

ATO disqualifies SMSF trustee who tried to use Merchant case in defence

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

An SMSF trustee and accountant who tried to leverage the decision of the recent case against Billabong Surf Clothing co-founder Gordon Merchant has been disqualified as a trustee by the ATO.

Matthew Burgess, director of View Legal, said in the original decision of Coronica and Commissioner of Taxation (Taxation)[2021] AATA 745, the factual matrix involved a range of breaches of the Superannuation Industry (Supervision) Act.

These included:

1. Section 66(1): prohibition on a trustee intentionally acquiring an asset from a related party.
2. Section 83: restrictions on the acquisition of in-house assets if the ratio of in-house assets to total assets exceeds 5 per cent.
3. Entering into transactions not at market value (as defined under section 10).
4. Contraventions of the accounting record keeping requirements, via the operation of a 'suspense account' (section 35A and section 65, which prevent the provision of financial assistance), despite the trustee arguing the approach was supported by Taxation Determination TD 2013/22, ATOID 2012/16, APRA SMSF Regulator's Bulletin 2018/1 and ATOID 2015/21.
5. Contravention of the sole purpose test (section 62) and the covenants prescribed in section 52 to keep the money and other assets of the SMSF separate from 'those (assets) that are held by the trustee personally'.
6. Breach of regulations regarding contributions mandated by section 34.

Burgess said the court's decision in 2021 confirmed that in the circumstances it would be inconsistent with the objects of SIS to issue a notice of compliance, thus the fund was held to be non-compliant and taxed at the penalty rate of 45 per cent.

"Some of the issues that supported this conclusion, in addition to those outlined above, were amplified by the trustee being an experienced accountant of more than 50 years, registered tax practitioner and registered company auditor," he said.

The court heard there were multiple contraventions over an extended period which were implemented by an experienced accountant, registered tax agent and registered company auditor, who ought to have known that the arrangements constituted contraventions of SIS.

"The facts show there were breaches of the provisions of the trust deed as well as lodgement of misleading documents with the tax office," Burgess said.

"There was also a reliance on undocumented valuation of a private investment company that, while not wilful, was grossly negligent if not incompetent and the contravention was not corrected within amnesty periods made public by the ATO and instead only corrected well after an audit activity had concluded."

SMSF Adviser

Initially, the request by the ATO in seeking to have the trustee disqualified was rejected due to the size of the monetary penalty imposed on the SMSF (due to the decision to make it non-compliant) and an attempted rectification of the breaches by the trustee.

“The original request was also rejected because of the trustee's commitment to keep their and the fund's affairs in compliance since the breaches and their willingness to provide appropriate undertakings such as not acting as the trustee of any other fund and continuing to invest only in listed shares and cash,” Burgess said.

However, in the appeal decision of *Coronica and Commissioner of Taxation (Taxation) [2024] AATA 2592* it was held that disqualification was appropriate given the nature and seriousness of the contraventions and the number of contraventions over several years, all arising directly from the member's decisions and actions.

“The tribunal stated these actions were not accidental or due to honest mistakes, nor did the member seek and rely on external independent advice. Indeed, the member had failed to act professionally, competently and with due diligence in carrying out his duties as a trustee of the fund,” Burgess said.

“The tribunal concluded that the member was not a fit and proper person to act as a trustee of a superannuation fund due to the seriousness and recurrence of the past contraventions, risk of future non-compliance and the desire of the tribunal to issue a message of general deterrence.”

Burgess added that while the tribunal acknowledged the member's “passion and enthusiasm for accounting”, it concluded that it was clear the member did not have the proper discipline and focus concerning the regulatory regime governing superannuation funds.

“Instead, the member was held to have adopted an opportunistic attitude to suit his self-interests and took advantage of his role as a trustee, while exhibiting a wilful disregard for the serious consequences,” he said.

“The response of the member following an audit to 'double down' to defend his questionable positions rather than taking responsibility and properly remedying all breaches was also a factor in reinforcing the need to disqualify (see Applicant in *WZWK and Commissioner of Taxation [2023] AATA 872*).”

He concluded that an attempt by the member to leverage the high-profile *Merchant* decision to avoid disqualification was also unsuccessful, given *Merchant* had undertaken the relevant transactions based on independent advice and there was no suggestion at the time that his actions were unlawful.