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Supreme Court of Western Australia - Court of Appeal

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IOPPOLO -v- CONTI [2015] WASCA 45 (10 March 2015)

Last Updated: 10 March 2015

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : IOPPOLO -v- CONTI [\[2015\] WASCA 45](#)

CORAM : MARTIN CJ

BUSS JA

BEECH J

HEARD : 17 OCTOBER 2014

DELIVERED : 10 MARCH 2015

FILE NO/S : CACV 136 of 2013

BETWEEN : ROSARIO ANTONIO IOPPOLO and GRACE SUSAN HESFORD as executors of the estate of the late **FRANCESCA CONTI**

Appellants

AND

AUGUSTO CONTI

First Respondent

AUGUSTO INVESTMENTS PTY LTD

Second Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA

Coram : MASTER SANDERSON

Citation : IOPPOLO & HESFORD -v- CONTI [\[2013\] WASC 389](#)

File No : CIV 1668 of 2013

Catchwords:

Superannuation - Self managed superannuation funds - Whether [Superannuation Industry \(Supervision\) Act 1993](#) (Cth) mandates appointment of executor of deceased member's estate as trustee upon death of member

Trusts - Superannuation - Review of exercise of trustee's discretion - Assertion of lack of bona fides - No evidence

Legislation:

[Superannuation Industry \(Supervision\) Act 1993](#) (Cth), [s 17A](#), [s 19](#), [s 40](#), [s 52](#), [s 42A\(5\)](#)
[Trustees Act 1962](#) (WA), [s 77](#)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellants : Mr C G Colvin SC & Mr A Metaxas

First Respondent : Mr N A Davis

Second Respondent : Mr N A Davis

Solicitors:

Appellants : Metaxas & Hager

First Respondent : Bowen Buchbinder Vilensky

Second Respondent : Bowen Buchbinder Vilensky

Case(s) referred to in judgment(s):

Finch v Telstra Super Pty Ltd [\[2010\] HCA 36](#); [\(2010\) 242 CLR 254](#)

Ioppolo & Hesford v Conti [\[2013\] WASC 389](#)

Karger v Paul [\[1984\] VicRp 13](#); [\[1984\] VR 161](#)

MARTIN CJ:

Summary

1 In 2002 the late Francesca Conti and her husband, Augusto Conti (the first respondent) became the trustees and beneficiaries of a trust known as the Conti Superannuation Fund (the Fund). The terms of the deed by which the Fund was established (the Trust Deed) required the Fund to be conducted at all times in compliance with the requirements of various statutes, including most pertinently the [Superannuation Industry \(Supervision\) Act 1993](#) (Cth) (the SIS Act), no doubt so as to secure the favourable tax treatment afforded to superannuation funds complying with that Act.

2 Mr and Mrs Conti made contributions to the Fund which were recorded in the books of the Fund as standing to the benefit of their respective accounts. Francesca Conti died on 5 August 2010. On 28 October 2010 probate of her will was granted to her son Rosario Ioppolo and her daughter Grace Hesford, who are the appellants in their capacity as executors of her estate.

3 On 3 February 2011, Mr Conti, acting in his capacity as trustee of the Fund, determined that the benefits standing to the account of his late wife would be paid to him rather than to any of her children. On the same day, acting in his capacity as a beneficiary of the Fund, he elected to take the benefit in the form of a pension, and funds have been paid to him in that form out of the assets of the Fund.

4 On 4 February 2011, Mr Conti resigned as trustee of the Fund with the effect from the appointment of Augusto Investments Pty Ltd as trustee of the Fund, which he effected that day. Augusto Investments Pty Ltd is a company of which Mr Conti is the sole director and is the second respondent to this appeal.

5 The executors commenced proceedings by originating summons claiming, amongst other things, that upon the death of the late Mrs Conti, Mr Conti as trustee of the Fund was required by s 17A of the SIS Act to appoint one of them to act as a trustee of the Fund in the place of the late Mrs Conti and that until such an appointment was made, Mr Conti had no power to deal with the interest which the late Mrs Conti had in the Fund in his capacity as trustee of the Fund. They asserted that Mr Conti's purported determination to confer the interest which the late Mrs Conti had in the Fund upon himself was void for that reason, and also because Mr Conti had acted in bad faith in making that determination, by preferring his own interests to those of the late Mrs Conti's children. The appellants' claims were tried by the Master. He held that s 17A of the SIS Act did not require Mr Conti to appoint one or other of the executors as a trustee of the Fund, and also held that there was no evidence capable of sustaining the assertion that Mr Conti had acted in bad faith in making the determination that the late Mrs Conti's interest in the Fund should be conferred upon him. Accordingly, the executors' claims were dismissed.

6 The executors appeal from that decision. For the reasons which follow, the Master's conclusions were correct and this appeal must be dismissed.

The facts

7 The primary facts are not in contention, although the executors assert that certain inferences and conclusions should be drawn with respect to the manner in which Mr Conti exercised his powers as trustee of the Fund which are contentious. The non-contentious facts established by the evidence follow, in chronological order.

Mr and Mrs Conti marry

8 Mr and Mrs Conti were married in 1981. Mrs Conti had four children from a previous marriage. Subsequent to their marriage, Mr and Mrs Conti derived income from business interests which they managed together, although the extent and worth of their respective contributions became a contentious topic in correspondence passing between the solicitors for the parties. Nothing turns upon those contentions.

The Fund is established

9 On 29 July 2002, the Fund was established by the execution of the Trust Deed by each of Mr and Mrs Conti. It seems that the terms of the Trust Deed have not been amended since its establishment. Each of Mr and Mrs Conti were trustees of the Fund from its inception.

10 The recitals to the Trust Deed record that the trustees wished to establish a superannuation trust fund in order to provide superannuation benefits for persons who become members of the Fund, and that the Fund is to be a Regulated Superannuation Fund, an expression defined by s 19 of the SIS Act, which definition was incorporated into the Trust Deed by reference pursuant to cl 4.4 of the Deed.

11 Clause 1 of the Trust Deed declared that the assets of the Fund were to be held by the trustees on trust for the objects and purposes of the Trust Deed. Clause 4.1 provides that the Trust Deed is to be read and construed subject to cl 35.1 and cl 35.6(a) of the Trust Deed.

12 Clause 35.1 of the Trust Deed provides:

35.1 If there is a conflict or inconsistency between the provisions of this Deed and the Relevant Legislation, the Relevant Legislation is to prevail and any provision in this Deed is to be read down, construed and interpreted by the Trustees in such a manner so as to give effect to the Relevant Legislation and to enable the Fund to be operated in a manner that is consistent with the Relevant Legislation.

13 The expression 'Relevant Legislation' is defined by cl 4.3 of the Trust Deed to mean various Acts, including the [Income Tax Assessment Act 1936](#) (Cth), the [Income Tax Assessment Act 1997](#) (Cth) and the SIS Act as amended from time to time, and any rules, orders or determinations made pursuant to those Acts which must be complied with in order for the Fund to obtain the maximum income tax concessions available in respect of superannuation or 'so as to enable the Fund to be deemed a Complying Superannuation Fund'.

14 Clause 35.6(a) of the Trust Deed provides:

35.6 (a) Notwithstanding any provision of this Deed any other covenant or other requirement required by the Relevant Legislation to be included in this Deed is deemed to be included as if every such covenant or requirement was set out in this Deed on and from the date that covenant or requirement is required to be so included.

15 There are other provisions within cl 35 in the same vein, although they are not specifically referred to in cl 4.1 of the Trust Deed. So, cl 35.2 - cl 35.4 provide:

35.2 The Trustees have the power to do all acts and things or to omit to do such acts or things as they consider necessary, desirable or expedient for the Fund to be operated or administered in accordance with Relevant Legislation and/or for the Fund to be a Complying Superannuation Fund and for the Trustees, Employers, Members and beneficiaries not to be in contravention or in the opinion of the Trustees any possible or potential contravention of the Relevant Legislation.

35.3 The powers conferred upon the Trustees by Clause 35.2, without limiting the generality of such powers, include the right to administer and operate the Fund so that:

- (a) the Fund is operated solely for one or more of the core and ancillary purposes specified in the Relevant Legislation;
- (b) the Fund is operated so as to comply with any standards prescribed under the

Relevant Legislation which are applicable to the Fund;

(c) the Trustees are entitled to provide to the Commissioner with [sic] such returns and information as required by the Commissioner or as required by the Relevant Legislation;

(d) the Trustees may follow, comply with, implement and obey any directions, instructions, orders or guidelines which may be issued or given by the Commissioner;

(e) the Trustees may inform or disclose to, the Commissioner such event, omission or thing that the Relevant Legislation may require to be disclosed to the Commissioner and/or seek the advice or ruling or direction of the Commissioner as they consider necessary;

(f) the Trustees may pay from the Fund any levy or charge imposed upon the Fund under the Relevant Legislation; and

(g) the Trustees may seek from the Commissioner any exemption or modification of the provisions of the Relevant Legislation in respect of their application of the Fund;

(h) the Trustees may pay a Member's or Beneficiary's benefits or interest in the Fund, in the circumstances provided by the Relevant Legislation, to the Commissioner or an Eligible Roll-Over Fund even if no claim for such benefit has been made by or in respect of the Member [or] Beneficiary.

35.4 The Trustees are not to be taken to be in contravention of the Deed or in breach of trust if in giving effect to clauses 35.1 and 35.2, they:

(a) construe or interpret this Deed;

(b) do such acts or things;

(c) omit to do such acts or things;

which might otherwise be in contravention of this Deed or in breach of trust but which the Trustees consider necessary, desirable or expedient to avoid a contravention of the Relevant Legislation.

16 Clause 4.3 of the Trust Deed defines the word 'Member':

'Member' subject to the Relevant Legislation means a person whom the Trustee has admitted as a Member of the Fund and has not ceased being a Member by virtue of clause 6.4 hereof.

17 Clause 6.4 of the Trust Deed provides that:

6.4 A person shall cease to be a Member when:

(a) all benefits which are or may be payable in respect of a Member have been

paid; or

(b) a transfer is made to an Eligible Fund in satisfaction of all the Member's entitlements to Benefits; or

(c) the Member's entitlement to Benefits is terminated or forfeited; or

(d) where the Trustee shall otherwise reasonably determine in circumstances not otherwise in breach of the Relevant Legislation.

18 Clause 4.3 of the Trust Deed defines the term 'Nominated Dependant' to mean 'a person nominated by a Member as the Nominated Dependant'.

19 There are various other provisions of the Deed which manifest a clear intention that the Deed shall at all times be conducted in such a way as to conform to the requirements of the SIS Act so as to secure the taxation benefits expressly envisaged by the terms of the Trust Deed. So, cl 6.5 provides that a person is not to be admitted as a member of the Fund if the admission of that person would result in the Fund not being a Self Managed Superannuation Fund (another term defined in the Deed by reference to the definition within the SIS Act) unless certain conditions are satisfied. Similarly, cl 8.1 of the Trust Deed requires that Members may make contributions to the Fund provided that the contribution is in accordance with the requirements of the Relevant Legislation. Clause 9.3 of the Trust Deed requires that the trustee is to invest the Fund's assets in a manner that does not contravene the Relevant Legislation, and a number of the powers specifically conferred upon the trustees of the Fund by cl 21 of the Trust Deed are specified to be subject to compliance with the provisions of the Relevant Legislation. Further, cl 29.4 provides that any amendments or variations to the provisions of the Trust Deed must comply with the requirements specified in the Relevant Legislation.

20 Clause 18.2 of the Trust Deed provides that the rights of the Members and their dependants to receive benefits from the Fund shall be those set out in the Trust Deed. The Trust Deed incorporates, by a 'Schedule of Rules', various provisions relating to Members' entitlements and the payment of benefits to Members or their Dependants.

21 Clause 20 of the Trust Deed contains various provisions relating to the office of trustee. Clause 20.1 provides:

20.1 Subject to the requirements of the Relevant Legislation being satisfied the Trustee shall have the power by deed or by an oral or written resolution to appoint a new or additional Trustee or Trustees **PROVIDED THAT** where the Trustee of the Fund is required by or pursuant to the terms of this Deed to be a Constitutional Corporation then such new trustee must be a Constitutional Corporation unless under or pursuant to this Deed the sole or primary purpose of the Fund is the provision of Old-Aged Pensions **AND PROVIDED FURTHER THAT** the Trustee is an Eligible Person. (original emphasis)

22 Clause 20.2 provides that the office of a trustee is to become vacant in certain specified circumstances, none of which are relevant to the circumstances of this case. However, cl 20.4 is relevant to this case. It provides:-

Any provisions of the Trust Law requiring at least two trustees after the retirement of a trustee which may be expressly negated or excluded from having effect shall not apply to

the Fund constituted by this Deed and it shall be permissible for one only trustee of Fund [sic] irrespective of the number of trustees appointed whether or not originally appointed at the time of creation of the Fund constituted by this Deed.

23 Clause 20.5 provides that if there is a deadlock between natural person trustees, subject to the requirements of the Relevant Legislation the deadlock is to be resolved by placing weight on each trustee's vote proportionate to that trustee's member account balance as a proportion of the total member account balances of the Fund.

24 As I have noted, cl 21 of the Trust Deed is concerned with the powers of the trustees. Clause 21.2 provides:

21.2 The Trustee may exercise any of its powers or rights even where there is a conflict of interest by reason of the Trustee:

- (a) being an Employer;
- (b) being a Member;
- (c) being an associate of an Employer;
- (d) being a Guardian, spouse or relative of a Member;
- (e) having a direct personal interest in the benefit or exercise of the power or right;

so long as the power or right is exercised in a bona fide manner and otherwise not in breach of the Relevant Legislation.

25 Further, cl 22 of the Trust Deed provides:

1. TRUSTEE - EXERCISING DISCRETIONS AND DISCRIMINATION

In administering the Fund and in exercising the trusts, powers and authorities vested in the Trustee herein and pursuant to the Rules annexed hereto, the Trustee shall have an absolute and uncontrolled discretion at all times to exercise or refrain from exercising such trusts, powers and authorities **PROVIDED THAT** the Trustee shall not discriminate against any person on the grounds of that person's race, sex or marital status in such a manner as to infringe any law of the Commonwealth or a State or Territory in respect of discrimination. (original emphasis)

26 As I have mentioned, Members' entitlements and the payment of benefits to the Dependants of Members are governed by a Schedule to the Trust Deed entitled 'Schedule of Rules'.

27 Clause 2 of that Schedule is relevant and is entitled 'Benefits payable on death where Dependants'. It relevantly provides:

2.1 Subject to the requirements of the Relevant Legislation being satisfied a Member or Beneficiary may provide the Trustee with a binding written direction in a form and style as permitted by the Trustee which may or may not be included on a Member Application Form but otherwise in accordance with the Relevant Legislation as to the payment of a Benefit

which would be payable upon their death to one or more of that person's Dependant's [sic] or the Legal Personal Representative of the deceased Member or Beneficiary, as the case may be (Binding Beneficiary Nomination Form). If the Trustee consents, such Binding Beneficiary Nomination Form may subject to the requirements of the Relevant Legislation relate to the type, amount, and proportions of different components or Benefit to be paid upon a Member's or Beneficiary's death and also specify whether a Pension Benefit, reversionary or not, is to be provided on the death of the Member. A Member or Beneficiary may vary any such direction contained in a Binding Beneficiary Nomination Form at any time by providing a fresh Binding Beneficiary Nomination Form to the Trustee prior to the Member's or Beneficiary's death (as the case may be) provided that such variation is in accordance with the requirements, if any, of the Relevant Legislation and the requirements relating to the Binding Beneficiary Nomination Form as aforesaid and otherwise provided in these Rules.

2.2 The Trustee shall subject to the Relevant Legislation and Rules 5, 6 & 7, pay the Benefits to the Dependants or Legal Personal Representatives or such other persons as permitted by the Relevant Legislation nominated on the Binding Beneficiary Nomination Form. In the absence of any such duly executed Binding Beneficiary Nomination Form or in the case where the Trustee is not bound by a Binding Beneficiary Nomination Form by reason of the Relevant Legislation, Rule 2.3 shall apply.

2.3 On the death of a Member or Beneficiary who has not provided the Trustee with a valid notice binding the Trustee in accordance with Rule 2.1 above or the Trustee is not under the Relevant Legislation bound by a Binding Beneficiary Nomination Form, the Trustee may pay or apply the Member's Benefit that is payable on the death of the Member or Beneficiary subject to Rules 5, 6 & 7 as follows:

(i) Where the Member or Beneficiary has left a Nominated Dependant or Nominated Dependants, to such one or more of the Nominated Dependants of the deceased Member or deceased Beneficiary in the manner, at the times and in such proportions between them, if more than one, that the Trustee may in its absolute discretion determines [sic] **PROVIDED THAT** should the deceased Member or deceased Beneficiary, as the case may be, not have Nominated Dependants, or should the Trustee in its absolute discretion determine that it would be inequitable or inappropriate to pay the Benefit or any part thereof to the Nominated Dependants, the Trustee shall pay or apply the Benefit subject to Rules 5, 6 & 7 to such one or more of the deceased Member's or deceased Beneficiary's Dependants in the manner, at the times and in such proportions between them, if more than one, as the Trustee may in its absolute discretion determine.

(ii) Where the Member or Beneficiary has no Dependants then Rule 3 shall apply.

2.4 In exercising the discretions conferred in Rule 2.3 the Trustee shall have regard to any Nominated Dependants but otherwise shall not be bound to apply the benefits towards the Nominated Dependants and otherwise has a complete discretion as to the allocation of the benefits as is stated in Rule 2.3.

...

2.6 A Member who gives the Trustee a Binding Beneficiary Nomination Form may:

- (i) confirm the Binding Beneficiary Nomination Form by giving to the Trustee a written notice, signed and dated by the Member to that effect; or
- (ii) amend, or revoke the Binding Beneficiary Nomination Form by giving to the Trustee a new Binding Beneficiary Nomination Form in accordance with the requirements of the Relevant Legislation of the amendment or revocation.

2.7 Unless sooner revoked by the Member, a Binding Beneficiary Nomination Form ceases to have effect:

- (i) at the end of the period of three (3) years after the day it was first signed, or last confirmed or amended by a Member; or
- (ii) upon a decree nisi being made in respect to the dissolution of the marriage of the Member if a nominated beneficiary in the Binding Beneficiary Nomination Form is the spouse of the Member;

which shall ever first occur. (original emphasis)

28 Clauses 5, 6 and 7 of the Schedule of Rules are concerned with the circumstance in which a member was in receipt of an allocated pension or a complying pension as at the date of that member's death and accordingly have no application to the present case.

The first binding beneficiary nomination is made

29 On the same day as the Fund was created, Mrs Conti executed a form entitled 'Application for Membership of Conti Superannuation Fund'. On the form, under the heading 'Nomination of Beneficiaries' and the text 'In the event of my death it is my wish that my benefits shall be paid to the following persons in the proportions stated below', Mr Conti's name and address is given, his relationship to Mrs Conti stipulated, and the proportion of benefits to be paid to him specified at 100%.

30 Another part of the form invites the applicant to declare whether the nomination was to be 'a binding beneficiary nomination binding the trustee to pay the benefits as prescribed above'. Adjacent to that portion of the text the word 'yes' has been circled.

31 The form goes on to provide that if an affirmative answer is given to the question, the party is to proceed to 'Execution Box A'. That box is the execution box used by Mrs Conti to execute the form in the presence of two witnesses who also executed the form.[\[1\]](#)

Mrs Conti makes her will

32 On 13 January 2005, Mrs Conti made the will in respect of which probate was granted following her death. It appoints the executors and contains a number of specific bequests, including, by cl 5, the specific bequest of 'my entitlements in the Conti Superannuation Fund' to her four children (including, of course, the executors).

33 This bequest was inconsistent with the binding beneficiary nomination made by Mrs Conti on 29 July 2002, which remained in force at the time she made her will, because as long as that nomination remained in force, in the event of her death, her interest in the Fund would pass in accordance with the nomination, rather than in accordance with her will. As the executors do not contend that Mrs Conti's interest in the Fund formed part of her estate, it is unnecessary to consider whether and in what circumstances her interest in the Fund could have passed according to her will.

The second binding beneficiary nomination is made

34 The first binding beneficiary nomination expired three years after it was made, on 29 July 2005. However, on 10 April 2006 Mrs Conti executed another binding beneficiary nomination form in favour of her husband. That form is in the same terms as the earlier form, and nominates her husband to receive 100% of her benefit. Although neither of 'yes/no' adjacent to the question on the form as to whether the nomination is to be a binding beneficiary nomination are circled, the form directs members wishing to make a binding beneficiary nomination to use 'Execution Box A', and Mrs Conti used that box when she executed the form in the presence of two witnesses who also executed the form. The executors appear to have always accepted that this was a binding nomination within the terms of cl 2 of the Schedule of Rules to the Trust Deed. However, pursuant to cl 2.7 of the Schedule of Rules, the nomination ceased to have effect three years after it was made, on 10 April 2009. There is no evidence that Mrs Conti made any other nomination or notified the trustees that the nomination of her husband had been renewed.

Mrs Conti dies

35 On 5 August 2010 Mrs Conti died. Probate of the will dated 13 January 2005 was granted on 28 October 2010.

Mr Conti obtains legal advice

36 Mr Conti obtained legal advice with respect to his rights and obligations as trustee of the Fund by letter from Norton & Smailes, lawyers, dated 14 December 2010. The letter recites the factual history, the relevant provisions of the Trust Deed, and the relevant provisions of the [Trustees Act 1962](#) (WA) and the SIS Act. In the letter those solicitors advise that s 17A(3) of the SIS Act did not require, but permitted, the legal personal representative of a deceased member to become a trustee of the Fund and further advised that a fund will cease to be a Self Managed Superannuation Fund six months after it first fails to comply with the requirements of s 17A. The solicitors therefore advised that Mr Conti was able to remain as the sole trustee of the Fund until six months after the death of Mrs Conti and recommended that after 6 February 2011, a second trustee or a corporate trustee should be appointed to act as trustee of the Fund.

37 The solicitors also gave advice with respect to the capacity of Mr Conti to determine that the benefits standing to Mrs Conti's account in the fund could be paid to him. After referring to the relevant rules of the Trust Deed, the solicitors advised that 'the Trust Deed permits the trustee to exercise its discretion to pay all of Francesca's superannuation death benefit to Augusto'. After referring to provisions of the SIS Act, the solicitors recommended that in order to remain a complying fund 'Francesca's death benefit should be paid out as soon as practicable to Augusto'.

38 At the conclusion of their letter, the solicitors summarised their advice. In that summary they reiterated that Mr Conti was currently the sole trustee of the Fund and that there was no requirement to appoint another trustee of the Fund until 6 February 2011. In relation to the allocation of Mrs Conti's benefit, the solicitors summarised their advice in these terms:

Under the terms of the Trust Deed for the Fund, the trustee has absolute discretion to deal with Francesca's superannuation death benefit. Only in the event that the superannuation death benefit is paid into Francesca's Estate, are the terms of her will relevant. In the present case however, it is proposed by the trustee of the Fund to pay the superannuation death benefit directly to Augusto. As set out [above] this is a valid exercise of the trustee's discretion.

39 Immediately following that passage, under the heading 'What interest do the children of the deceased have in the Fund?', the solicitors advised:

(i) Under the terms of the Trust Deed, Francesca's children do not have any interest in Francesca's superannuation death benefits. Rather, they have a right to be considered by the trustee in the exercise of his discretion.

(ii) In the event that Francesca's superannuation death benefit is paid into the Estate, then the superannuation death benefit is distributed to the children equally, in accordance with the Will.

(iii) However, the trustee may exercise his discretion to pay Francesca's superannuation death benefit to himself rather than to the Estate.

Mr Conti determines that he should receive the late Mrs Conti's benefit

40 On 3 February 2011, Mr Conti executed a document, purportedly in his capacity as trustee of the Fund, recording his resolution that the death benefit arising on the death of the late Mrs Conti should be paid to himself. The document requested his advice as to whether he required the death benefit to be paid as a lump sum benefit or as a pension benefit. By another document bearing the same date, Mr Conti, in his capacity as beneficiary of the Fund, advised himself, in his capacity as trustee of the Fund, that he wished to take the benefit arising on the death of Mrs Conti in the form of a pension benefit to be paid annually. Minutes of a trustee meeting bearing the same date and signed by Mr Conti record the notification which he had provided and record a resolution by Mr Conti, in his capacity as trustee, to take the necessary steps to enable the pension to be paid. Various other documents relating to the pension payable to Mr Conti were executed on the same date.

Mr Conti resigns as trustee

41 The following day, on 4 February 2011, Mr Conti executed a document giving notice of his resignation as trustee of the Fund, to take effect from the date the replacement trustee is appointed. In another document apparently executed on the same day in his capacity as retiring trustee of the Fund, Mr Conti noted that Augusto Investments Pty Ltd had consented to act as his replacement as trustee and resolved to execute a deed appointing the company as trustee. Minutes of a meeting of directors of the company executed by Mr Conti on the same day record the company's resolution to act as trustee of the Fund. Mr Conti was the sole director and shareholder of the company.

The SIS Act

42 As at the date of Mrs Conti's death in August 2010, s 17A of the SIS Act relevantly provided:

17A Definition of self managed superannuation fund

Basic conditions - funds other than single member funds

(1) Subject to this section, a superannuation fund, other than a fund with only one member, is a ***self managed superannuation fund*** if and only if it satisfies the following conditions:

- (a) it has fewer than 5 members;
- (b) if the trustees of the fund are individuals - each individual trustee of the fund is a member of the fund;
- (c) if the trustee of the fund is a body corporate - each director of the body corporate is a member of the fund;
- (d) each member of the fund:
 - (i) is a trustee of the fund; or
 - (ii) if the trustee of the fund is a body corporate - is a director of the body corporate;
- (e) no member of the fund is an employee of another member of the fund, unless the members concerned are relatives;
- (f) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;
- (g) if the trustee of the fund is a body corporate - no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for any duties or services performed by the director in relation to the fund.

Basic conditions - single member funds

(2) Subject to this section, a superannuation fund with only one member is a ***self managed superannuation fund*** if and only if:

- (a) if the trustee of the fund is a body corporate:
 - (i) the member is the sole director of the body corporate; or
 - (ii) the member is one of only 2 directors of the body corporate, and the member and the other director are relatives; or
 - (iii) the member is one of only 2 directors of the body corporate, and the member is not an employee of the other director; and
- (b) if the trustees of the fund are individuals:
 - (i) the member is one of only 2 trustees, of whom one is the member and the other is a relative of the member; or

- (ii) the member is one of only 2 trustees, and the member is not an employee of the other trustee; and
- (c) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;
- (d) if the trustee of the fund is a body corporate - no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for any duties or services performed by the director in relation to the fund.

Certain other persons may be trustees

- (3) A superannuation fund does not fail to satisfy the conditions specified in subsection (1) or (2) by reason only that:
 - (a) a member of the fund has died and the legal personal representative of the member is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during the period:
 - (i) beginning when the member of the fund died; and
 - (ii) ending when death benefits commence to be payable in respect of the member of the fund; or
 - (b) the legal personal representative of a member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during any period when:
 - (i) the member of the fund is under a legal disability; or
 - (ii) the legal personal representative has an enduring power of attorney in respect of the member of the fund; or
 - (c) if a member of the fund is under a legal disability because of age and does not have a legal personal representative - the parent or guardian of the member is a trustee of the fund in place of the member; or
 - (d) an appointment under section 134 of an acting trustee of the fund is in force.

Circumstances in which entity that does not satisfy basic conditions remains a self managed superannuation fund

- (4) Subject to subsection (5), if a superannuation fund that is a self managed superannuation fund would, apart from this subsection, cease to be a self managed superannuation fund, it does not so cease until the earlier of the following times:
 - (a) the time an RSE licensee of the fund is appointed;

(b) 6 months after it would so cease to be a self managed superannuation fund.

Subsection (4) does not apply if admission of new members

(5) Subsection (4) does not, except for the purposes of section 29J, apply if the reason, or one of the reasons, why the superannuation fund would cease to be a self managed superannuation fund was the admission of one or more new members to the fund.

...

Disqualified persons

(10) For the avoidance of doubt, subsection (3) does not permit a person, in the capacity of legal personal representative of a disqualified person (within the meaning of section 120), to be a trustee of a self managed superannuation fund or a director of a body corporate that is a trustee of a self managed superannuation fund.

43 However, by an amendment to the SIS Act in 2012, s 17A was amended retrospectively, with the amendment taking effect as and from 8 October 1999. The retrospective amendment involved the repeal of par 17A(3)(c) and its substitution with the following:

(c) if a member of the fund is under a legal disability because of age and does not have a legal personal representative:

(i) the parent or guardian of the member is a trustee of the fund in place of the member; or

(ii) if the trustee of the fund is a body corporate - the parent or guardian of the member is a director of the body corporate in place of the member; or

44 The expression 'legal personal representative' is defined for the purposes of the SIS Act by s 10 of that Act to mean:

[T]he executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person.

45 The same section provides that the word 'member' has a meaning affected by s 15B of the Act (which is not relevant to these proceedings), but does not otherwise define the term.

46 Part 6 of the SIS Act contains a number of provisions relating to the governing rules of superannuation entities. Within that part, s 52 specifies certain covenants that are to be included within the governing rules. As at 5 August 2010, that section provided:

1. Covenants to be included in governing rules

Governing rules taken to contain covenants

(1) If the governing rules of a superannuation entity do not contain covenants to the effect of

the covenants set out in subsection (2), those governing rules are taken to contain covenants to that effect.

The covenants

(2) The covenants referred to in subsection (1) are the following covenants by each trustee of the entity:

- (a) to act honestly in all matters concerning the entity;
- (b) to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;
- (c) to ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries;
- (d) to keep the money and other assets of the entity separate from any money and assets, respectively:
 - (i) that are held by the trustee personally; or
 - (ii) that are money or assets, as the case may be, of a standard employer-sponsor, or an associate of a standard employer-sponsor, of the entity;
- (e) not to enter into any contract, or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers;
- (f) to formulate and give effect to an investment strategy that has regard to the whole of the circumstances of the entity including, but not limited to, the following:
 - (i) the risk involved in making, holding and realising, and the likely return from, the entity's investments having regard to its objectives and its expected cash flow requirements;
 - (ii) the composition of the entity's investments as a whole including the extent to which the investments are diverse or involve the entity in being exposed to risks from inadequate diversification;
 - (iii) the liquidity of the entity's investments having regard to its expected cash flow requirements;
 - (iv) the ability of the entity to discharge its existing and prospective liabilities;
- (g) if there are any reserves of the entity - to formulate and to give effect to a

strategy for their prudential management, consistent with the entity's investment strategy and its capacity to discharge its liabilities (whether actual or contingent) as and when they fall due;

(h) to allow a beneficiary access to any prescribed information or any prescribed documents.

Covenant referred to in paragraph (2)(e)

(3) A covenant referred to in paragraph (2)(e) does not prevent the trustee from engaging or authorising persons to do acts or things on behalf of the trustee.

Covenant referred to in paragraph (2)(f)

(4) An investment strategy is taken to be in accordance with paragraph (2)(f) even if it provides for a specified beneficiary or a specified class of beneficiaries to give directions to the trustee, where:

(a) the directions relate to the strategy to be followed by the trustee in relation to the investment of a particular asset or assets of the entity; and

(b) the directions are given in circumstances covered by regulations made for the purposes of this paragraph.

Regulations may prescribe other covenants

(5) The regulations may prescribe a covenant to be included in the governing rules of a superannuation entity and, if the governing rules of such a superannuation entity do not contain a covenant to the effect of the prescribed covenant, those rules are taken to contain a covenant to that effect.

Prescribed covenants may overlap with other requirements

(6) Without limiting the generality of subsection (5), the regulations may prescribe, for the purposes of that subsection, a covenant that elaborates, supplements, or otherwise deals with, any aspect of:

(a) a matter to which a covenant in subsection (2) relates; or

(b) a matter to which a provision of this Act (other than this section) relates.

But prescribed covenants must be capable of operating concurrently with other requirements

(7) However, a covenant prescribed for the purposes of subsection (5) must be capable of operating concurrently with:

(a) all the covenants referred to in subsection (2); and

(b) this Act other than this section.

Covenant by corporate trustee has effect as covenant by trustee's directors

(8) A covenant by a corporate trustee of a superannuation entity that is to the effect of a covenant referred to in subsection (2), or to the effect of a covenant prescribed by regulations referred to in subsection (5), also operates as a covenant by each of the directors of the trustee to exercise a reasonable degree of care and diligence for the purposes of ensuring that the trustee carries out the first-mentioned covenant, and so operates as if the directors were parties to the governing rules.

Reasonable degree of care and diligence

(9) The reference in subsection (8) to a reasonable degree of care and diligence is a reference to the degree of care and diligence that a reasonable person in the position of director of the trustee would exercise in the trustee's circumstances.

47 Section 40 of the SIS Act provides that if a Fund has ceased to be a self managed fund, the Commissioner of Taxation can give notice to the effect that it has ceased to be entitled to income tax concessions, although the Commissioner can still treat the fund as complying and entitled to income tax concessions notwithstanding its non-compliance (see s 42A(5) of the SIS Act).

The proceedings

48 The executors commenced proceedings by originating summons on 26 April 2013. However, directions were made requiring the provision of pleadings. In their statement of claim, the executors asserted that the Trust Deed read in conjunction with s 17A of the SIS Act, 'required the appointment of a legal personal representative of the deceased, as a trustee of the Fund, forthwith upon the death of the deceased'. They sought an order of the court appointing one of them as a trustee of the Fund. They also asserted that Mr Conti purported to exercise the power to pay the amount standing to the credit of the late Mrs Conti in the Fund to himself with knowledge of the provisions of Mrs Conti's will 'and acted in bad faith in pursuit of his own personal interest, in order to defeat the interests of the deceased'.

The reasons of the Master

49 In his reasons,[\[2\]](#) the Master recorded that during the course of the hearing he had granted the executors' application to join Augusto Investments Pty Ltd as a second defendant to the proceedings. He also recorded his refusal of an application by the executors to cross-examine Mr Conti, who had provided an affidavit which was tendered at the hearing, because no prior notice had been given of the executors' intention. That aspect of the Master's decision has not been challenged in this appeal.

50 The Master's reasons include recitation of the facts which I have set out above, save that the Master inadvertently attributed the determination that the Fund standing to the credit of the late Mrs Conti should be paid to Mr Conti to the second defendant, the corporate trustee, rather than to Mr Conti. However, the executors accept that nothing turns on this.

51 The Master construed the relevant provisions of s 17A of the SIS Act in these terms:

The mechanism of the section is tolerably clear. Section 17A(3) allows for the appointment of an executor as a trustee of the fund but does not in its terms require such an appointment.

Section 17A(4) provides a period of grace - that is to say it allows a fund six months to organise its affairs so it can remain a SMSF. So in the case of a fund which has two members and which would qualify under s 17A(1), on the death of one of the members it remains a SMSF for six months. If the remaining member has not taken some steps during that period to bring the fund within the terms of s 17A(2) then it will cease to be a SMSF. In this case Mr Conti appointed a corporate trustee and the fund remained a SMSF. The fund remained a SMSF because it migrated from the type of fund covered in s 17A(1) to a fund covered by s 17A(2).[3]

52 The Master characterised the executors' alternative argument as an allegation that the discretion with respect to the allocation of the late Mrs Conti's benefit was not exercised 'in a bona fide manner as required by cl 21.2 of the deed',[4] although, as I have noted, the executors' pleading asserts bad faith. After referring to cl 21.2 of the Trust Deed, the Master observed:

It is to be noted the requirement is that the trustee exercise its discretion 'in a bona fide manner'. There is simply no evidence that was not done in this case. Before exercising his discretion the first defendant took advice. He had his solicitor instruct tax specialists Norton & Smailes as to his rights and obligations. Privilege has been waived over this advice and it appears as annexure RAI10 to the affidavit of the first-named plaintiff. This advice makes it plain Mr Conti was quite within his rights to have the trustee make payment to him. ... It is difficult to see how the first or second defendants could be said to be acting with a lack of bona fides when they had taken advice from a specialist.[5]

53 The Master then referred to the binding nominations of Mr Conti as a beneficiary made by Mrs Conti on 29 July 2002 and on 10 April 2006, and drew attention to the apparent contrast between those nominations and the provisions of Mrs Conti's will. In that context he observed:

Essentially it was the plaintiffs' argument because the first defendant did not comply with the direction in the deceased's will he was not acting bona fide.

In my view the trustee was entitled to ignore the direction in the will and the mere fact he did so could not in and of itself be evidence of a lack of bona fides. There is nothing else in the evidence which suggests the trustee did not act in good faith and the plaintiffs' arguments fail.[6]

54 The Master then dealt with an alternative submission by the executors to the effect that one of them should be appointed as a trustee pursuant to the provisions of [s 77](#) of the *Trustees Act 1962* (WA). However, he rejected that proposition on the basis that he was not satisfied that there was any lack of bona fides or impropriety in the conduct of the trustee and therefore no grounds for appointing an additional trustee. The executors' proceedings were accordingly dismissed in their entirety.

The grounds of appeal

55 There are various grounds of appeal which it is unnecessary to set out. Essentially they challenge the two critical conclusions of the Master - namely, that there was no obligation to appoint one of the executors as a trustee of the Fund forthwith upon the death of the deceased imposed by s 17A of the SIS Act, and that there was no evidence capable of sustaining a conclusion that the determination of the trustee to the effect that the late Mrs Conti's interest in the funds should be allocated to himself was lacking in bona fides or vitiated by bad faith. Other grounds of appeal also challenge the Master's

conclusions with respect to the grant of relief, but those grounds do not arise unless the executors succeed in one or other of their primary grounds.

Section 17A of the SIS Act

56 It should be noted at the outset that in order for the executors to succeed on this aspect of their argument, they must establish not only that s 17A of the SIS Act required that one of them be appointed as a trustee of the Fund during the period between Mrs Conti's death and the payment of her accrued benefits, but also that the continuing trustee of the Fund, Mr Conti, had no power to take any action with respect to the late Mrs Conti's interest in the fund unless and until such an appointment was made. The difficulty of establishing that each of those propositions are to be derived from a section which does nothing more than define a term used in the SIS Act, and which refers to the appointment of a legal personal representative in terms which are permissive rather than mandatory, should not be underestimated.

57 The issue raised by this aspect of the appeal is, of course, essentially an issue of statutory construction. Because of the frequency with which issues of that kind arise in this court, the relevant principles are also stated frequently. Little purpose would be served by restating them here, as this case does not give rise to any issue of novelty or contention with respect to the application of those principles.

58 For completeness, it should first be noted that I accept that if and to the extent that s 17A imposes requirements which must be met in order for a fund to be a Self Managed Superannuation Fund within the meaning of the SIS Act, under the Trust Deed it is the obligation of the trustee to comply with those requirements. That obligation is imposed by cl 35 of the Trust Deed, read in the context of the other provisions to which I have referred, which leave no doubt that a primary objective of the Fund is to obtain the income tax concessions which flow from the status of Self Managed Superannuation Fund under the SIS Act, and which require the trustees to act so as to achieve that objective for the benefit of the members of the Fund.

59 Before turning to the structure of s 17A and its language, it is appropriate to consider the role played by the section in the context of the SIS Act as a whole. In essence, the section defines the conditions which must be met if a fund is to come within the expression 'Self Managed Superannuation Fund' for the purposes of the SIS Act. If a fund meets those conditions, it is entitled to the tax concessions which flow from that status. If a fund ceases to be a Self Managed Superannuation Fund, it is at risk of losing those tax benefits if the Commissioner takes the action authorised by s 40 of the SIS Act.

60 In that context, s 17A is structured so as to differentiate between funds which have only one member, and funds which have more than one but fewer than five members. Funds meeting the latter description must meet the conditions specified by s 17A(1), which essentially require that each member of the fund must be a trustee of the fund, and vice versa, or if the trustee of the fund is a body corporate, each director of the body corporate must be a member of the fund and vice versa.

61 Section 17A(2) provides that in the case of a fund with only one member, if the trustee of the fund is a body corporate, the member must be the sole director of the body corporate or if there are two directors, those directors must meet the specifications of the subsection. Alternatively, if the trustees of the fund are individuals, there must be two trustees who must meet the requirements specified in the subsection.

62 The executors contend that the Fund remained subject to the requirements of s 17A(1) after Mrs Conti's death because she remained a member of the Fund. Indeed, that proposition is a prerequisite to the

construction which they place upon s 17A(3), which derives from the requirement contained in s 17A(1) to the effect that each member be a trustee of the Fund. They contend that the provision of s 17A(3) which enables the appointment of the legal personal representative of a deceased member as a trustee of the Fund during the period between the death of the member and the commencement of payment of death benefits payable in respect of the member of the Fund enables the requirements of s 17A(1) to be satisfied after a member has died.

63 On the other hand, if, contrary to that contention, Mr Conti was the only member of the Fund after the death of his wife, the conditions which must thereafter be met to come within the definition of 'Self Managed Superannuation Fund' are to be found in s 17A(2), and could be met without need to resort to s 17A(3) by the appointment of a corporate trustee of which the member was the sole director, as in fact occurred.

64 The executors' proposition to the effect that Mrs Conti remained a member of the Fund after her death seems to me to be very doubtful. Obviously a deceased person lacks any legal personality and it is therefore difficult to see how a deceased person could, within the ordinary use of language, be described as a member of a fund, enjoying the various rights and obligations which attend membership. As I have noted, the SIS Act does not provide any meaningful definition of the term 'member'. If and to the extent that the provisions of the Trust Deed are relevant to the proper construction or application of s 17A (which is itself doubtful), there would appear to be a cogent argument to the effect that Mrs Conti ceased to be a 'member' as defined in the Trust Deed, because upon her death her entitlement to benefits was terminated within the meaning of that expression in cl 6.4 of the Trust Deed, and in place of that entitlement the trustees were obliged to comply with the provisions of the Rules relating to the conferral of the benefit to which she would otherwise have been entitled upon either a nominated beneficiary, nominated dependant, or other dependant pursuant to those Rules.

65 However, for the reasons which follow, it is unnecessary to resolve the question of whether Mrs Conti somehow remained a member of the Fund after her death, because the executors' contentions fail even if that be assumed.

66 Essentially that is because s 17A(4) provides, quite clearly and unequivocally, that a Self Managed Superannuation Fund does not cease to be such a fund until six months after it would otherwise cease by reason of failing to meet the conditions specified within the section. Put another way, s 17A(4) manifests a clear and unequivocal legislative intention that if the Fund has achieved the status of 'Self Managed Superannuation Fund' by satisfying the requirements of s 17A, it does not lose that status until six months after the date upon which it becomes non-compliant. So, if and to the extent that the section can be construed as imposing obligations which must be met in order to maintain the status of 'Self Managed Superannuation Fund', and thereby imposing obligations upon the trustees of the Fund, the obligation can be put no higher than an obligation to bring the Fund into compliance within six months of the Fund failing to satisfy the relevant conditions.

67 That is what occurred in this case. On any view, the late Mrs Conti ceased to be a member no later than 3 February 2011, when Mr Conti determined, in his capacity as trustee, that her benefit was to be allocated to himself, pursuant to Rule 2 of the Schedule of Rules. That meant that her entitlement to benefits was terminated, so that she ceased to be a member under cl 6.4(c). On any view therefore, by 4 February 2011, Mr Conti was the only member of the Fund and on that day a body corporate of which he was the sole director was appointed trustee. So, even if it be assumed that the Fund did not meet the requirements of one or other of s 17A(1) or s 17A(2) as and from the date of Mrs Conti's death on 5 August 2010, the Fund was compliant within six months of her death and did not cease to be a Self

Managed Superannuation Fund.

68 The executors attempt to counter this construction of the section by asserting that on its proper construction, s 17A(3)(a) obliges the trustee of the Fund to appoint a legal representative of the member forthwith upon that member's death, in order to protect the interests of the deceased member, or perhaps more properly, the interests which the prospective beneficiaries or dependants of the deceased member may have in the member's interest under the Fund. They further assert that the provision should also be construed as precluding the trustee from taking any action with respect to the deceased member's entitlement unless and until such an appointment has occurred. This last point is an essential element in their claim based on s 17A.

69 The fundamental difficulty with these contentions is that they draw no support from the language of the subsection or from the structure of the section itself viewed in the context of the Act as a whole. Subsection (3) commences with the words:

A superannuation fund does not fail to satisfy the conditions specified in subsection (1) or (2) by reason only that:

70 The first three paragraphs of the subsection which follow those words refer to the appointment of a person as trustee 'in place of the member', either after the member has died (par (a)), is under a legal disability (par (b)), or is under a legal disability because of age (par (c)). So, in those circumstances, the appointment of a trustee 'in place of the member' is obviously intended to satisfy any aspect of either subsections (1) or (2) which would otherwise require the member to be appointed as a trustee. So, in the present case, if a legal personal representative of the late Mrs Conti had been appointed as a trustee in her place, that appointment would have satisfied the requirements of s 17A(1) to the effect that all members be trustees, if it could be said that the late Mrs Conti remained a member of the Fund.

71 Significantly, however, there are no words in s 17A(3), or any inference of legislative intention to be drawn from the operation or effect of the subsection viewed in the context of the section or in the context of the SIS Act as a whole, to suggest that a fund is obliged to utilise the opportunities for compliance provided by the subsection either within any particular time, or at all, if there are other means by which the fund can be brought into compliance. Nor is there anything in the language of the subsection or any inference of legislative intent to be drawn from the effect of the subsection viewed in the context of the section or the SIS Act as a whole to suggest that any constraint is placed upon the powers of the trustee unless and until the opportunities for compliance provided by the subsection are utilised. The other provisions in s 17A(3) are, as the executors rightly concede, permissive rather than mandatory. There is no sufficient basis to construe par (a) of s 17A(3) differently.

72 To the contrary, a consideration of other provisions of the SIS Act compels the conclusion that s 17A(3) should be construed in accordance with its natural and ordinary meaning - that is, as providing opportunities for compliance with the other requirements of the section which might, or might not, be taken up. As I have noted, pt 6 of the SIS Act contains a number of provisions with respect to the governing rules of superannuation entities and includes s 52 which contains a number of specific covenants to which trustees of regulated funds are subject. If it had been the intention of the legislature to impose obligations upon trustees for the protection of the interests which beneficiaries or dependants of deceased members may have in the benefits standing to the account of a deceased member, pt 6 of the Act would have been the obvious place in which to provide such obligations, rather than in s 17A which stipulates the conditions which must be met in order for a regulated fund to achieve the tax concessions which attend satisfaction of those conditions.

73 For these reasons, the executors' contention that s 17A of the SIS Act obliged Mr Conti to appoint one of them as a trustee of the Fund to represent the interests of their mother as a member of the Fund, with the further consequence that he was unable to take any action with respect to their mother's interest in the Fund until that appointment was made, must be rejected.

Lack of bona fides

74 In the circumstances of this case, before consideration is given to the executors' assertion of lack of bona fides, there is an initial question as to the nature of the discretion conferred upon Mr Conti as trustee pursuant to Rule 2 of the Schedule of Rules. Although it is clear that he was not the subject of a Binding Beneficiary Nomination Form at the time of Mrs Conti's death because each of the two nominations she had provided had lapsed, there seems to be significant argument to the effect that he was a Nominated Dependant, such that, pursuant to cl 2.3, he would receive the benefit standing to the account of the late Mrs Conti unless 'the Trustee in its absolute discretion determine[d] that it would be inequitable or inappropriate'. Each of the forms nominating Mr Conti as a beneficiary notified the trustee that in the event of Mrs Conti's death it was her wish that her benefits should be paid to her husband in their entirety. Clause 4.3 defines the term 'Nominated Dependant' to mean a person nominated by a member as the Nominated Dependant. There is a cogent argument to the effect that the beneficiary nomination forms executed by Mrs Conti, although deprived of their characteristic as binding beneficiary nominations by the lapse of time, nevertheless satisfied the requirement of identifying a person nominated by her as the person she wished to receive her benefit in the event of her death, which is an apt way of describing the role of a Nominated Dependant.

75 If that proposition were accepted, it would have the consequence that this aspect of the executors' argument could only succeed if they demonstrated that Mr Conti, in his capacity as trustee, failed to address the question of whether it would be inequitable or inappropriate to pay the benefit to himself, as the Nominated Dependant.

76 However, for the reasons which follow, it is unnecessary to resolve that interesting question because whatever view is taken of the ambit of the discretion conferred upon Mr Conti as trustee by cl 2 of the Schedule of Rules, there is no evidence capable of sustaining the conclusion that the exercise of that discretion miscarried in any way.

77 In the course of presenting oral argument on these issues, senior counsel for the executors advanced a nuanced position not previously evident in either the pleadings, the proceedings before the Master, the grounds of appeal or the written submissions in support of those grounds. It was asserted that it should be concluded that there was in fact no exercise of discretion by the trustee, but rather, Mr Conti simply determined that he should have the benefit of Mrs Conti's interest in the Fund for himself. Assuming, for the sake of the argument, that it is open, notwithstanding the way in which the case was conducted before the Master, it is difficult to see how this proposition adds anything to the executors' fundamental argument, which is to the effect that it should be concluded that the exercise of the trustee's discretion miscarried because he did not give full and proper consideration to the competing interests of the prospective beneficiaries as required by the principles enunciated in *Karger v Paul*^[7] as developed by the High Court in *Finch v Telstra Super Pty Ltd.*^[8] But whichever way the argument is presented, it must fail on the evidence.

78 As I have noted, the evidence includes a document executed by Mr Conti on 3 February 2011 which records his determination, in his capacity as trustee, that the benefits standing to the account of Mrs Conti would be allocated to him. There is nothing to suggest that the document is a sham or does not provide

cogent evidence of Mr Conti's determination to that effect.

79 Mr Conti's affidavit advances a series of propositions based on information provided by his solicitors. It also records his receipt of the advice provided by Norton & Smailes Lawyers, and annexes that advice to his affidavit. Included amongst the propositions drawn from the legal advice given to Mr Conti, and which he asserts in his affidavit, is the proposition that 'under the terms of the Deed, Grace, Ross, Antonietta and Sylvia only have a right to be considered by the Trustee in the exercise of the discretion of who to pay out the Death Benefits'.^[9] As I have noted, that proposition is specifically contained in the summary of advice given by Norton & Smailes.

80 In that context, there is simply no evidence capable of leading to the conclusion that Mr Conti did not take account of the interests of those beneficiaries when exercising his powers as trustee. It is not contended that his exercise of those powers is vitiated by conflict of interest - any contention to that effect being excluded by cl 21.2 of the Trust Deed. Rather, the case for the executors seems to be advanced on the basis that it should be inferred that Mr Conti's reasons for acting as he did are exactly those set out in the letter from Norton & Smailes, but excluding that portion of their advice which refers to the right of Mrs Conti's children to be considered in the exercise of the trustee's discretion. There is simply no basis in the evidence for drawing any inference to that effect.

81 As it is the executors who assert that Mr Conti did not exercise the discretion conferred upon him as trustee of the Fund in a bona fide manner, they carry the burden of proving that assertion on the balance of probabilities. They have made no attempt to discharge that burden other than by asserting that an inference is to be drawn as to Mr Conti's reasons from the terms of the letter of advice received from Norton & Smailes. No attempt was made to adduce evidence as to the respective financial positions of Mrs Conti's children, as compared to Mr Conti, and Mr Conti was not cross-examined on his affidavit. If and to the extent that Mrs Conti's wishes were relevant to the exercise of the discretion, as the Master pointed out, the evidence with respect to her wishes was equivocal, given that the terms of her will are inconsistent with binding beneficiary nomination forms which she executed both before and after her will. It is therefore impossible to draw an inference of lack of bona fides from, for example, an asserted failure to take into account the clear and unequivocal wishes of the deceased. It was open to Mr Conti to consider that the subsequent execution of the binding nomination meant that the expression of intention in the will had been superseded, and was no longer worthy of weight as an expression of the intention of the deceased member as to what should happen on her death.

82 It may be that the Master's observation that it was difficult to see how the trustee could be said to be acting with a lack of bona fides when he had taken advice from a specialist goes too far, but the Master was plainly correct to conclude that there was no evidence to support the executors' assertion that the exercise of the trustee's discretion was vitiated by a lack of bona fides.

83 As each of the propositions essential to the executors' success on the appeal must be rejected, no purpose would be served by addressing the issues raised by the executors with respect to the relief properly granted in the event of their success.

Conclusion

84 For these reasons, this appeal should be dismissed and the decision of the Master affirmed.

85 **BUSS JA:** I agree with Martin CJ.

86 **BEECH J**: I agree with the Chief Justice.

[1] Although, on its face, there are deficiencies in how the witnesses executed the form, nothing turns upon the execution of this nomination.

[2] *Ioppolo & Hesford v Conti* [2013] WASC 389 (Reasons).

[3] Reasons [20].

[4] Reasons [22].

[5] Reasons [23].

[6] Reasons [25] - [26].

[7] [1984] VicRp 13; [1984] VR 161.

[8] [2010] HCA 36; (2010) 242 CLR 254 [66].

[9] Affidavit of Augusto Conti, par 23.

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