

Advisers with SMSFs on notice about trustee duties

23 May 2025 by Matthew Burgess, View Legal

As specialist advisers are acutely aware, the role of trusteeship of any entity is one the courts have regularly highlighted as requiring conduct of the highest standards.

In relation to SMSFs, the expectations of trustees are arguably heightened by the significant legislative obligations also imposed.

This fact has been highlighted by numerous cases over recent years, despite the high profile 2024 decision involving Billabong Surf Clothing co-founder Gordon Merchant, who was granted the right to remain in control of his SMSF, despite Tax Office attempts to have him disqualified (see *Merchant and Commissioner of Taxation* [2024] AATA 1102).

Background to recent case

For advisers who themselves are members of an SMSF, the standard of trustee conduct expected is likely further heightened, as highlighted by the decision in *Omibiyi and Commissioner of Taxation (Taxation and business)* [2025] ARTA 553.

In this case, the key aspects of the factual matrix were as follows:

- (a) a director of the corporate trustee had permitted 117 separate withdrawals from the SMSF (which were mostly used to pay mortgages over the member's family home and two other investment properties) over a 6 year period;
- (b) the withdrawals were in breach of a specific prohibition under the trust deed, as well as numerous sections of the Superannuation (industry) Supervision Act, such as section 35D (failure to lodge returns on time), section 65 (lending to members), section 62 (sole purpose test), section 84 (in house assets) and section 109 (arm's length investments);
- (c) the auditor for the SMSF had initially notified the fund of breaches in 2017, and multiple times thereafter;
- (d) the director admitted to ignoring the requirements of the trust deed and legislation because of 'financial hardship';
- (e) the director was tertiary qualified as an accountant and held a financial services licence and a casino licence.

Decision

In confirming the director should be disqualified the tribunal noted:

1. Whilst not directly related to superannuation, the director's qualifications would have given a better than average understanding of the legal implications of the conduct engaged in.
2. Continuing to engage in conduct causing breaches despite being on notice from the auditor was inappropriate.
3. 117 breaches was significant - and they were deliberate in knowledge of the prohibited nature of the transactions, and over an extended period. Indeed, it was held 'remarkable that despite ... clear and repeated advice from an expert in superannuation (the director) continued to contravene ... (showing) a contumelious disregard for the law'.
4. Given the contraventions were very serious and were repeated over a lengthy period despite independent advice of the breaches, it appeared the director was willing to continue to contravene until the regulator stepped in.
5. While the director had shown some commitment to improved conduct in the future (eg by engaging specialist lawyers and accountants and completing online courses; without disclosing the content of the courses - although admitting they did not relate to superannuation), there was nothing to support a conclusion that the director had materially improved his understanding of superannuation principles.
6. Furthermore, the director had attempted to maintain before the tribunal a narrative that the breaches were 'inadvertent ... and did not affect the fund's assets or expose the fund to risk and ... were the result of honest and reasonable mistakes', which arguments the tribunal noted the wider evidence completely contradicted.
7. While the tribunal accepted disqualification would impact the director's reputation as an accountant and businessman and likely have a financial impact, the key factor when exercising the discretion was protection of the integrity of the superannuation system, which includes protecting the investing public.
8. Ultimately, the tribunal held that the director presented an ongoing risk of non-compliance with the Superannuation Act, and thus it was appropriate that he be disqualified.

