

## Case law review 2013-14

Simun Soljo  
Senior Associate  
King & Wood Mallesons

# 2014: Superannuation. Beyond the Fringe

## Three cases:

### *ASIC v APCHL (Prime Trust)*

- Duty of care, best interests, conflicts and related party benefits

### *Sharp v Maritime Super*

- Trustee's duty to properly inform itself

### *Hannover Life v Dargan*

- Meaning of “reasonably fitted” and “regular remunerative work” in TPD definition

# *ASIC v APCHL (in liquidation)*

## *Prime Trust*

Murphy J

[2013] FCA 1342



# 2014: Superannuation. Beyond the Fringe

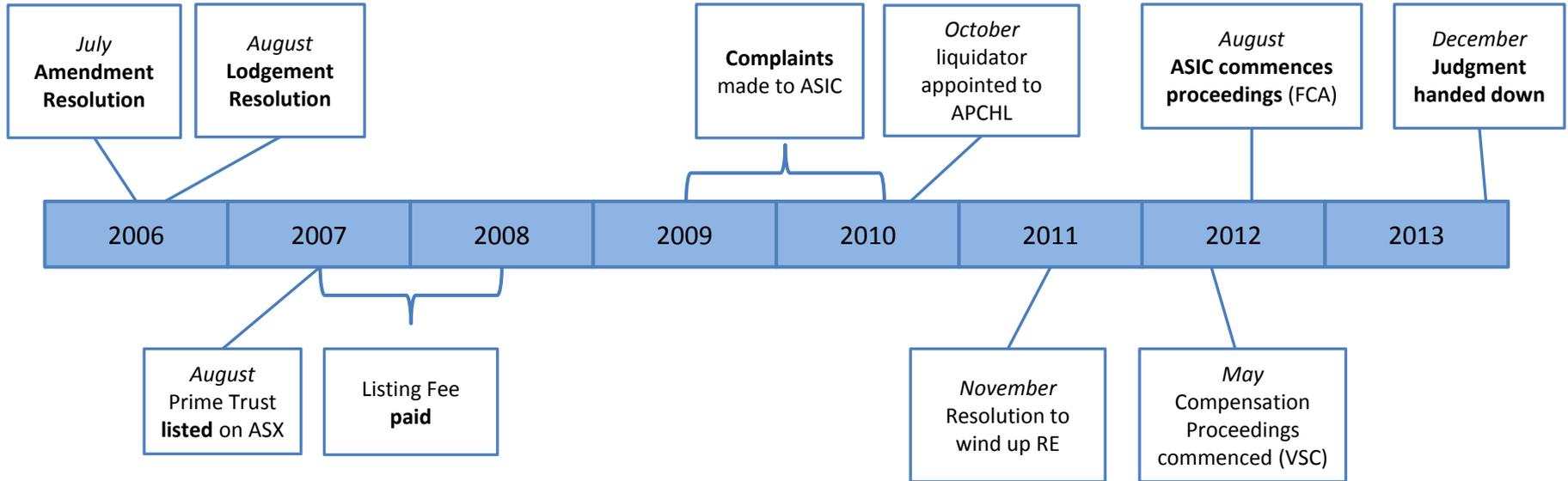
## *Background*

- Collapse of Prime Trust
- Complaints by investors
- Investigation and proceedings by ASIC



# 2014: Superannuation. Beyond the Fringe

## Chronology



## *Key actions by trustee*

- **Amendment Resolution (July '06)**
  - Amended constitution to introduce **Listing Fee**
  - Signed but undated
- **Lodgement Resolution (August '06)**
  - Dated and lodged with ASIC
- **Payment of Listing fee ('07-'08)**

## *Relevant duties:*

- **care and diligence**
- **best interests**
- **give priority** in cases of conflict of interests
- restrictions on **financial benefits** to related parties

## *Duty of care and diligence*

*To exercise the degree of care and diligence that a **reasonable person** would exercise if they were in the responsible entity's/officers position*

- **Heightened** duty of professional trustee (*ASC v AS Nominees*)
- Scrupulous in dealing with **conflicts**

## *Legal advice*

- Unusual – invited the client to make choice between mutually inconsistent interpretations
- A reasonable director would not have relied on it

## ***Comparison with superannuation***

*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 (52(2)(b))*

~ Prudent **professional** trustee standard

## ***Best interests***

- Duty “*does not extend its content beyond previously understood **general law boundaries***”
- Followed ***Invensys*** and ***Manglicmot***
- New and increased fees clearly not in members’ best interests

## ***Duty to give priority***

- Conflicts in this case were self-evident - “Blind Freddy” would have recognised them:

*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.*

## *Related party transactions*

- Restriction on **financial benefits given** to a **related party** unless approved by members (208 and 601LC)
- Exception for MISs where benefit **permitted by constitution**
  - amendment to introduce Listing Fee was found invalid
- Note exception for **closely held subsidiaries** (not for MIS)

# ***Sharp v Maritime Super Pty Ltd***

Ward J

[2012] NSWSC 1350

[2013] NSWSC 389

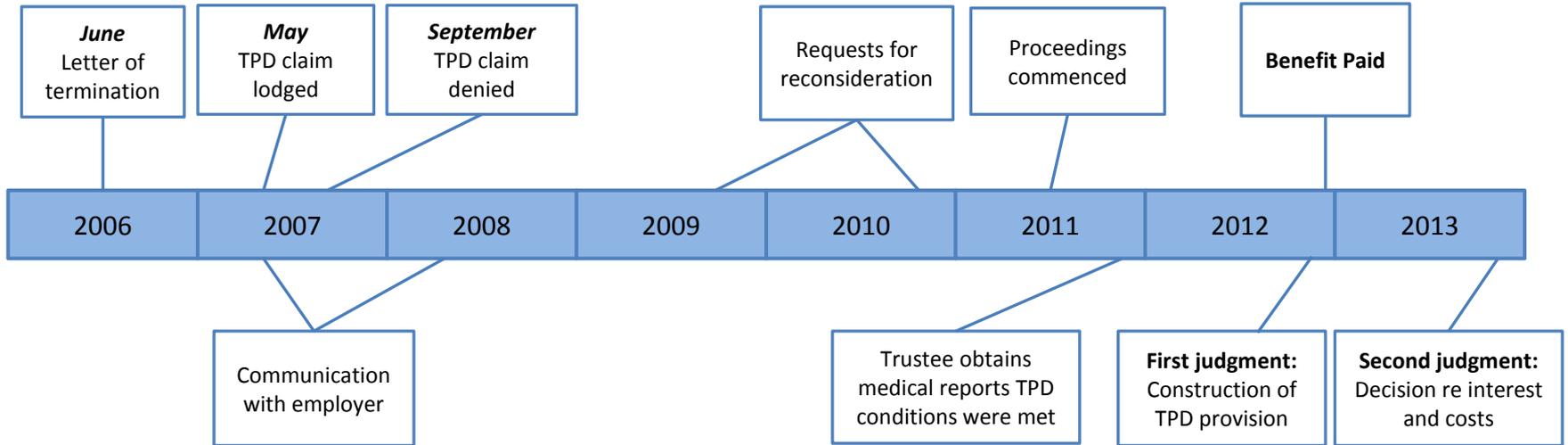


## *Key issues*

- Construction of the deed
- Trustee's breach of duty to investigate
- Equitable compensation

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## *TPD provision (Rule 23(a))*

The member's employment is terminated **solely** on the grounds that their physical or mental condition **at that time** is such that the member is

- permanently incapable of performing duties satisfactorily or
- a **danger to others**

## *Interpretation of TPD provision*

- Sets out an objective process to be followed by trustee
- Employer's subjective reasons not determinative
- Termination may be “solely on the basis of a situation or event that is causally linked to such a [physical or mental] condition”
- Subsequent medical evidence may be relevant

## *Trustee's duties*

- Duty of trustees to give **properly informed** consideration (*Finch v Telstra; Alcoa v Frost*)
- **More intense** in superannuation trusts
- **High duty** to make enquiries
- Does not require endless inquiries in pursuit of perfection
- Not appropriate to take only **reactive role**

## *Judge's conclusions*

- Trustee breached its duty to properly inform itself
- It took a “**reactive role**” up until commencement of litigation, relying only on employer’s subjective reasons
- Should have undertaken more comprehensive enquiries

## *Equitable compensation*

- To restore person to position they would have been in had there been no breach (*O'Halloran*)
- With full benefit of **hindsight** (*Canson Enterprises*)
- Trustee would have paid benefit by 1 January 2008
- Interest (equitable compensation) awarded to date it eventually paid the TPD benefit (December 2012)

# *Hannover Life v Dargan*

[2013] NSWCA 57



## *Background*

- Full time truck driver and labourer injured and unable to continue with previous work
- Obtained certificate and completed training course to work as taxi driver – part-time
- Claimed TPD benefit

## *Key issues*

- Whether “**reasonably fitted** by education, training or experience” for work if required further training/qualification?
- Whether “Regular Remunerative Work” in the policy includes **part-time** work?

## *“Reasonably fitted”*

- Applied ***Chammas*** – “reasonably qualified” even if requires “...***further training*** which it would be ***reasonable*** for him to undertake.”
- Requirement to obtain a licence and undertake limited qualifying course does not preclude him from being “reasonably fitted”

## “Regular Remunerative Work”

- Would not include *casual work* or other *intermittent* work
- **But** can include *part-time* work
- Cases considered:
  - *Chammas distinguished* - “employment” meant **full-time** employment
  - Agreed with *Manglicmot* – “work or reward”
  - Disagreed with *Alcoa*

## *Issues to consider*

- Implications for members
- Intention of trustee?
- SIS “permanent incapacity” condition of release

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## Key points:

### *ASIC v APCHL (Prime Trust)*

- Best interests – **general law**
- Consider **conflicts** and **related party benefits**

### *Sharp v Maritime Super*

- Properly informed consideration - not enough to be “**reactive**”

### *Hannover Life v Dargan*

- “Reasonably fitted” can require **further training/licensing**
- “Regular Remunerative Work” can be **part-time**