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THE DECISION NOT THE DISABILITY

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REJECTION
CLAIM

The decision, not the disability

To successfully challenge a rejected claim for total and permanent disability benefits, the claimant must show that the superannuation trustee or its insurer breached one of its duties.

By Nawaar Hassan

Total and permanent disability (TPD) claims to superannuation funds have become an important part of any personal injuries practice. While the exact criteria differ, superannuation fund members are often entitled to TPD benefits where they have not engaged in any work for a period of time and are unlikely ever to engage in work for which they are reasonably fit by their education, training or experience.

Although a TPD claim often follows an injury, when a claimant wants to challenge a rejected claim, the approach to litigation must be fundamentally different to traditional personal injuries litigation. It is generally not enough simply to present medical material to convince the court that the client is in fact totally and permanently disabled. To successfully challenge a TPD rejection, the claimant must establish that in rejecting the claim the decision maker breached one of its duties. The focus is therefore not necessarily on the fact of disability but on the decision making process.

THE FUND MEMBER, THE INSURED AND ITS INSURER

A claimant usually has to deal with two decision makers: the trustee of the superannuation fund and its insurer.

The claimant's entitlement to benefits is defined by the trust deed establishing the superannuation fund. The deed usually sets out the eligibility criteria for TPD benefits. The trustee will often obtain a group insurance policy to fund TPD claims. The deed may provide that the trustee has no liability to pay a TPD benefit unless the insurer agrees to indemnify it, or that the eligibility criteria are identical to those in the insurance policy.

The claimant will therefore often have to challenge both the insurer's and the trustee's decisions to succeed. In practice however, if the challenge to the insurer's decision is successful, the court will often substitute its own decision for that of the insurer and then remit the matter back to the trustee for reconsideration based on the court's findings.[1]

The insured under a group insurance policy is the trustee. The insurer has no contractual relationship with the claimant and no liability to pay them directly. Yet it is the claimant who, through the trustee, has paid the premiums and who expects the benefit of the insurance. For this reason, the courts have held that despite the lack of contractual relationship, the same duties of good faith and fair dealing apply between the insurer and the claimant as between the insurer and the trustee.[2] The claimant has standing to sue the insurer directly to enforce the insurance policy.[3]

THE TRUSTEE'S DUTIES

The trust deed will often provide that the trustee's discretion in making decisions to pay any benefit is absolute and unfettered. For many years it was held that the duties of trustees of superannuation funds were no different to any other trustee exercising a discretionary power.[4] The courts would only interfere with those decisions in very limited circumstances. Those were known as the principles in *Karger v Paul*.[5] These principles, as summarised in the TPD context in *Rapa v Patience*,[6] meant that the grounds of challenge were that:

- the discretion was not exercised in good faith;

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- the discretion was not exercised upon real and genuine consideration;
- the discretion was not exercised for the purposes for which it was conferred;
- if the reasons for the exercise of the discretion were given, the reasons were not sound; or
- the decision is one that no reasonable trustee could make on the material which was before it.

Section 52 of the *Superannuation Industry (Supervision) Act* 1993 imposes further duties by requiring the trustee to:

- act honestly;
- exercise the trustee's powers in the best interests of the beneficiaries; and
- do everything reasonable to pursue an insurance claim with reasonable prospect of success for the benefit of a beneficiary.

THE INSURER'S DUTIES

The trustee's insurer owes the claimant a duty to act in utmost good faith. That obligation includes duties to:

- act reasonably;
- deal with the claimant fairly;
- consider and determine the correct question; and
- give the claimant an opportunity to answer any adverse material on which the insurer intends to rely.

FINCH: A NEW APPROACH

Many trust deeds and policies provide for benefits to be paid where the claimant fulfils the eligibility criteria in the trustee's or insurer's opinion or to their satisfaction. In those cases, the right to benefits depends not on the objective fact of disability, but on the decision maker's opinion.

The High Court's decision in *Finch v Telstra Super Pty Ltd (Finch)*[7] marked a clear shift in the way courts approach a challenge to that opinion. Courts are now scrutinising more closely the decision making process and holding superannuation trustees and insurers to higher standards.

In *Finch*, the Court made clear that a superannuation trustee's decision making power is not a mere discretion like any other. Different criteria apply to the operation of a superannuation fund from those which apply to discretionary decisions made by trustees of other types of trust.[8] The Court noted that "while the term 'discretion' is used in the description or characterisation of varied acts or omissions in the law, the term may be an inadequate description of an inquiry which requires the identification and evaluation of factual matters".[9]

The Court emphasised that, despite a provision in the trust deed that the trustee's discretion was absolute, the trust was in reality a strict trust. The trustee had a duty to distribute to those who fall within the definition of TPD and not to distribute to those who did not. The trustee's power to form opinions "was not a matter of discretionary power to think one thing or the other; it was an ingredient in the performance of a trust duty". Mr Finch "was the beneficiary of a trust, and although the precise form and quantum of his beneficial interest was contingent on particular events, he did have a beneficial interest".[10] In essence, the Court emphasised that the power to form an opinion did not give the trustee a power to refuse to distribute benefits to those who satisfied the relevant TPD criteria.

The Court did not decide to what extent the duties in *Karger v Paul* should continue to apply. However, in assessing whether they had been breached, the Court emphasised the need to consider that superannuation "is not a matter of mere bounty … It is something for which, in large measure, employees have exchanged value – their work and contributions".[11] It is also, for some people, their most significant asset. "The legitimate expectations which beneficiaries of superannuation funds have that decisions about benefit will be soundly taken are thus high. So is the general public importance of them being sound".[12]

The decision in *Finch* related only to trustees as no insurer was involved. The duties of trustees and insurers are different in nature and origin. However, the High Court's comments about the importance of rigorous decision making by trustees apply equally to insurers in this context. The emphasis on the strict duty of trustees to distribute benefits to those who fulfil the criteria aligns with the insurer's similar contractual duty and results in similar requirements being imposed.

THE DUTIES IN ACTION – SOME EXAMPLES

Duty to make inquiries: In *Finch*, the Court held that the trustee's duty to make decisions upon real and genuine consideration includes a duty to give properly informed consideration. Most trust deeds will confer a power on the trustee to take into account information or act on advice. The trustee is under a duty to exercise that power to seek relevant information before making a decision. This includes a duty to seek further information to resolve conflicting bodies of material.[13]

The Victorian Court of Appeal enthusiastically applied *Finch* in *Alcoa of Australia Retirement Plan v Frost*.[14] Mr Frost had submitted medical material establishing a strong prima facie case of TPD. However the trustee rejected the claim based on another medical report which reached some inconsistent conclusions.

The Court held that there was no onus of proof on Mr Frost to satisfy the trustee of his claim. Where a claimant has put forward material to indicate that their application may have merit, or where there are inconsistencies in the material put forward, the trustee is under a "high duty" to make further reasonable inquiries. While the trustee is not under an obligation to go on endlessly seeking more and more information until the claim is made out, it must at least make inquiries to understand the points of disagreement and try to reconcile the apparent inconsistencies. Justice Nettle held that "[f]or the trustee to slough off responsibility for making those inquiries on the basis that Mr Frost failed to adduce sufficient evidence to satisfy the trustee that he was totally and permanently disabled is … to do the very thing which the High Court said in *Finch* was unacceptable".[15]

Similarly, in *Colella v Hannover Life Re of Australasia Ltd (No 2)*[16] the County Court of Victoria held that a duty to make further inquiries was part of the insurer's duty to act reasonably. A medical report referred to Mr Colella having undergone surgery and said that the opinion of the orthopaedic surgeon was a matter to be taken into account in determining his future work capacity. The insurer did not seek a report from the orthopaedic surgeon. The Court said: "Given the nature of the defendant's duty towards the plaintiff, it was not appropriate for it to rely upon only those aspects of the material before it which were most suited to a denial of the plaintiff's claim. In failing to seek or obtain material from the plaintiff's treating orthopaedic specialist, it acted unreasonably".[17]

Duty to act reasonably: The duty to make inquiries to resolve conflicts in material does not necessarily mean that the claim must be accepted where there is some material supporting the claim.

Once relevant information has been gathered and the other duties fulfilled, the rejection of the claim will only be overturned if the decision is so unreasonable that no reasonable trustee or insurer could have made it. This is a high threshold.

In *Chapman v United Super Pty Ltd*[18] the Supreme Court of New South Wales highlighted that the definition of TPD in some policies is extremely hard to satisfy. In that case there was medical evidence both ways. While there was sufficient material which would have enabled the trustee or insurer to come to the conclusion that Mr Chapman satisfied the definition, there was also substantial medical evidence that his condition was not as severe as he claimed.

Justice Young said that: "If I were the person that had to make a decision, on the balance of probabilities, as to the plaintiff's inability to work any job that his training and experience allowed him to do … I may have come to

the conclusion that there was sufficient evidence to satisfy that onus. However that is not what is required of me in this case. Further, the facts do not necessarily lead a reasonable adjudicator to that conclusion".[19] The Court emphasised that the focus is on "whether the decision of the insurer or trustee or both was so unreasonable that a reasonable person in that situation could not have made it".[20]

That said, a trustee or insurer cannot seize upon some small piece of adverse evidence to justify its rejection. Where the overwhelming body of evidence is in the claimant's favour, the trustee or insurer cannot cherry pick aspects of the material most suited to its purpose and ignore the rest of the evidence. It must be able to point to reasons for rejecting the evidence in the claimant's favour.

In *Colella v Hannover Life Re of Australasia Ltd (No 1)*,[21] the insurer's opinion stated that the medical evidence demonstrated that Mr Colella had capacity to work. In fact, there was only one expert report concluding that Mr Colella had capacity to work. The insurer ignored the rest of the medical evidence and made no attempt to reconcile the conflicts. The insurer's opinion did not refer to or analyse the reports supporting Mr Colella's claim, nor give any reasons for rejecting the opinions of his treating doctors. There was no consideration of alternative occupations for which he may be suited and whether those jobs would be available for him in the real world. The Court concluded that the insurer's opinion was comprehensively flawed and therefore unfair and unreasonable.

CONCLUSION

Where entitlement to benefits depends on the decision-maker's opinion, satisfaction or discretion, courts have been scrutinising the decision-making process more closely. While the shift in approach has made it easier for claimants to challenge a rejected claim, they must still demonstrate that the trustee or insurer has breached one of its duties. This remains a difficult task as the eligibility criteria for TPD benefits are often very difficult to satisfy. Where there is no breach of duty, a court will not disturb the decision even if the court itself may have formed a different opinion. ●

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1. *Hannover Life Re of Australasia Ltd v Sayseng* [2005] NSWCA 214, [35] and [89] ("*Sayseng*"). In some cases, where there is no other decision reasonably open to the trustee, the Court may decline to remit and substitute its own decision: *Flegeltaub v Testra Super Pty Ltd* [2000] VSC 107. For examples see: *Lazarevic v United Super Pty Ltd* [2014] NSWSC 96 and *Kawka v Australian Super Ltd* [2009] VCC 1588.
2. *Sayseng; Green v AMP Life Ltd* [2005] NSWSC 370.
3. *Erzurumlu v Kellogg Superannuation Pty Ltd* [2013] NSWSC 1115, [54]; *Mabbett v Watson Wyatt Superannuation Pty Limited* [2008] NSWSC 365, [3].
4. *Telstra Super Pty Ltd v Flegeltaub* [2000] VSCA 18, [4] and [25].
5. *Karger v Paul* [1984] VR 161.
6. Unreported, Supreme Court of New South Wales, McLelland J, 4 April 1985.
7. *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254.
8. Note 7 above, at [33]
9. Note 7 above, at [29]
10. Note 7 above, at [30]
11. Note 7 above, at [33]
12. Note 7 above, at [33]
13. Note 7 above, at [66].
14. [2012] VSCA 238.
15. Note 14 above, at [46].
16. [2013] VCC 990.
17. Note 16 above, at [14].
18. [2013] NSWSC 592.
19. Note 18 above, at [44].
20. Note 18 above, at [53].
21. [2013] VCC 620.