Case law review

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This paper provides a summary of three cases decided in 2013 which are of interest to lawyers advising trustees of superannuation funds.

*Particular focus is given to the **Prime Trust** case, which provides valuable guidance on trustee's duties, including the best interests obligation.*

*The paper also addressed two recent cases which provide further guidance to trustees on handling claims from members for total and permanent disablement benefits: **Sharp v Maritime Super**, and **Hannover Life Re v Dargan**.*

Speaker:
Simun Soljo, Senior Associate
King & Wood Mallesons
P: + 61 (0)419 579 685
Simun.Soljo@au.kwm.com

1. Prime Trust

1.1 Introduction

On 12 December 2013, Murphy J of the Federal Court of Australia gave his judgment in the case of *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3) [2013] FCA 1342* (the "**Prime Trust case**").

Australian Property Custodian Holdings Limited ("**APCHL**") was the responsible entity of the Prime Retirement and Aged Care Property Trust ("**Prime Trust**"), a managed investment scheme registered in accordance Chapter 5C of the Corporations Act 2001 (the "**Act**"). The Prime Trust was established as an unlisted unit trust with investments in retirement villages and aged care facilities. Following the listing on the ASX of the Prime Trust in 2007, the unit value soon began to decline, and the scheme collapsed in 2010/2011.

The proceedings were brought by the Australian Securities and Investment Commission ("**ASIC**") against APCHL and five former directors of the company. They arose from amendments made by APCHL in 2006 to the Prime Trust constitution to provide for a new fee to be payable on the listing of the Prime Trust, just as the directors were moving towards having the scheme listed, and increases to existing fees payable to APCHL. They also relate to the eventual payment of the listing fees in 2007 and 2008. ASIC alleged that, by making the amendments and paying the fees, APCHL and its directors breached their duties under the Act, including their duty of care and diligence, the duty to act in the best interests of scheme members, and the duty to give priority to the interests of those members.

Each of the directors defended the claims. APCHL did not play an active part in the proceeding.

Murphy J concluded that ASIC had made out its case in relation to each of the alleged breaches by the directors and APCHL. The case will now proceed to a hearing in relation to exoneration and penalties.

1.2 Significance for superannuation trustees

As noted by Murphy J in his judgment, a number of the provisions in the Act found to have been breached by APCHL and the directors in this case have not previously been considered by the courts.

Similar or equivalent provisions have been imposed on superannuation trustees and directors under the *Superannuation Industry (Supervision) Act 1993* ("**SIS Act**"). His Honour's discussion of the duties under the Corporations Act will therefore be of assistance in interpreting the meaning and extent of the SIS Act duties.

1.3 Key facts

Much of the judgment is given over to the analysis of evidence presented and findings of fact. This was made necessary because a key aspect of the defence presented for the directors was that many of the facts as alleged by ASIC did not occur. Murphy J in the end concluded that they did.

The key events were the amendment by APCHL of the constitution of the Prime Trust to introduce new fees and to increase existing fees payable to APCHL, and the payment of some of those fees to APCHL.

The amendments to the constitution were made in 2006 and provided for new fees to be payable to APCHL if the Prime Trust was listed on the Australian Stock Exchange (the "**Listing Fee**") or if APCHL was removed as responsible entity (the "**Removal Fee**"), and an increased fee to be payable to APCHL if the Prime Trust was subject to a takeover (the "**Takeover Fee**"). The amendments were made in two stages. The directors passed a resolution on 19 July 2006 to approve the amendments ("**Amendment Resolution**"), and although the deed containing the amendments was signed by two directors on that date, it was left undated. On 22 August 2006 the board resolved to lodge with ASIC the consolidated constitution incorporating the amendments so that they would become effective in accordance with section 601GC(2) of the Act (the "**Lodgement Resolution**").

ASIC did not rely on the Amendment Resolution to establish any breach and Murphy J surmised that this was because any contraventions of the Act which may have occurred on that date were *prima facie* out of time when ASIC filed the proceeding on 21 August 2012. ASIC instead relied on the Lodgement Resolution.

The directors argued that the Lodgement Resolution was never passed by them, that it had no effect on the deed of amendment or the rights and interests of the members, and was simply a procedural or administrative step. His Honour rejected each of these assertions. He found that the Lodgement Resolution was in fact voted for by the directors, that it was the final step which brought the Deed of Variation into effect, and that given APCHL's plain conflict of interest, the directors should have exercised a "*high level of care and caution*" in passing it (at [542] and [564]).

Murphy J also found that the amendments to the constitution were invalid because they were outside the amendment power in the constitution and were not permitted by section 601GC(1)(b).

APCHL paid the Listing Fee of about $33 million to itself in instalments at the time the Prime Trust was listed in 2007 as well as in 2008. All of the shares in APCHL were owned by one of the directors, William Lewski, several of his family members and an associated company, and so they received the benefit of the fee.

1.4 Alleged breaches

ASIC alleged that the facts disclosed breaches by both APCHL and the directors of the Act.

The Act imposes duties on responsible entities of registered managed investment schemes under section 601FC and on officers of responsible entities under section 601FD. These include the duties:

- to exercise care and diligence;
- to act in the best interests of members;
- to give priority to members' interests in cases of conflict of interests; and
- to comply with the constitution of the scheme.

(Similar duties are imposed on trustees of superannuation entities and their directors under the SIS Act.)

The directors also have a duty not to make improper use of their position, and to take all steps a reasonable person would take to ensure the responsible entity complies with its obligations.

ASIC alleged that APCHL and its directors breached these duties by approving the Lodgment Resolution which brought the amendments to the constitution into effect, and by approving and paying the Listing Fee.

Responsible entities are also subject to the restrictions on certain related party transactions, as set out in section 208 and modified by Part 5C.7 of the Act. ASIC argued that APCHL contravened section 208 (as modified), and that the directors were involved in the contravention (in breach of a separate duty imposed on them by section 209).

Murphy J saw five principal factors as being of particular significance in considering the alleged breaches (at [16]):

1 APCHL was acting as a trustee and the fees would be payable out of scheme property to it personally.

2 Consideration of the amendments to the constitution created "self-evident conflicts".

3 New fees would be payable in the event of listing or removal of APCHL where no fees were to be payable under the existing constitution in those events, a substantially increased takeover fee was imposed, and fees could potentially be payable on multiple occasions.

4 The fees were substantial, each having a value of around 6.7% of the net scheme property.

5 The fees were gratuitous in the sense that no equivalent countervailing benefit was provided to the members in return for them

Each of the alleged breaches was found by his Honour to have been made out by ASIC. More detailed analysis is set out below.

1.5 Care and diligence

Duty of care

In exercising its powers and carrying out its duties, the responsible entity of a registered scheme has a duty under section 601FC(1)(b) to "*exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position*". A corresponding duty is imposed on officers of a responsible entity by section 601FD(1)(b).

Standard to be applied

Murphy J referred to the comments of Finn J in *ASC v AS Nominees*[1] to the effect that the standard of care to be exercised by trustee companies which hold themselves out as having a special or particular knowledge, skill and experience and which invite reliance upon themselves by members of the public in virtue of this knowledge is higher than that of the ordinary prudent businessperson (at [537], referring also to *Bartlett v Barclays Trust Co Ltd (No 1)* [2]).

Citing Finn J in *ASC v AS Nominees*, His Honour was of the view that the "*standard of care and caution expected of a corporate trustee must flow through to its directors*" (at [541]).

He found that the standard of care and caution is particularly high when a conflict of interests or a conflict of interest and duty arises (at [542], citing Santow J in *ASIC v Adler*[3]), and that while the duty of care of an officer of a responsible entity under section 601FD(1)(b) corresponds with the duty of an officer of a company under section 180(1), the duty of an officer under 601FD(1)(b) will often be higher because the responsible entity is acting as trustee and because of the vulnerability of scheme members to conflicts (at [543]).

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1 (1995) 62 FCR 504.

2 [1980] Ch 515.

3 (2002) 42 ACSR 80; (2002) 20 ACLC 1146; [2002] NSWSC 483.

His honour noted that these factors are common in managed investment schemes under Part 5C, and (at [543]):

> *will often require that the directors of such [a responsible entity] exercise heightened care and caution and be scrupulous in dealing with any conflict of interest and conflict of interest and duty.*

This position seems somewhat unusual at first given that, on the traditional analysis, conflicts go towards the trustee's duty to act in the best interests of members. It is difficult to see why conflicts should affect the standard of care to be applied by the trustee and impose a "*heightened*" duty. Perhaps all that is meant here is that, in a situation where conflicts are present, the duty of care will also require the responsible entity to take care in dealing with the conflicts.

Relevant considerations

His Honour was of the view that the duty of care and diligence required the directors, before bringing the amendments into effect that would provide for substantial additional fees to be payable to the responsible entity, to (at [571]):

> *(a) recognise the trustee's obvious conflict of interest and conflicts of interest and duty;*
>
> *(b) give careful consideration to those conflicts and scrupulously prioritise the members' interests;*
>
> *(c) recognise that unusual and equivocal legal advice was not advice that should be relied upon in deciding to allow the fees;*
>
> *(d) identify and carefully consider the deleterious effects of the additional fees upon the members;*
>
> *(e) identify and carefully consider the fact that no corresponding benefit was provided to the members in return for the additional fees; and*
>
> *(f) look past the question as to the power to make the amendments and instead carefully consider whether the additional fees should be imposed.*

The fact that these matters, particularly the conflicts, required careful consideration was in his Honour's view obvious, and the conflicts would have been recognised even by "*Blind Freddy*" (at [572]). Because of the obvious conflicts, "*each director's duty of care and diligence fell to be exercised in a context calling for special vigilance and scrupulous concern by each of the Directors who were aware of it: ASIC v Adler]*" (at [600]).

Legal advice considered

Murphy J's reference to the "*unusual and equivocal legal advice*" deserves some further attention. At the 19 July board meeting, the directors had before them a somewhat unusual legal advice in relation to the proposed amendments. The advice dealt with the

amendment power in the constitution of the Prime Trust as well as under the Act. However, it did not clearly advise the board that APCHL had the power to make the amendments.

The advice instead gave two mutually exclusive interpretations of the amendment power in the constitution, under one of which the board did not have power to pass the amendments while under the other it did. It did not advise which of the interpretations was to be preferred and instead left it to the directors to determine which interpretation was to be relied on, despite the fact that they lacked legal qualifications (at [593]).

His Honour stated that, while directors are entitled to rely on specialist legal advice, the reliance could not be at the expense of their non-delegable duty of care (referring to *ASIC v Healey*). The unusual and equivocal legal advice provided by the responsible entity's solicitors would have set them on a train of inquiry such that (at [593]):

> *[a] reasonable director would not have relied upon the [solicitors'] Advice in passing the Amendments, and would have considered it necessary to obtain unequivocal legal advice, to seek a judicial direction, or at least to seek the members' approval.*

The case should give trustees pause for thought in situations where they may wish to request that their legal advisers provide them with advice setting out only the legal arguments in favour of a position they wish to adopt. The board that is advised that it is merely arguable that a proposed course of action is open to the board to take, without legal advice as to the correct or preferred view of the legal advisers, may not be able to rely on the advice without further enquiry consistently with their duty of care and diligence. Even if lawyers are at times asked to present arguments in favour of alternative interpretations of a provision or a legal requirements, the judgment indicates that it may be inappropriate to leave the choice of interpretation to the client without the legal adviser expressing their preferred view, at least in circumstances where the client is not legally qualified and where the presentation of the alternatives may indicate that both are equally open when that is not the case.

Conclusions

Murphy J concluded that the directors gave no proper consideration on 19 July at the time of passing the Amendment Resolution to each of the key issues set out above when they approved the amendments.

The directors argued that they were not required to have regard to the same considerations when approving the Lodgement Resolution, which they said was an administrative matter. His Honour disagreed. He found that it was not unrealistic to expect them to consider the matters when the amendments were back before them for final approval on 22 August, only a month after they initially approved the amendments. In his Honour's view, a reasonable director would have understood that the directors had failed to carefully consider and deal with these matters on 19 July and would have been concerned to properly address them (at [573]).

He concluded that there is no evidence that any of the directors exercised reasonable care and diligence when passing the Lodgment Resolution, and so ASIC made out its case in this respect (at [566]). The higher standard imposed on the directors of a responsible entity was "*of no great significance in the result*" (at [543]):

> *On the facts of the present case, the standard of care and caution exercised by each of the Directors fell below even the standard of the ordinary prudent business person in the Director's position.*

The facts in this case indicate such clear breaches of the responsible entity's duties and the directors' duties that it was unnecessary for the court to consider in any detail the scope of the heightened duty of professional trustees.

Position of Mr Clarke

One of the directors, Mr Clarke, was not a director at the 19 July meeting, but was a director and attended the 22 August meeting. His main defence was that he had not read the relevant board papers. He also argued that the relevant decision to approve the amendments was made before his appointment and that he should not have been expected to revisit that decision.

Murphy J disagreed. He found that, in this case, because the decision to pass the amendments was so clearly wrong given the failure by the directors to recognise the conflict of interests and give priority to members' interests, a reasonable director in Mr Clarke's position would have seen this and should have engaged with the issue of the board's power to make the amendments, rather than doing nothing (at [579] and [580])).

A reasonable director in Mr Clarke's position would have taken care to read and understand the resolution and the amendments which it purported to bring into effect, whereas Mr Clarke did none of these things (at [581] and [582]). Had he done so, he would have understood that APCHL had a plain conflict, that the amendments were deleterious to members' interests, and there was no countervailing benefit to members.

In these circumstances, Murphy J concluded that a "*reasonable director in his position would have questioned the Board's approach and voted against the resolution, or failing that made it clear that he abstained because he could not carry out his duties as a Director*" (at [584]).

Comparison with superannuation trustees

Section 52(2)(b) of the *Superannuation Industry (Supervision) Act 1993* ("**SIS Act**") inserts into the governing rules of a superannuation fund a covenant on the trustee to "*exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments*". A similar covenant is imposed on directors of superannuation trustees by section 52A(2)(b) to exercise the degree of care, skill and diligence as a "*prudent superannuation entity director would exercise*".

These covenants set an objective standard, which in effect is the standard of the prudent professional trustee and its directors.[4] The duties under the SIS Act are therefore similar to those imposed on responsible entities and their directors under Chapter 5C, which will ordinarily be the standard of a professional trustee holding itself out as having special skills, knowledge and experience. Murphy J's comments in relation to the matters which the directors should have considered in approving the amendment resolution (including careful consideration of conflicts and the effect of the proposed amendments on members) should therefore be instructive for trustees of superannuation contemplating similar amendments.

1.6 Best interests duty

The Act imposes on responsible entities of registered managed investment schemes a duty to "*act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests*" (section 601FC(c)). An equivalent duty is imposed on officers of responsible entities by section 601FD(c) of the Act.

Murphy J noted that the meaning of the phrase "*best interests of the members*" in these sections has not previously been the subject of judicial consideration (at [455]). In his view, the "*best interests of the members*" in the context of a managed investment scheme which is necessarily a trust (under section 601FC(2)) "*relates to the members' interests in the particular context in which that trust operates, and by reference to the terms of the constitution, the general law and statute*" (at [461]).

In analysing the meaning of the obligation, Murphy J considered the meaning of the words themselves, the meaning under general law, the meaning in other materials, and in similar statutory provisions.

Textual analysis

He noted the difficulties in interpreting the extent of the best interests duty from the words alone. The use of the word "best" could be interpreted to require that an objectively determined "best" outcome be achieved by the responsible entity or the directors. His Honour was disinclined to such a view because of the difficulties this would cause for a trustee (or director) in performing their role, and that it was not clear to him "*how in many common circumstances the 'highest' standard is to be determined let alone met*" (at [463]).

Given the difficulties therefore in delineating the outer boundaries of the duty from the words themselves, he turned to the meaning under general law.

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[4] Black J, *Understanding the Impact of Recent Cases on Directors Duties*, Law Council Superannuation Conference 2012.

General law meaning

The phrase has an established use in equity, and Murphy J noted that words used in a statute which have an established legal meaning are presumed to take that meaning unless a contrary intention is apparent (at [464]).

His Honour then surveyed the way in which the phrase has been interpreted in the cases dealing with trusts. The survey makes apparent that the term has been interpreted by courts in various ways. As with most discussions of the duty, the starting point is *Cowan v Scargill*[5], where Sir Robert Megarry V-C said that the paramount duty of trustees is "*to exercise their powers in the best interests of the present and future beneficiaries of the trust*", and that "*where the purpose of the trust is to provide financial benefits for beneficiaries… the best interests of the beneficiaries are normally their best financial interests*" (quoted at [465]).

Murphy J noted that this dictum has been affirmed on numerous occasions, but that sometimes it is expressed as a separate duty and at other times it is likened to other established trustee duties, such as the duty of undivided loyalty, the duty to act fairly and in good faith, and to act for a proper purpose (at [467]). He notes that it has also been seen by commentators as a referring to a combination of such specific and well established duties of a trustee. It is variously described as a "foundational" or "umbrella" duty (at [475]), and a duty which "marshals" the trustee's duty of loyalty and as a general duty that complements the more specific obligations to act honestly and exercise care, diligence and skill (referring to *Ford & Lee*, at [476]).

Similar statutory provisions

Murphy J noted that a similar duty is imposed on trustees of superannuation funds under section 52 of the SIS Act, which inserts into the governing rules of the superannuation fund (unless it is already contained there) a provision to the effect that the trustee covenants "*to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries*" (section 52(2)(c)). An equivalent covenant is now imposed on directors by section 52A(2)(c). Murphy J saw underlying this duty "*a general duty to give undivided loyalty to the service of the economic wellbeing of the members, complementing other more specific obligations*" (at [481]).

His Honour referred specifically to the two recent cases which have considered the duty in section 52(2)(c), *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd and Others*[6] ("**Invensys**") and *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd*[7] ("**Manglicmot**").

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5 [1985] Ch 270.

6 (2006) 15 VR 87.

7 (2011) 282 ALR 167.

Murphy J agreed with Byrne J's comments in *Invensys* that the best interests duty is to be treated as a combination of the well-established and more specific duties of loyalty and the duty to pursue to the utmost with appropriate diligence and prudence the interests of the beneficiaries (at [482]). His Honour noted that the judgment in *Invensys* did not suggest that the duty extended beyond any duty arising under general law, and he agreed with this approach, which is also consistent with the approach in *Manglicmot* and with the views expressed by the authors of *Jacobs' Law of Trusts in Australia* (7th edition).

It is noted in passing that the SIS Act best interests duties apply in relation to the performance by the trustee and its directors of their duties and the exercise of their powers. The equivalent duties in the Act imposed on responsible entities and their officers are expressed to be at large, to "*act in the best interests of members*". His Honour did not consider whether the difference in the statutory drafting was of any significance and appears to have taken the view that it was not.

Conclusion on meaning of best interests

In relation to the duty to act in the bests interests of members, Murphy J's key conclusions are summarised in the following paragraph (at [484]):

> *I conclude that the imposition of a duty to act in the best interests of the members in ss 601FC(1)(c) and 601FD(1)(c) does not extend its content beyond previously understood general law boundaries. I see the best interest duty as foundational and operating in combination with other duties. It encompasses the fundamental duty of undivided loyalty which in the present case required APCHL and the Directors to use their best efforts to pursue solely the members' interests, to act honestly and to exercise care, competence and prudence in doing so, and to eschew any conflict of interests between the members' interests and its own. If any conflict of interests arose they were required to prefer the interests of the members to APCHL's own interests. The duty also required APCHL to adhere to the terms of the Constitution.*

Some observations on the conclusion

His Honour's conclusion that the statutory duty does not extend beyond previously understood general law boundaries is helpful and consistent with the approach taken by courts in the superannuation context in *Invensys* and *Manglicmot*. It adds weight to the view that the statutory best interests duty, like the general law duty, is directed primarily towards the duties of a fiduciary, which were identified by the High Court in *Breen v Williams*[8] by Gaudron and McHugh JJ:

> *… equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorized benefit from the relationship and not to be in a position of conflict*

[8] [1996] HCA 57.

However, Murphy J's explanation of the scope of the duty leaves some uncertainty around the precise relationship between the best interests duty and a trustee's other duties. To say that it "operates in combination with" and at the same time "encompasses" the trustee's well established and more specific duties may raise questions about the precise relationship and extent of overlap of the duties. If the best interests duty is intended only as an "umbrella" duty, to refer collectively to the trustee's other duties, then its usefulness may be doubted, especially when there does not appear to be judicial or academic consensus on the duties encompassed.

The survey of the way in which the duty has been construed by the courts suggests that judges approach the framing and application of the duty with some flexibility, depending upon the particular factual scenario they have to contend with.

It is not necessarily the case, however, that the courts will take the same approach to interpreting all instance of a "best interests" duty imposed by statute. Courts are likely to look to the context of the particular legislation to determine if a fiduciary duty is intended to be imposed by Parliament. For example, section 961B of the Corporations Act imposes an obligation on an adviser providing personal financial product advice to a retail client to act in the best interests of their client. While the responsible entity of a managed investment scheme and the trustee of a superannuation fund will be trustees in accordance with the respective legislative regimes, and so of necessity are fiduciaries in relation to the beneficiaries, an adviser may not be a fiduciary. Whether an adviser and their client are in a fiduciary relationship will depend on the particular circumstances of the arrangement. Further, the legislation allows an adviser to meet the statutory best interests obligation by the taking the steps set out in the "safe harbour" provision in section 961B(2). These steps are unlikely to meet in all cases the obligations of a fiduciary under general law, and so there seems to be a reasonable prospect that courts will not interpret the best interests obligation in section 961B as coextensive with the general law duty on fiduciaries.

Application to facts

Whatever uncertainties remain in relation to the meaning of the best interests obligation in sections 601FC and 601FD, this was of little consequence in the particular facts of the Prime Trust, where the responsible entity and directors breached their duties on any possible view.

Murphy J concluded that the amendments to the constitution to introduce the new and increased fees were not in members' best interests and so the Lodgement Resolution which brought the amendments into effect was also not in members' best interests. A number of factors went towards this conclusion, a key one being that (at [491]):

> *the new and increased fees largely served the interests of APCHL and Mr Lewski rather than the members. The listing Fee was largely designed to incentivise Mr Lewski to proceed with listing when he was duty bound to support listing anyway. The Removal and Takeover Fees were largely designed to entrench APCHL as*

> *the [responsible entity] and to reduce the risk that it might be removed before it received the Listing Fee[.]*

In relation to whether the Lodgement Resolution involved a breach of the first limb of section 601FD(1)(c), Murphy J concluded (at [617]) that:

> *None of the Directors could have reasonably believed that it was in the best interests of the members to bring the Amendments into effect through the resolution. ASIC made out its claim.*

In relation to the later decision to pay the Listing Fee to APCHL in instalments, his honour also concluded that each of the directors breached his duty to act in the best interests of the members (at [748]). His Honour found that the amendments which provided for the Listing Fee were invalid (discussed further below), and so the payment of the Listing Fee was outside the power in the constitution and plainly against the members' interests because it involved a diminution of their interest (at [749] to [751]). Because the test for determining whether the directors acted in members' best interests is an objective one, their honest belief in the validity of the Listing Fee provisions did not assist because it was the product of their failure to comply with their duty to act in the members' best interests at the time they approved the Lodgement Resolution (at [752]-[754])). The failure of the board to also recognise the obvious conflicts at the time of making the decision to pay the Listing Fee, including to exclude directors with material personal interest from the decision making, was also a breach of their obligations (at [756]). The failure to consider the obvious conflicts was inconsistent with acting in members' best interests (at [759] to [761]).

1.7 Duty to give priority to members in the case of conflicts

The duty

The second limb of the duty in sections 601FC(1)(c) and 601FD(1)(c) provides that, if there is a conflict between the members' interests and the interests of the responsible entity, priority must be given to the members' interests.

Interaction with best interests duty

Although it was not commented on by Murphy, it is interesting to note that the duty of priority is contained in the same paragraph as the duty to act in the best interests of members of the scheme. This raises questions about how they interact. In particular, while the best interest duty was held not to extend beyond the previously understood general law duty, there remains a question about how the obligation to give priority to members in the case of conflicts interacts with the obligation under the general law to avoid conflicts.

In setting out the background to the legislation, his Honour quotes from the Australian Law Reform Commission Report which led to the amendments to the Act to introduce the best interests obligation. The Commission considered but did not recommend imposing a duty on operators of schemes to avoid conflicts, which submissions said are

inevitable in the scheme context. It instead recommended that operators be required to give priority to members. This suggests that, although "best interests" has been taken to have its general law meaning, the intention perhaps was not to incorporate the strict general law duty to avoid conflicts (quoted at [478]), and that a responsible entity and its directors can act even where there is a conflict, provided that they give priority to members' interests. It is difficult to see how the amendments made to the constitution in this case could have been approved by the directors if they had given priority to members' interests.

Conflicts in this case

As noted above, Murphy J found that the conflicts between the members' interests and those of APCHL in relation to the amendments made to the constitution of the Prime Trust were "self-evident" (at [492]). The members had an interest in receiving APCHL's services as responsible entity for the fees provided in the existing constitution, rather than having to pay higher or additional fees for those services. APCHL, and consequently Mr Lewski and his associates who owned the shares in APCHL, had an interests in it receiving additional fees for its services.

Conclusions on conflicts

In relation to the breach of the duty by the directors, His Honour concluded (at [619] and [620]):

> *It is clear that the Directors did not prefer the members' interests. To prioritise the members' interests over APCHL's interests the Directors were required to have voted against the Lodgment Resolution… ASIC has made out its claim.*

His Honour also found that the determination of APCHL's liability centres on the conduct of the directors acting as a board, and that it follows from his finding that the directors breached their duty to give priority to the members' interests over APCHL's that APCHL also breached its duty to do the same.

His Honour concluded in relation to this issue that (at [758]):

> *A reasonable director in each Director's position would have been alive to, at least, APCHL's conflict of interest and conflict of interest and duty. Notwithstanding that these conflicts were plain, the evidence shows that the Directors gave them no proper attention on 19 July or 22 August 2006, or when making the decisions to pay the Listing Fee. A reasonable director in each Director's position would have considered and sought to resolve these conflicts in favour of the members before making the decisions to pay $33 million from Trust funds to APCHL, and through it to one of the Directors.*

1.8 Duty not to make improper use of position

ASIC also alleged that the directors, in breach of their duty under section 601FD(1)(e), made improper use of their positions to gain an advantage for APCHL and its related

parties to the detriment of the members of the scheme. His Honour applied the test as set out by the High Court in *Byrnes v Chew*[9] (quoted at [626]):

> *Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case.*

He also referred to *Chew*[10] for the proposition that something "*may be improper even if the person concerned believed it to be in the interests of the company*" (quoted at [627]).

Having regard to the circumstances of Lodgment Resolution and the Listing Fees paid to APCHL, his Honour did not accept that "*a reasonable person in each of the Director's positions could have considered it proper to pass the Lodgement Resolution*" (at [631]).

1.9 Related party benefits

Restrictions on related party benefits

A further issue in the case was whether the Listing Fees paid by APCHL in accordance with the purported amendments were permitted by the constitution of the Prime Trust, and if they were not, whether the payments constituted a breach by APCHL of the prohibition on related party transactions under section 208 of the Act (as modified by section 601LC of the Corporations Act). If there was a breach by APCHL, there was a further question as to whether the directors were involved in the breach in contravention of section 209 of the Act.

Section 208 provides that a public company or an entity that a public company controls must not give a financial benefit to a related party unless the company obtains approval of its members (and gives the benefit within 15 months of obtaining the approval), or the giving of the benefit is within one of the exceptions set out in that Part of the Act. The section applies also to managed investment schemes but is modified in its application by section 601LC so that benefits given to certain related parties out of scheme property, or which may endanger scheme property, are prohibited unless approved by the members or unless an exception applies.

It was not denied by the defendants in this case that the payment of the Listing Fee was a "financial benefit" which was given out of the Prime Trust scheme property by APCHL, a related party of the scheme, to itself. APCHL did not obtain the members' approval for these payments and none of the exceptions in section 210 to 216 of the Act was alleged to apply. The elements of the contravention in section 208(1) (as modified by section 601LC) were therefore made out.

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9 (1995) 183 CLR 501.

10 (1992) 173 CLR 626 at 633.

Exception for benefits permitted by the constitution

The directors argued, however, that the payments were permitted in accordance with section 208(3) (as modified by section 601LC) because they were provided for in the constitution of the Prime Trust. Contrary to the directors' submissions, his Honour was of the view that it was for them to establish that the exception in 208(3) applied. This required the directors to establish that the amendments introducing the Listing Fee provisions into the constitution were validly made.

Were amendments introducing the Listing Fee valid?

Murphy J found that, on a proper construction of the provisions, the amendment power in the constitution was subject to the qualification that any amendment "*shall not be in favour of or result in any benefit to the Responsible Entity*". His Honour rejected an alternative interpretation proposed by the responsible entity's legal advisers, which suggested that the amendment power may not be subject to this qualification.

The amendments were clearly in favour of, or resulted in benefit to, APCHL and so Murphy J concluded that they were made outside the power to amend in the scheme constitution (at [653]).

Statutory power of amendment

Murphy J separately considered the statutory power of amendment in section 601GC(1) and concluded that the statutory power did not allow APCHL to amend the constitution even when considered without the qualification in the constitution.

The statutory power of amendment allows an amendment to a scheme constitution without member approval if the responsible entity "*reasonably considers the change will not adversely affect members' rights*". The legal advice obtained by APCHL dealt with the question of the meaning of "members' rights" and, on the basis of the prevailing view in decided cases at that time, concluded that amendments which provide for the payment of new and increased fees affect the value of members' rights but not the rights themselves. It apparently advised that the board did not need to have regard to the members' right to have the scheme administered according to the existing constitution as that was not a relevant members' right for the purposes of the statutory amendment power (at [664]).

Murphy J found, having regard to the decisions in *Premium Income*[11] and *360 Capital*,[12] which were both decided subsequently to the amendments in Prime Trust, that the right to have the scheme administered according to its existing terms was a relevant right for

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11 *Premium Income Fund Action Group Incorporated and Another v Wellington Capital Limited and Others* (2011) 84 ACSR 600.

12 *360 Capital Re Ltd v Watts and Another* (2012) 91 ACSR 328.

the purposes of the statutory amendment power(at [657] to [659], [667]). Although previous cases on this question adopted inconsistent approaches, Murphy J preferred the reasoning in *Premium Income* and *360 Capital* over the decisions of Barrett J in *ING Funds Management*[13] and *Re Centro Retail*[14], and the decision of Young J in *Smith*[15]. This decision therefore adds further judicial support for the view in *Premium Income* and *360 Capital*.

His honour concluded that the amendments to the constitution to introduce and increase fees adversely affected members' rights because it affected the members' right to have APCHL provide services as responsible entity of the Prime Trust for the fees provided in the existing scheme constitution at the time (at [667]). In the absence of member approval, the amendments were invalid under the statutory amendment power.

Interaction between statutory power and the constitution

Contrary to the view put by the directors, his Honour concluded that the statutory amendment power can be subject to any complementary but more restrictive power on amendments contained in the constitution (at [683]). He found that the amendment power in the Prime Trust constitution qualified the statutory amendment power (at [676]) so that an amendment would be prohibited if it was either for the benefit of the responsible entity or adversely affected members' rights. In this case, the amendment was prohibited under both the statutory amendment power and the power in the constitution.

Conclusion on related party benefits

On the basis that the amendments were not permitted by the amendment power, the amendment to introduce the Listing Fee was not validly made and so the constitution did not contain a power to pay the Listing Fee at the time that it was paid. This was so despite the fact that APCHL lodged a consolidated trust deed with ASIC containing the amendments. Because the payment of the Listing Fee was not permitted by the constitution, the exception in section 208(3) was not met, and the payment therefore contravened the prohibition on the giving of related party benefits under section 208 of the Act. His Honour found that each of the directors had knowledge of each of the elements of the contravention by APCHL of section 208. They failed to prove that the payment was permitted by the exception in section 208(3), and so they contravened section 209 by being involved in the responsible entity's breach (at [732] to [734]).

Application to superannuation trustees

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13 (2009) 228 FLR 444.

14 (2011) 255 FLR 28.

15 (1992) 10 ACLC 906.

The discussion in the case in relation to the particular power of amendment set out in the Prime Trust constitution and the statutory power of amendment for managed investment scheme constitutions will be of limited applicability to superannuation funds. However, superannuation trustees should be conscious that they are also subject to the prohibition on related party transactions under section 208 (if they are public companies). However, they do not have the benefit of the modifications provided for managed investment schemes by section 601LC. In particular, the payment of a benefit by the trustee will not necessarily be permitted where the trust deed of the fund allows it. The Trustee should consider whether the provision of the benefit would contravene section 208. The benefit may be exempted under the exception in section 214 for benefits given by closely-held subsidiaries (which is not available for managed investment schemes).

2. Sharp v Maritime Super Pty Ltd

2.1 Summary of issues and conclusions

This case involved a dispute between a member of a superannuation fund and the trustee of the fund in relation to the payment of a total and permanent disablement ("**TPD**") benefit.

The member, Mr Ben Sharp was employed as a stevedore from 1997 to June 2006. His employment with Toll Stevedoring was terminated on 23 June 2006. Shortly afterward he was diagnosed as suffering from a chronic psychiatric disorder.

Mr Sharp claimed that he was entitled to the payment of a TPD benefit in accordance with the terms of the trust deed of the fund. The claim was rejected by the trustee on the basis of its interpretation of the relevant provision.

Mr Sharp's solicitors provided the trustee with new medical information and requested a reconsideration of the decision on several occasions without success. They finally brought proceedings against the trustee in the Supreme Court of NSW in 2011. Ward J held in a judgment in 2012[16] (the "**2012 judgment**") that the trustee had incorrectly interpreted the TPD provision, and that in her view Mr Sharp was entitled to a TPD benefit, but she decided to remit the matter back to the trustee for decision. The trustee ultimately determined that Mr Sharp satisfied the TPD definition in accordance with her Honour's interpretation and paid the benefit of approximately $435,000.

A second proceeding was commenced in 2012 for payment of interest and costs. In a judgment given in 2013, her Honour held that the trustee had breached its duties to properly investigate and consider Mr Sharp's claim, that the trustee should have considered and determined the claim correctly by 1 January 2008, and she awarded interest by way of equitable compensation from that date until the payment of the benefit in 2012 (which was approximately $240,000).

2.2 Relevance of the decision for superannuation trustees

Although much of the 2012 judgment deals with the correct interpretation of the particular TPD provision found in the Maritime Super trust deed, the case is important as another reminder to trustees of the importance of properly informing themselves in making decisions and of making further inquiries where there are inconsistencies or where evidence is provided to them that places them on notice that their initial conclusions may be incorrect.

It is also a salient reminder of the importance of acting promptly in response to claims. A significant issue in this case was the disagreement between the trustee and the member in the interpretation of the trust deed provision, which resulted in the trustee rejecting the

16 [2012] NSWSC 1350.

claim for several years. In the end, her Honour concluded that the trustee's interpretation was incorrect, and it did not assist the trustee that it relied on legal advice for its view. The case suggests that trustees who find themselves in similar disputes with members in relation to the proper interpretation of deed provisions should seek a speedier resolution of the dispute, such as by seeking judicial advice in relation to the correct interpretation. In this case, the delay resulted in a significant judgement against the trustee of equitable compensation.

2.3 Construction of TPD provisions

The TPD provision was contained in Rule 23 of the trust deed and rules of the fund. Mr Sharp and the trustee disagreed over the interpretation of requirement in Rule 23(a), which required that the member's employment be "*terminated solely on the grounds*" that their condition was such that they were permanently incapable of performing their duties satisfactorily or were a danger to others. The trustee contended that it could rely on the subjective grounds expressed by the employer for the termination (which appeared to relate only to his performance on the job), whereas Mr Sharp contended that the grounds for termination should be the subject of medical opinion and required no element of judgement by the trustee.

Her Honour concluded that the correct interpretation was a "middle way" between these contentions, and that Rule 23(a) should be construed as requiring that (at [156] of 2012 judgment):

> *it be established as an objective fact that the termination (or cessation) of employment was solely on the ground(s) relating to (or fully accountable by reason of) the member's physical or mental condition at that time (being such as to render him or her permanently incapable of performing satisfactorily or being a danger to others) or solely on the basis of a situation or event is that is causally linked to such a condition…*

While the employer's subjective reasons for termination, as expressed in the separation notice or letters, are relevant to the trustee's determination of the grounds for the termination, they will not be determinative. Other evidence can and should, in the appropriate case, be considered by the trustee.

Her Honour held that medical reports prepared after the termination may be relevant to the trustee's determination and should, in the appropriate case, be considered. If they disclose an underlying medical condition which may lay behind the causes of the termination, this should have been investigated. Her Honour said (at [155] of the 2012 judgment):

> *… if the member's employment is terminated solely for reasons or on grounds that (unbeknownst to the employer or otherwise) are later recognised by unanimous medical opinion to have been caused by an underlying physical or mental condition suffered by the member at that time (being a condition such that the member is permanently incapable of performing his or her duties or is a danger to others in the workforce) then it* ***makes no sense that the member***

should later be unable to claim a total and permanent disablement benefit simply because the condition was not recognised at the time. (Emphasis added.)

2.4 Conclusions on facts

Although Mr Sharp had a history of absenteeism and performance issues, her Honour held (at [165] of 2012 judgment) that:

> *…the evidence establishes that the sole operative ground of termination was the conduct on 6 June 2006 that posed a danger to the safety of the plaintiff (and others) in the workplace, having regard to Mr Sharp's non-compliance with the safety rule when entering the isolated area on 6 June 2006 and his excessive speed when driving the machinery on that occasion.*

Her honour also noted that each of the medical reports provided to the trustee and the reports obtained by the trustee from its own doctors (at [201] of the 2012 judgment):

> *…contains an express finding that the employment of Mr Sharp was terminated solely on the grounds that he had a mental condition at the time that rendered him permanently incapable of performing his duties satisfactorily or a danger to others.*

Her Honour was of the view that each of the reports:

> *should be read as relevantly determining the existence of a causal link between Mr Sharp's mental condition at the relevant time and the incident that is found to have caused the termination of his employment.*

Her honour remitted the matter to the trustee for decisions to give the trustee the opportunity to test the assumptions included in the relevant medical reports.

2.5 Payment of benefit

Following the remittance of the decision in relation to the TPD claim to the trustee, the trustee promptly made a decision to pay the benefit and did so in December 2012. The amount of the benefit was $520,000 excluding legal costs.

2.6 Claim for equitable interest

Ward J had understood the position of the trustee in the initial hearing to be that, if she were satisfied (as she was) that there was a total and permanent disablement claim established as at 2007, then interest would run from that date. This understanding proved to be incorrect (at [13] of the 2013 judgment). The trustee instead claimed that interest should run only from the date of the final determination of the claim in accordance with her previous orders and the payment of the claim in December 2012.

The member claimed an entitlement to interest by way of equitable compensation because of the breaches of trust by the trustee. It was therefore necessary for her Honour to determine if these breaches occurred and when.

Purported breaches

The claim for equitable interest was focused on two alleged breaches by the trustee (at [22] of the 2014 judgment):

(1) the failure to investigate the claim by Mr Sharp until the trustee obtained its own medical reports in 2011; and

(2) the failure correctly to understand the trust instrument, by relying on the employer's subjective reasons to determine if Mr Share was entitled to a benefit under the TPD provision.

There was no question in the end as to the second allegation given her Honour found that the trustee had proceeded on an incorrect understanding of the deed.

Relevant principles

Her Honour made reference again to *Finch v Telstra* and *Alcoa v Frost* (at [27] to [33] of the 2013 judgment). The key principles emerging from these cases are as follows:

- The High Court in *Finch* stated that "*[t]he duty of trustees properly to inform themselves is more intense in superannuation trusts in the form of the Deed [considered in that case] than in trusts of the Karger and Paul type*".

- In *Finch,* the trust was a strict trust in which the beneficiary was entitled as of right to a benefit provided the beneficiary satisfied any necessary condition of the benefit. In this case, the power of the trustee to take into account "*information, evidence and advice the trustee may consider relevant*" was coupled with a duty to do so.

- In *Alcoa*, Nettle JA said that where the consideration of a claim by a member of a superannuation fund to a benefit requires the formation of an opinion by the trustee, this is not a "*mere discretionary decision*", and the trustee has a "*high duty*" to "*make such inquiries as they may reasonably consider relevant in order to properly determine the application*".

- A trustee may have a duty to make further enquiries even where the material is not conflicting. If the material provided allows an inference that the claimant was totally and permanently disabled, "*[t]hereupon at least, if not before, the trustee came under a duty to give properly informed consideration to the application*", and if the material was insufficient to reach a properly informed decision, "*the trustee was thereupon bound to make further inquiries*", which may include requesting further material from the claimant (quoting Nettle JA in *Alcoa*).

- However, *Alcoa* also held that the trustee's obligation to give properly informed consideration to applications for entitlements "*does not mean that a trustee is required to do the impossible*" or to "*go on endlessly in pursuit of perfect information in order to make a perfect decision*".

Specifically in relation to the duties of the trustee in this case, her Honour said (at [54] of the 2013 judgment):

> *As recognised in Alcoa, the duty of the trustee is properly to consider a claim for the benefit provided under r 23. To the extent that this requires a determination to be made as to the objective grounds for termination of the member's employment, then the trustee must make proper enquiries to satisfy itself as to what those grounds were (and as to the causal link between those grounds and any relevant medical condition of which it is made aware).*

Conclusions as to breach

Her honour in the end agreed with Mr Sharp's contention that the trustee was wrong to rely on the subjective reasons of the employer in determining the reasons for his termination for the purposes of the TPD provision (at [36] of 2013 judgment).

Her Honour found (at [52] of the 2013 judgment) that "*[t]he trustee seems to have taken a largely reactive role"* during the process from the time it received the initial application until the time the litigation was commenced in 2011.

The trustee's actions in investigating Mr Sharp's claims were insufficient to discharge its obligations. The trustee wrongly operated on the understanding that the employer's termination advice was determinative of the issue *"therefore no further enquiry was necessary".* When provided with further information by Mr Sharp's representatives, the employer's actions in merely making enquiries of the employer were insufficient. Her Honour found (at [53] of the 2013 judgment) that "*[t]he trustee simply relied on the rather dismissive response from the employer*".

Her Honour concluded that, given the duties of superannuation trustees as laid out in the authorities she surveyed, the trustee should have undertaken more comprehensive enquiries of the employer in May 2007 when it received additional medical evidence in support of Mr Sharp's application (at [56] of the 2013 judgment). This would have produced evidence that the incident which led to Mr Sharp's dismissal was considered by the employer as posing a danger to Mr Sharp and others, which was an element in establishing that the criterion in Rule 23(a) was met.

If the trustee still took the view that the causal connection between the termination and Mr Sharp's mental condition was not established, it should have given Mr Sharp an opportunity to obtain further evidence in support of his position that there was a causal connection. Medical reports subsequently obtained by the trustee as part of the litigation proceeding established this causal connection. Had the trustee not taken an incorrect interpretation of the relevant Rule, and had it made proper enquiries and obtained the

relevant reports when it was put on notice of Mr Sharp's medical claims, it would have paid the benefit sooner (at [57] of the 2013 judgment).

Conclusions on equitable compensation

In the end, the claim for interest was based only on the principles of equitable compensation (rather than on the alternative claim based on section 100 of the *Civil Procedure Act 2005 (NSW)*). Her Honour quotes (at [61] of the 2013 judgment) the statement of Spigelman CJ in *O'Halloran v R T Thomas & Family Pty Ltd*[17] that:

> *The object of equitable compensation is to restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation.*

The loss of the party claiming compensation "*is to be assessed with the full benefit of hindsight*" (per McLachlan LJ in *Canosn Enterprises Ltd v Boughton & Co*[18] quoted at [62] of the 2013 judgment).

In Mr Sharp's case, the assessment of the appropriate measure of equitable compensation required the court to consider what the trustee would have done had it interpreted the deed correctly and taken appropriate steps to investigate the claim. Her Honour was of the view that the trustee, after being provided with the additional medical reports in May 2007, would have taken around six months "*to allow for the investigation and completion of the appropriate enquiries and determination of the claim*" (at [64] of the 2013 judgment). In her Honour's view, it was therefore appropriate to allow interest at court rates by way of equitable compensation from 1 January 2008, the approximate date at which the trustee should have completed its enquiries and paid the benefit had it acted correctly, to 18 December 2012, the date on which it ultimately paid the benefit.

Reliance on legal advice

The trustee had acted on the basis of legal advice in interpreting the relevant provision of the trust deed in the way that it did. Her Honour held in the end that this construction was incorrect, and that, by failing to take the actions which were required of the trustee on a correct interpretation of the deed, the trustee breached its duties.

In determining the claim to equitable compensation, the fact that the trustee acted on incorrect legal advice was therefore not a relevant defence. To do so would "*put a premium on erroneous advice*", and the party relying on the advice "*would be advantaged by having obtained bad legal… advice*" (quoting Bongiorno J in *HIH Casualty & General Insurance v Insurance Australia (No 2)*[19]).

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17 45 NSWLR 262.

18 (1991) 95 DLR (4th) 129.

19 [2006] VSC 128.

3. Hannover Life v Dargan

3.1 Background

This case concerned an application by a member of a superannuation fund for the payment of a total and permanent disablement benefit. Mr Dargan had been a full-time truck driver and labourer with a removalist company before he injured his back at work and was unable to continue working as a removalist. He subsequently obtained a certificate and completed a short course which allowed him to work as a taxi driver. He was able to work as a taxi-driver only on a part-time basis at the relevant time of the claim.

Mr Dargan's claim for the payment of a total and permanent disablement benefit was denied by the insurer, Hannover Life Re of Australasia Ltd, the issuer of the group insurance policy held by the trustee of the superannuation fund. The definition of "Total and Permanent Disablement" in the policy required that the member be "*unlikely ever to be able to engage in any Regular Remuneration Work for which the Insured Person is reasonably fitted by education, training or experience*". The insurer argued that that Mr Dargan did not meet the definition.

Mr Dargan sued the trustee and the insurer in the Supreme Court of NSW and won at first instance (see the decision of Gzell J in *Dargan v United Super Pty Ltd & Anor* [2011] NSWSC 1316).

The insurer and the trustee appealed the decision arguing that Mr Dargan did not meet the definition of "Total and Permanent Disablement" in the policy because:

- Mr Dargan was able to work as a taxi driver, which, although different to his previous work as a truck driver and labourer, was work for which he was "*reasonably fitted by education, training or experience*". The fact that he was required to obtain a certificate and complete a short course in order to be able to work as a taxi driver did not prevent him from being "reasonably fitted" to working as a taxi driver at the relevant time of the claim.

- Although Mr Dargan was only able to work as a taxi driver part-time, this was "Regulator Remuneration Work" as defined in the policy.

In March 2013, Bathurst CJ (with whom the other judges agreed) allowed the appeal and overturned the judgment at first instance. The judgment is contained in *Hannover Life Re of Australasia Ltd and Another v Dargan* [2013] NSWCA 57 ("**Hannover v Dargan**").

3.2 "Reasonably fitted"

A key issue in the appeal was whether Mr Dargan was "reasonably fitted by education, training or experience" for work as a taxi driver. If he was reasonably fitted to that work at the relevant time of the claim (being six months after his injury) and if it was "Regulator Remunerative Work", then he would not meet the definition of Total and Permanent Disablement in the policy.

In order to qualify to work as a taxi driver, Mr Dargan was required to obtain a licence and undertake a four-day course. Bathurst CJ held (at [37]) that:

> *…it does not seem to me that the need to obtain a licence and as a condition of maintaining it undertake a limited qualifying course would preclude a person from being reasonably fitted for a particular occupation.*

His previous experience as a truck driver was relevant. It would have required him to be familiar with road rules and the "*demands involved in driving commercial vehicles*" (at [38]). He was able to obtain the necessary certificate and "*comfortably pass the test required as a condition of maintaining the certificate*". His Honour found that, even if he had been required to refresh his knowledge road rules and acquaint himself with the major roads, "*that would not in my opinion mean that he was not reasonably fit to drive a taxi by virtue of his education, training or experience*".

The facts in this case were distinguished by his Honour from those in *Halloran v Harwood Nominees Pty Ltd*[20]. In that case, the member claiming a disablement benefit previously worked greasing machinery. He subsequently obtained a TAFE course over several years in office administration and computer studies, and obtained work as a contract officer. The court found that, at the time disablement was to be tested (six months from the date of injury), the assessment should only take into account work for which the employee was suited at that time, and that he was not at that time suited to the work for which he subsequently retrained.

Bathurst CJ was of the view that *Halloran* did not deal with the key question in this case, which is whether the need to complete a training course where the claimant has the necessary education, training and experience to successfully complete it leads to the conclusion that at that time he was incapable of working within the meaning of the policy.

That question was directly addressed by Hodgson J in *Chammas vHarwood Nominees Pty Ltd*[21]. In that case, the court was required to determine the meaning of the phrase "occupation or work" for which the member is "reasonably qualified by education training or experience" in the definition of "Total and Permanent Disablement" in an insurance policy. Bathurst CJ cited the passage of Hodgson J's judgment where his Honour discusses the meaning of this phrase and states that (at [43] of *Hannover v Dargan*):

> *the employment must be employment which the member is capable of undertaking, having regard to his education, experience and training, or at least employment which he* ***could become capable of undertaking with further training*** *which it would be* ***reasonable*** *for him to undertake.* (My emphasis.)

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20 [2007] NSWSC 913.

21 (1993) 7 ANZ Ins Cas 61-175.

Bathurst CJ held that there was nothing to suggest that Mr Dargan was not capable of obtaining the relevant certificate and completing the training course to become qualified to drive a taxi, and so at the time his disability was to be assessed, he was "reasonably fitted to carry out the occupation of a taxi driver, at least on a part-time basis" (at [44]).

3.3 "Regular Remuneration Work"

The final issue to be determined was whether his part-time work as a taxi driver was "Regular Remuneration Work" as defined in the policy.

A person is defined as being engaged in "Regular Remunerative Work" "*if they are doing work in any employment business, or occupation. They must be doing it for reward – or the hope of reward – of any type*" (at [16]).

Having regard to the dictionary definition, Bathurst CJ noted that this would not, on a literal construction, exclude part-time work. In his view, therefore, given that Mr Dargan was capable of working as a taxi driver on a part-time basis, he was capable of doing "Regular Remunerative Work".

Bathurst CJ held that this conclusion is consistent with the purpose of the policy (to provide for a total, not partial, disablement benefit), and is not affected by the fact that the policy is a group policy intended to cover both part-time and full-time employees. It is also consistent with the decision of Giles JA in *Manglicmot*.

The different outcomes in *Chammas* and *Alcoa of Australia Retirement Plan Pty Ltd v Thompson* [22]("**Alcoa**") were also considered. *Chammas* was distinguished on the basis that the court in that case was interpreting the meaning of the term "employment" (not "Regular Remuneration Work"), which the judge in that case found to only encompass "full-time" employment. In *Alcoa*, RD Nicholson J concluded that work which the member was reasonably capable of performing did not include part-time work. Bathurst CJ disagreed with this conclusion and refused to apply it in this case, on the basis that the conclusion he had reached about the meaning of the phrase "Regular Remuneration Work" did not exclude part-time work.

3.4 Implications

When reviewing the total and permanent disablement benefits provided under life policies held for the benefit of members, trustees should consider and determine whether the policies will respond to claims in circumstances contemplated by the trustees. Trustees may consider clarifying whether part-time work is to be considered "regular remunerative work", and the circumstances in which a member who is required to retrain in order to be able to work in an alternative profession will still fail to meet the definition of "totally and permanently disabled" for the purposes of the policy.

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[22] [2002] FCA 256.

The ability of insurers to consider the ability of claimants to undertake reasonable retraining in determining total and permanent disablement adds an element of uncertainty in claims where a member may be able to continue with some sort of work, even on a part time basis. Insurers will be keen to argue, where they can, that the claimant is reasonably fitted by their previous education, training and experience for this work. The dividing line between retraining which is reasonable and which is beyond what should be expected of a claimant will continue to be drawn by the courts as individual facts present themselves.

Superannuation trustees should also be aware of the interaction between policies and the definition of "permanent incapacity" in SIS Regulation 1.03C for the purposes of the conditions of release, and the new requirement under SIS Regulation 4.07D that, from 1 July 2014, a trustee not provide an insured benefit in relation to a member of a fund unless the insured event is consistent with a condition of release specified in that regulation, including the "permanent incapacity" condition of release.