is difficult to see why the exercise of a member's right under a self-managed superannuation fund deed, to require the trustee of the fund to pay benefits, after their death, in a particular way would not be "a matter relating to the [member's] financial ... matters". Given the breadth of meaning of the word "financial" (of, pertaining, or relating to finance or money matters) such an act does fall within the meaning of this term.

The court next considered whether, as a matter of general law, making a binding death benefit nomination is an act that can only be performed personally (such as making a will, getting married and voting in an election), and not by an attorney. The court dealt with this issue by saying that making a binding death benefit nomination is not a testamentary act (footnote omitted):

> [70] The next question is whether there is any reason, arising from the Powers of Attorney Act itself, or as a matter of general law, to conclude that such an act is one that must be performed personally.
>
> [71] Although the making of a binding death benefit nomination under a superannuation fund has the effect of dealing with payment of benefits following death, it is not a testamentary act, and so is not captured, by analogy, by the restriction against delegating to an attorney the making of a will.

The court noted the view of the Australian Law Reform Commission in its Report 131 *Elder Abuse – A National Legal Response* (2017) that a binding death benefit nomination is "will-like" and should be treated similarly to a will, and the commission's policy position that an attorney under an enduring power, by virtue of that power alone, should not be able to make a binding death benefit nomination for a member of a superannuation fund (at [73]-[74]).

In the present context, section 73 of the Powers of Attorney Act was an important protective feature. Section 73 permitted an attorney for a financial matter to enter into a "conflict matter" (a term defined in section 73) "only if the principal authorise[d] the transaction, conflict transactions of that type or conflict transactions generally" (at [76]).

The court noted that here, under the enduring power of attorney dated 5 June 2013 the member had not authorised his attorneys to enter into a conflict transaction, of any particular kind or type, or generally. However, the court was satisfied that the 2016 extension of the binding death benefit nomination was not a conflict transaction (at [77] and [85]).

The court said:

> [85] In this case, by the 2016 extension, the attorneys did no more than confirm the nomination made by Mr Giles himself. Notwithstanding that involves a benefit conferred on one of the attorneys, Mrs Giles, and her son, in the circumstances of this case I am satisfied that is not a conflict transaction – as it is not a transaction in which there is, or may be, a conflict between the duty of the attorney towards the principal, and the interests of the attorney.

The court was satisfied that the 2016 extension complied with clauses 31.2 to 31.4 of the trust deed, and that it was within the scope of the attorneys' power to sign the document (at [88]).

The extension document dated 16 March 2016 extended the binding death benefit nomination dated 5 June 2013 for a further 3 years, until 16 March 2019. As mentioned above, the member died in June 2017.

The binding death benefit nomination dated 16 March 2016

The court declined to declare that the binding death benefit nomination executed by the attorneys dated 16 March 2016 was valid, as it could be said that this was a conflict transaction which the member had not authorised (at [91]).

The 2016 binding death benefit nomination had purported to:

- increase the share of the member's wife Mrs Giles, an attorney and a dependant, from 47.5% to 50%;
- increase the share of the member's wife minor son Nicolas Giles, a dependant, from 47.5% to 50%; and
- decrease the share of the member's sister Mrs Keenan, an attorney and a non-dependant, from 5% to nil.

This was a change, "albeit small", to what the member had proposed. The court said (footnotes omitted):

> There is a distinction between [the 2016], and the making of the 2016 [binding death benefit nomination], because it does represent an, albeit small, change to what Mr Giles had proposed. Where an attorney purports to make a binding death benefit nomination for a principal/member, who has lost capacity, for the first time (that is, where the principal/member had not previously done so personally); or purports to amend or vary a binding death benefit nomination previously made personally by the member, different considerations, in particular in terms of actual or potential conflicts of interest, may arise. In that context, questions as to the scope of the authority of the attorney would arise, in terms of whether the principal had authorised them to enter into a conflict transaction of that type, or generally; and in any event, whether the act was nevertheless one "on behalf of" and in the interests of the principal.

THE RESULT

In the result, the court declared that the document executed by the attorneys on 16 March 2016 which confirmed and extended for a further 3 years the member's binding death benefit nomination dated 5 June 2013 was valid; but declined to declare that the binding death benefit nomination executed by the attorneys dated 16 March 2016 was valid.

The binding death benefit nomination dated 5 June 2013 had provided for the death benefit to be distributed as follows:

- to the member's wife Mrs Giles – 47.5%;
- to the member's minor son Nicolas Giles – 47.5%; and
- to the member's sister Mrs Keenan – 5%.

As Mrs Keenan was a non-dependant, her 5% "share" fell to be dealt with by the trustee in accordance with clause 31.1 of the trust deed: (at [92]). (Clause 31.1 was not quoted or explained in the judgment.)

3. THE MEANING OF "INTERDEPENDENCY RELATIONSHIP" - *WILLIAMS V IS INDUSTRY FUND PTY LTD* [2018] FCA 529

The Federal Court (Logan J) has dismissed an appeal by the father of a deceased member of a superannuation fund from a determination of the Superannuation Complaints Tribunal (SCT). The father had unsuccessfully claimed that he and his son had been in an interdependency relationship immediately before the son's death. The case is *Williams v IS Industry Fund Pty Ltd* [2018] FCA 529.

This followed on from an earlier decision of the Federal Court (Reeves J) where the court had remitted the matter to the SCT: *Williams v IS Industry Fund Pty Ltd* [2016] FCA 524. (See the June 2016 issue of the Superannuation Case Law Update.)

BACKGROUND

The son lived in Ohio, in the United States of America, with his parents, until their divorce in about 1999/ 2000. Following his parents' divorce, the son lived in Ohio with his mother. From 2000 to 2005, the son attended college in Pittsburgh and during most of this period he lived on campus. He would, however, return to his mother's home in Ohio during college breaks.

From September 2005 until November 2010, the son lived variously in Pittsburgh, New York and Philadelphia in the United States of America. In November 2010, he commenced working for the Club Med organisation in the Whitsunday Islands, in Queensland, Australia. Upon commencing that employment, he joined a superannuation fund.

In May 2011, the son took 2 weeks' planned leave and returned to Ohio, where he stayed with his father. At the conclusion of his leave, he was scheduled to commence work at the Club Med resort at Turkoise in the British West Indies. However, at about that time he was diagnosed with cancer and, as a consequence, he never resumed his employment.

In late June 2011, the son was admitted to hospital in Cincinnati, Ohio for palliative care treatment. He remained in hospital until late September 2011, at which time he was transferred to a hospice in Michigan.

The son passed away in November 2011.

The trustee of the fund decided to pay the son's death

benefit to the son's legal personal representative. Critical to that decision was the question of whether the son had an "interdependency relationship" with his father. After unsuccessfully objecting to the trustee's decision, the father lodged a complaint with the SCT.

THE SCT'S FIRST DETERMINATION

In the SCT's view, the issue before it was whether the father and son were living together prior to the son's death. The SCT said:

> Under sl0A of the SIS Act, two persons are in an interdependency relationship if they live together or, if they do not live together, the reason they don't is that one of them suffers from a physical, intellectual or psychiatric disability. There is no evidence that, whilst the Deceased Member was working in Australia shortly before his death, he was suffering from any physical, intellectual or psychiatric disability.
>
> The issue for the Tribunal, therefore, in determining whether the Trustee's decision was fair and reasonable, is whether the Complainant and the Deceased Member were living together prior to the latter's death.

Based on that evidence, the SCT found that the father and son were not living together prior to the son's death. The SCT said:

> The Tribunal, therefore, finds that the Deceased Member was not living with the Complainant prior to his death and the two weeks that he stayed with the Complainant in May 2011 were whilst he was on vacation from his job and that he was due to live overseas after the two week vacation.

The SCT therefore held that the father was not in an interdependency relationship with the son.

The SCT affirmed the decision of the trustee of the fund to pay the son's death benefit to the son's legal personal representative.

THE FIRST APPEAL TO THE FEDERAL COURT

The father appealed to the Federal Court on the basis that the SCT had failed to take account of 2 matters as relevant considerations, namely:

- whether the father and son had an interdependency relationship immediately before his death on 7 November 2011; and
- if that were not so, whether that state of affairs was caused by the son having suffered from a physical disability.

In relation to the first matter, the father contended that the SCT erred by asking about his son's intentions in relation to his living arrangements when he arrived in Ohio on 1 May 2011 and confining its deliberation to the period immediately surrounding that date.

In relation to the second matter, the father accepted that, at the date of his son's death, they were not "living together" because at that time his son was living in a hospice. However, the father contended that, by the time his son first went to hospital, his son had been living with him between 18 May 2011 and 24 June 2011, and had apparently decided to do this "in the face of the terrible death sentence that he ... received in this period".

THE FEDERAL COURT'S FIRST DECISION

The Federal Court (Reeves J) held that the SCT had failed to take account of the above 2 matters as relevant considerations.

In relation to the first matter, the court relevantly said:

> ... there is no evidence from the Tribunal's Reasons that it had any regard to the six months (approximately) period between May 2011 and the date of the deceased's death in November 2011, which period plainly falls within the temporal confines of the expression "immediately before the death of" the deceased.

and:

> All of these aspects of the Tribunal's reasons go to demonstrate that this is not a case where the Tribunal has made an erroneous factual finding as [the trustee] has contended. Rather they demonstrate that the Tribunal has made a finding about a matter, namely, whether [the father] and his son were living together, without having regard to the period it was bound to consider: that immediately before the death of the deceased. For these reasons, I therefore consider the Tribunal failed to take into account a relevant consideration which it was bound to. It necessarily follows that the Tribunal has made an error of law in this respect.

In relation to the second matter, the court relevantly said:

> The next question is whether the Tribunal failed to consider this matter. On that question, despite [the trustee's] contention that the Tribunal did not have to consider this matter, there is some indication from the Tribunal's Reasons that it may have, at least incidentally. ... If, contrary to [the trustee's] submission, this statement can be taken as some indication that the Tribunal did consider the question posed by s 10A(2)(b) of the SIS Act, I consider it did so erroneously. That is so because, as with the first matter above, reg 1.04AAAA specifies that the relevant period for the purposes of determining this matter is the period "immediately before the death of" the deceased. Further, as with the first matter, it is apparent from this statement that the Tribunal confined its consideration to the period up to May 2011. For these reasons, I therefore consider the Tribunal failed to take into account a relevant consideration which it was bound to, namely, assuming [the father] and his son were not living together within the requirement in s 10A(1)(b) of the SIS Act, whether the reason why that was so was because his son suffered from a physical, intellectual or psychiatric disability.

The court remitted the matter to the SCT.

THE SCT' SECOND DETERMINATION

In its second determination, the SCT again affirmed the trustee's decision to pay the benefit to the executor, and not to the father.

In its reasons, the SCT expressly addressed the matters which had been of concern to the court in the first appeal. In particular, the SCT focussed on the existence or otherwise of an interdependency relationship immediately before the son's death.

The father again appealed to the Federal Court.

THE FEDERAL COURT'S SECOND DECISION

The Federal Court (Logan J) dismissed the father's appeal. The court said:

> [18] Reading the Tribunal's reasons as a whole, a perfectly logical, permissible explanation has been given for the conclusion as to why the Tribunal considered that it was fair and reasonable to affirm the decision of [the trustee]. The Tribunal has not ignored evidence as to the deceased's use of [the father's] address for voter registration, driver's licence and attendances on doctors. Rather, the Tribunal has permissibly observed (at [35]) of this use that they, "all concentrated around the Father's residence and environs" and "merely go to the issue of the closeness of the relationship".
>
> [19] In essence, the Tribunal has viewed the whole of the evidence as disclosing neither more nor less than an intended fortnight's visit by the deceased to his father after years of living and working abroad, prior to the intended taking up abroad of another work assignment, which was extended by a need for extensive dental treatment and an emergence of an underlying medical condition (at [37]).
>
> [20] The Tribunal noted that, on 16 June 2011, the deceased was admitted to hospital and thereafter gradually deteriorated until his death in November 2011, never again setting foot in [the father's] home. The Tribunal just was not persuaded on the evidence before it that the deceased and the father had ever lived together in an interdependency relationship, as defined.

The court made no order as to costs.

THE RESULT

In the result, the trustee's decision to pay the death benefit to the son's legal personal representative was affirmed. The father had not established that he was an interdependent.

4. TPD CLAIM - FURTHER MATERIAL REQUIRING RECONSIDERATION OF CLAIM - *BOARD OF TRUSTEES OF THE STATE PUBLIC SECTOR SUPERANNUATION SCHEME V GOMEZ* [2018] QCA 67

The Queensland Court of Appeal (Sofronoff P and Fraser JA and Henry J) has dismissed an appeal by the trustee of a superannuation scheme from an order by the trial judge (Boddice J) for the trustee to reconsider a member's claim to a total and permanent disablement (TPD) benefit, having regard to further material provided by the member. The case is *Board of Trustees of the State Public Sector Superannuation Scheme v Gomez* [2018] QCA 67.

The decision appealed from was *Gomez v Board of Trustees of the State Public Superannuation Scheme* [2017] QSC 98. (See the June 2017 issue of the Superannuation Case Law Update.)

BACKGROUND

The member was born in the Philippines in 1972. He obtained his nursing qualifications in the Philippines. He worked, pursuant to those qualifications, as a nurse and as a tutor prior to emigrating to Australia in 2003.

In Australia, the member predominantly worked as an intensive care nurse. He did not undertaken any work in Australia as a tutor. He was employed with Queensland Health from 2007 until being made voluntarily redundant in 2013. That employment, at the Princess Alexandra Hospital, was as an intensive care nurse.

In September 2011, the member was employed as an intensive care nurse at the Princess Alexandra Hospital. Whilst undertaking that employment he sustained an injury to his right shoulder, resulted in increasing pain and limitation of movement. He subsequently developed anxiety and depressed mood.

The member lodged a claim for compensation with WorkCover Queensland and was paid weekly compensation benefits. He undertook an alternative light duties programme for a period of time. However, the member's return to work on light duties was unsuccessful. He further injured his shoulder in March 2012. The member ceased reliance on WorkCover in May 2012. At that time he made application for income protection benefits from the superannuation scheme.

Attempts at finding alternate employment at the hospital which the member could perform were unsuccessful. He last performed duties at the hospital in April 2013. The member's employment with the Princess Alexandra Hospital ceased on 12 August 2013 when the member accepted a voluntary redundancy pursuant to an offer made by his employer.

The offer of a voluntary redundancy was made in circumstances where the employer had advised the member that as a consequence of a restructure of employment arrangements there was no suitable position available having regard to the member's ongoing restrictions in his employment capabilities.

In May 2012, the member lodged a claim for income protection benefits pursuant to the terms of the superannuation scheme. In August 2012, he lodged a claim for payment of a TPD benefit from the scheme.

The member's claim for payment of income protection benefits was initially allowed but subsequently declined by the trustee of the scheme. The trustee also declined the member's claim for payment of the applicable TPD benefit. The decision to decline to pay income protection benefits was overturned on review in March 2014.

The member's first claim for payment of a TPD benefit was lodged on 7 August 2012. That claim was rejected by letter dated 9 January 2013 by a delegate of the trustee on the basis the information available was not sufficient to establish the requirements for a TPD benefit (first decision).

By letter dated 10 February 2014, the member sought a review of that decision. The member provided submissions and new material for consideration by the trustee. On 26 June 2014, the trustee determined that the member did not satisfy the definition of TPD and affirmed its delegate's earlier decision (second decision).

On 15 April 2016, the member made a further request for review of the decision to decline his claim for a TPD benefit. Again, that request was accompanied by submissions and additional new material.

In particular, the member provided reports from Dr English, orthopaedic surgeon, and Dr Shaikh. Dr English opined that

with appropriate treatment the member would remain fit for work as a nurse supervisor, pre-admission nurse, telephone nurse, practice nurse, nurse educator, pathology collector, medical receptionist or general practice nurse.

Dr Shaikh, who had examined the member on 23 March 2016, noted the member reported ongoing constant pain of varying severity depending upon the activities undertaken by him. his pain disturbed his sleep leading to daytime fatigue which affected his concentration and memory. He required ongoing medication. Dr Shaikh opined that the member's sleep disturbances, impaired cognition and reduction in recreational pursuits were primarily due to physical complaints, not a psychiatric disorder.

The member also provided a supplementary report from Ms Hague, occupational therapist. Ms Hague had conducted a telephone consultation with the member. In her opinion, the member's accent would be a barrier to employment as a telephone triage nurse as would his lack of experience and additional qualifications. Further, as the member did not hold the requisite certificates for the occupation of pathology collector/venepuncture, the member was not reasonably qualified or experienced for work in that occupation. Similarly, as the member had no prior experience or formal qualifications as a ward clerk or a medical receptionist and no knowledge of specialised software programmes, he was not reasonably suited for this type of work by virtue of his education, training and experience. Ms Hague opined the position of health promotion officer was a profession with a recognised undergraduate qualification in Australia requiring an applicant to possess the understanding of public health sector policies and requirements. The member did not possess either the qualifications or the skills to allow him to work in this field.

Finally, the member provided a statement dated 15 April 2016 in which he indicated that over the previous three years he had attempted to look for alternate work and had submitted approximately 200 job applications without success. The member had only basic computer skills and spoke English with an accent and could not be described as highly fluent.

On 10 June 2016, the member was advised that the senior delegate of the trustee had determined that a review of that additional material did not indicate a reasonable possibility of a different result to the trustee's earlier decision and therefore affirmed the trustee's refusal to pay a TPD benefit to the member (third decision).

The issue said to disentitle the member to the payment of a TPD benefit was that there were occupations the member could undertake for which the member was reasonably qualified by his education, training or experience.

The member commenced proceedings against the trustee in the Queensland Supreme Court.

THE JUDGMENT AT FIRST INSTANCE

The trial judge (Boddice J) said that the trustee's first decision became of no practical effect once it made the second decision.

The trial judge held that the second decision was a decision reasonably open to the trustee (at [44]).

In relation to the third decision, the trial judge referred to the principle stated in *Gilberg v Maritime Super Pty Ltd* [2009] NSWCA 325 at [25]-[28] and said that here, the further material provided by the member called for a reconsideration of his claim. The trial judge said:

> [52] The further material provided to the [trustee] addressed not merely the availability of other occupations for which the [member] was qualified by relevant education, training or experience. That material addressed the likelihood of the [member] having such transferrable skills, having regard to the need for particular educational requirements and the ability to undertake certain types of communication. They were matters which had not been specifically considered by Ms Stewart [a rehabilitation adviser] or any of the medical practitioners who had earlier provided opinions to the [trustee].

and:

> [54] The [trustee], consistent with its obligations and duties under the [governing rules of the scheme], had to consider whether, having regard to the [member's] particular circumstances, the identified alternate occupations were occupations the [member] had the capacity to engage in having regard to his education, training or experience. That consideration had to be more than a theoretical exercise removed from reality. The additional material gave rise to that very consideration. It put forward sufficient material to show there was a case to be investigated further. That case justified the seeking of further opinions from Ms Stewart and the relevant medical practitioners.

The trial judge ordered the trustee to reconsider the member's claim to a TPD benefit.

The trustee appealed to the Queensland Court of Appeal. The member cross-appealed.

THE JUDGMENT OF THE COURT OF APPEAL

The Court of Appeal (Sofronoff P and Fraser JA and Henry J) dismissed both the trustee's appeal and the member's cross-appeal.

In relation to the trustee's appeal, the Court of Appeal gave various reasons why the trial judge's view that the additional information provided by the member raised a reasonable possibility that a different result to the second decision would be reached and that the trustee had breached its duty by failing to properly reconsider the application. The Court of Appeal then said:

> [93] None of this is to suggest that as a result of the additional information the [trustee] ought ultimately arrive at a different conclusion but it obviously indicates there was a reasonable possibility of a different result than the [trustee's] second decision. It was information of such objective importance that the [trustee] had a duty to consider it in fulfilling its duty to give properly informed consideration to [the member's] application.
>
> [94] The probability is that had the [trustee] properly considered it, it would have made further enquiry. However, it is unnecessary to reach a concluded view about that forecast in circumstances where the decision under appeal was merely that the additional material did not indicate a reasonable possibility of a different result to the second decision. That was not a conclusion reasonably open on the materials before the delegate [of the trustee]. It could not have been made upon a real and genuine consideration of those materials.

> [95] It follows the learned trial judge was correct in concluding that the [trustee] should be ordered to properly consider [the member's] request for reconsideration of his application.

The Court of Appeal ordered the parties to file and serve written submissions on costs in the event that, within 3 weeks, the parties did not reach agreement as to costs.

THE RESULT

In the result, the trial judge's order that the trustee reconsider the member's claim to a TPD benefit stood.

5. TPD CLAIM - STANDING OF MEMBER TO SUE INSURER - *CARROLL V UNITED SUPER PTY LTD* [2018] NSWSC 403

The New South Wales Supreme Court (Slattery J) has allowed a claim by a member of a superannuation fund for a total and permanent disablement (TPD) benefit. In so doing, the court has confirmed that a member of a superannuation fund has standing to sue the fund's insurer. The case is *Carroll v United Super Pty Ltd* [2018] NSWSC 403.

BACKGROUND

In 1988 Mr Nicholas Carroll (the member), a self-employed builder, joined a superannuation fund (at [1]).

The trustee of the fund took out a group life insurance policy which provided death and total and permanent disablement (TPD) cover in respect of members of the Fund. Relevantly, the definition of TPD in the policy read in part (at [25]):

> **Total and Permanent Disablement** means with respect to an Insured Person, who as at the Date of Disablement is covered under The Policy for Total and Permanent Disablement, that they meet one or more of the following Parts as outlined in clause 2.2:
>
> ...
>
> **Part 2 – Unlikely to Return to Work:**
>
> The Insured Person is unable to follow their usual occupation by reason of Illness or Injury for 3 consecutive months and in our opinion, after consideration of medical or other evidence satisfactory to us, is unlikely ever to be able to engage in any Regular Remuneration Work for which the Insured Person is reasonably fitted by education, training or experience.

"Regular Remuneration Work" was defined as follows (at [26]):

> **Regular Remuneration Work** means an Insured Person is engaged in regular remunerative work if they are doing work in any employment, business, profession or occupation. They must be doing it for reward, or the hope of reward of any type. The Insured Person is also considered to be engaged in regular remunerative work if they are on Employer Approved Leave.

By early 2012 the member was suffering intense hip pain. On 9 March 2012 he went off work, aged 43. He did not return to work (at [1], [4], [32] and [40]).

He lodged an income protection claim under an income protection policy which he had taken out with another insurer. That claim was initially accepted, but in September 2012 the income protection insurer denied the claim on the basis of non-disclosure of a pre-existing hip and back condition (at [43]-[44]).

Under the group life insurance policy, the date of disablement for the member was 9 June 2012, ie 3 months after he went off work on 9 March 2012 (at [4]).

In December 2012 the member claimed a TPD benefit of $104,000 from the trustee (at [5]).

In February 2013 the trustee referred the claim to the insurer. The insurer denied the claim on 3 occasions – in June and August 2013 and in February 2014. The trustee denied the claim twice – in September 2013 and in April 2014 (at [5], [53] and [79]).

In its first decline letter, the insurer asserted that the member could engage in more sedentary employment. The letter read in part (at [81]):

> Following a consultation with Orthopaedic Surgeon Dr Scott Fletcher in February 2012, a diagnosis was given of a bilateral hip dysplasia particularly on the right hand side, and also articular cartilage de-lamination, label tears and subchondral cyst formation, particularly in the acetabulum.
>
> It was opined by Dr Fletcher at that time that the member would be unable to work at the moment in a meaningful way and with the member being age 43 years, the member is a little too young for a hip replacement at this stage.
>
> However Dr Fletcher did hold the view that the member would be capable of performing lighter duties eg in a job that involves non-manual labour and where periods of rest can be undertaken. Such job roles considered as suitable would include those of quoting and estimating materials, and as such Dr Fletcher does not accept that the member is unlikely ever to be able to return to work in an occupation which he is reasonably fitted by way of education training or experience.

> Similarly, Consultant Orthopaedic Surgeon, Mr Z J Poplawski whom examined the member in December 2012, did recommend that the member should seek more sedentary type employment. To this end, the member had reported that his usual work duties did incorporate spending time looking at jobs and carrying out quotes and assessments, often after work and/or on week-ends, and of often having had a number of people working for him, whom he did need to supervise as required.
>
> Given that the member did work in the capacity of self-employment, it is reasonable to deduce that the member in all likelihood could have continued to engage in the managing of his own business undertaking the lighter non manual aspects such as quoting, estimating or supervision of sub-contractors, together with any necessary administration tasks, albeit his claimed bilateral hip condition.
>
> It would however appear that the member has elected to retrain in the area of Design, with the intent to go into that type of industry, of which is basically sedentary and not so physically demanding, as opposed to continuing in his own business within a lighter role/capacity.
>
> The member holds extensive knowledge, experience and training within the construction industry and panel beating industry, of which could be utilised into a number of other viable employment options, of which do not require a heavy physical demand.

In its first decline letter, the trustee asserted that the member was "fit for sedentary type work, such as that of a project manager" (at [55]).

In September 2014 the member commenced proceedings against the trustee and the insurer in the New South Wales Supreme Court (at [6]).

THE COURT'S DECISION

The member's standing to sue the insurer

The insurer and the trustee challenged the member's standing to sue the insurer. They pointed out that the member was not a party to the policy, which was between the insurer and the trustee. They submitted that the member could not sue on the policy and that he did not satisfy the preconditions for a beneficiary to stand in the shoes of the beneficiary's trustee to sue a third party at law (at [107] and [109]).

The court rejected this submission. The court said (at [87]):

> A member of a superannuation fund for whom the trustee has obtained insurance cover has standing to seek an order that the insurer pay the trustee the amount due to the trustee under the insurance contract: Erzurumlu v Kellogg Superannuation Pty Ltd [2013] NSWSC 1115 ("Erzurumlu") at [54]. The member has standing to bring a claim both under the Deed against the trustee and under the Policy against the insurer: *Wyllie v National Mutual Life Association of Australasia Ltd* (1997) 217 ALR 324 ("Wyllie"), at 337-338.

and (at [110]):

> Where, as in this case, [the member] is the only member of the superannuation fund with an interest in the relevant chose in action against [the insurer] to the extent that it involves assessment and determination of claims made by him under the policy, the "requisite special exceptional circumstances will be satisfied by a failure by the trustee to sue on a cause of action in the performance of the duties owed by the trustee to the beneficiary to protect the trust estate or protect the interest of the beneficiary": [*Tal Life Ltd v Shuetrim; Metlife Insurance Ltd v Shuetrim* [2016] NSWCA 68; (2016) 91 NSWLR 439] at [55]. It is not in contest that the Trustee has not sued [the insurer]. The relevant special circumstances are made out. Leave is not required.

The trustee's denial of the claim

The court held that the trustee's first decision to deny the claim was vitiated by its failure to obtain further vocational material, including on the question of whether the member might be able to work as an estimator or project manager. That was sufficient for the matter to be remitted to the trustee, depending on the outcome of the member's challenge to the insurer's decisions to deny the claim (at [133] and [137]).

The insurer's denial of the claim

The court held that the insurer's decisions to deny the claim should also be vitiated.

The insurer had suggested to the member that he could work as either an estimator or project manager. In each case the member had explained in a statement dated 23 December 2013 (at [169]):

> I would have extreme difficulties with standing, sitting, kneeling, squatting, walking on uneven ground and driving. I become incapacitated after doing some light tasks at home. There is no way I could work in this position. In addition my pain levels and lack of sleep will not allow me to be alert and functioning as expected.

The trustee had suggested that the member could upskill by gaining formal TAFE qualifications in project management or estimation. In response to the idea of retraining at TAFE, the member said in his statement (at [169]):

> I would have difficulties studying this course due to my sitting restriction, my lack of sleep and pain levels will affect my concentration. I honestly cannot see myself being able to study for this long.

The court found it "difficult to know" how the insurer had dealt with this (at [171]):

> It is difficult to know how [the insurer] engaged with the important contest presented by the 23 December 2013 statement of [the member's] stated inability to undertake the physical side of estimating and project management. That is because no reasons for [the insurer's] decisions appear.

This was a breach of the insurer's duty to give reasons, and the decision could be avoided on this basis alone (at [171]).

The second stage inquiry

Having vitiated the trustee's and the insurer's decisions to deny the claim, rather than remitting those decisions to the trustee and the insurer, the court proceeded to conduct its own inquiry as to whether the member was TPD. The court noted that the real questions for consideration were whether the member was "unlikely ever", to be able to engage in "regular remuneration work", for which he was "reasonably fitted education training or experience" (at [218]).

The court concluded that the member was TPD. The court summed up its findings in this way (at [278]):

> *In Summary*. In my view, no matter how [the member's] prior vocational experience is approached, [the member] is unlikely ever to be able to engage in Regular Remuneration Work as defined under the Policy, based on his education, training or experience. The two forms of work which he could undertake based on his education, training or experience are precluded for different reasons. Estimating and project management work is not wholly sedentary and requires visits to work sites. I accept the medical evidence that says [the member] is unfit for such physical work. And in relation to running small family businesses, the highest characterisation that could be given of [the member's] work for [his wife's business] Too Easy Distributing or [a proposed business] Nicholas Wines was that it was "casual work or other work of an intermittent nature", which Bathurst CJ said in [*Hannover Life Re of Australasia Ltd v Dargan* [2013] NSWCA 25; (2013) 83 NSWLR 246] does not qualify as Regular Remuneration Work.

THE RESULT

In the result, the member's claim to the TBD benefit succeeded.

COSTS

In a supplementary judgment, the court ordered the trustee and the insurer to pay 80% of the member's costs, assessed on the ordinary basis: *Carroll v United Super Pty Ltd* (No 2) [2018] NSWSC 1101. The 20% discount was on account of the member's failure to serve all of his affidavit evidence in support of his case at an earlier time (at [26]).

6. TPD CLAIM - INSURER'S DUTIES AND REINSURANCE - *MX V FSS TRUSTEE CORPORATION AS TRUSTEE OF THE FIRST STATE SUPERANNUATION SCHEME* [2018] NSWSC 923

In proceedings where a member of a superannuation fund was claiming a total and permanent disablement (TPD) benefit from the trustee of the fund and the fund's insurer, the New South Wales Supreme Court (Slattery J) has answered two separate (and preliminary) questions about whether the insurer had breached its duties adversely to the insurer. The court found that the insurer had acted in breach of its general law duties and its duty to act reasonably in considering the member's claim. Of particular interest were findings that the insurer had breached its duties in ways connected with the insurer's reinsurance. The case is *MX v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme* [2018] NSWSC 923.

BACKGROUND

The plaintiff once served as an undercover policeman. The court made a suppression order under the *Court Suppression and Non-Publication Orders Act 2010* (Cth) preventing the publication of his name in the judgment and in connection with the proceedings. In the judgment he was referred to as "MX" (at [2] and [15]-[16]).

MX left school in 1986. He worked as a trolley collector for a supermarket, a factory hand at a soft drink manufacturer and as a clerk in the New South Wales public service before commencing with the New South Wales Police in 1988. After completing his training, he was allocated to General Duties policing from 1988 to 1994 (at [36]).

After that, he worked in the Drug Squad, as a Drug Trafficking and Organized Crime Investigator, at State Crime Command and in the Special Service Group principally as an undercover officer (at [37).

In 1997, while disguised as a drug dealer, he was sent inside a house to buy cannabis. He carried money and a wire to relay to other police his attempt to entrap the dealers, men with established reputations for unlawful killing. But the plan misfired. The dealers began to rob him. They threw him to the ground and kicked him. The dealers hit him with a revolver, then placed it close to his head and threatened to shoot him. He was also concerned for the safety of another policeman with him, who was also being ill-treated. He was ultimately rescued (at [3]-[4]).

MX was involved in a number of other dangerous, stressful or demanding situations in the course of his Police duties both before 1997 and from 1997 until his medical discharge in October 2011. Apart from the his dangerous undercover work, some of those alleged stresses related to his claimed exposure to evidence relating to the investigations of paedophile rings, the prosecution of child pornography crimes and the attendance at the scenes of recent violent suicides (at [38]).

On 2 September 2010 MX consulted his general practitioner, who certified him as unfit to return to work. A period of six months absence from work followed up to 2 March 2011. On 13 October 2011, MX was medically discharged from the Police. Soon after, he was diagnosed as suffering delayed onset post-traumatic stress disorder, and was certified as unfit to work with the Police (at [39] and [41]).

In March 2012 MX lodged a claim for a TPD benefit (at [39]).

After investigating the claim, the insurer denied liability on 1 December 2014 and again on 9 June 2017 (at [32]).

In 2015 MX commenced proceedings in the New South Wales Supreme Court against the trustee and the insurer.

After investigating the claim and sending a procedural fairness letter on 7 March 2014, on 1 December 2014 the insurer denied liability (at [32] and [53]).

In 2015 MX commenced proceedings in the New South Wales Supreme Court against the trustee and the insurer.

On 9 June 2017 the insurer denied liability a second time, shortly before the first day of the trial on 15 June 2017 (at [32] and [308]).

REINSURANCE

The insurer had entered into a reinsurance treaty with a reinsurer. Article 18 of the treaty specified a detailed claims procedure. By article 18.8, the insurer agreed not to settle certain claims without the reinsurer's approval. Article 18.8 read (at [120]):

> 18.8 For any Sum Insured above the Claim Handling Limit defined in Schedule F, the Cedant [ie the insurer] must before accepting liability for a claim under that Reinsured Policy, obtain [the reinsurer's] prior approval.

MX's claim exceeded the applicable Claims handling Limit, and so article 18.8 was engaged (at [129]).

From the lodgement of MX's claim with the insurer in March 2012 until the insurer's first denial in December 2014, the insurer kept the reinsurer closely involved in the management of the claim (at [131]).

The reinsurer withheld its approval of the claim under article 18.8. This meant that if the insurer accepted the claim, it would be in breach of article 18.8 of the reinsurance treaty (at [144]-[145], [214] and [219]).

MX amended the Statement of Claim to add a number of allegations relating to the reinsurance (at [31] and [208]).

THE SEPARATE QUESTIONS

In March 2017 the court (Stevenson J) decided, by consent, that there should be a separate determination of the following questions (at [11]):

a. whether, in refusing to accept the plaintiff's [ie MX's] claim, the second defendant [ie the insurer] acted in breach of its statutory and/or general law duties;

b. whether the second defendant breached its duty to act reasonably in considering the claim made by the plaintiff.

THE COURT'S DECISION

The court found that, in various ways, the insurer had acted in breach of its general law duties and its duty to act reasonably in considering MX's claim, and declared the insurer's two decisions denying the claim to be void and of no effect.

Of particular interest were findings that the insurer breached its duties to MX in ways connected with the reinsurance.

First, the insurer had breached its duties by taking into account the reinsurer's "strong, repeated and unqualified" denial of approval to the insurer finding in MX's favour on his claim he was TPD within the policy (at [261]-[271]). The court said:

> [269] Nor are there any working papers among the materials produced by [the insurer] which show that [the insurer's] internal decision making process was kept insulated from [the reinsurer's] refusal to grant prior approval to an outcome favourable to the plaintiff. Indeed, as the plaintiff points out, the [insurer] decision maker has not been called to give evidence in these proceedings. In the absence of any internal evidence that any positive steps were taken to ring fence the decision from such clearly asserted influence, the inference that the decision maker took this consideration into account is strong, because of the potential commercial consequences for [the insurer] of proceeding to decide in the plaintiff's favour without [the reinsurer's] approval in breach of Article 18.8 ... I infer from all of these matters that [the insurer] took into account [the reinsurer's] refusal to grant prior approval to an outcome favourable to the plaintiff.

and:

> [271] In my view, [the insurer], by taking into account the irrelevant consideration of [the reinsurer's] expression of non-approval for [the insurer] deciding in favour of the plaintiff, breached its obligations of utmost good faith and of acting reasonably in forming an opinion: ... [The insurer's] first decision should be set aside on this ground.

Second, the insurer had breached its duty to provide procedural fairness to MX by failing to disclose to him the following three matters before its first decision (at [272]-[281]):

> (1) the Treaty; (2) [the reinsurer's] many additional communications to [the insurer] of its non-approval of [the insurer] deciding that the plaintiff was TPD within the Policy; and (3) that [the insurer] was taking those communications, which were irrelevant considerations, into account.

Taken together, these three matters placed the insurer in a position of conflict between its own self-interest and its contractual duty to MX. These three matters, left undisclosed to MX, constituted a denial of procedural fairness to him (at [272]).

The court said:

> [274] Had [the insurer] disclosed those three matters to the plaintiff, then the plaintiff would have been in a position to put submissions to [the insurer] as to whether, when and how [the insurer] should pursue its options to reduce or eliminate that conflict. The conflict had uncertain potential financial consequences for [the insurer]: ... And many such options were available for exploration: ...
>
> [275] This failure to disclose these three matters to the plaintiff placed the plaintiff at a procedural disadvantage. This omission was not something to be dismissed as of little consequence. Disclosure of these matters to the plaintiff could readily have generated ideas that could have led to elimination of the conflict. And indeed, disclosure may have allowed [the insurer] to comply with its contractual duties under both the Policy and the Treaty.
>
> [276] [The insurer's] failure to afford procedural fairness to the plaintiff by failing to disclose the conflict to the plaintiff and asking the plaintiff to make submissions about it, in my view, also vitiates [the insurer's] first decision.

Both the first and second decisions of the insurer should be vitiated.

The court noted that where an insurer's decision is vitiated and declared void and of no effect, two courses are open. Either the court can send the matter back to the insurer for a further decision as to whether the claimant is TPD within the meaning of the policy, or the court can proceed to a second stage of inquiry. The authorities suggest that a second stage inquiry is a commonly preferred course after an insurer's decision is vitiated at the first stage (at [359]).

THE RESULT

In the result, the court held that the insurer had acted in breach of its general law duties and its duty to act reasonably in considering MX's claim, and declared the insurer's two decisions denying the claim to be void and of no effect. The parties were directed to prepare draft Short Minutes of Order for the preparation and management of the second stage inquiry, being whether MX was TPD within the meaning of the policy (at [363]).

7. DISCLOSURE OF PERSONAL INFORMATION - *"PB" AND UNITED SUPER PTY LTD AS TRUSTEE FOR CBUS (PRIVACY)* [2018] AICMR 51

The Australian Privacy Commissioner (Mr Timothy Pilgrim) has held that the trustee of a superannuation fund made unauthorised disclosures of fund members' personal information to an external organisation, in breach of National Privacy Principle 2. The trustee was directed to make a written apology to affected members. The decision is *"PB" and United Super Pty Ltd as Trustee for Cbus (Privacy)* [2018] AICmr 51.

BACKGROUND

Disclosure of personal information to head contractor

In July 2013, Lis-Con Services Pty Ltd (Lis-Con Services) and Lis-Con Concrete Constructions Pty Ltd (Lis-Con Concrete) (collectively, Lis-Con) were providing services under contract to Civil, Mining and Construction Pty Ltd (the head contractor) in relation to a road construction project. At that time, a number of employees of Lis-Con were members of a superannuation fund to which Lis-Con made superannuation contributions (at [3]).

On 29 July 2013, the head contractor sent an email to the trustee of the find, which read in part as follows (at [4]):

> As per our discussion can you please confirm the status of Liscon Services conurbations [sic] to their workers superannuation fund, that CBUS have commenced legal proceedings against Liscon Services for non-payments of contributions, not meeting their legal obligations and not adhering to an agreed payment plan between yourselves and Liscon Services. Can you also please inform me of the last payments paid and to whom the money was actually paid for.
>
> You mentioned that the next payment is due in the first week of August (can you pls confirm?) also can you confirm that it is a legal requirement that contributions are made monthly not every 3 months?

In response to this request, the trustee made enquiries of fund administrator. On 30 July 2013, the administrator sent 3 emails to the trustee containing information about superannuation contributions made by Lis-Con to the fund in respect of Lis-Con employees. On the same day, the trustee forwarded these three emails to the head contractor (at [5]).

The first email contained the details of 300 Lis-Con Services employees. The second email contained the details of 35 Lis-Con Concrete employees. The third email contained the details of eleven employees of Lis-Con Services; five of whom were mentioned in the first email. The details included the following personal information:

- full name;
- date of birth;
- superannuation member number;
- most recent employer superannuation contributions; and
- duration of employment (at [6]).

In relation to those employees mentioned in the first and second emails, the emails also identified any voluntary contributions and employee salary-sacrifice contributions made by those members (at [7]).

On 31 July 2013, the head contractor forwarded the three emails it had received from the trustee to an employee of Lis-Con Services (the disclosures) (at [8]).

The complaint

On 11 September 2013, a complaint was made to the Office of the Australian Information Commissioner (OAIC) on behalf of Lis-Con and Lis-Con employees, whose names were included in a list attached to the complaint. A revised complaint was made in December 2013 by an employee of Lis-Con Concrete, on behalf of 340 Lis-Con employees whose personal information had been disclosed by the trustee to the head contractor. The revised complaint was lodged as a representative complaint (at [9]-[10]).

The revised complaint alleged that the trustee had interfered with the privacy of Lis-Con employees by improperly disclosing their personal information to the head contractor, a third party. In particular, the complaint alleged that the conduct of the trustee was in breach of National Privacy Principle (NPP) 2 (about the use and disclosure of personal information) and NPP 4 (about the security of personal information) (at [11]).

No complaint was made in relation to any disclosure of personal information by the trustee to the Construction, Forestry, Mining and Energy Union, which had been the subject of examination by the Royal Commission into Trade Union Governance and Corruption (at [15]).

THE PRIVACY COMMISSIONER'S DECISION

At the relevant time, the NPPs were the standards for handling personal information which private sector organisations subject to the Privacy Act were obliged to uphold. (The Australian Privacy Principles replaced the NPPs with effect from 12 March 2014.)

NPP 2 "Use and disclosure"

The trustee, in its submissions, proposed 3 alternative ways that its disclosure of personal information to the head contractor could be construed as complying with NPP 2 "Use and disclosure". First, the disclosure was for the primary purpose of collection of payments of members' contributions. Second, the disclosure fell within the NPP 2.1(a) exception to the prohibition of disclosure. Third, the related secondary purpose of receipt and management of superannuation contributions would have been reasonably expected by fund members (at [48]).

The Privacy Commissioner rejected these submissions.

In relation to the first submission, the Privacy Commissioner concluded that the primary purpose of the collection of personal information did not extend to disclosures made to head contractors. Nor did such disclosures fall within the scope of the primary purpose of administering fund members' accounts. The Privacy Commissioner said (at [58]):

> I am not satisfied that the primary purpose of collection, that is, the administration and management of members' superannuation accounts, extends to disclosures to head contractors to permit those entities to take action in respect of outstanding superannuation contributions owed by their subcontractors. Disclosure of personal information, including names of employees, dates of birth and past contribution details to a head contractor, seems patently outside the scope of primary purpose of administration of class members' accounts.

The trustee's second submission was that the disclosure to the head contractor came within the exception in NPP 2.1(a), which was in the following terms:

> 2.1 An organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection unless:
>
> a. both of the following apply:
>
> i. the secondary purpose is related to the primary purpose of collection and, if the personal information is sensitive information, directly related to the primary purpose of collection;
>
> ii. the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose;

Here, the secondary purpose was said to be "to facilitate payment of [fund] members contributions or alternatively, to receive and manage superannuation contributions". The Privacy Commissioner accepted this (at [61]-[65]).

However, in relation to the trustee's third submission, fund members would not reasonably have expected their personal information to have been disclosed to the head contractor. The Privacy Commissioner said (at [71]):

> In ordinary circumstances, [the trustee] only provides aggregated information. As such, I accept that members might have reasonably expected , [the trustee] to disclose aggregated information to sponsoring organisations to allow them to take action in accordance with an applicable award, industrial agreement or enterprise bargain agreement (if any). The disclosures the subject of this representative complaint occurred in quite different circumstances and included personal information

The Privacy Commissioner accordingly held that the trustee could not rely on the exception in NPP 2.1(a). As no other relevant exceptions were available, the trustee had breached NPP 2 (at [72]).

NPP 4 "Data security"

NPP 4"Data security" required organisations to take reasonable steps to protect an individual's personal information from misuse and loss and from unauthorised access, modification or disclosure. The Privacy Commissioner said that NPP 4 imposed "an obligation only to adopt safeguards as are reasonable in the circumstances" (at [78]).

The Privacy Commissioner held that the trustee had not breached NPP 4 (at [78]). The Privacy Commissioner said (at [76]-[77]):

> [76] I consider that as at 30 July 213 [the trustee] had adequate measures in place to satisfy the requirement in NPP 4 for the organisation to take reasonable steps to protect an individual's personal information from misuse and loss and from unauthorised access, modification or disclosure.
>
> [77] The conduct of the [trustee's] employee who was otherwise authorised to deal with the personal information made the disclosures to [the head contractor] through, it seems, a lapse of judgement or misjudgement. Notwithstanding this, the employee made the disclosures for a purpose within the scope of their work functions. Pursuant to s 8 of the Privacy Act, an act done or a practice engaged in by of a person employed in the service of, relevantly here, an organisation, shall be treated as having been done or engaged in by the organisation.

Remedy

The representative complainant sought the following declarations in regard to loss or damage:

- $2,000-$3,000 in general damages for each member of the class; and
- an award between $3,000 and $4,000 in aggravated damages per class member (at [86]).

Collectively, this came to $2.97 million (at [86]).

The Privacy Commissioner was not satisfied that the disclosure had caused any actual loss or damage, and thought that a written apology to affected fund members would be sufficient. The Privacy Commissioner said (at [93]):

> From the statements provided, I am left unsatisfied that the disclosures have caused actual loss or damage in respect of these class members, though I accept there was a genuine concern amongst these [fund] class members that they had not been made aware of the breach when it occurred. As loss or damage may include "hurt feelings", the concern which I accept class members had when they were made aware of the breach, arguably enlivens my capacity to provide some remedy. Notwithstanding this, in the circumstances of this matter, I think the most appropriate form of redress is to provide an apology. A public apology that explains the circumstances of the breach and what systems [the trustee] now has in place to minimise the risk of such a breach recurring, should go some way to alleviating the concerns expressed by class members who provided statements. In view of this, I decline to make an award for damages for the class members who have provided statements or any other class members.

The trustee was also directed to:

- provide written confirmation to the OAIC that it had implemented certain remedial measures; and
- undertake a review of those remedial measures and advise the OAIC in writing of the findings and outcomes of that review (at [102]).

THE RESULT

In the result, the Privacy Commissioner held that the trustee, by disclosing personal information about fund members who were Lis-Con employees to the head contractor, had breached NPP 2. The trustee was directed to make a written apology to affected members.

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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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