

Article Information

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A super self-managed super funds (SMSFs) tangle

Self-managed super funds (SMSFs) are funds usually established by an individual or family relatives as a means of looking after their own super savings. Once again, the exercise of discretion by an SMSF trustee has come into dispute. In the recent Queensland case of *Williams v Williams & Anor*^[1], following the death of Anthony Williams (Anthony), his second wife Gayle Williams sought relief in respect of the Boosey Doherty Superannuation Fund (SMSF) of which Anthony was the sole member and co-trustee with his son Paul.

On 26 March 2018, Anthony executed a BDBN directing the trustees to pay 50% of his death benefit to Gayle and 50% to his legal personal representative. Anthony had executed a will in 2020, in which he appointed his other son, Mark, as the executor.

Anthony died in December 2021. In March 2022, Paul signed a “Deed of Removal and Appointment of Trustee” appointing Mark as co-trustee of the SMSF (**Impugned Deed**).

Gayle sought two orders:

1. First, a declaration of the validity of a binding death benefit nomination (**BDBN**) made by Anthony, in respect of his death benefit in the SMSF;
2. Second, the removal of the current trustees of the SMSF and the appointment of independent professional trustees.

The Validity of the BDBN

The question of the validity of the BDBN turned on whether Anthony had given “notice” of the BDBN to the trustees in accordance with the deed establishing the SMSF (**SMSF Deed**), the trustees being Anthony and Paul.

The Court affirmed the decision in *Cantor Management Services Pty Ltd v Booth*^[2] that “(t)he purpose of communicating a (BDBN) is largely practical” and the trustees must know about a BDBN in order to give effect to it. However, the Court went on to emphasise the importance of the context and construction of the SMSF Deed in determining whether proper notice of the BDBN had been given to Paul.

Clause 24.6A of the SMSF Deed provided that “(i)f the Trustees are given a written notice by a Member requesting that benefits be paid following the death of that Member to a person...then the Trustees must...” provide a written acceptance, or give written notice of a proposed rule.

In that context, the Court considered whether the term “Trustees” in clause 24.6A meant all trustees of the SMSF, or was written notice of the BDBN to a singular trustee (Anthony himself) sufficient.

The word “Trustees” was defined in the SMSF Deed as “...the Trustees or the Trustee for the time being of the fund and “Trustee” has the same meaning.” In deciding that the BDBN was invalid, the Court looked to the interpretation provisions of the SMSF Deed Clause 2.1 provided that:

"In this Deed unless the context otherwise requires...words importing number include the singular number and the plural number..."

Referencing section 48(1) of the *Property Law Act 1974* (Qld), the Court interpreted the definition of "Trustees" as meaning all the trustees (where there is more than one trustee of the SMSF) which in this case was Anthony and Paul. It was held that the general provision of clause 2.1 was subject to the context of the SMSF Deed, and thus subject to the more particular provision as to the definition of "Trustees".

The BDBN was therefore invalid as Paul had not been provided with written notice of the BDBN.

The Removal of the Current Trustee or Trustees

Secondly, the Court was asked to determine whether the current trustees of the SMSF, said to be Paul and Mark, had, by entering the Impugned Deed, behaved in a way which justified their removal.

Clause 9.9 of the SMSF Deed allowed for a vacancy in trustees to be filled by resolution of two thirds majority of members. The Court held that the Impugned Deed in which Anthony was removed as a trustee and replaced by Mark, did not satisfy clause 9.9, as the *only* member of the SMSF at the time of execution was Anthony.

While, rule 2.5(a) of the SMSF Deed provided that a person ceased to be a member of the SMSF on death, subject to the *SIS Act*, the deceased's LPR was deemed to be a member upon death. However, at the time of the hearing, probate of Anthony's will had not been obtained by Mark and as such, there was no person who came within the definition of "legal personal representative" who could enter the Impugned Deed as a member.

The Court then considered Paul's conduct in refusing to provide relevant trust documentation to Gayle and only reluctantly doing so when required by a Court order. Additionally, in an affidavit, Paul stated that Anthony had been dishonest within the meaning of clause 27.1 of the SMSF Deed which provided that a member "*...ceases to be presently or presumptively entitled to his or her benefit or such part of that benefit as the Trustees in their absolute discretion determine...*" if the member, in the trustee's opinion, commits any fraud or is guilty of dishonesty or defalcation.

Paul, as trustee, claimed that Gayle did not provide a satisfactory explanation of Anthony's conduct in failing to issue Paul with written notice of the BDBN. Paul resolved to exercise his powers under clause 27.1 of the SMSF Deed resulting in Gayle and Anthony not being entitled to any benefit from the SMSF. As Paul failed to justify how or why he might expect Gayle to be able to explain Anthony's conduct, the Court held that Paul's actions were not what one might expect from 'a trustee acting rationally'.

The Court further considered the apparent conflicts for Paul and Mark as trustees of the SMSF who were claiming to be "dependents" for the purpose of having the death benefit paid in their favour outside of Anthony's estate, on the one hand, but also both being residuary beneficiaries of Anthony's will, on the other hand.

Such conduct and conflicts led the Court to conclude that it was appropriate to remove both Paul and Mark as trustees and to replace them with independent trustees.

In a further twist, the Court pointed out the requirements of the *SIS Act* that trustees of a SMSF must also be members. How, therefore, can "independent trustees" who are not, nor could be, members of the SMSF be appointed as trustees? This aspect remained for determination.

[\[1\]](#) [2023] QSC 90

[\[2\]](#) [2017] SASCFC 122