

## LIFE AND SUPERANNUATION CASES

# Success at Stage 1

## *Tambakeras v UniSuper Limited* (NSWSC 2022)

[Link to decision](#)

In an era of constant challenge to Stage 1 TPD decisions, the NSWSC in *Tambakeras v UniSuper Limited* (NSWSC 2022) has upheld a trustee's decision to decline a claim for a Disablement Benefit.

### Brief Facts

Mr Tambakeras (the **plaintiff**) was a former computer aided design draftsman at the University of Sydney. He developed a psychiatric injury in the context of workplace bullying and harassment allegations. He accepted a redundancy on 25 February 2011, aged 53. At the time, he had been working in a restricted capacity.

As part of his workers compensation claim, the plaintiff was referred to an employer-sponsored program to facilitate a return to work. His GP certified him fit for part time work until July 2011 before certifying him as fit for full time work. In November 2011, following unsuccessful job seeking, the GP certified him as unfit for all work due to a 'significant recent worsening' of his condition.

The plaintiff lodged a claim with UniSuper (the **Fund**) for a Disablement Benefit, which required he cease employment 'due to Disablement'. 'Disablement' was relevantly defined as 'a state of health which in the opinion of the trustee renders a Member permanently incapable of performing duties or engaging in employment for which they are reasonably qualified by training and experience'. The plaintiff furnished 'later in time' reports in support of his claim.

The Fund, preferring the contemporaneous evidence and noting medical evidence which raised concerns about the veracity of the plaintiff's self-reports<sup>1</sup>, declined the claim on numerous occasions. The plaintiff commenced proceedings alleging the trustee's determination to decline the claim ought to be vitiated on grounds the trustee breached its duties owing to him as a member of the Fund.

### Trustee's decision making duties

Henry J summarised the well-established principles that apply in relation to a trustee's decision making duties:

- when making a determination, a duty to apply a trust fund, in accordance with the trust deed;
- duties to act in good faith, on a real and genuine consideration of the material before it, for a proper purpose, for sound reasons where the trustee has disclosed reasons;
- a duty to give properly informed consideration, including making further inquiries when necessary;
- a duty to act honestly, to exercise the same degree of care, skill and diligence as a prudent trustee would exercise and to exercise powers in the best interests of the beneficiaries<sup>2</sup>.

### Judgment

#### **Duty to give properly informed consideration**

The plaintiff claimed the trustee was 'cherry picking' aspects from within conflicting material, in breach of its duty of inquiry. The trustee contended it was not obliged to make further inquiries as it was sufficient to resolve the conflicts of opinion by making a judgment on the preponderance of evidence as to what is the more powerful or relevant material.

The Court found no evidence the trustee breached its duty to give properly informed consideration. It considered that the 'large body' of medical evidence allowed the trustee to make a 'properly informed choice' between the various opinions. The bulk of the material provided a 'generally consistent picture' that aligned with the view the plaintiff was not relevantly disabled at the relevant date.

In the circumstance of the case, the Court found that the trustee was entitled to look at the wide range of contemporaneous documents that were submitted in the context of the workers compensation claim as these resolved many of the inconsistencies and were 'likely to be more accurate and reflective' of the doctor's view at the relevant time.

## Duty to act in good faith

The Court rejected an argument that the trustee's duty to act in good faith required it to provide the plaintiff with an opportunity to consider and respond to the trustee's internal memoranda, including comments made by its chief medical officer (CMO) and/or internal claims philosophy documents:

- The memoranda concerned the trustee's 'internal deliberative process and proposed conclusions' that 'are in a different category to medical reports or adverse information' requiring comment by the plaintiff. The memoranda and CMO's comments 'did not identify any critical fact, argument or piece of evidence which had not previously arisen'. The adverse recommendations drawn in the memoranda and the suggestions made by the CMO were conclusions which were obvious or natural evaluations of the material known to or supplied by the plaintiff.
- The claims philosophy documents were of a general nature and the trustee retained its exercise of discretion. The plaintiff was otherwise aware, through correspondence, that the trustee was placing greater weight on contemporaneous evidence.

## Duty to exercise sufficient care, skill and diligence

The first decision of the trustee was vitiated by the Court on the grounds the trustee failed to comply with its duty to exercise sufficient care, skill and diligence due to an absence of quorum at the first decision meeting<sup>3</sup>. However, this was not fatal to the Stage 1 assessment as the Court accepted that each determination of the trustee was a fresh determination and each determination replaced the previous determination. Referencing the principles espoused in *MetLife Insurance Ltd v MX* (NSWCA 2019), the Court said:

*'A fair reading of the declinature decision and minutes of the trustee delegate meeting (and memorandum) make plain that, in reaching its Second decision, the IC undertook a fresh consideration of Mr Tambakeras' claim for payment of a Disablement benefit. It did so by reference to all the material that was available. The outcome of that review was a determination... that Mr Tambakeras was not, at the relevant times [relevantly disabled], consistent with the First decision...'*

## Implications

This case demonstrates the limits to a trustee's high duty of inquiry. It sets the tones for what kind of inquiries are necessary. Trustees are not required to make inquiries to a point of factual perfection. A conflict in information may be readily resolved without further inquiry where there is a substantial amount of information available, which allows a properly informed choice to be made between rival sources of information.

Whilst insurers are not subject to the same high duty of inquiry, the decision may give some guidance as to what an insurer might reasonably do with competing bodies of evidence.

<sup>1</sup> Reporting the plaintiff was not suffering from a psychiatric diagnosis and/or was exaggerating his difficulties.

<sup>2</sup> ss52(2)(a), (b), (c) of the *Superannuation Industry (Supervision) Act 1993* (Cth).

<sup>3</sup> The Court having found that one of the members who sat on the trustee delegate committee at the time had not been properly appointed under the relevant delegated instrument of the trustee.

## For more information, please contact



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