

Insurance Benefits and Superannuation Trustee's Duties: Issues & Recent Cases

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Key matters when reviewing claims

- Need to identify the source of the trustee's duties
 - In group insurance, the life insured as a beneficiary has a direct claim against the fund trustee; the policyowner of the disablement insurance.
 - The benefits acquired under the insurance policy by the trustee are, under the SIS Act, superannuation interests and are therefore an incident of the member's participation in the trust. The claim is under the fund trust deed.
- Need to understand the scope of the trustee's duties
 1. to determine whether the beneficiary has a good claim under the trust deed, and
 2. to determine whether the trustee, as well as the life insured, has a good claim against the insurer under the insurance contract

Relevant duties when considering claims

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- Preserve the trust property (the fund)
- Observe the terms of the trust
- To act with reasonable care in managing the affairs of the trust – care which an ordinary prudent person of business would take
- To give properly informed consideration to applications for entitlements (*Finch v Telstra Super Pty Ltd* [2010] HCA 36) and, if that necessitates further inquiries, then they must make them (*Alcoa of Australia Retirement Plan Pty Ltd v Frost* [2012] VSCA 238)
- To act with reasonable dispatch (*Apostolovski v Total Risk Management* [2010] NSWSC 1451)

- Section 52 of the *Superannuation Industry (Supervision) Act* 1993 imposes further duties by requiring the trustee to:
 - act honestly
 - exercise the trustee's powers in the best interests of the beneficiaries
 - where trustee's duties conflict: give priority to the duty to, and the interests of, the beneficiaries; ensure the duties to the beneficiaries are met despite the conflict; and ensure that the interests of the beneficiaries are not adversely affected by the conflict
 - do everything reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success

The Insurance in Superannuation Working Group (ISWG):

‘People claiming should be made aware that the superannuation fund acts as the member’s advocate in assessing the decision of the insurer and pursuing the insurer when they are of the view that the claim has a reasonable prospect of success.

Insurance Governance Policy: *3.1 Insurance Guiding Principles*

‘To deal with all Member insurance claims: ... by pursuing, to the fullest possible extent, all claims that the Trustee considers both reasonable and which have reasonable prospects of success’

Insurer's duties

- *Insurance Contracts Act 1984 (Cth) s13* - parties to an insurance contract have a duty to act towards each other in utmost good faith. Insurer must have due regard to the interests of the insured as well as its own interests.
- The most common ways that insurers have been found to have breached this duty in the TPD context is by:
 - Failing to consider and determine the correct question
 - Failing to allow the claimant an opportunity to address adverse material upon which it proposes to base its decision (such as surveillance material)
 - Adopting an unreasonable decision-making process
 - Forming an opinion that was not open to an insurer acting reasonably and fairly
 - Failing to make a determination within a reasonable time

APRA v Kelaher [2019] FCA 1521

- A breach of duty by trustee in handling insurance claims could be a breach of s 52 SIS Act which (post Banking Royal Commission) means APRA may well commence proceedings against trustee & officers
- Potential consequences may include:
 - Declarations of contravention
 - Additional license conditions
 - Pecuniary penalties
 - Remediation orders
 - Compliance orders
 - Disqualification of directors and/or officers

Finch v Telstra Super Pty Ltd [2010] HCA 36

High Court held that decision that a person is entitled to payment out of a superannuation fund for TPD is not a discretionary decision.

A decision whether a member of such a fund is unlikely ever to engage in gainful work is an ingredient in the performance of a trust duty.

“It is extremely important to the beneficiaries of superannuation trusts that where they are entitled to benefits, those benefits be paid. Here, for example, the applicant was claiming a Total and Permanent Invalidity benefit to support himself for the rest of his life. His claim depended on the formation of an opinion by the Trustee about the likelihood that he would ever engage in “gainful Work”: that was not a mere discretionary decision. In the Deed there was a power to take into account “information, evidence and advice the Trustee may consider relevant”, and that power was coupled with a duty to do so. It would be bizarre if knowingly to exclude relevant information from consideration were not a breach of duty. And failure to seek relevant information in order to resolve conflicting bodies of material, as here, is also a breach of duty. The Scheme is a strict trust. A beneficiary is entitled as of right to a benefit provided the beneficiary satisfies any necessary condition of the benefit.”

Some subsequent cases of interest

Alcoa of Australia Retirement Plan Pty Ltd v Frost [\[2012\] VSCA 238](#)

Board of Trustees of the State Public Sector Superannuation Scheme v Gomez
[\[2018\] QCA 67](#)

Carroll v United Super Pty Ltd [\[2018\] NSWSC 403](#)

Macras v NULIS Nominees (Australia) Limited [\[2018\] FCA 1867](#)

MLC Nominees Pty Ltd v Daffy [\[2017\] VSCA 110](#)

*Aslami v Board of Trustees of the State Public Sector Superannuation Scheme
as Trustee for the QSuper Fund* [\[2019\] FCA 1560](#)

Qantas Super v McAulay [\[2019\] FCA 109](#)

Alcoa of Aust. Retirement Plan v Frost [2012] VSCA 238

- Conflict of medical opinion before trustee of defined benefit plan.
- Victorian Court of Appeal enthusiastically applied *Finch v Telstra Super*
- Held : a trustee has a duty to obtain sufficient information to make properly informed decision - the duty extends to seeking relevant information to resolve conflicting bodies of opinion
- Nettle JA: “At all event, I consider that, since the trustee was not satisfied the claim was made out, the prima facie inconsistencies between Mr Kierce’s and Mr O’Brien’s reports required investigation, at least by way of further inquiries of those two experts if not by taking advice from further medical and other experts, in order to establish whether Mr Kierce and Mr O’Brien were or were not agreed as to the nature and extent of Mr Frost’s disability; and, if they were agreed that he was totally and permanently disabled, whether they were agreed that he had reached that stage by the time his employment was terminated.”

Gomez injured his shoulder when working as a registered nurse.

Trial judge agreed the trustee's decision to decline payment should be set aside, and remitted for reconsideration. Trustee's appeal failed.

[25] The duty to give properly informed consideration also means it will not always be appropriate for the [Trustee] to move directly to refusing an application on the basis the [Trustee] has not received proof satisfactory to it that the applicant member is totally and permanently disabled. Of course that may be appropriate where it is apparent the lack of satisfactory proof merely reflects the fact TPD has not been suffered. However, if information of substance received by the [Trustee] tends to indicate an application may have merit but is inadequate for the purposes of the [Trustee] making a properly informed decision, then the [Trustee's] duty is to make reasonable inquiry seeking additional information for the purposes of making a properly informed decision.

QCA also said that if further material provided in support of an application does indicate “a reasonable possibility of a different result”, then “until such time as it is considered in addition to the earlier considered information, it can no longer be said the Trustee has met its duty of giving properly informed consideration to the application” (at [28]).

The duty to give properly informed consideration does not oblige the Trustee to inquire to a point of factual perfection. Much will depend upon the significance of the lack of information or conflict in information. The ultimate point of any further inquiry is to enable the Trustee to meet its duty to give properly informed consideration to an application. (at [51])

The Trustee had to consider whether, having regard to Mr Gomez's particular circumstances, the identified alternate occupations were occupations he had the capacity to engage in having regard to his education, training or experience. That consideration had to be more than a theoretical exercise removed from reality. The additional material he provided gave rise to that very consideration. It put forward sufficient material to show there was a case to be investigated further. That case justified the seeking of further opinions from Rehabilitation Advisor and the relevant medical practitioners.

Had the Trustee's delegate given consideration to that aspect of the additional material, there was a reasonable possibility of a different result being reached by the Trustee to that of its earlier decision. The delegate's failure to consider the material in that way breached the Trustee's obligation to reconsider its earlier decision and thus the Trustee breached its duty by failing to properly reconsider the application made to it by Mr Gomez for the payment of TPD benefits.

Carroll v United Super [2018] NSWSC 403 1/2

- Trustee's decision making process inadequate & breach of duty; was TPD & insurer to pay
- CBUS Trust Deed; Hannover life group cover. Member claimed TPD due to bilateral hip dysplasia; Trustee & insurer declined claim
- Court referred to *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254
- Court accepted that Trustee did *not* turn its mind to whether sedentary work was within Mr Carroll's education, training or experience and was realistically available to him
- Working documents had acknowledged that a "vocational assessment" would have made for a more complete assessment. The working documents and the presence, or absence, of other documents on the Trustee's file were evidence of the process the Trustee undertook, or failed to undertake, in making its decision

- “For the trustee to slough off responsibility for making those inquiries on the basis that Mr Frost failed to adduce sufficient evidence to satisfy the trustee that he was totally and permanently disabled is, in my view, to do the very thing which the High Court said in *Finch* was unacceptable.”
- “The better view of the cases seems to me to be that Mr Frost did not bear any onus of proof and that it was productive of error that the trustee proceeded as if he did.”
- “I reject the trustee’s alternative contention that, if it had a duty to make further inquiries, it discharged the duty by inviting Mr Frost to submit further material.”
- The other judges agreed: further inquiry should have been undertaken by the trustee and the invitation extended by the trustee was not a sufficient discharge of its duty.

Macras v NULIS & MLC [2018] FCA 18671/3

- Before taking out insurance, Macras disclosed to Insurer that had suffered from anxiety in 2008, received medication, & gave Insurer copy of some clinical notes. Insurer accepted application and granted IP/TPD cover.
- February 2016: Macras diagnosed with adjustment disorder, anxiety and Asperger's syndrome. Ceased work, claimed under policy.
- Insurer: reviewed treating doctor's reports, before made decision on claim, decided it needed more information, & to ascertain whether conditions were pre-existing.
- Mr Macras complained to SCT and revoked authorisation to obtain medical records.
- Position of Trustee was that it had not received a final recommendation from the Insurer on Mr Macras' claims and was therefore yet to conduct a formal review in relation to the claims.
- SCT held: the decisions of the Insurer and the Trustee under review were fair and reasonable in the circumstances. On appeal, Justice Davies held: no error by Tribunal.

- “The Tribunal is of the opinion that the Insurer has the right to request information it considers relevant to its liability under the Policy. The Policy states that it will pay a benefit *‘when we have proof satisfactory to us that all the events entitling the Trustee to payment of the Benefit have happened.’* The Policy also states that the Insurer *‘may ask for further proof or information to be satisfied that the Trustee is entitled to the Benefit.’* The Tribunal considered that this right extends to information required by the Insurer to allow it to ascertain whether a condition was pre-existing at the time of application (whether disclosed or not) as well as information related to assessment of the Complainant’s claims under the TPD and IP definitions.”
- “The Complainant has an obligation under the Policy to provide relevant requested information. The Tribunal noted that the Complainant has revoked his authority and refused to allow the Insurer to access certain of his medical records believing that the Insurer has all the information it requires to assess his claims. The Tribunal is of the opinion that under the Policy the Insurer has the right to determine relevance of medical evidence. It also noted that the Insurer had provided reasons as to why it requires further information.”

- ‘The Tribunal noted that under the Trust Deed, insurance is only payable *‘if; and to the extent that, the Trustee receives payment from the Insurer under the Policy’*. The Insurer has advised the Trustee that it is unable to make a decision on the Complainant's claims until it acquires further medical evidence. The Trustee has determined not to make a decision on the Complainant’s claims until it has received notification that the Insurer has made a decision following the receipt of such further evidence. The Tribunal is satisfied that the Trustee's approach is fair and reasonable in the circumstances.’
- Davies J (as to this passage): ‘The Tribunal addressed the correct questions and no legal error is discernible in the Tribunal’s reasoning, which had an evident and logical evidentiary basis for the conclusion reached. ‘

MLC Nominees v Daffy [2017] VSCA 110

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- Member suffered prolapsed disc at the L5/S1 level of his lower back on 14 October 2010
- On 24 May 2011, his employment was terminated during the course of a meeting with his fellow shareholders in SSDW (a participating employer) for unrelated reasons.
- Disability claim (income protection) accepted, but quantum reduced after taking workers compensation payments into account
- Claim for TPD under the M100 Policy refused. MLC contended that, upon the termination of his employment, Mr Daffy was transferred from the First Schedule to the Sixth Schedule.
- Central issue at trial: was Mr Daffy's claim for a TPD benefit to be determined in accordance with the TPD clause in the First Schedule, or the Sixth Schedule? Was the TPD benefit claimed by Mr Daffy on 29 May 2012 a benefit that had already accrued at the time his employment was terminated on 24 May 2011?
- This was a question of proper construction (interpretation) of cl 27.1(e) of the policy.

- After 12 day trial, Judge held that the First Schedule applied, insurer to pay \$1,521,071.64 (the amount of the TPD benefit under the policy) plus interest. MLC appealed against the decision.
- Victorian Court of Appeal: noted that in *Finch*, the High Court had referred to a construction of a TPD policy posited by a trustee as leading to potential results which were so unjust as to suggest an error in the reasoning that led to them. However, it also noted that this does not mean that a court can attribute a different meaning to the words of a policy simply because the court regards the meaning as otherwise working a hardship on one of the parties.
- Held: the First Schedule TPD benefit that was required, by cl 27.1 of the policy, to be accrued at the time of Mr Daffy's termination, was not a benefit that had accrued within the meaning of cl 27.1 of the policy. Appeal allowed.

Of interest: the VCA noted that Mr Daffy had given evidence at trial that, on 25 January 2013, he received a conference call from 'a male and a female' who told him that they were 'trustees from MLC'. Mr Daffy said he was told that his file was being reviewed and that they were 'looking at whether [he] should be in Schedule One or Schedule Six'.

Mr Daffy gave evidence:

"They said that there were pros and cons of both schedules, and one was better than the other and I said to them that I was 100 per cent sure as far as I was concerned that I was in Schedule One by virtue of the fact of when the injury was done and that was what was the cause of my inability to work and that it wasn't a new and separate injury that had occurred after I had finished. They said they were going to look into all these matters and I got some hope that they were going to actually sort something out for me."

Aslami v SPSS [2019] FCA 1560

- Construction of the phrase “education, training or experience”
- Unsuccessful appeal by member from SCT affirming decision of Trustee to decline claim for TPD benefit
- Member was a qualified electrician, suffered back injury. Several years later diagnosed with chronic adjustment disorder with mixed depression and anxiety symptoms, certified unfit for work; successful IP claim; later returned to work; in 2014 “ill-health retired” from employment. However, was also working in his own business.
- Tribunal correct in deciding that Trustee made no error in having regard to Mr Aslami’s existing education, training or experience as he employed that in his business in determining whether he had a “total and permanent disablement” w/n meaning of trust deed

Qantas Super v McAulay [2019] FCA 109

- McAulay made TPD benefit claim which was accepted by Trustee.
- However, the trustee also offset estimated future social security benefits expected to be received to the age of 67 against the TPD benefit payable, in addition to social security benefits actually received at the time of the trustee's decision, based on its construction of rule 23.10 of the Superannuation Plan.
- SCT held trustee wrongly construed the rule.
- On appeal, Perry J held SCT erred, trustee was correct.