JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	:	IOPPOLO & HESFORD -v- CONTI [2013] WASC 389
CORAM	:	MASTER SANDERSON
HEARD	:	8 OCTOBER 2013
DELIVERED	:	24 OCTOBER 2013
FILE NO/S	:	CIV 1668 of 2013
BETWEEN	:	ROSARIO ANTONIO IOPPOLO and GRACE SUSAN HESFORD as Executors of the Estate of the late FRANCESCA CONTI Plaintiffs AND AUGUSTO CONTI First Defendant AUGUSTO INVESTMENTS PTY LTD (ACN 146 964 338) Second Defendant

Catchwords:

Superannuation - Application by executors of deceased member of Self Managed Superannuation Fund (SMSF) to be appointed a trustee of the fund - Whether surviving member obliged to appoint executor as trustee - Whether trustee entitled to distribute deceased member's interest in the fund contrary to direction in deceased's will

Legislation:

Nil

Result:

No obligation to appoint executor as trustee
Remaining trustee entitled to distribute at his discretion

Category: A

Representation:

Counsel:

Plaintiffs	:	Mr P G McGowan
First Defendant	:	Mr N Davis
Second Defendant	:	Mr N Davis

Solicitors:

Plaintiffs	:	Metaxas & Hager
First Defendant	:	Bowen Buchbinder Vilensky
Second Defendant	:	Bowen Buchbinder Vilensky

Case(s) referred to in judgment(s):

Nil

1 **MASTER SANDERSON**: Self-managed superannuation funds (SMSF) are now a feature of the financial fabric of this country. They provide an important vehicle through which individuals can invest for their retirement. But as with any legal construct problems can arise in the administration of a fund. Mercifully such disputes seem rare. But this case is an example of how problems can arise within a family and lead to disputes relating to a superannuation fund.

2 This matter was commenced by originating summons but proceeded as if commenced by writ. Accordingly there were pleadings. There was no significant dispute as to the facts and they can be shortly stated. By a deed dated 29 July 2002 Francesca Conti and the defendant established a SMSF known as 'The Conti Superannuation Fund'. Francesca Conti and the defendant were the only trustees and members of The Conti Superannuation Fund. Francesca Conti died on 5 August 2010. She made a will dated 13 January 2005. Probate of the will was granted to the plaintiffs as executors of her estate on 28 October 2010.

3 It was a term of the deed that the fund would be a SMSF within the meaning of s 17A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (the SIS Act), unless the trustees resolved otherwise. The trustees have not resolved otherwise. I will deal with s 17A of the SIS Act in some detail below but it is appropriate first to deal further with the facts.

4 The amount in the fund standing to the credit of the deceased's account as at 30 June 2009 was $648,586. Under the superannuation deed rules, absent a binding written direction from a deceased member, the trustees may in their absolute discretion pay or apply the amount of the fund standing to the credit of a deceased member's account to a spouse or child of the member or any other person who in the opinion of the trustees was dependent on the member at the relevant date. As at the date of death of the deceased there was no binding written direction given by the deceased.

5 From the date of death of the deceased until 4 February 2011 the defendant was the sole trustee of the fund. By deed of appointment dated 4 February 2011 Augusto Investments Pty Ltd was appointed the trustee of the fund.

6 By the deceased's will she expressed the desire that her entitlements under the fund be applied to her children Antonietta Maria Cotellessa, Grace Susan Hesford, Sylvia Ioppolo and Rosario Antonio Ioppolo. She

specifically stated she did not want any entitlement paid to her husband the defendant.

7 It was common ground between the parties the trustees of the fund are entitled but not bound to take into account the desires of a deceased member expressed in a will as to the distribution or application of that member's superannuation account. This is provided for in the exercise of discretion in r 2.3 of the rules of the fund under the deed. In this case the second defendant as sole trustee of the fund determined the monies standing in the deceased's account should be paid to the first defendant and not to the beneficiaries mentioned in the deceased's will. It is this distribution which is at the heart of the dispute between the parties.

8 It is convenient at this point to refer to s 17A of the SIS Act. It is in the following terms:

> **Definition of self managed superannuation fund**
>
> Basic conditions--funds other than single member funds
>
> (1) Subject to this section, a superannuation fund, other than a fund with only one member, is a self managed superannuation fund if and only if it satisfies the following conditions:
>
> (a) it has fewer than 5 members;
>
> (b) if the trustees of the fund are individuals--each individual trustee of the fund is a member of the fund;
>
> (c) if the trustee of the fund is a body corporate--each director of the body corporate is a member of the fund;
>
> (d) each member of the fund:
>
> (i) is a trustee of the fund; or
>
> (ii) if the trustee of the fund is a body corporate--is a director of the body corporate;
>
> (e) no member of the fund is an employee of another member of the fund, unless the members concerned are relatives;
>
> (f) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;
>
> (g) if the trustee of the fund is a body corporate--no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for

any duties or services performed by the director in relation to the fund.

Note: Section 17B contains exceptions to paragraphs (1)(f) and (g).

Basic conditions--single member funds

(2) Subject to this section, a superannuation fund with only one member is a self managed superannuation fund if and only if:

(a) if the trustee of the fund is a body corporate:

(i) the member is the sole director of the body corporate; or

(ii) the member is one of only 2 directors of the body corporate, and the member and the other director are relatives; or

(iii) the member is one of only 2 directors of the body corporate, and the member is not an employee of the other director; and

(b) if the trustees of the fund are individuals:

(i) the member is one of only 2 trustees, of whom one is the member and the other is a relative of the member; or

(ii) the member is one of only 2 trustees, and the member is not an employee of the other trustee; and

(c) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;

(d) if the trustee of the fund is a body corporate--no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for any duties or services performed by the director in relation to the fund.

Note: Section 17B contains exceptions to paragraphs (2)(c) and (d).

Certain other persons may be trustees

(3) A superannuation fund does not fail to satisfy the conditions specified in subsection (1) or (2) by reason only that:

(a) a member of the fund has died and the legal personal representative of the member is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during the period:

(i) beginning when the member of the fund died; and

(ii) ending when death benefits commence to be payable in respect of the member of the fund; or

(b) the legal personal representative of a member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during any period when:

(i) the member of the fund is under a legal disability; or

(ii) the legal personal representative has an enduring power of attorney in respect of the member of the fund; or

(c) if a member of the fund is under a legal disability because of age and does not have a legal personal representative:

(i) the parent or guardian of the member is a trustee of the fund in place of the member; or

(ii) if the trustee of the fund is a body corporate--the parent or guardian of the member is a director of the body corporate in place of the member; or

(d) an appointment under section 134 of an acting trustee of the fund is in force.

Circumstances in which entity that does not satisfy basic conditions remains a self managed superannuation fund

(4) Subject to subsection (5), if a superannuation fund that is a self managed superannuation fund would, apart from this subsection, cease to be a self managed superannuation fund, it does not so cease until the earlier of the following times:

(a) the time an RSE licensee of the fund is appointed;

(b) 6 months after it would so cease to be a self managed superannuation fund.

Subsection (4) does not apply if admission of new members

> (5) Subsection (4) does not, except for the purposes of section 29J, apply if the reason, or one of the reasons, why the superannuation fund would cease to be a self managed superannuation fund was the admission of one or more new members to the fund.

9 Being Commonwealth legislation this section is of some complexity and not easy to understand. In approaching the legislation it should be borne in mind the section is dealing with the circumstances in which a SMSF will qualify for favourable tax treatment. Anyone can set up a SMSF and establish rules to suit their purposes. But it is only if that SMSF conforms with s 17A it will attract favourable tax treatment. And of course, as a necessary corollary to that statement of principle, if a SMSF is established which complies with s 17A it can fall out of the favourable tax regime if it fails at some later date after its creation to conform with the requirements of the section.

10 Turning then to the section itself it is introduced by the phrase 'Basic conditions--funds other than single member funds'. This introduction establishes the section is dealing with everything other than single member funds. Essentially what is required is that each member of the fund be a trustee of the fund. This is so whether the members of the fund are individuals or a body corporate. If the trustee of the fund is a body corporate each director has to be a member of the fund. The result is that all members of the fund have the same rights as trustees and members.

11 Section 17A(2) then deals with superannuation funds with only one member. It sets out the circumstances in which a superannuation fund with only one member can be a SMSF. Effectively it requires the trustee of the fund to be a body corporate. The single member of the fund must be the sole director of that body corporate save in a situation where a relative of the member is also a director of the body corporate.

12 Section 17A(3) is conditioned by the introductory phrase 'Certain other persons may be trustees'. This subsection applies to both s 17A(1) and s 17A(2). For present purposes it is s 17A(3)(a) which is important. It allows for the possibility of the 'legal personal representative' of a deceased fund member being appointed as a trustee of the fund. Section 17A(3)(a)(i) - (ii) provide a temporal limitation on the period during which the legal personal representative can be a trustee of the fund. So what the subsection anticipates is this. If there is a fund which has two or up to five members and one of the members dies the executor of the estate of the deceased can be appointed as a trustee of the fund. If that is done the fund will remain a SMSF as defined in s 17A(1). Of course the executor will not be a member of the fund - the member has died. The

executor is a trustee without being a member but that situation does not fall foul of s 17A(1). Once the death benefit payment commences then the executor must be removed as a trustee or the fund would not comply with s 17A(1).

13 Section 17A(4) is conditioned by the following phrase, 'Circumstances in which entity that does not satisfy basic conditions remains a self managed superannuation fund'. This section effectively provides a breathing space so that where a complying SMSF by virtue of changed circumstances no longer complies the situation may be put to rights. Relevantly for present purposes where one member of a two member complying SMSF - that is to say where s 17A(1) is satisfied - dies the fund has six months within which it can introduce new members to retain its status under s 17A(1) or convert to a single member fund under s 17A(2).

14 Before turning to the respective arguments of the parties I should deal with two matters which were raised at the commencement of the hearing. Both were applications by the plaintiffs. First the plaintiffs applied to join Augusto Investments Pty Ltd the present trustee of the fund as a second defendant to the proceedings. The defendant opposed the application. It was the plaintiffs' position the company was a necessary party to the proceedings and had interests in the outcome of the action. Further as the interests of the company coincided precisely with the interests of the present defendant no prejudice was suffered as a consequence of the addition of the company as a party.

15 After hearing argument I made an order adding Augusto Investments Pty Ltd as a second defendant to the proceedings. While I was not entirely satisfied it was necessary given the nature of the relief sought by the plaintiffs it seemed to me proper the present trustee of the fund ought be bound by the outcome of this action. I was satisfied an adjournment was not necessary. The company had no interests in the action beyond the interests of the present defendant. He was the sole director and shareholder of the company and the company could not in its own right advance any arguments not put by Mr Conti. Accordingly the order was made.

16 The second application was to cross-examine the defendant. Part of the plaintiffs' case was Mr Conti had acted in bad faith. I will go to those arguments in more detail below. For present purposes it is enough if I say the plaintiffs wanted the opportunity to cross-examine Mr Conti as to his motives in taking certain actions when administering the fund.

17 The defendants opposed the application. They pointed out programming orders for the hearing of the matter had been made by consent. The plaintiffs had filed a certificate of readiness in which they indicated the action was in all respects ready for hearing. The denial of any bad faith on the part of Mr Conti was made in the defence which was filed on 31 May 2013. No application for leave to cross-examine had been made prior to the hearing. While Mr Conti was present in court, and if called upon could be available for cross-examination, it was in the defendants' submission in all respects unreasonable and unfair to subject him to cross-examination at late notice.

18 Having heard argument I declined to order Mr Conti be cross-examined. All of the arguments put by counsel for the defendants carried weight. The issues in this case were straight forward. Any solicitor signing a certificate of readiness is obliged to turn his or her mind to the question of the evidence and in the case of an originating summons whether a party ought be cross-examined on an affidavit. If a decision is taken not to seek cross-examination there would need to be very good reason why at the hearing cross-examination ought be ordered. Perhaps if new matters had come to light which had not been foreshadowed in the pleadings leave to cross-examine might be appropriate. But that was not the case here. Nor is it a matter of preferring case management principles to the interests of justice. Fairness operates both ways.

19 Turning then to the plaintiffs' claims they fall into four broad categories. First it was said the first defendant was obliged to appoint one of the executors of the deceased's estate as a trustee of the superannuation fund. The argument was the deed required the fund to remain a SMSF. The only way that could be achieved by reference to s 17A and in particular s 17A(1)(d)(i) was for the appointment of the executor as a trustee. Counsel submitted although s 17A did not deem an executor to be a trustee of the fund it was obligatory in nature - that is to say it required an executor to be so appointed.

20 In my view there is no support for that submission either in the terms of s 17A(1) or in the overall thrust of s 17A. The mechanism of the section is tolerably clear. Section 17A(3) allows for the appointment of an executor as a trustee of the fund but does not in its terms require such an appointment. Section 17A(4) provides a period of grace - that is to say it allows a fund six months to organise its affairs so it can remain a SMSF. So in the case of a fund which has two members and which would qualify under s 17A(1), on the death of one of the members it remains a SMSF for six months. If the remaining member has not taken some steps during that

period to bring the fund within the terms of s 17A(2) then it will cease to be a SMSF. In this case Mr Conti appointed a corporate trustee and the fund remained a SMSF. The fund remained a SMSF because it migrated from the type of fund covered in s 17A(1) to a fund covered by s 17A(2).

21 While rejecting the plaintiffs' submissions in relation to s 17A counsel for the defendants took a different approach to s 17A. It was his submission on the death of one member of a two member fund the fund immediately migrated from s 17A(1) to s 17A(2) - that is to say it immediately moved to being a single member fund. For the purposes of this case, given the approach I have adopted, it is not strictly speaking necessary to deal with this issue. I would also accept the defendants' position is arguable. However it seems to me the interaction between s 17A(1) and s 17A(4) is inconsistent with a fund immediately moving from being covered by s 17A(1) to s 17A(2). As I have indicated determination of this question is not strictly speaking necessary and for present purposes it is enough if I simply acknowledge the defendants' submissions.

22 The second argument put by the plaintiffs was that it did not exercise its discretion in a bone fide manner as required by cl 21.2 of the deed. Clause 21.2 is in the following terms:

> The Trustee may exercise any of its powers or rights even where there is a conflict of interest by reason of the Trustee:-
>
> (a) being an Employer;
>
> (b) being a Member;
>
> (c) being an associate of an Employer;
>
> (d) being a Guardian, spouse or relative of a Member;
>
> (e) having a direct personal interest in the benefit or exercise of the power or right;
>
> so long as the power or right is exercised in a bona fide manner and otherwise not in breach of the Relevant Legislation.

23 It is to be noted the requirement is that the trustee exercise its discretion 'in a bona fide manner'. There is simply no evidence that was not done in this case. Before exercising his discretion the first defendant took advice. He had his solicitor instruct tax specialists Norton & Smailes as to his rights and obligations. Privilege has been waived over this advice and it appears as annexure RAI10 to the affidavit of the

first-named plaintiff. This advice makes it plain Mr Conti was quite within his rights to have the trustee make payment to him. It is the case the original advice contained an error of fact. At par 17 of the advice Messrs Norton & Smailes say a grant of probate of the will of the deceased had not yet been obtained. That was factually incorrect. This error was pointed out to the defendant's solicitors who then went back to Messrs Norton & Smailes asking whether the fact of the grant of probate made any difference. They were assured it did not. Quite clearly that advice was correct. It is difficult to see how the first or second defendants could be said to be acting with a lack of bona fides when they had taken advice from a specialist.

24 In further answer to the plaintiffs' submissions counsel for the defendants pointed out the deceased had in fact directed the benefits from the fund be paid to the first defendant on her death. Appearing as attachment AC2 to the affidavit of the first defendant sworn 18 September 2013 is a document entitled 'Application for Membership of Conti Superannuation Fund'. Under the heading 'Nomination of Beneficiaries' there is a direction to the trustees to pay any death benefit to the first defendant. This is not a so-called 'binding beneficiary nomination'. It is however a direction which was made by the deceased and to which the trustee was entitled to have regard when determining to whom the benefit ought be paid. In fact the deceased did make two binding beneficiary nominations. The first was made on 29 July 2002 and the second was made on 10 April 2006. Both directed the trustee to pay the benefit to the first defendant. A binding beneficiary nomination lapses after three years. Consequently neither was of any force and effect as at the date of death of the deceased. Curiously the second of these two binding beneficiary nominations was in effect as at the date the deceased made her will. So the direction in her will the benefit be paid to the nominated beneficiaries was not a direction with which the trustee could comply at the date the will was signed. While that is a rather curious situation it has nothing to do with the outcome of this application.

25 Essentially it was the plaintiffs' argument because the first defendant did not comply with the direction in the deceased's will he was not acting bona fide.

26 In my view the trustee was entitled to ignore the direction in the will and the mere fact he did so could not in and of itself be evidence of a lack of bona fides. There is nothing else in the evidence which suggests the trustee did not act in good faith and the plaintiffs' arguments fail.

27 The third submission made by the plaintiffs is really tied up with the issue of bona fides. The plaintiffs seek to have one of them appointed as a trustee under s 77 of the *Trustees Act 1962* (WA). To take that step it would be necessary to establish there was good reason for doing so. As I have indicated above I am not satisfied the trustee acted with a lack of bone fides or in any way improperly. There are no grounds for appointing an additional trustee. Moreover, to do so would sow the seeds of disaster. It would result in there being one corporate trustee aligned with the first defendant and one individual trustee aligned with the beneficiaries under the will. There is no mechanism for resolving the inevitable disputes that would arise in this situation. In such circumstances there would have to be a compelling reason to appoint an additional trustee. No such reason exists in this case and the discretion found in s 77 should not be exercised.

28 Finally, the plaintiffs say there should be a review of the discretion exercised by the trustee. This claim is only hinted at in the pleadings and was not developed to any extent in oral submissions. In his written submissions counsel for the defendant collected the cases which establish clearly a discretion of a trustee will only be reviewed by a court in very limited circumstances. It is not necessary to go to these cases in any detail. Suffice it to say I can see no grounds whatever for review of the trustees' decision in the circumstances of this case.

29 In my view the plaintiffs' application ought be dismissed. The defendants have foreshadowed an application for a special costs order and I will hear submissions from the parties in relation to such orders.