SMSFAdviser

# Meet the Friggers … and their ongoing contributions to educating SMSF advisers

***by Matthew Burgess, Director, View Legal***

The latest instalment of the (in)famous SMSF-related series of court decisions involving the Friggers has been released in Frigger v Banning (Application for Security for Costs on Review of Taxation) [2024] FCA 1207.

Advisers may recall an earlier, lengthy (namely 751 paragraphs) judgement in the decision of Frigger v Trenfield (No 10) [2021] FCA 1500 - with all key conclusions in the case confirmed in the similarly lengthy (namely 637 paragraphs), appeal decision of Frigger v Trenfield (No 3) [2023] FCAFC 49).

The earlier decisions, despite their length (and the fact that the court had to triage a range of conflicting statements and numerous examples of doctored or forged documentation), did provide helpful clarity for SMSF advisers across 5 key SMSF related areas, namely:

1. Complying with the prescribed standards;

2. Acquisitions from members;

3. Illegal conduct to support case;

4. Subjective intention of trustees;

5. Record keeping.

Approximately one-third of the way through the original judgement, the following caution was provided by the court 'the reader who has persevered this far should be warned: much of (the) evidence is simply a mess ... It is impossible to describe (it) in a tidy way ... the balance sheets and annual returns are a morass in which no sure footing can be found'.

In a similar vein, despite the (comparatively) extremely brief judgment in the latest decision (a mere 25 paragraphs), the court observed that 'Mrs and Mr Frigger are prodigious litigants in this and other courts over two decades. In most instances, they have conducted the proceedings as litigants in person'.

The genesis of the recent case was a costs order following a previous litigation that had been estimated at $106,987.09 - which Mrs and Mr Frigger objected to.

Unfortunately, on the costs being independently assessed (or 'taxed'), the total costs were determined to in fact be $160,098.41 - that is around 50% higher than first assumed.

At the heart of the most recent decision was the fact that Mrs and Mr Frigger had been previously bankrupted on the basis of debts owed under court orders for the payment of costs. The respondents were therefore seeking security for costs that evidently could only be sourced if the Friggers accessed funds retained within their SMSF (that had not been forfeited on the prior bankruptcy).

The court accepted that the superannuation entitlements of the Friggers, while retained within their SMSF, were not monies at risk if a costs order was to be made in favour of the respondents, although also noted the Friggers could evidently access their entitlements (that is they had satisfied a condition of release) if they chose to.

In imposing a requirement for $10,000 to be paid into court as security for costs if the Friggers wished to proceed with their arguments, the court noted that their claims were 'an army of arguments in an effort to resist paying any costs' and included:

(a) that the respondents were not permitted to attend the taxation;

(b) a request for the removal of the respondents' response to the grounds of objection from the court file;

(c) allegations that retainer agreements of the lawyers for the respondents were not in existence or were void;

(d) allegations that counsel in the proceedings entered into impermissible direct retainers and took steps to conceal this fact;

(e) allegations about a charge obtained from one of the respondents to secure payment of legal fees which was a sham for the purpose of defeating creditors of that respondent;

(f) that the respondents had admitted allegations in the proceedings that entitled them to recover any amount assessed under the costs orders as damages; and

(g) a request for an order that the certificate of taxation be set aside and an amount of $62,000 (that had already been paid into court by way of security for the costs of the proceedings) to be paid out to them, with accrued interest.