IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S260 of 2017

BETWEEN:

SAS TRUSTEE CORPORATION
Appellant

and

PETER MILES
Respondent

RESPONDENT'S SUBMISSIONS

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Part I: SUITABILITY FOR PUBLICATION

1. The respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: ISSUE RAISED ON APPEAL

2. Whether, in determining the additional amount payable to a "disabled member of the police force" under s.10(1A)(b) of the *Police Regulation (Superannuation) Act 1906* (NSW) ("*Police Superannuation Act*"), the extent to which matters other than being "*hurt on duty*" in terms of s.1 and the consequences of being so hurt on duty, are to be disregarded in determining the extent of the member's incapacity for work outside the police force.

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Part III: *JUDICIARY ACT 1903* (Cth), s. 78B

3. The respondent does not consider that any notice under s.78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: FACTUAL BACKGROUND

4. The respondent generally accepts the facts set out in paragraphs 6 to 15 of the Appellant's Submissions ("AS"). There are, however, some additional matters:

5. The statutory scheme was not wholly beneficial but required financial sacrifice by the respondent for the relevant benefit.[1] It is not a compensation scheme[2]; it is a superannuation scheme.

30 6. The respondent was a "disabled member of the police force" for the purpose of s.10(1).

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[1] *Police Regulation (Superannuation) Act 1906 (NSW)* s.5(1).
[2] CA at [77]; *Lembcke v SAS Trustee Corporation* (2003) 56 NSWLR 736 at [56]. *SAS Trustee Corporation v Cox* [2011] NSWCA 408 at [93] and [94],

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7. Re AS[9], the respondent was certified by the Commissioner as being hurt on duty when he was a member of the police pursuant to s.10B(3).

8. Re AS[13], the rejection of the respondent's attempt to include the psychiatric condition on his certificate of discharge was not because he did not have a psychiatric condition, nor because that injury was not sustained in the course of his duties as a police officer. It failed because of a procedural irregularity in his commencement of proceedings.[3]

9. At first instance, Neilson DCJ was satisfied (at J [82]):

   (a) The respondent was suffering from a psychiatric condition.

10 (b) The psychiatric condition adversely affected the respondent's capacity for employment outside the police force.

   (c) That if he was permitted to take the psychiatric condition into account, he would have found a 90 per cent incapacity in the open labour market.

10. He held, however, that he was precluded from doing so because the psychiatric condition had not been certified under s.10B(3) (J [81]).

Part V: APPLICABLE PROVISIONS

11. The respondent accepts the appellant's statement of applicable legislative provisions.

Part VI: ARGUMENT

12. AS[19] – [35] refer to the general principles of statutory interpretation. The general
20 principles, as stated for example in the passages quoted at AS[24] and [25] from *SZTAL v. Minister for Immigration and Border Protection* [2017] HCA 34, are not in dispute. In applying them:

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[3] *Miles v SAS Trustee Corporations* [2011] NSWIRComm 15 at [13]. *"In other words, the sequence was that in 2003 Mr Miles was certified under s.10B(1) as being incapable of personally exercising the functions of a police officer. For the reasons given, Mr Miles could not have been aggrieved by STC's decision in 2003 to issue the certificate and, therefore, no dispute could have existed about that decision. Mr Miles made application in 2009 to amend the 2003 certificate to add an infirmity. STC rejected the application on the basis that there was no dispute because Mr Miles, having been successful in his application for a certificate under s.10B(1), could not have been aggrieved by the decision to issue the certificate. The decision rejecting the amendment was not a determination under s.67 of the SA Act because it was not in relation to any dispute. The dispute only arose once there was a decision rejecting the amendment. STC is yet to make a determination in relation to that dispute. The appeal to this Court against the decision of the respondent to reject the claimed amendment to the 2003 certificate is premature."*

(a) The Court should be careful to depart from the text when it does not have the insight into the political compromises that might have been reached before the final wording of the statute was reached.[4]

(b) Care also needs to be taken to avoid a priori assumptions about the purpose of the statute.[5]

13. The appellant's contention is that when the literal words of the statute are read in context, there is a clear constraint in the operation of s.10(1A)(b)(ii) so as to limit the incapacity only to the certified "*hurt on duty*" injuries. The respondent submits that no such constraint exists and, in particular, that reliance on "the context" does not support the appellant's contention.

14. Turning first to context in broad terms, the *Police Superannuation Act* provides for a superannuation scheme to which the member and the police officers contribute. The appellant is a trustee: *Superannuation Administration Act 1996 (NSW),* ss 49 and 50.

15. It does so in the first place by providing in s. 7(1) for the more usual cases, ie:

(a) members who have attained the age of 60 and have given more than 20 years service; and

(b) members under 60 who are retired from infirmity of body or mind.

Their superannuation may be up to 72.75 per cent calculated in accordance with s. 7(1). Even though s. 7(1) refers to "infirmity of body or mind", the provisions of s. 7(1) will not apply if s. 10 is applicable: see s. 7(2).

16. In the case where superannuation payable under s. 7(1) to a member under 60 is sought, s. 8(1) provides that such a superannuation allowance may not be paid unless STC has certified the member as incapable, from infirmity of body or mind, of personally exercising the functions of a police officer.

17. The heading to s. 7 is "Superannuation allowance except where member is hurt on duty" and the heading to s. 8 is "Determination of members medically unfit". The headings do no more than provide the briefest statement of what is provided for by the

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[4] *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378 per French CJ and Hayne J at [26].
[5] *Stevens v Kabushiki Kaishi Sony* (2005) 224 CLR 193 at [32] per Gleeson CJ, Gummow, Hayne and Heydon JJ and [225] per Kirby J. *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39].

actual *words* of the two provisions. Reliance on these headings – as in AS[36] – is misplaced.

18. When one goes to ss 10 and 10B, whose headings are also relied on, those provisions themselves reflect an important part of the background context. It is that the men and women who are members of the police force fulfil public duties for the public benefit. They may not refuse orders, and the discharge of their duties carries with it the risk of injury, due to amongst other things the need to restrain or arrest persons reasonably suspected of committing a crime, or by the police officer intervening in criminal activity and riots, restraining crowd behaviour dealing with the consequences of crime and natural disasters, and potentially being regularly exposed to circumstances of the most ghastly kind. Where a police officer has been "hurt on duty" *and* is unable to continue in the police force, it is hardly surprising that the scheme of the Act is to provide them with entitlements which will increase as their ability, for whatever reason, to work *outside* the police force declines. After all their chosen career in the police force has been brought to a premature end and they have to survive in a different employment milieu.

19. Section 10 provides for the quantification of the superannuation allowance payable where the member has been hurt on duty. Its heading "Superannuation allowance where member hurt on duty" says no more than that. Section 10B provides for the manner of determining whether a member was hurt on duty. Its heading "Medical examination of disabled member and determination of whether hurt on duty" again does no more than reflect the terms of the provision, namely to determine whether the member was "hurt on duty" and is a "disabled member of the police force". The reality is that consideration of the headings of the four provisions – ss 7, 8, 10 and 10A – as "context" adds nothing to the meaning of the words used in the provisions. And no matter how much attention may be directed to context, it *is* necessary to look to the words used in the relevant statutory provisions.

20. The starting point is s. 10(1A). By that provision the annual superannuation allowance for a "*disabled member of the police force*" is one of the three figures referred to in paragraphs (a), (b) and (c) of s.10(1A).

21. As the opening words of s.10(1A) make clear, however, in order to qualify for an allowance under any of the three paragraphs of s.10(1A), the person must be a

"*disabled member of the police force*". To fall within that definition, the person must satisfy its requirements. The definition of "*disabled member of the police force*" is found in s.10(1).

22. A "*disabled member of the police force*" is, relevantly, a member who has satisfied the requirements of the definition of that term in s.10(1)(a). Those requirements are:

(a) The member was discharged from the police force.

(b) The discharge followed a certification under s.10B(1).

(c) The certification under s.10B(1) was to the effect that the member was incapable of personally exercising the functions of a police officer referred to in s.14(1) of the *Police Act 1990.*[6], the incapacity deriving from a specified infirmity of body or mind.

(d) The infirmity so specified was one which has been determined pursuant to s.10B(3) to have been caused by the member having been "*hurt on duty*". That term, it may be noted, is defined by s.1 to mean:

> "injured in such circumstances as would, if the member were a worker within the meaning of the Workers Compensation Act 1987, entitle the member to compensation under that Act."

23. "*Hurt on duty*", however, is a broad concept, picking up the concepts used in the *Workers Compensation Act 1987*. Thus, a member could be "*hurt on duty*" not only in situations of risk such as those contemplated by s.10(1A)(c) but also in the wide variety of circumstances contemplated by the relevant provisions of that Act. They include, for example, injuries sustained in a motor accident while on the way to work.[7]

24. Turning to s.10B(1), that provision requires that the appellant, having regard to medical advice on the condition and fitness for employment of the member, have

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[6] *Police Act 1900* (NSW) s.14 provides *"In addition to any other functions, a police officer has the functions conferred or imposed on a constable by or under any law (including the common law) of the State."*

[7] See cl. 25 of Part 19H of Schedule 6 of the *Workers Compensation Act 1987* which provides *"The amendments made by the 2012 amending Act do not apply to or in respect of an injury received by a police officer, paramedic or firefighter (before or after the commencement of this clause), and the Workers Compensation Acts (and the regulations under those Acts) apply to and in respect of such an injury as if those amendments had not been enacted."*. The importance is that s.10(3A) was inserted by the *Workers Compensation Legislation Amendment Act 2012* (this Act is defined by clause 25 as the *"2012 amending Act*) which provides *"A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose."* Accordingly, s.3 of the WCA simply applies in these terms *"The journeys to which this section applies are as follows: (a) the daily or other periodic journeys between the worker's place of abode and place of employment."*

certified the member to be incapable, from a specified infirmity of body or mind, of personally exercising the functions of a police officer referred to in s.14(1) of the *Police Act.* As is also apparent from the terms of s.10B(1), it requires the infirmity to be identified, ie "*specified*". (An appeal lies to the District Court from a decision by STC under s.10B(1): see s.21(1)(a)).

25. Importantly, the matter certified under s.10B(1) is that the relevant incapacity is "*of personally exercising the functions of a police officer* "referred to in s.14(1). That criterion – it may be noted in passing – is quite different from that referred to in s.10(1A)(b), namely the member's incapacity for work *outside* the police force.

10 26. The requirement of s.10B(3) is that the relevant "*infirmity*", ie the infirmity certified under s.10B(1), has been caused by the member having been "*hurt on duty*", (or more accurately that there has been a determination by the Commissioner of Police under s.10B(3) that the infirmity certified under s.10B(1) was so caused). Again there is provision for an appeal to the District Court from the decision of the Commissioner: s.21(1)(b))

27. The provisions of ss 10B(1) and 10B(3) are relevant to whether the member falls with the definition of "disabled member of the police force". If the member falls within that definition s. 10(1A) applies and it then becomes a question as to which of the three rates set out in s. 10(1A) is applicable.

20 28. The lowest is provided for by s.10(1A)(a). It is an amount equal to 72.75 per cent of the member's "*attributed salary of office*", ie salary at the date of discharge. It is payable whatever may have been the circumstances in which the member was "*hurt on duty*". Those circumstances may, or may not, have exposed the member to risks to which members of the public, the "general workforce", would not normally be required to be exposed in the course of their employment. Thus, the amount payable under s.10(1A)(a) will be the same whether – assuming for example that the "*infirmity*" came about from a motor accident – the accident occurred during a police chase, or when the police officer was being driven to work by a spouse. In either event the same amount is payable pursuant to s.10(1A)(a).

30 29. It will also be seen that the entitlement to an allowance at the rate referred to in s.10(1A)(a) does not turn *at all* on the extent, if any, of the member's capacity to find work *outside* the police force. That only becomes a relevant matter when one goes to

ss.10(1A)(b) and (c), in that each of those provisions looks at circumstances where there is an incapacity for work *outside* the police force.

30. Going to s.10(1A)(b), its terms indicate that the amount referred to in it is to be "*additional*". In the circumstances that can only mean additional to the amount referred to in the preceding paragraph, the 72.5 per cent.

31. Secondly the "*additional amount*" under s.10(1A)(b) is capped at 12.25 per cent of the member's attributed salary of office. It may be a small, or large, part of the 12.25 per cent, or it may be the whole of the 12.25 per cent.

32. The third feature of s.10(1A)(b) is that the only criterion to be applied in determining whether any or all or part of the 12.25 percent is to be the disabled member's entitlement is the member's incapacity for work *outside* the police force. It does not in any respect turn on the extent to which that incapacity is attributable to the injury which meant that the former member had been "hurt on duty". Of course, it may well be the case that the injury which resulted in the member being "*hurt on duty*" plays a part in the member's incapacity for work outside the police force, but that is not a necessary feature under s.10(1A)(b).

33. The short fact is, as submitted earlier, that the "*disabled member of the police force*" and his and her comrades have paid into a contributory superannuation fund[8] to ensure that if "*hurt on duty*" and in consequence becoming "*disabled members of the police force*" and having thus lost their future careers and prospects as serving members of the police force, they are provided for by reference to superannuation benefits at a level thereafter commensurate with their ability to work in the circumstances in which they now have to work, ie outside the police force.

34. Once the relevant criterion in s.10(1A)(b) is identified, then in determining whether, and to what extent, that criterion has been satisfied, there is no reason why *the whole person* is not to be considered. The question under s.10(1A)(b) is not whether the member has been "*hurt on duty*" or is a "*disabled member of the police force*". Those matters are already established; one does not get to s.10(1A)(b) unless they have been. Once one gets to s.10(1A)(b) it is then directed to a different question, namely to what extent is the member *now* capable of work outside the police force. That involves

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[8] *Police Regulation (Superannuation) Act 1906* (NSW) s.5.

consideration of the member's actual situation, whatever be the cause, or causes, of it. See CA[67].

35. When a member is immediately on disablement totally incapacitated for work outside the police force, the 12.5 per cent payable under s. 10(1A)(b) would be payable as from discharge. But it is also possible for the degree of a person's incapacity for work outside the police force to change with the passage of time, and from time to time, and for reasons which may, or may not, be a consequence of the injury which resulted in the member having been "*hurt on duty*".

36. That is recognised by s.10(1D) which allows the making or variation, at any time, of a determination of the thing contemplated by s.10(1A)(b), namely an additional amount of superannuation allowance, *and* allows the determination or variation to take effect from an appropriate date.

37. The third provision of s. 10(1A), s.10(1A)(c), operates if the disabled member is totally incapacitated for work outside the police force.

38. A member of the police force who has been "*hurt on duty*" and is in consequence incapable of personally exercising the functions of a police officer may yet not be totally incapacitated for work outside the police force. Take the case of a police officer who takes a bullet in the leg when making an arrest. The wound heals but the leg is damaged permanently. The officer can't carry on as a policeman, but can run a business. He or she would not qualify under s.10(1A)(c), even though hurt in circumstances to which s.10(1A)(c) would otherwise apply.

39. In relation to the application of s.10(1A)(c), it needs to be borne in mind that the disabled member is *ex hypothesi* totally incapacitated for work outside the police force, and will already have qualified for the 12.25 per cent referred to in s.10(1A)(b).

40. That is then used as the base starting point for s.10(1A)(c)(i). The additional sum also has a cap – 27.25 per cent – which if reached would bring the total allowance to 100 per cent of the member's attributed salary of office. The point between 12.25 and 27.25 per cent which is to be chosen is to be commensurate with the risk causing the member to be hurt on duty and subject to the application of the multiplier of the "*equivalent service ratio*" in s.6.

41. AS[50] suggests that the words *"incapable"* and *"incapacity"* as they appear in s.10(1) and s.10(1A)(b)(ii) respectively cannot have different meanings. The first difficulty with that contention is that the words *"incapable"* and *"incapacity"* have no technical meaning that requires them to be construed other than in accordance with their ordinary and current meaning.[9] The second difficulty is that each of the words takes its meaning from the words to which it relates, and they relate to quite different concepts.

42. One such concept, in s. 10(1), is to determine whether the member is incapable of personally performing the functions of a police officer, and thus falling within the definition of *"disabled member of the police force"*. The other concept, in s. 10(1A), requires a consideration of the former member's *"incapacity for work outside the police force"*.

43. The context of *"incapacity"* within s10(1A)(b)(ii) is distinct from that found in the definition of a *"disabled member of the police force"* containing the reference to *"incapable"*. The incapacity described at s. 10(1A)(b)(ii) has a meaning of its own: incapacity for work outside the police force. No further qualification is found in the words of the statute.

44. The context of the use of *"incapable"* and *"incapacity"* rebuts any "same word presumption".[10]

45. The AS rely heavily on the requirements of s. 10B: see AS[55], [59], [71]-[79], [81], [88]. But the submissions there advanced fail to give the relevant provisions of s. 10B the effect which their language (and the heading to s. 10B) requires. The essential purpose of s. 10B can be seen:

    (a) as to s 10B(1), to determine an element of the definition of "disabled member of the police force" in s. 10(1)[11];

    (b) as to s. 10B(3), to determine a second element of that definition.

    Once the requirements of the definition are satisfied, ss 10B(1) and (3) have no further function. Section 10(1A) comes into play.

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[9] *Thompson v His Honour Judge Byrne & Ors* (1999) 196 CLR 141 at 158 per Gaudron J
[10] *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 643 per Gibbs J; *Murphy v Farmer* (1988) 165 CLR 19 at 27 per Deane, Dawson and Gaudron JJ
[11] See CA[4], [10], [71], [72].

46. Further:

(a) The definition of *"disabled member of the police force"* excludes those police officers who do not have the certification of the trustee pursuant to s.10B(1) and the certification of the Commissioner under s.10B(3) from enjoying the benefit of a superannuation entitlement under s.10. It has no other purpose. It is not directed to constraining the grant of any additional payment under s.10(1A)(b) as suggested by the appellant.

(b) Section 10(1A) is a quantification provision, not an entitlement provision. There is no express exclusion in s.10(1A)(b)(ii) limiting the increase to "certified" medical conditions. The legislature could have included the exclusion.[12] There is no evident statutory intention in any of the provisions to limit an increase in pension due to incapacity to perform work outside the police force to only certified injuries.[13]

47. The Act severely limits the class of recipients paid under s.10, so as to provide benefits only to those who meet the certification requires in s.10B.[14]

48. The question whether a police officer has been "hurt on duty" is a factor in determining whether the officer is a disabled member of the police force, thus entitling the officer to superannuation benefits under the Act. The quantum of those benefits, however, is determined pursuant to s. 10(1A), with the core question for relevant purposes being not the extent to which the police officer was hurt on duty, but rather – in terms of s. 10(1A)(b)(ii) – the extent to which the police officer now has an incapacity for work *outside* the police force.

49. The appeal should be dismissed with costs. If it is allowed an order should be made in terms of AS[95].

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[12] *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378 at [38] per French CJ and Hayne J.
[13] *Certain Lloyds Underwriters v Cross* (supra) per Kiefel J at [101].
[14] However, if a police officer resigns or retires from the police force but does not notify of injuries before resignation or retirement, or does not notify within six months of sustaining the injury, then any award of superannuation under s.10 is prohibited by s.10B(2). As such, police officers who sustain injury or impairment after their resignation or retirement through disease of gradual onset, or latent disease, are not entitled to a s.10 superannuation allowance. In other words, the injury may have been sustained in the course of duty as a police officer, but due to the strict notification provisions, there is no entitlement to the basic s.10 superannuation allowance. This provision can operate harshly against individual claimants despite the fact they have injury and disability during their service, even though they are wholly incapacitated from employment. This capacity to exclude demonstrates the legislature addressed the limits of the scheme. One does not know the compromises that were struck to achieve the final operation of the scheme.

Part VII: NOTICE OF CONTENTION / CROSS-APPEAL

50. Not applicable.

Part VIII: ESTIMATE

51. The respondent estimates oral argument will take no longer than 1.5 hours.

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