THOMSON GEER
LAWYERS

Superannuation Case Law Update

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Contents

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1. Enterprise agreement – proposed closure of defined benefits plan – *Lend Lease Building Pty Ltd v CFMEU* [2015] FWC 1966

The Fair Work Commission (Commission) (Commissioner Riordan) has ordered an employer covered by an enterprise agreement to "take all steps reasonabl[y] available to it to have, and use its best endeavours to procure", a related company and a superannuation trustee to not alter or close a defined benefits plan, so that the members of the plan covered by the agreement remain members of the plan until the agreement is superseded by a replacement enterprise agreement. The case is *Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FWC 1966.

Background

Lend Lease Corporation Ltd (Lend Lease Corporation) was the principal employer-sponsor of the Lend Lease Superannuation Plan (the Plan), which was part of a superannuation fund. The Plan contained a Defined Benefits Division.

Lend Lease Building Pty Ltd (Lend Lease Building) was a wholly owned subsidiary of Lend Lease Corporation.

Some employees of Lend Lease Building were members of the Defined Benefit Division, as well as being members of the Construction, Forestry, Mining and Energy Union (CFMEU).

The members of the Defined Benefit Division were covered by an enterprise agreement.

Clause 11.1 of this agreement read (emphasis added):

> **11.1 General**
>
> (a) The Company, as a wholly owned subsidiary of Lend Lease Corporation Limited, is currently able to provide a comprehensive benefits package in consideration for work performed.
>
> (b) This package aims to provide meaningful income and security in the event of sickness, accident, cessation of employment, retirement, disablement or death for Employees and further links benefits for Employees to Company performance via profit share and ownership of Lend Lease shares.
>
> (c) The Parties recognise and agree that Company obligations and Employees' rights in respect of these benefits (except for superannuation) are not granted or regulated by the terms of this Agreement, but by separate Trust Deeds, Rules and Agreements. It is recognised that terms of those benefits may be altered by the Lend Lease Group or the respective Trusts from time to time, without reference to this Agreement.

Clause 11.2(c)(ii) of the agreement provided for employees joining the company prior to 1 January 1999 to be members of the Defined Benefits Plan. Clause 11.2 read (emphasis added):

> **11.2 Superannuation**
>
> (a) The Company will make superannuation contributions to a fund of the Employee's choice, the Lend Lease Superannuation Plan (LLSP), or the Construction and Building Industry Superannuation Fund (Cbus).
>
> (b) If the Employee does not choose a fund, then by default the Employee will remain (or become) a member of the LLSP.
>
> (c) If the Employee is a member of LLSP:
>
> (i) For Employees joining the Company after 1 January 1999, the Company will pay its employer contributions and any member contributions that the Employee decides to make to the Accumulation Plan of the LLSP. The Company's employer contributions to the LLSP shall be in accordance with Appendix C or superannuation guarantee rate of 9% of the Employee's Ordinary Times Earnings, whichever is the greater.
>
> (ii) *Employees of the Company prior to 1 January 1999 may be members of the Defined Benefit Plan of the LLSP.* The Defined Benefit Plan is non-contributory, and provides a Company Benefit calculated at 12.75% (after Federal Government contributions tax) from the date of operation of this Agreement, for each year of membership, multiplied by the Employee's Ordinary Times Earnings over the previous three years of service.

Clause 6 of the enterprise agreement precluded "extra claims", in the following terms:

> **6 No extra claims**
>
> The Parties acknowledge and agree that this Agreement covers the field, and is in full and final settlement of all matters, claims and demands however described whether or not any matter, claim or demand is specifically addressed within this Agreement.
>
> The Parties to this Agreement undertake not to pursue any further claims as to wage increases/decreases, or improvements/reductions to conditions of employment, whether they are Award or over-award, during the life of this Agreement.

Under the trust deed of the fund, Lend Lease Corporation was permitted to terminate contributions to the Defined Benefits Division, and the trustee of the fund had discretion to terminate the Defined Benefits Division.

In February 2014 Lend Lease Corporation announced a proposal to close the Defined Benefits Division. Subsequently, there were discussions between the CFMEU and Defined Benefit Division members, on the one hand, and Lend Lease Corporation or Lend Lease Building,

on the other hand.

On 1 May 2014 the trustee of the fund notified members that the Defined Benefit Division would close on 31 May 2014.

The first proceeding – 2014

On 2 May 2014 the CFMEU notified a dispute to the Commission.

On 27 May 2014 the Commission (Deputy President Gooley) made interim orders. These included an interim order in the following terms:

1. That Lend Lease Building Pty Ltd take all steps reasonably available to it to have Lend Lease Corporation or [the trustee] not alter or close the Defined Benefits Division of the Lend Lease Superannuation Plan so as to permit the members of the Defined Benefits Division covered by the [enterprise agreement] to remain members of the Defined Benefits Division until further order of the Commission.

On 28 May 2014 the Commission made a Decision supporting the interim orders ([2014] FWC 3547).

The CFMEU sought final orders against Lend Lease Building in the following terms:

(a) that Lend Lease Building Pty Ltd (LLB) take all steps reasonably available to it to have, and use its best endeavours to procure, Lend Lease Corporation Ltd or [the trustee] to not alter or close the Defined Benefit Division of the Lend Lease Superannuation Plan so as to permit the members of the Defined Benefits Division covered by the [enterprise agreement] to remain members of the Defined Benefits Division until its nominal expiry date of 31 March 2016 or the agreement is superseded by a replacement enterprise agreement.

(b) that Lend Lease Building Pty Ltd refrain from engaging in its proposed contravention of clause 11.2 of the [enterprise agreement], in that Lend Lease Building Pty Ltd proposes to not make or will permit not to be made superannuation contributions to the Defined Benefits Division of the Lend Lease Superannuation Plan in respect of 23 construction workers that are members of that part of that Plan.

(c) that Lend Lease Building Pty Ltd take all steps reasonably available to it to have, and use its best endeavours to procure, Lend Lease Corporation Ltd not to be involved in a proposed contravention by Lend Lease Building Pty Ltd of clause 11.2 of the [enterprise agreement], in that Lend Lease Corporation Ltd proposes to close the Defined Benefits Division of the Lend Lease Superannuation Plan of which 23 construction workers are members.

(d) that Lend Lease Building Pty Ltd refrain from engaging in its proposed contravention of clause 6 of the [enterprise agreement], in that Lend Lease Building Pty Ltd proposes to not make or will permit not to be made superannuation contributions to the Defined Benefits Division of the Lend Lease Superannuation Plan in respect of 23 construction workers are members of that part of that Plan.

(e) such other orders that the Commission considers appropriate to settle the dispute and addresses the proposed acts and/or omissions of Lend Lease Building Pty Ltd and/or Lend Lease Corporation Ltd.

The CFMEU sought orders in the same terms against Lend Lease Corporation.

The CFMEU contended that the decision to terminate the Defined Benefits Division was inconsistent with Lend Lease Building's obligations under the enterprise agreement.

The Commission (Deputy President Gooley) made its Decision on 19 June 2014 ([2014] FWC 4032).

The Commission held that it did not have the jurisdiction to resolve the dispute by arbitration, as the dispute resolution procedure had not been complied with. The Commission said :

> I find therefore that there was not a genuine attempt by the CFMEU to resolve the dispute by direct discussions with [Lend Lease Building] prior to it referring the dispute to the Commission.

In the event that the Commission was wrong and it did have jurisdiction to hear the dispute, the Commission went on to determine what clause 11 of the enterprise agreement required Lend Lease Building to do.

The Commission noted that while industrial instruments may deal with the level of contributions to a superannuation fund, all superannuation funds are governed by trust deeds that are not able to be modified by industrial instruments, and are also governed by statute. The Commission said :

> Industrial instruments do not regulate the benefits to be provided by superannuation funds. Industrial instruments may deal with the level of contributions, regularity of contributions, choice of funds and employee pre tax contributions. All superannuation funds are governed by trust deeds which are not able to be modified by industrial instruments. In addition, superannuation is governed by statute.

The Commission held that clause 11.1(c) (which conferred on Lend Lease Building a discretion to change employee benefits "except for superannuation") did not permit Lend Lease Building to change its obligations under clause 11.2 (about superannuation) .

The Commission further held that clause 11.2 required Lend Lease Building "to provide the benefits set out in clause 11.2(c)(ii)" and "to ensure that there is sufficient money available to meet this obligation".

The Commission noted that Lend Lease Building was meeting its obligation under clause 11.2(c)(ii) through its arrangement with Lend Lease

Corporation. Specifically, Lend Lease Corporation paid the contributions to the trustee and Lend Lease Building reimbursed it.

The Commission noted that:

> If [Lend Lease Corporation] decides that it no longer wants to maintain the [Defined Benefit Division], it is of course able to do so and the Commission does not have the power through the dispute resolution procedure of the Agreement to make orders preventing it from doing so.

If Lend Lease Corporation closed the Defined Benefit Division, "this would not absolve [Lend Lease Building] of its obligations under the Agreement".

The result

In the result, as the Commission had held that it did not have jurisdiction to resolve the dispute, the CFMEU's application was dismissed and the interim orders made on 27 May 2014 were set aside.

The second proceeding – 2015

Lend Lease Building applied to the Commission in relation to the interpretation of clause 11 of the enterprise agreement.

The Commission (Commissioner Riordan) made its Decision on 26 March 2015 ([2015] FWC 1966).

The Commission noted that Lend lease Building had an obligation under the superannuation guarantee legislation, the Building and Construction General On-Site Award 2010 and the enterprise agreement to make superannuation contributions for its employees.

The Commission also noted that until recently, there had been less than 240 employees who were members of the Defined Benefits Plan. (Whereas in the 2014 Decisions referred to above the defined benefits section was referred to as the "Defined Benefits *Division*", in this Decision it was referred to as the Defined Benefits *Plan*".) Only 19 employees were covered by the enterprise agreement. The other 200 odd members of the Defined Benefits Plan had been "simply moved to the accumulation scheme, without being given a choice". The 19 employees covered by the enterprise agreement had resisted all attempts to encourage or incentivise their transfer to an accumulation scheme.

The Commission also noted that the rationale for the closure of the Defined Benefits Plan was "to provide equity and consistency of superannuation benefits across all employees".

The parties accepted that the Commission had authority to arbitrate the dispute.

The Commission applied the rules in *AMIEU v Golden Cockerel Pty Ltd* [2014] FWCFB 7447 and determined that the question before the Commission was whether the relevant provisions of the enterprise agreement had a plain meaning or contained ambiguity.

The Commission examined the meaning of "except" in the phrase "except for superannuation" in clause 11.1(c) (set out above). The Commission said that the Macquarie Dictionary definition of "except" – that is, "with the exclusion of; other than" – was "a universally accepted meaning of the term and provide[d] absolute clarity to the provision".

It followed that members of the Defined Benefit Plan employed by Lend Lease Building were entitled to remain members of the Defined Benefit Plan for the life of the enterprise agreement.

Finally, the Commission noted that an ambiguity in the Participation Schedule between the trustee of the superannuation fund and Lend Lease Corporation in relation to the role and capacity of the Principal Employer and an Employer resulted in the "real scenario" where Lend Lease Corporation could simply advise the trustee to close the Defined Benefit Plan and leave Lend Lease Building in breach of its obligations under the enterprise agreement and the Building Construction General On-Site Award. The Commission doubted that this was the intent of the Participation Schedule.

The result

In the result, on 26 March 2015 the Commission made an order in the following terms:

> (a) That Lend Lease Building Pty Ltd take all steps reasonabl[y] available to it to have, and use its best endeavours to procure, Lend Lease Corporation Ltd or [the trustee] to not alter or close the [Defined Benefits] Plan of the Lend Lease Superannuation Plan so as to permit the members of the Defined Benefits Plan covered by the [enterprise agreement] to remain members of the Defined Benefits Plan until the Agreement is superseded by a replacement enterprise agreement.

Comments

These Decisions serve as a reminder that depending on the circumstances, changing the design of an employee's superannuation benefits can have implications for the employer. In particular, the employer needs to closely consider the terms of relevant industrial awards, enterprise (or similar) agreements, and contracts of employment before prosecuting or acquiescing in a change of benefit design.

Employers are also reminded of their continuing contribution obligations under the superannuation guarantee legislation that operates in parallel with obligations arising under industrial instruments.

On one view, the Commission's statement that if Lend Lease Corporation closed the Defined Benefit Division, "this would not absolve [Lend Lease Building] of its obligations under the

Agreement" is surprising. It is difficult to see how an employer could be in breach of an enterprise agreement in circumstances where, through no act of its own, further contributions to a particular defined benefits plan became impossible because the plan ceased to exist.

Nevertheless, in negotiating future enterprise agreements employers will need to be mindful of these decisions.

2. SMSF – invalid binding death benefit nomination – *Munro v Munro* [2015] QSC 61

The Supreme Court of Queensland (Mullins J) has held that a binding death benefit nomination in favour of the "Trustee of Deceased Estate" was invalid for the purpose of the SMSF. The case is *Munro v Munro* [2015] QSC 61.

The facts

In 2004 Mr and Mrs Munro set up a self-managed superannuation fund (SMSF) with themselves as trustees and members.

Clause 31.2 of the trust deed required the trustee to pay a benefit upon the death of a member in accordance with a signed binding death benefit nomination by the member in favour of "one or more Nominated Dependants or the legal personal representative of the member".

Clause 31.1 of the trust deed conferred a discretion on the trustee, absent a valid binding death benefit nomination, to pay the benefit to the legal personal representative of the member or any of the member's dependants, in such proportions as the trustee may determine.

In 2009 Mr Munro signed a binding death benefit nomination in favour of "Trustee of Deceased Estate".

In 2011 Mr Munro died.

Mrs Munro and Mr Munro's replacement trustee gave notice of their intention to exercise their discretion as trustees in paying Mr Munro's death benefit, as they considered the binding death benefit nomination to be invalid.

The proceedings

Mr Munro's two daughters commenced proceedings against the trustees of the SMSF seeking a declaration to the effect that the deceased member's binding death benefit nomination was a binding death benefit nomination.

The court's decision

In considering the laws applicable to the payment of the death benefit, the court said that section 59(1A) of the *Superannuation Industry (Supervision) Act 1993* (Cth) and in turn regulation 6.17A of *the Superannuation Industry (Supervision) Regulations 1994* (Cth) do not apply to an SMSF, in the following terms:

> As s 59(1) of the SIS Act does not apply to a self managed superannuation fund, the exception to the application of s 59(1) found in s 59(1A) also does not apply to a self managed superannuation fund. Regulation 6.17A sets out the conditions for the purpose of s 59(1A) for the payment of a death benefit after the death of a member, but in view of the exclusion of a self managed superannuation fund from the operation of s 59(1), those conditions do not apply by virtue of either the SIS Act or the SIS Regulations to a self managed superannuation fund.

The court went on to distinguish the facts of this case with those of *Donovan v Donovan* [2009] QSC 26. In particular, in Donovan the trust deed had been drafted in such a way to incorporate regulation 6.17A, whereas the wording of the trust deed in this case did not incorporate that regulation. The court held that unless the trust deed specifically incorporates it, regulation 6.17A does not apply to SMSFs, in the following terms:

> In contrast [with the trust deed provisions considered in *Donovan v Donovan*], the definition of "Relevant Requirements" for the purpose of the fund is limited to any requirement the trustee of the fund or the subject trust deed must comply with in order to avoid a contravention of the requirements or in order for the fund to qualify for concessional taxation treatment as a complying super fund. The "Relevant Requirements" are defined as requirements only if they apply to the fund and therefore do not import reg 6.17A which does not apply to the fund.

The court said that the roles of the executor and trustee are distinct, in the following terms:

> Although colloquially the term "executor" may be used interchangeably with the term "trustee", the roles are distinct: *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12, 17-18. An executor holds the property of a deceased for the purpose of carrying out the functions and duties of the administration of the estate, but upon the completion of those administration duties the assets then may be applied to the trusts under the will. The same person who was executor may become the trustee of the deceased estate, when the administration duties of collecting in the assets, paying the debts of the deceased and the administration expenses and setting the assets aside to give effect to the gifts in the will have been completed.

Here, the binding death benefit nomination was invalid, as it referred to the deceased member's "Trustee", rather than his executors. The court said:

> It may be that Mr Munro intended by instructing the form be completed with "Trustee of Deceased Estate" to mean his executors, but it is difficult to reach that conclusion when the form itself provided for the option of specifying a legal personal representative and advised how to complete the form accordingly.
>
> …
>
> The nomination form must be construed on its face and having regard to its purpose … It is not appropriate to construe the nomination form by reference to the will when the nomination is for the purpose of payment of the death benefit from the fund.
>
> …
>
> The nomination by Mr Munro dated 22 September 2009 must mean what it says which is that it was the Trustee of Deceased Estate that was nominated by Mr Munro.
>
> …
>
> Clause 31.2 regulates both the form and substance of the nomination. There is no power given to the trustees under the trust deed or otherwise to dispense with compliance with the conditions set in clause 31.2 for a binding death benefit nomination. It is only a nomination for the purpose of clause 31.2, if all the conditions set out in that clause are met by the nomination. If it is intended to nominate the legal personal representative of the member who has since died, it must specify that it is nominating the legal personal representative or the executor of the will or name the executor of the will (if that coincides with the executor named in the last will), but identify that the named person is the legal personal representative.

The court then turned to the effect of the binding death benefit nomination:

> Regulation 6.22 of the SIS Act Regulations is prescriptive as to when a member's benefits can be cashed to persons other than the member and limit the circumstances in the case of the member's death to the member's legal personal representative and one or more of the member's dependants. That is replicated by clause 31.2(b) of the trust deed for the fund.
>
> The [binding death benefit nomination form] did not comply with either clause 31.2 of the trust deed or reg 6.22 of the SIS Regulations, as the nomination was of neither Mr Munro's executors under his will or one or more of his Nominated Dependants.
>
> The [binding death benefit nomination form] is therefore not a binding nomination for the purpose of clause 31.2 of the trust deed.

The result

In the result, the court held that the binding death benefit nomination signed by the deceased member was not a binding nomination for the purpose of the SMSF.

Comment

In this case, the court took a strict view of what was required for an effective nomination of the deceased member's legal personal representative as the recipient of the death benefit. It would appear to be prudent for trustees to proceed on the basis that this strict view will be followed in the other States and Territories.

3. TPD claim – *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2015] NSWCA 104

The New South Wales Supreme Court of Appeal (Basten JA, Meagher JA and Gleeson JA) has held that a member of a superannuation fund did not satisfy the definition of "total and permanent disablement", as he could engage in work which he was reasonably capable of performing by reason of education, training or experience with further training. The court accordingly dismissed his appeal against the trustee and the insurer. The case is *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2015] NSWCA 104.

The facts

In 2009 a member of a superannuation fund was injured at work.

In 2011 he made a claim for total and permanent disability.

Both the insurer and the trustee rejected the claim.

The proceedings

In 2013 the member commenced proceedings against the trustee and the insurer in the Supreme Court of New South Wales.

The member claimed that the trustee and the insurer owed him "a duty of good faith and fair dealing". He further claimed that the trustee had breached this duty by delegating to the insurer the "authority to exclusively determine" whether he had suffered a relevant incapacity.

The member also claimed that the insurer had breached this duty when it failed to consider the evidence of his treating medical practitioners and the fact that he had made several unsuccessful applications for employment.

The member sought the following relief:

- declarations that he was totally and permanently disabled within the meaning of the insurance policy issued to the trustee; and
- orders that the insurer and trustee pay him a sum representing the benefit for total and permanent disability.

Judgment at first instance

At first instance the court (Hallen J) dismissed the member's claim.

The court held that both the trustee and the insurer had breached their obligations and duties in two respects when they concluded that the member had not satisfied the total and permanent disablement definition, as follows:

- first, they had failed to take into account that the member had applied for numerous positions without success; and
- second, they had failed to take into account the fact that beyond the initial period of six months, during which the member was unable to work, he had continued to be unable to find any alternative employment as at April 2012.

The court then turned to determining the member's claim and whether it was unlikely that he would ever engage in or work for reward in any occupation or work for which he was reasonably capable of performing by reason of education, training, or experience.

The court said that there was insufficient evidence to establish that the member would not ever obtain work.

The court said:

> Having considered all of the evidence, I am not satisfied it has been established that the Plaintiff was within the definition of TPD in the Policy and the Trust Deed. In these circumstances, he was not entitled to be paid the relevant amount. It follows that the Plaintiff's claim must be dismissed.

The appeal

The member appealed to the New South Wales Court of Appeal.

He challenged the correctness of the decision and sought the sum of the insured benefit plus interest.

The Court of Appeal's decision

The Court of Appeal dismissed the appeal and ordered the member to pay the trustee's and the insurer's costs of the appeal.

The court considered the definition of total and permanent disablement and assessed the extent to which the member's incapacity to engage in or work for reward as a result of injury or illness. The court held that the extent of that incapacity must be such as to render the person "unlikely ever to engage in or work for reward in ay occupation or work" that he or she "is reasonably capable of performing by reason of education, training or experience".

When considering whether there was any occupation or work that the member was reasonably capable of performing by reason of his "education, training or experience" the court said:

> I agree with the primary judge's conclusion that the need for this further training did not mean that the appellant was not already reasonably capable of performing the roles to which it was directed. The expression

> "reasonably capable" recognises the reality that a person may have to undertake specific training or certification to enable him or her to engage in particular employment for which he or she is otherwise qualified by education, training or experience. That training or certification may be available in the form of a TAFE or other certification course or from the employer.

The court compared the member's position to that of the insured in *Hannover Life Re of Australasia Ltd v Dargan* [2013] NSWCA 57. In that case the insured had to obtain a certificate and complete a training course to be a taxi driver, when he was no longer able to work as a truck driver. It was held that the evidence "did not suggest that his existing training and experience was insufficient to enable him to complete that course".

Further, the court held any further training required would have been minimal, in the following terms:

> The evidence supported the primary judge's conclusion that any further training or certification required would have been minimal and that in the circumstances it was reasonable for the [Mr Birdsall] to undertake that training in order to gain employment utilising his existing skills and experience.

The result

In the result, the appeal was dismissed and the member was ordered to pay the trustee's and the insurer's costs of the appeal.

Take away point

This case shows that where an insured is no longer able to work in their current occupation, the fact that further training is required to utilise their existing skills to gain employment does not automatically equate to total and permanent disablement.

4. SMSF – trustee ordered to repay superannuation contributions – *Australasian Annuities Pty Ltd (in liq) (recs and mgrs apptd) v Rowley Super Fund Pty Ltd* [2015] VSCA 9

The Victorian Court of Appeal (Warren CJ, Neave JA and Garde AJA) has held that the corporate trustee of a superannuation fund was liable to repay another company for monies received from that other company, in circumstances where a director of the corporate trustee knew that the monies had been paid in breach of the director's fiduciary duties to the other company. The case is *Australasian Annuities Pty Ltd (in liq) (recs and mgrs apptd) v Rowley Super Fund Pty Ltd* [2015] VSCA 9.

The facts

Australasian Annuities Pty Ltd (Australasian Annuities) carried on a financial planning business and acted as trustee of the Rowley Family Trust.

Rowley Super Fund Pty Ltd (the Company) was the trustee of the Rowley Superannuation Fund, a self-managed superannuation fund (the Fund). The four directors of the Company were members of the Rowley family.

Mr Rowley was one of the directors of the Company. He was also the sole director of Australasian Annuities.

Australasian Annuities borrowed monies from a bank under a facility agreement, entered into by Mr Rowley in his personal capacity and on behalf of Australasian Annuities.

Australasian Annuities used these monies to make payments, characterised as either employer contributions, eligible termination payments or self-employed contributions, to the Fund for the benefit of members. The payments were effected by Mr Rowley.

Australasian Annuities failed to repay monies loaned to it by the bank. The bank appointed a receiver and manager to Australasian Annuities.

The proceedings

The receiver and manager, in Australasian Annuities' name, commenced proceedings against the Company in the Victorian Supreme Court.

Australasian Annuities claimed that the payments by Australasian Annuities (effected by Mr Rowley) to the Fund, breached the fiduciary duties Mr Rowley owed to Australasian Annuities.

Australasian Annuities sought the following relief:

1. a declaration of a constructive trust and equitable compensation or an account of profits for knowing receipt of payments made by Mr Rowley under the first limb of *Barnes v Addy* (1874) LR 9 Ch App 244; and
2. restitution, either personal or proprietary, by the Company on the basis that the Fund received the monies as a volunteer.

Judgment at first instance

At first instance, the court (Almond J) dismissed Australasian Annuities' claim.

The court held that Mr Rowley, in his capacity as director of Australasian Annuities, breached fiduciary duties owed to Australasian Annuities by facilitating the making of contributions to the superannuation fund. He failed to act in the interests of Australasian Annuities, exercised his powers and duties for a collateral and improper purpose, and did not avoid conflicts of interest.

However, in relation to the claim against the Company, the court held that there was no knowing receipt of trust property by the Company under the first limb of *Barnes v Addy*. The trial judge observed that:

> To establish liability on this ground, the plaintiff

> must establish that RSF [ie the Company] received trust property and knew that the relevant property was trust property being misapplied or transferred pursuant to a breach of fiduciary duty or trust.

The court said:

> Notwithstanding these findings, the plaintiff cannot succeed in its claim against RSF, the trustee of the Super Fund, as there was no knowing receipt of trust property by RSF and RSF gave valuable consideration for the contributions made to the Super Fund which it accepted in good faith and without notice of the breaches of fiduciary duty. Accordingly, RSF does not hold the funds or their traceable proceeds on trust for the plaintiff nor is it liable to the plaintiff for money had and received.

The appeal

Australasian Annuities appealed to the Victorian Court of Appeal.

It challenged, among other things, the following two conclusions of the court at first instance:

1. that there was no knowing receipt of trust property by the Company; and
2. that the trustees of the superannuation fund gave valuable consideration for the receipt of monies and thereby were not volunteers.

The Court of Appeal's decision

The Court of Appeal allowed the appeal and set aside the judgment and orders of the court at first instance.

In relation to the first point, in separate reasons, the majority (Neave JA and Garde AJA) held that the Company knowingly received the funds paid to it as a consequence of Mr Rowley's breach of his fiduciary duty owed to Australasian Annuities. The majority agreed that Mr Rowley was the "directing mind and will" of the Fund and the Company. This conclusion was reached on the basis that he "was the only active or knowledgeable director" of the Company, he was "instrumental in all of the transactions", and there was no evidence to suggest that anyone other than him was "the directing mind and will" of the Fund and the Company.

On this basis, the first challenge succeeded.

In relation to the second point, in separate reasons, the majority (Warren CJ and Garde AJA) applied the rationale of the High Court in *Cook v Benson* (2003) 214 CLR 370 and held that the Company had not received the monies as a volunteer. Specifically, Warren CJ said (emphasis added):

> First, the [Company] held the contributions on behalf of the members in accordance with the trust deed. The individual members of the Rowley family did no retain legal or beneficial ownership of the contributions: they only had rights under the trust deed.

and:

> Secondly, the payments were made in return for obligations to be performed by the individual; [trustee] in accordance with the trust deeds. The members of the [Fund] were provided with certain benefits and rights in accordance with the trust deed. These rights and benefits were sufficient to amount to consideration for the purposes of the transactions.

On this basis, the second challenge failed.

The result

In the result, the Court of Appeal ordered the Company to repay Australasian Annuities the monies received from Australasian Annuities, as Mr Rowley, a director of the Company, knew that the monies had been paid in breach of his fiduciary duties to Australasian Annuities.

The court ordered that the amount of $1,674,744.99 plus interest be repaid by the Company to Australasian Annuities.

The appeal was allowed and the judgment and orders of the court in first instance were set aside.

Take away point

This decision confirms that the knowledge of a company director may be imputed to the company where that director is the directing mind and will of the company. Further, this principle applies where the company is the trustee of a superannuation fund.

5. Procedural fairness and the SCT: *Southwell v Equity Trustees Limited* [2015] FCA 536

The Federal Court of Australia (Farrell J) has held that a denial by Superannuation Complaints Tribunal (SCT) of a request to make oral submissions to the SCT on behalf of members of a superannuation fund, Mr and Mrs Southwell, did not constitute a breach of procedural fairness. The court did uphold the appeal of Mrs Southwell that, in not giving notice to her of how her delay in taking action had relevance to the decision of the SCT, the SCT had breached its obligations of procedural fairness. The case is *Southwell v Equity Trustees Limited* [2015] FCA 536.

The facts

In 2006 Mr Southwell and Mrs Southwell became members of a superannuation fund.

In March 2009, Mr Southwell lodged investment switching forms (the Switching Forms) signed by Mr and Mrs Southwell respectively to change all of their respective investments in the fund from the "balanced" investment option to the "conservative" investment option.

The administrator of the fund acknowledged receipt of the Switching Forms and stated in return correspondence that requests for investment switches are usually actioned within 30 days of the date of receipt of a fully completed switching form.

However in April 2009, a representative of the administrator contacted Mr Southwell to discuss the Switching Forms. The representative of the administrator formed the view that he had been verbally instructed by Mr Southwell to not act on the Switching Forms and to leave both Mrs and Mrs Southwell's investments in the balance investment option. As a consequence, the Switching Forms were never acted upon.

Later in 2009 the trustee of the fund advised members that the fund had deferred processing requests for redemption or transfers from the balanced option due to liquidity problems as a result of the impact of the global financial crisis on investment markets.

The Southwells were sent benefit statements in January 2010 relating to the fund's balanced investment option.

In April 2011 both Mr and Mrs Southwell separately wrote to the Trustee seeking to make a complaint that the Switching Forms should have been acted on by the Trustee and that their accounts should be adjusted as though their accounts were invested in the conservative option from March 2009.

The Trustee responded stating that it has determined that proper instructions were given by Mr Southwell to revoke the Switching Forms and that no adjustments were to be made to the respective accounts.

The complaints to the SCT

Both Mr and Mrs Southwell lodged complaints with the SCT.

Briefly stated, both Mr and Mrs Southwell's complaints focussed on the following:

- the Switching Forms should have been accepted as proper instructions to the Trustee from the Southwells to switch their investments from the balanced investment option to the conservative investment option and acted upon in March 2009;
- no verbal instructions were given by Mr Southwell in April 2009 to revoke the Switching Forms;
- that they suffered loss through the Trustee not acting on the Switching Forms and their loss was the difference between the investment losses in the balanced investment option and the investment gains in the conservative investment option;
- they asked that all of their respective account balances be placed in the conservative investment option and that their accounts be adjusted as though having been invested in the conservative investment option since March 2009; and
- that the fund reimburse an increase in management fees effected in August 2011 as these fees were increased without giving proper prior notice to the members.

In September 2012 the SCT approved the Southwells' request to be legally represented in the matter.

In October 2013 the Southwells' solicitor made an application to the SCT to have Counsel make oral submissions to the SCT at the review meeting.

The SCT denied this request on the basis that no reasoning for having Counsel make oral submissions had been provided by the Southwells' solicitor.

The SCT determination

Briefly stated, the SCT determined that:

(i) in relation to Mr Southwell's complaint, it was fair and reasonable for the fund to rely on oral instructions not to act on the Switching Forms given by Mr Southwell in the telephone conversation in April 2009. The SCT therefore affirmed the Trustee's decision in relation to Mr Southwell;

(ii) in relation to Mrs Southwell's complaint, the SCT held that it was not fair and reasonable for the fund to rely on Mr Southwell's oral instructions to the employee of the fund's administrator in respect of her request to switch investment options. The SCT refused to affirm the

Trustee's decision in relation to Mrs Southwell and it substituted its own decision;

(iii) the SCT required the Trustee to adjust Mrs Southwell's account for the period 1 April 2009 to 1 March 2010 on the basis that Mrs Southwell knew as of receipt of her benefit statement in January 2010 that the investment had not been switched and could have taken steps to switch the investments, but she had not done so; and

(iv) for completeness, the SCT also dismissed the complaint made by the Southwells that member fees increased without giving proper prior notice to the members.

The appeal

Mr and Mrs Southwell separately appealed to the Federal Court.

Their appeals both contained a common ground of appeal: that the SCT failed to take into account the relevant consideration that their solicitor had provided written reasons seeking an oral hearing.

The balance of Mrs Southwell's appeal grounds focussed on the allegation that the SCT had not advised her of the fact that it was considering the delay in her complaint to the Trustee that her Switching Form had not been acted on.
Mrs Southwell argued that in not advising her that her delay in making a complaint was relevant the SCT had denied her procedural fairness by not giving her an opportunity to provide evidence and submissions on this issue.

The balance of Mr Southwell's appeal grounds focussed on whether the SCT granted Mr Southwell procedural fairness in preventing him making oral submissions on the issue of this oral instructions to the Trustee in April 2009, whether the SCT erred in law by adopting the position of the Trustee that Mr Southwell had revoked his Switching Form and whether the SCT had failed to find that the Trustee had not complied with its own published standards to act on switching forms within a set time period.

The court's decision

The court considered that for the purpose of forming a view as to whether oral submissions are necessary, it is appropriate for the SCT to require the party proposing that course to articulate clearly the reasons supporting the request.

The court did not consider that solicitors for Mr and Mrs Southwell adequately gave reasons supporting their request for oral submission and so held that this ground was not made out.

In relation to Mrs Southwell's appeal, the court concluded that procedural fairness obligations require the SCT not to make a determination adverse to the interests of a party to a review without giving that party a reasonable opportunity to provide evidence and make written submissions to the SCT on the approach that the SCT is contemplating.

Because Mrs Southwell did not have notice of how her delay in taking action might be relevant to the SCT's decision Mrs Southwell was not in a position to provide submissions to the SCT concerning this issue. Once the SCT decided that delay was a relevant factor, it was appropriate to seek submissions from Mrs Southwell and the Trustee as to these matters. The court was therefore satisfied that the SCT did not afford Mrs Southwell procedural fairness on this issue.

In relation to Mr Southwell's appeal, the court was satisfied that he had adequate opportunity to put his evidence and arguments to the SCT without the need for an oral submission.

The court also held that, whilst the SCT has used ambiguous wording in its written determination, it had in fact made its own finding of fact that Mr Southwell had given oral instructions to the Trustee to revoke his Switching Form.

Finally, Mr Southwell did not point to anything in the Trust Deed or otherwise which prohibited or rendered ineffective an oral instruction that the Trustee not act on a document lodged with the administrator. While Mr Southwell's written submissions asserted breach of standards by reason of the failure of the administrator to make the switch within the "usual" 30 days timeframe set out in the product disclosure statement, Mr Southwell's submissions to the SCT did not assert invalidity of the Trustee's actions as a consequence and there was therefore no basis on which the SCT should make such a finding.

The result

In the result, none of Mr Southwell's grounds of appeal were made out and his appeal was dismissed.

Mrs Southwell's appeal was allowed and her complaint remitted to the SCT for the purpose considering the mitigating circumstances cited by her in relation to the delay in her making a complaint.

Take away point

The Trustee could have avoided many of the problems it faced in this case if it had recorded the relevant telephone conversation with the member and confirmed the outcome of the conversation with its members by letter.

6. SMSF – carried forward tax losses – *The Trustee for the Payne Superannuation Fund v Commissioner of Taxation* [2015] AATA 58

The Administrative Appeals Tribunal (AAT) (Senior Member RW Dunne) has upheld an objection decision of the Commissioner of Taxation that a self-managed superannuation fund (SMSF) cannot carry forward the excess of losses and outgoings relating to the SMSF's exempt income as a carried forward loss to be offset against the SMSF's exempt income in a future year. The case is *The Trustee for the Payne Superannuation Fund v Commissioner of Taxation* [2015] AATA 58.

The facts

The trustee of an SMSF lodged tax returns, claiming a deduction for exempt current pension income for several financial years.

The SMSF's tax losses were audited by the Commissioner, resulting in some items in the SMSF's returns being identified as incorrect and amended assessments being issued.

The trustee of the SMSF objected to an amended assessment. The Commissioner disallowed the objection.

The proceedings

The trustee applied to the Administrative Appeals Tribunal (AAT) for a review of the Commissioner's objection decision. The issue before the AAT was the interpretation of section 36-20(1) of the *Income Tax Assessment Act 1997* (Cth).

The AAT's decision

The AAT held that "although s 36-20(1) does not use the words 'except losses and outgoings from previous years', the section is interpreted to include those words in it". Therefore, the section permits a "deduction for a loss or outgoing to the extent that it is incurred in deriving that exempt income in that year of income".

The AAT accordingly agreed with the Commissioner that the SMSF could not carry forward the excess of losses and outgoings relating to the SMSF's exempt income as a carried forward loss to be offset against the SMSF's exempt income in a future year.

The result

In the result, the AAT affirmed the Commissioner's objection decision.

Take away point

A superannuation fund cannot carry forward the excess of losses and outgoings relating to the fund's exempt income as a carried forward loss to be offset against the fund's exempt income in a future year.

About Thomson Geer

Thomson Geer is one of the largest independent, truly national full-service law firms in Australia, with over 80 Partners and about 500 lawyers and staff – located evenly across our offices in Sydney, Melbourne, Brisbane and Adelaide.

As one of Australia's top ten independent commercial law firms by size, our expertise, enthusiasm, responsiveness and innovative approach has allowed us to build and retain strong relationships with Australia's leading businesses and government bodies.

Our Superannuation and Wealth Management team is led by Scott Charaneka and Stanley Drummond. In 2014 and 2015 Scott was named in Best Lawyers in Australia in the Superannuation Law and Regulatory Practice categories, while Stanley was named in the Insurance Law category.

They are frequent speakers at seminars and training courses convened by the Association of Superannuation Funds of Australia and other industry and professional bodies, and the authors of many texts and articles.

Scott and Stanley have comprehensive experience in establishment, licensing, governance, administration, distribution, restructuring, investments and tax matters associated with superannuation, life insurance and management investment products. They act for many of Australia's largest private and public sector financial institutions.

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