THOMSON GEER
LAWYERS

Superannuation Case Law Update

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1. Trust deed amendments – meaning of "accrued benefits" – *Beck v Colonial Staff Super Pty Ltd* [2015] NSWSC 723

The New South Wales Supreme Court (Slattery J) has held (among other things) that purported amendments to the trust deed of a superannuation fund in December 1996 that removed discretionary "Leaving Service Benefits" contravened regulation 13.16 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations) and were ultra vires and void. This meant that the clause conferring those discretionary benefits continued to be part of the trust deed. Further, that clause survived a subsequent successor fund transfer. The trustee of the transferee fund breached its duty as a trustee to give consideration to a request by a member for a discretionary benefit. That trustee was now required to give consideration to that request.

The case is *Beck v Colonial Staff Super Pty Ltd* [2015] NSWSC 723.

Brief summary of the main facts

Mr Beck migrates to Australia

Mr Beck (the member), an actuary by profession, was employed by Colonial Mutual Life Assurance Society Limited (Colonial Mutual). In 1987 he relocated from South Africa to Melbourne. His employment with Colonial Mutual continued, but he became a member of the Colonial Group Staff Superannuation Fund (Old Colonial Fund) (at [8]-[11]).

The July 1996 amendments

In July 1996 the trust deed of the Old Colonial Fund was amended (at [105]-[124]).

Following these amendments, clause A11.3 of the trust deed provided a discretionary "Leaving Service Benefit" in the following terms (this was similar to the benefit provided by a previous clause) (at [122], underlining added):

> A11.3 In exceptional circumstances and usually only if the Member has had a long period of Service, the Trustees may with the approval of the Company pay to or in respect of the Member referred to in Rule 11.1 a further sum of such amount as will increase the total payment to or in in respect of such Member to an amount not exceeding the reserve value as determined by the Trustees after considering the advice of the Actuary held in the Fund in respect of such Member as at the date the Member ceases employment with the Employer.

It is to be noted that payment of the benefit required "the approval of the Company" (ie the employer).

Also, the amendment power was varied to read (at [114], underlining added):

> **33 AMENDMENT**
>
> 33.1 Subject to Clause 33.2, and to the Relevant Requirements, the Trustees may, with the consent of the Company, by supplemental deed or resolution, amend, add to, delete or replace (together 'amend') all or any of the provisions of the Deed including this Clause with effect from such date (whether before, on or after the date on which the supplemental deed is executed or the making of such resolution) as may be specified in that deed or that resolution. In the absence of express specification, the date of the execution of the deed or the making of the resolution shall be deemed to be specified. Each such amendment is binding on each Employer, each Member and any other person claiming under or bound by the Deed. Any amendment made by resolution shall be confirmed by supplemental deed as soon as practicable after it has been made.
>
> 33.2 Subject to Clause 33.3, no amendment shall be made whereby the value of the benefits accrued in respect of any Member prior to the effective date of the amendment is detrimentally affected without the written consent of that Member (the value of the benefits accrued being such amount as the Trustees, after considering the advice of the Actuary, determine has accrued).
>
> 33.3 Any amendment which the Trustees consider necessary or desirable for better securing taxation concessions or for ensuring conformity to the Relevant Requirements or any other present or future State or Commonwealth laws governing or regulating the operation or maintenance of superannuation funds shall be deemed not detrimentally to affect the value of the benefits accrued in respect of any Member prior to the effective date of such amendment, and may be given effect without the consent of that Member.

The December 1996 amendments

In December 1996 the trust deed of the Old Colonial Fund was further amended. By that time Colonial Staff Superannuation Pty Limited was the trustee of the fund (at [125]-[127]).

These amendments restructured and redefined members' benefits. Among other amendments, clause A11.3 – the clause that provided a discretionary Leaving Service Benefit – was deleted (at [126]-[127]).

Demutualisation and reconstitution

In 1997 Colonial Mutual was demutualised and became Colonial Limited (at [29]).

In 1998 the Old Colonial Fund was reconstituted. The various superannuation arrangements for different parts of the Colonial group were merged into a single superannuation fund. As part of this restructure, the assets held for the benefit of the members of the Old Colonial Fund were henceforth held for the benefit of the Colonial Group Staff Superannuation Scheme (**New Colonial Fund**) (at [30]).

The member changes employment

In 2000 the Commonwealth Bank of Australia (CBA) acquired Colonial Limited. As part of the

takeover arrangements, the member was offered and accepted employment with CBA (at [34]).

Before accepting employment with CBA, in mid-2000 the member had conversations with CBA executives about the terms of his employment by CBA and his superannuation benefits (at [35]-[50]). In one of these conversations, the following exchange occurred (at [45]-[46]):

> The member:
>
> > I won't come to CBA unless I can protect and enhance my pension that I'm entitled to under my defined benefit pension scheme. I have been a member of that scheme for many years, including my time in South Africa and I have a significant accrued pension in the fund.
>
> CBA executive:
>
> > Whatever your pension rights were under the Colonial Fund, we undertake to protect those going forward.

The member's subsequent written employment agreement with CBA read in part (at [53]):

> Your existing superannuation arrangements will continue to apply.

Within days of accepting employment with CBA, the member was required to move from Melbourne to Sydney. His wife and 3 children remained in Melbourne. The wife had a job in Melbourne (at [55]).

The CBA was keen to persuade the member and his wife to move permanently to Sydney. In mid-2001 the CBA arranged to fly the wife to Sydney for a dinner at Aria Restaurant, near the Sydney Opera House. There were 6 people present – 2 CBA executives, their partners, the member and his wife. The wife was seated between the 2 CBA executives. The following exchange occurred (at [56]-[57]):

> CBA executive:
>
> > When does your contract finish and how long will you and the children stay in Melbourne?
>
> The wife:
>
> > I recently signed a contract for a year but since the project is running late, I've just been asked to sign another one.
>
> CBA executive:
>
> > When will you and the family move to Sydney? It doesn't show commitment to the bank, if you [and the member] are living apart.

The next day the member and his wife decided to move to Sydney, which they did in early 2002 after their daughter had finished her year 12 studies (at [59]).

Successor fund transfer

In 2003 the member's interest in the New Colonial Fund was transferred to the Commonwealth Bank Officers Superannuation Fund (CBOS fund) as part of a successor fund transfer. The trustee of that fund was Commonwealth Bank Officers Superannuation Corporation Pty Limited (CBOS trustee) (at [63]).

Termination of employment

In July 2005 the CBA terminated the member's employment. At that time he was 51 years of age (at [8], [69], [74] and [86]).

The member's request for a benefit

In the meantime, in January 2005 the member had raised with CBA a number of possible options to try to avoid a loss of pension, if he were retrenched before age 55. Later in January 2005 he sent an email to CBA in which he alluded to the possibility of him being paid a discretionary Leaving Service Benefit before reaching age 55 (at [74]-[75]).

In February 2005 the member wrote to the CBOS trustee asking for a pre-55 discretionary benefit (at [80]-[81]). By letter dated 11 May 2005 the CBOS trustee replied, rejecting the request and pointing out that the clause providing the discretionary Leaving Service Benefit had been deleted from the Old Colonial Fund trust deed by the December 1996 deed of amendment (at [83]).

After his employment was terminated in July 2005, the member corresponded further with the CBOS trustee and with the Superannuation Complaints Tribunal concerning his superannuation entitlements (at [89]). (The judgment does not include details of his contact with the Superannuation Complaints Tribunal.)

The proceedings

In 2011 the member commenced proceedings in the Supreme Court of New South Wales against (at [5]):

- Colonial Staff Superannuation Pty Limited, the trustee of the Old Colonial Fund at the time of the December 1996 amendments. That company went into liquidation and did not appear in the proceedings;
- the CBOS trustee, the trustee of the CBOS fund to which the member had been transferred as part of a successor fund transfer in 2003 and which in 2005 had rejected his request to be paid a discretionary Leaving Service Benefit; and
- CBA, the member's employer from 2000 to 2005.

The claim against the CBOS trustee

Against the CBOS trustee, the member relied on a number of interrelated arguments (at [202]-[205]).

Briefly stated, the member's main argument – which succeeded – was along the following lines:

(a) as at December 1996, the amendment power in clause 33 of the trust deed of the Old

Colonial Fund was expressed to be subject to the "Relevant Requirements". This meant that compliance with the Relevant Requirements was a condition precedent to the valid exercise of the power to amend the trust deed (at [280]);

(b) the trust deed defined "Relevant Requirements as including the *Superannuation Industry Supervision Act 1993* (Cth) (SIS Act) and the SIS Regulations (at [303]);

(c) the December 1996 amendment purporting to delete clause A11.3 which provided for a discretionary Leaving Service Benefit contravened regulation 13.16 of the SIS Regulations, as it adversely altered "a beneficiary's right or claim to accrued benefits [or] the amount of those accrued benefits" (at [281]);

(d) that amendment also constituted a breach by the trustee of the Old Colonial Fund (Colonial Staff Superannuation Pty Limited) of its duty under section 52(2)(c) of the SIS Act to act in the "best interests" of the beneficiaries of the fund (at [265]);

(e) given these contraventions of regulation 13.16 and section 52(2)(c), the amendment was ultra vires and void. Clause A11.3 remained a part of the trust deed of the Old Colonial Fund (at [304]);

(f) clause A11.3 survived the successor fund transfer to the CBOS fund in 2003 (at [304], and see also [313]). (The member did not contend that the successor fund transfer itself involved any breach of regulation 6.29 of the SIS Regulations by either Colonial Staff Superannuation Pty Limited as trustee for the New Colonial Fund or the CBOS trustee: at [65]-[66].); and

(g) the CBOS trustee should have considered the member's request in 2005 for a discretionary benefit (at [309]).

In relation to (c), the court said (among other things) (at [296]):

> … reg 13.16(1) prohibits adversely altering the amount of potential entitlements, or a beneficiary's claims to potential entitlements in defined benefit funds such as the Old Colonial Fund. For [the member] to seek the exercise of the Trustee's clause A11.3 discretion is to claim his potential entitlements. In my view, to delete clause A11.3 from the Old Colonial Fund in December 1996 was to contravene reg 13.16. Even though reg 13.16 was a discretionary provision, its deletion still was adverse to [the member] in removing his capacity to claim his potential entitlements.

The court held that the CBOS trustee should now consider the member's request for a discretionary Leaving Service Benefit under clause A11.3 (at [322] and [380]).

This conclusion made it unnecessary to consider other, alternative remedies (at [323]).

The claim against the CBA

Against the CBA, the member also relied on a number of arguments.

The argument that succeeded was that the CBA was estopped from denying that it would employ the member until age 55, when he could retire and receive a pension from the CBOS fund. This estoppel was founded on the oral representations made by CBA executives in 2000 and mid-2001 (see above) – but not the written employment agreement (at [332]-[362]).

The member was accordingly entitled to relief against the CBA on the basis that he was entitled to a pension at age 55, subject to adjustments flowing from the fact that he had only worked till age 51, and other submissions about relief (at [364], [379] and [381]).

One of several arguments of the member against the CBA that failed was that the CBA was estopped from denying that it would consent to the member being paid a discretionary Leaving Service Benefit under clause A11.3. (As mentioned above, clause A11.3 required "the approval of the Company" before the trustee could pay this benefit.) The mid-2000 pre-employment discussions (see above) were focussed on the member becoming entitled to a pension at age 55. It was going too far to say that as a result of those discussions the member expected that he would be paid a discretionary pre-55 benefit (at [341]-[345]).

Supplementary hearing

The parties were directed to bring in short minutes of order to give effect to the court's reasons, and the proceedings were adjourned to a supplementary hearing to deal with the form of relief and, if necessary, costs (at [364], [379] and [385]-[383]).

The judgment – key points

The following key points emerge from the judgment:

- *amendment power* – the scope of a trustee's power to amend the governing rules of a superannuation fund depends on the precise wording of the power of amendment in the trust deed*;*
- *accrued benefits* – discretionary benefits can be "accrued benefits" for the purposes of regulation 13.16. Amending the governing rules of a superannuation fund to remove discretionary benefits can constitute a contravention of regulation 13.16;
- *best interests* – amending the governing rules of a superannuation fund to remove discretionary benefits can also constitute a

breach of the trustee's duty under the general law and section 52(2)(c) of the SIS Act to act in the "best interests" of the beneficiaries of the fund;

- *successor fund transfers* – where the purported deletion of a clause providing discretionary benefits is void, the clause survives a successor fund transfer and become part of the governing rules of the transferee fund; and
- *estoppel* – the law of estoppel operates in the superannuation context. Employers and trustees can find themselves bound by representations made to members about their superannuation entitlements.

It is understood that the *Beck* judgment will be the subject of an appeal by the CBOS trustee and the CBA.

Comments

Beck is the first decided case on the meaning of "accrued benefits" in regulation 13.16 in the context of amendments to the governing rules of a fund.

The court took an expansive view of the concept of "accrued benefits".

This approach appears inconsistent with what the courts have previously said about regulation 13.16 in other cases, namely, *Asgard v Maher* [2003] FCA 156; (2003) 131 FCR 196; *Employers First v Tolhurst Capital Ltd* [2005] FCA 616; (2005) 143 FCR 356; *Auspine Staff Superannuation Pty Ltd v Henderson* [2006] FCA 1281; and *KCA Super Pty Limited (No 2)* [2011] NSWSC 1301. Drawing on these and other cases, the conventional view among superannuation lawyers has been that the concept of "accrued benefits" does not include a benefit that depends on the trustee exercising a discretion to pay the benefit in favour of the member (and which can be exercised against the member, so that the member receives nothing).

Another curious aspect of the judgment is that the clause in question survived a successor fund transfer and became part of the governing rules of the transferee fund, without any express amendment of the governing rules of the transferee fund. There are no previous cases on this point, but the conventional view among superannuation lawyers has been that in a successor fund transfer, the governing rules of the transferor fund do *not* become part of the governing rules of the transferee fund, except to the extent that the governing rules of the transferee fund are expressly amended to preserve the governing rules of the transferor fund – but this is because the governing rules of the transferee fund are amended, not because the governing rules of the transferor fund are automatically carried across to the transferee fund.

Take away points

Trustees will want to consider this judgment carefully before making any amendments to the governing rules of their fund.

Trustees will also want to consider whether any previous amendments to the governing rules of their fund (and perhaps even of predecessor funds) contravened either or both of the prohibition in regulation 13.16 against adversely affecting accrued benefits and the "best interests" duty under the general law and section 52(2)(c) of the SIS Act.

Trustees may also want to consider whether there is any need to review representations made to the members of their fund (and perhaps even of predecessor funds) about their superannuation entitlements.

2. Claim for TPD benefit – *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QSC 245

In dismissing a claim by a member of a public sector superannuation scheme for a total and permanent disablement (TPD) benefit, the Queensland Supreme Court (Bond J) has held that in the circumstances of that case, there was no contract of insurance between the trustee of the scheme and the member. The case is *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QSC 245.

Background

The background to the case included a long history of litigation.

Under Queensland legislation, the Board of Trustees of the State Public Sector Superannuation Scheme (the Board) administers the State Public Sector Superannuation Scheme (the Scheme), known as QSuper. The Scheme was established by the *Superannuation (State Public Sector) Deed 1990* (Qld) (the Deed).

Among other things, the Board provides TPD benefits to Scheme members. The Board is a self-insurer.

In 1994 a person who later became a member of the Scheme was diagnosed with schizophrenia.

On 10 September 2001 he commenced employment with the Queensland Department of Primary Industry. He automatically became a member of the Scheme, with four units of death and TPD cover. Later in 2001, he applied for and was given 17 additional units of death and TPD cover.

The member worked as part of a small team that would search for fire ants by inspecting domestic and commercial premises. In January 2002, in the course of carrying out his duties, he was involved in an incident concerning two Rottweiler dogs. He

was able to continue working, but ceased work in July 2002. In September 2002 he made a claim for income protection benefits on the basis that he had damaged his right foot when he was running away from vicious dogs, tried to jump a fence and fell. That claim was admitted and he received income protection benefits.

The member applies for a TPD benefit

In February 2003, the member applied for a TPD benefit. He described his medical condition that prevented him from working as "damaged body anxiety stress phobic nerves feet". In May 2003 a delegate of the Board determined that he was unlikely to work again and was therefore TPD, but he was not entitled to the TPD benefit because the evidence did not establish that his schizophrenia was not related to a medical condition existing before he became a member.

The Board's 2004 decision

The member appealed to the Board against the delegate's decision. In 2004 the Board affirmed the delegate's decision, for reasons expressed in similar terms to the delegate's decision.

First complaint to the SCT

Later in 2004 the member complained to the Superannuation Complaints Tribunal (SCT) against the Board's decision, under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (Complaints Act). In 2006 the SCT affirmed the Board's decision.

First appeal to the Federal Court

The member appealed to the Federal Court. That appeal was dismissed: *Edington v Superannuation Complaints Tribunal* [2007] FCA 1989. The member appealed to the Full Federal Court. In 2008 that appeal was allowed by consent, as the Board conceded that the SCT had made an error in concluding that a relationship had been demonstrated between the member's schizophrenia as a pre-existing medical condition and the post-traumatic stress disorder which was the basis of the claim under the relevant insurance policy. The SCT's decision was set aside and the matter remitted to the Board: *Edington v Superannuation Complaints Tribunal* [2008] FCAFC 78.

The Board's 2008 decision

In 2008 the Board affirmed its previous decision that the member was not entitled to a TPD benefit for his 21 units.

Second complaint to the SCT

In 2009 the member complained to the SCT against the Board's 2008 decision. Later in 2009 the SCT affirmed the Board's 2008 decision.

Second appeal to the Federal Court

The member successfully appealed to the Federal Court and the SCT's determination was set aside: *Edington v Superannuation Complaints Tribunal* [2010] FCA 504. The Board appealed to the Full Federal Court, which allowed the appeal and in lieu of the orders made by the Federal Court, ordered that the appeal from the SCT's decision be dismissed: *Board of Trustees of the State Public Sector Superannuation Scheme v Edington* [2011] FCAFC 8.

At this stage the member had exhausted his remedies under the Complaints Act and related appeals to the Federal Court. The Board's 2008 decision and the SCT's 2009 determination remained in effect. The member then embarked on a different approach.

Proceeding in the Supreme Court

In 2011 the member commenced a proceeding in the Queensland Supreme Court. He sought a declaration that the Board's 2008 decision was void for breach of fiduciary duty by it as trustee, that it be set aside, and that a substitute decision be made by order of the court.

The member relied on section 8 of the *Trusts Act* (Qld), which provides for the court to review an act, omission or decision of a trustee.

Application for summary disposal

In late 2011, the Board filed an application for summary disposal of the proceeding. This application was dismissed: *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2012] QSC 211. The Queensland Supreme Court (Mullins J) held that the fact that the SCT had affirmed the Board's 2008 decision did not, as a matter of law, preclude the member from seeking to invoke s 8 of the *Trusts Act* in respect of the Board's 2008 decision, as affirmed by the SCT. Further, despite the apparent lack of substance in the member's allegations against the Board, the court was not prepared to exercise the discretion to terminate the proceeding summarily.

Questions for separate determination

At the request of the parties, the Queensland Supreme Court (Bond J) set down a number of questions for separate determination.

The court noted that the member's claim involved two broad alternatives: a claim for review of a decision of the Board as a trustee under section 8 of the *Trusts Act*, and a claim that there was a contract of insurance between the Board and the member which the Board had breached. The questions according fell into two categories: questions about the Board's decision as trustee, and questions about the claim based on a contract of insurance.

The claim for review of a decision of a trustee

It was common ground between the parties that the legislative scheme created a trust. Even so, the court examined the issue. After noting that

there were no explicit statements in the legislation that the Board holds property on trust for members of the Scheme, and observing that a trust may arise from legislation which does not expressly so provide, the court concluded that there were sufficient indicia in the legislation and the subject matter with which they deal to justify the conclusion that the Board was to be regarded as a trustee subject to trust obligations.

The court's jurisdiction under section 8 of the *Trusts Act* was accordingly enlivened (if the merits of the matter otherwise supports an order being made).

The court said that a decision by a trustee in the position of the Board would be regarded as reviewable and capable of being set aside pursuant to section 8 if the Court was satisfied that the decision (at [55]):

(a) was not made in good faith; or

(b) was not made upon a real and genuine consideration of the material before the trustee; or

(c) was not made in accordance with the purposes for which the power to make the decision was conferred.

These bases for challenge by a beneficiary under s 8 may be inferred if the trustee has come to a conclusion which no reasonable person could have come to on the evidence before the trustee.

After referring to the principles applicable to superannuation trustees stated by the High Court in *Finch v Telstra* [2010] HCA 36 and by the Victorian Court of Appeal in *Alcoa of Australia Retirement Plan Pty Ltd v Frost* [2012] VSCA 238, the court said (among other things) that the trustee's duty in a particular case may require the trustee to observe the requirements of natural justice. The court said (at [50(c)]):

> Even though a trustee is not determining a dispute *inter partes*, the trustee's duty in a particular case may nevertheless require the trustee to give attention to the requirements of natural justice and to give the claimant a chance to address adverse information and an opportunity to respond to it. In such a case, failure to give the claimant the requisite chance would be a failure to make appropriate inquiries.

In relation to a trustee's duty to give a member's claim "real and genuine consideration", the court said that real and genuine consideration requires "properly informed consideration". The court expanded on this in the following terms (at [57]):

(a) A trustee in a superannuation context must discharge a "high duty" to make inquiries concerning matters which the trustee may consider to be relevant.

(b) It will usually be wrong for a trustee to approach this issue on the basis of the claimant beneficiary having any onus of proof.

(c) The trustee's duty in a particular case may require the trustee to give attention to the requirements of natural justice and to give the claimant a chance to address adverse information and an opportunity to respond to it, if the trustee is to discharge its duty to make inquiries.

The member contended that there were four "breaches" by the Board which justified setting aside the Board's decision pursuant to section 8 of the *Trusts Act*.

None of these breaches was established.

One of the member's arguments was that the Board had not resolved a conflicting body of medical evidence, and that the Board came to a conclusion that no reasonable person could have come to on the evidence before it. The court rejected this. The Board had resolved the conflicting medical evidence, and had come to a conclusion that was reasonably open to it on the evidence before it (at [89]-[90], [99] and [133]).

The claim for breach of a contract of insurance

As mentioned above, in the alternative, the member contended that between the Board and the member there was a contract of insurance which the Board had breached.

The court rejected the member's contention that there was a contract of insurance, primarily because there was no evidence of an intention of the parties to create contractual relations between themselves. When the member joined the Scheme, he became a beneficiary under a trust. There was an intention to create *legal* (ie equitable) rights and obligations between themselves, but that was not sufficient to justify the conclusion that *contractual* relations were intended, including where the member elects (eg by providing written notice) to increase the level of insurance and that election is accepted by the Board.

In reaching this conclusion, the court observed the following matters in particular (at [171]):

(a) The statutory legal framework which established the trust relationship between the Board and the members of [the Scheme] was already extant before the [member] became a member.

(b) The provision of insurance and the promulgation of the insurance terms by the Board was done in fulfillment of an obligation imposed on the Board by law, namely by ss 84 and 86 of the Deed.

(c) The relationship which was established between the [member] and the Board on 10 September 2001 was established by operation of law automatically when the plaintiff entered into the contract of employment with the [Department of Primary Industry].

(d) Unless some other agreement was struck between the [member] and the Board, the Board was entitled by the operation of

delegated legislation (namely by s 87 of the Deed) to deduct the premiums from the [member's] accumulation account.

(e) The [member] did not adduce any evidence that there had been any other agreement so struck.

The court noted that contractual and fiduciary relationships may exist between the same parties, but the facts of this case did not demonstrate that the parties intended to bring a contractual relationship into existence in relation to the existing trust structure. A case which reached a different result on different evidence in relation to a different superannuation scheme was *United Super Pty Ltd v Built Environs Pty Ltd* [2001] SASC 339. The court refrained from expressing a view as to the correctness of that decision, in the following terms:

> The differences in context and evidence between that case and the present mean that it is unnecessary for me to express a view on the correctness of the conclusion reached.

As mentioned above, the court found that there was no contract of insurance between the Board and the member. In case the court was wrong about this, the court went on to consider whether, if there was an insurance contract, the insurer had breached it. After noting that the test for review of a decision made by an insurer under an insurance contract is expressed differently from the test for review of a decision made by a trustee, the court said that here, applying the test for an insurer rather than the test for a trustee, the answer would not be any different (at [181]-[183]).

Finally, the court said that if it was wrong about this and there was an insurance contract that the Board had breached, the court could and should decide the question for itself (at [190]).

The result

In the result, in answering the questions for separate determination the court said (in effect and among other things) that the Board's 2008 decision that the member was not entitled to a TPD benefit should not be set aside, and that there was no contract of insurance between the Board and the member.

Take away points

Several take away points emerge from this judgment. First, the Queensland State Public Sector Superannuation Scheme is a trust, even though there are no explicit statements in the legislation establishing the Scheme that the Board holds property on trust for members of the Scheme.

Second, in a particular case a superannuation trustee's duty to give a member's claim "real and genuine consideration" may require the trustee to give attention to the requirements of natural justice and to give the member a chance to address adverse information and an opportunity to respond to it.

Finally, in the circumstances of this case there was no contract of insurance between the Board and the member.

3. Unsigned trust deed – presumption of regularity – *Re Thomson* [2015] VSC 370

In apparently the first case of its kind, the Supreme Court of Victoria (McMillan J) has applied the "presumption of regularity" to an unsigned copy of a supplementary deed to the trust deed of a superannuation fund, and held that the supplementary deed was operative. The case is *Re Thomson* [2015] VSC 370.

The facts

The Ken Thomson Superannuation Fund was created by a trust deed in 1986 (the 1986 Deed). It was amended by a supplementary deed in 1990 (the 1990 Deed). The 1990 Deed was lost. The trust deed was amended again by a further supplementary deed in 2000 (the 2000 Deed). Before the court, the only copy of the 2000 Deed was an unsigned copy (at [1]).

Since at least 2007, Kenneth Thomson had been the sole member of the fund. He died in 2014 (at [2]).

The 1986 Deed had named Mr Thomson and a Mr Crane as the trustees of the fund, but the unsigned 2000 Deed had named Mr Thomson and his wife as trustees. In the period from at least 2006 to 2013 Mr and Mrs Thomson had approved the fund's financial statements and reports (at [5]).

Mrs Thomson died in April 2015. At that time the assets of the fund were about $1.247 million (at [3] and [6]).

The proceedings

Mr Thomson's executor applied to the Supreme Court of Victoria for declarations and orders to the following effect (at [2] and [11]):

1. that the 2000 Deed be declared the operative deed of the fund or, alternatively, that the 1986 Deed be declared the operative deed;

2. that the property of the fund be vested in the executor; and
3. that the fund be wound up (as there were no trustees left to administer it), with the associated costs to come out of Mr Thomson's estate.

The presumption of regularity

The executor's principal submission was that the "presumption of regularity" should be applied to render the 2000 Deed operative, even though a signed copy could not be located (at [4]).

The court noted that in *Cross on Evidence* the presumption of regularity is described as "a rebuttable presumption establishing due appointment and capacity to act", and that it has also been expressed in the following terms (at [12]):

> Where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act.

The principle had also been stated by Lindley LJ in *Harris v Knight* (1890) 15 PD 170 in the following terms (at [12]):

> The maxim, “Omnia praesumuntur rite esse acta,” is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried in effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect.

The court noted that the presumption is based on inference from probabilities, and on policy considerations of public and commercial convenience for the smooth operation of business. Although of general application in both criminal and civil proceedings, it is mainly applied to matters of public law (at [13]).

In *Kingham v Sutton* [2002] FCA 506 the Federal Court had considered the application of the presumption in an industrial law context. In that case a question had arisen as to whether it was necessary to verify the legitimacy of all the signatures on a petition of union members requesting a referendum in order for that petition to be valid. In considering the application of the presumption of regularity, Wilcox and Marshall JJ said (at [17]):

> It may be said that most of the instances of its application are found attended by several conditions; first, that the matter is more or less in the past and incapable of easily procured evidence; second, that it involves a mere formality or detail of required procedure in the routine of a litigation or of a public officer's action; third, that it involves to some extent the security of apparently vested rights so that the presumption will serve to prevent an unwholesome uncertainty; and finally, that the circumstances of the particular case add some element of probability.

In *Sutherland v Woods* [2011] NSWSC 13, in the Supreme Court of New South Wales Hallen AsJ (as he then was) had applied the presumption of regularity and said that he would infer, as a matter of probability, that all of the documents associated with the creation of a superannuation fund had been signed, where all relevant parties had arranged their affairs on the basis that the creation of the fund was valid (at [20]).

There did not appear to be any case law that dealt specifically with the present scenario (at [14]).

The judgment

The court held that the presumption of regularity ought to be applied to render the 2000 Deed operative (at [24]).

The court's reasons were (at [24]-[26]):

- based on the financial records provided, it was reasonable to assume that all relevant parties believed the 2000 Deed was effective;
- the existence of the signed 1986 Deed lent probative weight to the contention that an executed copy of the 2000 Deed could be presumed to exist, as the latter document was supplemental to a deed already in existence;
- no fraud was alleged and there was no evidence of irregularity;
- the application of the test in *Kingham v Sutton* supported the conclusion that the presumption of regularity ought to apply. In particular, the matter was some 15 years in the past, and it seemed unlikely that evidence could now be procured that would determine the issue of the execution of the 2000 Deed. The executor had caused all reasonable efforts to locate the document. The application of the presumption would prevent the "unwholesome uncertainty" referred to by Wilcox and Marshall JJ as to the manner in which the estate was to be disposed. The creation of the fund's financial records in reliance on the 2000 Deed and the bank's reliance on the 2000 Deed increased the degree of probability of regularity; and
- if the validity of the 2000 Deed were not established, reliance upon the 1986 Deed

would most probably lead to the same result, except that the executor would not have to reassess the fund's financial statements and reports that had been approved in the belief that the 2000 Deed was operative.

The result

In the result, the court made orders to the following effect:

- the operative trust deed of fund was the 2000 Deed;
- the property of the fund be vested in the executor;
- the fund be wound up; and
- the costs of the proceeding be paid out of Mr Thomson's estate.

Take away point

Where an executed version of a trust deed cannot be located, the presumption of regularity may apply to render an unexecuted version operative.

4. Enterprise agreement – proposed closure of defined benefits plan – *Lend Lease Building v CFMEU* [2015] FWCFB 5081

As reported in item 1 of the June 2015 issue of the Thomson Geer Superannuation Case Law Update, on 26 March 2015 the Fair Work Commission (Commissioner Riordan) decided and ordered that an employer covered by an enterprise agreement "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 would remain members of the plan until the agreement is superseded by a replacement enterprise agreement.

The Full Bench of the Commission (Senior Deputy President Drake, Deputy President Asbury and Commissioner Cambridge) has refused the employer permission to appeal that decision and order. The case is *Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FWCFB 5081.

Background

The background to the dispute was set out in item 1 of the June 2015 issue of the Thomson Geer Superannuation Case Law Update. What follows is a short summary.

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 Benefit 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 11.2 of the agreement provided (among other things) for employees joining the company prior to 1 January 1999 to be members of the Defined Benefit Plan.

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

In February 2014 Lend Lease Corporation announced a proposal to close the Defined Benefit Division, and in May 2014 the trustee of the fund notified members that the Defined Benefit Division would close on 31 May 2014.

The first proceeding – 2014

In May 2014 the CFMEU notified a dispute to the Commission. The CFMEU contended that the decision to terminate the Defined Benefit 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: *Construction, Forestry, Mining and Energy Union v Lend Lease Building Pty Ltd* [2014] FWC 4032. The Commission held that it did not have jurisdiction to resolve the dispute, as the dispute resolution procedure had not been complied with, and the CFMEU's application was dismissed.

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: *Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FWC 1966. The Commission examined clause 11 of the enterprise agreement and held 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.

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 superannuation 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.

Application for permission to appeal

Lend Lease Building applied for permission to appeal the second proceeding, on the following grounds:

1. The Commissioner erred in failing to provide adequate reasons for his conclusion … that "members of the [Defined Benefit Plan] employed by [Lend Lease Building] are entitled to remain members of the fund for the life of [the enterprise agreement]".

   …

2. The Commissioner erred in failing to properly take into account relevant considerations, namely the matters raised by [Lend Lease Building] supporting its preferred construction of clause 11.2 of the [enterprise agreement]

   …

3. The Commissioner erred in constructively failing to exercise the jurisdiction conferred upon the Commission to deal with the dispute.

Decision of the Full Bench

The Full Bench of the Commission made its decision on 8 September 2015: *Lend Lease Building Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FWCFB 5081.

The Full Bench found no appealable error in the decision of Commissioner Riordan and could not identify public interest in the question for determination. Permission to appeal was accordingly refused.

In reaching this conclusion, the Full Bench rejected a submission by Lend Lease Building that there was no express obligation in the words of clause 11.2 of the enterprise agreement to "maintain in perpetuity a defined benefit division of the superannuation plan to which [Lend Lease Building] employees participate". Rather, the clause stated that employees may be members of the defined benefit division for so long as the enterprise agreement remains in operation.

The Full Bench went on:

> We are satisfied and find that, contrary to the submission of [Lend Lease Building], that [the enterprise agreement] by the natural and ordinary meaning of the words in clause 11.2(c)(ii), confirms the entitlement of employees to be members of the defined benefit division of the superannuation plan for the term of [the enterprise agreement]. We are satisfied that the natural and ordinary meaning of the words "…may be members" is that the relevant employees - those employees who were members of the defined benefit plan prior to 1 January 1999 - may continue to be members for the term of the operation of [the enterprise agreement].

Finally, the Full Bench rejected a criticism by Lend Lease Building of Commissioner Riordan's decision for its reliance on Deputy President Gooley's reasoning and conclusion, and a contention that the Commissioner had not dealt with the relevant question himself. Commissioner Riordan had considered the relevant question himself, while also adopting the reasoning of Deputy President Gooley. The Full Bench said that it also agreed with the reasoning and conclusion of Deputy President Gooley and could identify no error in the Commissioner's adoption of those reasons.

The result

In the result, the Full Bench refused Lend Lease Building permission to appeal. The Order issued on 26 March 2015 stood – ie the order that Lend Lease Building "take all steps reasonabl[y] available to it to have, and use its best endeavours to procure", Lend Lease Corporation and the superannuation trustee to not alter or close the Defined Benefit Plan, so that the members of the plan covered by the enterprise agreement would remain members of the 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.

5. Liability for conduct of authorised representative – *Casaclang v WealthSure Pty Ltd* [2015] FCA 761

The Federal Court (Buchanan J) has held an Australian financial services (AFS) licensee liable for the conduct of its authorised representative under section 917B of the *Corporations Act 2001* (Cth), in circumstances where that authorised representative had acted outside his authority. The case is *Casaclang v WealthSure Pty Ltd* [2015] FCA 761.

Legislative framework

Section 917B

Section 917B of the *Corporations Act 2001 (Cth)* makes an AFS licensee responsible for the conduct of its representative, irrespective of whether the conduct was within the representative's authority. Section 917B reads:

> **917B Responsibility if representative of only one licensee**
>
> If the representative is the representative of only one financial services licensee, the licensee is responsible, as between the licensee and the client, for the conduct of the representative, whether or not the representative's conduct is within authority.

The liability of an AFS licensee under section 917B is broader than the liability of a principal for the conduct of its agent under the general law. Under the general law, a principal is only liable for the conduct of its agent where the agent is acting within their authority.

Prior to *Casaclang*, section 917B had received little judicial consideration.

Section 769B

Separately, section 769B of the Corporations Act makes general provision for when a body corporate is, for the purposes of Chapter 7 "Financial Services and Markets", liable for the conduct of its agents. Conduct by an agent is taken to be the conduct of the corporation if within the scope of the agent's actual or apparent authority.

The facts

WealthSure Pty Ltd (WealthSure) carried on a financial services business and held an AFS licence (at [10] and [12]).

WealthSure appointed a Mr Oberg, a financial planner, as an authorised representative (at [10]).

After receiving complaints from clients of Mr Oberg about him, in 2010 WealthSure terminated his appointment as an authorised representative (at [31]).

The proceedings

In 2013 Mr and Mrs Casaclang and a number of other clients of Mr Oberg commenced proceedings against WealthSure in the Federal Court. Mr Oberg was not a party to the proceedings (at [1] and [5]).

The clients' allegations against Mr Oberg varied according to their dealings with him.

Mr and Mrs Casaclang alleged that over about a 10 year period Mr Oberg had approached Mr Casaclang on number of occasions trying to interest him in providing money, to be pooled with other investments, to provide loan funds for short term finance on the basis of good returns. Mr Oberg then made a further approach to Mr Casaclang proposing an investment of $70,000 to $75,000 for only three months. Mr Casaclang was assured there was no risk because Mr Oberg had "investment insurance through WealthSure". Mr Casaclang, relying on the nature of the investment described, including that it was "no risk", transferred $75,000 from their joint accounts into Mr Oberg's hands. The money was never repaid (at [46]-[48] and [254]-[255]).

The claims against WealthSure

The clients formulated their claims against WealthSure in a number of ways.

Staying with the claim by Mr and Mrs Casaclang, their main arguments – which succeeded – were that:

Mr Oberg's misconduct

- Mr Oberg's statement about the "no risk" investment (referred to above) contravened the prohibition in section 1041E of the *Corporations Act* against making a false statement likely to induce a person to acquire a financial product;
- Mr Oberg had breached his contract with Mr and Mrs Casaclang by failing to provide the services with reasonable care (at [390]);
- Mr Oberg had been negligent (at [390]);

Attribution of Mr Oberg's misconduct to WealthSure

- section 917B of the *Corporations Act* made WealthSure liable for Mr Oberg's conduct referred to above (ie irrespective of whether it was within authority). They could recover damages under section 1041I (at [256], [267] and [393]); and
- alternatively, WealthSure was liable for Mr Oberg's conduct referred to above by virtue of section 769B of the *Corporations Act*, as the conduct was within the scope of Mr Oberg's apparent authority. The Financial Services Guide said that Mr Oberg acted on behalf of WealthSure (at [274]-[277] and [393]).

Mr Oberg had also failed to give a Product Disclosure Statement, as required by section 1012A of the *Corporations Act*. Section 1022B(4)(a) made WealthSure liable for that failure of Mr Oberg as its authorised representative (at [378] and [381]).

Section 917B

Perhaps the most interesting aspect of the judgment is the court's commentary on section 917B of the *Corporations Act*.

The court noted that the section only applies to conduct of a "representative". Therefore, it cannot apply to an authorised representative once their authorisation has been revoked. The court also noted the limitation (in section 917A(1)(b)) that the conduct be conduct upon which the client "could reasonably be expected to rely" (at [201]-[203]).

The court then contrasted liability under section 917B with the liability of a master for the conduct of their servant under the general law – in which context the concept of "going on a frolic" appears. The court said (at [204], emphasis added):

> 204. Within the boundaries I have identified, s 917B assigns responsibility to WealthSure for the conduct of Mr Oberg while he was an authorised representative even if he was (as Barrett J said in *Zhang v Minox Securities Pty Ltd; Liu v Minox Securities Pty Ltd* [2008] NSWSC 689 at [33]) *on a "frolic of his own"*. The colloquial content of this phrase is not without importance in an understanding of this issue at the heart of the present case. The phrase appears to have its origins in a summing up by Parke B, recorded in *Joel v Morison* (1834) 6 C & P 501; 172 ER 1338; [1834] EWHC KB J39, where he said:
>
> > 5. … This is an action to recover damages for an injury sustained by the plaintiff, in consequence of the negligence of the defendant's servant. There is no doubt that the plaintiff has suffered the injury, and there is no doubt that the driver of the cart was guilty of negligence, and there is no doubt also that the master, if that person was driving the cart on his master's business, is responsible. If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going *on a frolic of his own*, without being at all on his master's business, the master will not be liable. …
>
> 205. In the present case, Mr Oberg may be said to have been, to a substantial extent, engaged on an enterprise of which WealthSure neither knew or would have approved. *He may truly be said, in those respects, to have been on a frolic of his own, well outside his authority. Nevertheless, s 917B makes WealthSure responsible, and intendedly so.*

The court further noted that section 917B does not require that there be a relationship between the licensee and the "client". The client is simply a third party who could reasonably be expected to rely on the conduct of the representative (at [206]).

The court noted that the responsibility and liability cast on WealthSure for Mr Oberg's conduct by section 917B was "strict and unyielding" (at [208]).

The result

In the result, all of the clients were entitled to relief by way of damages or compensation for their claimed loss, plus interest from the date of those losses which was in each case the date of transfer of funds to the control of Mr Oberg (at [304]).

Take away points

This case is interesting because it is the first time that a court has commented in any detail on section 917B. The case illustrates the broad reach of both that section and section 769B (about conduct within actual or apparent authority).

It should be noted that while this case involved conduct of an authorised representative, section 917B extends to conduct of a "representative". "Representative" of an AFS licensee is defined broadly (in section 910A(a)) as an authorised representative of the licensee, an employer or director of the licensee or of a related body corporate of the licensee, or "any other person acting on behalf of the licensee". This last category is very broad and apparently even catches another AFS licensee acting on behalf of the first licensee.

Section 917B has broad reach indeed.

6. Claim for TPD benefit – insurer's duty to act in utmost good faith – *Panos v FSS Trustee Corporation* [2015] NSWSC 1217

In dismissing a claim by a member of a superannuation fund for a total and permanent disablement (TPD) benefit, the Supreme Court of New South Wales (Robb J) has considered an insurer's duty to act with the utmost good faith. In particular, the court said that procedural fairness required the insurer to provide the member with "at least a concise outline of its position in relation to the evidence that it regarded to be significant". The case is *Panos v FSS Trustee Corporation* [2015] NSWSC 1217.

Background

The trustee of a superannuation fund held an insurance policy that provided TPD cover. The definition of TPD in the policy included the concept of the fund member "having provided proof [of incapacity] to the satisfaction of [the insurer]" (at [14]).

In 2011 a member of the fund was injured in a motor vehicle accident.

In 2012 the member lodged a claim for a TPD benefit with the trustee by a letter sent by his solicitors. The letter included documents in support of his claim, including claim forms and medical evidence (at [23]).

The proceedings

The member commenced proceedings against the trustee and the insurer in the Supreme Court of New South Wales. Neither the trustee nor insurer had made a determination of the member's claim.

The member sought a declaration that the trustee and the insurer had constructively denied his claim for a TPD benefit, a declaration that he was TPD, and an order that the insurer pay to the trustee in trust for the member the insured benefit together with costs and interest (at [24]).

The member later filed an amended statement of claim in which he limited his claim to a declaration that the insurer had constructively denied his claim (at [32]). The trustee filed a submitting appearance, save as to costs (at [35]). The parties apparently accepted that if the court made the orders sought by the member and the insured TPD benefit was paid by the insurer to the trustee, the trustee would in due course pay that amount to the member (at [2]).

One week before the proceedings were due to be heard, the insurer wrote a letter (the procedural fairness letter) to the member's solicitors listing the documents that the insurer was going to consider when making its determination of the member's claim, including some documents not previously provided to the member. The procedural fairness letter sought comment from the member by a deadline that was less than 2 days from the date of the procedural fairness letter (at [37]).

The insurer later informed the member that it had determined to decline his claim (at [39] and [41]).

The trustee's solicitors wrote a letter to the insurer in which they requested that the insurer review its determination, and to reconsider the claim on further evidence (at [45]).

The insurer responded by saying that it had reviewed its first decision, but that that review had led it to decide to make further enquiries before completing its reconsideration.

The member filed a further amended statement of claim seeking a declaration that the insurer's decision to decline his claim was wrong at law and therefore void (at [84]).

The issues

The court considered that there were 2 issues. First, whether the insurer's determination to decline the member's claim should be set aside because the insurer had not processed the member's claim with utmost good faith. Second, if the insurer's determination was set aside, whether the member had established that he was entitled to the TPD benefit (at [217]).

The decision

The court concluded that the insurer had not complied with its obligation to process the member's claim with the utmost good faith (see below), and that the insurer's decision to decline the claim should be set aside (at [217]).

The court then considered the evidence provided by the insurer and the member, but held that the member had failed to establish that he was entitled to the TPD benefit under the policy (at [284]–[470]).

Utmost good faith

As mentioned above, the court found that the insurer had not complied with its obligation to process the member's claim with the utmost good faith.

The court's reasons for this conclusion were as follows (at [217]-[263]):

- there was no apparent reason why the insurer had taken such a long time to make its determination or took such a long time to send the procedural fairness letter to the member (at [222]);
- the insurer had given the member no more than 2 days to provide to it any further submissions and evidence in support of his claim. The court said that this time period was "manifestly inadequate" (at [224]);
- while the insurer had requested comments from the member on material that may have been adverse to his claim in the procedural fairness letter, the letter did not identify any parts of the material that the insurer

considered were adverse to the member's claim (at [226]-[227]). The court said ((at [229]):

> Particularly considering the brevity of time that the Insurer gave [the member] to respond, in my view it is clear that [the member] and his legal representatives had no real opportunity to analyse the material, and provide an effective response in the time available …

The court went on (at [233]):

> In my view, in the circumstances of this particular case, where the consideration by the Insurer of [the member's] claim had become so protracted, and it had accumulated over the time such a large amount of disconnected, and in many cases significantly inconsistent, evidence, reasonable fairness required that the Insurer would provide the trustee and [the member] with at least a concise outline of its position in relation to the evidence that it regarded to be significant, including as to the medical evidence that it preferred, the aspects of [the member's] statements that it questioned, the extent of [the member's] disabilities that it accepted, and the approach it was minded to take concerning the real prospects that [the member] would actually gain employment that was reasonably suitable on the basis of his education, training and experience, and then give [the member] adequate time to make a focused response. In particular, in my view, the same reasoning that supports a conclusion that an insurer should not rely upon a medical report that it has obtained, without giving the claimant an opportunity to respond to the report, supports the conclusion that the insurer should not act upon the conclusion that it does not believe the evidence personally given by the claimant, without giving the claimant a warning, and an opportunity to respond specifically to the reasons why the insurer is not inclined to accept the claimant's evidence.

- the court considered that the insurer had expedited its decision because there was an impending hearing date and in an attempt to counter the member's constructive denial claim. The court said (at [235]):

  > In taking that course, the Insurer acted entirely in its own interests, and sacrificed the entitlement of [the member] to receive any "procedural fairness" at all. Thereby, the Insurer breached its duty of utmost good faith to [the member] …

- the insurer's letter to the member declining his claim had not fairly summarise the report of his treating doctor, and the insurer had not taken the trouble to ask the doctor to respond more fully, or send the response to the member, with enough time to allow him to ensure that his treating doctor responded properly (at [243]); and

- in declining the member's claim, the insurer had not considered some of the medical reports provided by the member (at [253]).

Claim process

The court made a number of comments about the process an insurer, a superannuation trustee and a member should adopt in dealing with a claim of this nature.

First, between the insurer and the member, the process should not be adversarial. The court said:

> 268. The process that must be applied by the Insurer is akin to administrative determination. The process is not adversarial. The applicant is required to provide materials to assist the Insurer to reach the necessary satisfaction. There is no burden of proof on the applicant in the strict sense. The process is in some respects inquisitorial, but with the difference that the Insurer has a positive duty to act with utmost good faith (as does the trustee, and by implication, the applicant). The process is in some respects collaborative. The Insurer must take reasonable steps to ensure that it protects the interests of the applicant, and not just its own. The Insurer's consideration of the issues need not comply with all of the strictures to which a judicial determination is subject; in particular, the rules of evidence. The Insurer does not need to publish reasons that satisfy the requirements applicable to the reasons necessary to support a judicial decision. The Insurer must give adequate and clear reasons, but their validity will not be determined by the court as if on appeal.

Second, the member should not be expected to bear the costs of the investigation:

> 270. While, in a practical sense, the applicant has a burden to put sufficient material before the Insurer, it is not expected that the applicant will bear the cost burden of a full forensic investigation and proof. Much of the cost of the determination will be an overhead of the Insurer (or the trustee).

Third, the duty of utmost good faith may require the member to provide all their material to the trustee and the insurer:

> 274. Not only will it be natural for the applicant to provide all of this material to the trustee, and then the Insurer, to support his or her TPD claim, but the applicant's own duty to exercise utmost good faith may require it.

Fourth, the member can rely on the trustee and the Insurer to commission substantive expert reports where that is thought necessary, and provide them to the member for comment:

> 275. Although cases may occur where it appears desirable for the applicant to commission expert medical and other opinion to support the applicant's TPD claim, it is more likely to appear sufficient for the applicant to supply the materials that have been produced over time, in the ordinary course (not least for reasons of cost), and to rely upon the trustee and the Insurer to commission substantive expert reports where that is thought necessary, in the expectation that the results will be supplied to the applicant for response.

Finally, where it becomes necessary for the court to decide the question of whether the member is entitled to a TPD benefit because the court has set aside the determination made by the insurer, the court is then required to make the determination on the basis of a conventional adversarial approach. In this situation:

> 281. …It is for the applicant to support his or her case by the necessary evidence. The Insurer ceases to have any positive obligation to assist the applicant in the presentation of his or her case.

The result

In the result, as the member had failed to establish that he was entitled to the TPD benefit under the policy, the court ordered that his claim be dismissed, and that the parties be given leave to make submissions on all questions of costs (at [472]).

Comments

The court's comments about what procedural fairness requires of an insurer are supported by authority and are uncontroversial.

However, the court's other comments about the process an insurer, a superannuation trustee and a member should adopt in dealing with a claim of this nature are somewhat inconsistent with authority and may need to be treated with caution.

For example, the court said (at [268])

> The Insurer must take reasonable steps to ensure that it protects the interests of the applicant, and not just its own.

This statement can be read as implying that, depending on the circumstances, an insurer's duty of utmost good faith may require it to actively investigate a claim, to "protect the interests of" the claimant.

However, it is a fundamental principle of insurance law that the insured (and not the insurer) bears the onus of proving (on the balance of probabilities) that a loss is covered by the terms of the policy: *British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41. In *Petersen v Union des Assurances de Paris IARD* (1995) 8 ANZ Ins Cas 61-244 at 75,749 (affirmed (1997) 9 ANZ Ins Cas 61-366) Rolfe J said, under the heading of "A consideration of some principles":

> Firstly, the plaintiffs must establish that the cause of the loss and/or damage was a result of an insured peril, in the sense that the insured peril was the dominant or effective proximate cause.

The insurer is entitled to put the insured to strict proof that a loss covered by the policy has occurred. In *Regina Fur Co Ltd v Bossom* [1958] 2 Lloyd's Rep 425 at 428 Lord Evershed MR said:

> I think that a defendant — whether he is an underwriter or any other kind of defendant — is entitled to say, by way of defence, "I require this case to be strictly proved, and admit nothing".

In *Chapman v United Super Pty Ltd* [2013] NSWSC 592 at [52] Young AJ said:

> … I am not the person who decides whether the [member] is totally and permanently disabled. The Trust Deed gives that decision to the Trustee and the Insurer. When considering that decision it is important to remember that the plaintiff clearly bears the onus of proving the loss is covered by the terms of the policy: *Petersen v Union des Assurances de Paris IARD* (1995) 8 ANZ Ins Cas 61-244 and that the Insurer is entitled to put the claimant to strict proof: *Regina Fur Co Ltd v Bossom* [1958] 2 Lloyd's Rep 425. Although these propositions may have to be stated with less certainty after the High Court's decision in *Finch v Telstra Super Pty Ltd* [2010] HCA 36, they remain basically true for the instant case.

In former times, insurance policies often contained a clause requiring the insured to provide, in support of their claim, proof of loss to the satisfaction of the insurer. For example, the policy considered in *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782; 121 ER 904 required the production of "proof satisfactory to the directors of the company". It was held that, as a matter of construction, this clause did not permit the insurer to act "capriciously" or "unreasonably" in requiring further evidence, or to "require any evidence, however chimerical, capricious, and unjust the asking for it might be". Similarly, in *Moore v Woolsey* (1854) 4 El & Bl 243; 119 ER 93 at 99 Lord Campbell CJ said that it was sufficient for the insured to show that proof had been laid before the directors, "with which reasonable men would be satisfied". The inference then arose that the proof had been to their satisfaction.

More recently, in *Edwards v Hunter Valley Co-op Dairy Co Ltd* (1992) 7 ANZ Ins Cas 61-113 at 77,536 McLelland J cited these and other cases as supporting the principle that:

> In the field of insurance, it is well established that where under a contract of insurance an element of the insurer's liability is expressed in terms of the satisfaction or opinion of the insurer, *the insurer is obliged to act reasonably in considering and determining that matter* … (emphasis added)

Neither these cases nor the "procedural fairness" line of cases beginning with *Beverley v Tyndall Life Insurance Co Ltd* [1999] WASCA 198; (1999) 21 WAR 327 and including *Sayseng v Kellogg Superannuation Pty Ltd* [2003] NSWSC 945 (affirmed in *Hannover Life Re of Australasia Ltd v Sayseng* [2005] NSWCA 214; (2005) 13 ANZ Ins Cas 90-123) say or suggest that that an insurer is subject to a general duty to actively investigate claims. Rather, these cases support the narrower principle that the insurer is required to give the insured (or a person with a sufficient interest in the policy benefit, such as the member in *Sayseng v Kellogg Superannuation*) an opportunity to respond to adverse material on which the insurer intends to rely, before the

insurer makes its decision.

Take away point

This case confirms that procedural fairness requires an insurer to provide a claimant with at least a concise outline of its position in relation to the evidence that it regarded to be significant. It is not sufficient for the insurer to simply provide the claimant with a bundle of documents, or a list of documents, that the insurer is going to consider in making its decision about the claim.

7. Video will – *Re Estate of Wai Fun Chan, Deceased* [2015] NSWSC 1107

The Supreme Court of New South Wales (Lindsay J) has admitted to probate a codicil to a will in the form of a digital video disc (DVD) recording. This appears to be the first time that a "video will" has been admitted to probate in New South Wales. The case is *Re Estate of Wai Fun Chan, Deceased* [2015] NSWSC 1107.

The facts

Mrs Chan died in Sydney in June 2012, aged 85 years. She had been born in China but lived in Australia for 23 years before her death.

On 6 March 2012 she executed a formal will, in English, prepared by a solicitor. She had wanted to make a special legacy in favour of 2 of her daughters above and beyond the provision made for her 8 children generally, but one of those daughters, acting against self-interest, had dissuaded her from doing this in that formal will (at [35]-[36]).

Mrs Chan was dissatisfied with the formal will, but was not able to return to the solicitor's office.

On 8 March 2012 she made a short oral statement in Cantonese that was recorded on DVD. In this statement she said that she wanted to give a special legacy in favour of the 2 daughters (as referred to above). The recording was made with the help of one of those daughters and her spouse at home in the kitchen (at [37]-[38] and [65]).

The application for probate

The 2 daughters applied for a grant of probate of the formal will, together with the video will as a codicil, as the executrices named in the formal will. Their application was accompanied by a transcription of the video will in Chinese, and a certified English translation of that transcription (at [39]).

After requisitions, the application was eventually referred to the Probate List Judge (Lindsay J) (at [44]-[45]).

The judgment

The court noted that Mrs Chan had commenced her oral statement by recording the date it was made (8 March 2012) and an express claim to be “of a clear and sound mind”. That opening declaration was followed by a series of short, and apparently well-considered, disciplined statements of intent (coupled with motherly exhortations in passing) that stood neatly with the will as an alteration of the primary document. Her presentation was "calm, measured and at ease with the surroundings" (at [63]-[66]).

The court said that the form of the video will, reinforced by extrinsic evidence as to the circumstances and manner in which it was made and the absence of any objection from adverse interests, left no room for doubt about her knowledge and approval of the recorded dispositions, freely and voluntarily made (at [65]).

The court was satisfied that the video will met the requirements for admission to probate as an "informal will" under section 8 of the *Succession Act 2006* (NSW) (as opposed to a "formal will" under section 6) (at [66]).

The result

In the result, the court ordered that the formal will dated 6 March 2012 and the codicil made on 8 March 2012 (in the form of the DVD recording) be admitted to probate (at [67(1)]).

Implications for superannuation trustees

Due to the requirements as to form in regulation 6.17A(6) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth), a DVD recording made by a member could never constitute a valid binding death benefit nomination.

However, where there is no valid binding death benefit nomination, a DVD recording made by the member is a matter that a superannuation trustee could take into account in exercising its discretion as to the manner of payment of a death benefit. A trustee could look to a formal will, a DVD recording or any other statement by the member as a source of information as to the member's wishes.

8. Trustee's offer of settlement – calculation of benefits – *Sherrah v Commonwealth Superannuation Corporation* [2015] FCA 698

The Federal Court (Besanko J) has upheld a determination of the Superannuation Complaints Tribunal (SCT) that a trustee offering a settlement amount, rather than recalculating a benefit in the way sought by the member, was fair and reasonable. The case is *Sherrah v Commonwealth Superannuation Corporation* [2015] FCA 698.

The facts

The member made an application for a retirement benefit from the Commonwealth Superannuation Scheme (the Fund) and received a lump sum and an annual pension (at [4]-[6]).

The member was given incorrect advice by either the trustee or its administrator about the date on which his benefit would be calculated (at [7]). The member said that had he received the correct advice, he would have switched his account from the default investment option to the cash option pending the payment of his benefit (at [8]).

In March 2012 the member complained to the SCT.

In October 2012 the trustee made an offer of compromise to the member. The offer was the difference between the benefit the member received and the benefit he would have received had he switched his account to the cash option. The trustee acknowledged that the member had been given incorrect advice. The trustee said that the member's claim for a benefit had been processed by it in accordance with the rules of the Fund, having regard to the definition of "termination day" in the *Superannuation Act 1976 (Allocated Interest – CSS) Determination 2007* (Cth) (the Determination) (at [9]).

The member rejected to the trustee's offer. In August 2013 the trustee improved the offer.

The member rejected the improved offer claiming that his benefit should be recalculated using his preferred calculation dates and that the improved offer was not tax-effective for him. He sought an increased offer (at [11]).

The SCT determination

The SCT identified the issue on which it had to make a determination as whether the decision of the trustee to make an offer to settle the member's claim, rather than recalculate his benefit, was fair and reasonable. The SCT said the issue was not what decision it would have made on the evidence before it (at [14]).

The member argued that calculation of benefits on the date determined by the trustee could result in members receiving different benefits if their benefits were paid on different days and that was without regard to the need for equity between members or performing duties and exercising powers in the best interests of the beneficiaries.

The SCT rejected this submission. The SCT considered that the trustee has properly applied the governing rules of the Fund in regard to calculation of the member's benefit.

The SCT said that allowing members to determine the date on which their benefits were calculated could allow arbitrage against the Scheme and potentially disadvantage other members of the Fund (at [18]).

The SCT concluded that the trustee had acted fairly and reasonably by offering a settlement, rather than recalculating the member's benefits (at [21]).

The appeal

The member appealed the SCT determination to the Federal Court, seeking orders to have the trustee recalculate his benefit from his preferred calculation date.

The appeal was lodged outside the time limits for lodgment of appeals and the member applied for leave to lodge his appeal outside these time limits. The court granted his application and allowed his appeal (at [28]).

The trustee unsuccessfully sought to have the appeal dismissed on the basis that the member's arguments did not raise an error of law (at [29]).

Briefly stated, the questions of law raised by the member in the appeal mostly concerned whether the governing rules of the Fund and relevant legislation permitted the member's benefit to be calculated on the date used by the trustee. He also raised questions as to whether an allowance for capital gains tax should have been included in the trustee's offer of settlement (at [25]).

The court's decision

The member submitted that the SCT's determination of the date on which the member's benefit should be calculated was erroneous. In support of this, he pointed to the following:

- the SCT's interpretation of when the benefit payable could result in differences in the size of benefits between members whose position is essentially the same;
- a reason advanced by the SCT for the construction of the Determination which it adopted, namely, that could engage in arbitrage against the Fund; and
- if the SCT's interpretation of the calculation date for the member's benefit is the correct one, it is contrary to the provisions of the relevant legislation (at [42]).

The court rejected all these arguments.

It considered the provisions relating to the calculation date for the benefit were clear and, this case, correctly applied.

The court said that the SCT did not suggest that the member was trying to lock in rates retrospectively and engage in arbitrage against the Fund. Rather, it was saying that the interpretation of the governing rules advanced by the member could have that consequence.

Finally, it could be assumed that the trustee would calculate and process benefits in the ordinary course of business and there is nothing to suggest that the date would be manipulated.

The result

In the result, the court dismissed the member's appeal and upheld the determination of the SCT.

Take away point

The determination illustrates that a trustees can make offers of compromise in matters before the SCT.

9. Insurer's actual decision-making process off limits in determining claim for interest – *O'Neill v FSS Trustee Corporation* [2015] NSWSC 1248

In dismissing a claim by a member of a superannuation scheme for preliminary discovery by the scheme's insurer, the NSW Supreme Court (Slattery J) has held that in the circumstances of that case, the member had sufficient information to decide whether to bring a claim for interest against the insurer under s 57 of the *Insurance Contracts Act 1984* (Cth). The case is *O'Neill v FSS Trustee Corporation* [2015] NSWSC 1248.

Background

Mr O'Neill (the member) was a member of a superannuation scheme which was established for the benefit of serving police officers in the NSW Police Force.

The trustee of the scheme maintained two group life insurance policies in association with the scheme, with the same insurer.

From 1989 until 2009, the member was a serving police officer of the NSW Police Force.

From 1990 until 1995, the member was posted to King's Cross Police Station in Sydney, for which he received training about the risks of Hepatitis C and HIV. Following this training, he developed a phobia towards germs and eventually developed a disabling Obsessive Compulsive Disorder.

In 2008, the member submitted a workers compensation claim. In mid-2009, he stopped serving in the NSW Police Force.

In 2010, the NSW Police Force accepted that the member was permanently incapacitated for work and approved his medical discharge.

In 2011, the member applied to the trustee for a total and permanent disability (TPD) benefit. Later in 2011, the member attended an independent

medical examination. The doctor's report confirmed that the member suffered from severe Obsessive Compulsive Disorder and that he was TPD.

Later in 2011, the insurer organised covert surveillance of the member, and supplied the doctor with the resultant surveillance report. Following the doctor's review of the surveillance report, in late 2011, the doctor issued a supplementary report that said the member was "not disabled in any capacity".

In 2012, the trustee informed the member that it was initiating a "Procedural Fairness" process regarding his claim.

The Claims Review Committee considers the claim

On 5 February 2013, the insurer informed the trustee that it had decided to decline the member's TPD claim. The trustee invited the member to have the claim considered by the Claims Review Committee. (The Claims Review Committee consisted of an independent chairman agreed by the trustee and the insurer, together with one representative of the trustee and one representative of the insurer. The insurer had agreed to be bound by the outcome of that contractual expert review process.)

The claim is paid

Later in 2013, the Trustee advised the member that his TPD claim had been admitted by the Claims Review Committee. Shortly after, and approximately 32 months after applying for his TPD benefit, the member received a payment from the insurer in satisfaction of his TPD claim.

The member applies for preliminary discovery

In mid-2014, the member filed a Summons in the Supreme Court of NSW against the trustee and the insurer seeking preliminary discovery of documents relating to his potential entitlement to relief against the insurer:

- for interest under s 57 of the Insurance Contracts Act; and
- for the insurer's alleged breach of its contractual obligation to act with the utmost good faith pursuant to either s 13 of the Insurance Contracts Act or its common law duty as an insurer.

The Assistant Registrar refused to order preliminary discovery.

The member applies for a review

The member applied for the court to review and set aside the Assistant Registrar's decision, and to order the insurer to give preliminary discovery on the basis of the potential claim for interest under s 57 of the Insurance Contracts Act alone (ie the member dropped his alternative claim for preliminary discovery on the basis of failure to act with the utmost good faith). Specifically, the member sought "documents that are or have been in the [insurer's] possession and that relate to the question of whether or not the [member] is entitled to make a claim for relief [pursuant to s 57 of the Insurance Contracts Act]."

The issues before the court

The member's standing to bring proceedings against the insurer

The member was not a party to the insurance policies issued by the insurer to the trustee. He argued that he had standing to bring proceedings directly against the insurer pursuant to s 52 of the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act).

Section 52 specifies covenants which are taken to be included in the governing rules of all registrable superannuation entities under the SIS Act. The trustee was the trustee of such an entity. Relevantly to insurance, s 52(7)(d) provides:

> (7) The covenants referred to in subsection (1) include the following covenants by each trustee of the entity:
>
> …
>
> (d) to do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success.

Here, the member argued that he could have enforced s 52(7)(d) by directing the trustee to bring his potential claim against the insurer, and that this meant he had standing to seek preliminary discovery by the insurer directly.

The insurer conceded that the member had standing to bring a claim directly against the insurer under s 57 of the Insurance Contracts Act as a person entitled to receive a payment under a contract of insurance.

The only remaining issue was whether an order for preliminary discovery was justified in support of the member's potential action for interest under s 57.

Preliminary discovery

Under r 5.3 of the Uniform Civil Procedure Rules 2005 (NSW), the court may order a party to a proceeding to give preliminary discovery.

The court noted (at [38]):

> The purpose of r 5.3 is not merely to enable an applicant to determine whether a cause of action is available. As Hely J explained in *St George Bank Ltd v Rabo Australia Ltd* (2004) 211 ALR 147 at [26](f), "The question is whether the applicant has sufficient information to make a decision *whether to commence proceedings* in the Court."

The court broke down the provisions of r 5.3(1)(a) and (b) into the following 5 elements relevant to the member's claim for preliminary discovery (at [40]):

(1) Whether [the member] may be entitled to make a claim for s 57 relief against [the insurer];

(2) Whether [the member] has made reasonable inquiries to obtain sufficient information to decide whether or not to commence proceedings against [the insurer];

(3) If so, whether [the member] is unable to obtain sufficient information to decide whether or not to commence proceedings against [the insurer];

(4) Whether [the insurer]may have or have had possession of a document or thing that can assist in determining whether or not [the member] is entitled to make such a claim for relief, and

(5) Whether inspection of such a document would assist [the member] to make the decision concerned.

Element 1 – entitlement to claim

The court noted that the insurer had all but conceded that interest pursuant to s 57 of the Insurance Contracts Act may have been payable to the member. Further, the court was satisfied that the member had standing to directly make a claim against the insurer (see above). On this element, the court found in the member's favour.

Element 2 – reasonable inquiries

The insurer argued that the member had not made reasonable inquiries to obtain sufficient information to decide whether to commence s 57 proceedings against it. On this element, the court also found in the member's favour. The member had made reasonable inquiries to obtain sufficient information.

Elements 3, 4, and 5 – documents to assist deciding on a s 57 claim

The member argued that a preliminary discovery of documents was necessary as authorities indicated that depending on the individual circumstances of a case, a court *may* consider a range of time periods reasonable for the payment of a claim. The member submitted that the information sought was relevant to the question of whether the insurer had unreasonably delayed its consideration of his claim.

The insurer argued that in the case of a fully litigated insurance claim, a court would consider objective evidence – not the range of documents which the member sought in a preliminary discovery – and that the application should be refused on that basis. The insurer said that the principal hearing would be decided on the evidentiary basis of the objective material that had been disclosed by the insurer to the insured in the procedural fairness process, and that it would usually not require discovery. The insurer further argued that (at [54]):

> … it would be extraordinary if, after such a principal proceeding, the s 57 question required the reopening of evidence in the proceeding to include material that was not relevant to and not part of the principal proceedings.

And (at [54]):

> … were [the member's] application here to be upheld it would change the entire course of practice in s 57 interest proceedings and would increase the potential costs of such proceedings beyond the scope of the costs usually expended in the principal proceedings.

The member had previously been provided with informal discovery of the trustee's file in relation to his TPD claim. The member submitted that some of the documents in the respective files of the trustee and insurer may be different.

The insurer argued that the member possessed sufficient information to decide whether or not to commence proceedings against it. The insurer submitted (at [56]):

> … if [the member] was granted preliminary discovery in this matter, despite already holding what he described as a "plenary" amount of information regarding his claim, the precedential effect would be that an insurer's claim file would be available by r 5.3 as a matter of course to every insured in every matter.

The court's decision

The court said that the insurer's arguments were the more persuasive, and noted that it was unlikely that the member would have been able to use any of the documents sought to advance a potential claim under s 57. The court said (at [57]):

> When the Court comes to determining the claim *Sayseng* [*v Kellogg Superannuation Pty Ltd*], *HIH Casualty* [*& General Insurance Ltd (in liq) v Insurance Australia Limited (No. 2)*], *V.L. Credits* [*Pty Ltd v Switzerland General Insurance Co Ltd*] and *Fitzgerald* [*v CBL Insurance Ltd*] are all authorities for the proposition that the Court would not examine [the insurer's] actual decision making processes. [The insurer's] file, documents relating to the management or assessment of the applications claim and communications with the Trustee and third parties (to the extent they are not already in [the member's] possession from the Trustee) and contractual arrangements between [the insurer] and the Trustee, as are requested in the Summons, could only go to an issue of [the insurer's] process of actual consideration of this claim. Prima facie this is an impermissible area of enquiry on a s 57 claim and [the insurer] would be justified on such a contested claim in submitting to a Court that such documents should not be taken into account.

The court also noted that the documents already provided by the trustee to the member were sufficient for him to decide whether to advance a potential claim under s 57. The court said (at [58]):

> [The member's] s 57 claim will not be a contest about [the insurer's] own decision-making

processes. It will be a contest about how long a reasonable insurer in [the insurer's] position would have taken to process [the member's] claim. This kind of assessment cuts through any deficiencies in [the insurer's] own internal decision-making processes and allows the Court to look at the issue objectively. And there is substantial material for [the member], or any expert engaged by him, to advance the case that the date by which it was unreasonable for [the insurer] not to have paid the claim was a date before the date that [the insurer] apparently concedes payment should have been made, 5 February 2013. [The member] has the principal documents in the chronology from when he first applied to the Trustee for a TPD benefit in February 2011 through until [the insurer] declined to indemnify him in February 2013. The Trustee's files should sufficiently indicate to [the member] what [the insurer] was given, the full nature of the claim presented to it and the timing of the principal communications. This is all that is necessary to provide the platform to decide [the member's] s 57 claim.

The result

In the result, the court dismissed the member's application for a review of the Assistant Registrar's decision refusing to order preliminary discovery by the insurer, affirmed the Assistant Registrar's decision, dismissed the member's Summons, and ordered the member to pay the insurer's costs.

Take away point

This decision confirms that in determining a claim for interest under s 57 of the Insurance Contracts Act, the Court will not examine the insurer's actual decision-making process. Rather, the relevant question is how long a reasonable insurer in the insurer's position would have taken to process and pay the claim.

10. FOI applications – *"GH" and ComSuper* and *"GF" and Department of Treasury* [2015] AICmr 47

In two separate but related decisions by the Privacy Commissioner (Timothy Pilgrim), a member of a superannuation scheme has been unsuccessful in obtaining documents that related, among other things, to actuarial advice held by the scheme and the Department of Treasury (Treasury), under the *Freedom of Information Act 1982* (Cth) (FOI Act). The decisions are *"GH" and ComSuper* [2015] AICmr 49 and *"GF" and Department of Treasury* [2015] AICmr 47.

Legislative background

Briefly stated, the FOI Act gives the Australian community access to information held by the Government by requiring agencies to publish the information and by providing for a right of access to documents. Generally, a person who wishes to obtain access to a document of an agency may request access to the document.

If an applicant is dissatisfied with the decision made by an agency on internal review of an access refusal decision, the applicant may make a further application to the Information Commissioner under section 54L of the FOI Act for a review of the agency's decision (**IC review**). The Office of the Australian Information Commissioner (**OAIC**) reviews decisions under the FOI Act.

Both ComSuper and Treasury are agencies subject to the FOI Act.

Legal professional privilege

An applicant may be refused access to a document which is subject to legal professional privilege. Such a document is an "exempt document" under section 42(1) of the FOI Act. However, under section 42(2), if legal professional privilege has been waived, the document will not be exempt.

The applications to ComSuper and Treasury

"GH" and ComSuper

A member of the Commonwealth Superannuation Corporation (ComSuper) was in a dispute with ComSuper over a "claim for compensation".

He complained to the Superannuation Complaints Tribunal (SCT).

In April 2013, he applied to ComSuper for access to documents that related to his complaint to the SCT. In particular, he sought documents that related to:

- actuarial advice that ComSuper had obtained; and
- the identification of ComSuper's expenditures, which included a brief to the Australian Government Actuary.

In June 2013, ComSuper gave the member access to a submission document and told him that ComSuper did not have the documents sought by the member on file.

In July 2013, the member wrote to ComSuper querying a number of aspects of ComSuper's decision.

In August 2013, ComSuper told the member that in a further search, ComSuper had located an email chain (a kind of document sought by the member). However, ComSuper relied on section 42 of the FOI Act and refused access to that email chain in full.

"GF" and Department of Treasury

In the meantime, the member had also applied to Treasury for access to documents that also related to his complaint to the SCT. In particular, he sought documents that related to:

- the material on which the Australian Government Actuary's report was based; and
- the expenditure incurred in obtaining the Australian Government Actuary's report.

In December 2013, Treasury told the member that it had identified two documents that were relevant to his request. The first document was the Australian Government Actuary's file (in this case note referred to as "the Actuary's file") of the actuarial advice it had provided to the Australian Government Solicitor. However, Treasury relied on section 42 of the FOI Act and refused access to the Actuary's file in full. (Treasury also refused access to the second document in full, relying on other sections of the FOI Act.)

The applications to the Australian Information Commissioner

"GH" and ComSuper

In September 2013, relying on section 54L, the member sought an IC review of ComSuper's decision.

During the IC review, ComSuper undertook searches with the Australian Government Solicitor. Subsequently, in May 2015, ComSuper provided the OAIC with:

- copies of expenditure documents between the Australian Government Actuary and the Australian Government Solicitor from 2011; and
- a brief from the Australian Government Solicitor to the Australian Government Actuary.

"GF" and Department of Treasury

In December 2013, relying on section 54L, the member sought an IC review of Treasury's decision.

The Privacy Commissioner's decision

The Privacy Commissioner, acting as Information Commissioner, heard both applications. The application involving Treasury was dealt with first.

"GF" and Department of Treasury

As mentioned above, Treasury had decided that the Actuary's file was exempt in full on the basis of legal professional privilege. In considering this exemption under section 42, the Privacy Commissioner said:

> Legal professional privilege had two distinct limbs. A document attracts legal professional privilege, and therefore exempt from disclosure under s 42(1) of the FOI Act if:
>
> - it was created for the dominant purpose of giving or receiving legal advice (legal advice privilege); or
> - it was created for use in connection with actual or anticipated litigation (litigation privilege).

The Actuary's file contained a brief from the Australian Government Solicitor to the Australian Government Actuary regarding the member's compensation claim for the purpose of obtaining actuarial advice, and actuarial calculations and estimates. ComSuper had engaged the Australian Government Solicitor for the purpose of obtaining legal advice, and the Australian Government Solicitor had in turn engaged the Australian Government Actuary to create a report.

The Privacy Commissioner found that a legal adviser/client relationship existed between the Australian Government Solicitor and ComSuper; and that the Australian Government Solicitor had given confidential, independent legal advice to ComSuper.

The Privacy Commissioner accordingly found that the Actuary's file attracted legal professional privilege under section 42(1).

As mentioned above, section 42(2) provides that a document is not exempt under section 42(1) if legal professional privilege has been waived.

Here, the member questioned whether legal professional privilege had been waived, as the SCT had previously refused Treasury leave for representation (ie there had been no anticipated litigation).

The Privacy Commissioner held that ComSuper had not waived legal professional privilege. The Commissioner noted that legal professional privilege protects confidential communications between a legal adviser and their client, and is independent of any actual or anticipated litigation.

The Commissioner said:

> There is no information before me to suggest that there has been any disclosure inconsistent with the confidentiality protected by privilege.

"GH" and ComSuper

In the application involving ComSuper, as the Privacy Commissioner had already made decisions relating to documents sought in the application involving Treasury, the Privacy Commissioner said that the only remaining issue was whether the email chain was an exempt document under section 42 of the FOI Act.

The email chain contained a thread of communications between the Australian Government Solicitor and the Australian Government Actuary, which was sent on to ComSuper. As mentioned above, ComSuper had found the email chain to be exempt in full under section 42 of the FOI Act as the email chain contained communications between ComSuper and its legal advisors for the dominant purpose of receiving legal advice.

The Privacy Commissioner agreed with ComSuper, and found that the email chain was created for the dominant purpose of providing legal advice to ComSuper. As was the case in the application involving Treasury, in respect of the email chain, the Privacy Commissioner found that a legal adviser/client relationship existed between the Australian Government Solicitor and ComSuper; and the Australian Government Solicitor had given confidential, independent legal advice to ComSuper.

The Privacy Commission accordingly found that the email chain attracted legal professional privilege under section 42(1) of the FOI Act.

The Privacy Commissioner said that section 42(2) of the FOI Act would have operated if ComSuper had waived legal professional privilege over the email chain. The member submitted that ComSuper had implicitly waived legal professional privilege by having previously provided an expert report (which related to the email chain) to the SCT in order for the member to respond to it.

As in the application involving Treasury, the Privacy Commissioner held that ComSuper had not waived legal professional privilege.

The result

In the result, the Privacy Commissioner upheld the decisions of ComSuper and Treasury to refuse the member access to the email chain and the Actuary's file.

Take away point

These decisions illustrate the broad scope of section 42 of the FOI Act, and how that section protects documents that are subject to legal professional privilege from disclosure under the Act.

11. Tax treatment of a foreign retirement plan – *Re Baker and Commissioner of Taxation* [2015] AATA 469

The Administrative Appeals Tribunal (AAT) (FD O'Loughlin, Senior Member) has considered whether a retirement plan established in the USA should be treated as a superannuation fund for tax purposes under the *Income Tax Assessment Act 1997* (Cth). The determination is *Re Baker and Commissioner of Taxation* [2015] AATA 469.

The facts

The taxpayer worked in the USA before becoming an Australian resident for tax purposes (at [1] of annexure A). Before leaving America he transferred money to a personal tax-deferred retirement plan (the plan) (at [8] of annexure A).

The governing rules of the plan provided that funds could be withdrawn at any time prior to retirement, at the discretion of the members of the plan (at [29]).

The taxpayer sought a ruling from the Commissioner of Taxation (the Commissioner) that a proposed payment from the plan would be either paid from a "foreign superannuation fund" or would be a "payment from a scheme for the payment of benefits in the nature of superannuation upon retirement" – and therefore be given concessional tax treatment under of the *Income Tax Assessment 1997* (Cth) (ITAA97).

The Commissioner declined such a ruling (at [2]).

The proceedings

The taxpayer appealed the Commissioner's determination to the AAT.

The taxpayer argued that payment from the plan should be deemed to be either paid from a "foreign superannuation fund" for the purposes of section 305-80(1) of the ITAA97 or be a "payment from a scheme for the payment of benefits in the nature of superannuation upon retirement" within the meaning of section 305-55(2) of the ITAA97 (at [2]). Satisfying either of these definitions would result in concessional tax treatment of payments from the plan under the ITAA97.

The expression “foreign superannuation fund” is defined in the ITAA97 as a “superannuation fund” that is not an “Australian superannuation fund”. The expression “superannuation fund” is given its meaning in section 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act), where it is defined as a fund that is an indefinitely continuing fund, and is a provident, benefit, superannuation or retirement fund, or a public sector superannuation scheme.

The Commissioner argued that the plan did not qualify as a "superannuation fund" because it was not indefinitely continuing and because the taxpayer was not restricted in taking money from it at any time (at [23]).

The determination

The AAT noted that Australian superannuation funds only permit withdrawal of benefits when a condition of release is satisfied under the SIS Act and are only permitted to accept a narrow range of contributions (at [30]). In contrast, the plan permitted the withdrawal of funds at any time and accepted contributions in a wide range of circumstances.

The ATT said (at [32]):

> … the restrictive features required of trusts so as to be superannuation funds for Australian income tax purposes do not accommodate the flexible structures that appear to be promoted in the USA to achieve equivalent purposes in Australia.

The AAT therefore determined that the plan was not a "superannuation fund" as defined in the SIS Act and therefore was not a "foreign

superannuation fund" within the meaning of the ITAA97.

The AAT also determined that the flexibility of withdrawals from the plan was such that payments in the nature of superannuation payments from it were just one of a number of possibilities. This meant that the plan did not qualify as one "for the payment of benefits in the nature of superannuation upon retirement or death", as required by the ITAA97 (at [34]).

The result

In the result, the AAT affirmed the Commissioner's decision not to give the ruling sought by the taxpayer, ie that a proposed payment from the plan would be either paid from a "foreign superannuation fund" or would be a "payment from a scheme for the payment of benefits in the nature of superannuation upon retirement".

Take away point

Foreign retirement plans may have more flexible rules than Australian superannuation funds around the withdrawal of benefits, which may preclude concessional tax treatment of payments from these plans.

12. Superannuation guarantee – *Re OEM Supplies Pty Ltd and FCT* [2015] AATA 532

The Administrative Appeals Tribunal (AAT) (Deputy President J W Constance) has held that a worker who built and maintained a company website and performed related tasks was not an "employee" of a company for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGA Act). The decision is *Re OEM Supplies Pty Ltd and FCT* [2015] AATA 532.

The facts

Between 2007 and 2012 (the relevant period) the worker was engaged by OEM Supplies Pty Ltd (OEM) to build and maintain a website for the company, and to carry out specified marketing tasks related to the website.

During the relevant period, the worker issued invoices to OEM for the commission payments due and a monthly fee of $1,000. The worker was also paid annual bonuses. OEM did not make any superannuation contributions in respect of the worker during the relevant period.

The Commissioner of Taxation determined that during the relevant period, the amounts earned were income earned by the worker as an employee and that OEM had not met its superannuation guarantee obligations.

The review

OEM sought a review of the Commissioner's decision by the AAT.

OEM submitted to the AAT that during the relevant period, the worker had been an independent contractor and not an employee (ie no superannuation contribution had been payable).

The AAT's decision

The AAT found that relationship between OEM and the worker was characterised by several fundamental characteristics which were not suggestive of a relationship of employment. Some key characteristics included:

- the work performed by the worker was performed in his own business operating under his own business name;
- OEM had a lack of control as to how the agreed work was to be carried out;
- the worker had limited integration into OEM's business; and
- the worker had the ability to employ others to assist him.

Accordingly, the AAT found that the worker had not been an employee of OEM at common law nor within the meaning of section 12(3) of the SGA Act.

The result

In the result, the AAT set aside the Commissioner's objection decision, and remitted the matter to the Commissioner for reconsideration in accordance with its reasons for decision.

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 2015 Scott and Stanley were both named in *Who's Who Legal* as leading individuals within the practice area of Pensions & Benefits worldwide. In 2015 and 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 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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