Supreme Court of Victoria

Wooster v Morris [2013] VSC 594 (1 November 2013)

Last Updated: 6 November 2013

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMERCIAL AND EQUITY DIVISION

No. 3693 of 2012

SUSAN CAROLYN **WOOSTER** and KERRY LINDA SMOEL	Plaintiffs
v	
PATRICIA MOLLY **MORRIS**	First Defendant
v	
NATHAN PETER ASHMAN	Second Defendant
v	
UPPER SWAN NOMINEES PTY LTD (in its personal capacity and as Trustee of the **MORRIS** FAMILY SUPERANNUATION FUND)	Third Defendant

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JUDGE:	McMillan J
WHERE HELD:	Melbourne
DATE OF HEARING:	29 July 2013
DATE OF JUDGMENT:	1 November 2013
CASE MAY BE CITED AS:	**Wooster** v **Morris**
MEDIUM NEUTRAL CITATION:	[2013] VSC 594

COSTS — TRUSTS — SUPERANNUATION — Whether death benefit nomination binding — Whether decision of Special Referee on payment of interest binding on Court — Whether Trustee entitled to indemnity

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APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr M Colbran QC	Aitken Partners Pty Ltd
	Mr P Crofts	
For the Defendants	Mr A G Uren QC	Piper Alderman
	Mr S Pitt	

HER HONOUR:

Introduction

1 The plaintiffs are the daughters of Maxwell Vernon **Morris**, deceased ('the deceased'), and his first wife. The first defendant is Patricia Molly **Morris** ('Mrs **Morris**'), the second wife of the deceased.[1] The second defendant is Nathan Peter Ashman ('Mr Ashman'), the son of Mrs **Morris** by her first marriage. The third defendant is Upper Swan Nominees Pty Ltd ('Upper Swan') in its personal capacity and as trustee of the self-managed **Morris** Family Superannuation Fund ('MFSF'). Mrs **Morris** was the sole director and shareholder of Upper Swan.

2 This proceeding concerns disputes over a binding death benefit nomination ('the BDBN'), executed by the deceased on 18 March 2008 in favour of the plaintiffs in respect of all of his interest in the MFSF.

3 By consent orders made on 27 September 2012, the parties referred the following matters for determination by a Special Referee, Mr Stewart Anderson SC ('the Special Referee'):

> 2. The Referee determine:
>
> 1. whether the document, referred to in paragraph 10 of the Statement of Claim, dated 18 March 2008, is a binding death benefit nomination for the purposes of [the MSFS Trust Deed] dated 24 August 2005?
> 2. if yes, are the [plaintiffs] or any one or other of them entitled to be paid against that binding death benefit nomination:
>
> i. the sum of $30 775.14; or
>
> ii. the sum of $924 509.37; or
>
> iii. some other and if so which sum?[2]

4 By orders made 13 December 2012, the Special Referee was directed to include a recommendation as to

the award of costs arising out of the conduct of the reference.

5 In his report dated 7 March 2013, the Special Referee found that the BDBN was valid and binding and that the plaintiffs were entitled to be paid the value of the deceased's interest in the MFSF, namely $924 509, together with statutory interest accruing on that sum from 30 June 2010.

6 By a subsequent report dated 12 March 2013, the Special Referee recommended that the defendants pay the whole of the plaintiffs' costs of the Special Reference.

7 By consent orders made on 10 April 2013, the Court:

a. adopted the Special Referee's report;
b. entered interim judgment for the plaintiffs in the sum of $600 664.87;

c. ordered that the sum of $600 664.87 be paid to the plaintiffs by Upper Swan by 16 April 2013 from the funds held in the MFSF in the name of the deceased;

d. otherwise adjourned the proceedings for directions as to the determination of the remaining issues in the proceeding.[3]

8 The defendants did not pay all of the interim judgment on time. Orders by consent were made on 1 May 2013 whereby the defendants were ordered to pay interest pursuant to the Penalty Interest Rate Act 1983 on any amount overdue as from 16 April 2013 until such amount was paid.[4] Pursuant to the consent orders, penalty interest of $219.20 was paid to the plaintiffs on 4 June 2013.

9 Further orders were made on 1 May 2013 concerning the hearing and determination of the remaining disputes between the parties, including:

(a) the accounts(s) in the MFSF from which final judgment was to be paid;

(b) the quantum of any final judgment;

(c) the liability of the defendants for the parties' costs in the proceeding;

10 Points of claim were filed and served by the plaintiffs on 7 June 2013. Points of defence were filed and served by the defendants on 22 July 2013.

11 The remaining disputes between the parties can be summarised as follows:

a. The plaintiffs seek a declaration that the BDBN was valid and binding on the trustee of the MFSF. The defendants contend that the plaintiffs are entitled to the relief sought against Upper Swan, only in respect of their entitlements in the MFSF;
b. The plaintiffs seek final judgment for the sum of $323 844.50,[5] statutory interest accruing on the amount recommended by the Special Referee but unpaid from 30 June 2010, and reasonable costs of and incidental to the proceedings, including of the Special Reference. The defendants contend that any relief granted should only be against Upper Swan and only in respect of their entitlements in the MFSF. In respect of interest, the defendants submit that the Special Referee went beyond his terms of reference when he recommended that interest be paid on the final amount at the statutory rate and, if any interest is to be ordered to be paid to the plaintiffs, it should be calculated at the 'trustee rate of interest' and not the statutory rate; and

c. The plaintiffs seek an orders that Upper Swan as trustee of the MFSF and Mrs **Morris** pay such final judgment as is ordered within 14 days from any funds or other assets for or in the name of the MFSF and any other property owned by them. The defendants contend that the plaintiffs are entitled to the relief sought against Upper Swan only in respect of their entitlements in the MFSF.

Factual Background[6]

12 The MFSF was established by deed dated 24 August 2005. It was established as a self-managed superannuation fund under the Superannuation Industry (Supervision) Act 1993. The trustees of the MFSF were the deceased (until his death on 27 February 2010) and Mrs **Morris**. The deceased and Mrs **Morris** were the two members of the MFSF. Since December 2005, the deceased and Mrs **Morris** have received a pension from the MFSF.

13 As stated, the deceased executed the BDBN on 18 March 2008 in favour of the plaintiffs in respect of all of his interest in the MFSF.

14 The deceased died on 27 February 2010.

15 As of 30 June 2010, the MFSF had net assets of $1 376 157.18, with the deceased's interest totalling $924 509.37 and the interest of Mrs **Morris** totalling $451 647.81.

16 Probate of the deceased's will dated 8 April 2009 was granted to his daughters, the plaintiffs, on 15 September 2010.

17 In September 2010, Mrs **Morris** engaged and consulted an accountant, Mr Lal Pardasani of the firm Lal Pardasani & Associates, to provide accounting advice in relation to the affairs of the MFSF and to prepare the financial statements of the MFSF for the financial years ending 30 June 2009 and 30 June 2010.

18 In October 2010, Mrs **Morris** appointed Mr Ashman as a co-trustee of the MFSF.

19 On 31 March 2011, the financial accounts of the MFSF for the year ending 30 June 2009 were signed by Mrs **Morris** and Mr Ashman, the trustees of the MFSF. In those financial accounts, the assets of the MFSF were $1 391 893.58. On 31 March 2011, the electronic lodgement declaration form attached to the 2009 tax return was signed by Mrs **Morris** and she declared the tax return true and correct.

20 In or about April 2011, Mr Pardasani prepared the financial statements of the MFSF for the year ending 30 June 2010. The financial statements for the MFSF for the year ending 30 June 2010 were signed by the trustees of the MFSF. The 2010 MFSF tax return was not qualified by the auditor of the MFSF. On 1 May 2011, the electronic lodgement declaration form attached to the 2010 tax return was signed by Mrs **Morris** and she declared the tax return true and correct.

21 Prior to 11 May 2011, Mrs **Morris** and Mr Ashman sought the advice of DLA Piper, solicitors, on whether the BDBN was binding on the trustees of the MFSF. Mrs **Morris** provided the BDBN to DLA Piper in her capacity as a co-trustee of the MFSF.

22 On 11 May 2011, Mr Philip Broderick of DLA Piper provided advice to Mrs **Morris**, Mr Ashman and Mr Pardasani that the BDBN was ineffective as it did not meet all the requirements of the cls 37.5(a) and (b) of the MFSF trust deed. In their letter of advice, DLA Piper referred to their instructions

that:

> The [BDBN] was prepared by the Deceased who was one of the Trustees of the [MFSF]. However, we are instructed that he never delivered it to Patricia (the co-trustee) ...

23 Prior to 16 August 2011, Mrs **Morris**, Mr Ashman and Mr Pardasani sought advice from DLA Piper in relation to the form in which the death benefits could be paid; how the deceased's death benefits might be paid and what the trustees of the MFSF were required to do or refrain from doing in order to pay the death benefits.

24 On 16 August 2011, Mrs **Morris**, Mr Ashman and Mr Pardasani received two further letters of advice from Mr Philip Broderick advising on those issues.

25 On 18 August 2011:

a. Mr Philip Broderick provided advice to Mrs **Morris**, Mr Ashman and Mr Pardasani on whether the trustee of the MFSF should comprise individuals or a corporation.
b. A deed of resignation and appointment of trustee of the MFSF was executed. Pursuant to the deed, Mrs **Morris** and Mr Ashman, who were the existing co-trustees, resigned and Upper Swan was appointed trustee. Mrs **Morris** was the sole director and shareholder of Upper Swan.

c. Mrs **Morris**, as the sole director of Upper Swan, the trustee of the MFSF, resolved that all the deceased's pension and accumulated benefits in the MFSF be paid to the deceased's wife, Mrs **Morris**. The recitals to the trustee's resolution on 18 August 2011 record the following:

> It was noted that:

1. Maxwell Vernon **Morris** (Deceased), a member of the fund, died on 27 February 2010.
2. At the time of his death, the deceased had benefits in a pension account (Pension Benefits) and an accumulation account (Accumulation Benefits).
3. The deceased made a nomination (Nomination) that his benefits be paid to his daughters Kerryn Smoel and Susan **Wooster**.
4. The trustee has received and considered legal advice from law firm DLA Piper dated 11 May 2011 and considered that the Nomination is defective and not binding on the Trustee.

> RESOLVED that the legal advice be accepted, and that the Nomination is not binding on the Trustee.

26 The deceased's interest in MFSF was transferred and divided between accounts held in the name of Mrs **Morris**. Accordingly, as at 30 June 2012, the MFSF had net assets available to pay benefits of $1 398 868.41 held solely in Mrs **Morris**' name. Since 18 August 2011, Mrs **Morris** has received pension payments from the MFSF.

27 These proceedings were issued by the plaintiffs on 28 June 2012, who sought declarations that the BDBN given by the deceased was, as a matter of law, valid and binding. If it was declared to be valid, the plaintiffs sought declarations of what benefits or interests were covered by the BDBN.

28 Before 11 July 2012 and after the plaintiffs commenced proceedings, Mr Pardasani became aware that there could be legal ramifications for what he had done. He conceded in cross-examination that he sought

the advice of Mr Broderick of DLA Piper after the proceeding had commenced in relation to how the benefit accounts for a deceased member of the MFSF, namely the deceased, should be recorded. Specifically, Mr Broderick advised as to whether the member information statements for the deceased should be rectified to record that the deceased's benefits continued to be held in the respective accumulation and pension accounts after his death.

29 On 11 July 2012, Mr Broderick advised that the recording of the deceased's accounts in the member information statements, after his death, should be rectified to record that his benefits were held in one accumulation account and two (account based) pension accounts as were in existence at the date of the death of the deceased. Mrs **Morris** paid for the advice from DLA Piper.

30 As a result of the advice, Mr Pardasani prepared amended member information statements for the MFSF for the period 1 July 2009 to 26 February 2010. The amended accounts record a balance of $30 775.14 in the deceased's accumulation account in the MFSF, in contrast to the initial accounts, which record a balance of $924 509.37. The amended accounts were produced by Mr Ashman before the Special Referee.

31 The Special Referee found that Mr Pardasani's evidence as to how he prepared the financial statements and member information statements of the MFSF for the year ended 30 June 2010 was unsatisfactory in a number of respects.

32 The Special Referee concluded that the amended member information statements prepared by Mr Pardasani in July 2012 after the commencement of the proceeding were inaccurate and did not correctly record the true amount of the deceased's entitlement under the accounts in his name held with the MFSF.

33 In cross-examination conducted during the Special Reference, Mr Pardasani conceded that the amended statements provided a more favourable result for Mrs **Morris** and would assist her case against the plaintiffs.

The Plaintiffs' Claims

Generally

34 In respect of the matters in dispute between the parties, the plaintiffs submit that all moneys held in the MFSF should be declared available to meet the payment of any orders made in favour of the plaintiffs. In practical terms, this means not only the sum of $75 711.98 currently held in the name of the deceased in the MFSF but also the sum of $477 991.57 held in the name of Mrs **Morris**.[7]

35 The defendants submit that the plaintiffs' entitlement to any orders should only be made against Upper Swan and then only in respect of the plaintiffs' entitlements in the MFSF. In other words, the defendants' position is that any orders made in the plaintiffs' favour can only be satisfied to the extent of the amount now standing in the name of the deceased in the accounts of the MFSF. As stated above, that amount is now $75 711.98.

Is the BDBN Binding on the Trustee(s) of the MFSF?

36 In respect of the declaration and order sought by the plaintiffs that the BDBN was valid and binding on the respective trustee(s) of the MFSF, the defendants concede that the plaintiffs are entitled to such relief against Upper Swan, but only in respect of their entitlements in the MFSF.[8]

37 Until 18 August 2011, Mrs **Morris** and Mr Ashman were the trustees of the MFSF and took certain steps concerning the validity of the BDBN. For these reasons, in my view, any declaration or order as to the validity and binding nature of the BDBN should be effective against Upper Swan and the former trustees of the MFSF. Accordingly, the plaintiffs are entitled to the declaration and order sought, that is, that the BDBN is valid and binding on Mrs **Morris** and Mr Ashman as trustees of the MFSF up until 18 August 2011 and thereafter, on Upper Swan as the current trustee of the MFSF.

The Quantum of the Final Orders

38 The quantum of $924 509.37 as determined by the Special Referee is not disputed by the defendants. As the sum of $600 664.87 has already been paid from the MFSF, the plaintiffs are entitled to judgment for the remaining amount due of $323 844.50.

39 The question whether the judgment sum should be ordered only against Upper Swan and only in respect of the plaintiffs' entitlements in the MFSF is considered below.

Entitlement to Interest

40 The defendants submit that, because the order adopting the Special Referee's report is only interlocutory, the Court is not bound by its findings on the interest claimed by the plaintiffs. The defendants submit that, because the Court still has to make a final order in respect of interest, it must do so based on proper legal considerations.

41 The defendants also submit that the Special Referee's report cannot go beyond its terms of reference, which did not include the payment of interest, but only the validity of the BDBN and the ascertainment of the amounts that the plaintiffs were entitled to be paid.

42 The plaintiffs submit that the adoption of an opinion given by a Special Referee with respect to a question constitutes the opinion of the Court and is its judgment on the question,[9] and therefore the defendants' submissions amount to an appeal from the Special Referee's report. The plaintiffs submit that the adoption of a Special Referee's report by the Court is only reviewable by an appellate court according to the principles applying to appeals from an exercise of discretion.[10]

43 In my view, it should be borne in mind that one of the purposes of a reference by the Court to a Special Referee is to provide a form of partial resolution of disputes in a manner alternative to orthodox litigation in an effort to provide a quicker and less costly determination of the disputes.[11]

44 If the Court were required to reconsider disputed questions where the parties have had the opportunity of giving evidence and submissions before the Special Referee, the purposes of the reference would be frustrated.

45 I also note that the objections now taken by the defendants on the question of interest were not raised at the time the consent orders were made on 10 April 2013 or on 1 May 2013.

46 In my view, since the report of the Special Referee has now been adopted by the Court, the orders are binding on the defendants. This includes the findings by the Special Referee on the payment of interest by the defendants. In my view, the plaintiffs are entitled to interest on the amount due to them from 30 June 2010, less any amount of interest already paid.

The Appropriate Rate of Interest

47 The plaintiffs seek interest pursuant to the Penalty Interest Rate Act 1983 as calculated in Annexure A of their points of claim for the period from 30 June 2010 to the date of the points of claim and thereafter an amount of $93.16 per day. The plaintiffs submit that the opinion of the Special Referee on the plaintiffs' entitlements included the payment of statutory interest and that he was satisfied that 30 June 2010 was the date upon which the trustees should have paid out the entitlement in accordance with the BDBN.

48 The defendants submit that, because the plaintiffs' claims are made in the Court's equitable jurisdiction, any interest payable should be payable applying equitable principles rather than pursuant to the Supreme Court Act 1986. The defendants rely on the decision of Pistorino v Connell,[12] where Croft J applied the 'trustee rate' of interest, being the lesser figure of 4.55 per cent, based on the actual earnings of the fund. Applying the same principles as in Pistorino v Connell, the defendants calculate the appropriate rate at 7.76 per cent, or if not, at 8 per cent.

49 The defendants contend that, although the plaintiffs are to be paid later than they would have been had there not been a dispute, they have not lost their interest in the MFSF or the benefit of interest earned by it. They have also retained the taxation benefits of the MFSF.

50 In Pistorino v Connell, although the defendant trustee of the fund did not pay the plaintiff's one-third share to her after she made a demand for payment, the plaintiff did not assist the trustee by providing her bank details, which conduct was not 'helpful or facilitative.'[13] Croft J determined that the 'trustee rate' provided 'appropriate compensation to the plaintiff for [the] delayed payment'[14] to her in those circumstances.

51 The circumstances of this proceeding and those in Pistorino v Connell are distinguishable. In this proceeding, the plaintiffs have not behaved in an unhelpful manner towards Upper Swan or the former trustees. They have always contended for the payment of their entitlement from the MFSF and have not been the cause of the delay in that payment. Their entitlements should have been paid on 30 June 2010 and have still not been paid in their entirety. It is the defendants that have resisted the payment and defended the proceeding on grounds that have been dismissed by the Special Referee, all at substantial cost in terms of legal and accountancy fees, which have been paid only from the accounts in the name of the deceased.[15]

52 By the adoption of the report of the Special Referee, the Court has made the determination that the rate of interest that the plaintiffs should receive should be calculated pursuant to the Penalty Interest Rate Act 1983.

53 The defendants' objections to the rate of interest were not raised at the time the consent orders were made on 10 April 2013; nor were they raised when consent orders for the payment of penalty interest by the defendants were made on 1 May 2013.

54 In such circumstances, I consider the plaintiffs should be paid interest calculated pursuant to the Penalty Interest Rate Act 1983 from 30 June 2010 to the date of payment of the judgment sum.

The Payment of the Plaintiffs' Costs of the Proceeding

55 The plaintiffs seek their costs of and incidental to the proceedings, including all reserved costs and the costs of the Special Reference, such costs to be agreed within 14 days and taxed in default of agreement. They seek these costs against Upper Swan and Mrs **Morris** personally. They do not seek any costs

orders against Mr Ashman.

56 The defendants submit that the plaintiffs are entitled to the costs claimed, but only against Upper Swan, and only in respect of the plaintiffs' entitlements in the MFSF.[16]

57 The usual rule in relation to costs is that they follow the event and a successful litigant receives a costs order against the unsuccessful litigant. In this proceeding, Upper Swan, in its capacity as trustee, elected to defend the proceeding and it was entirely unsuccessful.

58 As the defendants do not resist the costs orders sought by the plaintiffs against Upper Swan, those orders should be made. However, in view of the nature of the litigation thus far, it may be more efficient if orders be made for a gross costs order rather than taxation in default of agreement.

The Plaintiffs' Submissions in relation to a Costs Order against Mrs Morris

59 The plaintiffs submit that the purpose of an award of costs, as explained by Latoudis v Casey, is that it is 'just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred'.[17] Accordingly, this purpose should inform the exercise of the Court's discretion, which is absolute. As stated, costs normally follow the event so that the successful litigant receives a cost order against the unsuccessful litigant.

60 The plaintiffs also submit that, in some circumstances, a Court can order costs to be paid by a non-party where the considerations of justice demand it.[18] This is particularly so where the non-party has played an active role in the litigation and sought to benefit from it.

61 The plaintiffs rely on the following matters to justify that Mrs **Morris** (and Upper Swan) should pay the costs of the proceeding:

a. The person who benefitted from the trustee's decision to refuse the BDBN was Mrs **Morris**.
b. Mrs **Morris** was the sole director and shareholder of Upper Swan.

c. Upper Swan, as the trustee, had its lawyers undertake, and has apparently paid for, not only work for itself that had the principal (if not sole) purpose of benefitting Mrs **Morris**, but also apparently work for the personal benefit of Mrs **Morris**.

62 The plaintiffs submit that, as Mrs **Morris** was the person who caused them to suffer the costs of the litigation, she should reimburse them for the liability so incurred. They say it would be unjust and inequitable for her to suffer no consequences. Finally, the plaintiffs submit that the costs orders should be made against Upper Swan and Mrs **Morris** personally on the basis of joint and several liability.

The Defendants' Submissions

63 The defendants submit that no order should be made against Mrs **Morris** and Mr Ashman personally, since they ceased to be trustees of the MFSF from 18 August 2011 and were not trustees when the proceeding commenced. As stated, the plaintiffs do not seek any costs orders against Mr Ashman.

64 They contend that the plaintiffs' entitlement to costs should be paid out of the MFSF, and not personally by any of the trustees (including the former trustees).

65 The defendants submit that this is not a case where there has been a breach of trust resulting in a loss

to the trust, or where a prior trustee has wrongly paid a benefit to a person not entitled to it, reducing the trust. It is, according to the submissions of the defendants, simply a disputed claim for a benefit under the trust deed.

66 The defendants submit that conflicts like the one complained of by the plaintiffs are inherent in self-managed superannuation funds:

> Litigation by a Member or Beneficiary involving benefits will often, and perhaps always, involve a consequential monetary benefit to one of the (human) trustees or directors, and it will also often, and perhaps always, involve a decision by one of the trustees or directors to deny a benefit to a claimant. These are the ordinary occurrences of a trust of the present sort, and do not warrant a special order being made as to costs ...[19]

67 The defendants submit that Upper Swan, in defending the proceeding, was carrying out its duties as trustee of the MFSF, and should not be found to be acting for, or for the benefit of, Mrs **Morris** in her personal capacity. The defendants submit that it would be incorrect to characterise the actions of the trustee as being 'for the benefit' of Mrs **Morris** without some finding of dishonesty or bad faith.[20]

68 In addition, the defendants submit that the cases referred to by the plaintiffs concern suits by the trustee for indemnity where the trust funds are not sufficient to meet it and, as a consequence, the trustee takes action against the beneficiaries. The defendants submit that, as the funds of the MFSF are sufficient to indemnify Upper Swan, these cases have no relevance. Those authorities 'do not stand for a principle that a beneficiary is liable to a trustee of a solvent estate for its expenditure or liabilities simply by virtue of being a beneficiary'.[21]

Should a Costs Order Be Made against Mrs Morris Personally?

69 In this proceeding, Mrs **Morris** and Upper Swan denied the validity of the BDBN, and it is evident that Mrs **Morris** was the only person who would gain from the decision to defend the proceeding, a gain of $924 509.37.

70 In my view, this is a situation where the separate corporate identity of Upper Swan should not protect Mrs **Morris**. As Slicer J said in National Mutual Life Association of Australasia Ltd v Chris Poulson Insurance Agencies Pty Ltd, 'there is no reason why the presence of a corporate veil should preclude a costs order against a controlling director who stands to benefit from the proceedings'.[22] In Carborundum Abrasives Ltd v Bank of New Zealand [No 2] Tompkins J explained the relevant considerations as follows:

> In many cases a major consideration will be the reason for the non-party causing a party, normally but not always an insolvent company, to bring or defend proceedings. If the non-party does so for his own financial benefit, either to gain the fruits of the litigation or to preserve assets in which the person has an interest, it may, depending upon the circumstances, be appropriate to make an order for costs against that person. Relevant factors will include the financial position of the party through whom the proceedings are brought or defended and the likelihood of it being able to meet any order for costs, the degree of possible benefit to the non-party and whether, in all the circumstances, the bringing or

> defending of the claim — although in the end unsuccessful — was a reasonable course to adopt.[23]

71 Further, the plaintiffs submit that:

> There will always be a conflict between a member of a self managed super fund who is a Trustee (or a director of a trustee) and stands to benefit if a BDBN proves to be [invalid] and those who seek to claim under a valid BDBN. A conflict which it is submitted makes it all but impossible for the Trustee to hold 'the scales impartially between different classes of beneficiaries'.[24]

72 While she was a trustee of the MFSF, Mrs **Morris** made the decision that the BDBN was not binding on the MFSF and, through her control of Upper Swan, the decision was made to defend these proceedings. She has controlled the position in favour of her own personal stake and, in doing so, has failed to take proper account of the interests of the other beneficiaries in the MFSF.

73 The paramount duty of a trustee is to 'exercise [its] powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries'.[25] In my view, Mrs **Morris**' substantial financial interest in the outcome and the lack of concern for the other beneficiaries in making the decision to defend proceedings mean it is fair that, if Upper Swan is unable to pay all of a costs award made against it, it should fall upon Mrs **Morris**, in her personal capacity, to meet any shortfall.

The Accounts in the MFSF from Which the Plaintiffs' Judgment and Costs Are to Be Paid

The Plaintiffs' Submissions

74 The plaintiffs submit that the entire amount of the MFSF is available to meet any orders made in their favour, that is, the interests of both Mrs **Morris** and the deceased in the MFSF.

75 The plaintiffs submit that at the commencement of the proceedings there was only one interest in the MFSF, as the deceased's interest had been transferred to Mrs **Morris**. In particular, the plaintiffs rely on a number of provisions in the trust deed of the MFSF, as follows:

(a) clause 17.3 gives the trustee of the MFSF the power to defend any legal proceedings against it, which the plaintiffs argue implies that any expenses from the litigation could be drawn from the MFSF; and

(b) clause 11.6 allows the trustee, at its discretion, to pay out of the MFSF any expenses relating to the administration of the MFSF. The plaintiffs say that the fact this is an option permits the trustee to claim expenses from those associated with the MFSF.

76 Importantly, the trust deed does not separate the MFSF into various sub-trusts or accounts held on behalf of particular members or their interests, but rather treats all the money as one account. In particular, cl 3.4 provides that a beneficiary:

> may have an interest in the Fund conferred on that person under the provisions contained in this Deed but shall not have any interest in any particular part of the Fund or in any investment in the Fund.[26]

77 As a result, the plaintiffs submit that they have an interest in the MFSF as a whole, and any judgment

in their favour is enforceable against the entirety of the fund.

The Defendants' Submissions

78 The defendants seek to limit the plaintiffs to claiming the judgment, including costs and interest, out of the deceased's interest in the MFSF only. They justify this limitation by pointing to the fact that Upper Swan is compelled by the trust deed to establish and maintain an 'accumulation account' for each beneficiary, which includes the plaintiffs. They contend that this allows for credits to be made and debits to be made from these accounts. Under cl 29.1 of the trust deed, any benefits (including the death benefit) are to be paid out of the member's accumulation account.

79 The defendants submit that, because the BDBN was an allocation of an entitlement, any order for costs must be paid out of this accumulation account, not the entirety of the fund. In their submissions, the defendants explained how the accumulation accounts can be adjusted, and that therefore it needed to be determined what the deceased's interest in the fund was to determine what moneys are available to satisfy any orders.

Conclusion

80 In my view, cl 3.4 of the trust deed provides that any member, dependent or beneficiary has an interest in the trust fund of the MFSF as a whole, not in any particular part of the fund. In any event, since the transfer of the deceased's accumulation account into the account of Mrs **Morris**, it is not appropriate now to try to pry the two accounts apart, particularly in light of the control that Mrs **Morris** and Mr Ashman and then Upper Swan have exercised over the MFSF.

81 Accordingly, the orders made against the MFSF should come out of the fund as a whole, not just the interest of the deceased. This outcome best reflects the terms of the trust deed and the way the MFSF has been managed.

Can Upper Swan and/or Mrs Morris Claim a Right of Indemnity for Its Costs As Trustee out of the MFSF?

82 As I have concluded that Upper Swan and then Mrs **Morris** should pay the costs of the plaintiffs, the question arises whether either of them can claim an indemnity for this award and their own costs out of the MFSF.

The Plaintiffs' Submissions

83 The plaintiffs submit that a trustee is not entitled to an indemnity where it has failed to act impartially. As stated above, the plaintiffs refer to the conflict of interest between a member of a self-managed super fund who is a Trustee (or a director of a trustee) and stands to benefit if a BDBN proves to be invalid and those who seek to claim under a valid BDBN that makes it all but impossible for the Trustee to hold 'the scales impartially between different classes of beneficiaries.'[27]

84 The plaintiffs submit that Upper Swan should have sought the approval of the Court to involve itself in litigation, including the propriety of being indemnified from trust funds, and in particular should have sought advice on the propriety of deciding whether the BDBN was invalid. They rely on EM Squared Pty Ltd v Hassan[28] as authority that the determination of the validity or otherwise of a BDBN was a proper thing for a trustee to bring to a Court.

85 The plaintiffs submit that the defendants took steps to act in a way designed to benefit Mrs **Morris** as trustee, co-trustee or sole director and shareholder of the trustee to the detriment of the plaintiffs, noting that:

a. The trustee had decided to reject the BDBN before it received advice, as shown by the original 2009 and 2010 Members Information statements;
b. The advice from DLA Piper did not support the principal bases for invalidity of the BDBN on which the defendants conducted the Special Reference and these advices, or some of them, were paid for by Mrs **Morris**;

c. The trustee has on two separate occasions amended accounts from a pre-existing position published and relied upon, after learning of how the plaintiffs used those accounts. The amendments support Mrs **Morris**' position;

d. There is a history of incomplete disclosure and costly delay by the trustee;
e. The issue of costs is also relevant:
    a. Had the trustee held the scales impartially, in the light of the plaintiffs' offers of settlement this matter would have resolved rather than erode, to the extent it has, estate assets;
    b. There is prima facie evidence that the trustee's solicitors were also acting for Mrs **Morris** personally but billing the MFSF (though this is yet to be tested);
f. Finally, there was and remains a conflict of interest between Mrs **Morris** as a beneficiary of the MFSF and as the sole director and shareholder of the trustee, Upper Swan.[29]

86 The plaintiffs rely on the following facts to establish that the trustee did not act independently and in the interest of all the beneficiaries, and in fact demonstrated an intentional and reckless failure to exercise the degree of care required:

a. The evidence that Mrs **Morris** as co-trustee had determined to deny the validity of the BDBN even before receiving independent advice (if that is what she did receive);
b. The reliance on altered accounts prepared after the commencement of litigation in circumstances where it was acknowledged that such accounts would assist Mrs **Morris** in her case against the plaintiffs;

c. The timing and circumstances of disclosure of altered accounts and other aspects of the defence.

The Defendants' Submissions

87 The defendants submit that under s 36(2) of the Trustee Act 1958 and under general law a trustee, including a former trustee, is entitled to an indemnity for its liabilities and its costs and expenses out of the trust fund unless it is proved that it has acted improperly.[30] The defendants say that no findings have ever been made by the Special Referee or the Court to that effect. The defendants referred to Chief Commissioner of Stamp Duties (NSW) v Buckle,[31] which cited Worrall v Harford[32] with approval and said:

> In aid of that right to reimbursement or exoneration for liabilities properly incurred in the administration of the trust, the trustee cannot be compelled to surrender the trust property to the beneficiaries until the claim has been satisfied. In that sense, the entitlement to reimbursement or exoneration confers a priority in the further administration of the trust.[33]

88 The defendants also rely on the following clauses of the trust deed, including:

a. Clause 5.1 provides that the trustee shall have all the 'powers and discretions' entitled to such indemnities that are conferred by law or the trust deed;
b. Clause 9 provides that the trustee and, where applicable, its directors, 'shall be indemnified out of the Fund against all liabilities incurred by it or them in the exercise or purported exercise of the trusts, powers, authorities and discretions vested in it or them'. Clause 9 also sets out a number of situations where the indemnity does not apply, including where the trustee 'in respect of acts or omissions involving wilful misconduct, wilful neglect or wilful default' or where the trustee 'intentionally or recklessly fails to exercise, ... the requisite degree of care that the Trustee or a directora is required to exercise'.

c. Clause 11.6 provides that the trustee may pay out of the fund all expenses of or incidental to the administration of the MFSF.

d. Clause 17.3 provides that the trustee may conduct or defend legal proceedings by or against the MFSF.
e. Clause 17.7 provides that the trustee may do all acts and things as the trustee considers necessary or expedient for the due administration, maintenance and preservation of the MFSF and in performance of its obligations under the trust deed.

Conclusion

89 There is no doubt that the defendants had a right of indemnity out of the MFSF: Upper Swan as trustee, Mrs **Morris** and Mr Ashman as former trustees, and Mrs **Morris** as the director of Upper Swan. This is according to both general law and the terms of the trust deed.

90 As a consequence of the decisions of Mrs **Morris**, if the defendants claimed an indemnity from the MFSF, they would bear only a small portion of the financial consequences of the litigation, despite being entirely unsuccessful. Rather, the loss would be borne almost entirely by the plaintiffs in the depletion of their interest in the MFSF, which both parties agree does not contain enough money to cover the plaintiffs' award and the plaintiffs' and the defendants' costs.

91 In my view, the defendants have lost their right for indemnity by acting a manner designed to benefit Mrs **Morris** as trustee, co-trustee and sole director and shareholder of Upper Swan. The right of indemnity does not apply to both their own costs and the costs of the plaintiffs for this proceeding. Upper Swan, and Mrs **Morris** as its director, have failed to act impartially in the administration of the trust and are, therefore, in breach of their obligations as trustees. As Dal Pont explains:

> The duty of impartiality prohibits a trustee acting to favour one class of beneficiaries at the expense of another.[34]

92 There are two decisions made by Mrs **Morris** that, given that she did not seek the advice of the Court, amount to a breach of her obligations to the trust: first, when she made the decision that the BDBN was not binding on the MFSF; and secondly, when she (through her control of Upper Swan) made the decision to defend the proceedings brought by the plaintiffs. In making both decisions, she failed to act impartially, putting her interests ahead of the other beneficiaries in the MFSF. She should have recognised her conflict of interest and sought the advice of the Court before making either decision.

93 It is clear that in making the decision to deny the validity of the BDBN and to defend the proceedings brought by the plaintiffs, the trustee, and Mrs **Morris**, favoured Mrs **Morris**' own interests over the other beneficiaries. This is perhaps unsurprising: Upper Swan, the trustee, is controlled by her. She stood to benefit from defending the plaintiffs' claim. The fact that it is a risk 'inherent', as the defendant submits, to these kinds of superannuation funds does not excuse the failure on the part of the trustee. In fact, it should serve to put the trustee on notice that a trustee must be very careful to treat all the beneficiaries equally.

94 Mrs **Morris**, through Upper Swan as trustee, made the decision to defend the proceeding in circumstances where she had a substantial conflict of interest. Furthermore, the Special Referee found that Mrs **Morris** had already formed a view on the validity of the BDBN prior to receiving legal advice: DLA Piper were instructed that the requirements for a valid BDBN were not met.[35] Her financial stake in defending the BDBN should have put her and her lawyers on notice that Upper Swan should have sought the advice of a Court before deciding that the BDBN was invalid and then deciding to defend the proceedings. Given this conflict, the advice of DLA Piper that the BDBN was ineffective was not enough to fulfil Upper Swan's duty to the trust to act impartially and in the absence of a conflict of interest.

95 Compounding the problem was her decision, through Upper Swan, to pay legal and accounting fees for the wrong-headed defence exclusively from the funds that should have been in the deceased's account in the MFSF and have been found to be for the benefit of the plaintiffs. After all, the advice she received turned out to be incorrect: the Special Referee found wholly in the plaintiffs' favour. He found that the defendants should pay the whole of the plaintiffs' costs of the Special Reference. If Mrs **Morris** and Upper Swan were permitted to claim an indemnity, the costs of their wrong-headed defence will be borne by the trust fund. Instead, the defendants should pay the costs consequent upon the decision to defend the proceeding.

Conclusion

96 Accordingly, subject to consideration by the parties, I shall make the following declarations:

a. The deceased's Binding Death Benefit Nomination dated 18 March 2008 was and is valid and binding on Mrs **Morris** and Mr Ashman as trustees of the MFSF up until 18 August 2011 and thereafter on Upper Swan as the current trustee of the MFSF.
b. All moneys held by the MFSF are available to meet the payments required by the orders made herein.

97 Subject to the consideration by the parties, I shall also make the following orders:

a. Judgment be entered for the plaintiffs against Upper Swan in its capacity as trustee of the MFSF and Mrs **Morris** personally, jointly and severally, for the sum of $323 844.50 together with statutory interest calculated pursuant to the *Penalty Interest Rate Act 1983* from 30 June 2010 to the date of payment of the judgment sum.
b. Upper Swan and Mrs **Morris** pay the judgment amount within 14 days of these orders.
c. Upper Swan and Mrs **Morris** pay the plaintiffs' costs of an incidental to the proceedings, including all reserved costs and the costs of the Special Reference.

98 In respect of the costs order, I shall hear the parties on whether the appropriate order should be that

such costs to be agreed within 14 days and taxed in default of agreement or, as stated, a gross sum costs order.

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[1] The Court was notified that Mrs **Morris** passed away on 24 September 2013. With no disrespect, in this judgment I refer to her as Mrs **Morris**.

[2] Orders made by Zammit AsJ dated 27 September 2012.

[3] Orders made by Zammit AsJ dated 10 April 2013.

[4] Orders made by McMillan J dated 1 May 2013.

[5] Which is $924 509.37 less the $600 664.87 already paid.

[6] As determined in the Report of the Special Referee dated 7 March 2013.

[7] This last amount is the amount in Mrs **Morris**' account as at 30 June 2013.

[8] Defendants' Written Submissions dated 22 July 2013, [21].

[9] *Skinner and Edwards (Builders) Pty Ltd v Australian Telecommunications Corp* (1992) 27 NSWLR 567 (5 June 1992) 575.

[10] Plaintiffs' Outline of Oral Submissions dated 29 July 2013, [16](c).

[11] *Chocolate Factory Apartments Pty Ltd v Westpoint Finance Pty Ltd* [2005] NSWSC 784 (8 August 2005) [7].

[12] [2010] VSC 511 (12 November 2010) [22]–[23].

[13] Ibid [22].

[14] Ibid [23].

[15] The draft financial accounts for 2013 of the MFSF (received on 22 July 2013) record legal fees of $302 699.96 and accountancy fees of $43 560 paid from the deceased's account for the year ended 30 June 2013.

[16] Defendants' Written Submissions dated 22 July 2013, [21]–[22].

[17] [1990] HCA 59; (1990) 170 CLR 534, 566–7.

[18] *Knight v FP Special Assets Ltd* [1992] HCA 28; (1992) 174 CLR 178, 192–3.

[19] Defendants' Written Submissions dated 22 July 2013, [39].

[20] The defendants rely on *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593, 609.

[21] Defendants' Written Submissions dated 22 July 2013, [44].

[22] (1998) 8 Tas R 123, 135.

[23] [1992] 3 NZLR 757, 765.

[24] Plaintiffs' Written Submissions dated 11 June 2013, [56], quoting *Cowan v Scargill* [1985] Ch 270, 286–7 (Megarry VC).

[25] *Cowan v Scargill* [1985] Ch 270, 286-7 (Megarry VC).

[26] Trust Deed, **Morris** Family Superannuation Fund, 7.

[27] *Cowan v Scargill* [1985] Ch 270, 286-7 (Megarry VC).

[28] [2010] SASC 62 (19 March 2010).

[29] Plaintiffs' Outline of Oral Submissions dated 29 July 2013, [34].

[30] The defendants rely on *Turner v Hancock* (1882) 2 Ch D 303; *Re Knight's Will* (1884) 26 Ch D 82; *Re Love; Hill v Spurgeon* (1885) 29 Ch D 348; *Re Aitken and Barron's Bill of Costs* (1932) 49 WN (NSW) 224; *Saker; Re Great Southern Managers Australia Ltd (Receivers and Managers Appointed) (in liq) [No 2]* [2011] FCA 958, [45]–[50].

[31] [1998] HCA 4; (1998) 192 CLR 226.

[32] [1802] EngR 342; (1802) 32 ER 250, 252; [1802] EngR 342; 8 Ves Jun 4, 8.

[33] *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226, 246.

[34] G E Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) 649, citing *Re Lepine* [1892] 1 Ch 210, 219; *Re Charteris* [1917] 2 Ch 379, 388-9; *Re Mitchell* [1955] VicLawRp 23; [1955] VLR 120, 123.

[35] Report of the Special Referee dated 7 March 2013, [82](g).
