THOMSON GEER

LAWYERS

Superannuation Case Law Update

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Contents

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1. Fund merger – no fetter on trustee's discretion – *Queensland Local Government Superannuation Board v Superannuation Complaints Tribunal* [2014] FCCA 2473

The Federal Circuit Court (Judge Burnett) has held that the terms of a merger of 2 superannuation funds in relation to how surplus funds were to be applied after the merger did not involve an unlawful fetter on the transferee trustee's discretion. The case is *Queensland Local Government Superannuation Board v Superannuation Complaints Tribunal* [2014] FCCA 2473 (29 October 2014).

The facts

In 2010/2011 City Super Pty Ltd, the trustee of the Brisbane City Council Superannuation Plan (City Super), and the Queensland Local Government Superannuation Board (Board), the trustee of the Local Government Superannuation Scheme (LG Super), the scheme established for other local government employees, decided to merge their 2 funds.

The merger occurred on 1 July 2011.

In a letter dated 23 May 2011 (prior to the merger), City Super Pty Ltd had requested formal confirmation from the Board that after the merger any surplus of LG Super would be dealt with in accordance with the policy determined by City Super Pty Ltd.

On 1 June 2011 City Super Pty Ltd and the Board agreed that if any surplus or deficit arising because of the actual performance of City Super's funds investment (as determined some months after the merger) differed to the estimates used to credit member accounts shortly after 30 June 2011, such would be applied to the former City Super members who were members in the year ended 30 June 2011 and remained members of LG Super when final results were determined.

On 15 June 2011 City Super Pty Ltd amended its trust deed to include a new clause 15.4 which authorised it to transfer "unallocated" funds to a successor trustee on terms providing for the application of the transferred funds. Upon the merger of the two funds on 1 July 2011, the Board considered that it was bound to deal with any surplus (or deficit) from City Super in the manner agreed with City Super Pty Ltd prior to the merger.

On 2 February 2012, the Board determined, on a final accounting, that there was a surplus. Part of the surplus was applied to meet City Super's agreed contribution to the operational risk reserve. The balance of the funds were available for distribution to the qualifying members.

On 9 February 2012 the Board made the distribution to qualifying members.

Patricia Davies was a member of City Super who had transferred to LG Super as part of the merger. On 13 January 2012 (prior to the distribution on 9 February 2012) she exited LG Super, and thereby became ineligible to receive a share of the distribution of about $3,596.

She complained about this to the Board and then to the Superannuation Complaints Tribunal (SCT).

The SCT determination

The SCT determined that the Board's decision to exclude Ms Davies from the distribution was not fair and reasonable. The SCT said that the Board had unlawfully fettered its discretion, in the following terms:

"(a) When the assets of City Super were transferred to LG Super on 1 July 2011 it fell to the sole discretion of LG Super as to how any ultimate surplus would be dealt with. Such was subject to its trust deed, but without regard to the decision made by City Super on 23 May 2011 or the fact that LG Super had agreed prior to receiving any funds to deal with any transfer surplus on the terms decided by City Super;

(b) To the extent that LG Super regarded itself as bound to give effect to the terms stated by City Super and agreed by LG Super, it had unlawfully fettered the exercise of its discretion as to how any surplus would be distributed;"

The SCT set aside the Board's decision and replaced it with a decision in favour of Ms Davies.

The Board appealed.

The court's decision

The key issue in the appeal was whether the Board, in agreeing with City Super Pty Ltd how any transferred surplus was to be dealt with by the Board after the merger, had unlawfully fettered its discretion.

The court began by noting that:

> "It is uncontroversial, as a matter of general principle, that a trustee which has the discretion or duty to exercise a power from time to time as the circumstances require must not fetter its discretion by binding itself as to how the power will be exercised at some future time, regardless

> of the circumstances which may exist at that future time …"

The court noted that the processes of the trustee in the current context had been favourably considered by the New South Wales Supreme Court in *HIH Superannuation Pty Ltd* [2003] NSWSC 65 where Barrett J, in considering a distribution plan set out in a deed giving an apparent actuarial surplus of a fund, had to consider issues similar to those before the SCT. As Barrett J had noted, in that instance the life of the fund was limited, with the relevant employer company being in liquidation and accordingly all the employees there were ceasing to be employed. In that case, the circumstances to be considered involved distributing the actuarial surplus arising from the trust deed and given the rules governing the fund. In that case, Barrett J was not considering a rollover in the sense being considered here, although its effect was similar to this case. That is, a windup has the same effect as a rollover. However, the scheme there was intended to effect what the SCT might have otherwise characterised as a fetter for present purposes. For in that instance, the effect of the scheme was to give the trustee direction in respect of benefits to be payable to eligible members.

As here, the question there was whether, on the winding-up of a fund, the outgoing trustee could fetter itself in respect of the distribution. Barrett J noted particularly that in the context, the trust's rules provided, by the deed of trust, that the proposed plan of distribution of the fund on winding-up appeared to constitute either a fetter, or a contravention of section 58 of the *Superannuation Industry (Supervision) Act 1993* (Cth). However Barrett J had accepted that in considering the provisions of the deed, the court should adopt "a practical and purposeful" approach to the construction of the trust provisions, recognising the basis of such schemes in a contractual framework involving employers, trustees and employees. Barrett J further accepted that such a framework emphasises the need to construe these provisions in a way that reflects the respective roles of the parties in such contracts. That is plainly the situation in this instance.

It is not material whether the reported fetter on the exercise of the discretion was one sought to be exercised by the former trustee or the incoming trustee by agreement. The real issue is whether or not there was a true fetter upon the trustee's exercise of its powers.

Here, the Board contended that the decision of City Super Pty Ltd (the former trustee) of 23 May 2011 concerned solely the 2010/2011 financial year, which was the then current financial year just about to end. There, the total investment earnings which had been derived in that year could not be immediately distributed, as it was practically certain that there would be a differential between the total amounts provisionally applied to member accounts as at 30 June 2012 and the final determination of earnings following finalisation. Thus, there was likely to be a possible surplus for distribution or a possible deficit to be charged to relevant members on the wind up. Furthermore, while the amounts were not known, the source of the surplus or deficit, the means by which each amount would be ascertained and the range of potential beneficiaries (or debtors) were all known with certainty on both 23 May and 1 June 2011. Accordingly, it was submitted that the decision which was made on 23 May 2011 was one sufficiently ripe to be made at that time.

Additionally, consistent with the remarks in *Ford & Lee,* the Board submitted that the question of whether or not discretion is fettered must be considered in the context of the relevant trust deed. In this case the process was expressly contemplated in the principles which identified the class of members between whom any surplus or deficit was to be applied by the provision which had the effect of releasing the former trustee from its duty to exercise its power in respect of those funds more broadly.

The Board further contended that *Dagenmont Pty Ltd v Lugton* [2007] QSC 272 provides an illustration of the application of this principle. There, the court was considering whether an agreement entered into between the trustees of a discretionary trust and a beneficiary acted as a fetter upon a broad discretionary trust. In that case Chesterman J noted that a provision in a trust deed authorising trustees to release powers which they would otherwise have a duty to exercise are valid: see *Muir v Inland Revenue Commissioners* [1966] 1WLR 1269 at 1283*.* In the context of the case before him, Chesterman J noted that the deed was capable as being read as a release by the trustee of the power conferred on it by the general power provision to exercise an unfettered discretion to distribute or accumulate all or part of the trust income and, in the case of a distribution, to select those beneficiaries as recipients of the distribution. Chesterman J noted that, in that case, upon the release being given, the discretion was no longer unfettered and was reduced in scope co-extensively with an obligation created by the agreement to pay the sum specified in the agreement from the trust income.

The Board submitted that such an arrangement was effected in this case. In this instance, on 15 June 2011 – that is, before funds were transferred – clause 15.4 of the City Super Trust Deed was amended to expressly authorise the transfer by City Super to LG Super of an unallocated amount to be applied to the benefit of a defined class of City

Super members. To the extent that the funds not yet allocated to individual members, they were subject to a direction as to how they would be dealt with when the time came for actual payment. That course was explicitly authorised by the amended trust deed which is not under challenge.

In this instance, as with the circumstances in *Dagenmont*, the deed was meant to resolve termination issues relevant to the windup of the trust. Here, as in *Dagenmont*, the Board had set upon a process it thought fair and proper. It introduced a mechanism by which that result could be achieved lawfully and so arguably the former trustee's act in providing for that methodology could not be regarded as an improper exercise of its power.

The court concluded that the Board in acting upon its agreement with the former trustee in the circumstances did not constitute a fetter upon the exercise of its discretion, and that the SCT's decision that the arrangement constituted a fetter on the Board's discretion was in error.

The result

In the result, the Board's appeal from the determination of the SCT succeeded. The Board was not required to include Ms Davies in the distribution of the surplus.

Take away point

In the context of a fund merger, the transferor trustee and the transferee trustee can agree on how any transferred surplus is to be dealt with by the transferee trustee after the merger, without this constituting an unlawful fetter on the transferee trustee's discretion.

2. TPD claim – need for "practical and realistic" assessment – *Banovic v United Super Pty Ltd* [2014] NSWSC 1470

The Supreme Court of New South Wales (Hall J) has held that the decision of an insurer to deny a member's claim for a total and permanent disablement (TPD) benefit was invalid, and that the member was TPD within the definition of TPD in the insurance policy and the trust deed. The case is *Banovic v United Super Pty Ltd* [2014] NSWSC 1470 (27 February 2014).

The facts

The member, a formwork labourer, was injured and claimed a TPD benefit in the amount of $100,000. He suffered injuries to his left upper limb. He alleged that injuries were suffered to his left shoulder, cervical spine and median nerve. Medical evidence was conclusive that he was not fit to return to heavy labouring work.

Under the trust deed and insurance policy, in order to be eligible for TPD benefit, both the trustee and the insurer had to form an opinion that the member was "unlikely ever" to be able to engage in any occupation for which they suited by reason of their "education, training or experience".

In this member's case, both the trustee and insurer considered that the member was not likely to ever return to heavy manual labour based on the medical evidence provided. However, despite this finding, they also considered that there was other work for which they considered that the member had retained capacity and therefore refused to pay the benefit. They considered the member was able to work as a light packer, delivery driver or forklift driver.

The member's initial claim was declined. The member provided further information but his claim was declined again.

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

The proceedings

The court considered that there were 2 issues. First, whether the decision to decline the claim was vitiated by error – in other words, whether the decision to decline the claim was a decision that no reasonable person could come to on the evidence which was before them. Second, if the decision was vitiated by error, whether the member was entitled to the TPD benefit.

The member submitted that, when considering the likelihood of him working in the future by reference to his education, training and experience, it was not correct to include reference to his "Forklift licence" as he had only obtained that licence after the accident and had no prior experience as a forklift driver. It was submitted that the correct time of assessment should be at the time of the accident and not afterwards. It was also submitted that it was not correct to include reference to "process worker" when the member had little experience or training as a process worker. The member also challenged the adequacy of the summary of the medical reports, submitting that the loss of grip strength in his left side had not been given adequate consideration.

The member further submitted that the real likelihood of him working in the future by reference to his education, training and experience in the job market had not been taken into account, including factors such as: the availability of such work, his lack of English ability and his lack of education. He submitted, and the court agreed, that a theoretical possibility of future work was not enough to conclude that he would be able to work again. A practical approach had to be taken.

The trustee and insurer submitted that the forklift licence was relevant to the possibility of the member's future employment, and that his completing of a forklift driving course showed that his English ability was not a barrier. They also submitted that the definition of TPD required only that work be of the type that the insured person is reasonably fitted by reason of their education, training or experience and did not require that they have undertaken such work in the past. Therefore, it was submitted that it was possible to conclude that the member could undertake work such as delivery driving, of which he had no prior experience.

The decision

The court held that there had been failure to apply the TPD test correctly. The trustee and insurer had to determine whether the member was unlikely to be able to engage in regular remuneration work, which involved a realistic evaluation of his disablement. The trustee and insurer had failed to take into account a "balanced, objective or comprehensive review of the medical opinions". The insurer also appeared to have applied the wrong test by considering whether the member was "fit for suitable duties" without having regard to what work the member was "reasonably fitted" for by reference to his education, training or experience.

The trustee's and insurer's obligations required them:

> "… to undertake a practical and realistic assessment of the likelihood or otherwise of the [member] returning to Regular Remuneration work having regard to him as an individual – his age, his training, education and experience (or lack thereof) – not an assessment as to any theoretical possibility of him doing so."

The court held that the decision to decline the claim was vitiated by error and that the worker satisfied the definition of TPD within the meaning of the insurance policy.

The result

In the result, the court ordered the trustee and the insurer to pay the TPD benefit to the member. The trustee was also ordered to pay the member pre-judgment interest. Finally, the court indicated that the trustee and the insurer should pay the member's costs.

Take away point

When assessing whether a member is TPD, trustees and insurers must make a "practical and realistic" assessment of the likelihood or otherwise of the member returning to regular work having regard to them as an individual – that is, their age, his training, education and experience (or lack thereof) – not an assessment as to any theoretical possibility of them doing so.

3. Trio Capital – chief investment strategist permanently banned – *Liu v Australian Securities and Investments Commission* [2014] AATA 817

The Administrative Appeals Tribunal (AAT) (Ms JL Redfern, Senior Member) has affirmed a decision of the Australian Securities and Investments Commission (ASIC) to permanently ban a person involved in the Trio Capital collapse, on the basis that the person had breached a financial services law and was not a person of good fame or character. The decision is *Liu v Australian Securities and Investments Commission* [2014] AATA 817 (31 October 2014).

The facts

Eugene Liu was a director of both Astarra Asset Management Pty Ltd (AAM) and Astarra Funds Management Pty Ltd (AFM) in the relevant period, as well as chief investment strategist of AAM. AAM was the investment manager of Astarra Strategic Fund (ASF). Over 90% of ASF's funds were invested in offshore-based hedge funds controlled by Jack Flader, the ultimate controller of Trio Capital Ltd.

Subsequent to Trio Capital's collapse, Mr Liu was served notice by ASIC in September 2012. In February 2013, ASIC made a decision to permanently ban Mr Liu from providing financial services, and in doing so particularised its concerns as to Mr Liu's breaches of the *Corporations Act 2001* (Cth) as follows:

- ASIC may have reason to believe that he was not of good fame or character (section 920A(1)(d));
- ASIC may have reason to believe that he was not adequately trained, or was not competent, to provide a financial service or financial services (section 920A(1)(da));
- he may not have complied with a financial services law (sections 1041H (misleading or deceptive conduct) and 1041G (dishonest conduct)) (section 920A(1)(e));
- ASIC may have reason to believe that he was likely to contravene a financial services law (section 920A(1)(f));
- he may be involved in the contravention of a financial services law by another person (section 920A(1)(g)); and
- ASIC may have reason to believe that he was likely to become involved in the contravention of a financial services law by another person (section 920A(1)(h)).

The proceedings

Mr Liu lodged an application with the AAT for a review of ASIC's decision.

The issue that the AAT was required to determine was whether Mr Liu should be permanently banned, and therefore ASIC's decision affirmed, or whether the decision should be varied or set aside and some other decision substituted in its place.

The decision

The AAT found Mr Liu breached a financial services law and that he was not a person of good fame or character. Further, The AAT found that Mr Liu should be permanently banned and ASIC's decision affirmed.

The AAT's decision was based on the following considerations:

- the nature and seriousness of the suspected conduct, the public benefit in making orders, any mitigating factors and the likelihood of general or specific deterrence as being relevant to the issue of whether banning orders should be made and, if so, the period of the banning (pursuant to ASIC Regulatory Guide 98 *Licensing: Administrative action against financial services providers*);
- a banning of:
    - o three to 10 years may be appropriate where the alleged conduct was inconsistent with the orderly operation of financial markets, there was false, misleading or deceptive or unconscionable conduct, being conduct with a lesser degree of dishonesty, there was incompetence or a high level of carelessness, or there was disregard for the law and compliance with regulations; and
    - o 10 years or more or a permanent banning would be considered to be appropriate where there was dishonesty or intent to defraud, continued knowing and wilful contraventions of the law, serious incompetence and irresponsibility, likelihood of the person engaging in contravening conduct in the future, or any dishonest conduct involving clients; and
- the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding were considerations which must affect the answer to the question whether the issue had been proved to the reasonable satisfaction of the AAT. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

In reaching its decision, the AAT noted that Mr Liu was alleged to have:

- been knowingly responsible for drafting false key statements in respect of ASF's investment objectives and strategy in ASF's Product Disclosure Statement, that clearly misrepresented:
    - o the fact that investors' funds were being invested in Mr Flader's offshore accounts;
    - o how AAM chose its absolute return managers; and
    - o its due diligence process;
- been knowingly responsible for the preparation of false statements made in the Alternative Investment Management Association Questionnaire (Questionnaire), in respect of ASF, that was provided to Aegis Equities Research Pty Ltd (Aegis). Aegis published a favourable research report, based on those statements, that was sent to a number of financial planners, which resulted in $90,280,486 being invested in ASF;
- failed to inform Trio Capital or Aegis of the fact that AAM did not comply with the investment strategy referred to in the Questionnaire; and

- received $396,880 as reward for his involvement in the scheme giving rise to a conflict of interest. These payments had not been disclosed.

The result

In the result, the AAT affirmed ASIC's decision to permanently ban Mr Liu.

4. Superannuation guarantee charge – nominal interest component – *The Trustee for Rane Haulage Trust v Commissioner of Taxation* [2014] AATA 733

The Administrative Appeals Tribunal (AAT) (Deputy President S E Frost) has affirmed objection decisions of the Commissioner of Taxation in relation to the imposition of the nominal interest component on superannuation guarantee (SG) charge payable by a taxpayer. The decision is *The Trustee for Rane Haulage Trust v Commissioner of Taxation* [2014] AATA 733 (10 October 2014).

The facts

In April 2013 the Commissioner notified the taxpayer that he proposed to undertake an audit of the taxpayer's employer obligations in respect of the period 1 July 2010 to 31 December 2012 (Period).

The Commissioner found that the taxpayer had a superannuation guarantee shortfall for 6 of the Period's quarters (due to late payments subsequently made throughout the Period). The taxpayer also lodged late SG statements on 10 June 2013 in respect of those periods (rather than on the 28th day of the second month after the end of the relevant quarter).

Late lodgement of the statements also meant that SG charge became payable on that date, under section 46 of the *Superannuation Guarantee (Assessment) Act 1992* (Cth) (SGA Act), as well as the 10% nominal interest component under section 31 of the SGA Act.

The taxpayer objected against the assessments, but the objections were disallowed.

Application to the AAT

The taxpayer sought the AAT's review of the Commissioner's decision on the basis that it considered the calculation of the nominal interest component to be unfair because it was calculated by reference to the *date of lodgment* of an SG statement – which was many years removed from the *date of contribution*.

The taxpayer submitted that the imposition of nominal interest component in this case was "unfair, inequitable and unreasonable" and it urged the Commissioner (and the AAT) to apply section 37 of the SGA Act to amend the nominal interest component to a lesser amount.

Section 37 provides that the Commissioner "may, subject to this section, at any time amend any assessment by making any alterations or additions that the Commissioner thinks necessary, whether or not superannuation guarantee charge has been paid in relation to the assessment". The taxpayer submitted that the Commissioner can make any alterations that he thinks necessary and therefore he should make an alteration that would remove, or at least reduce, the nominal interest component.

The AAT's decision

The AAT said that it appears to be a deliberate design feature of the legislation that, once a contribution is made late, then whether it is made a day late or several years late will have no bearing on the calculation of the nominal interest component. What becomes important is not the date of contribution, but the date of lodgment of the SG statement with the Commissioner. Therefore, the question is whether, having regard to the clear and unambiguous terms of section 31, and the consequence that the nominal interest component has been correctly calculated by the Commissioner, section 37 authorises an amendment to the assessments to remove or reduce that interest component. In the AAT's view, it does not.

Instead, section 37 authorises the Commissioner to amend an assessment by making any alterations or additions that the Commissioner thinks necessary. An alteration to an assessment would be necessary if, but only if, it brought an assessment into alignment with the Commissioner's understanding of the facts and the law. For example, if the Commissioner had made an assessment on an initial understanding that an employee's wages were $12,000 when in fact they were $10,000, or an original assessment had incorrectly used a "charge percentage" of 10% when it should have been 9%, the Commissioner would be empowered, and indeed obliged, to amend the assessment so that it reflected the true position.

However, as the AAT noted, the Commissioner cannot pretend that a statement was made in 2011 when in fact it was made in 2013. The Commissioner is not empowered to make assessments which, while perhaps consistent with some undefined notion of fairness, are nevertheless contrary to the law.

The result

In the result, the AAT confirmed the Commissioner's objection decisions. The taxpayer had to pay the nominal interest component as calculated by the Commissioner.

Take away point

Where SG charge is payable, the nominal interest component is calculated by reference to the date of lodgment of the SG statement, not the date of superannuation contribution.

5. Multiple breaches of SIS Act by SMSF trustee – assessment of penalty – *Deputy Commissioner of Taxation v Lyons* [2014] FCA 1353

The Federal Court (Bennett J) has ordered the trustee of a self managed superannuation fund (SMSF) to pay a monetary penalty of $32,500 for multiple breaches of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act). The case is *Deputy Commissioner of Taxation v Lyons* [2014] FCA 1353 (12 December 2014).

The facts

Anthony Shaune Lyons (Lyons) and his former wife were the trustees of SMSF. Over the course of 11 months, Lyons made six loans from the assets of the SMSF totalling $190,000 (Loans) to Paul Ellis (Ellis), who was Lyons' brother-in-law. The governing rules of the SMSF did not authorise such loans. The total assets of the SMSF at the time of the Loans were $193,459.44.

Upon receipt of the Loans, Ellis immediately transferred the Loans to a retail business owned and operated by Lyons (Business). The Business was struggling and the Loans were used to support the working capital of the Business. The Loans were not recoverable.

Lyons was advised by a financial planner that the he, as trustee of the SMSF, could make the Loans to Ellis using the assets of the Fund. Lyons acted in accordance with that advice. However, that advice was incorrect.

Lyons appointed an auditor to audit the SMSF. The auditor lodged an auditor contravention report with the Australian Taxation Office (ATO) in respect of the Loans. The ATO commenced an audit of the

SMSF and issued a notice of non-compliance against the SMSF on the basis of illegal access to superannuation benefits and contravention of the SIS Act. This had the effect of cancelling the concessional tax treatment of the SMSF.

The proceedings

The Deputy Commissioner of Taxation (Superannuation) (DCT) commenced proceedings against Lyons in the Federal Court.

Lyons admitted that the making of the Loans to Ellis constituted multiple contraventions of the following sections of the SIS Act:

- section 62, by failing to ensure that the SMSF was maintained solely for one of the purposes prescribed in section 62(1);
- section 65, by lending money using the assets of the SMSF to a relative of a member of the SMSF;
- section 84, by failing to take reasonable steps to ensure that the provisions of Division 2 and Division 3 of the Act were complied with in respect of the SMSF, instead making loans to a relative of a member which caused the market value ratio of the SMSF's in-house assets to exceed 5% and failing to prepare a plan setting out steps to ensure the disposal of in-house assets in excess of the 5% limit. The market value ratio of the in-house assets of the SMSF was approximately 97%; and
- section 109, by failing to deal with other parties to transactions at arm's-length.

Each of the above provisions was contravened multiple times (ie each time a Loan was made by Lyons, which was six times in total). Each of the above provisions is a civil penalty provision of the SIS Act and carrying a maximum penalty of $220,000.

The DCT submitted that Lyons should pay a monetary penalty of $32, 500 and costs of $5,000.

The court's decision

The court outlined the process for assessing whether the penalty submissions made by the DCT were appropriate.

How penalties ought be attached to multiple contraventions of the Act

The court stated that where a person contravenes multiple civil penalty provisions:

> "… such an offender should be given a sentence which fairly reflects the substance of the offending conduct, rather than a purely mathematical accumulation of sentences for each separate offence which may be able to be technically attached to the same act."

Given that the Loans made to Ellis were part of a "course of conduct" of funding the Business, the court said that a single penalty should be imposed even though there were multiple separate contraventions of sections 62, 65, 84 and 109 of the SIS Act.

Principles for determining an appropriate penalty for each contravention

The court referred to the following principles which guide the determination of an appropriate penalty in the circumstances:

- the statutory maximum penalties, in this case under the SIS Act;
- whether the penalty achieves the desired deterrence effect (see below);
- the factors to be taken into account in determining a penalty of appropriate deterrent value (see below); and
- conducting a synthesis of the above principles (ie weighing together all relevant factors rather than making additions or subtractions from a set figure, for example, the statutory maximum penalty).

    the statutory maximum penalties, in this case under the SIS Act;

Does the penalty achieve both general deterrence and specific deterrence?

Penalties imposed should have a general effect of deterring those "who may be disposed to engage in prohibited conduct of a similar kind" and a specific effect on the person deterring him or her from further contraventions.

The court said that the substantial penalties "will provide a strong incentive to officers to take care to understand and ensure compliance with the requirements of the [SIS] Act and reduce the risks of non-compliance."

The court said that given Lyons' remorse (which was evident by him agreeing to negotiate with the DCT) and his conciliatory nature, a penalty that achieves the general deterrent effect would also provide a specific deterrent effect.

Applying the principles to determine a penalty for each contravention

The court referred to *Deputy Commissioner of Taxation v Fitzgeralds* [2007] FCA 1602 where certain relevant factors to be identified in determining what an appropriate penalty is. Here, the court said that the following factors were appropriate for the current facts:

- the nature and extent of the contravening conduct;
- the loss and harm arising from the conduct;
- the size of the SMSF;
- the deliberateness or otherwise of the contravention;
- any relevant matters personal to the contraveners;
- any steps taken to repair or rectify the harms caused by the wrongdoing
- the degree of co-operation provided by Lyons;
- any contrition by Lyons;
- any past record of Lyons; and
- Lyons' personal financial position.

Should the penalty be moderated in accordance with the principle of "totality"?

The court said that the:

> "… question of totality requires answering what the appropriate penalty would be for each contravention and then determining whether a discount for totality is warranted, having regard not only to the total amount of the appropriate pecuniary penalties but also to the compensation and disqualification orders to be made."

The principle of "totality" had been expressed by Weinberg J in *Australian Prudential Regulatory Authority v Derstepanian* [2005] FCA 1121 at 31 in the following terms:

> "It is a well-recognised principle of sentencing that a person not be punished twice for what is, in substance, the same conduct, even if that conduct can be viewed as giving rise to two separate offences."

Here, the court said that appropriate adjustments had been made to take into account the fact that there had been multiple contraventions of the same provisions.

The penalty

After conducting the analysis set out above, the court held that given the maximum penalties available and the mitigating factors, the penalties submitted by the DCT were appropriate.

In the result, by consent, the court ordered Lyons to pay:

- a monetary penalty of $35,500 under section 196 of the SIS Act; and
- the DCT's costs of and incidental to the proceedings in the sum of $5,000,

with the penalty and costs to be paid in equal monthly instalments over a period of 36 months.

Take away point

Trustees of SMSFs must be fully aware of their obligations under the SIS Act and ensure that their actions in relation to the SMSF do not breach the Act. If a trustee breaches the Act in a serious away (as Lyons did), this may lead to the imposition of a substantial penalty.

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 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 speaker 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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