

# FEDERAL COURT OF AUSTRALIA

## EEU20 v Meat Industry Employees' Superannuation Fund Pty Ltd (Trustee) [2020] FCA 1359

File number: VID 946 of 2019

Judgment of: **MORTIMER J**

Date of judgment: 23 September 2020

Catchwords: **SUPERANNUATION** – appeal from decision of the Superannuation Complaints Tribunal – death benefit – deceased and another man died in a fight – primary beneficiary charged with the murder of the other man shortly before the Tribunal's decision – Tribunal did not adjourn or seek further information – procedural fairness – legal unreasonableness – relevant considerations

Legislation: *Superannuation (Resolution of Complaints) Act 1993* (Cth) ss 25, 33, 34, 37, 42, 46  
*Superannuation Industry (Supervision) Act 1993* (Cth) s 52

Cases cited: *AIA Australia Ltd v Lancaster* [2017] FCA 962  
*Board of Trustees of the State Public Sector Superannuation Scheme v Edington* [2011] FCAFC 8; 119 ALD 472  
*Chapman v QSuper Board* [2020] FCA 88  
*Citicorp Life Insurance Ltd v Smith* [2005] FCAFC 102  
*Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* [2016] NSWCA 218; 334 ALR 692  
*Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389  
*Finch v Telstra Super Pty Ltd* [2010] HCA 36; 242 CLR 254  
*Kioa v West* [1985] HCA 81; 159 CLR 550  
*Mercer Superannuation (Australia) Ltd v Billingham* [2016] FCA 1274; 161 ALD 338  
*Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; 162 CLR 24  
*Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; 230 FCR 431  
*Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437  
*Minister for Immigration and Border Protection v Stretton*

[2016] FCAFC 11; 237 FCR 1

*Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332

*Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164

*Retail Employees Superannuation Pty Ltd v Crocker* [2001] FCA 1330; 48 ATR 359

*Southwell v Equity Trustees Ltd* [2015] FCA 536

*Stead v State Government Insurance Commission* [1986] HCA 54; 161 CLR 141

Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	102
Date of hearing:	15 June 2020
Counsel for the Applicants:	Mr S Burt
Solicitor for the Applicants:	Legal GP

## ORDERS

VID 946 of 2019

**BETWEEN:**            **EEU20 BY HER LITIGATION REPRESENTATIVE EEV20**  
First Applicant

**EEW20**  
Second Applicant

**EEX20**  
Third Applicant

**AND:**                **MEAT INDUSTRY EMPLOYEES' SUPERANNUATION  
FUND PTY LTD AS TRUSTEE OF THE MEAT INDUSTRY  
EMPLOYEES' SUPERANNUATION FUND**  
First Respondent

**SUPERANNUATION COMPLAINTS TRIBUNAL**  
Second Respondent

**ORDER MADE BY: MORTIMER J**

**DATE OF ORDER: 23 SEPTEMBER 2020**

### THE COURT ORDERS THAT:

1.     Until further order, pursuant to s 37AF(1)(a) of the *Federal Court of Australia Act 1976* (Cth), on the ground specified in s 37AG(1)(a):
  - (a)   all references in the file and reasons to the first applicant by name are to be replaced with the pseudonym “EEU20”;
  - (b)   all references in the file and reasons to the second applicant by name are to be replaced with the pseudonym “EEW20”;
  - (c)   all references in the file and reasons to the third applicant by name are to be replaced with the pseudonym “EEX20”; and
  - (d)   all references in the file and reasons to the applicants’ mother by name are to be replaced with the pseudonym “EEV20”.
2.     Rules 9.63(2) and (3) of the *Federal Court Rules 2011* (Cth) be dispensed with.
3.     EEV20 be appointed as litigation representative for the first applicant.

4. Until further order, leave is required for any non-party to access any document on the Court's file.
5. The application be allowed.
6. Set aside the decision of the Superannuation Complaints Tribunal made on 30 July 2019.
7. Remit the matter to the Superannuation Complaints Tribunal to be dealt with according to law.
8. If the applicants seek any orders for costs:
  - (a) the applicants are to file and serve written submissions, limited to two pages, specifying the orders sought, by 30 September 2020; and
  - (b) the respondents are to file and serve any written submissions in response, limited to two pages, by 7 October 2020.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

### MORTIMER J:

#### INTRODUCTION

- 1 This is an application by way of an appeal on a question of law from a determination of the Superannuation Complaints Tribunal, brought pursuant to s 46 of the *Superannuation (Resolution of Complaints) Act 1993* (Cth). The underlying decision concerns the payment of a death benefit pursuant to the terms of the Meat Industry Employees' Superannuation Fund trust deed.
- 2 The applicants are the deceased's daughters. The first respondent is Meat Industry Employee's Superannuation Fund Pty Ltd, the trustee of the Meat Industry Employees' Superannuation Fund. The second respondent is the Tribunal. Both respondents filed submitting notices, save as to costs.
- 3 For reasons that will become apparent, the identities of those individuals affected by the subject matter of this application should be suppressed. I am satisfied that is necessary to avoid prejudice to the administration of justice. For the same reasons, orders will be made assigning a pseudonym to the proceeding and restricting any inspection of the Court's file by third parties without the leave of the Court. Once any criminal proceedings are finally determined, those orders can all be vacated.
- 4 On 8 October 2019, the Court ordered the applicants to serve the notice of appeal on the deceased's widow, who I will refer to as the spouse, who is presently the major beneficiary of the deceased's death benefit. It was the payment to her which is the subject of the applicants' challenge to the Tribunal's decision. An affidavit filed by the applicants' solicitor confirmed that the notice of appeal had been served on the spouse. By correspondence, the trustee also confirmed the death benefit would not be disbursed until this proceeding was concluded, so there was no need for a stay.
- 5 The hearing was delayed for some time at the request of the applicants, pending a criminal committal process, the relevance of which will become apparent. The Court was subsequently informed that the spouse had been committed to stand trial for the murder of her ex-husband, in an incident during which the deceased was also killed.

6 At the hearing, it became apparent that the court book that had been filed did not contain all of the material upon which the applicants sought to rely, or which was relevant to the application. The Court ordered the applicants to file a supplementary court book as soon as reasonably practicable. A supplementary court book was filed on 13 July 2020. That supplementary court book still omitted the applicable trust deed, which the Court considered to be no more than an oversight. The trust deed was subsequently marked as an exhibit.

7 For the reasons set out below the application will be allowed, the decision of the Tribunal made on 30 July 2019 set aside, and the matter remitted to the Tribunal for determination according to law.

## **BACKGROUND**

8 The deceased died on 12 March 2016 at 49 years of age. He was recently re-married, with two step-sons. He had three daughters from his former marriage, the applicants. He died in violent circumstances, during a fight with another man, who was the spouse's ex-husband. In early 2019, the spouse was charged with the murder of her ex-husband. It was the circumstances which led to that event which were the catalyst for the applicants' challenge before the Tribunal to the proposed distribution by the trustee, and which form the factual basis for their arguments on this application. To understand those circumstances, it is necessary to set out the narrative that emerges from the documents contained in the court book and supplementary court book, all of which were before the Tribunal on its review.

9 For present purposes, the narrative begins with the deceased commencing a relationship with the spouse. There were differing accounts before the Tribunal as to when this happened. The spouse said it was in November 2014. The deceased's daughters provided death benefit application forms to the trustee in which they said it was 16 February 2015. There is no explanation why the Tribunal selected (as it did) the account of the spouse.

10 On 18 June 2015, the deceased completed a nomination of dependants form as follows:

- (a) The oldest daughter: 20%
- (b) The middle daughter: 20%
- (c) The youngest daughter: 20%
- (d) The spouse: 40%

11 At that time, the oldest daughter was 18 years old, the middle daughter was 16 years old, and  
the youngest daughter was 14 years old.

12 On 20 January 2016, the deceased completed a new nomination of dependants form. That form  
altered the proportions to the following:

- (a) The oldest daughter: 10%
- (b) The middle daughter: 10%
- (c) The youngest daughter: 10%
- (d) The spouse: 70%

13 At that time, the oldest daughter was 18 years old, the middle daughter was 17 years old, and  
the youngest daughter was 15 years old.

14 On 27 February 2016, the deceased married the spouse.

15 On 12 March 2016, as I have stated, the deceased died.

16 A media report of the death of the deceased and the spouse's ex-husband, which was before  
the Tribunal, stated:

Homicide squad detectives have spoken with [the spouse's ex-husband's] partner,  
[redacted], who was taken to the Royal Melbourne Hospital in a serious but stable  
condition and later discharged.

17 In other words, the information before the Tribunal indicated that at least four people were  
reported to have been involved in the men's deaths – the spouse, the deceased, the spouse's ex-  
husband and his partner.

18 On 26 May 2016, the applicants completed death benefit application forms, seeking one third  
each of the deceased's death benefit. The oldest daughter wrote:

The reason I would like 1/3 of the amount is due to being 1 of his 3 biological daughters  
and I am not working due to the grief. Also we have not got any of Dad's belongings  
due to his wife (of two weeks) keeping everything and planning his whole service and  
not allowing me nor by sisters any part in anything. And [the spouse's] boy will be  
getting his father's money and no doubt she will try and get everything if possible like  
she already has.

19 The middle and youngest daughters' form, which appears to have been completed by their  
mother, who I will refer to as the former spouse, stated:

[Redacted] are his biological daughters.

[The middle daughter] is now a mum to [redacted]

[The oldest daughter] is not working due to everything that has happened.

[The youngest daughter] is struggling with life – very angry & seeing a psychologist.  
[The youngest daughter] needs major dental work which [the deceased] was paying ½ of.

The girls have had no say in anything. [The spouse] cremated him which everyone knew he never wanted. [The spouse] has given the girls nothing of [the deceased's] at all. They have no urn with [the deceased's] ashes. [The spouse] has not contacted the girls since the service. If it wasn't for her he would not be dead.

[The youngest stepson] will probably be getting his dad's estate (whom also died in the same fight)

[The spouse] and [the deceased] were only married for 2 weeks, his girls were alienated by [the spouse] and not included. [The spouse] has his Harley and everything else. The girls need something and deserve everything as their father would still be here if it wasn't for her!!

- 20 On 22 July 2016, the administrative committee of the trustee met to discuss the deceased's death benefit. The decision recorded in the minutes of the meeting was:

The Committee discussed the potential impact of illicit substances in this death. [The administrative manager of the trustee] advised that she has requested the Coroner's report and will convey these results if they impact the benefit in any way.

The Committee **RESOLVED** that irrespective of the total benefit amount, to pay 70% of the benefit to [the spouse]; and to pay 10% of the benefit to [the former spouse] in trust for [the youngest daughter]; and to pay 10% of the benefit to [the former spouse] in trust for [the middle daughter]; and to pay 10% of the benefit to [the oldest daughter] and note that this portion of the benefit will be taxed; and claim stake.

- 21 There was no coroner's report in the materials before the Court, but there was an autopsy report dated 17 October 2016, which states:

On the basis of information available to me at this time, I believe a reasonable cause of death statement could be constructed as:

#### CAUSE OF DEATH

I (a) STAB WOUND TO ABDOMEN

- 22 On 20 June 2017, the trustee sent letters to the beneficiaries advising them of the trustee's decision of 22 July 2016.

- 23 On 12 July 2017, the applicants' legal representative exchanged emails with the detective investigating the deceased's death. The applicants' legal representative requested an update on the investigation. The detective responded:

That matter is currently before the Coroner and there is yet to be any findings handed down regarding the circumstances of [the deceased's] death.



The Coroner may yet decide to hold an Inquest into the death and I will be delaying any further decisions or actions in this matter until such time as those proceedings have concluded.

- 24 On the same day, the applicants' legal representative faxed a letter to the administration manager stating that his clients objected to the distribution of any part of the deceased's death benefit to the spouse "until the findings of the State Coroner of Victoria are finalised". The letter attached a copy of the detective's email.
- 25 On 18 July 2017, the administrative manager sent a letter to the applicants' legal representative stating that they had already been provided with a copy of the coroner's report and asking whether the applicants intended to press their objection.
- 26 It appears that there may have been some confusion over the nature of the report referred to at [21] above – that is, whether it was in fact the coroner's report. In any event, on 25 September 2017, the applicants' legal representative confirmed that his clients intended to object to the trustee's decision of 22 July 2016 whatever the findings of the coroner.
- 27 On 4 October 2017, the administration committee produced a report on the distribution of the deceased's death benefit in which it recommended that the trustee's original decision be confirmed. The administration committee's report states:

We finally received a copy of the Coroner's Report on 13 June 2017 and this was reviewed by both the Administration Manager and the Fund Manager, who agreed that the report did not reveal anything that would cause MIESF's insurer, TAL, to restrict the insured portion of the benefit.

On 20 June 2017 letters were sent to all of the beneficiaries advising of the decision made by Administration Committee on 22 July 2016 in relation to the distribution of the benefit.

On 10 July 2017, we received advice from [the spouse] that she agreed to the distribution. On 13 July 2017 we received a fax from [the applicants' legal representative], which was an objection to the Administration Committee's decision.

This objection seemed to be related to the Coroner's Report not being issued, which was not the case, so I did not record this as an official objection at this stage, but rather contacted the [the applicants' legal representative] both by telephone and mail that the report had been issued, however, given considerations of privacy, I was not able to provide them with a copy.

In the information attached there are copies of some of the to-ing and fro-ing between myself and [the applicants' legal representative] and it was finally confirmed on 25 September 2017 that regardless of whether the Coroner's Report had been issued or not, his clients wished to object to the distribution.

No reason was given for the objection and **no alternative distribution was suggested**, although this was requested. I have left telephone messages to the parties involved requesting further information regarding the objection, however to date I have not

received a response.

(Emphasis added.)

28 The statement in bold does not appear to take into account the claims made by each of the daughters in their forms lodged with the trustee on 26 May 2016, which clearly propose an “alternative distribution”.

29 The committee’s report contained the proposed wording of a notification to “all parties”, which was reflected in a letter sent to the applicants on 5 October 2017. This stated:

The Trustee’s Administration Committee has considered the original decision they made in relation to the distribution of the death benefit payable following the death of [the deceased] following an objection received from [the applicants’ legal representative] and have resolved to confirm their original decision.

Under the Fund’s Trust Deed, the death benefit must be paid to one or more of the dependants of the member in such proportions, as the Trustee shall, in its absolute discretion, determine. If in the opinion of the Trustee there are no dependants, the benefit is then paid to the deceased’s Legal Personal Representative.

A dependant is classified by the Trust Deed as any one or more of the following:

- a spouse, including a de facto spouse;
- any child, regardless of age, including a step-child, adopted child, ex-nuptial child or a child born after the member’s death or any financially dependant child;
- any person with who the member had an interdependency relationship; and
- any person the Trustee considers was financially dependent upon the deceased member or had a legal right to look to the member for financial support.

[The spouse], as [the deceased’s] current wife, together with [his daughters] as his children all fit the definition of a dependant as shown above. It should also be noted that [the former spouse’s] children, [redacted] and [redacted], as [the deceased’s] step-children, also meet this definition.

It was noted that at the date of [the deceased’s] death, 12 March 2016, [the oldest daughter] was 18 years old, [the middle daughter] was 17 years old and [the youngest daughter] was 15 years old and his step-children, [redacted] was 8 years old and [redacted] was 2 years old. Based on this, [the deceased’s] children with [the former spouse] had either reached the age or were approaching the age where he would no longer be required to support them.

In addition to this, [the deceased] had completed a “Change of Details & Nomination of Dependants” form on 20 January 2016, advising that in the event of his death he wished [the spouse] to receive 70% of the benefit and for [the daughters] to each receive 10% of the benefit.

The Administration Committee noted that this form was completed only 2 months before [the deceased] passed away and represented a clear indication of his wishes at that time given his personal circumstances at the time of his death, they considered this distribution to be reasonable.

30 On 2 November 2017, the applicants, by their mother, the former spouse, registered a complaint in the Tribunal. The former spouse wrote:

**We have tried to put a hold on any money being paid till the entire coroners inquest has been completed as we know [the spouse] has been an accessory in the murders/homicide and in that case should not receive any of the super death policy.**

I also enquired at the beginning as to how the decided on the percentages and I was not told it was changed in the policy.

I also know [the deceased] had not been of sound mind – He was depressed, lost huge amounts of weight and was very stressed as they were arguing all the time.

I also expect it is [the spouse's] writing on the change of policy.

(Emphasis added.)

31 In response to the prompt “State why you consider the superannuation provider’s decisions or actions are unfair or unreasonable”, the former spouse wrote:

[The spouse] had stated there was a will then changed her mind and said there was none after he died.

She cremated [the deceased] when all his family/friends told her he never wanted to be. She did not even consult his children about this or include them apart from getting photo's off them. She promised them his ashes which she did not give them. She was going to give them something personal of [the deceased's] but that didn't eventuate. She even kept there things at the house eg Wii – that was a Christmas present years prior.

The girls have struggled and had no closure. They have nowhere to see their father on birthdays/Christmas/special occasion. They are depressed, have panic attacks. [The youngest daughter] is struggling at school and has had numerous behavioural problems.

[The youngest daughter] also has 10 adult teeth missing which runs on [the deceased's] side of the family and will need major dental work/implants which will cost over \$15,000 after she is 18yo and she has finished growing.

[The spouse] also had a new man in her life 2 mths after but was out on the town prior to that. She now has a new baby that she claims is [the deceased's] through IVF but her ex is sure its his.

32 In answer to the question “What outcomes are you seeking to resolve your complaint?”, the former spouse wrote:

The girls deserve at least 25% each. They are his biological children.

[The spouse] moved on very quickly and her children will not even remember him. They were only together 13 mths.

His children will never forget him and will never be the same again.

33 On 3 December 2018, the former spouse stated that the benefit should be distributed 1/3 to each of the daughters, which was what each of the daughters had said in their original forms. She wrote:

My name is [redacted] and I am writing on behalf of my daughters [redacted].

**I am writing to let you know there is still an ongoing investigation following the death of [the deceased]. Detective [redacted] is investigating the case and is able to be contacted. [The spouse] is being investigated as an accessory to the case.**

[The spouse] and [the deceased] were together for 15 mths and married for 2 wks prior to his death. During this time the girls would spend some time there. [The spouse] ended up kicking both [the youngest daughter] and [the middle daughter] out. [The oldest daughter] was actually @ the house at the time of his death.

The girls watched their father turn from a healthy, fit man to a very unstable one. At the start he spent time with them but then it started to become less and less and sometimes was lucky to spend time with them once a month for an hour @ a time.

The girls have struggled with life since he left. All 3 dropped out of school and since his death have barely coped or worked.

[The spouse] has not had any contact since his death. They were not given any of his ashes. They do not even know where their father is. They have nowhere to go on father's day, birthdays, or just to be with him. They have had no closure and probably never will because of [the spouse].

[The deceased] was a means to an end for [the spouse]. He was unstable enough to do her dirty work for her but his family and the girls are paying the price.

[The spouse] had a new partner less than 3 mths later. She left him when she got pregnant and even told her mum it was [the deceased's]. The father has since found out it was his baby. She has moved states twice and also changed her name to [redacted].

She has been able to move on but our family have stopped. [The deceased's] family have not had any closure. He now has 2 grandchildren that will never know their granddad. Yes, he did the wrong thing and we will have to live with that forever, but [the spouse] deserved nothing!! She has lied and schemed from start to finish. [The deceased] was a means to an end and now his own daughters are paying the price. They will never get over this.

34 There is some suggestion in the form that the former spouse herself was financially dependent on the deceased in the lead up to the deceased's death, although as she did not claim that any part of his death benefit should be paid to her it is not necessary to set this out.

35 The former spouse also made separate submissions, which are undated, and included the following:

Those who knew [the deceased] well spoke repeatedly of changes in his personality and emotional instability during this time, and **the belief that [the spouse] contributed to the circumstances of his death.** At this time there is still an investigation pending to decide if the case is going to criminal or coronial court.

[Redacted] is the Detective investigating the case.

...

On seeing the paperwork supplied on the USB, I'll agree that it is [the deceased's] signature on the policy **but the rest isn't his writing**. There is doubt in my mind that [the deceased] even knew about the percentages and it has been added without his knowledge. **He would not have left the girls unprovided for after his death by choice.**

...

Although we acknowledge that [the deceased] showed affection for [the spouse's] boys, we would question their entitlement to [the deceased's] superannuation. [The spouse's] youngest son [redacted] would be entitled to a portion of his biological father's estate. **His father was the other fatality at the time of [the deceased's] death.** The tragic incidence which resulted in their deaths was believed to be a dispute regarding the upcoming custody hearing.

(Emphasis added.)

- 36 On 20 March 2019, the spouse emailed the trustee rejecting the former spouse's characterisation of her, the deceased and her relationship with the deceased:

I do not wish to add much further then what has already been included. I however have only just realised what has been written about me. I can not believe what i read.

It has been 3 years. I along with many other people have been spoken to by police on how [the deceased] was leading up to his death. I am still here today. **I am not accessory**. Then for her to go on and say she knows [the deceased] was not of sound mind and was suffering depression. It contradicts and reads that again - bullying and defamation of character.

I have moved interstate and have changed my name due to the stalking and all the harassment from the other party members. (namely [the former spouse] the ex wife for a reason).

Yes [the deceased's] super was changed. No [the former spouse] did not need to know about it as they were divorced. [The deceased] wanted to have myself on their as we were becoming a family. **It does not matter who's writing it is.** It is his signature. He wanted 100% to go to me but we had 2 of his girls living with us at the time **and i put them on the form** still as that felt like the right thing to do. I did so much for those girls. opened up my home, cared for them, cooked, cleaned, ran them around, pocket money, school pick ups etc.

(Emphasis added.)

- 37 On the same day, the former spouse emailed the trustee stating:

[The deceased's] children have had an awful time since there father has died. [The spouse] has not made this any easier. She discontinued all contact, refused to give them any small momentos of their own fathers belongings as a keep sake and kept everything herself and has not given the girls any of their fathers ashes like she promised she would. They are traumatized about where their fathers ashes are. For all we know they have been disgarded. We will probably never find out.

They do not have a father any more but I'm sure [the spouse] will again move on as

she did after [the deceased] died when she had her baby daughter. She does not deserve such a big percentage of his superannuation.

This should be the girls inheritance as it will be the only thing they get of their fathers.

There is still another superannuation policy pending that [the spouse] is likely to get majority of so this also should be taken into account.

Under the cleft palate scheme, [the youngest daughter] is only able to get basic work done not any of the dental work she needs such as implants and crowns/veneers. Knowing [the spouse] worked as a dental nurse in [redacted], I would have thought she would have known this. This work was estimated at \$20,000 and this was when she was in primary school. There is no way she will ever be able to afford this now as she is on centrelink payments as she is now a mum herself.

Please think of the girls when making your decision. Don't think of them as another number, think of them as 3 traumatized daughters of a man that made the wrong decision and ended up murdered. They will never get over this, EVER. They will never function normally and will require help and counselling for years to come.

38 On 22 March 2019, the trustee made submissions to the Tribunal in support of its decision. It provided reasons reflecting its letter dated 5 October 2017 (see [29] above). It also stated:

In the information that MIESF did receive, that has previously been provided to the SCT, it was established that [the spouse] was married to [the deceased] and they were living together with her two children from a previous relationship, [redacted] and [redacted], and [the deceased] was the stepfather of these two children. Although they had only married shortly before [the deceased] died, MIESF were advised that they had been living together in a defacto relationship since November 2014.

[The deceased] had previously been married to [the former spouse] and they had three children, [redacted]. They had divorced and a financial settlement had been made between the two former partners.

39 On 22 June 2019, the former spouse emailed the Tribunal stating:

Further to our phone call I wish to inform the SCT review submissions that [the spouse] has been charged with the murder of the other party that died when [the deceased] died and is in jail. This was her ex-partner and father of her youngest son. [Redacted] is the detective involved in the case and can be called for more details.

40 This was provided to the other parties, but there is no evidence there was any response. There is no evidence the Tribunal responded to the former spouse, or made any further inquiries. This is consistent with the Tribunal's reasons at [8], to which I refer below. Rather, the next event on the Tribunal's file is the notification of its decision, on 1 August 2019.

41 On 21 August 2019, the former spouse wrote to the Tribunal stating:

I am writing as I am surprised a decision has been made since circumstances have changed.

I have sent emails to [redacted] and received no response and when I have tried to phone I have been told she is not available or on leave.

[The spouse] was charged with murder and has been in jail since the 19/6/19. She has been charged with the murder of [redacted], her ex partner and father of her youngest son, [redacted]. [The deceased] died the same night. [Redacted] is the detective involved in the case since they both died and is available to answer any questions you have. His number is [redacted].

I await a swift response as if you are unwilling to put a decision on hold I only have till the 27/8/19 to apply to court as stated in the last emails from the SCT tribunal.

## **THE TRIBUNAL'S DECISION**

42 On 1 August 2019, the Tribunal issued its determination, which is dated 30 July 2019. The Tribunal set aside the decision of the trustee and substituted it with the same decision, save that tax was not deducted from the oldest daughter's 10%.

43 At [8], the Tribunal appears to note the email I have extracted at [39] above, describing it as "further information" which was provided to all parties.

44 At [17], the Tribunal set out the relevant parts of the trust deed in its reasons, which I reproduce below at [66] to [71].

45 There is no doubt that all of the applicants, as well as the spouse and her two sons, fell within the definition of "dependent". As I have explained, the former spouse had not contended any part of the deceased's death benefit should be paid to her. That is, her submissions to the Tribunal were on behalf of her daughters.

46 The Tribunal set out aspects of the parties' submissions before it. It did not set out those parts of the material submitted by the former spouse and her daughters which went to the truthfulness and motivations of the spouse in making a claim for 100% of the deceased's death benefit, nor the allegation of her role in the deceased's change of death benefit preferences in the weeks before his death, all of which I have summarised above.

47 At [21]-[22], the Tribunal emphasised its role was to determine if the trustee's decision was fair and reasonable, rather than to decide for itself how the trustee's discretion should be exercised.

48 At [33]-[34], the Tribunal found:

Further, the Spouse contends the Deceased Member's death has resulted in her facing considerable financial difficulties. In the absence of any contrary evidence, the Tribunal accepts this to be the case.

In her final submission to the Tribunal, the Former Spouse made some allegations about the Spouse. However, these allegations are uncorroborated by independent evidence. Regardless of the veracity of these allegations, the issue for the Tribunal's

consideration is whether the Spouse was a dependant of the Deceased Member at the date of his death. For the reasons articulated above the Tribunal is so satisfied.

49 I note here that there was never any real debate that the spouse was a dependent of the deceased, because she fell within the definition of the term “spouse”. That the Tribunal dismissed the former spouse’s allegations and information for this reason would appear to miss the point she was seeking to make. There is no explanation in the Tribunal’s reasons why it accepted the spouse’s assertions at face value, but rejected those of the former spouse and her daughters.

50 At [43], the Tribunal found that each of the applicants “was partially financially dependent on the Deceased Member before he died”.

51 At [46], the Tribunal found that the January 2016 nomination form (completed a few weeks before the deceased died and, on the spouse’s admissions, filled out by her but signed by the deceased) was “a clear indication of the Deceased Member’s wishes at that time”.

52 The Tribunal also found at [47]:

Having sighted documents provided by the Trustee, the Tribunal is satisfied that during the course of his membership in the Fund, the Deceased Member made changes to the nominations in his Fund account, to reflect his personal circumstances at the relevant times.

53 Again, this finding takes the nomination changes at face value, without any assessment of the distinct and unusual context alleged to exist in the material submitted to the Tribunal.

54 At [51]-[53], the Tribunal found:

In the event of a death before retirement, the Tribunal’s approach is to consider what might have occurred had the member not died, and whether there is anyone who had an expectation of ongoing financial support or a right to look to the Deceased Member for ongoing financial support had the Deceased Member not died.

Given the Tribunal’s findings that the Deceased Member was the sole financial provider of the Spouse and the Step-Sons, the Tribunal is satisfied that their joint expectation of ongoing financial support from him would have been quite high, given the Step-Sons were very young.

Conversely, the Tribunal is satisfied that given the Daughters were all much older than the Step-Sons, who were teenagers, their expectation of ongoing financial support from the Deceased Member would have been proportionally lower.

55 Despite the last paragraph extracted immediately above, the Tribunal found that the deceased’s two youngest daughters were financially dependent on him, and the oldest daughter was partially financially dependent on him. In consequence of the oldest daughter’s partial dependence, the Tribunal varied the trustee’s decision, but only so as to distribute 10% to the



oldest daughter *not* less tax. How and why the Tribunal considered the trustee's decision to fix these proportions at 10% was fair and reasonable is not explained in the reasons, and there is no assessment of the material before it from the daughters and the former spouse which was, as I have set out above, quite detailed in terms of the level of dependency.

56 Further, the finding that the deceased was the "sole financial provider" for his stepsons does not appear to take into account whether the spouse received any support for them from their fathers (one of whom was the spouse's ex-husband), nor whether the younger child would receive any financial settlement after his biological father's death.

### **THE AMENDED NOTICE OF APPEAL**

57 At the hearing, the Court indicated leave would be granted to the applicants to rely on an amended notice of appeal.

58 By their amended notice of appeal, the applicants sought orders that the decision of the Tribunal be amended to pay 1/3 of the death benefit to each of the daughters. They advanced three grounds:

#### **Amended Ground 1:**

The Tribunal denied the Applicants procedural fairness, in the discharge of their statutory obligations, to assess whether the Trustee acted fair and reasonably and by doing so did not inform itself of the correct inquiry to be made pursuant to s 37(6) of the Complaints Act.

#### **Amended Ground 2**

In determining whether the decision of the Second Respondent was in all the circumstances fair and reasonable, the Tribunal did not take into account all relevant considerations available to it at the time of making its decision.

#### **Amended Ground 3**

The Tribunal's decision was legally unreasonable in that, upon consideration of all of the evidence before it, the only reasonable conclusion open to it was that the Trustee's decision was not fair and reasonable.

### **SUBMISSIONS**

59 The three grounds of appeal all have a common foundation: namely, that the spouse's conduct in relation to the change of nomination form shortly before the deceased's death, her alleged responsibility for the death of the man who killed the deceased in a fight between the two men and her alleged involvement in the circumstances of the deceased's death more generally were all matters capable of affecting the exercise of discretion by the trustee about the payment of benefits under the deed, and also all matters capable of affecting the Tribunal's determination

of whether the trustee's decision was fair and reasonable. Where necessary, I set out below more detail about the applicants' submissions.

## **RESOLUTION**

60 Section 37 of the Complaints Act sets out, relevantly to this application, the function of the Tribunal:

- (1) For the purpose of reviewing a decision of the trustee of a fund that is the subject of a complaint under section 14:
  - (a) the Tribunal has all the powers, obligations and discretions that are conferred on the trustee; and
  - (b) subject to subsection (6), must make a determination in accordance with subsection (3).
- (2) If an insurer or other decision-maker has been joined as a party to a complaint under section 14:
  - (a) the Tribunal must, when reviewing the trustee's decision, also review any decision of the insurer or other decision-maker that is relevant to the complaint; and
  - (b) for that purpose, has all the powers, obligations and discretions that are conferred on the insurer or other decision-maker; and
  - (c) subject to subsection (6), must make a determination in accordance with subsection (3).
- (3) On reviewing the decision of a trustee, insurer or other decision-maker that is the subject of, or relevant to, a complaint under section 14, the Tribunal must make a determination in writing:
  - (a) affirming the decision; or
  - (b) remitting the matter to which the decision relates to the trustee, insurer or other decision-maker for reconsideration in accordance with the directions of the Tribunal; or
  - (c) varying the decision; or
  - (d) setting aside the decision and substituting a decision for the decision so set aside.
- (4) The Tribunal may only exercise its determination-making power under subsection (3) for the purpose of placing the complainant as nearly as practicable in such a position that the unfairness, unreasonableness, or both, that the Tribunal has determined to exist in relation to the trustee's decision that is the subject of the complaint no longer exists.
- (5) The Tribunal must not do anything under subsection (3) that would be contrary to law, to the governing rules of the fund concerned and, if a contract of insurance between an insurer and trustee is involved, to the terms of the contract.
- (6) The Tribunal must affirm a decision referred to under subsection (3) if it is

satisfied that the decision, in its operation in relation to:

- (a) the complainant; and
- (b) so far as concerns a complaint regarding the payment of a death benefit—any person (other than the complainant, a trustee, insurer or decision-maker) who:
  - (i) has become a party to the complaint; and
  - (ii) has an interest in the death benefit or claims to be, or to be entitled to benefits through, a person having an interest in the death benefit;

was fair and reasonable in the circumstances.

61 In *Retail Employees Superannuation Pty Ltd v Crocker* [2001] FCA 1330; 48 ATR 359 at [28]-[33] Allsop J (as his Honour then was) set out a description of the framework for the Tribunal's performance of its task which has been adopted numerous times since in this Court:

The question as to whether a decision was unfair or unreasonable cannot be judged otherwise than by having regard to the conformity of the decision with the governing rules of the fund and the terms of the policy. The conformity of the decision with those matters is therefore a relevant consideration in the sense discussed in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39-40 and see *Telstra Corp Ltd v Seven Cable Television Pty Ltd* (2000) 178 ALR 707 (special leave refused on 20 August 2001). If conformity with the governing rules or the terms of the policy required the very decision, which was made, to be made, the strictures of subs 37(5), the universe of possible conduct under subs 37(3) and the balance of the *Superannuation (Resolution of Complaints) Act 1993* (Cth), including subs 37(6), would require a conclusion of the tribunal that the decision was not unfair or unreasonable. It could not be otherwise, as it would, on this hypothesis, be the only decision capable of being reached by the Trustee or the Insurer in the light of the governing rules or terms of the policy; or, put another way, any determination under para 37(3)(b), (c) or (d) would involve the tribunal doing an act contrary to the governing rules or the terms of the policy.

It may be that a decision of a trustee or an insurer is in conformity with, but not required by, the governing rules of the fund or the terms of the policy. This may be because the decision could be described as one of a discretionary character: see s 14AA of the *Superannuation (Resolution of Complaints) Act 1993* (Cth) and Merkel J in *Collins v AMP* at 578-79. For myself, I would prefer not to use any dichotomy between discretionary and non-discretionary decisions as a tool in this analysis. I do not think that the presence of s 14AA mandates it. The presence of s 14AA is to be understood for reasons other than any which make the terminology used within it a compulsory tool for analysis of the understanding by the tribunal of its task: see *National Mutual v Campbell* at 568-70 [21] to [30] and *Seafarers' Retirement Fund v Oppenhuis* at 596-98. It may be that the decision of a trustee or an insurer is in conformity with, but not required by, the governing rules or policy terms not because there was involved any exercise of discretion, properly so-called, but because the decision was one which so involves elements of fact, degree, opinion or value judgment that different minds can legitimately differ in reaching a decision or because one aspect of the rules or policy terms, but not another, has been the foundation of the decision. A decision of a trustee or an insurer about a matter of judgment, for instance one involving weighing competing expert or lay opinion about a state of affairs, might be lawful and in

conformity with the governing rules and policy terms. It might be described as “correct” in that it was the product of an inquiry directed to the right question and in that there was material available to support it. In this, perhaps limited, sense the decision was correct and was open to be made. However, the tribunal is not engaged in a form of judicial review. It reviews the decision (as expanded by s 4) complained of from the position of the trustee or insurer (paras 37(1)(a) and 37(2)(b)). The tribunal may find, in its opinion, in some degree (see subs 37(4)), the decision to be unfair or unreasonable and may act under subs 37(3) to give effect to its view of the merits as long as subs 37(5) is not infringed. It seems to me that this analysis accords with the approach described by the full court in *National Mutual v Campbell* at 570-71 [32] and [33] and see also Kirby J in *Attorney-General v Breckler* (1999) 197 CLR 83 at 129 [88]. It seems to me that the very use of the words “unfair” and “unreasonable” in their breadth, individually and in the composite phrase “unfair or unreasonable”, supports this view: see, in other contexts, *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 815-16, and Samuels JA in *Antonovic v Volker* (1986) 7 NSWLR 150 at 154-55.

... In many cases, for non-discretionary questions, the governing rules or policy terms will only yield a single result.

The tribunal’s task is not to engage in ascertaining generally the rights of the parties, nor is it to engage in some form of judicial review of the decision of the trustee or insurer. Rather it is to form a view, from the perspective of the trustee or insurer, as to whether the decision of either was (recognising the overriding framework given by the governing rules and policy terms, respectively) unfair or unreasonable.

Thus, essential to the task before the tribunal, as a consideration mandated by the terms of s 37, is an inquiry as to whether the decision by the trustee or insurer was in conformity with the governing rules or the terms of the policy. If the Tribunal finds that the decision is contrary to the governing rules or the terms of the policy it may well be an easy step to conclude that it is unfair or unreasonable. I do not need to decide whether a finding by the tribunal that the trustee’s or insurer’s decision was contrary to the governing rules or policy terms required a finding of unfairness or unreasonableness: cf Merkel J in *Collins v AMP* at 578-79 and Sundberg J in *Wilkinson* at 492. If the tribunal finds that the decision of the trustee or the insurer is in conformity, with and required, by the governing rules or policy terms, in the sense which I have discussed above, it cannot other than find or be satisfied that the decision is fair and reasonable. If the tribunal finds that the decision of the trustee or the insurer is in conformity with, but not required by, the governing rules on policy terms, in the sense which I have discussed above, it may proceed, in effect, to supplant the decision of the trustee or insurer with its view of the merits, bearing in mind the limitations of subs 37(4) and subs 37(5).

Certainly, what the tribunal is not entitled to do is to make a determination reflecting its view of the rights of the parties inter se, if that is contrary to the terms of the governing rules or policy terms.

- 62 I respectfully adopt these passages as an accurate description of the Tribunal’s task for the purposes of this application.
- 63 Unfairness or unreasonableness may be identified by reference to the process adopted by a trustee in making its decision, which may lead to the decision itself being unfair or unreasonable: see *Mercer Superannuation (Australia) Ltd v Billingham* [2016] FCA 1274;

161 ALD 338 at [19] and [74]. In the latter passage, Moshinsky J relied on the Full Court's decision in *Citicorp Life Insurance Ltd v Smith* [2005] FCAFC 102 at [19]:

The actual question for the Tribunal was whether the decision under review was 'unfair or unreasonable' (s 14). If the Tribunal was satisfied that the decision was 'fair and reasonable', it was required to affirm the decision (s 37(6)). It has been said that the role of the Tribunal is to consider 'whether the actual decision, as opposed to the process by which the decision was reached, was fair and reasonable in the circumstances' (*Colonial Mutual Life Assurance Society Ltd v Brayley* [2002] FCA 1333 at [31] per Branson J; see also *National Mutual Life Association of Australia Ltd v Scollary* [2002] FCA 695 at [24] per Ryan J). However, depending upon the circumstances, unfairness in process may lead to unfairness in decision.

64 However, the focus of the Tribunal's function must be to determine whether the decision under review is fair and reasonable, not to engage in any assessment of whether the trustee's reasoning was fair and reasonable. In other words, the Tribunal may adopt a different reasoning process, and look at different material, yet nevertheless reach the view that the decision under review was fair and reasonable in its operation and application to the Tribunal applicant: see *Board of Trustees of the State Public Sector Superannuation Scheme v Edington* [2011] FCAFC 8; 119 ALD 472 at [53].

65 The point has been made many times in the authorities of this Court that the Tribunal is not engaged in any form of judicial review of the trustee's decision: see *Mercer* at [73], by reference to the reasons of Allsop J in *Crocker* at [31].

66 As the applicants submitted, by cl 11.1 of the trust deed,

the covenants that are required by the Superannuation Law to be included in the Deed are deemed to be included in the Deed as covenants by the Trustee and (to the extent applicable) by each Director for so long as and to the extent required by the Superannuation Law.

67 By s 52(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth), if the fund's governing rules do not contain covenants to the effect of the covenants set out in s 52, those governing rules are taken to contain covenants to that effect. Section 52(2) relevantly provides:

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

(c) to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries; ...

68 Clause 28.1 of the trust deed provides:

Any amount payable on the death of a Member shall be paid or applied to or for the benefit of:

- (a) such one or more of the Dependants of the deceased Member to the exclusion of the other or others of them in such shares and proportions as the Trustee may in all respects in its absolute discretion determine; or
- (b) if in the opinion of the Trustee there are no Dependants of the Member then to the Member's Legal Personal Representative.

69 Here, the trustee's task under cl 28 clearly involved a discretionary decision: cf *Crocker* at [29]; *Finch v Telstra Super Pty Ltd* [2010] HCA 36; 242 CLR 254 at [30]; *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* [2016] NSWCA 218; 334 ALR 692 at [96].

70 Finally, the definition of "dependant" in cl 2 the trust deed should be set out in full:

**Dependant** means:

- (a) a Spouse; and
- (b) a Child; and
- (c) any person with whom the Member or Pensioner had an Interdependency Relationship; and
- (d) any other person who is in the opinion of the Trustee at the relevant date (or in the case of a deceased Member or Pensioner was at the Member's or Pensioner's death) wholly or partially financially dependent on the Member or Pensioner or had a legal right to look to the Member or Pensioner for financial support.

71 Relevantly to para (b) of the definition of "dependant", cl 2 of the trust deed provides:

**Child** means a child of a Member or Pensioner at the time of the Member's or Pensioner's death or other relevant time and shall include

- (a) a child legally adopted or recognised by the Trustee as an adopted child of the Member or Pensioner;
- (b) a step-child of the Member or Pensioner;
- (c) an ex-nuptial child of the Member or Pensioner;
- (d) a child of the Member or Pensioner born after the death of the Member or Pensioner;
- (e) a child of the Member's Spouse; and
- (f) someone who is a child of the Member within the meaning of the *Family Law Act 1975* (Cth).

72 What these definitions make clear is that the age of a child is not determinative of the status of dependency. Obviously, the younger the child, the greater a presumption of dependency might be – although even this will depend on the factual circumstances. The definition of "child" in the deed is simply describing a classificatory relationship.

## **General findings**

- 73 The applicant contends, and I accept, that, although the Tribunal set aside the trustee's decision (so that it could replace it with one which did not deduct taxation liabilities from the oldest daughter), its decision was, in substance, identical.
- 74 The trustee's decision was not one which could be said to be inconsistent with the terms of the trust deed and therefore the Tribunal was not bound to find it unfair and unreasonable: cf *AIA Australia Ltd v Lancaster* [2017] FCA 962 at [41].
- 75 Rather, the still unfolding events about how the deceased died, and what (if anything) was the spouse's involvement in the circumstances of his death, were, on the applicants' contentions before the Tribunal, matters which the trustee failed to grapple with in the exercise of its power under cl 28.1. In substance the applicants were contending it was an inappropriate exercise of discretion in those unfolding circumstances for the bulk of the death benefit to be given to the spouse. It was not in the best interests of all beneficiaries for those unfolding events to be put aside and not taken into account. Inherent in this, as I understand it, must be an acceptance that there should have been some delay in the trustee's decision (and, on review, in the Tribunal's decision as well).

## **Ground 1**

- 76 The same arguments were made on behalf of all the applicants, noting the practical reality that before the Tribunal the former spouse put forward much of the material on behalf of her daughters.
- 77 This ground is that the process adopted by the Tribunal was procedurally unfair in the unusual circumstances of the review before the Tribunal. The communications by the former spouse in June 2019 put the Tribunal on notice of new developments concerning the events on the night of the deceased's death, and the alleged involvement of the spouse in the events of that night, in particular a charge of murder against her. So far as appears from the material before the Tribunal, the identity of the person who killed the deceased was not certain, and there was little information before the trustee or the Tribunal about what had occurred that night (save for matters such as media reports). What the trustee and the Tribunal did know, however, was that the circumstances of that night were under investigation – first by the coroner as to the deceased's death, and then by the police as to the spouse's conduct.

78 In those circumstances, the applicants contend that if they had been given a further opportunity to be heard and, or alternatively, if the Tribunal had considered the former spouse's information – which they contend was credible, relevant and significant in the sense described in *Kioa v West* [1985] HCA 81; 159 CLR 550 – they may have been able to persuade the Tribunal, or the Tribunal might itself have been persuaded, that it was not fair and reasonable for the trustee to make a decision which simply implemented the deceased's wishes as expressed on a form filled out by the spouse (and signed by the deceased) only a few weeks before his death.

79 Correctly, the applicants contend that the Tribunal's reasons do not refer to the content of the email from the former spouse, nor to any consideration of the fact of the murder charge against the spouse. Also correctly, the applicants contend that the Tribunal relied on the submissions of the spouse and that its failure to take into account the more recent developments put to it by the former spouse was part of the denial of procedural fairness to the applicants.

80 In *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389 at [24], Gummow and Callinan JJ said (Hayne J agreeing):

To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice.

81 That statement of principle is applicable to the Tribunal's decision: cf *Southwell v Equity Trustees Ltd* [2015] FCA 536 at [162]; *Chapman v QSuper Board* [2020] FCA 88 at [49]. Prior to the completion of its review, the former spouse presented the Tribunal with credible, relevant and significant information about the spouse's alleged involvement in the events that led to the deceased's death. The Tribunal knew from earlier information that there was a police investigation underway. It knew, from the claims of the three daughters, and from the former spouse's submissions to it on their behalf, that there were competing hypotheses about what distribution would be in the best interests of all beneficiaries, what level of dependency on the deceased existed, and whether the nomination form filed just prior to his death really reflected his wishes. All these matters were factual issues for the Tribunal to determine and weigh as part of its function of deciding whether the exercise of the discretion by the trustee was fair and reasonable in *all* the circumstances. The last piece of information communicated to the Tribunal by the former spouse was capable of adding some further credibility to the position taken by her on behalf of her daughters, and by her daughters themselves. It was capable of affecting the decision whether the Tribunal should accept the assertions of the spouse at face value (as it did). It was capable of suggesting to the Tribunal that further inquiries and



consideration should be undertaken, rather than the fairly superficial approach which, with respect, its reasons reveal it took.

82 This was a very unusual situation. The Tribunal appeared to wish to shut its eyes to that fact. In doing so, it denied the applicants procedural fairness. The applicants were denied the possibility of a different outcome on the review because of that denial: see *Stead v State Government Insurance Commission* [1986] HCA 54; 161 CLR 141 at 145.

## **Ground 2**

83 The applicants submit that the investigation of a criminal matter relevant to the death of the member and/or “the initiation of criminal proceedings against the major beneficiary” were relevant considerations in the discharge of the Tribunal’s review function.

84 It is trite that whether or not a matter is a consideration that a decision-maker must take into account, so as to be characterised as a “relevant consideration”, depends on the scope, subject matter and purpose of the statute which confers the power on the decision-maker to make the decision concerned, or perform the task or function conferred: see *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; 162 CLR 24 at 39-40.

85 The matter identified by the applicants is not a matter which the Complaints Act requires the Tribunal to take into account. By s 33 a party to a review has an entitlement to make submissions. It may well be implicit in the scheme from the presence of s 33, and the function of the Tribunal, that it is bound to take any submissions which are made into account: cf *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164 at [29].

86 It was not the applicants’ contention that the Tribunal failed to take their submissions into account – that is, failed to consider them at all. I doubt this could have been inferred from the Tribunal’s reasons in any event. However, this argument was not made.

87 It is possible that this ground could have been framed as a failure by the Tribunal to take account of a fact critical to the outcome of its review, which is also capable of being an error of law (and a jurisdictional one): see *Minister for Immigration and Border Protection v MZYTTS* [2013] FCAFC 114; 230 FCR 431 at [52].

88 Ground 2 fails.

### Ground 3

89 The principles of legal unreasonableness are set out in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332, and further explained and applied by several Full Courts in this Court: see *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437 and *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1.

90 In the latter case, at [11]-[13], Allsop CJ said:

The boundaries of power may be difficult to define. The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.

Crucial to remember, however, is that the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error; rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful. The undertaking of that task may see the decision characterised as legally unreasonable whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised.

The relationship between the conclusion or outcome and the reasoning process revealed by reasons to reach it is one that should not be rigidly set. Reasons may fail to disclose an evident and intelligible justification or may not be sufficient to outweigh the inference that the decision is so unjust as to be (in the context of the statutory source of the power) beyond a lawful exercise of the power.

91 All these authorities continue to emphasise the demanding threshold which must be reached for an exercise of power to be characterised as legally unreasonable.

92 It is not strictly necessary to determine ground 3, as I have concluded ground 1 should succeed. However, since the matter will be remitted, I consider it is appropriate to indicate that had I been required to determine this ground, I would have found the applicants' contention to have some force.

- 93 In the highly unusual factual circumstances facing the Tribunal when it came to make its review decision (and especially after the former spouse's email of 22 June 2019), there was no evident and intelligible justification disclosed in its reasons (as to the role of which in legal unreasonableness see *Singh* at [47]) for the Tribunal's non-advertence to those circumstances in its reasoning about why the trustee's decision was fair and reasonable, in the proportions as between the three daughters and the spouse. There is no intelligible justification for taking what the spouse said at face value and rejecting what the former spouse and her daughters said. There is no reasoning supporting that choice. The treatment of the applicants' submissions at [34] of the Tribunal's reasoning, extracted at [48] above, illustrates the lack of justification.
- 94 With respect, contrary to the Tribunal's focus, whether or not the spouse fell within the definition of "dependent" was not the issue for the Tribunal (or the trustee), or was at the very edge of the issues necessary to decide. The real question was what the appropriate discretionary distribution was between those who were properly characterised as dependents. That question could clearly engage any facts, or allegations of fact, about why it was not an appropriate discretionary distribution to allocate most of the benefit to a person who was alleged to have been involved in the incident which led to the death of the deceased, and against whom a number of other allegations were being made. There is no reasoning at all about these matters. They could not be dismissed as vexatious after 22 June 2019, and in my opinion they are unlikely to have been able to be dismissed as vexatious before that date. A more detailed and careful inquiry was required than the one in which the Tribunal engaged. Further, the Tribunal may well have had to consider whether the distribution should await the steps in the criminal process, and what may or may not be revealed during those steps.
- 95 The Tribunal could have allowed oral submissions in order to better gauge the veracity of what the former spouse and her daughters were alleging: s 34(2). The Tribunal could itself have made further inquiries and obtained further information and documents: s 25. It was able to adjourn the review from time to time: s 42. The Tribunal had been told who the detective was who was investigating the criminal allegations. While the Tribunal may generally not be obliged to take such steps, it has ample powers available to it to conduct the kinds of inquiries which might be necessary in a particular case. This was, as I have observed, an unusual case. Without articulating what caused it simply to dismiss everything the former spouse and her daughters were saying, and to favour the account of the person who during its review was charged with the murder of her ex-husband, being the other man involved in the deceased's

death, it is difficult to describe both its reasoning and its conclusion as one to which a Tribunal, acting reasonably, could have come.

96 Finally, if I had been required to decide the legal unreasonableness claim, there were other factors I would also have taken into account. First, the Tribunal's reasons at [35]-[44] about the dependency of the daughters, and its conclusion they were "partially dependent" but were approaching the age where the deceased "would no longer be required to support them", is an approach which, with respect, is not entirely rational. There is no suggestion that, by law, the deceased was "required to support" the spouse. There was no evidence about what facts might have given rise to such a legal obligation, yet the trustee and then the Tribunal had been prepared to give the spouse the overwhelmingly greatest proportion of the death benefit. The concept of "dependency" which might be said to be the governing concept in the trust deed, and an important factor in the exercise of the discretion to distribute, is not age limited. While children becoming adults may well be a factor, much will depend on the factual circumstances. As I have noted, even with younger children, there may well be facts (and may have been here) which suggested they might not have been financially dependent on a deceased member. The Tribunal appeared to use age as a determinative criterion when it had no basis to do so.

### **Relief**

97 I consider the Court can take judicial notice of the fact that the spouse was committed to stand trial on a charge of the murder of her ex-husband. The existence and conduct of the committal proceedings were the reason the applicants requested the hearing and determination of this application be delayed. I accepted that was appropriate.

98 In those circumstances, and while the spouse is entitled to the presumption of innocence, some of the arguments and allegations being raised by the applicants can hardly be said to be fanciful or simply vexatious, so that they could be dismissed out of hand as the Tribunal did. The "full story" is not yet told.

99 Of course when the Tribunal comes to assess the review application again, the daughters will be older, and their circumstances may also have changed, as might the factual circumstances of others who fall within the definition of "dependent". These are matters for the Tribunal, as is the decision whether to await the outcome of the murder trial, and what additional material it should consider as part of its review, which may for example arise as part of the trial.

- 100 The applicants sought a direction from the Court that the remitted review should await the outcome of the criminal trial. I do not accept that is appropriate. The Court should not control how the Tribunal exercises its powers on review. The course to be taken by the Tribunal on remitter will be a matter for it, taking into account what has been said by the Court in these reasons, and whatever the factual situation is as presented to it.
- 101 Nor is it appropriate, as the amended notice of appeal sought, for the Court to determine the distribution of the death benefit itself. That is a matter for the Tribunal, if and only if it is satisfied that the trustee's decision was not fair and reasonable in the circumstances.
- 102 In their written submissions (although not in their amended notice of appeal) the applicants stated that they seek an order for costs. This was not the subject of argument and though the respondents did not participate in the hearing they stated that they wished to be heard in the event the applicants pressed for an order for costs. In my opinion, there having been no active contradictor, and there being no evidence of unreasonable conduct by either of the respondents, it would not be appropriate to make orders that the respondents, or either of them, compensate the applicants for their legal costs of this proceeding. However, since the applicants raised this matter in their submissions, they will have an opportunity to file written submissions if they do intend to press for an order for costs, and the respondents will have an opportunity to file written submissions in response.

I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Mortimer.



Associate:

Dated: 23 September 2020