

Case law review 2013-14

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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



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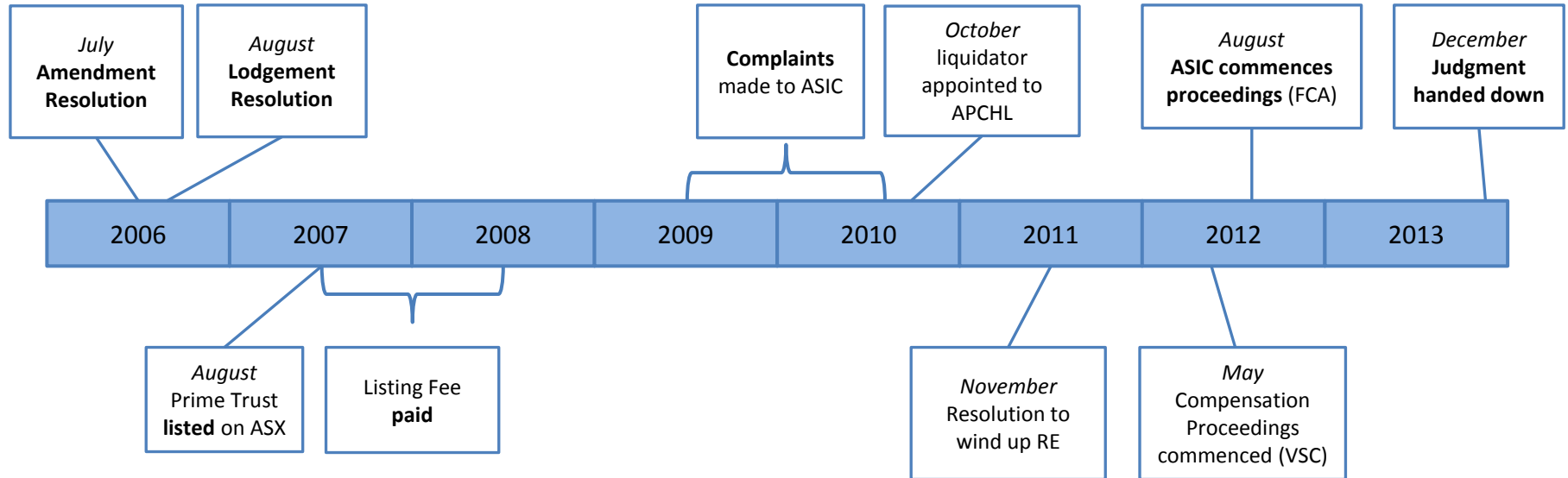
Background

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



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Chronology



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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)**

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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

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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



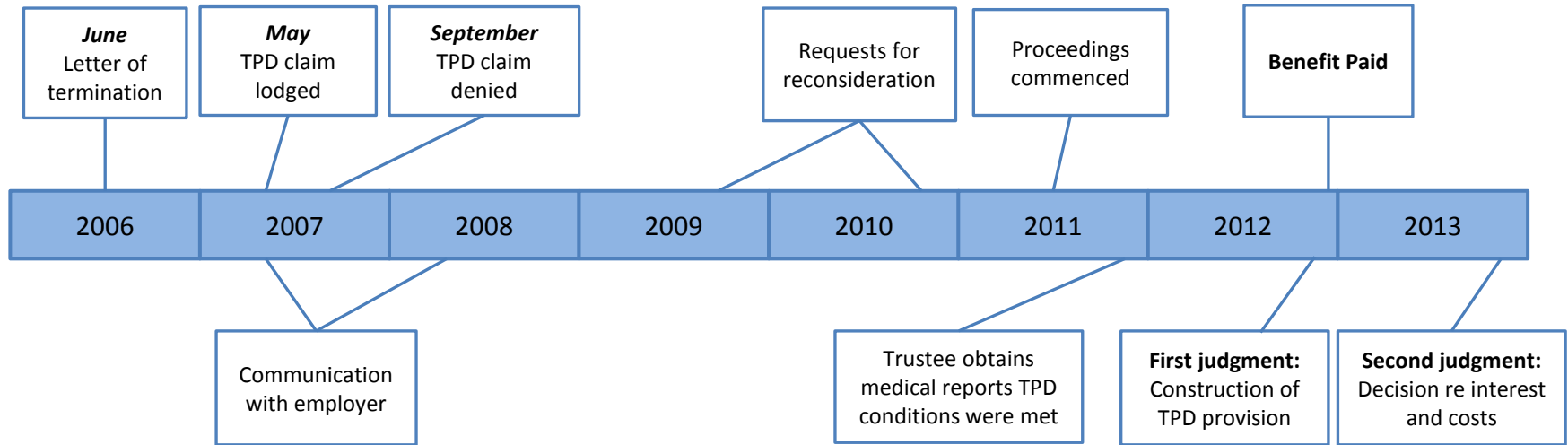
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Key issues

- 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

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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**