

#INC2019


SMSF Case Law 2018 Breakdown: How it applies in practice



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Rebecca is an experienced commercial lawyer with specialisations in superannuation, funds management and private wealth management. She also has tax and structuring advice experience within the superannuation context and supports various practice areas with high level advice.

Rebecca's clients include public offer superannuation funds and self-managed superannuation funds, fund managers, accountants, family-owned businesses and high net wealth individuals. Rebecca focuses on providing strategic and commercially focused advice in delivering client outcomes



KEY CASES

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- **Aussiegolfa Pty Ltd (Trustee) v Federal Commissioner of Taxation**
- **Cam & Bear Pty Ltd v McGoldrick**
- **Ryan Wealth Holdings Pty Ltd v Baumgartner**



AUSSIEGOLFA PTY LTD v FCT



Issue:

Whether the arrangement contravened:

- sole purpose test in section 62 of the SIS Act
- in-house asset provisions in part 8 of the SIS Act

AUSSIEGOLFA PTY LTD v FCT



Facts:

- Trustee invested in units in an MIS (**DomaCom Fund**)
- The Trustee (along with two related parties) held 100% of the units in a sub-fund of the Domacom Fund that held a residential property
- The property was leased at market rent to the member's daughter.

AUSSIEGOLFA PTY LTD v FCT



Facts:

- Trustee sought declarations that the investment did not contravene the sole purpose test and was not an in-house asset
- Commissioner filed a contingent appeal that if the Court found that the investment was not an in-house asset, the Commissioner's determination under section 71(4)(b) to deem the Trustee's investment to be an in-house asset would stand

AUSSIEGOLFA PTY LTD v FCT



Decision:

Sole purpose test

- Leasing the property to a related party did not cause the Fund to contravene the sole purpose test
- There did not appear to be any financial or other non-incidental benefit to the Fund or the member

AUSSIEGOLFA PTY LTD v FCT



Decision:

Sole purpose test

This conclusion would be different if there was evidence that:

- Rent received by the Fund was less than market value
- Providing accommodation to the member's daughter had influenced the Fund's investment policy

AUSSIEGOLFA PTY LTD v FCT



Decision:

In-house asset

- Fund's investment in the sub-fund was an investment in a related trust and an in-house asset
- Effectively and in substance created a circumstance whereby a residential property indirectly owned by the Trustee was being leased to a related party

AUSSIEGOLFA PTY LTD v FCT



Decision:

In-house asset

- Decision turned on whether the sub-fund was a separate trust
- Constitution facilitated the creation of a distinct trust associated with a particular class of units

AUSSIEGOLFA PTY LTD v FCT



Decision:

In-house asset

Had the investment not been an in-house asset, the Court would have upheld the Commissioner's determination regarding section 71(4)

AUSSIEGOLFA PTY LTD v FCT



Practical implications:

- Sole purpose test is not a panacea for all matters that appear to generally contravene the spirit of the superannuation legislation
- Contravention of the sole purpose test generally requires a financial benefit to be provided or received
- ATO does not consider this case authority for the proposition that a trustee can never contravene the sole purpose test where an asset is leased to a related party for market rent

AUSSIEGOLFA PTY LTD v FCT



Practical implications:

- Documents should be drafted correctly and reflect the parties' intention and the reality of the circumstances
- Obtain advice prior to setting up the relevant trust
- Important to understand the structure under the constitution and disclosure documents

AUSSIEGOLFA PTY LTD v FCT



Practical implications:

- Some doubt over the breadth and validity of the Commissioner's power under section 71(4):

'...the power to undo the application of s 71(1) is seemingly unlimited. A provision cast in such terms raises the possibility that it is an unconstitutional delegation of legislative power.'

Cam & Bear Pty Ltd v McGoldrick



Issue:

Whether the auditor had been negligent in two respects:

- Failing to identify an issue with the description of the Fund's assets
- Failing to notify the trustee of material and significant matters concerning the Fund, and to qualify the audit report

If the auditor was negligent in the matters outlined above, to what extent was the auditor liable for damages to the Fund?

Cam & Bear Pty Ltd v McGoldrick

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Facts:

- Management of the Fund was entrusted to Mr Lewis
- Dr Bear was making regular Fund contributions by way of cheques payable, at Mr Lewis' request, to Lewis Securities
- Dr Bear understood that the Fund's assets consisted of cash and shares
- Assets described in the financial statements as 'cash' were unsecured loans to a company

Cam & Bear Pty Ltd v McGoldrick

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Facts:

- Each year the auditor signed and certified the audit reports without qualification
- The experts agreed that 'cash' was defined as 'cash on hand and cash equivalents'.

Cam & Bear Pty Ltd v McGoldrick

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Facts:

The experts broadly agreed that:

- Auditor required to make enquiries to ascertain the nature, existence and valuation of the 'cash'
- Auditor should have made enquiries about the financial condition of the company
- Items described in the Fund's financial statements did not satisfy the definition of cash

Cam & Bear Pty Ltd v McGoldrick



Decision:

- Dr Bear (despite his lack of financial sophistication) should have considered the prudence of depositing significant amounts of money with Mr Lewis' company
- Auditor's negligence was of significantly greater importance in causing the trustee's loss
- Responsibility for the loss should be apportioned 10% to the trustee and 90% to the auditor.

Cam & Bear Pty Ltd v McGoldrick



Decision:

- Auditor owed a duty of care to the trustee to exercise reasonable care, skill and diligence to ensure that the financial report presents a fair description of the circumstances
- Incumbent on the auditor to draw any issues to the attention of the trustee and qualify the report

Ryan Wealth Holdings Pty Ltd v Baumgartner



Issue:

Whether the auditor breached his duty and contractual obligations by failing to:

- Report on the Trustee's compliance with its investment strategy
- Bring serious issues to the Trustee's attention
- Qualify the audit report
- Exercise reasonable care and skill

Ryan Wealth Holdings Pty Ltd v Baumgartner



Facts:

- On the advice of a financial planner, the Trustee made loans to various entities and invested in unit trusts (of which the adviser had a personal interest)
- Financial statements described a number of the Fund's investments as 'mortgage loans' (loans were unsecured)

Ryan Wealth Holdings Pty Ltd v Baumgartner



Facts:

- Audit report for the Fund was unqualified in 2007, 2008 and 2009
- Trustee claimed that the auditor's conduct:
 - Breached duties in contract and tort
 - Contravened obligations as an auditor under superannuation law
 - Misleading and deceptive

Ryan Wealth Holdings Pty Ltd v Baumgartner



Facts:

Auditor admitted he failed to exercise reasonable care in the preparation of the audit reports:

- Nominated assets were of substantially compromised value
- Financial statements were materially inaccurate
- Material available did not support unqualified opinion

Ryan Wealth Holdings Pty Ltd v Baumgartner



Decision:

- Auditor failed to exercise:
 - Reasonable care and skill to ensure the investments were valued at net market value
 - Judgement in assessing the reasonableness of the values disclosed
- Auditor had a duty to report to the trustee concerns about conflict of interest and high level of risk associated with the loans and investments

Ryan Wealth Holdings Pty Ltd v Baumgartner



Decision:

- Damages assessed by reference to the likelihood the commercial opportunity would have yielded success
- Substantial prospect that the trustee would have been financially better off exercising rights in 2008 than in 2015
- Damages assessed at **\$2,260,140**

Ryan Wealth Holdings Pty Ltd v Baumgartner



Decision:

Contributory negligence

- Trustee departed from standard of care reasonable person would have applied
- Auditor's duty to protect trustee against the harm it suffered
- Loss apportioned 10% to the trustee and 90% to the auditor

Ryan Wealth Holdings Pty Ltd v Baumgartner



Decision:

Proportionate liability

- Auditor had a far higher degree of culpability than the accountant that prepared the financial statement
- Fund trustee's loss should be apportioned to the accountant as to 20%

Practical implications



- Copy client in on all communications
- Review the terms and conditions of client retainers, including the scope of the work to be undertaken and any carve outs
- Review professional indemnity insurance thresholds, terms and conditions, and in particular, check any applicable exclusions

Practical implications



- Ensure client files contain all relevant information, and detailed file notes
- Training to identify and manage conflict of interest scenarios
- Training on key issues when providing advice and services to clients, such as fraud and misuse of client funds

Practical implications



- Ensure clients confirm in writing that the information provided is correct in all material particulars
- Expect mistakes and errors to occur, and critical issues to be overlooked
- Implement processes and procedures to counteract the human error risk

Questions?



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