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Supreme Court of New South Wales

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← Katz → v ← Grossman → [2005] NSWSC 934 (16 September 2005)

Last Updated: 22 September 2005

NEW SOUTH WALES SUPREME COURT

CITATION: ← Katz → v ← Grossman → [\[2005\] NSWSC 934](#)

CURRENT JURISDICTION:

FILE NUMBER(S): 03731/2004

HEARING DATE(S): 29 August 2005

JUDGMENT DATE: 16/09/2005

PARTIES:

Daniel Frank ← Katz → v Linda Ann ← Grossman → & Peter Anthony ← Grossman →

JUDGMENT OF: Smart AJ

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:

B.W. Rayment QC & V.F. Kerr for plaintiff

D. E Grieve QC & J.M Baxter for defendants

SOLICITORS:

Streeter Commercial Lawyers for plaintiff
Dennis & Co for defendants

CATCHWORDS:

Appointment of new Trustee
Construction and application of s.6(4)(b) of [Trustee Act 1925](#)

ACTS CITED:

[Trustee Act 1925](#) (NSW). Wills, Probate and Administration Act 1898 (NSW)

DECISION:

Plaintiff's action dismissed. Costs out of Superannuation Fund (see paras 58 &59)

JUDGMENT:

IN THE SUPREME COURT OF NEW SOUTH WALES EQUITY DIVISION

SMART AJ

16 September 2005

03731/04 Daniel Frank  KATZ  v Linda Ann  GROSSMAN  & Peter Anthony 
GROSSMAN 

JUDGMENT

1. This is a contest between a brother and a sister over the control of a superannuation trust fund established at the behest of their late father Ervin  **Katz** . The assets of the fund exceed \$1 million. Peter  **Grossman**  is the husband of Linda Ann  **Grossman** .
2. By a deed of settlement dated 25 March 1965 a superannuation trust fund was established by E.  **Katz**  Manufacturing Jewellers Pty Ltd ("the company") with Marta Baumel and Ervin  **Katz**  as trustees. The fund was originally known as the "E.  **Katz**  Manufacturing Jewellers Pty Limited Employees Superannuation Fund" and is now known as the E.  **Katz**  Employees Trust Fund (Fund). In the 1965 deed it was recited that the fund was established by the company "with a view to making provision for benefits for such present and future employees and their dependants as shall be eligible." By clause 2(f) "employee" includes every male or female person employed by or for the time being an officer or director of the company.
3. By clause 2(e) "member" means and includes every employee who shall become and for the time being

be a member of the Fund in accordance with the deed. The deed contained a procedure whereby employees could become members. By clause 2(c) company means E. ← **Katz** → Manufacturing Jewellers Pty Ltd or any successor thereto taking its place under and bound by deed to perform and observe the provisions thereof.

4. The deed provided for contributions to be made by the company and the member. By clause 11 it was envisaged that benefits would be paid upon retirement from employment with the company.

5. Ervin ← **Katz** → became a member of the fund on 25 March 1965.

6. By clause 23 the company was given power by deed to appoint such additional trustees as to it may seem necessary. By clause 26 a trustee may be a member and a member may be a trustee. By clause 31 the trustees with the consent of the company could repeal, alter and add to the provisions of the deed. However by sub clause (b) no alteration, addition or repeal should be made which would have the effect of substantially varying the basic principle thereby established for the constitution of the Fund. This underlines the basic thrust of the deed to make provision for benefits for employees on their retirement. The description of the Fund as a Superannuation Fund also points in the same direction.

7. By clause 2(d) of the 1965 deed -

'Dependant' means wife, husband, widow, widower, children or grand children of a member or other person who in the opinion of the Trustees received or was entitled to receive immediately prior to the death of such member financial support from such member. This provision has to be contrasted with the provisions of a deed executed in 1995 referring to a deceased member.

8. Clause 12A of the 1965 deed provided that a member shall cease to be a member upon death.

9. Between 25 March 1965 and 27 March 1995 the deed was amended from time to time by various amending deeds. By amending deed of 27 June 1978 recital A referred to the earlier 1965 deed and that the Fund was created for the personal benefit of the employees of E. ← **Katz** → Manufacturing Jewellers Pty Limited. It also recited that the initial definition of "company" had been deleted in 1975 and the following substituted:

*"Company" means E. ← **Katz** → Manufacturing Jewellers Pty Limited and Associated Companies or any successor thereto taking their place and bound by Deed to perform and observe the provisions thereof"*

and a description of 'Associated Company' included which was very broad.

10. The 1978 deed also included as a recital the substance of the terms of clause 31(b) of the deed. The Deed provided, in its operative provisions, that E. ← **Katz** → Manufacturing Jewellers Pty Limited, Diamonds and Australian Opals Pty Limited and E. ← **Katz** → Manufacturing Jewellers (ACT) Pty Limited may contribute to the Fund on behalf of their own employees only who have or whose dependants have a right to receive benefits from the Fund.

11. On 19 September 1983 E. ← **Katz** → Manufacturing Jewellers Pty Limited by deed appointed Evelin ← **Katz** →, the wife of Ervin ← **Katz** →, as an additional trustee of the 'E ← **Katz** → Manufacturing Jewellers Pty Limited Employees Superannuation Fund.

12. By deed of 27 March 1995 between Mr & Mrs **Katz** ('the trustees') and E. **Katz** Manufacturing Jewellers (ACT) Pty Limited ('Principal Employer') it was recited that the 1965 deed was amended from time to time to comply with the Occupational Superannuation Standards and that cl 32 of the deed of amendment of 30 October 1990 empowers the trustees with the consent of the Principal Employer to rescind alter or add to any of the provisions of the 1965 deed. It was further recited that the trustees with the consent of the Principal Employer had resolved in order to comply with the Superannuation Industry (Supervision) legislation applying to Superannuation funds eligible for concessional tax treatment to amend the 1965 deed.

13. Clause 1 of the 1995 Deed provided that the 1965 Deed was amended by repealing the whole of clauses 1 to 40 inclusive, the Schedule of Rules and Appendices 'A' to 'C' thereto and replacing those provisions with the provisions set out in Schedule A to the 1995 deed.

14. The 1995 deed does not purport to vary the recital that the Fund was established with a view to making provision for benefits for eligible present and future employees and their dependants. Also by clause 2 the Principal Employer acknowledged that after the 1995 deed it would have no further rights under the terms of the Fund.

15. Clause 3 of the 1995 Deed provided that it was supplemental to the 1965 Deed.

16. The definition of 'Member' in Schedule A to the 1995 Deed reads 'Member' means a person who becomes and for the time being is a member of the Fund. This differs from the 1965 definition. Further there is no equivalent of clause 12A of the 1965 Deed specially providing that a member shall cease to be a member upon death. Clause 3.2 of Schedule A provides that upon the satisfaction or forfeiture of the whole of a member's right of benefit hereunder, his membership shall cease.

17. Clause 21.1 provides that upon the death of the member the balance of the member's benefit not applied in payment of an old age pension shall be commuted to the extent permitted by the [Superannuation Industry \(Supervision\) Act 1993](#) and paid in accordance with clause 21.5. That provides that where the member has died the Trustees must pay the benefits to or for the benefit of such of the dependants of the deceased member as they consider appropriate or where there are no dependants surviving the deceased member to the legal personal representatives of the deceased member.

18. The phrase "deceased member" is not used in the 1965 deed. That phrase and the accompanying provisions in the 1995 deed suggest that the death is acknowledged but the deceased member's estate remains a member until the benefits are paid.

19. Similarly the definition of Dependant in the 1995 deed, unlike the 1965 deed uses the phrase "deceased member" Clause 1 of Schedule A to the 1995 deed provides:

"Dependant' means the spouse of a member, the widow or widower of a deceased member and any other children of a member or deceased member and any other person who is dependant on a member or in the case of a deceased Member was dependant at the time of the Member's death for his maintenance

The phrase "deceased member" also appears in the definition of spouse in cl. 1.1 of the Deed and in cl. 13.1 dealing with the payment of a benefit.

20. Clause 2.1 provides that as from 27 March 1995 the primary purpose of the Fund is to provide old age Pensions (within the meaning of the [Superannuation Industry \(Supervision\) Act 1993](#)).

21. Evelin **Katz** died on 28 July 1998. Prior to her death she was a member of the Fund. Probate of her will was granted to Ervin **Katz** on 7 March 2000. He was the sole beneficiary.

22. In the Deed of 18 May 1999 by which Ervin **Katz** (described as 'Continuing Trustee') purports to appoint his daughter Linda **Grossman** (described as 'New Trustee') as an additional trustee the earlier death of Evelin **Katz** is recited and also that the Continuing Trustee is the sole trustee of the Fund and that the Continuing Trustee as the sole trustee is desirous of appointing the New Trustee as an additional trustee of the Fund.

23. Clause 2 of the operative provisions of the May 1999 deed provides:

"In exercise of the powers conferred upon him by the [Trustee Act 1925](#) (as amended) and every other power enabling him the Continuing Trustee hereby appoints the New Trustee as an additional trustee of the Fund"

24. Clause 5 of that deed provides

*"Ervin **Katz**, to the extent as may be necessary, as a Member and in his capacity as a member appoints the New Trustee as a trustee in respect of the Fund"*

25. Mr **Katz** does not purport to exercise a power to appoint as executor or sole beneficiary under his wife's will. On 25 May 1999 some 7 days after her purported appointment as a trustee Mrs **Grossman** and Mr **Katz** met and resolved that the benefits standing to the credit of the late Mrs. **Katz** of \$552,387 be paid to Mr. **Katz** only as being one of the dependants of the deceased member.

26. On 30 August 2003 Linda **Grossman** completed an application form for admission as a member of the E **Katz** Employees' Superannuation Fund. On the bottom of the form this notation appears:

*"Membership application accepted
Linda **Grossman**
Trustee. 30/Aug/2003"*

27. Ervin **Katz** died on 19 September 2003. Probate of his last will was granted to his son, the plaintiff and his daughter, the first defendant on 5 August 2004.

28. By a deed of appointment dated 5 December 2003 Linda **Grossman**, purporting to act as sole trustee and sole member of the Fund, purported to appoint Peter **Grossman** her husband, as an additional trustee of the Fund.

29. Purported Appointment of Linda **Grossman** as additional trustee

The plaintiff submitted that the purported appointment of Linda **Grossman** as an additional trustee of the Fund on 18 May 1999 was ineffective for the following reasons:

- a) while upon the death of Mrs **Katz** on 20 July 1998, Mr **Katz** was the sole trustee this did not give him the right to appoint a new trustee. Under clause 7.2 of Schedule A to the 1995 deed, the members may by notice in writing given by a majority of members appoint a new Trustee as Trustee
- b) as at 18 May 1999 there were two members of the Fund namely Mr E **Katz** and the estate of the late Mrs **Katz**. They had to act by majority. At that stage her estate was vested in the Public Trustee by virtue of s.61 of the Wills [Probate and Administration Act 1898](#). No limited grant of Probate or Administration had been obtained
- c) There was no capacity in Ervin **Katz** as at 18 May 1999 acting as sole trustee to appoint an additional trustee because the Members were able and willing to act.
- d) There was no capacity in Ervin **Katz** as at 18 May 1999 acting alone as purported sole member to appoint an additional trustee

30. Section 6 (2)(a) of the Trustees Act 1925 provides that a new trustee may be appointed where a trustee is dead. Section 6 (4) of the Act provides:

"The appointment may be made by the following persons, namely:

- (a) by the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or*
- (b) if there is no such person, or no such person able and willing to act, then by the surviving or continuing trustees or trustee for the time being, or by the legal representative of the last surviving or continuing trustee."*

31. The defendants submitted that the persons nominated for the purpose of appointing new trustee by the 1995 deed were not as at 18 May 1999, able and willing to act in that no representative of the estate of the late Mrs **Katz** had been appointed. There was, it was submitted, no majority of members able to act to appoint a new trustee. The only active member was Mr Ervin **Katz**. In Mrs **Katz**'s estate there was a substantial and unexplained delay in obtaining a grant of Probate, that is from 28 July 1998 to 7 March 2000 during which her estate was vested in the Public Trustee. Unexplained, that delay would seem to have been due to Mr **Katz**. Any remarks as to this may well miss the mark as Mr **Katz** was his wife's sole beneficiary. If a grant had been obtained by Mr **Katz**, he in his personal capacity and as executor of his wife's will would have formed a majority of members and been able to make the appointment of Mrs **Grossman** as the additional trustee which he so evidently desired.

32. If, as I think, there was no majority of members as at 18 May 1999 able and willing to make the appointment of a new trustee, then pursuant to s.6 (4)(b) the surviving or continuing trustee was able to make the new appointment.

33. Counsel for the defendants put an alternative submission namely, that s.44 of the Wills [Probate and](#)

[Administration Act 1898](#) operated to validate what had been done by Mr **Katz** in May 1999 once he was granted Probate of his wife's will. [Section 44](#) provides that upon the grant of probate of the will of any person all his or her real and personal estate in New South Wales shall as from the death of such person pass to and become vested in the executor to whom Probate has been granted. It was submitted that as the executor's title extended back to the date of Mrs **Katz**'s death this meant that as at 18 May 1999 Mr **Katz** represented his wife's estate and that therefore he constituted the majority of members, that is, in his own right and as his late wife's executor. There is force in the additional point that as Mr Ervin **Katz** was the sole executor and sole beneficiary of her estate and the moving spirit behind the Fund an overly technical approach should not be taken. All the relevant facts were well known.

34. Attention was directed to the clause "every other power enabling him" in cl.2 of the deed of 18 May 1999 which stated that Mr **Katz** was acting in exercise of the powers conferred upon him by the Trustees Act 1925 and every other power enabling him. The clause quoted is the one commonly used when a party wishes to rely on every possible power to act in a particular way; that is, in this instance to appoint a new trustee. The plaintiff contended that the clause quoted meant every other power enabling him as trustee to make the appointment. I would not adopt the limited construction propounded by the plaintiff but it is not necessary to explore the limits of those words in view of the other conclusions which I have reached.

35. Where a trustee has died and the person having either alone or with others the power to appoint a new trustee has died and there is a need for a grant of Probate or Administration before the new trustee can be appointed (as in this case to represent the deceased member), the power under s.6(4)(b) is not exercisable by the continuing trustee if there is only a relatively short period, for example, three months, before the grant is obtained after the death. On the other hand, if there is a substantial delay it can fairly be said that there is no person having the power either alone or jointly who is able and willing to act. The twin pitfalls of a continuing trustee seeking to act unfairly and protracted delay on the part of those responsible for obtaining a grant effectively delaying if not preventing the appointment of a new trustee have to be avoided.

36. I read s.6(4)(b) as meaning no person having the power to appoint either solely or jointly was able and willing to act within a reasonable time. That was the position in this case. As at 18 May 1999, 9½ months had elapsed since the death of the person having jointly the power to appoint and a grant was obtained on 7 March 2000 some 19 months after the death.

37. Although it cannot bear on the construction of [s.6\(4\)\(b\)](#) of the [Trustee Act 1925](#) and the view I have adopted as to its operation cl 7.3 of Schedule A to the 1995 deed provides that any vacancy occurring pursuant to [Part 7](#) shall be filled within 90 days of the day on which the vacancy occurs. [Part 7](#) deals with the retirement or vacation of office of trustees and the appointment of new trustees.

38. The specification of the time limit mentioned strongly suggests that it was not intended that there should be an extended vacancy in the office of trustee and that reasonably prompt steps should be taken to fill the vacancy. Thus when the requisite steps have not been taken to appoint a representative of the estate of the deceased member over an appreciable period so a new trustee can be appointed it is not inappropriate and indeed it is permissible for the surviving trustee to utilise the power conferred by [s.6\(4\)\(b\)](#) of the [Trustee Act](#).

39. Senior counsel for the first defendant submitted that if the plaintiff were to succeed that would represent a triumph of form over substance and that was a result the court should avoid. It is unnecessary to discuss that submission further.

40. In my opinion Mrs **Grossman** was validly appointed as a new trustee consequent upon the powers conferred upon Mr **Katz** by the [Trustee Act 1925](#).

Was Linda Grossman a Member of the Fund

41. There is no evidence that Linda **Grossman** was an employee of any of the Companies who contributed to the Fund. The plaintiff contended that consequently she was not eligible to be a Member of the Fund. The plaintiff relied on the recital in the 1965 deed earlier mentioned, namely, the Fund was established with a view to making provisions for eligible present and future employees.

42. The defendants submitted that since the amendments effected by the 1995 deed it was no longer a requirement that a member be an employee. The defendant pointed to the change in the definition of 'member' from the 1965 deed to the 1995 deed. Under the 1965 deed a member had to be an employee. Under Schedule A to the 1995 deed 'member' means a person who becomes and for the time being is a member of the Fund. Cl 3.1 of Schedule A provides:

"Such persons who apply in writing in the form set out in Schedule 1 as the Trustees shall from time to time determine shall be eligible for membership of the Fund"

43. While the recital in the 1965 deed and the name of the Fund point to it being a fund for employees the amendments of 1995 have the effect of it not being limited to employees. A non employee may be a member of the Fund.

44. As earlier mentioned Mrs **Grossman** applied in writing for admission as a member of the **E Katz** Employees' Superannuation Fund on 30 August 2003 and on that day as Trustee accepted her own membership application. At that stage there were two trustees, namely her father and herself. There is no evidence of her father's consent to her becoming a member or the trustees delegating to her the power to admit herself as a member or new members. Under cl 3.1 of the Schedule, the trustees who determine eligibility for membership of the Fund. Cl 9.8 of Schedule A permits a trustee to vote notwithstanding that he has an interest in the matter under consideration.

45. In my opinion Mrs **Grossman** has not been validly admitted as a member of the Fund.

Was Peter Grossman validly appointed as a new Trustee

46. As earlier mentioned Mr Ervin **Katz** died on 19 September 2003 and on 5 August 2004, probate of his will was granted to the plaintiff and the first defendant. On 5 December 2003 Mrs **Grossman** as the continuing trustee purported to appoint her husband as the new trustee.

The Deed of 5 December 2003 provided

*"2. In exercise of the powers conferred upon her by the [Trustee Act 1925](#) (as amended) and every other power enabling her, the continuing trustee [Mrs **Grossman**] hereby appoints the new trustee [her husband]."*

"5. Linda Ann Grossman to the extent it may be necessary, as a member and in her capacity as a member hereby appoints the new trustee in respect of the Fund"

47. Mrs Grossman again relied on her membership application of 30 August 2003 and her acceptance of her application in her capacity as trustee on that day. For the reasons earlier given she did not become a member at that time. Nor was there any evidence that she did so subsequently.

48. The appointment of her husband as the new trustee does raise questions. On the death of Mr Katz his estate was the only member of the Fund and thus the appointment of a new trustee would be made by his executors. Whether the executors would be able to agree on an appointment is doubtful. The trustees will decide which dependant or dependants of Mr Katz receive the benefits to which Mr Katz was entitled and in what amounts.

49. The strategic and relatively speedy appointment of Mrs Grossman's husband raises questions when Mrs Grossman was one of the executors of her late father's will and there was such a long delay in obtaining a grant of Probate, that is from 19 September 2003 to 5 August 2004. The evidence does not explain the delay. It may have been thought not to be relevant. If Mrs Grossman purported to act pursuant to s.6(4)(b) of the [Trustee Act](#) and could do so validly, she could act alone.

50. Assuming that the plaintiff was prepared to act promptly either to obtain a grant of Probate or a limited grant of Administration and Mrs Grossman was not obstructive there are a number of possible scenarios once a grant was obtained. They may have been able to agree on someone whom they both regarded as suitable to be the new trustee and appointed that person, they may have been prepared to accept the person recommended or suggested by an independent person or body or they may have been unable to agree. If either party sought to appoint somebody closely associated with that party and not the other, a deadlock could be expected. The plaintiff and the defendant may have been able to agree to two new trustees being appointed, one being recommended by the plaintiff and one by Mrs Grossman. That may or may not have resolved any potential deadlock.

51. Thus, the obtaining of a grant may but would not necessarily have resolved who was to be appointed as the new trustee. As I understand the position once it is held that Mrs Grossman was not validly appointed as a member in August 2003, the only member of the Fund was the late Ervin Katz. When the person nominated in the trust deed as having the power to appoint dies and his estate as represented by his executors becomes the member, a reasonable time should be allowed for the executors nominated in his will to obtain a grant of Probate or a limited grant of Administration.

52. On the other hand the due administration of the trust cannot be left indefinitely. Emergencies may arise, for example, a Trust's shares or its other property may be about to drop in value. Potential liabilities may have to be compromised.

53. The trust deed envisages that a new trustee will be appointed within 90 days of a vacancy occurring in the office of a trustee. The period of 90 days expired on 18 December 2003, some 13 days after the appointment of 5 December 2003. On the evidence the appointment does not appear to have been precipitate. The continuing trustee cannot be criticised for carrying out the terms of the trust deed. As at 5 December 2003 and for many months thereafter there was no person or persons nominated for the purpose of appointing new trustees by the trust deed able and willing to act. The estate of the late Ervin

← **Katz** → appears to have been either immobilised or deadlocked.

54. In my opinion Mrs ← **Grossman** → was entitled to exercise the power under [s.6\(4\)\(b\)](#) of the [Trustee Act](#) to appoint a new trustee and the challenge to the appointment of her husband fails.

Costs

55 The plaintiff and the defendants each submitted that if he or they won there should be an order for costs in his or their favour and against the other. Each submitted that this was adversarial litigation. The plaintiff and the defendants each submitted that if he or they lost then the costs should be paid out of the Fund. Each repelled the suggestion by the other that he or they were having a bet each way.

56. Although the issues have been confined they have been difficult of resolution. The appointment by Mrs ← **Grossman** → of her husband as the new trustee was bound to cause dissension as was her refusal to confirm that she would give effect to her father's non binding death benefit nomination of 5 December 2003 that his benefits in the fund should be shared equally between his daughter and his son.

57. The terms of the trust deed were not comprehensive and easy to construe nor was it easy to marry its terms with [s.6\(4\)](#) of the [Trustee Act](#).

58. The costs of both parties including the reserved costs should be paid out of the E ← **Katz** → Employees' Superannuation Fund, those of the defendants on a trustee- indemnity basis.

59. The plaintiff's action is dismissed. An order is made for the costs of both parties in accordance with the preceding paragraph.

LAST UPDATED: 21/09/2005

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