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LIFE INSURANCE AND SUPERANNUATION ALERT

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Manglicmot v The Commonwealth Bank Officers' Superannuation Corporation Limited, NSW Court of Appeal, 27 July 2011

The Court of Appeal's decision in Manglicmot considers the extent of duties imposed on trustees by section 52 of the Superannuation Industry (Supervision) Act 1993 Cth (SIS Act) and the interpretation of TPD clauses - particularly whether a person who can only return to work part time is TPD.

The decision is good news for life insurers and superannuation trustees. It confirms that TPD clauses should be read strictly and that a person is only TPD if they are totally disabled from work.

For superannuation trustees, the decision confirms that s52(2)(b) and (c) SIS only codify, and do not add to, the general law duties of trustees. The Court rejected the appellant's argument that these sections impose strict liability on trustees for the outcome of their decisions.

WHO DOES THIS AFFECT?

Superannuation trustees and life insurers

HIGHLIGHTS

Section 52(2)(b) and (c) SIS do not expand a superannuation trustee's general law duties.

TPD clauses to be construed strictly.

Facts

- The appellant was an employee of the Commonwealth Bank of Australia (CBA) doing clerical work in branches. He suffered a series of injuries in 2000, rendering him unfit for full time work from November 2002. He reduced his hours from full time to 15 hours per week, spread over 3 days. On 25 August 2003 he accepted an offer of voluntary redundancy.
- The appellant was a member of The Officers' Superannuation Fund (the fund) and in September 2004, he made a claim for TPD benefits. The trustee of the fund was the Commonwealth Bank Officers' Superannuation Corporation Pty Limited (the Trustee). In August 2003 the Trustee held a group life policy with the Colonial Mutual Life Insurance Society Limited (the CMLA). The TPD definition in the CMLA group life policy expressly provided that a person was not TPD if they were able to work part time. Accordingly the appellant could not recover TPD benefits under the CMLA policy. The parties agreed that the appellant was only fit for part time work.
- The appellant argued that although he was not eligible for a TPD benefit under the CMLA policy, he would have been eligible under a previous policy with Hannover Life Re of Australasia Ltd (Hannover) which had insured members of the fund until June 2003. He therefore claimed that the Trustee had breached its general law and statutory duties by changing to a policy which was less favourable to him.

The Hannover policy contained the following TPD definition:

"TOTAL AND PERMANENT DISABLEMENT means:....

(a) ...

(b) having been absent from work through injury or illness for an initial period of six (6) consecutive months and in our opinion being incapacitated to such an extent as to render the Insured Person unable ever to engage in or work for reward in any occupation or work which he or she is reasonably capable of performing by reason of education, training or experience".

CONTACT



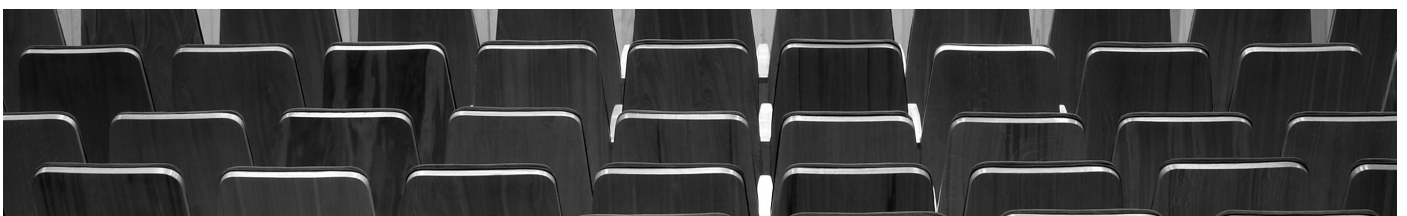
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The issues

The Court of Appeal considered the following issues:

- The interpretation of s52(2)(b) and (c) SIS which imports into the governing rules of a superannuation entity a covenant by the trustee;
 - (b) To exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;
 - (c) To ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries.

Does this section impose strict liability on a trustee for the outcome of their decisions?

- Whether the words in the Hannover TPD definition "unable ever to engage in or work for reward" should have imported into it a notion that it is full time work under consideration?
- Whether the appellant had been absent through injury or illness given that he ceased work because he accepted a voluntary redundancy?

Court of Appeal Decision

• Interpretation of Section 52 SIS

The appellant argued that s52(2)(b) and (c) SIS imposed additional duties on a trustee beyond its general law duties. Specifically, the appellant argued that the words "to ensure" in subsection (c) imposed strict liability on trustees to ensure that the outcome, rather than the process, of the exercise of their powers was in the best interests of beneficiaries. The Court rejected the appellant's argument. The Court found that neither s52(2)(b) or (c) added materially to a trustee's general law duties to take reasonable care and to act in the best interests of members of the fund. The Trustee's general law obligation could be expressed, in the language of s52(2)(c), as an obligation to perform and exercise its duties and powers in the best interests of the beneficiaries. The words "to ensure" add nothing; an obligation is an obligation. The Trustee was exercising a discretionary power when it negotiated the



terms of the CMLA policy, particularly the TPD definition and “to ensure” does not turn the question of exercise of a discretionary power into one of strict liability. There is liability if the discretionary power is exercised improperly, but otherwise there is not.

- **Is a person TPD if they can only work part time?**

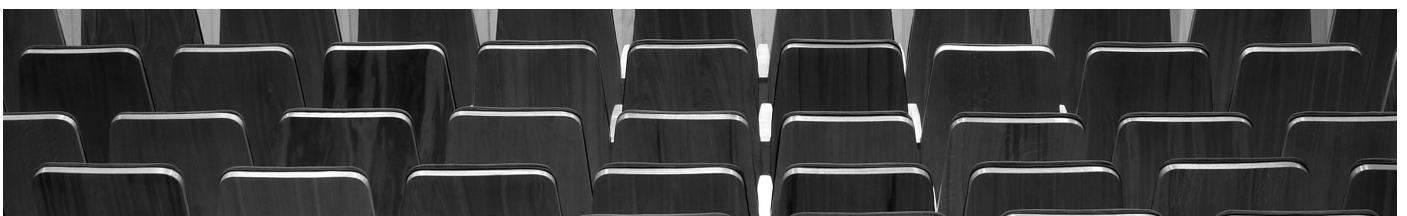
The wording of the CMLA policy specifically excluded those who could work part time from being TPD. The appellant argued that if the Trustee had not changed from the Hannover policy to the CMLA policy (with its allegedly stricter TPD clause) he would have been entitled to a TPD benefit. The appellant claimed that the second limb of the Hannover TPD definition should be read with the bracketed words included:

Unable ever to engage in or work [full time] for reward in any occupation or work.

Justice Rein at first instance rejected the appellant’s construction and so did the Court of Appeal. The Court reviewed all the case law dealing with what has come to be referred to as the “full time/part time question” and concluded that in respect of the Hannover TPD definition under consideration, the definition requires unfitness to work, without distinction between full time and part time work. The Court found that the words “unable ever to engage in or work for reward in any occupation or work” should be interpreted strictly. Our view is that this finding overrules the oft cited 1993 decision of *Chammas v Harwood Nominees Pty Ltd*.

- **Causation - plaintiff’s acceptance of voluntary redundancy**

The TPD definitions in both the Hannover policy and the CMLA policy required the appellant to be absent from all work or employment for an initial period of 6 consecutive months through (Hannover) or as a result of (CMLA) injury or illness. The Trustee argued that the appellant did not satisfy that requirement as he ceased work because he accepted redundancy, not because he was unable to work. It was also relevant that about 2 weeks prior to accepting the offer of redundancy, the appellant signed a redeployment opportunity form seeking an alternate position with the same employer.



The Court of Appeal agreed with the Trustee that the evidence was that the appellant ceased work because he accepted redundancy, not because of sickness, illness or injury.

Implications

The Court of Appeal's finding that the covenants implied into a fund's trust deed by s52(2)(b) and (c) SIS do not alter the nature or content of a trustee's general law duties, will come as a comfort to trustees.

Claims officers (for both insurers and trustees), when determining a TPD claim under a clause similar to the Hannover policy, can now be confident in determining the claim according to the words of the clause, without having to consider the full or part time nature of a persons pre-disability employment.

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