

**Re Marsella; Marsella v Wareham (No 2) [2019] VSC 65 (15 February 2019)**

Last Updated: 15 February 2019

IN THE SUPREME COURT OF VICTORIA

Not Restricted

AT MELBOURNE

COMMON LAW DIVISION

TRUSTS, EQUITY &amp; PROBATE LIST

S CI 2017 01826

 IN THE MATTER of [s 48](#) of the [Trustee Act 1958](#)

-and-

IN THE MATTER of the estate of HELEN FREETH MARSELLA (also known as HELEN FREETH SWANSON)

RICCARDO GIACOMO MARSELLA (who sues both personally and as Executor of the estate of HELEN FREETH MARSELLA) (also known as HELEN FREETH SWANSON)

Plaintiff

-and-

CAROLINE ELIZABETH WAREHAM and MARTIN WAREHAM (as Trustees of the Swanson Superannuation Fund)

Defendants

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<u>JUDGE:</u>	McMillan J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	12 November 2018
<u>DATE OF JUDGMENT:</u>	15 February 2019
<u>CASE MAY BE CITED AS:</u>	Re Marsella; Marsella v Wareham (No 2)
<u>MEDIUM NEUTRAL CITATION:</u>	<a href="#">[2019] VSC 65</a>

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TRUSTS — Self-managed superannuation trust — Where power of appointment a special power — Where first defendant resolved as trustee to pay herself the whole benefit of the fund — Where defendants as co-trustees resolved as trustee to pay first defendant the whole benefit of the fund — Whether defendants exercised the power of appointment in good faith, upon real and genuine consideration and for a proper purpose — Whether defendants acted in conflict of duty — [Superannuation Industry \(Supervision\) Act 1993](#) (Cth) — *Curwen v Vanbreck Pty Ltd* [2009] VSCA 284; (2009) 26 VR 335.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr S P Newton	Stidston Warren Lawyers
For the Defendant	Dr B Orow	Hill Legal

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HER HONOUR:

**Introduction**

1 Helen Marsella ('the deceased') died on 27 April 2016. She was survived by her husband of 32 years ('the plaintiff') and her two children from her previous marriage, the first defendant and Charles Swanson. The second defendant is the first defendant's husband.

2 Prior to her death, the deceased managed her retirement funds via the Swanston Superannuation Fund ('the fund'). When the fund was established, the deceased and first defendant accepted appointment as trustees and the deceased was the sole member. The deceased was also the founder of the fund. Upon the deceased's death, the first defendant became the sole trustee of the fund. At the time of the deceased's death, the death benefit payable was estimated to be \$450,416. Although the deceased executed a death benefit nomination on 12 May 2003 to the benefit of her grandchildren, it is accepted that the nomination has expired, and in any event, purported to direct the benefits to persons other than dependants. No other written nomination was executed by the deceased.

3 On 17 April 2017, the first defendant resolved as 'surviving trustee' to pay the entire benefit of the fund to herself. Also on 17 April 2017, the first defendant purportedly appointed the second defendant as a trustee of the fund pursuant to s 41(1)(b) of the *Trustees Act 1958* and the trustees resolved to distribute the fund to the first defendant.

**Plaintiff's application**

4 By originating motion, the plaintiff in his personal capacity and in his capacity as the executor of the deceased's estate, seeks removal of the defendants as trustees of the fund, the appointment of a new trustee and an order that the defendants repay to the fund any sum that has been distributed, together with interest. The plaintiff asserts that the defendants did not give real and genuine consideration to the interests of the dependants of the fund and the distribution made from the fund should be set aside.

5 The issues in dispute are:

- (a) whether the defendants properly exercised their discretion in resolving to distribute the proceeds of the fund on 17 April 2017, that is, whether they acted in good faith, upon real and genuine consideration and in accordance with the purpose for which the power was conferred; and
- (b) whether the trustees should be removed and replaced with an independent trustee.

**The fund**

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6 The deceased established the fund by deed on 12 May 2003 ('the fund deed'). The recitals of the fund deed note that the intention of the founder and trustee was for the fund to be a complying regulated superannuation fund for the purposes of a number of named Acts, including the [Superannuation Industry \(Supervision\) Act 1993](#) ('the SIS Act').

7 The fund deed defines 'beneficiary' as including a member or dependant who has a mere expectancy to receive payment of a benefit entitlement. A 'dependant' includes the widower of a member, and any child of the member. Clause 8 of the fund deed deals with the appointment and removal of trustees. Specifically, clause 8.1 states that subject to clause 8 and clause 7, the office of the trustee is to be held by two or more individual trustees or a corporate trustee. According to clause 7.5, in the context of a fund with only one member, the office of the trustee is to be held by the member as one of two individual trustees or by a corporate trustee of which the member is the sole director. Clause 8.4 states that the appointment or removal of any person to or from the office of trustee shall comply with, inter alia, the SIS Act. Consistent with this Act, clause 8.5 confers power on the founder of the fund to appoint and remove any person as an individual trustee, conditional upon the approval of a members' resolution. Upon the death of an individual trustee, that person ceases to hold office.

8 A meeting of the trustee is only competent to exercise any of the powers where a quorum of 75 per cent of individual trustees, or of the total number of directors of a corporate trustee, is present. Amendments to the fund deed may be affected by the trustee at the request of the founder, subject to the consent of the beneficiaries in the event that their interests would be adversely altered.

9 The trustee is afforded broad discretionary powers in administering the trust and exercising powers and obligations under the trust deed. Clause 10.1 specifies that that unless otherwise provided for by the fund deed or named legislation, the trustee 'shall not be bound to give any person any reason for or explanation' of the trustee's exercise of power, while clause 10.2 states:

[t]he Trustee shall have in the exercise or non-exercise or partial exercise of each and every power exercisable by the Trustee an absolute and unfettered discretion and is not bound to act subject to the direction of any other person unless otherwise expressly provided by the Act.

10 A number of covenants are made by the trustee in clause 12, including ensuring that the trustee's duties and powers are performed in the best interests of beneficiaries, and to allow a beneficiary access to certain information. The covenants in clause 12 reflect those required by s 52B of the SIS Act.

11 In accordance with clause 66.1(b), upon the death of the founder, the legal personal representative of the founder's deceased estate is to hold the office of founder. In circumstances where there are no members remaining in the fund, the fund is to be terminated and its balance distributed in such manner as the trustee considers appropriate in accordance with the fund deed. While clause 51.3 provides that a member can make a binding beneficiary nomination, that nomination ceases to have effect after three years.

12 In circumstances where there is no binding beneficiary nomination in effect, clause 51.4(b) provides that the death benefit must be paid or applied to or for the benefit of a person nominated in writing by the deceased member, provided that the trustee is satisfied that the person was a dependant, one or more dependants of the deceased member, or the legal personal representative of the deceased member. The payment is to be in such proportions between all or any of those persons or categories of persons as the trustee shall determine in its discretion.

## Background

13 The plaintiff and deceased commenced a relationship in 1982 and married in 1984, when the first defendant was aged 12 and Mr Swanson was aged 14. The plaintiff and deceased lived together at a property in Alicudi Avenue, Frankston ('Alicudi Avenue') until the deceased's death on 27 April 2016. Prior to the death of the deceased, the plaintiff considered he had good relationships with the first defendant and Mr Swanson.

14 In 2003, the deceased approached Mr Matthew Hayes, an accountant and partner at the firm Hamilton Morello, to establish the fund. Hamilton Morello prepared the fund deed, which was executed by the deceased on 12 May 2003. According to Mr Hayes, as the deceased did not elect to have a corporate trustee, in accordance with the provisions of the SIS Act, she was required to have a relative as co-trustee while the fund remained as a single member fund. Hamilton Morello prepared financial records for the fund annually since it was established, however, it did not prepare the binding death benefit nomination dated 12 May 2003.

15 The deceased's last will named the plaintiff as executor and trustee. It bequeathed certain chattels to the plaintiff and directed that he distribute them between the first defendant and Mr Swanson. It also directed that a property at Mornington be held upon trust as a home for the plaintiff, and that the interest on \$100,000 was to be used for the upkeep of that property. The will stated that no further provision was made for the plaintiff 'by agreement' and bearing in mind that the assets disposed of by her will were pre-marital assets. The will also made gifts of money to be held on trust for the deceased's grandchildren, and devised properties from the estate of the deceased's first husband to the first defendant and Mr Swanson. The residuary estate was left to the plaintiff and Mr Swanson equally.

16 The estate became the subject of two separate proceedings: the plaintiff sought further provision pursuant to Part IV of the [Administration and Probate Act 1958](#) ('the Part IV proceeding');<sup>[1]</sup> and the first defendant pursued a claim that Alicudi Avenue, which was purportedly devised by the will, was in fact held by the deceased upon an earlier trust ('the trust proceeding').<sup>[2]</sup>

17 On 31 May 2016, the plaintiff's lawyers, Stidston Warren, wrote to Hamilton Morello informing the firm of the deceased's death and requesting 'details of any interests of the deceased' in the fund. Hamilton Morello then provided Stidston Warren with a copy of the fund's 2015 financial statements and Mr Hayes commenced preparing the fund's final accounts.

18 According to Mr Hayes, under the requirements of the SIS Act, a superannuation death benefit must be paid out 'as soon as practicable' after the date of death, and generally within six months, otherwise certain tax benefits would be lost and 'severe administrative penalties' could be imposed upon the trustees. Mr Hayes states that with such concerns in mind, he made several attempts to contact the plaintiff to obtain the necessary information in order to finalise the fund's returns. Despite these attempts, the plaintiff never responded to Mr Hayes.

19 On 9 July 2016, an incident occurred at Alicudi Avenue, during which the first defendant is said to have taken certain chattels. In associated correspondence from the first defendant's lawyers, Hill Legal, the relationship between the plaintiff and first defendant was described as 'strained'.

20 The plaintiff's application for a grant of probate filed 4 August 2016 listed the proceeds of the fund in the inventory of assets and liabilities, however, it is conceded by the plaintiff that this may have been an error, based upon advice that he had received.

21 In December 2016, Hill Legal contacted Hamilton Morello seeking information regarding the fund. This was followed by a telephone call by the first defendant to Mr Hayes on 13 March 2017.

22 The first defendant met Mr Hayes at the offices of Hamilton Morello in early April 2017. Mr Hayes states that, on account of the likelihood that the fund would lose its complying tax status and risk significant tax penalties, he impressed upon the first defendant the importance of the death benefit being paid out as soon as possible. He also advised that the fund should be 'wound-up' as soon as the 2015-16 financial returns were lodged. Mr Hayes deposed that at the meeting he also discussed with the first defendant her need to consider the interests of all of the deceased's dependants as defined in the fund deed and that she should obtain specialist advice. The first defendant is asserted to have then informed Mr Hayes that she would carefully consider all dependants of the deceased and consult with her solicitor to ensure that she complied with her duties as trustee.

23 Later that month Mr Hayes received from the first defendant two sets of minutes of meetings and resolutions dated 17 April 2017 in relation to the fund. The first minutes, titled 'trustee meeting and resolutions' and stated to be of the first defendant, notes that:

[p]ursuant to rule 9 of the Trust Deed of the Fund, the trustee may meet, adjourn and regulate its meetings as the Trustee sees fit and that the Trustee may exercise any of its discretions or powers conferred on it by the Trust Deed having met the quorum requirements set out in rule 9.2.

24 The first minutes continue to note the 2003 binding death benefit nomination and that an updated or renewed nomination was not made, before stating:

[a]fter due consideration having been made by the surviving Trustee of the possible interests of all Dependants of the deceased member, the potential eligible Beneficiaries of the Member, and the Member's Estate, the Trustee has HEREBY RESOLVED to exercise the discretion afforded to her pursuant to rule 51.4(b) of the Trust Deed of the Fund to forthwith pay the deceased member's death benefits as a lump sum payment to [the first defendant], being a Dependant of the deceased member.

25 The second minutes, again titled 'trustee meeting and resolutions', notes the presence of the first defendant and second defendant. It then provides that clause 8.1 of the fund deed requires the trustee office to be held by two or more trustees where they are individuals. Given the deceased's death, the power in clause 8.5 could not be exercised in the absence of a member to make a member's resolution. The second minutes then indicate the first defendant relied on s.41(1)(b) of the *Trustee Act 1958* as allowing the first defendant to nominate a co-trustee. The minutes continue, alongside a heading 'appointment of member payment of', to state that the first defendant resolved to appoint the second defendant as co-trustee, before providing alongside the heading 'payment of death benefits', that the trustee resolves to pay the benefits of the fund to the first defendant. The second minutes employ language similar to the first in indicating that 'due consideration' was given prior to the resolutions to pay the whole of the fund's benefits to the first defendant.

26 Mr Hayes deposes that the first defendant informed him that she had given careful consideration to all of the deceased's dependants as defined by the fund deed and her mother's wishes as stated in the lapsed binding death benefit nomination of 2003. The minutes of the meetings were said to have been prepared with the assistance of Hill Legal. The first defendant also informed Mr Hayes that given the uncertainty as to clause 8 of the fund's deed, and because the fund was a single-member fund, the second trustee should preferably be a relative. As such, the second defendant had been appointed co-trustee. This was said to be based upon legal advice obtained by the first defendant.

27 On 24 April 2017, the plaintiff became aware that assets of the fund were being sold. On 26 April 2017, the plaintiff's solicitors, Stidston Warren, wrote to Hill Legal seeking an explanation regarding the sale of certain assets of the fund. The correspondence asserted that the assets were effectively 'estate assets', and sought an undertaking by 5 pm that the assets would not otherwise be dealt with. It also requested that the first defendant provide accounts of any dealing with the fund.

28 On the same day, the first defendant informed Mr Hayes that the trustees had resolved to wind up the fund. The minutes of meeting, dated 26 April 2017 with the time noted as 3.15 pm, provide, inter alia, that the fund was terminated in accordance with the SIS Act and clause 62.3 of the fund deed, and that the benefits remaining in the fund were approximately \$490,000. The minutes state further that those benefits 'have or will be paid' out of the fund in accordance with earlier resolutions.

29 Also on 26 April 2017, Hill Legal replied to Stidston Warren, confirming that the first defendant had taken 'the required action as sole surviving trustee' to wind up the fund and distribute the death benefits. The action was said to be based on the recommendations of Hamilton Morello and the need to distribute the proceeds as soon as practicable. The correspondence went on to state:

[The plaintiff] continually failed to provide details relating to the Fund to our office, and to Hamilton Morello, despite numerous requests from both offices, despite having access to same ...  
Our client is an individual trustee of the Fund, and has been since its creation in 2003. As such, she is responsible for ensuring the proper administration of the Fund, and the payment of death benefits on termination of the Fund.

[The plaintiff] is neither a Member, Trustee or Beneficiary of the Fund, and as such our client is not required to consult with him on any matter relating to the administration of the Fund, nor to provide any undertakings or accounting as requested in your letter of today's date.

30 A response from Stidston Warren dated 27 April 2017, asserted that the benefits of the fund were payable to the estate or the plaintiff, not an adult child of the deceased. The correspondence also identified the plaintiff's status as founder of the fund, and the requirement that the office of trustee was to be held by two or more individuals or a corporate trustee. In reply, Hill Legal informed Stidston Warren that the trustees of the fund, now said to be the defendants, had resolved to pay the death benefit to the first defendant. Further, as the superannuation benefits did not form part of the estate, they should have 'no interest' to the plaintiff; the definition of 'trustee' in the fund deed did not necessarily preclude a single surviving trustee from acting; the first defendant had a duty, as co-trustee, to pay out the benefits 'as soon as practicable'; and the defendants had an 'absolute and unfettered discretion' in relation to the resolution to distribute the proceeds of the fund.

31 Mediation in the Part IV proceeding took place on 1 May 2017.

32 By letter of 4 May 2017 to Hill Legal, Stidston Warren sought an undertaking in order to preserve the proceeds of the fund. The letter also asserted that the appointment of the second defendant and transfer of assets was done 'in the context of a clear conflict on the part of the trustees and without the trustees having given any proper consideration whatsoever'. In a reply of the same date, Hill Legal stated:

superannuation trustees have an unfettered discretion as to the distribution of the superannuation funds (save as required by the Superannuation Industry Act). In the present case the Trustees were entitled to make a death benefit distribution to any of the eligible beneficiaries. We are familiar with *Karger v Paul*. You will know that a discretionary trustee is not required to give reasons for any decision and our client does not do so. You have asserted no foundation for an improper exercise of discretion. You refer to a conflict of interest but we fail to see how that allegedly arises. The Trustee is permitted to exercise her discretion, to any eligible object, which includes herself. Our client owes no duty to the estate or other beneficiaries ... Without making any admission but to preserve the status quo our client is willing to give you her personal undertaking that the funds will not be distributed or disbursed ...

33 On 13 June 2018, the Court handed down judgment in the Part IV proceeding, ordering that the plaintiff be provided with a flexible life interest in the Alicudi Avenue property and a pecuniary legacy.<sup>[3]</sup> Of note, the Court made a number of findings regarding the relationship between the plaintiff and first defendant, namely, that upon the death of the deceased the first defendant exhibited a marked negative attitude toward the plaintiff, that their relationship had broken down irretrievably and that the first defendant's evidence tended to be jaundiced by her negative feelings toward the plaintiff. Subsequent to this judgment, the first defendant discontinued the trust proceeding.

#### Applicable principles

34 In accepting office, a trustee becomes bound by certain duties, including becoming familiar with the terms of the trust instrument, and exercising her or his powers in the best interests of the beneficiaries.<sup>[4]</sup>

##### *Good faith and real and genuine consideration*

35 While a trust instrument may afford the trustee absolute and unfettered discretion, such discretion must be exercised in 'good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred.'<sup>[5]</sup> The following summary of the approach was quoted by the High Court in *Attorney-General v Breckler*:

[w]here a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously, wantonly, irresponsibly, mischievously or irrelevantly to any sensible expectation of the settlor, or without giving a real or genuine consideration to the exercise of the discretion. The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable or unwise. Where a discretion is expressed to be absolute it may be that bad faith needs to be shown. The soundness of the exercise of a discretion can be examined where reasons have been given, but the test is not fairness or reasonableness.<sup>[6]</sup>

36 In considering the question of whether the trustee acted in good faith, upon real and genuine consideration and in accordance with the purpose for which the power was conferred, a court may look at the inquiries the trustee made, the information they had, and their reasons for, and manner of, exercising their discretion.<sup>[7]</sup> This includes consideration of any gaps or errors in the information.<sup>[8]</sup> However, it is not the Court's role to determine the weight that the trustee should have attributed to relevant matters in exercising its discretion, or to decide how the power should have been exercised, or the wisdom of its exercise.<sup>[9]</sup>

37 In this context a lack of good faith, or mala fides, encompasses more than fraud.<sup>[10]</sup> It may include the taking account of irrelevant considerations and a refusal to take into account relevant considerations.<sup>[11]</sup> While unreasonableness of itself is not a ground for interference by the Court, it may form evidence that a discretion was never really exercised at all, or evidence of mala fides.<sup>[12]</sup> Moreover, a 'grotesquely unreasonable result may be evidence of a miscarriage of duty.'<sup>[13]</sup> 'Mere carelessness or honest blundering' will not amount to mala fides.<sup>[14]</sup>

38 The trustee must inform her or himself of the matters relevant to the decision.<sup>[15]</sup> If consideration is not properly informed, it is not genuine.<sup>[16]</sup> There must be the exercise of an 'active' discretion.<sup>[17]</sup> Byrne J set out a number of applicable principles in *Sinclair v Moss*, including:

The Court will interfere where a clear case is made out that the discretion is not exercised upon a real and genuine consideration of the matter entrusted to the trustees' discretion:

"If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene."<sup>[18]</sup>

39 In *Finch v Telstra Super Pty Ltd*, the High Court said that '[t]he duty of trustees properly to inform themselves is more intense in superannuation trusts in the form of the Deed than in trusts of the *Karger v Paul* type.'<sup>[19]</sup> Of note, however, those comments were made in the context of entitlement to Total and Permanent Invalidity benefits — a strict trust under which the duty of the trustee was to form an opinion.<sup>[20]</sup> The circumstances were viewed as distinct from those in which discretion is exercised in respect of 'competing claims of potential candidates for bounty.'<sup>[21]</sup>

##### *Purpose for which the power is conferred*

40 The purpose for which the power is conferred on the trustee must be inferred from the trust deed.<sup>[22]</sup> Whether a trustee exercised a power for a proper purpose is a question of fact to be decided on the evidence.<sup>[23]</sup> A trustee is not bound to disclose her or his reasons in reaching a particular decision,<sup>[24]</sup> and a negative inference cannot be drawn from the non-disclosure by a trustee of the reasons for his or her decision.<sup>[25]</sup> Where a power is exercised for a combination of proper and improper purposes, the improper purpose will constitute a fraud on the power if it is an 'operative or actuating purpose — one without which it cannot be said that the appointment would have been made.'<sup>[26]</sup>

41 In *Hooke v Robson*, the distinction between an actuating and non-actuating improper purpose was described as whether the trustee would have exercised the power had it not been for the purpose, or whether the purpose was merely incidental.<sup>[27]</sup> In paragraphs upon which the defendants rely, the Court of Appeal in *Curwen v Vanbrech Pty Ltd* stated:

[t]he trustee submitted its discretion in exercising the exclusion power was absolute and uncontrolled as the trust deed provided no relevant restriction upon how the trustee ought exercise its power ...

Where the discretion is unconfined by any restriction contained in the trust document a court will not intervene, even where it seems that the discretion has been exercised

for a poor or questionable reason, so long as it is in pursuit of the purpose of the grant. Hence, even where the power of exclusion is unfettered, it is still necessary to exercise the power for the purpose for which it has been conferred. The purpose must be inferred from the trust deed.<sup>[28]</sup>

42 In *Curwen v Vanbrech Pty Ltd*, the Court of Appeal considered a claim of improper purpose.<sup>[29]</sup> In that case, the plaintiffs were two beneficiaries who were excluded from the trust approximately one month after one of them had sought access to the trust documents. The plaintiffs asserted that the power to exclude had been improperly exercised in order to prevent access to the trust documents. The trial judge found in favour of the trustee. The plaintiffs appealed on four grounds, the first of which was that the trial judge had misapplied the rule in *Brown v Dunn*<sup>[30]</sup> in relation to the

cross-examination of the trustee. This ground was rejected on the basis that the trial judge was not concerned with whether there had been compliance with the rule, but rather, whether an inference could be drawn from the events leading up to the exercise of discretion in the absence of direct evidence of the alleged impugned conduct or cross-examination about the allegations.<sup>[31]</sup> The Court of Appeal noted that it was not in issue that *Karger v Paul* set out the circumstances in which a court may review a discretionary decision by a trustee. It also said:

[c]ounsel for the appellants was right to eschew any suggestion in oral argument that the absence from [the sole director of the corporate trustee's] evidence of any reasons for the trustee's decision could found an inference that the trustee was actuated by the purpose of which notice had to be given. No adverse inference of any improper purpose could be drawn from the non-disclosure in her evidence of the trustee's reasons.<sup>[32]</sup>

43 The other three grounds of appeal surrounded the assertion that, on the evidence, it was not open to the trial judge to conclude that the purpose of the trustee, in exercising the discretion to exclude the beneficiaries, did not include preventing the plaintiffs from accessing the trust documents. This assertion was also rejected by the Court of Appeal, which determined that:

[a] subjective intention or purpose may be inferred from objective or circumstantial matters which may include the exercise of the power of appointment. But the fact that an appointment is consistent with an improper purpose will not necessarily lead to the drawing of such an inference ... "it is not enough that an appointor or some person not an object of power may conceivably derive some benefit". An intention by an appointor to obtain an improper end is not necessarily to be inferred because the effect of an appointment is consistent with there having been an improper purpose in the making of the appointment. It will be a question of fact in each case.<sup>[33]</sup>

## Consideration

### *Jurisdiction of the Court*

44 As a preliminary point, the defendants submitted that the plaintiff seeks orders on the erroneous assumption that the fund is continuing, when in fact it was 'wound up' on 27 April 2017 and thus no longer in existence. In such circumstances, the Court would have to exercise 'some form of gymnastics' in order to recreate the trusts, re-appoint the first defendant and then remove her. If such a submission were accepted, it would allow a trustee to avoid the jurisdiction of Court regarding a breach of trust simply by terminating the trust.<sup>[34]</sup> The defendants' submission is rejected.

### *The power to distribute benefits under clause 51.4(b)*

45 The defendants submitted that the fund deed, which is to be construed objectively, afforded them absolute and unfettered discretion. They also submitted that it would be impossible if, in the context of a trust intended to benefit a particular family, a trustee who is a family member could not take part in decisions that benefitted her. The defendants submitted that the trustee had a general power of appointment, which was tantamount to ownership, and the plaintiff was misconceived in asserting that such a power creates an inherent conflict. It was the deceased who placed the first defendant in the position of conflict with the knowledge that the first defendant could exercise the power of distribution to her own benefit, effectively saying that if the first defendant wanted all of the proceeds she could take them. As such, according to the defendants, the exercise of the discretion in favour of the first defendant was entirely consistent with the purpose for which the fund was set up, as indicated objectively by the terms of the fund deed.

46 The defendants submitted that the deceased chose not to appoint the plaintiff as

co-trustee when the fund was established, many years after the deceased and plaintiff married, and the binding death benefit says something about her state of mind. It was 'abundantly clear' from these circumstances that the deceased did not want to confer a benefit on the plaintiff. As advanced by counsel for the defendants:

the inference to be drawn from these facts is this: the testator wanted to benefit – wanted the superannuation benefits to go to her children from the previous marriage, and not to benefit the first plaintiff in any way. And that's why it was halved off.

47 Contrary to the defendants' submissions, the power of distribution provided in clause 51.4(b) is a special power,<sup>[35]</sup> in accordance with which the trustee must distribute the proceeds of the fund to one or more individuals who fall within the class of objects identified.<sup>[36]</sup> The fact that the first defendant falls within the class of objects did not negate her duty to exercise the power in good faith, upon real and genuine consideration, and for the purposes for which the power was conferred.

48 It has been suggested that the donee of a fiduciary power ought to be even more vigilant that she has discharged her duties when exercising the power in her own favour.<sup>[37]</sup> Here, it appears the first defendant took the opposite approach. Based upon the correspondence of Hill Legal, the first defendant appears to have approached the exercise of discretion under misapprehensions as to the terms of the fund deed, the duties she owed to the plaintiff and the relevance of the plaintiff's role as legal personal representative of the estate of the deceased.

49 To assert that the plaintiff was not a beneficiary, while technically correct according to trust law,<sup>[38]</sup> is inconsistent with the way in which the phrase is defined in clause 1 of the fund deed. The first defendant's duty was to familiarise herself with the terms of the fund deed. Moreover, the assertion by Hill Legal on 27 April 2017 that the plaintiff should have 'no interest' in the fund is also inconsistent with the plaintiff's status, both personally, as a potential object of the exercise of discretion, and as legal personal representative, as having a role in relation to s 17A(3) of the SIS Act. Albeit subsequent to the exercise of discretion, the claim by Hill Legal in the letter of 4 May 2017, that the first defendant owed the estate or other beneficiaries 'no duty' is incorrect and inconsistent with the defendants' later submissions that noted the dependants had rights to be considered for selection and to compel proper administration of the trust.

50 Similarly, the assertion in the same Hill Legal letter that the defendants failed to see how a conflict allegedly arose, indicates an ignorance or deliberate mischaracterisation of the true circumstances at hand. As identified in the reasons in the Part IV proceeding, and evidenced particularly by the existence of related litigation and the incident in July 2016, substantial conflict existed between the plaintiff and

first defendant. Furthermore, the assertion is inconsistent with the earlier acknowledgment of Hill Legal that the relationship between the plaintiff and first defendant was strained.

51 While it is not the Court's role to consider the fairness or reasonableness of the outcome of the exercise of discretion and usurp the role of the trustee, the outcome itself, particularly where the result is 'grotesquely unreasonable', may form evidence that the discretion was never properly exercised, or was exercised in bad faith. In the circumstances of this proceeding, the outcome of the defendants' exercise of discretion, that is, the distribution of the entire proceeds of the fund to the first defendant, supports the conclusion that there was a lack of real and genuine consideration.

52 Relevant factors for consideration include, but are not necessarily limited to, the intention of the deceased as the settlor of the fund, the relationship between the deceased and the dependant, and the financial circumstances and needs of the dependants.<sup>[29]</sup> Here, on account of the Part IV proceeding, the Court has notice of the relationship between the deceased, the parties and Mr Swanson, and their respective financial circumstances. Even assuming that the defendants' position that the deceased did not intend the plaintiff to benefit from the fund is correct, ignoring the plaintiff's substantial relationship with the deceased and relatively limited financial circumstances, demonstrates a failure of the first defendant to take into account a relevant consideration. Further, the fact that no distribution was made to Mr Swanson is inconsistent with the defendants' own submissions regarding the deceased's intention to benefit her children and grandchildren.

53 The first defendant signed one set of minutes as sole trustee, and one set of minutes as co-trustee with the second defendant. The explanation given to Mr Hayes for such a course was the uncertainty surrounding clause 8 of the fund deed. Rather than seeking advice to resolve this uncertainty and properly comprehend the fund deed, the inference is that the first defendant was attempting to cover both interpretations of the fund deed. Moreover, the correspondence of Hill Legal suggests that there was ongoing uncertainty surrounding the required number of trustees, for example, the letter from Hill Legal of 26 April 2017 does not mention the appointment of a second trustee, only referring to the first defendant as an individual trustee. While the later correspondence of 4 May 2017 acknowledges the appointment of the second defendant, it does not concede that the decisions of the trustee must be exercised by two or more individual trustees.

54 On the other hand, as submitted by the defendants, there is some evidence which supports the contention that the defendants did exercise the power of appointment in accordance with their duties as trustees. This evidence includes the comment of the first defendant to Mr Hayes that she had given careful consideration to all of the dependants, and the statement in the resolutions that refers to consideration of:

the possible interests of all Dependants of the deceased member, the potential eligible Beneficiaries of the Member, and the Member's Estate, the Member's Estate.

55 This evidence does not indicate that any misapprehensions the first defendant was under were otherwise resolved and is more than outweighed by the totality of the evidence. In this regard, the Court accepts the plaintiff's submission that they are formulaic. Further, while the Court notes that the first defendant obtained legal advice and the advice of Mr Hayes, she did not obtain specialist advice as suggested by Mr Hayes and did not seek to resolve uncertainty surrounding the fund deed, in the context of a significant financial decision, that is, distributing the amount of \$490,000.

56 On balance, the inference to be drawn from the evidence is that the first defendant acted arbitrarily in distributing the fund, with ignorance of, or insolence toward, her duties. She acted in the context of uncertainty, misapprehensions as to the identity of a beneficiary, her duties as trustee, and her position of conflict. As such, she was not in a position to give real and genuine consideration to the interests of the dependants. This conclusion is supported by the outcome of the exercise of discretion.

57 The ill-informed arbitrariness with which the first defendant approached her duties also amounts to bad faith. The dismissive tenor of the correspondence from Hill Legal, the willingness to proceed with the appointment and distribution in the context of uncertainties and significant conflict and the lack of specialist advice despite the recommendation of Mr Hayes, all support the conclusions that her conduct was beyond 'mere carelessness' or 'honest blundering'. This conclusion is reached without reference to the lack of evidence deposed by the defendants personally.

58 The position of the second defendant is less certain. There is no evidence that the second defendant received advice from Hill Legal, as the relevant correspondence refers simply to 'our client'. As such, it cannot be concluded that he acted under the same misapprehensions as the first defendant. However, three factors raise the suspicion that the second defendant did not exercise the power upon real and genuine consideration:

- (a) he agreed to be appointed as co-trustee despite his position of conflict and the significant acrimony between the parties;
- (b) he distributed the proceeds of the fund on the same day as he was appointed co-trustee; and
- (c) the outcome of the exercise of distribution is grotesquely unreasonable.

59 However, even if these facts establish that the second defendant acted without real and genuine consideration, the decisions in *Attorney-General v Breckler* and *Curwen v Vanbreck Pty Ltd* suggest that in the context of an absolute discretion, bad faith may need to be shown. Here, the evidence does not support the conclusion that the second defendant approached the exercise of discretion with the same arbitrariness or bad faith as the first defendant and it may be, for example, that his role in the distribution came down to mere carelessness.

60 The evidence does support the finding, however, that the second defendant acted in a position of conflict between his duties toward the dependants and his interest as the husband of the first defendant. Unlike the position of the first defendant, the second defendant's position of conflict was neither apparent to, nor potentially tolerated by, the deceased at the establishment of the fund. As such, the same argument cannot be accepted that his duties in relation to conflict were somehow modified, and in excising the discretion under clause 51.4(b) in favour of his wife, the second defendant was acting in breach of his duty to avoid conflict.

*Was the discretion in clause 51.4(b) exercised for an improper purpose?*

61 Although the Court has concluded that the exercise of the first defendant's discretion was made in bad faith and without real and genuine consideration, the inference cannot be drawn that it was made for an improper purpose.

62 The purpose of a power is to be determined by construing the trust deed. Here, the purpose of the power afforded in clause 51.4(b) is to distribute all of the funds to one or more dependants, and thereby terminate the fund. The power is to be exercised consistently with the broader aims of the fund, to provide financial support to the fund member, and upon the member's death, dependants of the member as defined by the fund deed.

63 The plaintiff asserts that the defendants exercised the power of distribution for their own benefit and to the exclusion of the plaintiff. The difficulty is that the first defendant falls within the class of objects that are the subject of the power and additional evidence is required to demonstrate an improper purpose, such as evidence of a deliberate defeating of what the donor of the power, the deceased, authorised and intended, as ascertained from the fund deed.<sup>[40]</sup>

64 Evidence of anger or resentment is not sufficient by itself to establish fraud on the power.<sup>[41]</sup> The plaintiff also points to the timing of the distribution, two weeks before mediation in the Part IV proceeding, and the outcome of the resolution. However, the evidence does not support an inference that any improper purpose associated with the conflict between the first defendant and plaintiff was the 'operative or actuating purpose' in distributing the fund. In summary, it is apparent that the first defendant acted arbitrarily, in the sense that she persisted in the face of uncertainties and significant conflict, and acted without real and genuine consideration. However, it is unclear whether such arbitrariness and lack of consideration was on account of her personal animosity toward the plaintiff or that the fund needed to be distributed as soon as practicable. The latter would appear to be a purpose falling within the intention of the fund to comply with the SIS Act. Accordingly, the Court is not satisfied that the power of distribution was exercised for an improper purpose.

*The appointment of the second defendant as trustee*

65 The purported appointment of the second defendant by the first defendant is also difficult to reconcile with the first defendant being aware of her duties and relevant considerations. The defendants suggested that, as deposed by Mr Hayes, the appointment of the second defendant was on account of the second trustee needing to be a relative in the context of a single-member fund and the need to comply with the SIS Act. However, the affidavit of Mr Hayes provides that it was the first defendant who informed him that, based upon legal advice, the second trustee should preferably be a relative. The defendants' oral submissions did not go beyond asserting that this was the first defendant's understanding based upon legal advice.

66 Several points must be made in this regard. First, the appointment of the second defendant did little to alleviate the conflict between the trustee of the fund and plaintiff. As submitted by the defendants, it can be accepted that in appointing the first defendant as trustee, the fund was established by the deceased as tolerating a degree of conflict between the first defendant's duties as trustee and interest as a dependant. In this regard, the rule against conflicts of duty and interest may have been modified.<sup>[42]</sup> However, the first defendant's position of conflict extended beyond that created by her appointment as trustee, to the significant personal acrimony between her and the plaintiff. This conflict appears to have commenced upon the deceased's death, and as such, it would not have been considered by the deceased at the time of establishing the fund. In that context, there was a heightened risk that the first defendant would not bring a rationale mind to her duties as trustee.

67 Secondly, the appointment of the second defendant as co-trustee only served to compound the personal acrimony between the parties and demonstrates an ignorance or insolence to the circumstances at hand. While it can be accepted that the need to avoid a conflict of duty and interest may have been modified regarding the first defendant, the same cannot be said in relation to the second defendant, that is, the second defendant was not appointed at the establishment of the fund and the deceased may not necessarily have intended that the second defendant hold a power of disposition from which his wife could benefit.

68 Thirdly, the first defendant's decision-making process regarding the appointment of the second defendant and ensuring that the fund remained compliant with the SIS Act appears inadequate. While the second defendant falls into the definition of 'relative' under s 10 of the SIS Act, and the definition of a self-managed superannuation fund in s 17A(2) refers to one individual trustee being a member and the other a relative of the member, it also provides that a trustee can be an individual who is not an employer of the member.

69 Moreover, it is not apparent how the provision is said to apply in the context of the death of a member, where the terms of the fund deed provide that upon death, the individual ceases to be a member, and the relevance of s 17A(3) has not been considered. That subsection, which is headed 'certain other persons may be trustees', recognises that the requirements of s 17A(2) may be met notwithstanding the death of a member trustee where a legal personal representative is acting in the member's place. Although the subsection is permissive rather than mandatory,<sup>[43]</sup> it potentially had relevance in seeking to ensure that the fund remained a complying fund for the purposes of the SIS Act. Depending upon the circumstances at hand, ensuring that a fund remains compliant with the SIS Act may raise significant complexities.<sup>[44]</sup>

70 In *Cantor Management Services Pty Ltd v Booth*,<sup>[45]</sup> the sole member of a self-managed superannuation fund with a corporate trustee died. After referring to s 17A(2) and 17A(3) Kourakis CJ (with whom Peek and Nicholson JJ agreed) stated:

In these circumstances, the legal representative of the deceased's estate must assume the directorship of the corporate trustee for the SMSF to remain compliant pursuant to s 17A(3)(a). The legal personal representative must then comply with reg 6.21 of the [Superannuation Industry \(Supervision\) Regulations 1994](#) (Cth) (the SIS Regulations) which triggers a compulsory cashing event of a members benefit as soon as practicable after a member dies.<sup>[46]</sup>

71 While it is not suggested that in every instance specialist advice should be sought, in the circumstances of this proceeding, particularly in light of the size of the fund and complexities surrounding the fund deed and compliance with the SIS Act, specialist advice appears justified and is reinforced by the suggestion of Mr Hayes in this regard.

*Should the defendants be removed as trustees?*

72 In determining whether a trustee should be removed the chief consideration is the welfare of the beneficiaries.<sup>[47]</sup> The Court will have regard to the security of the trust property, the efficient and satisfactory execution of the trust and the faithful and sound exercise of powers conferred upon the trustee.<sup>[48]</sup> A breach of trust will not necessarily lead to the removal of a trustee,<sup>[49]</sup> nor will the existence of a conflict between duty and interest.<sup>[50]</sup> At times, however, such factors may be sufficient to justify the trustee's removal.<sup>[51]</sup> Ultimately, whether the Court exercises its discretion turns upon the circumstances of each case.

73 The defendants failed to exercise the discretion afforded to them under clause 51.4(b) by not giving real and genuine consideration to the interests of the defendants. In distributing the proceeds of the fund to the first defendant they arbitrarily dealt with the entirety of the property subject to the trust. They did so in the context of substantial personal conflict with the plaintiff. In all the circumstances it is appropriate for the defendants to be removed as trustees of the fund.

74 The question arises as to a suitable replacement for the trustee of the fund. The fund deed contemplates that the fund can have a corporate trustee. It also provides that it is:

[t]he intention of the Founder and the Trustee that the Fund shall be a complying regulated superannuation fund within the meaning of the Act and will at all times

comply with the Act in order that the Fund is eligible for concessional tax treatment.

75 Aligned with this intention, clause 8.4 provides that the appointment or removal of any person or combination of persons to or from the office of the trustee and the composition of persons holding the office of trustee shall comply with 'the Act'. Certain trustee requirements are also specified if the fund is to be 'Self-Managed'.

76 In addition, the definition of self-managed superannuation fund in s 17A of the SIS Act has a condition that no trustee of the fund (or director of a body corporate trustee) is to receive remuneration.

77 An appointment by the Court of a trustee, or director of a corporate trustee, remunerated by the proceeds of the fund may be at odds with the intention that the fund is a 'complying regulated superannuation fund' within the meaning of the SIS Act. Submissions on this point were not made by the parties, other than the plaintiff's assertion that a corporate trustee may be appointed. It is not certain whether such an appointment will align with the intention of the fund to comply with the SIS Act. Further submissions should be filed in this regard.

#### Conclusions

78 The defendants exercised the discretion afforded to them in clause 51.4(b) without real and genuine consideration to the interests of the dependants of the fund and the exercise of discretion is set aside.

79 In the context of an improper exercise of discretion, and significant personal acrimony between the first defendant and plaintiff, the defendants are to be removed as trustees of the fund.

80 The plaintiff is to file further submissions in relation to the identity of a trustee, or director of a corporate trustee, in light of the intention of the fund to be a compliant superannuation fund for the purposes of the SIS Act.

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<sup>[1]</sup> Proceeding number S CI 2016 04180.

<sup>[2]</sup> Proceeding number S CI 2017 01951.

<sup>[3]</sup> *Re Marsella; Marsella v Wareham* [2018] VSC 312.

<sup>[4]</sup> *Harvey v Olliver* (1887) 57 LT 239, 241; see G E Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 6<sup>th</sup> ed, 2015) [22.10].

<sup>[5]</sup> *Karger v Paul* [1984] VicRp 13; [1984] VR 161, 164.

<sup>[6]</sup> (1999) 197 CLR 87, 99–100 quoting *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* [1998] FCA 51; [1998] 79 FCR 469, 480 (Heerey J, quoting the trial judge, Northrop J).

<sup>[7]</sup> *Karger v Paul* [1984] VicRp 13; [1984] VR 161, 164.

<sup>[8]</sup> *Ibid* 175.

<sup>[9]</sup> *Mandie v Memart Nominees Pty Ltd* [2018] VSC 719 (21 November 2018) [154].

<sup>[10]</sup> J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2016) 327 [16-09].

<sup>[11]</sup> *Ibid*.

<sup>[12]</sup> J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2016) 329–30 [16.14], 326 [16.08].

<sup>[13]</sup> *Re Lofthouse* (1885) 29 Ch D 921.

<sup>[14]</sup> *Jones v Gordon* (1877) 2 AC 616, 628–9.

<sup>[15]</sup> *Finch v Telstra Super Pty Ltd* [2010] HCA 36; [2010] 242 CLR 254, 280; *Partridge v Equity Trustees Executors and Agency Co Ltd* [1947] 75 CLR 149, 164; *Scott v National Trust* [1998] EWHC 318; [1998] 2 All ER 705, 717.

<sup>[16]</sup> *Finch v Telstra Super Pty Ltd* [2010] HCA 36; [2010] 242 CLR 254, 280–1.

<sup>[17]</sup> *Partridge v Equity Trustees Executors and Agency Co Ltd* [1947] 75 CLR 149, 164 quoted in *Karger v Paul* [1984] VicRp 13; [1984] VR 161, 164.

<sup>[18]</sup> [2006] VSC 130 (7 April 2006) [17] quoting *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, 905 (Lord Reid) (citations removed).

<sup>[19]</sup> [2010] HCA 36; [2010] 242 CLR 254, 280.

<sup>[20]</sup> *Ibid* 281.

<sup>[21]</sup> *Ibid* 270.

<sup>[22]</sup> *Curwen v Vanbreck Pty Ltd* [2009] VSCA 284; [2009] 26 VR 335, 351 (citations omitted).

<sup>[23]</sup> *Ibid* 350.

<sup>[24]</sup> *Karger v Paul* [1984] VicRp 13; [1984] VR 161, 165.

<sup>[25]</sup> *Curwen v Vanbreck Pty Ltd* [2009] VSCA 284; [2009] 26 VR 335, 349.

<sup>[26]</sup> *Ibid* 351, 352.

<sup>[27]</sup> [1962] NSW 606, 609 quoted in *Curwen v Vanbreck Pty Ltd* [2009] VSCA 284; [2009] 26 VR 335, 352.

<sup>[28]</sup> *Curwen v Vanbreck Pty Ltd* [2009] VSCA 284; [2009] 26 VR 335, 351 (citations omitted).

<sup>[29]</sup> [2009] VSCA 284; [2009] 26 VR 335.

<sup>[30]</sup> (1893) 6 R 67.

<sup>[31]</sup> *Curwen v Vanbreck Pty Ltd* [2009] VSCA 284; [2009] 26 VR 335, 350.

<sup>[32]</sup> *Ibid* 349.

<sup>[33]</sup> *Ibid* 354.

<sup>[34]</sup> See, eg, *Johns v Johns* [2004] NZCA 42; [2004] 3 NZLR 202 (31 March 2004), 219–20.

<sup>[35]</sup> See Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2<sup>nd</sup> ed, 2012) [1.17].

<sup>[36]</sup> J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2016) [2-46].

<sup>[37]</sup> Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2<sup>nd</sup> ed, 2012) [12.32].

<sup>[38]</sup> *Mercanti v Mercanti* [2015] WASC 297 (20 August 2015) [376].



<sup>[39]</sup> Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2<sup>nd</sup> ed, 2012) [10.112]; see, eg, *Edwards v Postsuper Pty Ltd* [2007] FCAFC 83 (5 June 2007) [9]; *Webb v Teeling* [2009] FCA 1094 (29 September 2009).

<sup>[40]</sup> Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2<sup>nd</sup> ed, 2012) [9.01], [9.03].

<sup>[41]</sup> *Mercanti v Mercanti* [2015] WASC 297 (20 August 2015) [171]; Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2<sup>nd</sup> ed, 2012) [9.78].

<sup>[42]</sup> See generally Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2<sup>nd</sup> ed, 2012) [12.20].

<sup>[43]</sup> *Toppolo v Conti* [2015] WASCA 45; [2015] 293 FLR 412, 430.

<sup>[44]</sup> See, eg, *ibid*; *Cantor Management Services Pty Ltd v Booth* [2017] SASCF 122; [2017] 106 ATR 615.

<sup>[45]</sup> *Cantor Management Services Pty Ltd v Booth* [2017] SASCF 122; [2017] 106 ATR 615.

<sup>[46]</sup> *Ibid* 621 [28].

<sup>[47]</sup> *Letterstedt v Broers* (1884) 9 AC 371, 385–6; *Miller v Cameron* [1936] HCA 13; (1936) 54 CLR 572, 575.

<sup>[48]</sup> *Miller v Cameron* [1936] HCA 13; [1936] 54 CLR 572, 580–1.

<sup>[49]</sup> *Re Wrightson* [1908] 1 Ch 789.

<sup>[50]</sup> *Porteous v Rinehart* [1998] WASC 270; (1998) 19 WAR 495, 514.

<sup>[51]</sup> *Monty Financial Services Ltd v Delmo* [1996] VicRp 7; [1996] 1 VR 65, 83.

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