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Contents

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1 CHILD SUPPORT PAYMENTS – *CARMODY V SUPERANNUATION COMPLAINTS TRIBUNAL* [2020] FCA 291

The Federal Court (Collier J) has dismissed an appeal from the Superannuation Complaints Tribunal (SCT) by a member of a superannuation fund. The trustee of the fund had made deductions from the member's pension as required by Child Support Agency notices given under the *Child Support (Registration and Collection) Act 1988* (Cth) (Collection Act). The member unsuccessfully argued that, by so doing, the trustee had altered his pension contrary to regulation 13.16 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations). The case is *Carmody v Superannuation Complaints Tribunal* [2020] FCA 291.

LEGISLATIVE FRAMEWORK

Collection Act

Briefly stated, the Collection Act is intended to ensure that parents provide their children with the financial support that the parents are liable to provide.

Section 45 of the Collection Act provides for the issue of a notice to an "employer" to collect child support (underlining added):

> (1) The Registrar may, for the purpose of collecting amounts due to the Commonwealth under or in relation to a deductible liability by deduction from the salary or wages of the payer under this Part, give a notice in writing to an employer of the payer: …
>
> (b) instructing the employer:
>
> (i) to make … periodic deductions … from salary or wages paid by the employer to the payer …

Section 72A of the Collection Act provides for the issue of a notice to a "third person" to collect child support (underlining added):

> **72A Registrar may collect debts from a third person**
>
> (1) The Registrar may give written notice to a person:
>
> (a) by whom money is due or accruing, or may become due, to a relevant debtor; or
>
> (b) who holds, or may subsequently hold, money for or on account of a relevant debtor; or …
>
> requiring that person to pay to the Registrar: …

SIS Regulations

Regulation 13.16(1) of the SIS Regulations provides that a trustee of a regulated superannuation fund must not adversely alter a beneficiary's accrued benefits:

> (1) For the purposes of subsection 31(1) of the Act, it is a standard applicable to the operation of regulated superannuation funds that, subject to subregulation (2), a beneficiary's right or claim to accrued benefits, and the amount of those accrued benefits, must not be altered adversely to the beneficiary by amendment of the governing rules or by any other act carried out, or consented to, by the trustee of the fund.

The SIS Regulations also provide that a trustee must not recognise, or in any way encourage or sanction:

- an assignment of a superannuation interest of a member or beneficiary (regulation 13.12); or
- a charge over, or in relation to a member's benefits (regulation 13.13).

BACKGROUND

In 1994 the member was medically discharged from the Royal Australian Air Force after suffering a severe traumatic brain injury.

After a period of assessment, he received two pensions:

- pension 1, from his former employer the Department of Defence; and
- pension 2, which was an invalidity pension payable from the Military Superannuation and Benefits Scheme (at [7]-[10]).

In 2009 the member's marriage ended. He was assessed by the Child Support Agency as being required to pay child support in relation to his two children.

The member incurred a debt in respect of child support.

The Child Support Agency served notices under the Collection Act on the trustee of the Military Superannuation and Benefits Scheme. These included notices under sections 45 and 72A requiring the trustee to make deductions from the member's pension 2, and to remit the amounts deducted to the Child Support Agency.

The trustee complied with the notices.

The member complained to the SCT. The member contended that the trustee, by complying with the notices, had contravened regulation 13.16 of the SIS Regulations. The member also contended that the trustee was not required to comply with the notices as:

- there was no employer/employee relationship between trustee and the member for the purposes of a section 45 notice under the Collection Act; and
- the trustee was not a "person" for the purposes of a section 72A notice under the Collection Act.

THE SCT DETERMINATION

The SCT affirmed the trustee's decision to comply with the notices under the Collection Act (at [40]).

The SCT determined that the deduction by the trustee of amounts from the member's pension 2 in accordance with the Child Support Agency notices did not contravene regulation 13.16 of the SIS Regulations:

> [53] The Tribunal found that the deduction by the Trustee of monies in accordance with the notices served by the Child Support Agency did not adversely alter [the member's] rights or claims, or the amount of his benefits, because the Trustee was applying – on [the member's] behalf – a specified amount in satisfaction of a legal obligation which [the member] had incurred, and had acknowledged that he had incurred. Further, the Tribunal found that [the member's] entitlement to pension 2 remained unaffected, and there was no alteration in circumstances where, once [the member's] debt was extinguished, the amount of pension 2 he received would revert to the pre-deduction amount.

Nor had there been any contravention of regulations 13.12 or 13.13.

The SCT rejected the member's contention that there was no employer/employee relationship between the member and the trustee. This was due to the broad definitions of "employer" and "employee" in the Collection Act:

> [32] The Tribunal noted the Trustee's submission that the terms "employer" and "employee" were very broad under the [Collection Act], and that for the purpose of s 45 the Trustee was the applicant's "employer" as it made "work and income support related payments" to him.

The SCT also determined that the trustee was a "person" who must comply with a section 72A notice:

> [37] The Tribunal observed that the definition of person in s 72A of the [Collection Act] included "a partnership and any Commonwealth, State or Territory public authority (whether incorporated or unincorporated)". The Tribunal noted that the Trustee was a "body corporate, continued in existence … by an act (Act 2) of Federal Parliament", and hence that it was fair and reasonable for it to comply with the s 72A notice.

The SCT also determined that:

- relevantly to regulation 13.12 – there had been no assignment of the member's superannuation interest; and
- relevantly to regulation 13.13 – there had been no charge given over the member's superannuation interest.

The member appealed to the Federal Court.

THE FEDERAL COURT DECISION

The Federal Court dismissed the member's appeal.

The sole ground of appeal was (at [41]):

> That the [trustee] contravened Regulation 13.16 of the SIS Regulation and should never have informed the Child Support Registrar that the [member] was an employee.

The court agreed with the SCT that the deduction by the trustee of amounts from the member's pension 2 in accordance with the Child Support Agency notices did not contravene regulation 13.16 of the SIS Regulations:

> [58] [The member's] entitlement to his accrued benefits in respect of pension 2 remains intact. The amount of those accrued benefits also remains the same. What was altered was where those accrued benefits were paid. The Trustee has applied certain amounts towards satisfaction of a child support debt owed (and conceded to be owed) by [the member] in compliance with ss 45 and 72A notices. In those circumstances, I am not satisfied that [the member's] right or claim to accrued benefits, or the amount of those accrued benefits, has been altered adversely to him.

The court also held that there had been no error in the SCT's findings that the trustee was the "employer" of the member and a "person" for the purposes of the Collection Act (at [93] and [100]).

Finally, the court agreed with the SCT that:

- relevantly to regulation 13.12 – there had been no assignment of the member's superannuation interest (at [115]-[121]); and
- relevantly to regulation 13.13 – there had been no charge given over the member's superannuation interest (at [122]-[123]).

RESULT

In the result, the member's complaint was dismissed. The trustee had correctly made deductions from the member's pension 2 as required by Child Support Agency notices given under the Collection Act.

2 INTEREST ON TPD BENEFIT – *CHAPMAN v QSUPER BOARD* [2020] FCA 88

The Federal Court (Rangiah J) has dismissed an appeal from a determination of the Superannuation Complaints Tribunal (SCT) (SCT determination D18-19 [2019] SCTA 24) by a member of a superannuation fund claiming that the trustee of the fund should have calculated interest on his total and permanent disablement (TPD) benefit from an earlier date.

The member claimed, and was eventually paid, a TPD benefit on account of a psychiatric illness, Major Depression. The trustee calculated interest from 16 September 2013, when the trustee received the report of a Dr Nielsen, Consultant Psychiatrist, which prompted the trustee to reverse its earlier decision to deny the claim. The member claimed interest from 1 April 2010, when his psychiatric illness had commenced, or alternatively 3 December 2010, when he had ceased employment.

The SCT affirmed the trustee's decision to reject the member's claim for additional interest.

The case is *Chapman v QSuper Board* [2020] FCA 88.

THE TRUST DEED AND INSURANCE TERMS

The fund provided self-insured TPD benefits to members. The terms of the self-insured TPD benefits were contained in "Insurance Terms" (at [24]-[26]).

The trust deed of the fund did not expressly provide for the payment of interest on benefits. However, the trust deed conferred on the trustee broad discretion to "do all acts and things….in its discretion necessary … in the exercise of its powers, authorities, functions and duties". As the SCT said (at [14]):

> … The Tribunal considers that no provisions in the Trust Deed or Insurance Terms dictate the payment of interest. It falls within the Trustee's discretion as to the payment of interest, and therefore the Tribunal's task is to determine whether the exercise of that discretion was fair and reasonable in its operation in relation to the Complainant in the circumstances.

BACKGROUND

The SCT was satisfied of the following events (among others) (SCT determination at [18] and [55]):

- 7 July 1989 – the member commenced employment with the employer, became a member of the fund and obtained TPD cover in the fund;
- October 2009 – the member first experienced symptoms of headaches, onset dizziness, depression and psychotic delusions;
- 4 January 2010 – the member ceased work and commenced sick leave;
- 1 April 2010 – Dr Unwin, the member's treating Psychiatrist, reported that he did not anticipate that the member could resume work in some capacity, but also that the work-related effects of his injury would resolve when he left the employer;
- 17 July 2010 – the member lodged a claim for a TPD benefit as a result of a "nervous condition – major depression";
- 3 December 2010 – the member ceased employment with the employer;
- 1 August 2011 – the trustee declined the member's claim for a TPD benefit;
- October 2011 – the approximate date the member refused the trustee's request for a further medical assessment by a psychiatrist;
- 15 December 2011 – the trustee affirmed its decision not to approve the member's claim for a TPD benefit;

- February 2012 – the member made his first SCT complaint;
- 23 July 2013 – the SCT adjourned its review meeting and requested the member be further assessed and a report be provided by Dr Nielsen and that the trustee reconsider the member's claim for a TPD benefit in light of that report;
- 16 September 2013 – the trustee received Dr Nielsen's report dated 26 August 2013;
- 24 October 2013 – the trustee determined that the member was entitled to the TPD benefit with interest payable from the date of receipt of Dr Nielsen's report on 16 September 2013;
- 31 October 2013 – the member withdrew his first SCT complaint;
- 4 November 2013 – the trustee notified the member that it had determined (on 24 October 2013) that the member was entitled to the TPD benefit with interest payable from the date of receipt of Dr Nielsen's report on 16 September 2013;
- 12 November 2013 – the trustee paid the member the balance of his accumulation account in the sum of $321,909.42, the TPD benefit of $1,771,200, and interest of $5,414.91 from 16 September 2013 (the date of receipt of Dr Nielsen's report) to 12 November 2013 (the date of payment) at the fund's cash rate; and
- 6 January 2014 – the member requested payment of interest of $581,061.22 at the rate prescribed by the Supreme Court practice direction number 7 of 2013 under s 58 of the *Civil Proceedings Act 2011* (Qld).

The member subsequently sought interest pursuant to "section 38 of the *Insurance Contracts Regulation 2017*" in the sum of $539,727.07 (SCT determination at [70]).

The member claimed that he became entitled to payment of the TPD benefit on 1 April 2010, when his psychiatric illness commenced, or alternatively 3 December 2010, when he ceased to be at work due to his psychiatric illness. Further, as the TPD benefit became payable on 1 April 2010 or 3 December 2010, interest was, prima facie, payable from then (at [32]).

By letter dated 13 January 2014 the trustee informed the member of its decision to refuse to pay additional interest in respect of the TPD benefit (SCT determination at [3]).

The member complained to the SCT. As well as his claim for additional interest, the member claimed damages of $414,710 for financial loss. He said that the trustee's delay in paying him the TPD benefit had resulted in the loss of his home (SCT determination at [17]).

THE SCT DETERMINATION

The SCT affirmed the trustee's decision to pay the member interest on his TPD benefit limited to an amount of $5,414.91 calculated from 16 September 2013 at the fund's cash rate (at [1]).

The SCT considered that it was fair and reasonable that the trustee did not admit the member's claim prior to the receipt of Dr Nielsen's report dated 26 August 2013, on 16 September 2013 (SCT determination at [60]):

> [60] The Tribunal considers that in light of the conflicting [medical] opinions above, it was not unreasonable for to the Trustee to decline the claim until after it had received the report of Dr [Nielsen] dated 26 August 2013, a report which significantly contributed to clarification of the nature of the Complainant's illness and its temporal relation to his TPD status.

As for the rate of interest, the SCT said (SCT determination at [52]):

> [52] The Tribunal considers that no provisions in the Trust Deed or Insurance Terms dictate the payment of interest. It falls within the Trustee's discretion as to the payment of interest, and therefore the Tribunal's task is

> to determine whether the exercise of that discretion was fair and reasonable in its operation in relation to the Complainant in the circumstances.

The SCT was satisfied that the payment of interest at the fund's cash rate from 16 September 2013 to the date payment was made was fair and reasonable in the circumstances (SCT determination at [72]).

The SCT also rejected the member's claim for financial loss (SCT determination at [68]):

> [68] The Tribunal notes its earlier finding that it was fair and reasonable for the Trustee to determine that the Complainant was not TPD until after it received Dr [Nielsen's] report on 16 September 2013. The Tribunal is satisfied that following receipt of the report, the Trustee then admitted the Complainant's claim and paid the Benefit with interest in a reasonable period of time. It thus follows that the Complainant's claimed loss did not arise as a consequence of the Trustee's decision.

The SCT was accordingly satisfied that the trustee's decision was fair and reasonable in the circumstances and, affirmed the trustee's decision (at [18]).

The member appealed to the Federal Court.

THE FEDERAL COURT DECISION

The Federal Court dismissed the member's appeal with costs.

The court held that – contrary to the member's contention that his entitlement to be paid the TPD benefit arose on 1 April 2010, when his psychiatric illness commenced, or 3 December 2010, when he ceased work due to his psychiatric illness – that entitlement did not arise until 24 October 2013, when (subsequent to the receipt on 16 September 2013 of Dr Nielsen's report dated 26 August 2013) the trustee determined that the member was TPD (at [38]). The court noted that (at [38]):

> … The Trustee's decision to pay interest from 16 September 2013, when it received Dr [Nielsen's] report, was presumably made so the applicant would not be disadvantaged by the delay between the receipt of the report and the making of the decision.

The member also contended that the SCT had erred in failing to take into account relevant considerations (including the fact of the member's serious financial hardship), and in having regard to irrelevant considerations (including the mere expression of hope regarding the member's possible return to work in one of the medical reports, when that opinion did not inform the correct test of TPD within the meaning of the Insurance Terms). The court rejected these contentions (at [40]-[52]).

RESULT

In the result, the member's claim to additional interest on his TPD benefit was rejected. The way the trustee had calculated interest on the TPD benefit stood.

3 DISABILITY CLAIM – AUDIO RECORDING OF MEDICAL EXAMINATION NOT PERMITTED – *LONGBOTTOM V NULIS NOMINEES (AUSTRALIA) LTD* [2020] WASC 21

The Western Australian Supreme Court (Master Sanderson) has refused a request by a member of a superannuation fund claiming a disability benefit for permission to make an audio recording of a medical examination of the member being arranged by the insurer of the fund. The decision is *Longbottom v NULIS Nominees (Australia) Ltd* [2020] WASC 21.

BACKGROUND

A member of a superannuation fund claimed a disability benefit for an alleged psychiatric illness. The member had already served evidence from a psychiatrist of his choice (at [6]).

The insurer wanted the member to be examined by a psychiatrist, Dr Edwards-Smith. The member's lawyers indicated by email that the examination of the member would be recorded (at [7]). The insurer's lawyers responded by email (at [7]):

> You purport to "put us on notice" that the examination will be recorded. As you no doubt appreciate, the recording of psychiatric examination is highly unusual. This is the first time we have ever received a request to have a psychiatric examination be recorded and we are unsure as to why this request has been made.
>
> We made enquires with Dr Edwards-Smith's rooms and we have been informed they do not allow recording of psychiatric examinations due to:
>
> 1. Privacy legislation;
>
> 2. Given the nature of matters which can be addressed in a psychiatric examination, there is a concern that the examinee will replay the examination recording which poses a risk to their mental health.

The email went on to say that were the member to attempt to record the examination, Dr Edwards Smith would terminate the assessment (at [8]).

The insurer issued a chamber summons seeking orders that the member submit to a medical examination by a psychiatrist. The member opposed the application (at [1]).

THE COURT'S DECISION

The court made the following orders (at [1], underlining added):

> 1. The [member] shall submit himself for medical examination by Dr Gemma Edwards-Smith on [specified time] at [specified place].
>
> 2. A medical adviser chosen by the [member] shall be entitled to be present at the examination.
>
> 3. <u>Neither the [member] nor his medical adviser is permitted to record the examination by audio or visual means</u>.
>
> 4. The [insurer] have liberty to apply for an order that the action be stayed.
>
> 5. The [member] pay the [insurer's] costs of this application in any event.

Neither the insurer nor Dr Edwards-Smith objected to the member having a medical adviser or a support person present at the examination (at [4]).

However, Dr Edwards-Smith took the view that it was inappropriate to record the interview. The question, then, was "whether it was in the interests of justice to permit the [member] to attempt to record the examination, being mindful that the likely outcome of his attempting to do so was that Dr Edwards-Smith

would not undertake the examination and the [insurer] would be denied the opportunity to have Dr Edwards Smith's opinion" (at [9]-[10]).

The court was satisfied that the view of Dr Edwards-Smith was decisive:

> [11] The argument put on behalf of the [member] was straightforward. Given the [member] would attend the examination accompanied by a support person and a medical practitioner there was no reason why the consultation should not be recorded. If a dispute arose as to what was said during the course of the consultation the [member] could call either or both of the accompanying persons to give evidence supporting his version of events. Rather than rely on the [member's] memory and the memory of the two accompanying persons an audio recording would settle all disputes. Further, counsel submitted the audio recording would indicate the tone in which the consultation took place. So, for instance, if the [member] alleged Dr Edwards Smith was antagonistic or sarcastic, that would emerge clearly from the audio recording.
>
> [12] There is much to be said for courts embracing advances in technology. Although the order does not by its terms anticipate an audio or audiovisual recording of a medical consultation it is clearly designed to offer some protection to a person submitting themselves to a medical examination. The common law position as set out in the English cases to which I have referred makes no mention of a right by a party who is medically examined to have his or her medical practitioner present. That suggests the present form of the rules was designed to protect the position of the party being examined. It is at least arguable on that basis a plaintiff who seeks further protection by recording a consultation should be entitled to do so.
>
> [13] Against that there is the view of Dr Edwards Smith. In the end I was satisfied her view was decisive. Furthermore, while there might be a dispute as to the "tone" of the interview the [member's] position was adequately protected by the attendance of a support person and a medical practitioner. It is open to question whether any recording could add anything further to the way in which the consultation was conducted.

THE RESULT

In the result, the member was permitted to have a medical adviser present at the medical examination, but neither the member nor the medical adviser was permitted to make an audio or visual recording of the examination.

4 SUPERANNUATION GUARANTEE – PRINCIPAL RACING AUTHORITY AN "EMPLOYER" – *COMMISSIONER OF TAXATION V RACING QUEENSLAND BOARD* [2019] FCAFC 224

The Full Federal Court (Griffiths, Derrington and Steward JJ) has held that the Racing Queensland Board (Board) was deemed to be an "employer" for superannuation guarantee purposes. The case is *Commissioner of Taxation v Racing Queensland Board* [2019] FCAFC 224.

LEGISLATIVE FRAMEWORK

Briefly stated, the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGA Act) effectively requires an employer to make superannuation contributions in respect of an "employee". Section 12(8) of the SGA Act expands the ordinary meaning of "employee" (underlining added):

> 12(8) The following are employees for the purposes of this Act:
>
> (a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment;
>
> (b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment;

The term "employer" is correspondingly expanded by section 12(8)(a) (at [51]).

BACKGROUND

The Board was the principal racing authority for Queensland, responsible for the general administration of the thoroughbred, harness and greyhound racing industries in Queensland. Changes of government and policy resulted in a number of changes to the identity of the entity charged with that function.

In about 2000 the Board's predecessor adopted a centralised prizemoney system after the introduction of the goods and services tax (GST) in order to minimise the administrative burden that the new tax would have on the racing industry (at [15]). A letter circulated by the Board's predecessor about the introduction of a centralised prizemoney system said (at [18], emphasis added):

> The decision will mean that the [Board's predecessor] will, from 1 July [2000], make all prizemoney payments to owners, winning percentages to trainers and jockeys, and jockeys riding fees, **on behalf of race clubs** for all meetings conducted in Queensland. …
>
> The decision was made by the Committee in response to the introduction of the GST on 1 July, with the aim of minimising the administrative impact the new tax will have on the industry. It will mean much of the record keeping and documentation, and the compliance burden, associated with prizemoney and riding fees will be taken off race clubs, owners, trainers, and jockeys, and handled by the [Board's predecessor] **on their behalf** …

All jockeys were required to be licensed by the Board to ride in races in Queensland. A jockey applied to the Board for a licence by completing an application form, in which the Board indicated that it would be paying the riding fees to jockeys. If the Board accepted the application, the jockey was licensed to ride horses in races under the terms contained in the application form (at [12] and [27]).

The rules during the relevant periods were ambiguous as to the nature of riding fees payable to jockeys for their participation in races. It was accepted that the jockeys received fees properly described as a fee paid to the rider of a horse that starts in a race, or in cases where a rider is engaged and the horse is subsequently scratched but the rider does not secure a replacement mount (at [13]).

THE COMMISSIONER'S ASSESSMENT

The Commissioner of Taxation issued a number of default assessments to the Board on the basis that it had a liability for unpaid superannuation guarantee charges on various payments to individual jockeys who rode

races in Queensland between July 2009 and September 2014. This was on the basis that the individual jockeys were "employees" of the Board for the purposes of the SGA Act. The total amount of the assessments was $949,317.32.

The Board objected to the assessments. The Commissioner disallowed the Board's objection.

The Board appealed to the Federal Court to review the Commissioner's objection decision. The onus was on the Board to prove the assessments were excessive (at [47] and [48]).

APPEAL TO THE FEDERAL COURT

The court (Logan J) held that the jockeys were *not* employees of the Board under the SGA Act ([2019] FCA 509 at [68]):

> [68] What follows from this is that, throughout the Relevant Periods, a jockey was a person who was paid to participate in a sport, namely thoroughbred racing, but the person legally liable to pay the riding fee, which was the payment for that participation, was always the owner or trainer who had employed or engaged that jockey to ride in that race. The Commissioner has misunderstood the nature of the Centralised Prizemoney System and the source of the legal liability to pay the riding fees. The source remained the contract between jockey and the owner or trainer but that liability was discharged by a payment made on behalf of that owner or trainer by the Board (or a predecessor) via the Centralised Prizemoney System.

While the court accepted that the Board paid riding fees to jockeys as a consequence of the centralised prizemoney system, the court held that it did so "on behalf of" the owners or trainers (at [57]).

(This case was reported in the June 2019 issue of the Superannuation Case Law Update.)

The Commissioner appealed to the Full Federal Court.

APPEAL TO THE FULL FEDERAL COURT

The central issue on appeal was whether the Board was liable to pay the riding fees to jockeys in respect of their participation in thoroughbred horse racing. If that question was answered in the affirmative, then the Board was obliged to pay the superannuation guarantee charges (at [4]).

THE FULL FEDERAL COURT'S DECISION

The Full Federal Court held that the Board was liable to pay the racing fees. The court held that the primary judge had placed much emphasis on a state of affairs as at when the system was put in place and not contemporary evidence from the relevant periods (at [84]):

> [84] Whatever may have been the intention of the [Board's predecessor] in 2000 when the several documents relied upon by it were written, the evidence before the primary judge disclosed that what in fact occurred in the Relevant Periods was significantly different. Were it to have been the case that, having paid the riding fees to the jockeys, the [Board's predecessor] deducted an equivalent amount from the prizemoney paid to the owners, it might be accepted that the riding fees were being paid on behalf of the owners. However, that was not the case. There was no recovery of the riding fees from the owners or trainers. Further, the [Board's predecessor] held itself out as being the entity which would pay the riding fees, admitted in the recipient created tax invoices that it had an obligation to pay those amounts, did so, along with the GST, and then claimed as against the Commissioner that it was entitled to input tax credits in respect of the GST paid. The actions of the [Board's predecessor] only pointed towards it having the obligation or liability to pay the riding fees to jockeys.

RESULT

In the result, the Board was held to be deemed to be an employer, as it was liable to pay the riding fees. Consequently, it was obliged to pay the unpaid superannuation guarantee charges in respect of the riding fees paid to the individual jockeys.

5 SUPERANNUATION GUARANTEE – RACE CLUB AN "EMPLOYER" – *COMMISSIONER OF TAXATION V SCONE RACE CLUB LIMITED* [2019] FCAFC 225

The Full Federal Court (Derrington and Steward JJ; Griffiths J dissenting) has held that the Scone Racing Club (Club) was deemed to be an "employer" for superannuation guarantee purposes. The case is *Commissioner of Taxation v Scone Racing Club* [2019] FCAFC 225.

The result in this case is similar to that in *Commissioner of Taxation v Racing Queensland Board* [2019] FCAFC 224 (*Racing Queensland Board*). However, Griffiths J noted that there were significant differences between the two appeals.

LEGISLATIVE FRAMEWORK

Briefly stated, the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGA Act) effectively requires an employer to make superannuation contributions in respect of an "employee". Section 12(8) of the SGA Act expands the ordinary meaning of "employee" (underlining added):

> 12(8) The following are employees for the purposes of this Act:
>
> (a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment;
>
> (b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment;

The term "employer" is correspondingly expanded by section 12(8)(a) (at [10] and [110]):

> … although there is no explicit provision which expands the meaning of "employer" with respect to s 12(8)(a) of the SGA Act, the proper construction is that the term "employer" is expanded accordingly so as to apply to the person who is liable to make the payment referred to in s 12(8)(a).

BACKGROUND

Among other statutory provisions and rules, the thoroughbred racing industry in NSW is regulated by the Local Rules of Racing (Local Rules). Between July 2009 and June 2014 (the relevant period), Local Rule 72(1) provided that (at [19]):

> … Clubs shall pay such fee for a jockey or apprentice jockey in consideration for their riding a horse in a race or a barrier trial as may be set from time to time by the Board [ie Racing NSW].

During the relevant period, the Club paid fees to jockeys in respect of the riding in horse races and barrier trials. This is different to *Racing Queensland Board* because in that case individual clubs had no involvement in paying riding fees to jockeys, as the Board itself made these payments (at [20]).

THE COMMISSIONER'S ASSESSMENT

Having regard to Local Rule 72(1), the Commissioner of Taxation formed the view that the Club was "the person liable to make the payment" of riding fees to jockeys, and therefore an employer of jockeys, for the purpose of section 12(8) of the SGA Act (at [22]).

The Commissioner issued notices of assessment to the Club for unpaid superannuation guarantee charges in respect of superannuation guarantee shortfalls during the relevant period (at [22]).

The Club objected to the assessments. The Commissioner disallowed the Club's objection (at [23]).

The Club appealed to the Federal Court. The Club accepted that it had the burden of proving that the relevant assessments were excessive (at [23]).

APPEAL TO THE FEDERAL COURT

The primary judge in the Federal Court (Logan J) held that the Club was *not* the employer of jockeys. In coming to this conclusion, the primary judge relied upon findings in respect of the regulation of the racing industry and its customs and practices. The primary judge held that although riding fees were paid by the Club (via racing NSW) to jockeys during the relevant period, they did so on behalf of owners and not because the Club was "liable" to do so within the meaning of s 12(8)(a) of the SGA Act (at [23]).

(This case was reported in the September 2019 issue of the Superannuation Case Law Update.)

The Commissioner appealed to the Full Federal Court (at [1]).

APPEAL TO THE FULL FEDERAL COURT

The agreed issue for determination was whether the Club had discharged its onus of showing that it was not liable to pay jockeys for riding in races (or barrier trials) conducted by the Club (at [11] and [84]).

THE MAJORITY'S DECISION

The majority, Steward and Derrington JJ, held that the Club was liable to pay the riding fees and was an employer of jockeys during the relevant period (at [81], [109] and [111]).

Their Honours held that the Club had not discharged its onus of proof. The evidence relied upon to draw the inference that the Club was not liable to make payments of riding fees to jockeys was held to be "overwhelmed" by evidence that the Club was liable to make the payments (at [81] and [109]):

> [109] In this case the taxpayer contended that owners of race horses, and not it, were liable to pay riding fees. It bore the onus of establishing this. The salient factors were that Racing NSW paid the fees on behalf of the taxpayer; that the taxpayer never sought to recover the fees from owners or anybody else; that the taxpayer booked the fees as an expense in its accounts; that it claimed input tax credits for GST purposes when it paid the fees to jockeys which it treated as “subcontractors”; that the concept of “returns to owners” was concerned with the elimination of costs which had been imposed on owners in order to promote racing in New South Wales; and that Local Rule 72 clearly stated that the taxpayer, as a club, “shall” pay such fees to jockeys. In addition, no evidence was led that it was a term of any contract entered into between owners and jockeys that the owners were liable to pay riding fees; and no evidence was led from any owner, trainer or jockey. No statement of account sent out by Racing NSW suggested that liability lay with the owners. In these circumstances, the taxpayer nonetheless asserts that it was not liable to pay the riding fees. In my view, given these factors, the trial judge erred in inferring that the riding fees were paid on behalf of owners, in the sense that the owners, and not the taxpayer, were liable to pay such fees. The evidence in favour of the drawing of that inference was simply overwhelmed by the evidence denying its existence.

THE MINORITY'S DECISION

Griffiths J (dissenting) held that that the riding fees were paid to jockeys on behalf of owners or connections during the relevant period (at [3] and [65]).

His Honour said (at [59]) and [65]:

> [59] Having regard to all this evidence, and despite the Commissioner’s heavy reliance on LRR 72 as supporting his contention that the Club was liable to pay riding fees, the primary judge reasoned that LRR 72 did not alter the existing and established industry practice under which riding fees were paid on behalf of owners. This is made clear at [62], where the primary judge said (emphasis added):
>
> > It is not difficult to see how, having regard to s 12(8)(a) of the SGAA and reading LR 72 in isolation, the Commissioner might reasonably have formed the view which he did as to the Club’s liability. **However, once the regulation of the industry and its customs and practices are understood, that view is not sustainable …**

> [65] The policy developed and implemented by Racing NSW relating to returns to owners provides relevant context within which LRR 72 is to be construed. It strongly supports the primary judge's conclusion that LRR 72 did not impose a legal liability on the Club to pay riding fees Rather, in accordance with the industry custom and practice, riding fees were paid to jockeys by the Club (via Racing NSW) on behalf of owners or connections during the relevant period.

In distinguishing this conclusion from that reached by the Full Federal Court in *Racing Queensland Board*, his Honour said (at [66]):

> [66] It is notable that the policy of returns to owner assumed much greater prominence in these proceedings than was the case in Racing Queensland Board. It provides a central point of difference between the proceedings. Another important point of difference is the significance in the appeal in Racing Queensland Board of the gaps and inconsistencies in the taxpayer's evidence in that matter, as highlighted by Griffiths and Derrington JJ at, for example, [5], [19], [21], [34], [49], [61] and [72] of the joint reasons for judgment.

RESULT

In the result, the Board was held to be deemed to be an employer, as it was liable to pay the riding fees. Consequently, it was obliged to pay the unpaid superannuation guarantee charges in respect of the riding fees paid to the individual jockeys.

6 DEATH BENEFIT – AFCA SUBSTITUTES TRUSTEE'S DECISION – *SUPERANNUATION DETERMINATION CASE NUMBER 610554*

The Australian Financial Complaints Authority (AFCA) has substituted its decision as to the manner of distribution of a death benefit, for the trustee's decision. The trustee had decided to pay the benefit to the deceased member's 3 minor children in equal shares, to the exclusion of the complainant (in this case note referred to as "the fiancée") who claimed to be the member's de facto spouse and a financial dependant. AFCA determined that the fiancée should be included in the distribution as a financial dependant (but not as a de facto spouse). The decision is superannuation determination case number 610554 (6 September 2019).

BACKGROUND

The member died in 2017. From the AFCA determination it appears that he did not leave a will.

The background facts included the following:

- In 2015 the member and the fiancée met;
- In October 2016 they were engaged to be married;
- In March 2017 the member attempted to make a binding death benefit nomination in favour of the fiancée. This nomination was invalid due to a discrepancy in the dates. The trustee wrote to the member about the discrepancy but a replacement nomination was never received;
- In March 2017 the fiancée obtained a restraining order against the member. The fiancée claimed that due to difficulties with the member, in 2017 she lived with the member 90% of the time and with her mother and brother the rest of the time;
- In May 2017 the member and the fiancée bought a property together in joint names and with a joint mortgage;
- The fiancée fell pregnant to the member but in June 2017 miscarried;
- By the time the member died (in October 2017), they were no longer living together due to difficulties arising from the member's drug addiction and alleged drug-fuelled abuse. However, they were still in regular communication with each other. The minor children (through their respective mothers asserted that the relationship terminated in June 2017;
- On 6 October 2017, the day before the member's death, the member made Facebook posts where he advertised himself as single. He also sent messages to the fiancée saying that he would be moving to another city and would be refinancing their loan and "getting her name off at the same time"; and
- On 7 October 2017 the member died. There was a coronial inquest.

THE TRUSTEE'S ALLOCATION

The trustee initially accepted the fiancée's assertion that she was the member's de facto spouse. The trustee decided to allocate the death benefit as follows:

- to the fiancée – 40%;
- to minor child 1 – 20%;
- to minor child 2 – 20%;
- to minor child 3 – 20%.

The minor children (through their respective mothers) objected.

The trustee then changed its decision as it no longer concluded that the fiancée was the member's spouse, and decided on the following allocation:

- to the fiancée – nil;
- to minor child 1 – 33.3%;
- to minor child 2 – 33.3%;
- to minor child 3 – 33.3%.

However, the trustee did not consider whether the fiancée was a financial dependent.

The fiancée then complained to AFCA.

AFCA'S DETERMINATION

AFCA determined that the fiancée was not the member's de facto spouse at the date of his death, but she was a financial dependant.

In considering whether the fiancée was the member's spouse, AFCA applied the factors usually applied by the court, as follows:

- The duration of the relationship;
- The nature and extent of their common residence;
- Whether a sexual relationship exists;
- The degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- The ownership, use and acquisition of their property;
- The degree of mutual commitment to a shared life;
- The care and support of children; and
- The reputation and public aspects of the relationship.

Here, AFCA was not satisfied that the fiancée was a de facto spouse:

> The definition of "spouse" required the [fiancée] and the deceased member to be living together on a genuine domestic basis in a relationship as a couple at the date of his death. I am satisfied that this was not the case at the date of the deceased member's death …
>
> While it is clear from the copies of text messages provided by the [fiancée] that she and the deceased member still had very strong feelings for one another, on balance, I agree with the trustee's conclusion that the [fiancée] and the deceased member were no longer living together in a genuine domestic relationship as a couple at the date of his death.

However, AFCA was satisfied that the fiancée was financially dependent on the member (which, as mentioned above, had not been considered by the trustee).

AFCA noted that the purpose of a superannuation death benefit is:

> … to provide for a deceased member's dependents who were receiving financial support and might reasonably have expected to continue to receive financial support from the member, had the member not died.

Here, AFCA was satisfied that the evidence indicated that the fiancée was at least partially financially dependent on the member:

> Although the [fiancée] and the deceased member were not living together at the date of his death, they had purchased property together and were jointly responsible to meet the mortgage payments secured by the property. The [fiancée] was financially dependent on the deceased member to make these payments at the date of his death and has been unable to meet them since his death.

and:

> Bank statements produced by the [fiancée] show she has consistently struggled to meet the loan repayments without the deceased member's contribution. This evidence indicates that the [fiancée] was at least partially financially dependent on the deceased member to meet the loan repayments at the time of his death.
>
> The [fiancée] acknowledges that, due to his drug addiction, the deceased member had difficulty maintaining employment but says that he did contribute to joint expenses and also supported his children when he could, either from his earnings or his Centrelink payments.

However, the minor children's need for financial support was greater than that of the fiancée:

> The [fiancée's] need for financial support from the deceased member is primarily to enable her to meet the mortgage repayments to which they had jointly committed, but she is employed and it is otherwise reasonable to expect that she can support herself.
>
> The joined parties' needs, as minor children, are greater than the [fiancée's] needs because they require financial support for their daily maintenance, ongoing education and health expenses.

AFCA accordingly substituted the following allocation for the trustee's allocation:

- to the fiancée – 13%;
- to minor child 1 – 29%;
- to minor child 2 – 29%;
- to minor child 3 – 29%.

RESULT

In the result, AFCA substituted its own decision for the decision of the trustee. AFCA determined that the fiancée was financially dependent on the member and should be included in the distribution of the death benefit.

COMMENT

This AFCA determination shows that AFCA appears to be taking an approach to the distribution of death benefits that is similar to the approach that the Superannuation Complaints Tribunal formerly took.

Our superannuation expertise

We act for a broad range of superannuation clients located around Australia. Our clients include some of the country's largest industry, corporate and public sector schemes, with most of our client relationships going back many years. Our Superannuation team operates as a "seamless team" across our Sydney, Melbourne, Brisbane, Adelaide and Perth offices.

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Scott has comprehensive experience in the establishment, licensing, governance, administration, distribution, restructuring, investment and tax matters associated with superannuation, funds management and life insurance products. He is a regular speaker at conferences, has designed key training programs for boards and responsible managers and is a guest lecturer at UNSW law school. In 2012-2020 Scott was recognised by his peers in *Best Lawyers in Australia* in the Superannuation Law category, and in 2015-2020 in the Regulatory Practice category. In 2015-17 he was listed in *Who's Who Legal: Pensions & Benefits*.

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Stanley specialises in insurance, superannuation, funds management and financial services regulation. He is a prolific author who has written many articles for the Insurance Law Journal, the Insurance Law Bulletin and the Superannuation Law Bulletin. For many years he was also a co-author of *Wickens The Law of Life Insurance in Australia*. His contributions included new chapters "Insurance in Superannuation" and "Privacy and Direct Marketing". In 2014-2020 Stanley was recognised by his peers in *Best Lawyers in Australia* in the Insurance Law category. In 2015-17 he was listed in *Who's Who Legal: Pensions & Benefits*.

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