THE NATURE OF A MEMBER'S INTEREST IN A SUPERANNUATION FUND AND STANDING TO COMMENCE PROCEEDINGS

SUPERANNUATION LAW CASE NOTE

Shimshon v MLC Nominees [2021] VSCA 363.

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[The case considers the rights of members of superannuation funds to bring proceedings against the trustee to recover loss or damage under either general law or statute. The decision relates to group proceedings in Victoria but involves principles that may be more broadly relevant for trustees of superannuation funds, members, and their legal representatives. Consideration is also given to the nature of a member's interest in a superannuation trust, and how the general law and statute apply in a superannuation context. This decision appears to demonstrate the continued development of a distinctive superannuation context which is relevant to the application of equitable principles in general law and the interpretation of statute.]

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I INTRODUCTION

The standing of superannuation fund members to commence a class action against the trustee of a superannuation fund was considered in the recent decision in *Shimshon v MLC Nominees,*[1] an application for leave to appeal to the Supreme Court of Victoria Court of Appeal in relation to the decision by the Victorian Supreme Court in *Shimshon v MLC Nominees Pty Ltd*.[2]

The decision is significant because it considered in obiter the nature of a member's interest in a superannuation fund and made observations on the construction and interpretation of s 55 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act).

The decisions also give detailed consideration to the legal remedies that might be available to members of a superannuation fund where they suffer loss caused by the trustee and explore the extent to which the general law of trusts may diverge when applied in the context of interpreting the statutory regime that applies to the superannuation system.

II BACKGROUND AND FACTS

The class action was commenced by Mr Shimshon on behalf of members against MLC Nominees Pty Ltd as trustee for The Universal Super Scheme (TUSS), and NULIS Nominees Australia Limited as trustee for the MLC Super Fund which received a transfer of members from TUSS via Successor Fund Transfer in 2016.

The applicant's claims against the trustees related to loss or damage to member interests in the fund which resulted from MLC Nominees Pty Ltd (the trustee's) alleged failure to transfer Accrued Default Amounts to a MySuper product as soon as reasonably practicable.

The applicant claimed that this failure constituted a breach of the general law duties and statutory covenants imposed on the trustees by the *SIS Act* and resulted in loss or damage to members in the form of additional fees and costs that were deducted from member accounts.

[1] *Shimshon v MLC Nominees* [2021] VSCA 363.
[2] *Shimshon v MLC Nominees Pty Ltd* [2020] VSC 640.

III AT TRIAL

The applicant sought relief in the form of: (1) declarations that the trustee contravened the *SIS Act* and breached its duties at general law; and (2) statutory compensation under s 55 of the *SIS Act* and, in the alternative, equitable compensation to the members themselves or restitution of the trust corpus.[3]

At trial, the Court decided that the class action commenced by the plaintiff, Mr Shimshon – a member of the fund – had not been validly commenced as a group proceeding under Part 4A of the *Supreme Court Act 1986* (Vic). The trial judge held that s 33B(2)(b)(ii), which excludes group proceedings that concern "property subject to a trust,"[4] operated to preclude the class action on the grounds that the remedies sought "flow[ed] from causes of action that are about trust property" and the members were not entitled to make a personal claim as the nature of the interest held by members in the fund was not an equitable proprietary interest that would provide the requisite standing to commence proceedings against the trustee.

In his judgement, John Dixon J focused on the nature of the relief sought by Mr Shimshon and reasoned that the claims made by the members were claims "to enforce causes of action to restore trust property diminished through breaches of duty by the trustee,"[5] and that it therefore could not sensibly be contended that a claim for equitable compensation or restoration of the beneficiary's equitable interest would flow from causes of action that are about trust property.[6]

His honour reasoned further that the claims of members "could not be about the individual entitlements of the beneficiaries because, in the relevant sense, 'there are none':[7]

> *The relief sought in the proceeding cannot be about the individual entitlements of the beneficiaries, because there are none that can be or have been alleged. That is because the terms of the governing rules under which a member may become entitled to a payment have not yet been satisfied. The plaintiff does not, and cannot, allege a present entitlement to an interest in either superannuation fund and must be treated as a member whose interest remains contingent upon the occurrence of a future event. Put another way, the plaintiff's interest has not yet vested in him. I should say more about the nature of a member's entitlements in a superannuation fund.*[8]

The basis for John Dixon J's conclusion was reasoned to be authorised by decisions in several precedents which supported the description of a member's entitlement in a superannuation fund as an 'expectancy'.[9] He

[3] *Ibid*.
[4] *Supreme Court Act 1986* (Vic) s 33B(2)(b)(ii).
[5] [2020] VSC 640 at 124.
[6] [2021] VSCA 363 at 5.
[7] [2020] VSC 640 at 124.
[8] [2021] VSCA 363 at 121.
[9] *Re Coram; Ex Parte Official Trustee In Bankruptcy v Inglis* (1992) 36 FCR 250, *Caboche v Ramsay* [1993] FCA 611, *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254; [2010] HCA 36, *Macoun v Commissioner of Taxation* (2015) 257

also went on to characterise the nature of a member's interest in a superannuation fund as being 'an accounting allocation' of the member's entitlement and 'an expression of a legitimate expectation'.[10]

Consideration was given to the argument put forward by counsel for Shimshon that a member's entitlement to transfer or rollover their interest in the fund revealed that the member's interest was 'not merely contingent on a future event', however the argument was dismissed as it had not been pleaded. His honour contemplated in obiter that 'a rollover or transfer would not change the nature of the existing member's interest; it would simply transfer it to a different trust fund, subject to the same contingency events.'[11]

Reasoning that members — as beneficiaries of the superannuation trust — did not have a present entitlement to an interest in the fund, John Dixon J held that members of the superannuation fund therefore had no general law right to commence an action against the trustee to seek equitable remedies.

John Dixon J then turned his attention to the construction and interpretation of s 55(3) of the *SIS Act* which provides that a person who suffered loss and damage as a result of conduct in contravention of a covenant contained, or taken to be contained, in the governing rules of a superannuation fund might recover the amount of that loss and damage by action.[12]

The judge observed that "[t]he plaintiff has not suffered loss or damage, notwithstanding that his expectation — that he may suffer loss or damage in the future — could be legitimate.[13] Further, John Dixon J reasoned that:

> *Applying established statutory construction principles, I accept the defendants' contention that the plaintiff's submission — that 'loss or damage' in s 55(3) should be read more broadly than those concepts are understood at general law — cannot be correct. The text of the section, using the word 'suffers' rather than 'will suffer', does not admit of an expectation. Loss and damage does not extend to prospective loss.*[14]

Such an interpretation of the statute, seemingly constructed by reference to the judge's reasoning concerning the general law nature of a member's interest in a superannuation fund, would operate to significantly limit the operation of s 55 and member rights to rely on it as a source of statutory remedy to loss or damage caused by the trustees breach of its statutory covenants.

John Dixon J sought to address such a concern, reasoning that such a construction didn't deprive s 55(3) of any meaningful operation, suggesting that it would still operate under circumstances where a member's interest

CLR 519; [2015] HCA 44, and *Commonwealth Bank Officers Superannuation Corporation v Beck* [2016] NSWCA 218.

[10] [2020] VSC 640 at 119.

[11] [2020] VSC 640 at 136-137.

[12] *Superannuation Industry (Supervision) Act 1993* (Cth) s 55(3).

[13] [2020] VSC 640 at 146.

[14] [2020] VSC 640 at 147-149.

had vested through the occurrence of a contingency event (such as retirement or disablement), or a proceeding by a new trustee against a former trustee.[15]

In concluding that the statutory causes of action under s 55 of the *SIS Act* didn't entitle the applicant to a cause of action, the judge reaffirmed his reasoning that where the trust property is diminished, "the trustee is the legal owner of that trust property and it is the trustee who suffers loss or damage in the sense to be understood from the statutory text and context of s 55."[16]

IV ON APPEAL

The Court issued two decisions which both held that the application for leave to appeal to the Supreme Court of Victoria Court of Appeal should be granted. Sifris and Walker JJ, and separately Whelan JA reasoned independently in reaching the same conclusions. The decisions provide an important clarification to the law concerning the nature of a member's interest in a superannuation fund, and the associated standing of members to bring a cause of action under the general law and s 55 of the *SIS Act* to seek remedy for a diminished interest in the fund caused by the trustee.

Sifris and Walker JJ overturned the reasoning of John Dixon J at trial in ruling that the applicant did have standing to make the claims that had been pleaded, reasoning that the applicant (and other members) had an equitable proprietary interest in the funds, and that such claims and proceedings commenced were not about the trust property but rather the members' holding the trustee to account for breaches of trust.[17]

In support of their reasoning, the judges rely on Whelan JA's analysis of the relevant precedents. His Honour's analysis concluded that the judge at trial had misinterpreted and incorrectly applied the decision in *Young v Murphy*,[18] in concluding that a chose in action will properly belong exclusively to the trustee where the remedy upon successful prosecution will be part of the corpus of the trust estate.[19]

Whelan J's decision asserts that the judge in *Young v Murphy* "clearly understood that beneficiaries undoubtedly have standing to bring actions for breach of trust."[20]

In their decision, Sifris and Walker JJ articulated the Court's position clearly in holding that:

> *Members are clearly prejudiced by the alleged breaches and the consequential impairment of their beneficial interest. Their account balances in the fund are incorrect. The trustee is obliged to maintain correct balances. The correct balance is important in relation to tax, family law and financial planning*

[15] [2020] VSC 640 at 148.
[16] [2020] VSC 640 at 149.
[17] [2021] VSCA 363 at 13.
[18] *Young v Murphy* [1996] 1 VR 279.
[19] [2021] VSCA 363 at 147.
[20] [2021] VSCA 363 at 149.

> *matters. It is also relevant for other purposes, such as transferring or rolling over to another fund, or giving the trustee directions as to alternative investment options. This prejudice is, in our opinion, sufficient to give the applicant standing so far as the pleaded claims are concerned. That is, prior to the ultimate payment from the fund, a fund member has rights and is entitled to protect and vindicate those rights.*[21]

In holding that the beneficiaries of the trust may have standing under the general law to commence an action against a trustee claiming remedies to loss of damage allegedly caused by a breach of trust, the Court has clarified the principle that members of a superannuation fund have an equitable proprietary interest in their fund, notwithstanding that they may not have an immediate right to payment. While acknowledging that members may not have a proprietary interest in any specific assets of the fund, the decisions clarify that a member's interest is best characterised and understood as prospective or conditional rather than contingent.[22]

Sifris and Walker JJ also made observations in relation to the trial judge's interpretation of s 55(3) of the *SIS Act*, where it was held that the applicant had not suffered damage or loss – rather he may suffer loss or damage in the future – and therefore had no right to the statutory cause of action under s 55(3).

Their Honours reasoned that the question of when a person suffers loss of damage for the purpose of s 55(3) is a question of statutory interpretation and construction that requires regard be given to the text, context, and purpose of the section.[23] The reasoning also relies on the authority of *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*, in observing that it is appropriate to have regard to the principle of construction of beneficial legislation (which includes the *SIS Act, section 55 in particular*) in a manner which accords a 'fair, large, and liberal interpretation' rather than an interpretation which is literal or technical.[24]

In adopting such an interpretation of s 55(3) of the *SIS Act*, the judges also considered the statutory context and purpose of s 55, which included:

- The High Court's characterisation of employer contributions to a superannuation fund as 'deferred pay';[25]
- Statutory requirements that describe members as having 'benefits in the fund';[26]
- Requirements on trustees to maintain minimum benefits for members;[27]
- Obligations on trustees to allocate contributions to individual members;[28]

[21] [2021] VSCA 363 at 14.
[22] [2021] VSCA 363 at 264.
[23] [2021] VSCA 363 at 264.
[24] *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232.
[25] *Finch v TelstraSuper Pty Ltd* (2010) 242 CLR 254, 271 [33]; [2010] HCA 36.
[26] *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 5.02-5.03.
[27] *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 5.04.
[28] *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 7.08.

- The portability of interests between superannuation funds;[29] and
- The treatment of superannuation benefits in family law proceedings.

It was reasoned that "each of these matters supports a reading of 'loss or damage' in s 55(3) as sufficiently broad as to include a diminution in the member's individual account within the fund, even where the member's entitlement to payment out of the fund has not crystallised."[30]

Sifris and Walker JJ also gave consideration to extrinsic materials in constructing the intention of Parliament when debating the *Superannuation Industry (Supervision) Bill 1993* (Cth) (SIS Bill).[31] The judges observed that "an important purpose of s 55(3) is to provide a meaningful remedy to members of superannuation funds whose interests are affected by a breach of the statutory covenants,"[32] as evidenced by the relevant Parliamentary debates, which justified the *SIS Bill* on the basis that "[a]ny member who suffers a loss or damage due to a breach of these covenants will have a statutory right of action against the trustee."[33]

Sifris and Walker JJ's decision applies the principles of statutory interpretation to the construction of s 55(3) in a way that overturns the interpretation adopted by the judge at trial — that had the effect that, in many cases, a member will have no claim under s 55(3) against a trustee, and that only the trustee will have such a claim — on the basis that such an interpretation is at odds with the purpose of that sub-section.[34]

Whelan J's decision also explored the relationship between the general law of trusts in equity and its relevance for the interpretation of superannuation trusts that are subject to the statutory supervisory regime. The judge observed that "[s]uperannuation trusts are different to other trusts, and principles applying to other forms of trust may not apply to them or may not apply in the same way. Superannuation is 'deferred pay'. The interest of a member of a superannuation fund is not analogous to that of an interest upon remainder or that of a member of a class of beneficiaries in a discretionary trust."[35]

His Honour's decision adds to the existing body of case law that suggests a trend of divergence of the equitable principles that apply to trusts in other contexts, particularly discretionary trusts or solicitor's trust accounts, as not being automatically applicable to superannuation trusts.

V ANALYSIS & CONCLUSIONS

While the Court has granted leave to the applicant to appeal to the Court of Appeal, the merit of the claims pleaded remain the subject of ongoing proceedings.

[29] *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 6.33 and 6.44.
[30] [2021] VSCA 363 at 64.
[31] *Superannuation Industry (Supervision) Bill 1993* (Cth).
[32] [2021] VSCA 363 at 65.
[33] *Commonwealth, Parliamentary Debates, House of Representatives*, 27 September 1993, 1089.
[34] [2021] VSCA 363 at 67.
[35] [2021] VSCA 363 at 264.

The nature of a member's interest in a superannuation fund

Although the Court of Appeal's reasoning in relation to the nature of a member's interest in a superannuation fund is largely obiter, lawyers advising and representing superannuation trustees and members of superannuation funds should consider its impact on a member's standing to bring suit against a superannuation trustee and the associated remedy.

The characterisation of interests under trusts dates back to the 19th century when property lawyers often considered whether the interests of beneficiaries in trusts were vested, contingent, defeasible or mere expectancies.[36] The characterisation of a member's interest in a superannuation fund has similarly been the subject of debate amongst scholars and practitioners and has evolved over the years in the courts.

John Dixon J relied on cases describing a member's interest as:

- "[I]nchoate," "no more than an expectancy," "neither the legal nor the beneficial owner," as "entitlements are all in the future and are all dependent upon the happening of a prescribed event, of which the most common was the attainment of an agreed retirement age"; and
- An equitable proprietary interest in the fund, albeit one which did not carry an immediate right to payment," which "was conditional in the sense that no benefit might be paid until certain conditions were satisfied." The fact that the trustee could deduct amounts from the member's account to pay expenses did not warrant a different result.
- A "beneficial interest" of which "the precise form and quantum" is contingent on particular events.[37]

The Court of Appeal's decision clarifies that a member's interest in a superannuation fund is: a "proprietary right" that is "more than a 'mere expectancy' or a 'legitimate expectation,'" and "prospective" rather than "contingent," as it "is certain that there will be an entitlement, and the member cannot be deprived of it."[38]

It is also worth noting here that the SIS Act defines beneficiary as "a person (whether described in the governing rules as a member, a depositor or otherwise) who has a beneficial interest in the fund, scheme or trust," and a "MySuper member" as a "member of a regulated superannuation fund [who] hold a beneficial interest in the fund of a class that the RSE licensee of the fund is authorised to offer as a MySuper product."

As the Court of Appeal's decision on this issue is largely obiter, it is very likely that its observations will be the subject of further debate and consideration by courts. In the meantime, however, the decision provides insight as to the nature of a member's interest in a superannuation fund as being that of an equitable proprietary interest that provides standing in general law for proceedings by a member against the trustee, such that

[36] Hill, Graham, *The True Nature of a Member's Interest in a Superannuation Fund*, [2002] J|ATax 1.
[37] (2010) 242 CLR 254.
[38] [35]-[39]

members may be able to bring class actions against trustees for breach of trust. We are, however, of the view that while in obiter, the decision is the reasoning of a superior – and appellate – court which is likely to prove to be persuasive.

The text, context, and purpose of section 55(3)

The Court of Appeal felt it appropriate to address the interpretation of section 55(3) at Trial, while acknowledging that it was not strictly necessary. The decision related to the interpretation of section 55(3) appears to be orbiter, yet it remains important as it has already been relied on in the interpretation of section 55(3).

In *Brady v Nulis Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund (No. 3)*,[39] the Applicant submitted that the "critical question" at the initial trial is whether Nulis' conduct, "if proved, caused the value of a relevant interest or amount to reduce and whether that reduction sounds in damages under s 55(3)" of the SIS Act. The Applicant cites *Shimshon* as support to frame the interpretation of section 55(3) in a manner that is consistent with the Court of Appeal's interpretation, being that "the section was specifically intended to confer on any person who has suffered loss or damage the right to seek compensation unconstrained by general law principles, and that "loss or damage" was to be construed broadly."[40]

Despite finding that the question, as framed, would go beyond the Applicant's pleading, the court analysed the Court of Appeal's interpretation in *Shimshon* with approval and suggested that the Applicant may wish to amend his pleading and a consequential amendment to the common questions for the initial trial would be considered.[41]

While attention should be paid to any further consideration of the interpretation of the breadth of "loss or damage" under section 55(3) in superior Commonwealth Courts, it does appear that a broader interpretation is in favour. This broader interpretation provides members with a statutory cause of action under section 55(3) without needing to demonstrate a present benefit entitlement.

More member class actions?

The decision in *Shimshon* is also important to the extent that it considers the rights of beneficiaries to commence group proceedings, or a class action against the trustee in circumstances where errors are made in calculating or disclosing member benefit entitlements.

The total penalty amount from ASIC proceedings resulting from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry as at 31 December 2021 was $110.67 million (with 10 proceedings still before the courts). These proceedings have ranged from relating to misleading and

[39] [2022] FCA 224 at 25.
[40] [2022] FCA 224 at 16-25.
[41] [2022] FCA 224 at 24-29.

deceptive conduct for failures to update defective disclosure statements to charging fees for no service. While most entities subject to ASIC's enforcement actions have completed remediation activities to remediate member accounts, does this decision add an additional litigation risk that superannuation trustees should be considering in the event an issue is uncovered – defending a class action? We think yes.

While largely obiter, the decision and the Court of Appeal's reasoning should prompt trustees and those advising them to seriously consider the potential implications of this decision, alongside the possible increase in the risk of class actions, when assessing potential breaches.

The application of equitable principles in the superannuation context

The Court of Appeal's decision is significant in adding momentum to the trend towards a divergence in the application of equitable principles that apply in the general law of trusts in a superannuation context to other trust contexts. In reaching the conclusion that "the interest of a member of a superannuation fund is not properly characterised as contingent," but rather "prospective" based on the certainty "that there will be an entitlement, and the member cannot be deprived of it," the Court of Appeal "consider[ed] it important to emphasise the particular nature of the modern superannuation funds."

At the inception of the SIS Act, it was deemed to simply clarify the obligations already imposed by trust law. However, the utility of using equitable principles to interpret superannuation law, which is now largely governed by statute, is increasingly diminished. As recognised by the Hon Ronald Sackville AO QC in a paper titled *Duties of Superannuation Trustees: From Equity to Statute*, which was presented at the 2010 Law Council Superannuation Conference, the "progression towards a separate specialty of superannuation law has been marked by a transition from a system governed largely by common law and equitable principles to one governed largely by statute."[42]

The purpose of statutory interpretation is to decipher what the legislature intended through the words of the statute. The starting point is the text of the statute and the ordinary, natural meaning of the words used, in the context of the entirety of the statute. Reference to legislative history or equitable principles in trust law generally becomes relevant in deciphering the purpose of the legislative text only (some may argue that such consideration is only appropriate where the terms of the statute are ambiguous).[43]

As dictated by one of the maxims of equity, equity follows the law and does not interfere where the law exhaustively covers an area. Does the Court of Appeal's decision and reasoning in relation to section 55 of the SIS Act edge superannuation law closer to a time where statute exhaustively covers the field of superannuation? While, superannuation law is not "codified" in statute in its entirety and the general law of trusts still has an important role in supplementing the statutory law, the general law is being applied with a

[42] Superannuation Committee of the Law Council of Australia, *The Evolving Role of Trust in Superannuation* (2017).

strong focus on context – the superannuation context, which may at times diverge from traditional equitable principles and the general law of trusts applied in other contexts. But isn't this the very nature of equity?

The importance of context, both in the construct of statutory interpretation and the application of equitable principles, must not be ignored. The modern approach to statutory interpretation is that statutory text must be interpreted in conjunction with its context in the first instance (not only where the text is ambiguous). In the same way, equity has since its origins given significant weight to the particular circumstances of a case.

As the corpus of superannuation law continues to develop alongside the general law of trusts, the professional and social context within which it operates, must undoubtedly lead to it diverging away from other trust contexts. We may in the future refer to the law of superannuation as a field that is closely related to, but separate and distinct from, the general law of trusts. As the High Court's observation in *Finch* – "[f]or some people, superannuation is their greatest asset apart from their houses . . . Superannuation is not a matter of mere bounty, or potential enjoyment of another's benefaction… It is deferred pay," and with future increases in the superannuation guarantee and the projection that superannuation assets will grow to over 200% of GDP by 2061, it will become even more important to emphasise the nature of modern superannuation funds and their purpose, as relevant context in applying equitable principles developed in other trust contexts to the context of superannuation.

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