FEDERAL COURT OF AUSTRALIA

Raelene Vivian, suing in her capacity as the Deputy Commissioner of Taxation (Superannuation) v Fitzgeralds
[2007] FCA 1602

CORRIGENDUM

THE DEPUTY COMMISSIONER OF TAXATION (SUPERANNUATION) OF THE COMMONWEALTH OF AUSTRALIA v ROBERT BURLEY FITZGERALDS AND LILA ANN FITZGERALDS

QUD 318 OF 2006

LOGAN J
15 OCTOBER 2007 (CORRIGENDUM 31 OCTOBER 2007)
BRISBANE

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **QUD 318 OF 2006**

BETWEEN:	**THE DEPUTY COMMISSIONER OF TAXATION (SUPERANNUATION) OF THE COMMONWEALTH OF AUSTRALIA** **Applicant**
AND:	**ROBERT BURLEY FITZGERALDS** **First Respondent**
	LILA ANN FITZGERALDS **Second Respondent**

JUDGE:	**LOGAN J**
DATE OF ORDER:	**15 OCTOBER 2007**
WHERE MADE:	**BRISBANE**

CORRIGENDUM

1 On Cover Sheet, Orders Page and Reasons for Judgement page respondents should read:

"ROBERT BURLEY FITZGERALDS & LILA ANN FITZGERALDS"

2 On Cover Sheet, Orders Page and Reasons for Judgement page the court file number should read:

"QUD 318 of 2006 not QUD 318 of 2007".

I certify that the preceding two (2) numbered paragraphs are a true copy of the Corrigendum to the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 31 October 2007

FEDERAL COURT OF AUSTRALIA

Raelene Vivian, suing in her capacity as the Deputy Commissioner of Taxation (Superannuation) v Fitzgeralds
[2007] FCA 1602

CORRIGENDUM

RAELENE VIVIAN, SUING IN HER CAPACITY AS THE DEPUTY COMMISSIONER OF TAXATION (SUPERANNUATION) OF THE COMMONWEALTH OF AUSTRALIA v ROBERT BURLEY FITZGERALDS & ANOR

QUD318 OF 2007

LOGAN J
15 OCTOBER 2007 (CORRIGENDUM 23 OCTOBER 2007)
BRISBANE

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **QUD318 OF 2007**

BETWEEN:	**RAELENE VIVIAN, SUING IN HER CAPACITY AS THE DEPUTY COMMISSIONER OF TAXATION (SUPERANNUATION) OF THE COMMONWEALTH OF AUSTRALIA** **Applicant**
AND:	**ROBERT BURLEY FITZGERALDS & ANOR** **Respondent**

JUDGE:	**LOGAN J**
DATE OF ORDER:	**15 OCTOBER 2007**
WHERE MADE:	**BRISBANE**

CORRIGENDUM

1 On page 13 at paragraph 50 the third sentence should read:

> "Those matters observed, in the exercise of judicial power it does seem to me that respondents ought not, unless there be particular good cause, be burdened with choices that, as a matter of public administration, the Commissioner chooses to make in relation to the locale of particular administration of particular provisions or related legal advisers."

I certify that the preceding one (1) numbered paragraph is a true copy of the Corrigendum to Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 23 October 2007

FEDERAL COURT OF AUSTRALIA

Raelene Vivian, suing in her capacity as the Deputy Commissioner of Taxation (Superannuation) v Fitzgeralds
[2007] FCA 1602

SUPERANNUATION – where contraventions of ss 62(1) and 65(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) have been admitted – where declarations are sought that would reflect those admissions

CIVIL PENALTIES – consideration of the imposition of civil penalties pursuant to s 197(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) - where the contraventions involved monies held in a self-managed superannuation fund being "stripped out" by the respondents who were the trustees of that fund - where those contraventions were deliberate and significant – consideration of other principles and factors relevant to the assessment of an appropriate penalty

FEDERAL COURT – ORIGINAL JURISDICTION – PROCEDURE AND EVIDENCES – parties – application for civil penalties pursuant to s 197(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) – whether application should be brought in individual or official name of Registrar or delegate

RAELENE VIVIAN, SUING IN HER CAPACITY AS THE DEPUTY COMMISSIONER OF TAXATION (SUPERANNUATION) OF THE COMMONWEALTH OF AUSTRALIA v ROBERT BURLEY FITZGERALDS & ANOR

QUD318 OF 2007

LOGAN J
15 OCTOBER 2007
BRISBANE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **QUD318 OF 2007**

BETWEEN: **RAELENE VIVIAN, SUING IN HER CAPACITY AS THE DEPUTY COMMISSIONER OF TAXATION (SUPERANNUATION) OF THE COMMONWEALTH OF AUSTRALIA**
Applicant

AND: **ROBERT BURLEY FITZGERALDS & ANOR**
Respondent

JUDGE: **LOGAN J**
DATE OF ORDER: **15 OCTOBER 2007**
WHERE MADE: **BRISBANE**

THE COURT DECLARES THAT:

1. The respondents, as trustees of the Axent Group Superannuation Fund ("the Fund"), caused the Fund:

   (a) on 5 June 2001 to pay the first respondent the sum of $12,000 from the Fund without authorisation under the governing rules of the Fund;

   (b) on 13 June 2001 to pay the first respondent the sum of $23,000 from the Fund without authorisation under the governing rules of the Fund; and

   (c) on 29 June 2001 to apply the net proceeds of sale of the property belonging to the Fund at Unit 3 (Lot 2), 38 Jade Drive, Nerang, in the State of Queensland, as to $13,738.69 to the first respondent and as to $99,994 to William John Fletcher as the liquidator of Antrend Pty Ltd (in liquidation) in satisfaction of a claim made by him against the first respondent, and thereby contravened:

      (i) s 62(1) of the Superannuation Industry (Supervision) Act 1993 (Cth) ("the SISA") by failing to ensure that the Fund was maintained for one or more of the purposes set out in s 62(1), instead maintaining the Fund for the purpose or significant

purpose of making payments to satisfy a claim made against the first respondent by a third party; and

(ii) s 65(1) of the SISA by giving financial assistance using the resources of the Fund to a member of the Fund, namely the first respondent.

THE COURT ORDERS THAT:

2. The name of the applicant in the title to the proceeding be amended as shown in the Amended Application filed with the Court on 15 October 2007.

3. The first respondent pay to the Commonwealth of Australia a monetary penalty in the sum of $20,000.

4. The second respondent pay to the Commonwealth of Australia a monetary penalty in the sum of $10,000.

5. The respondents pay the applicant's cons of and incidental to the application, fixed in the sum of $32,500.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **QUD318 OF 2007**

BETWEEN: RAELENE VIVIAN, SUING IN HER CAPACITY AS **THE DEPUTY COMMISSIONER OF TAXATION (SUPERANNUATION) OF THE COMMONWEALTH OF AUSTRALIA**
Applicant

AND: **ROBERT BURLEY FITZGERALDS & ANOR**
Respondent

JUDGE: **LOGAN J**
DATE: **15 OCTOBER 2007**
PLACE: **BRISBANE**

EX TEMPORE REASONS FOR JUDGMENT

1 I propose now to deliver judgment in this matter, and also to pronounce formal orders as to the declarations sought, and also in respect of penalty.

2 This is a civil penalty proceeding which has been brought by a Deputy Commissioner of Taxation pursuant to section 197 subsection (1) of the *Superannuation Industry (Supervision) Act* 1993, which I shall term hereafter "the SISA". In its original form, the application named as applicant an office rather than an individual. By that I mean that in its original form, the applicant was named as the Deputy Commissioner of Taxation (Superannuation) of the Commonwealth of Australia.

3 I raised with the applicant's counsel whether or not, having regard to observations made in the High Court in *Bainbridge-Hawker v Minister of State for Trade and Customs* (1957-1958) 99 CLR 521, that was an appropriate entitlement of the applicant in the proceeding. Upon reflection, and as against a stance of neither consenting to, nor opposing the amendment on the part of the respondents, the applicant sought, and I granted leave, to amend the name of the applicant so that it read Raelene Vivian suing in her capacity as the Deputy Commissioner of Taxation (Superannuation) of the Commonwealth of Australia. Such an amendment seemed to me to be necessary, having regard in particular to an

observation that Sir Owen Dixon made in the *Bainbridge-Hawker case* at page 546, that there was:

> *...much to suggest that the proper course is to employ the Minister's personal name followed by the description of his office, so as to show the character in which he proceeds. But failure to do so cannot be fatal to the proceedings.*

4 Some federal statutes permit the institution of civil penalty proceedings and, for that matter, other civil proceedings in the name of an office rather than an individual. Section 197 of the SISA, in providing that an application for a civil penalty may only be made by the "Regulator" or a person to whom the "Regulator" has delegated the power to make application for civil penalty orders, does not seem to me to fall into that class of provision. Rather, it seems to me that it is more in keeping with the type of provision considered in the High Court in the *Bainbridge-Hawker case,* which was a provision in the *Customs Act* 1901, namely, section 245 in its then-form.

5 The matter of the applicant's nomenclature being, as indicated, an irregularity rather than a nullity, I permitted the amendment in the manner indicated. The applicant is a delegate of the Commissioner of Taxation, and an analysis of the SISA takes one to the position that so far as the provisions of that Act of present interest are concerned, the Commissioner of Taxation is the "Regulator" for the purposes of the legislation. An instrument of delegation has been tendered. It is apparent from that, that the applicant holds an office which is the subject of delegation and it is not controversial that she is an appropriate person to institute the present proceedings.

6 The respondents are respectively, as first respondent, Robert Burley Fitzgeralds and as second respondent his wife, Lila Ann Fitzgeralds. I shall refer to them as Mr and Mrs Fitzgeralds. Mr and Mrs Fitzgeralds are, and at all times material to this proceeding since about 30 June 2000 have been, the trustees of a superannuation fund which is known as the Axent Group Superannuation Fund. That fund was established on or about 20 August 1993. Before Mr and Mrs Fitzgeralds became the trustees of the fund, its sole trustee was a company, Antrend Proprietary Limited, hereafter "Antrend", of which Mr and Mrs Fitzgeralds were at all material times the directors.

7 The parties have agreed to a particular summary of facts. What follows is a

recitation of the facts, as agreed, as they seem especially pertinent to me for present purposes. The agreed summary forms an exhibit in the proceedings and recites in greater detail the facts that are agreed.

8 The fund had two members, namely, Mr and Mrs Fitzgeralds. In or about October 1997, the then trustee of the fund, Antrend, acquired realty, namely, an industrial property at Nerang in Queensland.

9 That property came to be registered on the Register of Land in Queensland in the name of that company, but without specific reference in the title register to its ownership in the capacity of trustee. The *Land Title Act* 1994 (Qld) permits, but does not mandate, the endorsement on the register of the ownership of realty in a trustee capacity. It is said that the omission of trustee capacity occurred due to an error at the time of acquisition. Be that as it may, from that time onwards the Nerang property, which I shall hereafter call it, was the principal asset of the fund. Further, Mr and Mrs Fitzgeralds at all times understood this to be the case. In the fund's financial statements as at 30 June 2001, the Nerang property was valued at $111,297. The other assets of the fund were valued at $28,247.10.

10 On 1 February 2001, the Supreme Court of Queensland ordered that Antrend be wound up under the provisions of the *Corporations Law*. A Mr William John Fletcher was appointed as the liquidator of the company. The liquidator at first treated the Nerang property as an asset of Antrend, which was available in the liquidation. On 27 March 2001, Mr and Mrs Fitzgeralds' solicitors, H. Drakos and Company wrote to the liquidator's solicitors, a firm known as Raj Lawyers, enclosing an advice from Mr and Mrs Fitzgeralds' accountants, Statewide Taxation Services Pty Ltd, to the effect that the Nerang property was paid for and owned by the fund.

11 Later, on 6 April, Raj Lawyers replied to H. Drakos and Company advising that the liquidator was satisfied that the Nerang property was not an asset of Antrend, but rather an asset of the fund. On or about 12 May 2001, the liquidator of Antrend commenced a proceeding against Mr Fitzgeralds in the District Court of Queensland, claiming the sum of $129,994. That sum was alleged to be owing by him to Antrend under a deed of covenant and assurance dated 3 August 2000. On or about 7 June 2001, Mr Fitzgeralds paid the liquidator the sum of $30,000 in partial satisfaction of that claim pursuant to a settlement

agreement reached between him and the liquidator on behalf of the company, in respect of that District Court proceeding.

12 Later in time, on or about 29 June 2001, the liquidator caused the Nerang property to be sold for the sum of $115,000. The liquidator, on behalf of Antrend, executed a transfer to the purchasers. The sale was procured by Mr and Mrs Fitzgeralds as trustees of the fund and at a time when the Nerang property remained an asset of the fund. The sale of the property was handled by H. Drakos and Company as solicitors for Mr and Mrs Fitzgeralds in their capacity as trustees of the fund. On or about 29 June 2001, by arrangement between the liquidator of Antrend and Mr and Mrs Fitzgeralds, that firm dispersed the proceeds of sale of the Nerang property, after deduction of legal expenses, in the following manner:

(a) as to the sum of $13,738.69 to Mr Fitzgeralds; and

(b) as to the balance, namely, $99,994, to the liquidator on behalf of Mr Fitzgeralds in final satisfaction of the District Court claim and in accordance with the settlement agreement mentioned.

13 These disbursements were made strictly on the instructions of Mr and Mrs Fitzgeralds. Apart from that particular realisation of superannuation fund property, there were other payments made from the assets of the superannuation fund. On or about 5 June 2001, Mr and Mrs Fitzgeralds, again in their capacity as trustees of the fund, paid to Mr Fitzgeralds a sum of $12,000. On or about 13 June 2001, again in their capacity as trustees of the fund, they paid to Mr Fitzgeralds the sum of $23,000 from that fund. Neither of these payments were authorised by the rules that govern the fund.

14 In the application the claim is detailed as follows. Declarations are sought that each of Mr and Mrs Fitzgeralds, in failing to ensure since 5 June 2001 that the fund was maintained solely for one or more of the purposes specified in section 62 subsection (1) of the SISA, contravened section 62 subsection (1). Next, it is sought that a declaration be made that each of Mr and Mrs Fitzgeralds, in giving financial assistance from the resources of the fund to a member of the fund, namely, Mr Fitzgeralds, on 5 June, 13 June, and 29 June 2001, contravened section 65 subsection (1) of the SISA.

15 It is further the case that civil penalties are sought. I shall outline the nature of that claim in a moment. By section 196 subsection (1) of the SISA, if the court is satisfied that a person has contravened a civil penalty provision, the balance of that section applies. Each of sections 62 and 65 is a "civil penalty provision." See section 193 of the SISA. Having regard to the agreed summary of facts, I am satisfied that Mr Fitzgeralds and Mrs Fitzgeralds have each contravened the civil penalty provisions nominated. That being the case, section 196 subsection (2) is engaged.

16 I am informed, and indeed there is no dispute, that there is no declaration already in force under division 4 of the legislation. That being so, and having regard to the satisfaction mentioned, the court is obliged to declare that each of Mr and Mrs Fitzgeralds has, by a specified act or omission, contravened the particular provision concerned in relation to what is termed a specified superannuation entity. That entity for present purposes is the fund mentioned. I shall make declarations accordingly. The form of declarations has been the subject of agreement between the parties, minutes of which have been tendered to the court along with the agreed summary of facts. Those declarations seem to me to be appropriate.

17 The question then becomes whether or not civil penalties ought to be imposed?

18 In the application it is sought that each of Mr and Mrs Fitzgeralds pay to the Commonwealth such monetary penalty as the court determines to be appropriate for each of them in respect of each of the contraventions that are alleged in the statement of claim. As pleaded, those contraventions are as follows. Under section 62 subsection (1) of the SISA, that Mr and Mrs Fitzgeralds, as trustees, were required to ensure the fund was maintained solely: (a) for one or more of the core purposes set out in section 62 subsection (1) paragraph (a) of that Act; or (b) for one or more of those core provisions and one or more of those ancillary purposes set out in section 62 subsection (1) paragraph (b).

19 It is further pleaded, in respect of the pecuniary penalties sought, that in contravention of section 62 subsection (1), Mr and Mrs Fitzgeralds firstly caused or permitted the Nerang property to be sold; secondly, made the payments which I have referred to earlier; and, thirdly, procured the payments referred to earlier and thereby caused the fund to

be maintained for purposes other than a purpose described in section 62 subsection (1) paragraph (a) or, as the case may be, paragraph (b); namely, to make payments to Mr Fitzgeralds other than in accordance with the governing rules of the fund, and to satisfy the balance of the District Court claim mentioned on his behalf.

20 It is further sought by way of application for pecuniary penalty that by making and procuring the making of each of the payments to which I have referred, Mr and Mrs Fitzgeralds provided financial assistance using the resources of the superannuation fund to a member of the fund, namely, Mr Fitzgeralds, in contravention of section 65 subsection (1) of the SISA.

21 Originally, by way of defence, there was pleaded on behalf of Mr and Mrs Fitzgeralds the allegation that at all times they were advised by legal, financial, and accountancy professionals in relation to the fund, and it was put forward that they were acting in reasonable reliance on information provided to them by their advisers, and that they were not advised that they were in breach of the rules of the fund. That particular defence has not been pressed, as is apparent from the agreed summary. It stands very much to the credit of Mr and Mrs Fitzgeralds, to my mind, is that they have accepted as trustees that the primary responsibility in respect of the maintenance of a superannuation fund in accordance with the terms of the deed, and as required by the SISA, falls upon them.

22 Another factor that I bear in mind particularly in relation to penalty is that each of the respondents has cooperated significantly in the administration of justice by the agreement to a particular summary of facts which, in terms, amounts to an acceptance on their part that they have contravened, each of them, each of sections 62 and 65 of the Act. In so doing, they have saved the Commonwealth particular expense in terms of the proceedings, and they have also saved the Commonwealth in the judicial branch a particular devotion of time to the hearing of the proceeding to determine whether or not, indeed, penalties were proven.

23 The effect of the conduct which is the subject of agreement is that, to use the vernacular, substantially all of the assets of a superannuation fund were "stripped out" not for purposes that were permitted either by the terms of the fund's governing trust deed, or relevantly governing legislation. Instead, they were used to satisfy a debt encountered by a

member of the fund.

24 The submission made on behalf of the applicant is that the making of the payments to which I have referred for the benefit of Mr Fitzgeralds deprived the fund of its principal asset, namely, the Nerang property, and caused the fund not to be maintained for any of the core or ancillary purposes. Instead, Mr and Mrs Fitzgeralds caused the fund to be maintained - or, perhaps, not maintained is a better expression to use - for the principal purpose of enabling payments to be made to Mr Fitzgeralds to satisfy the balance of the claim mentioned.

25 Our Parliament has deliberately constructed a scheme whereby, in return for submission to a regulatory regime found in the SISA, particular taxation benefits are given to the trustee of a superannuation fund and its members. The public policy that seems to underlie that particular concession is to encourage prudent provision by Australians for their retirement. In so doing, the burden on other Australian taxpayers in the provision of social security benefits for the aged is thereby lessened. I can, I believe, responsibly take judicial notice that a contemporary phenomenon is a recognition that Australia has, in terms of its demographics, a need for such provision to be encouraged.

26 Part of the scheme found in the legislation is to enable what one might term small funds or, at least, funds which have fewer than five members to be self-managed. That is a particular benefit conferred by the Parliament on those who would wish to make provision for their retirement. It enables self-management as opposed to becoming a member of a fund the management of which may be remote from membership. It is a privilege. It is a privilege that that should not be abused. It's quite plain to me that in this case that that privilege has been abused. I am in no doubt whatsoever that, in terms of the legislation, this particular case is one in respect of which I can be satisfied that there have been contraventions which are, in terms of section 196 subsection (4) of the SISA, serious.

27 That being so, this is a case in respect of which the making of civil penalty orders is appropriate and, indeed, necessary.

28 There are principles which should inform the making of a civil penalty order in a case like this. Those principles one may distil from two earlier decisions of this court,

namely, *Australian Prudential Regulation Authority v Holloway*, a decision of Mansfield J, (2000) 45 ATR 278; and *Australian Prudential Regulation Authority v Derstepanian*, a decision of Weinberg J, (2005) 60 ATR 518. Counsel for the applicant has helpfully summarised those principles, and I do not understand there to be any particular dispute in relation to that summary.

29 The principles that one derives, therefore, from the cases mentioned seem to me to be these. Firstly, a civil penalty needs to be sufficiently high to deter contravention by others, but not so high as to be oppressive. Secondly, general deterrence is a very significant factor, with other objectives including denunciation and punishment. The submission has been made, and I agree with it, that contraventions of the SISA may be difficult to detect, and the investigation of those contraventions can be complex and expensive.

30 I should add that it seems to me to be part of the scheme on the legislation, in its provision for self-management, that those who take advantage of the utilisation of a self-managed fund do, indeed, self-manage that fund in accordance with the terms of the deed and the legislation, rather than have a much wider and more detailed policing of that. In other words, the Parliament is entrusting those who manage a self-managed fund with a duty of adhering to the terms of the deed and the terms of the legislation. That is not an unusual duty. Any trustee - and the trustee of a superannuation fund is but a particular exemplar of a trustee - is obliged to discharge his or her duty according to the terms of a governing trust deed.

31 The next principle that seems applicable is that one should have regard, in an appropriate case - and this seems to me to be one - to a totality principle. Section 196 subsection (3) provides that the monetary penalty in respect of a contravention should be an amount specified in the order that the court makes, which does not exceed 2000 penalty units. The effect of reading that provision in conjunction with section 4AA of the *Crimes Act* 1914 is that the maximum penalty in respect of any one contravention is $220,000. In *Derstepanian's case* Weinberg J, by reference to the there pertinent provisions allegedly contravened, namely, sections 62 subsection (1) and section 109 subsection (1) of the SISA, observed that they were simply different ways of characterising the same misbehaviour. Having done that, his Honour observed in that same paragraph, that:

It is a well-recognised principle of sentencing that a person should not be

punished twice for what is, in substance, the same conduct, even if that conduct can be viewed as giving rise to two separate offences.

32 His Honour continued:

Accordingly, it was submitted that, as a practical matter, the maximum penalty for these two contraventions should be regarded as $220,000.

33 His Honour accepted that submission. The submission has been made to me, on behalf of the applicant, that while for each respondent three contraventions of two provisions are alleged - those provisions being section 62 and section 65 - making each liable in theory to six penalties of up to $220,000, bearing in mind the totality principle, the various contraventions may properly be seen as one contravening course of conduct for which each respondent should be liable to a single or maximum penalty of $220,000. The particular paragraph mentioned in Weinberg J's decision is cited in supported of that proposition.

34 There is no doubt in this case that there is a single course of conduct motivated by the commercial pressure to which Mr Fitzgeralds was subject as a result of the claim made in the District Court proceedings. Further, whilst there were two trustees of the fund, it is not difficult to see how in a marriage it became very difficult indeed for there to be any dissent as between trustees as to the temptation offered by access to the superannuation fund assets. I am therefore prepared to accept the submission made on behalf of the applicant to which, perhaps, not surprisingly, there has been no demur by the respondents.

35 A further general principle that has been submitted is that there are a series of relevant factors which are to be considered in fixing what should be an appropriate penalty. They are:

I. the nature and extent of the contravening conduct;

II. the amount of any loss or damage caused;

III. the size of the organisation;

IV. the deliberateness or otherwise of the contraventions;

V. the period over which the contraventions extended;

VI. the degree of cooperation of the person concerned, either in the investigation or the subsequent hearing;

VII. the past record of the person;

VIII. the person's financial position;

IX. any amounts already paid by way of compensation or legal costs; and,

X. contrition.

36 Some of those matters I have already referred to. Neither Mr nor Mrs Fitzgeralds have any past history of contraventions of the SISA. Further, as has been submitted on their behalf, each, either in their capacity as directors of the corporate trustee, or later in his or her own right as trustees, managed the fund on and from 1993 until 2001 in a way that was appropriate and compliant.

37 The fund was a small fund; I take that into account. Small in the sense that its membership was confined, necessarily - given its nature under the legislation - to a compressed class, and that whilst that class could doubtless be extended a little, its actual membership was confined to Mr and Mrs Fitzgeralds.

38 In relation to financial position, I should record the following which I have taken into account, in terms of the financial position of Mr and Mrs Fitzgeralds. I have been informed that, in terms of legal expenses, they have incurred something in excess of $40,000 to date in the course of the defence of these proceedings. Each of them now draws his or her income from a shop-fitting business known as Fitzgeralds Shop-fitting. Their individual drawings from that business, I have been informed, amount to $52,000 per annum each. They have a loan debt secured by a mortgage. That loan debt is in the order of $650,000. Repayments in respect of that loan amount, I was informed, to some $4000 per month. Their remaining superannuation amounts to no more than 30,000 to 40,000 dollars. This is now held in an independently managed fund, in contradistinction to a self-managed fund.

39 There has also - not unnaturally - been a considerable degree of stress occasioned by these proceedings, although it must be said that that particular stress is one that has been brought upon them by their own conduct.

40 I accept that there is contrition involved, though, as is apparent from the abandonment of the particular endeavour to shift responsibility, as originally pleaded in the defence, from them to their advisers. And their presence here in court today to hear proceedings, as well as the outcome of them, also, to my mind, stands very much to their credit. In other words, they haven't just sought to send along legal advisers and await the result, but have taken the decision directly.

41 The applicant contends that the contraventions are serious within the meaning of the Act, and, as I have indicated, I accept that. The submission is made that the object of the Act is, relevantly, to make provision for the prudent management of regulated superannuation funds. I respectfully agree. That, though, is what one might term an immediate object. The long-term object envisaged by the Parliament, to my mind, is to encourage Australians that they must make provision for their retirement, and to do that by the conferring of taxation benefits in return for responsible management of funds. In *Holloway's case*, to which I have made reference, Mansfield J made reference to this in relation to the in-house asset rule.

"Submission by a superannuation fund to be a regulated superannuation fund under the Act carries with it eligibility for concessional taxation treatment. Each of the relevant superannuation funds by their trustees elected to become regulated superannuation funds .... Part 8 of the Act sets out rules about the level of in-house assets ... . Its intent is clearly to ensure that the investments of a regulated superannuation fund should not be exposed to the vagaries of the business of the employer-sponsor ...."

42 In the same way, the provisions of section 62 and section 65 can be seen to have a role to play in ensuring that the assets of a fund are indeed available for their members as and when they become eligible in terms of the governing deed, as opposed to being prematurely accessed for unauthorised purposes.

43 Another factor that one might note in terms of public policy that is evident from Parliament's value judgments in relation to the importance that Parliament perceives of superannuation funds for the retirement of Australians is that, in terms of limitations on what amounts to property divisible amongst creditors on a bankruptcy, section 116 subsection (2) of the *Bankruptcy Act* 1966 contains, subject to the qualifications noted, particular exemptions from divisible property in respect of regulated superannuation funds within the meaning of the SISA. I also take into account that particular evident public policy position when determining an appropriate penalty to impose in this case.

44 It has been submitted that the contraventions were neither trifling, nor insignificant, and that they were deliberate. I agree. In a relative sense, the amounts involved were not sizeable, having regard to what one might apprehend would be much larger independently managed funds. Nonetheless, effectively, all of the assets of the fund were - again, to use the vernacular – "stripped out". Whilst reference has been made, helpfully, in submissions to *Derstepanian's case* and *Holloway's case*, neither side contends that those particular cases are on all fours with the present. I agree. It is evident that in each of those cases there were devices employed, either artificially, to inflate values for the purposes of an in-house asset test, or artificially to inflate the value of property which was acquired for a fund. They seem to be to me much more grave contraventions for that reason than the present. For that reason, though the submission was made on the behalf of the applicant, that a penalty of $100,000 would be at the end of a range, it seems to me that that is rather excessive for the circumstances of this particular case. I do note, though, that when Weinberg J came to impose penalty in *Derstepanian's case*, his Honour was constrained - indeed, as his Honour very forcefully, with respect, observed, or seems to have apprehended, perhaps artificially constrained - by an agreement between the parties as to penalty, and that his Honour would have been disposed but for that to have imposed a greater penalty.

45 Having regard to the agreed summary, and the particular commercial pressure described, it does seem to me that Mr Fitzgeralds was the more culpable of the two trustees. It is, though, quite unacceptable for a fellow trustee to be a passive participant in a breach of trust by another trustee no matter what the matrimonial pressures might be.

46 Having regard to the circumstances related, it seems to me that the appropriate penalties, taking into account the principles that I have mentioned, are as follows. I should, in respect of Mr Fitzgeralds' contraventions, applying the totality principle, impose a penalty of $20,000, and that in respect of Mrs Fitzgeralds' contraventions, again applying the totality principle, impose a penalty of $10,000. I shall, in addition, make declarations in terms of the minutes of orders that were tendered and marked as an exhibit.

47 I direct the parties to bring in minutes of orders reflecting the penalties that I have mentioned, as well as the declarations that I have indicated that I shall make.

48 There remains, then, a question of costs, and I will hear counsel as to that.

49 …In addition, there will be an order that the respondents pay to the applicant costs which I fix in the amount of $32,500. In so doing, I should observe this: that is a responsible and convenient course for the parties to have taken. I have particularly noted that submission made on behalf of the applicant, that there were additional costs incurred by the applicant by the very nature of this being the first of its kind, and, further, by the phenomenon that the applicant's legal representatives are from Victoria. This is a national court, and each of those whose name appears on the roll maintained under the Judiciary Act, irrespective of their place of residence, is entitled as of right to appear here.

50 Further, it is no part of this court's role in any way to determine how, as a matter of good public administration, the Commissioner of Taxation chooses to divide the administration of Acts cast to his administration. Neither is it any part of the court's role to indicate which particular legal advisers the Commissioner ought to employ in the conduct of proceedings. Those matters observed, in the exercise of judicial power it does seem to me that respondents ought not, unless there be particular administration of particular provisions or related legal advisers. And as I understand it, that particular phenomenon is recognised in terms of the agreement as to costs that has been propounded to the court, and I respectfully commend the applicant, in particular, for that recognition.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 15 October 2007

Counsel for the Applicant: S G E McLeish

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent: A P Simpson

Solicitor for the Respondent: Queensland Law Group

Date of Hearing: 15 October 2007

Date of Judgment: 19 October 2007