

Court case provides another reminder for decision making by SMSF trustees

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As featured in this publication recently, the Victorian Court of Appeal has ordered the removal of a trustee from a family trust in an appeal from a previous decision, namely the case of *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142.

While the case centred on a dispute involving distributions from a family trust, it has a number of lessons for SMSF trustees, particularly in relation to the matters a trustee must have regard to in the exercise of a power.

Specifically the judgment confirms that particularly for superannuation funds, the decision of a trustee may be reviewable for want of 'properly informed consideration'.

That is, if a trustee's consideration is not properly informed, it is not genuine.

Therefore, the duty of trustees to properly inform themselves is 'more intense' in superannuation funds than for discretionary trusts.

The case quotes the High Court decision in *Finch v Telstra Super Pty Ltd* [2010] HCA 36.

In broad terms the Finch case concluded that the exercise of a discretion by a trustee is not subject to review by the courts; unless one of the following three factors is present:

1. The trustee does not act in good faith;
2. The trustee does not give real and genuine consideration to the exercise of the discretion and the purposes for which the discretion was granted; or
3. Reasons for the decision are provided by the trustee, but those reasons are unsound.

Furthermore, a trustee's decision cannot be reviewed unless on the material before the trustee it is one that no reasonable trustee could have made.

Given this test, best practice dictates trustees adopt a disciplined and detailed analysis of all possibly relevant issues before reaching a decision and clearly document their considerations.

Thus, as further explained in *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, the matters a trustee should consider may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever may be relevant.

While documenting all such investigations is critical, it is generally preferable to not formally record the reasons for the final decision as to do so unnecessarily exposes the trustee to a challenge based on having unsound reasons.

The issues in this regard are critical for SMSFs that have multiple members - and in any situation where payment of a death benefit is being deliberated.

By way of further example, the case of *Re Marsella; Marsella v Wareham (No.2)* [2019] VSC 65 provides another example of the types of issues that need to be considered by trustees of SMSFs before making a decision on how to distribute a member's death benefits.

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The original decision was upheld, essentially without any exceptions in the appeal case of *Caroline Elizabeth Wareham and Martin Wareham (as trustees of the Swanson Superannuation Fund) v Riccardo Giacomo Marsella (both personally and as executor of the estate of Helen Freeth Marsella (also known as Helen Freeth Swanson))* [2020] VSCA 92.

The central arguments by the trustees on appeal revolved around their belief that they had exercised their discretion validly and therefore the payment of 100% of the death benefit to one of the trustees personally should be reinstated.

In rejecting the argument, the appeal court confirmed:

(a) The trustees (through their lawyers) were on record as stating their belief that the deceased's surviving husband (who she had been married to for over 30 years) was '(not a) Beneficiary of the Fund' - a conclusion that was plainly wrong.

(b) There was also evidence to suggest the trustees believed they owed 'no duty to the estate or other beneficiaries' - again an erroneous assumption.

(c) Furthermore, the evidence supported a conclusion that the trustees had failed to look at the trust deed for the fund - a further breach of their duties.

Ultimately the court concluded that if the trustees did not exercise their discretion upon real and genuine consideration, there was no proper exercise of the discretion.

The fact that the discretion could have been properly exercised in the same way as the trustee proceeded (ie to pay the benefit entirely to one of the trustees) could not alter that position.

