HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND BELL JJ

ALAN MICHAEL FINCH APPLICANT

AND

TELSTRA SUPER PTY LTD RESPONDENT

Finch v Telstra Super Pty Ltd [2010] HCA 36
20 October 2010
M5/2010

ORDER

1. *Special leave to appeal granted.*

2. *Leave to file proposed amended draft notice of appeal granted.*

3. *Proposed amended draft notice of appeal treated as filed in the appeal and appeal treated as instituted and heard instanter and allowed with costs.*

4. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 23 December 2009 and 23 February 2010, and in their place order that the appeal to that Court from the order of Byrne J made on 28 November 2008 be dismissed with costs.*

On appeal from the Supreme Court of Victoria

Representation

J P Brett with M C Wall for the applicant (instructed by Arnold Thomas & Becker)

A G Uren QC with R J Harris for the respondent (instructed by Freehills)

CATCHWORDS

Finch v Telstra Super Pty Ltd

Superannuation – Construction of superannuation trust deed – Applicant applied for total and permanent invalidity ("TPI") benefit under superannuation trust deed – Definition of TPI required continuous absence from "all active Work" for six months – Whether "all active Work" limited to work for employer responsible for superannuation fund ("Telstra") – Whether period of absence assessed at date applicant left Telstra or date of trustee's determination.

Trusts – Superannuation – Review of decisions of trustees of superannuation trusts – Trustee required to determine whether applicant was "unlikely ever to engage in any gainful Work" – Whether *Karger v Paul* [1984] VR 161 applies to superannuation trusts – Whether trustee's decision discretionary – Whether trustee gave genuine consideration to application – Whether trustee failed to comply with duties to make inquiries.

Practice and procedure – Whether Court should remit matter to trustee – Whether trustee incapable of forming opinion satisfactorily – Whether only one decision open.

Words and phrases – "all active work", "genuine consideration", "total and permanent invalidity".

Superannuation Industry (Supervision) Act 1993 (Cth), ss 3, 52.
Superannuation (Resolution of Complaints) Act 1993 (Cth), s 14.

1 FRENCH CJ, GUMMOW, HEYDON, CRENNAN AND BELL JJ. The parties to this application for special leave to appeal are in controversy about the construction of a superannuation trust deed and the legal principles affecting control of decisions by its trustee. The applicant, Alan Michael Finch, is a beneficiary of the trust. The orders of which he complains are orders of the Court of Appeal of the Supreme Court of Victoria (Buchanan and Redlich JJA and Hansen AJA)[1] allowing an appeal from orders of Byrne J which were in the applicant's favour[2]. The application was argued as on an appeal.

The factual background

2 The applicant was born male. He was initially known as "Alan Finch". For some years before 1988 the applicant lived as a female under the name "Helen Finch". In 1988, at the age of 21, the applicant underwent surgery to change gender from male to female. On 1 October 1992 the applicant began employment under the name "Helen Finch" with Telstra Corporation Ltd ("Telstra"). The surgery turned out to have been extremely unsatisfactory in the sense that the applicant became very distressed about the move to female gender. On 30 September 1996 the applicant took sick leave from Telstra. In October 1996 the applicant reassumed a male personality, name and dress. He underwent surgery to reverse the gender change as far as possible. He became severely depressed, suffered from adjustment disorder and was sensitive about his appearance. On 24 March 1997 he returned to work with Telstra as "Alan Finch". On 23 January 1998 he left the employment of Telstra. From 22 February 1999 until 26 March 1999 he worked for Foxtel: during that time he took two weeks' sick leave. From 29 November 1999 until 16 May 2000 he worked part-time for Qantas: during that time he took over two weeks' sick leave.

The procedural background

3 In consequence of his employment with Telstra, the applicant was a member of a superannuation fund, the Telstra Superannuation Scheme ("the Scheme"). The Scheme is regulated by a Trust Deed ("the Deed"). For more than 10 years, since 19 May 2000, the applicant has been seeking a benefit under

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1 *Telstra Super Pty Ltd v Finch* [2009] VSCA 318.

2 *Finch v Telstra Super Pty Ltd* [2008] VSC 481; *Finch v Telstra Super Pty Ltd (No 2)* [2008] VSC 527.

cl 2.3.3 of the Deed – the benefit payable for total and permanent invalidity[3]. The respondent, Telstra Super Pty Ltd, is the trustee of the Scheme ("the Trustee").

4 On 21 March 2002 the relevant committee of the Trustee made what was called in the courts below the "first determination". It rejected the applicant's claim for a total and permanent invalidity benefit. On 10 September 2002 the applicant requested a reassessment by the Trustee. On 20 March 2003, the relevant committee again dismissed the applicant's claim in the "second determination". The applicant challenged the two determinations denying his claims in the Supreme Court of Victoria.

Byrne J's decision

5 The trial judge in the Supreme Court of Victoria, Byrne J, remitted the matter to the Trustee. He did so because he set both determinations aside on the basis that the second replaced the first, and the second was flawed. The flaw arose because the Trustee had failed to comply with its obligations to give genuine consideration to one question posed by the applicant's second application. The question was whether the applicant was unlikely ever to engage in gainful work. The applicant had relied on strong medical opinion in his favour to demonstrate that he was unlikely ever again to engage in gainful work. On the other hand, the applicant had worked since the reverse gender procedures – for some months with Telstra, and thereafter for one month with Foxtel and for five months with Qantas. The Trustee relied on these periods of work to show that the applicant was likely to engage in employment in the future. Byrne J considered that, in view of the strength of the medical opinion in favour of the applicant, the Trustee ought to have made further inquiry into three matters. One comprised the circumstances of the applicant's last months with Telstra. The second comprised the circumstances of his employment thereafter with Foxtel and Qantas. The third was a statement by the applicant to the Chief Executive Officer of the Trustee that his employment with Qantas was "a real job"[4].

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3 That clause is set out below at [7].

4 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [45]-[53].

The Court of Appeal's decision

6 The Court of Appeal of the Supreme Court of Victoria allowed the Trustee's appeal, set aside Byrne J's orders and ordered judgment for the Trustee with costs. The Court of Appeal held that the applicant's claim did not fall within cl 2.3.3 of the Deed because he did not satisfy a condition stated in the definition of "Total and Permanent Invalidity". The condition was that the applicant be absent from active work for at least six months. In its view, which differed from that of Byrne J, the condition had to be satisfied as at the date when the applicant ceased to work for Telstra, and the necessary absence from work was absence from work at Telstra: it did not suffice that there had been six months' absence by the date of the Trustee's determination[5]. The question whether the Trustee had given genuine consideration to the unlikelihood of the applicant working therefore did not arise. Nevertheless, the Court of Appeal expressed disagreement with Byrne J's conclusion in that respect[6]. Both issues arise in this Court. It is convenient to start with the first issue.

The construction of the Deed

7 *The key provisions.* Division 2 of the Deed dealt with contributions and benefits, and Pt 2.3 dealt with benefits. Part 2.3 of the Deed set out five types of benefit: Retirement benefits, Death benefits, Total and Permanent Invalidity benefits, Redundancy benefits and Withdrawal benefits. Clause 2.3.3 dealt with Total and Permanent Invalidity benefits. The material part of it provided:

> "if a Member ceases to be an Employee during a period of Division 2 Membership because of Total and Permanent Invalidity, there is payable to the Member from the Fund a lump sum benefit of an amount equal to the benefit which would have been payable under clause 2.3.2 if the Member had died on the date on which the Member ceased to be an Employee or any other date agreed between the Trustee and the Principal Employer [Telstra] from time to time either generally or in any particular case."

Clause 2.3.2 set out a formula for determining benefits which rested on, inter alia, the Member's final average salary and the years yet to elapse between the

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5 *Telstra Super Pty Ltd v Finch* [2009] VSCA 318 at [58]-[63].

6 *Telstra Super Pty Ltd v Finch* [2009] VSCA 318 at [65]-[78].

cessation of employment and attainment of the age of 60. It was common ground that the applicant was a Division 2 Member. The dispute between the parties centres on the definition of "Total and Permanent Invalidity" in cl 2.1.2. The material part was as follows:

> ""**Total and Permanent Invalidity**' means, in relation to a Member, disablement as a result of which –
>
> (a) unless otherwise agreed between the Trustee and the Principal Employer from time to time either generally or in any particular case, the Member has been continuously absent from all active Work for a period of at least six months and has been required by the Employer [in the applicant's case, Telstra] to participate in a Rehabilitation Programme; and
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> (b) in the opinion of the Trustee after consideration of any information, evidence and advice provided to the Trustee by the Employer and any other information, evidence and advice the Trustee may consider relevant, the Member has ceased to be an Employee and is unlikely ever to engage in any gainful Work for which the Member is for the time being reasonably qualified by education, training or experience".

Below, these paragraphs will be called "limb (a)" and "limb (b)". "Work" was defined in cl 1.1.1 as meaning "engagement in any business, trade, profession, vocation, calling, occupation or employment." There was no dispute about the applicant's satisfaction of the Rehabilitation Programme requirement in limb (a). The dispute was whether the applicant satisfied the requirement in limb (a) of having been continuously absent from "all active Work" for six months.

8 *The applicant's position.* The applicant contended that the requirement in limb (a) that he must have been continuously absent from "all active Work" for a period of at least six months was satisfied by absence from work for six months by the time of the Trustee's determinations. If that were the correct construction, the applicant met the requirement, because he had not worked after 16 May 2000, more than six months before either of the Trustee's determinations. At the time it made its determinations, the Trustee did not take issue with this construction. That is, the Trustee did not dispute that the applicant satisfied limb (a), but declined to form the opinion called for by limb (b).

9 *The Trustee's position.* However, in the Supreme Court the Trustee contended that the requirement of six months' absence from work had to be

satisfied by the time the applicant left Telstra's employment on 23 January 1998. He had not engaged in active work between 30 September 1996 and 24 March 1997, and for some periods between 24 March 1997 and 23 January 1998, but none of these periods was a continuous absence from work for six months – although the first period was only six days short of that figure. This was a different argument from that which the Court of Appeal relied on. The Court of Appeal required the six months' absence to be absence from work *at Telstra*, whereas the Trustee accepted that the six months' absence could be absence from work for Telstra or anyone else, so long as that absence existed before the Member left Telstra.

10 *The Court of Appeal's reasoning.* The Court of Appeal reached its conclusion in part for a reason which it expressed thus[7]:

> "there may be cases where a Member is required to do (and does) a rehabilitation program before their [sic] absence period reaches six months, and then after the rehabilitation program he or she ceases to be an employee in circumstances where the total absence was less than six months. In these circumstances, the Member would satisfy the second requirement of [limb (a)] but not the first, as the absence from Telstra was less than six months. That is to say, the second requirement does not depend on fulfilment of the first requirement, but it does presuppose that the Member has been absent from work at Telstra, and in that regard points to the expression 'active Work' meaning work at Telstra."

This reasoning was not supported by the Trustee in this Court. But in any event all that the reasoning establishes is that limb (a) required events to take place while the Member was employed by Telstra which caused Telstra to require the Member to participate in a Rehabilitation Programme. The reasoning does not establish that the six months' absence from "all active Work" must be from work at Telstra or must be before the Member ceases work at Telstra. At most it establishes only that some of the period of six months may have passed before the Member left Telstra.

11 *Arguments for the applicant's construction.* The following textual indications favour the applicant's construction.

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7 *Telstra Super Pty Ltd v Finch* [2009] VSCA 318 at [59].

12 First, limb (a) does not explicitly state that the absence from "all active Work" for six months be six months' absence from work with Telstra or from work while employed by Telstra. In this respect there is a contrast with other provisions in the Deed, which use the expression "absent from active employment with the Employer".

13 Secondly, the definition of "Work" – a word which is only used in the definition of "Total and Permanent Invalidity" in Divs 2 and 3 – is quite unlimited by reference to work for or while in the employment of any particular employer. When used in limb (b), "Work" plainly means work for any employer or in any business, trade, profession, vocation, calling or occupation; that points against "Work" in limb (a) being limited to work for, or before leaving the employment of, Telstra.

14 Thirdly, the definition of "Total and Permanent Invalidity" may be said to create four requirements:

(a) (i) continuous absence of the Member from "all active Work" for at least six months;

(a) (ii) a requirement by the Employer that the Member participate in a Rehabilitation Programme;

(b) (i) a requirement that the Trustee form the opinion that the Member has ceased to be an Employee; and

(b) (ii) a requirement that the Trustee form the opinion that the Member is unlikely ever to engage in "gainful Work".

The opinion of the Trustee described in limb (b) cannot always be formed eo instanti with the cessation of the employment. Requirement (b) (i) cannot be satisfied while the Member continues to be an Employee of Telstra. Requirement (b) (ii) is capable of being satisfied after the Member has ceased to work for Telstra and is unlikely to be satisfied earlier, because the Trustee has to receive the claim, consider the claim, form the relevant opinion and calculate the payment. The process of consideration is not necessarily speedy, because the Trustee has to consider "information, evidence and advice" – not only that provided by Telstra but also any other material in that category which the Trustee considers relevant. These are indications inconsistent with the contention that requirement (a)(i) can only be satisfied by the Member being continuously absent from work with, or while in the employment of, Telstra for six months.

15 Fourthly, the Trustee's construction leads to potential results which are so unjust as to suggest an error in the reasoning that led to them. One is that a Member on a short-term contract who suffered a catastrophic disablement within six months of the end of the contract would not satisfy the definition. A second is that a Member who suffered a disabling condition and resigned within six months in order to obtain access to accumulated benefits would also be disqualified from fulfilling the definition. A third is that an employer could terminate a disabled Member's employment prior to the expiration of the six months and avoid payment of a Total and Permanent Invalidity benefit. The Court of Appeal[8] met the first of these results, and the Trustee met the first and second of them, by contending that the Trustee and Telstra could agree to waive the requirement for six months' absence from Work while employed by Telstra. The Trustee submitted in this Court that in this case the Trustee and Telstra did not consider whether to waive the requirement because once the Trustee had decided limb (b) was not satisfied, there was no point in considering the application of limb (a), since the discretion it provided for would not have availed the applicant even if it had been considered. That was not, however, the order in which the officer advising the relevant committee of the Trustee approached the issues: he acted on the applicant's approach to the construction of limb (a) before recommending against the Trustee forming the limb (b) opinion. And the injustice in the outcomes cannot be overcome by relying on the existence of a discretionary power. That is so for two reasons.

16 The first is that it would be strongly against the interests of Telstra to exercise it. It is against those interests because any exercise of the power in favour of a Member will reduce the available trust funds. The Scheme is relevantly a defined benefit scheme (in which each Member gets the benefit defined whatever the state of the trust investments), as opposed to an accumulation scheme (in which each Member's benefit rises or falls with the prosperity of the trust investments). Telstra bore the risk of adverse investment performance, was entitled to surplus (cl 1.15.1), had power to make further contributions (cl 5.3.1) and had to face the industrial relations consequences of under funding. To waive the requirement of six months' absence would increase the risk that Telstra would have to make further contributions to the Scheme.

17 The second reason why the discretionary power of Telstra to agree with the Trustee to waive the requirement of six months' absence cannot be relied on turns on cl 1.24.2. It provided that "in the exercise, non-exercise or partial

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8 *Telstra Super Pty Ltd v Finch* [2009] VSCA 318 at [60].

exercise of each Power exercisable by it under this Deed, [Telstra] … has an absolute and uncontrolled discretion and is not subject to any fiduciary or like duty, obligation or standard." "Power" was defined as meaning "a power, right, discretion or authority of any nature and howsoever arising (including without limitation a power which a person has a duty to exercise and a power of approval)". It follows that whatever duties might lie on the Trustee in relation to its power to agree with Telstra, for most practical purposes a decision of Telstra not to make an agreement with the Trustee will be uncontrollable. It is therefore necessary to express disagreement with the Court of Appeal's statement[9]: "The mere fact that the [Trustee] might, in some cases, not agree to waive the absence period, does not mean that the construction proposed by the [Trustee] leads to absurd or illogical results." In any event, the problem lies with Telstra more than it does with the Trustee.

18 Fifthly, the crucial question in relation to "Total and Permanent Invalidity" is whether the condition of the Member is such that, in the opinion of the Trustee, the Member is unlikely ever to engage in any "gainful Work" – that is, whether the Member is in that sense a total and permanent invalid. The words "because of" in cl 2.3.3 require that condition to be the cause of the Member's cessation of employment. The same requirement flows from the words "disablement as a result of which" in the definition of "Total and Permanent Invalidity" read with the reference in limb (b) to ceasing to be an Employee. The condition must also cause the Member to be continuously absent from work for six months. But one key guide to whether the Member has in fact suffered a "disablement" with these consequences is the fact of continuous absence from work for six months. It is not important to the utility of that guide whether the absence was entirely from work for one employer or another. The applicant was entitled to say to the Trustee:

> "The vital issues are whether I am unlikely ever to engage in any gainful Work, and whether I have ceased to be an Employee 'because of' that fact. It can now be seen that the reason why I ceased to be a Telstra Employee was a state of affairs making it unlikely that I will ever engage in any gainful Work again. What matters is that that state of affairs arose while I was a Telstra Employee. It does not matter that the symptoms of that state of affairs emerged more clearly after I left Telstra's employment. And it does not matter that I was not continuously absent from active Work for six months before I left Telstra's employment, so long as I was absent for

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9 *Telstra Super Pty Ltd v Finch* [2009] VSCA 318 at [60].

that period at some time before the Trustee was called on to arrive at its opinion."

19 The construction advocated by the applicant is sound, and the Trustee's opposing arguments did not demonstrate the contrary.

20 *The arguments put by the Trustee.* What were the Trustee's arguments? Leaving aside various contextual aspects of the Deed on which the Trustee relied which were not decisive pointers for or against either side's position, the Trustee's arguments may be grouped as follows.

21 The Trustee submitted that because the five types of benefit provided pursuant to Pt 2.3 of the Deed are mutually exclusive, it is important to know at the time when employment ceases what particular benefit is obtainable. The difficulty in the submission is that the definition of "Total and Permanent Invalidity" does not permit a conclusion to be reached at the time when employment ceases. That is so for two reasons. One reason is that, as the applicant submitted, Total and Permanent Invalidity benefits are not payable as at the date of the cessation of employment. As discussed above[10], they are only payable after the Trustee has received the claim, considered it, formed the relevant opinion and calculated the payment. The other reason is that one matter about which the Trustee must form an opinion is whether "the Member has ceased to be an Employee" – an opinion which cannot always be formed eo instanti with cessation of the employment.

22 The Trustee further submitted that on the applicant's construction, it would be possible for a Member to cease to be an Employee because of a broken leg, for example, to recover from that condition quickly, to work for another employer, and then, 10 years later, to become totally and permanently incapacitated. The Trustee submitted that this led to an absurd result: the sum payable under cl 2.3.3 would run from the date when employment with Telstra ceased, not the date of total and permanent incapacity, with the result that the Member would obtain not only his salary for the 10 year period but also Total and Permanent Invalidity benefits for the 10 years in which he had earned that salary. The flaw in this argument, as the applicant submitted, is its far-fetched nature. To be disabled within the definition of "Total and Permanent Invalidity" it is necessary to cease work because of a disablement that causes the Member to have to stay away from work for six months continuously, that involves the

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10 At [14].

requirement to participate in a Rehabilitation Programme, and that leads to the opinion that the Member is unlikely ever to work again. A broken leg is very unlikely to have these consequences, and it is difficult to imagine a condition with these consequences which would allow a Member to work for 10 years in the interim.

23 The Trustee also relied on the decision of McLelland J in *Rapa v Patience*. The trust deed under consideration there defined "Total and Permanent Disablement" to mean, inter alia, "absence from the service of the Employer through illness or injury for six consecutive months". Very briefly but correctly, McLelland J said that that expression "suggests a continuation of the relationship of employer and employee for the period of such absence."[11] The Trustee submitted that that clause "is not dissimilar to the present one". But in truth, as the applicant submitted, that decision was distinguishable. As discussed above[12], limb (a) did not explicitly provide that the absence had to be "from the service of the Employer".

24 An argument of the Trustee which was much stressed was as follows. "It is impossible to cease to be an Employee *because of* Total and Permanent Invalidity, if one of the ingredients of Total and Permanent Invalidity is that there has been six months absence from work, but there has not been that six months absence at the time of the cessation" (emphasis by the Trustee). The fallacy in the submission is that it pays no attention to the fact that, as discussed above[13], a judgment by the Trustee about whether to form the opinion referred to in limb (b) of the definition need not and often cannot be made at the time when the Member ceases to be an Employee. It can be said that a Member has ceased to be an Employee "because of Total and Permanent Invalidity" if, looking back, one can see that at the date when the Member ceased to be an Employee, the reason was a condition of disablement defined in terms of the definition of "Total and Permanent Invalidity", even though at that date it could not be perceived that every element of that condition had been satisfied. The fallacy in the Trustee's submission is observable from another passage in which it was advanced: "use of the expression 'as a result of' in the definition of 'Total and Permanent Invalidity' evinces the intention of the settlor that 'disablement' does not reach the

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11 Unreported, Supreme Court of New South Wales, 4 April 1985 at 10-11.

12 See at [12].

13 At [14].

level of total and permanent invalidity unless and until the requirements of (inter alia) [limb] (a) are satisfied". What are the other things referred to by the words "inter alia" which are to be satisfied? Only the things mentioned in limb (b). Yet the first part of limb (b) – the Trustee's formation of an opinion that the Member had ceased to be an Employee – will often not be satisfied until that time has passed. On the Trustee's submission, a Member would not be able to cease work because of Total and Permanent Invalidity unless, in the opinion of the Trustee, the Member had already ceased to be an Employee. Acceptance of the Trustee's submission would mean that there could never be a valid claim under cl 2.3.3, which is absurd.

25 For those reasons, limb (a) of the definition of "Total and Permanent Invalidity" did not require the applicant to be continuously absent from "all active Work" for six months before leaving Telstra's employment. The applicant's absences from work after he left Telstra's employment enabled him to satisfy that part of limb (a).

26 *Conclusion.* The applicant did cease to be an Employee during a period of Division 2 Membership. He did so because of what can now be seen to be disablement which caused him to be continuously absent from "active Work". To require that the absence from "active Work" for six months take place before the Member ceased to be an Employee is to read words into the clause unnecessarily. It may be true that the causal relationship between the disablement and the absence cannot be established until after the Member ceases to be an Employee, but it does not follow that it did not exist before that time. A period of absence from work after ceasing to be an Employee simply assists in demonstrating that the connection between the disablement and the cessation of work actually existed.

27 *Special rules of construction.* The applicant advanced arguments to the effect that the approach to the construction of the Deed should be "practical and purposive, rather than detached and literal", so as to give it a "reasonable and practical effect"[14]. Even on the questionable assumption that in this context there

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14 Citing *In re Courage Group's Pension Schemes* [1987] 1 WLR 495 at 505; [1987] 1 All ER 528 at 537, followed in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 at 1610; [1991] 2 All ER 513 at 537; *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593 at 602; *Collins v AMP Superannuation Ltd* (1997) 75 FCR 565 at 580; *Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd* (2002) 174 FLR 1 at 54-57 [215]-[216].

can be different approaches, it is not necessary to resort to this aid to the construction of the Deed. The applicant also submitted that the Trustee's construction was "arguably ambiguous" and that the Deed should be construed contra proferentem. There is no need to invoke that aid to construction either.

Controlling the Trustee

28 *Karger v Paul principles.* The Court of Appeal treated the decision of the Trustee to form or not form an opinion under limb (b) of the definition of "Total and Permanent Invalidity" as a "discretionary decision". The Court of Appeal said[15]:

> "The Court has power to set aside the discretionary decision of a trustee if the relevant discretion was not exercised by the trustee in good faith, upon real and genuine consideration, and in accordance with the purposes for which the discretion was conferred. However, the mere fact that a trustee makes an error as to a fact or some other matter or does not make all inquiries that may have been open to be made is not sufficient reason for the Court to set aside a determination that was made in good faith, upon real and genuine consideration, and for a proper purpose."

The Court of Appeal cited the decision of McGarvie J in *Karger v Paul*[16]. In that case a testatrix left all her property to her husband for life and conferred a power on the trustees "in their absolute and unfettered discretion and upon the request of my said husband to pay or transfer the whole or part of the capital of my said estate to" the husband. The will then created a remainder after the husband's death in favour of the testatrix's cousin. The cousin challenged a decision by the trustees to transfer all the capital to the husband. McGarvie J held that the case concerned a "discretionary decision", and so did most of the well-known cases which McGarvie J discussed.

29 *A discretionary decision?* In *Dwyer v Calco Timbers Pty Ltd*[17] the Court emphasised 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

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15 *Telstra Super Pty Ltd v Finch* [2009] VSCA 318 at [65] (reference omitted).

16 [1984] VR 161.

17 (2008) 234 CLR 124 at 138-139 [37]-[40]; [2008] HCA 13.

evaluation of factual matters. The present is not a case involving a "discretion". The Trustee had to consider whether to reach two opinions. One was whether a Member had ceased to be an Employee. That is scarcely a discretionary decision. It is no more discretionary than the decision of a judge in conventional litigation about whether a contract of employment has come to an end. The second opinion was whether the Member was unlikely ever to engage in "gainful Work". In the forming of an opinion on that subject there are no doubt factors to be examined which are difficult to weigh, impressions to be formed, and judgments to be made, but the field is quite different from fields in which the competing claims of potential candidates for bounty are compared.

30 The Trustee was trustee of a trust. It had a duty to distribute to those who fell within the definition of "Total and Permanent Invalidity" and a duty not to distribute to those who did not. That affected its role in relation to the forming of its opinion under limb (b). Forming that opinion 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. That duty was owed to the Members, including the applicant. The applicant was not the object of a discretionary power of appointment. He 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.

31 That conclusion is supported by various aspects of the context.

32 First, there is the factual context. The history of Telstra – by which the telephone services provided by colonial governments were taken over by the Commonwealth, and run first by a Commonwealth government department, then by a quasi-autonomous body corporate subject to Ministerial direction, then by a company limited by shares wholly owned by the Commonwealth, and thereafter by that company but with the shares owned by the public and the Future Fund – is discussed elsewhere[18]. The applicant began employment with Telstra while it was wholly owned by the Commonwealth. By the time he left it was partly owned by the public. The Scheme was instituted in 1990, before Telstra was incorporated and before Telstra succeeded the then Principal Employer, the Australian Telecommunications Corporation. Amendments to the Deed since that time have reflected the advent of Telstra in 1991. At all stages Telstra and its predecessors have been very large employers of labour.

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18 *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 220-223 [9]-[20]; [2008] HCA 7.

33 Another aspect of the factual context is that the Deed is dealing with the superannuation of employees. For some people, superannuation is their greatest asset apart from their houses; for others it is even more valuable. Different criteria might be thought to apply to the operation of a superannuation fund from those which apply to discretionary decisions made by a trustee holding a power of appointment under a non-superannuation trust[19]. Employer superannuation is part of the remuneration of employees. Membership of the employee superannuation fund may be compulsory. Superannuation, unsurprisingly, is a matter of trade union interest. The question of superannuation entitlements may form the subject of an industrial dispute within the meaning of s 51(xxxv) of the Constitution[20]. Superannuation is not a matter of mere bounty, or potential enjoyment of another's benefaction. It is something for which, in large measure, employees have exchanged value – their work and their contributions. It is "deferred pay"[21]. These are propositions which are not falsified by arguments advanced by the Trustee to the effect that the Death and Total and Permanent Invalidity benefits under the Deed involve in part an element of bounty. Superannuation is a method of attracting labour[22]. 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.

34 A further factor is the public significance of superannuation. The federal government has attempted to reduce outflows by reducing the dependence of retired persons on the old-age pension funded out of general revenue. The taxation concessions now provided pursuant to Pt 3-30 of the *Income Tax Assessment Act* 1997 (Cth) are designed to encourage citizens to make provision for their retirement by investing in superannuation and to encourage their

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19 See Walker, "Some Trust Principles in the Pensions Context", in Oakley (ed), *Trends in Contemporary Trust Law*, (1996) 123; Hayton, "Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts", (2005) 69 *Conveyancer* 229.

20 *Re Amalgamated Metal Workers Union; Ex parte Shell Co of Australia Ltd* (1992) 174 CLR 345 at 356; [1992] HCA 38.

21 *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 at 1407.

22 *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341 at 355; [1986] HCA 23.

employers to create superannuation funds in their favour. The Parliament also has required employers to contribute a certain percentage of the employee's salary for these purposes[23]. Partly as a result, large amounts of assets are administered by the trustees of superannuation funds.

35 Because of the potentially lengthy time periods over which superannuation savings are accumulated, it was natural, and it is now in many instances mandatory, for a trust mechanism to be employed. These funds have increasingly come under detailed statutory regulation. The government considers that the taxation advantages of superannuation should not be enjoyed unless superannuation funds are operating efficiently and lawfully. For that reason it has, by procuring the enactment of the *Superannuation Industry (Supervision) Act* 1993 (Cth) ("the Supervision Act") and regulations made under it, imposed quite rigorous regulatory standards. The Deed reflects the enactment of that legislation. Section 3(1) of that Act provides:

> "The object of this Act is to make provision for the prudent management of certain superannuation funds, approved deposit funds and pooled superannuation trusts and for their supervision by [the Australian Prudential Regulation Authority], [the Australian Securities and Investments Commission] and the Commissioner of Taxation."

And s 3(2) provides:

> "The basis for supervision is that those funds and trusts are subject to regulation under the Commonwealth's powers with respect to corporations or pensions (for example, because the trustee is a corporation). In return, the supervised funds and trusts may become eligible for concessional taxation treatment."

36 Thus the public significance of superannuation and the close attention paid to it through statutory regulation support the conclusion that the decisions of superannuation trustees are not likely to be largely immunised from judicial control without clear contrary language in the relevant trust document[24].

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23 *Superannuation Guarantee (Administration) Act* 1992 (Cth), Pt 3 (ss 16-32). The terms "employer" and "employee" are defined in s 12.

24 The Trustee submitted, in effect, that the language existed here. It submitted that it had "an absolute and uncontrolled discretion" in relation to its "Powers" (cl 1.4.1) and that its role in considering whether to reach a limb (b) opinion was a "Power".

(Footnote continues on next page)

Decisions like those which the Trustee made in this case are not discretionary decisions in the sense used in *Karger v Paul*.

37 Those reasons also suggest, though the contrary was apparently not put to it, that the Court of Appeal was wrong to approach the present controversy as if the principles stated in *Karger v Paul*, developed in and appropriate to other fields, were applicable in the present field without any qualification. But the question how far those principles should be qualified may be postponed for a time[25].

38 *The crucial question.* The crucial question is whether the Court of Appeal's reasons for rejecting Byrne J's conclusion that the Trustee had conducted insufficient inquiries, applying the *Karger v Paul* test, are sound. It is crucial because if the applicant establishes that the answer is that they are not sound in the light of the *Karger v Paul* test, he will be successful, and he can do no better by urging the development and application of a more generous test[26].

39 *The role of the reasons.* The problems that arise in cases where trustees do not give reasons for a conclusion to which they have come are not present here. The advice given to the relevant committee of the Trustee was given in writing. The deliberations of the committee were recorded in detailed minutes. And the Trustee gave reasons through one of its officers (the Manager Insured Benefits) when that officer informed the applicant's solicitors of the Trustee's first determination, ie its decision not to reach the opinion described in limb (b). He said:

> "The Trustee noted that at the date he ceased employment with Telstra, [the applicant] had completed a rehabilitation program and was considered capable of performing his normal duties without restriction. The Trustee also noted [the applicant] had been the successful applicant for a position with Telstra Mobilenet based at Collingwood Victoria, however he had

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"Power" was defined as meaning "a power, right, discretion or authority of any nature". That submission must be rejected.

25 See below at [57]-[66].

26 The applicant's proposed amended draft notice of appeal contains a number of grounds which are both ambitious and vague, but ground 2.4(c) sufficiently relies on the correctness of Byrne J's approach.

> accepted an offer of redundancy instead of taking up that position. It was therefore the opinion of the Trustee that [the applicant] had the capacity for gainful work as at the date he ceased employment with Telstra.
>
> The Trustee also noted that [the applicant] had worked since ceasing employment with Telstra.
>
> It was the opinion of the Trustee that the work [the applicant] had done was gainful work for which he was qualified and this had demonstrated that [the applicant] had the capacity to engage in gainful work both at the date he ceased employment and thereafter."

The second determination did not add to the reasons given in that letter to the applicant's solicitors.

40 *Matters troubling Byrne J.* Although Byrne J found for the applicant in one respect, he was troubled in other ways. He expressed unease about, but did not decide, whether the Trustee had addressed the correct question in that it had inquired whether the applicant was not "capable" of work or lacked the "capacity" for work; it had not inquired in terms whether he was "unlikely ever to engage" in work[27]. Byrne J expressed "a feeling of profound discomfort"[28] about the fact that the committee, if the minutes of its meeting on 20 March 2003 are fair, do little more than repeat the reasons stated in the minutes of the committee meeting held on 21 March 2002 which led to the first determination. The minutes of the 20 March 2003 meeting did additionally record the following:

> "The Chief Executive Officer of [the Trustee] informed the Committee that he had a telephone conversation on 27 February 2003 at the instigation of [the applicant]. [The Chief Executive Officer] informed the Committee that, during the conversation, [the applicant] volunteered the statement that his employment with Qantas had been a real job."

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27 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [28].

28 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [41].

Byrne J explained the source of his discomfort thus[29]:

> "There is nothing to suggest that the trustee undertook any consideration of the contention made by [the applicant] that the work at Foxtel and Qantas was a failed rehabilitation effort. There is no reason to reject these uncontradicted assertions made by and on behalf of [the applicant]. Nothing, that is, except the fact of his employment with Foxtel and Qantas and the volunteered statement to [the Chief Executive Officer] that the Qantas employment was a real job."

As will be seen, this statement of the Chief Executive Officer was important to the aspect of Byrne J's reasoning on which he found for the applicant[30]. However, Byrne J, applying a test stated in *Telstra Super Pty Ltd v Flegeltaub*[31] that "a court may infer a breach of duty if the decision is one which no reasonable trustee could make on the material which was before it", which he called a "severe test", found himself "unable to conclude that a reasonable trustee could not have rejected" the applicant's claims[32].

41 It is not necessary to examine the applicant's arguments in relation to those matters. It is sufficient to consider the reasoning of Byrne J on the one point on which the applicant succeeded.

42 *Byrne J's reasoning in favour of the applicant.* Byrne J held that the Trustee failed to decide the question of what opinion it should reach "in good faith and to give genuine consideration to it."[33] He said the Trustee[34]:

> "viewed the question as, in effect, a contest between the opinions of the doctors and the actual observed experience of [the applicant] in the workplace with Telstra and thereafter. The difficulty which I have with

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29 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [41].

30 See at [48]-[49] below.

31 (2000) 2 VR 276 at 284 [26].

32 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [44].

33 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [45].

34 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [46].

> the determinations is that the [Trustee] appeared to be very ready to accept the evidence as to the claimant's work experience without any or very much inquiry as to its true nature and to reject the very strong evidence of the doctors to the contrary."

43 When Byrne J used the words "good faith", he was not suggesting that the Trustee was acting in bad faith. Indeed he later acquitted it of "mala fides" in terms[35]. Byrne J meant only that the Trustee had failed to give the matter "genuine" consideration in that it had failed to pursue sufficient inquiries. The Trustee advanced a submission in this Court which contended that Byrne J had misunderstood the *Karger v Paul* test in relation to "good faith and genuine consideration". Read as a whole, Byrne J's reasoning reveals that criticism to be ill-founded.

44 Byrne J held that the Trustee failed in its duty to make inquiries in three ways.

45 *First failure: the last months with Telstra.* The first failure was that the Trustee made no inquiry about the last months of the applicant's employment with Telstra.

46 Byrne J said[36]:

> "[The Trustee] did not even have a record of [the applicant's] absences from work or the reasons for them – information which it had sought and obtained from Foxtel and Qantas. Against the bald statements of the managers, the [Trustee] might have weighed the harrowing account of the insecure man in an environment which he may well have seen as hostile, in a work situation where his secure and relatively prestigious job had been downgraded and had become insecure. … [The Trustee] ought … [to] have made some further inquiry of these matters which [the applicant] said led him to decide not to continue working within the Telstra organisation."

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35 *Finch v Telstra Super Pty Ltd (No 2)* [2008] VSC 527 at [9].

36 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [47].

47 *Second failure: the employment with Foxtel and Qantas.* The second failure was described thus[37]:

> "It is true that, on its face, the ability of [the applicant] to hold a job for a month with Foxtel and for five months with Qantas was powerful evidence against his being unlikely ever to engage in gainful work. But in this case, [the applicant] had marshalled a body of material to suggest that his work was merely a rehabilitative effort on his part to return to the workforce. If this was accepted, this requirement of the definition of [Total and Permanent Invalidity] would be satisfied. The evaluation of this material is, of course, for the [Trustee]. But what troubles me, again, is the readiness of the [Trustee] to put it aside and to prefer a conclusion that this employment, which in each case had failed, demonstrated that [the applicant] was not unlikely to engage in employment in the future. The [Trustee] had before it the 'real job' statement volunteered to [the Chief Executive Officer of the Trustee] and the information from Qantas that [the applicant] performed his duties adequately and had a good command of the skills and expertise required. It may be that such information was not inconsistent with the views of the doctors that he did have the ability to perform his work but that his psychological fragility rendered him unable to exercise these abilities in the workplace. It seems to me that a [Trustee], acting in good faith and approaching its task with an open mind so that a genuine consideration should be given to the claim, would have made further inquiry to determine the accuracy of the assessments of this work experience offered on behalf of [the applicant]."

48 *Third failure: the "real job" conversation.* The third failure arose from the fact that the Trustee placed weight on the statement which its Chief Executive Officer told the committee at its 20 March 2003 meeting had been made to him by the applicant in a telephone call allegedly initiated by the applicant. Byrne J found it a little surprising that the applicant made the call, and more surprising that the Chief Executive Officer would have spoken to him. He continued[38]:

> "But it seems he did. In the course of this conversation [the applicant] volunteered that his employment with Qantas was 'a real job'. Why he should have volunteered this is unclear. It was a question which [the

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37 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [48].

38 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [51].

Chief Executive Officer] would have been very interested in because the principal matter at issue at that time was whether this employment was a rehabilitation attempt or a real job. Nothing is known as to what, if anything, [the Chief Executive Officer] told his co-directors about the circumstances of this conversation, the context of the volunteered statement or his interpretation of it."

49 Byrne J then said[39]:

"The information provided to the board by [the Chief Executive Officer] has … another dimension which causes me further disquiet. As recorded, it seemed to be the only material before the [Trustee] which directly impugns [the applicant's] case that his employment should be seen as rehabilitation. I express no view, of course, as to the accuracy of this remarkable conversation as reported in the minutes. I know nothing of the context in which the information was volunteered. I do not know what is to be understood by the expression 'a real job'. It appears to have been a significant factor in determining whether [the applicant's] work at Qantas should be seen as an indication that he had secured gainful employment in the sense required by the definition of [Total and Permanent Invalidity]. In these circumstances, [the Chief Executive Officer] played the role of witness and that of participant in the evaluation and interpretation of his own evidence. … This important piece of information, however, was not communicated to [the applicant] or his legal [advisers] for their response. If this had been done and he denied making the statement, the position of the directors would have been very delicate indeed. How would [the Chief Executive Officer] be expected to cast his vote in the circumstances? Would his co-directors be expected to reject his account of the conversation or his interpretation of it? It is not for me to enter into this arena. It is sufficient that I say, as I do, that a fair-minded trustee seeking to give genuine consideration to a [Total and Permanent Invalidity] benefit claim ought to have investigated this information further, at least by inviting comment from [the applicant]."

50 The Trustee did not mount any direct attack on the reasoning of Byrne J in the above respects. It supported the Court of Appeal's reasoning.

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39 *Finch v Telstra Super Pty Ltd* [2008] VSC 481 at [52].

51 *The Court of Appeal's reasoning: the "first failure".* The Court of Appeal dealt with the trial judge's conclusions about the Trustee's "first failure" by saying that further inquiries as to the circumstances of the applicant's last months of employment at Telstra would have relevance which was only "limited" and "minimal"[40]. The Court of Appeal appeared to think that the sole question on which Byrne J concentrated was whether the applicant had been "mistreated" at Telstra. That is not so: he was concerned with the applicant's health generally, and his possible reaction to the environment as hostile, whether or not it actually was hostile. The "harrowing account" to which Byrne J referred was contained in the applicant's initial application for a Total and Permanent Invalidity benefit, and constituted an element in the histories which the applicant gave his doctors. The "harrowing account" and the medical opinions based on it appear to have had considerable, not limited or minimal, relevance. The Court of Appeal attributed to Byrne J the proposition that the Trustee merely adopted the "bald assertion" of the Telstra managers that the applicant was not a total and permanent invalid in April 1997[41]. Byrne J did not say that; but in any event the internal Telstra material to which he referred, which came from persons who admitted they were "not medically qualified" and disclaimed knowledge of the applicant's "current medical status", was wanting in detail compared to the information which the applicant supplied. The Court of Appeal did not demonstrate error in Byrne J's conclusion that the Trustee should have pursued further inquiries about the last months of the applicant's employment with Telstra.

52 *The Court of Appeal's reasoning: the "second failure".* The Court of Appeal did not deal with that part of Byrne J's reasoning which supported his conclusion about the Trustee's "second failure".

53 *The Court of Appeal's reasoning: the "third failure".* In relation to the "third failure", the Court of Appeal said that the "real job" statement did not detract from the applicant's case, and hence there was no reason why the Trustee should have sought the applicant's comment about it[42]. To this there are two answers.

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40 *Telstra Super Pty Ltd v Finch* [2009] VSCA 318 at [76].

41 *Telstra Super Pty Ltd v Finch* [2009] VSCA 318 at [77].

42 *Telstra Super Pty Ltd v Finch* [2009] VSCA 318 at [75].

54 First, the "real job" statement was regarded as important. It can only have been regarded as important because it detracted from the applicant's case. The conclusion that it was regarded as important flows from the following circumstances. It was recorded in the minutes of the committee meeting held on 20 March 2003 as additional information that had come to hand since the first determination on 21 March 2002. The letter of 4 April 2003 to the applicant's solicitors stated that the Trustee had had before it, inter alia, information made available since 21 March 2002, and that the Trustee had reached its second determination having "considered all the information". Further, in the recommendation of the Manager Insured Benefits that the applicant's request for reconsideration be rejected, which was before the committee at its meeting on 20 March 2003, there is a passage rejecting the applicant's claim that the Foxtel and Qantas employments were only rehabilitative: it was likely that the "real job" conversation was seen as supportive of that rejection. If the person who drafted the minutes and the Manager Insured Benefits (who made the recommendation and sent the letter) thought it right to express themselves in this way, it is hard to avoid the conclusion that the "real job" statement detracted from the applicant's case in the view of those responsible for the Trustee's decision.

55 Secondly, although the Trustee in this Court relied on the fact that counsel for the applicant below took the position that there was no conflict between the "real job" statement and other material before the Trustee, counsel for the Trustee had submitted the contrary to the trial judge. Prima facie that contrary submission has force. Byrne J's opinion on that subject is therefore soundly based.

56 It must be concluded that the Court of Appeal's attacks on Byrne J's reasoning fail. His opinion that the Trustee did not comply with a duty of inquiry stands.

The status of *Karger v Paul*

57 Earlier the question how far the principles in *Karger v Paul* should be qualified was postponed[43]. It was a question of some controversy between the parties.

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43 See [37] above.

58 The applicant argued that the Court should hold that the principles stated in the *Karger v Paul* line of cases do not apply to superannuation trusts, at least in relation to substantial matters like claims to total and permanent invalidity benefits. Among the reasons which emerged in the course of the argument for this conclusion were the following.

59 First, the context in which *Karger v Paul* principles grew up is one in which settlors donated assets on trusts and selected trustees to administer those trusts. Usually the beneficiaries were few. Usually the beneficiaries were volunteers. Without the protection given by *Karger v Paul* principles it might be difficult to attract people to hold the gratuitous office of trustee. In contrast, trustees of superannuation funds are typically corporations holding vast assets which they seek to administer in professional fashion under tight statutory regulation. The members are not volunteers or objects of bounty. Both employers and members contribute to the fund, sometimes pursuant to the contracts of employment, and, now, pursuant to statute law. Significant numbers of judges have therefore questioned the application of the *Karger v Paul* principles to superannuation funds. The applicant submitted that those judges who had applied *Karger v Paul* principles in the superannuation trust area had been wrong to do so.

60 Secondly, s 52(1) and s 52(2)(b) of the Supervision Act provide that where the superannuation trust rules do not contain a covenant by the trustee to the following effect, the rules will be taken to contain it: "to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide".

61 Thirdly, superannuation funds are not in truth discretionary trusts.

62 Fourthly, s 14(2) of the *Superannuation (Resolution of Complaints) Act* 1993 (Cth) ("the Complaints Act") gives rights to members to complain to the Superannuation Complaints Tribunal about decisions of superannuation trustees which are unfair or unreasonable. The Tribunal may affirm the decision, may remit or vary it, or may set it aside and substitute a new decision (s 37(3)); there is an "appeal" to the Federal Court of Australia on a question of law (s 46(1)). Here the applicant was out of time in complying with the time limit fixed by s 14 for making a complaint to the Tribunal: in such cases the general law should be modified so as to conform to the statute. The *Karger v Paul* principles are too narrow and too difficult to satisfy in relation to superannuation trusts, and do not adequately protect the important interests of beneficiaries in having the decisions of trustees properly controlled. The applicant therefore submitted that the Court

should hold that the decision of a superannuation fund trustee should be set aside if it were not "fair and reasonable".

63 The Trustee disputed these submissions. Among other things, it said that not all superannuation funds are matters of bargain, without any element of bounty. It was said that a vast bulk of authority assumed or said that *Karger v Paul* principles applied to superannuation funds. The Complaints Act was said not to help the applicant, because it changed the existing law, but did not reflect the type of broad legislative change to which the general law should accommodate itself[44]. It was said to be wrong to change the general law so as to confer the rights given by that Act without the accompanying limitations like time limits. The Trustee said that those who created superannuation trusts had deliberately adopted the trust model, with its accompanying conferral on trustees of a considerable area within which their decisions are unreviewable.

64 Something should be said in passing about the authorities referred to by the Trustee as applying *Karger v Paul* principles to superannuation funds. Some of the decisions preceded the Supervision Act[45]. In some no point was taken that *Karger v Paul* principles did not apply[46]. In most it would have been difficult for the relevant court to depart from the assumptions of judges in other cases. Others, described by the Trustee as being cases where *Karger v Paul* principles were applied, not to discretionary decisions, but to decisions turning on matters of fact and judgment, and hence to decisions similar to the limb (b) opinion in this case, were wrongly so described[47].

65 However, save in one respect, it is not necessary further to evaluate the merits of the competing contentions about how far *Karger v Paul* principles were applicable and whether other principles should be adopted. That is because it is sufficient for the resolution of the present case to hold that Byrne J's reasoning in favour of the applicant is sound and the Court of Appeal's criticisms of it are

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44 Citing *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 63 [26]-[28]; [1999] HCA 67.

45 For example, *Rapa v Patience* unreported, Supreme Court of New South Wales, 4 April 1985 at 11-12 per McLelland J.

46 For example, *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 99-100 [7]; [1999] HCA 28; *Edge v Pensions Ombudsman* [2000] Ch 602.

47 For example, *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440 [42 ER 330].

unsuccessful. To offer answers to wider questions which might arise in disputes different from the present where it is not necessary to do so would have an unsettling effect on the law which may not be beneficial.

66 Byrne J's reasoning is, however, reinforced by one qualification to *Karger v Paul* principles in the present context. There is no doubt that under *Karger v Paul* principles, particularly as they have been applied to superannuation funds, the decision of a trustee may be reviewable for want of "properly informed consideration"[48]. If the consideration is not properly informed, it is not genuine. The duty of trustees properly to inform themselves is more intense in superannuation trusts in the form of the Deed than in trusts of the *Karger v Paul* type. It is extremely important to the beneficiaries of superannuation trusts that where they are entitled to benefits, those benefits be paid. Here, for example, the applicant was claiming a Total and Permanent Invalidity benefit to support himself for the rest of his life. His claim depended on the formation of an opinion by the Trustee about the likelihood that he would ever engage in "gainful Work": that was not a mere discretionary decision. In the Deed there was a power to take into account "information, evidence and advice the Trustee may consider relevant", and that power was coupled with a duty to do so. It would be bizarre if knowingly to exclude relevant information from consideration were not a breach of duty. And failure to seek relevant information in order to resolve conflicting bodies of material, as here, is also a breach of duty. The Scheme is a strict trust. A beneficiary is entitled as of right to a benefit provided the beneficiary satisfies any necessary condition of the benefit. Whether or not it will be decided hereafter that, consistently with s 14 of the Complaints Act, the duty of a trustee in forming an opinion of the present type is a duty to form a fair and reasonable opinion, or even a duty to form a correct opinion, there is because of the importance of the opinion and its place in the Scheme a high duty on the Trustee to make inquiries for "information, evidence and advice" which the Trustee may consider relevant. The existence of that duty in a more intense form than exists under *Karger v Paul* principles in their standard application is further support for the correctness of Byrne J's decision.

Relief

67 The only controversial aspect of the relief concerns a submission of the applicant to Byrne J, repeated in this Court, that if his other arguments

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48 *Kerr v British Leyland (Staff) Trustees Ltd* [2001] WTLR 1071 at 1079; *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27 at 31.

succeeded, the matter should not be remitted to the Trustee for determination, but that the Court should make its own determination standing in the shoes of the Trustee in the light of the material before the Trustee at the time of the second determination. In particular, the Court should do this if it thought that on the present materials there was only one decision open. The applicant argued that the Court could not be confident that the Trustee could fairly and objectively assess the applicant's claim on its merits, given the history of events, the fact that the Trustee had argued "vehemently" against the applicant's case in the courts and the failure of the Trustee to comply with its obligations of genuine consideration. On the other hand, the Trustee submitted that the Deed committed the questions arising in limb (b) of the definition of "Total and Permanent Invalidity" to the opinion of the Trustee, not the Court. It would only be appropriate not to remit the matter to the Trustee if it were to be concluded that the Trustee was incapable of approaching the task of forming its opinion satisfactorily.

68 The Trustee was correct in submitting that that conclusion should not be drawn. As Byrne J said, the Trustee had done no more than fail to observe due process by giving genuine consideration: there was no mala fides. Further, it cannot be said that a conclusion in the applicant's favour on limb (b) is the only possible conclusion. In those circumstances, regrettable though the further delays are, the matter must be remitted to the Trustee.

Orders

69 The orders are:

1. Special leave to appeal granted.

2. Leave to file proposed amended draft notice of appeal granted.

3. Proposed amended draft notice of appeal treated as filed in the appeal and appeal treated as instituted and heard instanter and allowed with costs.

4. Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 23 December 2009 and 23 February 2010, and in their place order that the appeal to that Court from the order of Byrne J made on 28 November 2008 be dismissed with costs.