FEDERAL COURT OF AUSTRALIA

Trustees of the Property of Morris (Bankrupt) v Morris (Bankrupt) [2016] FCA 846

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| File number: |  |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 22 July 2016 |
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| Catchwords: | **BANKRUPTCY** – after-acquired property – life insurance payments to widowed spouse of member of superfunds – widowed spouse bankrupt – whether payments from superfunds constitutes after-acquired property divisible amongst creditors and vested in trustees in bankruptcy – *Bankruptcy Act 1966* (Cth) ss 58, 116**SUPERANNUATION** – after-acquired property – life insurance payments to widowed spouse of member of superfunds – widowed spouse bankrupt – whether payments from superfunds constitute after-acquired property divisible amongst creditors and vested in trustees in bankruptcy – whether interest in superannuation fund ought to be construed as superannuation interest as defined in *Superannuation Industry (Supervisions) Act 1993* (Cth) – *Bankruptcy Act 1966* (Cth) ss 58, 116  |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 58, 58(1), 116, 116(1), 116(2), 116(2)(a), 116(2)(d), 116(2)(d)(iii) , 116(2)(d)(iii)(A), 116(2)(d)(iv), 116(2)(d)(iva), 116(2)(d)(vii)*Family Law Act 1975* (Cth)*Superannuation Industry (Supervision) Act 1993* (Cth) |
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| Cases cited: | *Di Cioccio v Official Trustee in Bankruptcy* (2015) 229 FCR 1*Lin, Re; Law v Lin* (1960) 18 ABC 142*NM Superannuation Pty Ltd v Young* (1993) 41 FCR 182*Sainsbury v Inland Revenue Commissioners* [1970] Ch 712 |
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| Date of hearing: | 22 July 2016 |
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| Registry: |  |
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| Number of paragraphs: | 35 |
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| Counsel for the Applicant: | Mr M Hickey |
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| Solicitor for the Applicant: | James Conomos Lawyers Pty Ltd |
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| Counsel for the Respondent: | Mr A Fraser |
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| Solicitor for the Respondent: | Williams Graham Carman Lawyers |

ORDERS

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|  | QUD 432 of 2016 |
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| BETWEEN: | THE TRUSTEES OF THE PROPERTY OF DEBBIE ALINA MORRIS (A BANKRUPT)Applicant |
| AND: | DEBBIE ALINA MORRIS (A BANKRUPT)Respondent |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 22 JULY 2016 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent’s costs of and incidental to the application, to be taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1. Ms Debbie Alina Morris (also known as Foreman) is a bankrupt. She was made bankrupt on 28 August 2013. At that time, Mr Nick Combis and Mr Peter Dinoris, each official liquidators and registered trustees, were appointed as the trustees of her bankrupt estate.
2. Ms Morris is a widow. Her late husband, Mr Michael Parnell Foreman, died on 19 May 2013. At the time of Mr Foreman’s death, he and Ms Morris had two dependent children: Gracie Dulcie Foreman, born on 11 July 2011, and Wes John Foreman, born on 26 January 2013. At the time of his death, the late Mr Foreman held policies with the trustees for the AustSafe Super Fund (AustSafe Super) and the Plum Superannuation Fund (Plum Super).
3. After becoming bankrupt, Ms Morris received two payments which are of present interest:

(a) on 23 December 2013, a payment of $45,392.48 from AustSafe Super (the AustSafe Super payment); and

(b) on 26 March 2014, a payment of $67,240.27 from Plum Super (the Plum Super payment).

Ms Morris separately received from Plum Super a payment of $311,865.93 by way of a life insurance and related anti-detriment adjustment payment. Her receipt of that sum is not controversial as between Ms Morris and her bankruptcy trustees. What is controversial is whether the AustSafe Super payment and the Plum Super payment or either of them form part of the property which is divisible amongst her creditors.

1. A scheme of the *Bankruptcy Act 1966* (Cth) (the Bankruptcy Act) is that by s 58(1) and subject to other provisions of the Bankruptcy Act, where a debtor becomes bankrupt:

(a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and

(b) after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.

1. Section 116(1)(a) provides:

all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge

1. That particular statement as to the property divisible amongst the creditors of a bankrupt is subject to the limitations found in respect of particular property designated in s 116(2). Of the classes of exempted property there specified, the following are of particular interest in these proceedings:

(a) property held by the bankrupt in trust for another person;

…

(d) subject to sections 128B, 128C and 139ZU:

(i) policies of life assurance or endowment assurance in respect of the life of the bankrupt or the spouse or de facto partner of the bankrupt;

(ii) the proceeds of such policies received on or after the date of the bankruptcy;

(iii) the interest of the bankrupt in:

(A) a regulated superannuation fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); or

(B) an approved deposit fund (within the meaning of that Act); or

(C) an exempt public sector superannuation scheme (within the meaning of that Act);

(iv) a payment to the bankrupt from such a fund received on or after the date of the bankruptcy, if the payment is not a pension within the meaning of the *Superannuation Industry (Supervision) Act 1993*;

(iva) a payment to the bankrupt under a payment split under Part VIIIB of the *Family Law Act 1975* where:

(A) the eligible superannuation plan involved is a fund or scheme covered by subparagraph (iii); and

(B) the splittable payment involved is not a pension within the meaning of the *Superannuation Industry (Supervision) Act 1993*;

(v) the amount of money a bankrupt holds in an RSA;

(vi) a payment to a bankrupt from an RSA received on or after the date of the bankruptcy, if the payment is not a pension or annuity within the meaning of the *Retirement Savings Accounts Act 1997*;

(vii) a payment to the bankrupt under a payment split under Part VIIIB of the *Family Law Act 1975* where:

(A) the eligible superannuation plan involved is an RSA; and

(B) the splittable payment involved is not a pension or annuity within the meaning of the *Retirement Savings Accounts Act 1997*;

1. The general operation and effect of ss 58 and 116 of the Bankruptcy Act was described by the Full Court in *Di Cioccio v Official Trustee in Bankruptcy* (2015) 229 FCR 1 at 9-11 [28] – [34] (*Di Cioccio*):

28. Section 58 is in Div 4 of Pt IV of the Act: see [8] above. It contains the general rule for the *vesting of property* when a debtor becomes a bankrupt. The general rule is “[s]ubject to this Act”. The section deals with the property of a bankrupt at the time of becoming bankrupt (subs (1)(a)) as well as “after-acquired property of the bankrupt” (subs (1)(b)). As s 58(1)(b) states, after-acquired property of the bankrupt vests in the Official Trustee (or the trustee of the bankrupt’s estate) as soon as it is acquired by, or devolves on, the bankrupt. As we have seen, *after-acquired property* is defined in s 58(6) for the purposes of s 58 to mean “property that is acquired by … the bankrupt on or after the date of the bankruptcy, being *property that is divisible amongst the creditors of the bankrupt*” (emphasis added): see [11] above.

29. The last phrase, *property [that is] divisible amongst the creditors of the bankrupt*, is specifically addressed in s 116 of Div 3 of Pt VI of the Act: see [13] above. That section identifies, subject to other provisions of the Act, the property that is divisible (s 116(1)), and that which is not divisible (s 116(2)), amongst the bankrupt’s creditors.

30. The nature of the property (whether it is divisible amongst creditors or not) determines whether or not the property vests in the trustee. If an item of property is of a kind which is divisible amongst the creditors of a bankrupt (s 116 (1)), it vests in the trustee. If it is property of a kind which falls within one of the categories listed in s 116(2), it is entitled to be retained by the bankrupt. Section 116(1) is broad. It includes property that has been acquired, or is acquired by, the bankrupt after the commencement of the bankruptcy and before discharge: s 116(1)(a). It is to be read, and is able to be read, with s 58 of the Act.

31. What s 116(2) does is limit the operation of s 116(1) by stating that s 116(1) *does not extend* to certain identified property. Generally, the effect of the provision is that a bankrupt is permitted to acquire and hold a range of items of property without that property vesting in the trustee and being divisible amongst the bankrupt’s creditors. A review of the items of property listed in s 116(2) (and thereby excluded from the operation of s 116(1)) is instructive. For example, the items of property excluded and not divisible amongst a bankrupt’s creditors include:

(1) Property held by a bankrupt in trust for another person: s 116(2)(a);

(2) Household property of particular kinds and quantities: s 116(2)(b)(i) read with reg 6.03 of the Regulations;

(3) The bankrupt’s property used by him or her in earning income by personal exertion, as limited by value: s 116(2)(c)(i) read with reg 6.03B(1) of the Regulations;

(4) Property used by a bankrupt primarily as a means of transport, as limited by value: s 116(2)(ca) read with reg 6.03B(3) of the Regulations.

32. As will be apparent, the Act enables the bankrupt to retain specific property: including property which the bankrupt requires for day-to-day living, property used to earn income by personal exertion and a form of transport. At the same time, the Act limits the kinds and value of that property: see [31] above. The Act may be read as encouraging a bankrupt to commence re-establishing themselves but, until discharged, the Act does not permit a bankrupt to commence acquiring *all* kinds of assets to the detriment of a bankrupt’s creditors.

33. Section 116(2) of the Act does not expressly refer to property representing income previously derived by an undischarged bankrupt or, for that matter, to property acquired by an undischarged bankrupt using property representing income previously derived by an undischarged bankrupt below the *actual income threshold amount* applicable to that bankrupt. The question of construction is whether one can discern from the scheme of the Act such an exemption?

34. The answer is no. As we have seen, ss 58 and 116 are concerned with property, not with the character of property as income or capital. The items of property able to be acquired and retained by an undischarged bankrupt are specified. It an item of property (for example, shares) is not listed in s 116(2) then it is caught by s 116(1) and is divisible amongst the bankrupt’s creditors …

1. In this case, Ms Morris’ trustees in bankruptcy contend that the two payments do not fall within any of the items listed in s 116(2) and thus are caught by s 116(1) and are divisible amongst her creditors. For her part, Ms Morris contends that, as to each of the AustSafe Super and Plum Super payments, they each fall within either or each of the items specified in s 116(2)(d)(iii)(A) or s 116(2)(d)(iv). Further, or alternatively in respect of the Plum Super payment, it is put on behalf of Ms Morris that that payment, in any event, falls within the terms of s 116(2)(a). As to the latter, there is a dispute between the parties as to whether an inference ought to be drawn as to whether the payment to her from Plum Super was just a payment to her, as a subsequent, payment covering letter from the trustee of that superannuation fund might suggest if read alone, or whether it was, as the trustee of that superannuation fund had proposed by letter of 26 February 2014 to her, a payment for her benefit and the benefit, education and maintenance of Gracie and Wes Foreman as dependents.
2. It has not been possible for the bankruptcy trustees to secure from the trustee of the Plum Super fund, though they have sought the same, a document which evidences formally the decision of the trustees, nor is such a document otherwise in evidence. The covering letter itself is neutral in that, even as proposed, the payment would always have been made just to Ms Morris albeit on terms that upon her acceptance of that payment she would hold it on the basis proposed by the trustees of the Plum Super fund. What is put to her in the letter of 26 February 2014 is that if she is satisfied with the decision as proposed, she ought to complete a release agreement and return it. She is also advised that if she wishes to lodge an objection, she must do so with the Plum Super fund’s Complaints Officer for subsequent consideration by the trustee of that fund. No such objection is in evidence.
3. In the absence of any evidence of any such objection, and one might expect reference to the same in the letter covering the payment if there were one, the inference to be drawn, in my view, on the available evidence, is that the Plum Super trustee’s decision was as proposed by the letter of 26 February 2014. That conclusion does mean that it is necessary, additionally, to have reference to the exempt items specified in s 116(2)(a), at least if the alternatively-claimed exemption in respect of the Plum Super fund payment is not applicable. Save for this particular area of controversy just resolved, there is no disagreement between the parties as to the pertinent facts. The disagreement is wholly one of the construction and application of the paragraphs in s 116(2) already mentioned.
4. Before turning to that subject, it is necessary to detail pertinent terms from each of the deeds governing the respective superannuation funds.
5. The AustSafe Super payment was made to Ms Morris from a fund known as the AustSafe Superannuation Fund, a trustee of which is AustSafe Pty Ltd. AustSafe Pty Ltd holds the AustSafe Superannuation Fund pursuant to a consolidated trust deed varied by amendments dated 25 February 2008 and further deeds of variation dated 28 February and 25 June 2013 respectively. Clause 1 of the deed contains a number of presently pertinent definitions:

**Beneficiary** means a person presently and absolutely entitled to receive a Benefit at the relevant time which shall include a Pensioner but which shall not include a person who is a Member at that time (other than a person who became a Member pursuant to sub-clause 6.4(1) of this Deed);

**Benefit** means any amount which is payable by the Trustee out of the Fund in accordance with this Deed to or in respect of a Member;

**Death Benefit Notice** means a binding death benefit notice given by the Member to the Trustee which meets the requirements of the Relevant Law;

**Dependent** in relation to a Member means the Spouse and surviving Spouse of the Member and or the Child of the Member and or any person who, in the opinion of the Trustee, is at the relevant date wholly or partially dependent on the Member and any person who may be a dependant under the Relevant Law;

**Member** means an Eligible Person who has been accepted as a Member of a Division of the Fund and who has not ceased to be a Member and **Membership** shall mean Membership of a Division of the Fund;

**Payment Flag** has the same meaning as in the *Family Law Act 1975*;

**Payment Split** has the same meaning as the *Family Law Act 1975*;

**Relevant Law** means any requirement under the *Superannuation Industry (Supervision) Act 1993*, the *Superannuation Industry (Supervision) Regulations 1993*, the *Superannuation (Resolution of Complaints) Act 1993*, the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*, the *Tax Act*, the *Family Law Act 1975*, the *Corporations Act 2001* and the *Corporations Regulations* 2001 and any other present or future legislation which the Trustee must comply with in order for the Fund:

(a) to qualify for the concessional Taxation treatment as a Complying Superannuation Fund; or

(b) to meet any other requirements of the Regulator or legislation,

and includes any proposed requirements, rulings, announcement or obligations which the Trustee believes will have effect retrospectively.

1. Clause 3.2 of the AustSafe Super deed vests the assets of the fund in the trustee upon trust. The exercise of the trustee’s rights as governed by cl 4.1 provides:

All powers, rights, decisions, discretions, appointments and other authorisations of whatsoever nature or kind granted to or conferred on the Trustee under this Deed may be exercised, made, done or performed by or on behalf of the Trustee by resolution of its Directors in accordance with its constitution or by any person or persons having the authorisation of such Directors to act on their behalf provided that any requirements of the Relevant Law are satisfied.

1. Clause 4.3 makes provision in respect of the rights of members and dependents to receive benefits in these terms:

The rights of the Members and their Dependants to receive Benefits payable under this Deed are to fully secured within the meaning of the Relevant Law.

1. Admission to membership is governed by cl 6.5. It is not necessary to set out the terms of that clause, but it should be noted that by cl 6.9(2) a person ceases to be a member of the fund upon, materially, that person’s death. It is possible under the AustSafe Super deed, by cl 7.4, for a member to nominate a dependent or dependents. The late Mr Foreman did not do this. Clause 14.4 of the AustSafe Super deed makes provision in respect of the exercise by the trustee of discretions in these terms:

The Trustee in the exercise of the trusts, authorities, powers and discretions conferred on it by this Deed shall have an absolute and uncontrolled discretion as to their exercise in relation to the manner, mode and timing of exercise, the exercise of which shall be final and binding subject to the Relevant Law.

1. Particularly relevant for present purposes is cl 23 of that deed:

23.1 **Nomination of recipients for death benefits**

(1) Where a Pension is payable to a Member, the Trustee may offer the Member the option of nominating a Reversionary Beneficiary on commencement of the Pension.

(2) Where:

(a) a Member transfers to the Fund by a successor fund transfer; and

(b) the Approved Benefit Arrangement that the Member transferred from notifies the Trustee that, immediately before the transfer, a nomination of a person as a reversionary beneficiary was in force in respect of that Member; and

(c) that nomination is in a form acceptable to the Trustee,

on the Member’s commencement of Membership the nominated person is a Reversionary Beneficiary for the purposes of the Fund.

(3) The Trustee may offer Members, other than a Member who has a Reversionary Beneficiary, the option of giving a Death Benefit Notice nominating any one or more of their Dependants or Legal Personal Representative to receive any part or all of the benefit payable on their death.

(4) A Member, other than a Member who has a Reversionary Beneficiary, may nominate any one or more of their Dependants or Legal Personal Representative to receive any part or all of the benefit payable on their death. The Member’s nomination is not binding on the Trustee where the nomination is not in the form of a Death Benefit Notice.

(5) A Member may change a Death Benefit Notice or other nomination at any time in a form approved by the Trustee for that purpose.

23.2 **Payment of death benefits**

(1) On the death of a Member, unless sub-clause 23.2(2) or (3) applies:

(a) where there is a Death Benefit Notice in respect of all or part of the benefit, the Trustee must pay the benefit or that part of the benefit to the person or persons nominated, and if more than one person is nominated in the proportions specified;

(b) where there is no Death Benefit Notice in respect of all or part of the benefit, the Trustee must pay the benefit or that part of the benefit to any one or more of the Member’s Dependants and Legal Personal Representative in the proportions the Trustee decides.

(2) On the death of a Member in receipt of a Pension, where there is a Reversionary Beneficiary the Trustee must pay the death benefit to the Reversionary Beneficiary.

(3) If a Member has no Dependants or Legal Personal Representative, the Trustee may pay the benefit in such manner as is permitted by the Relevant Law.

23.3 Discharge of Trustee

The receipt by a Dependant, the Legal Personal Representative, Relative or other person of a Benefit paid under this clause shall be a complete discharge to the Trustee in respect of any amount paid to that person and the Trustee shall not be bound to see to the application thereof.

23.4 Death Benefit paid as Pension

If a death benefit is paid in the form of a Pension it will only be paid to those Dependants or others eligible to receive the Pension in accordance with the Relevant Law.

1. A payment made to Ms Morris was a sequel, because of the absence of a death benefit notice, to an exercise by the trustee of the AustSafe Super fund of the discretion found in cl 23.2(1)(b).
2. As to payment of benefits, cl 24.1 provides:

The Trustee may forward the Benefits to the postal address or bank account of the Member or Beneficiary last notified to the Trustee or to such other place as the Trustee shall determine.

In terms of the AustSafe Super deed, beneficiary is defined. Upon the exercise in her favour of that discretion found in cl 23.3(1)(b), Ms Morris became presently and absolutely entitled to receive a benefit, also as defined, from the Fund.

1. The terms of the Plum Super deed dated 14 March 2013 are not, in any presently material way, different to those of the AustSafe Super deed. Under the Plum Super deed, a fund known as the Plum Superannuation Fund is consigned to PSF Nominees Proprietary Limited to administer as the trustee of that fund. It is only necessary to set out the following provisions from that deed. In the definitions clause, cl 1.1 provides:

**Beneficiary** means a Member and includes a person who has become entitled to a benefit as a result of the death of a Member.

…

**Dependent** means in relation to a person any one or more of –

(a) the Spouse of that person;

(b) any Child of that person;

(c) any natural person who, in the opinion of the Trustee, is at the relevant date (or, in the case of a deceased person, was at the time of death of the deceased) wholly or partially dependent on that person; or

(d) any other natural person who, in the opinion of the Trustee, satisfies the definition of “dependent” under the Relevant Law.

…

**Member** means a person who has been admitted to membership of the Fund for so long as he or she participates in the Fund.

1. Clause 4.3 of the Plum Super deed makes provision in respect of benefits. Materially, it provides:

**Benefits**

(a) Benefits:

(1) are as set out in a Plan or Sub-Plan or otherwise are as the Trustee determines;

(2) are not payable unless the Beneficiary makes application, and provides information in accordance with the requirements of the Trustee;

(3) shall include Net Earnings up to the date of payment if the Trustee determines or Relevant Law requires;

(4) of a Beneficiary who in the Trustee’s opinion is not capable of receiving a benefit or managing his affairs, may be paid to any person for the benefit of the Beneficiary;

(5) payable on the death of a Member are payable:

 (A) to the Member’s Nominated Beneficiary;

(B) if there is no Nominated Beneficiary or if payment under (A) cannot otherwise be made, to such of the Member’s Dependants and legal personal representatives in such shares between them and to any one or more of them to the exclusion of any other, as the Trustee determines

(C) if payment under (B) cannot be made, to such persons, permissible under the Relevant Law, in such shares between them and to any one or more of them to the exclusion of any other, as the Trustee determines.

…

1. Once again, Mr Foreman had not specified, in this case, what the Plum Super deed terms a “member’s nominated beneficiary”. Instead, what occurred is that the trustee of the Plum Super Fund exercised the discretion found in cl 4.3(a)(5)(B).
2. Neither the research of counsel nor my own, has disclosed prior authority concerning the meaning and effect of s 116(2)(d)(iii) or (iv) of the Bankruptcy Act. There is however, authority in respect of earlier versions of the exemption item found in s 116(2)(d).
3. Before turning to that authority, reference ought to be made to particular submissions as to the construction of the controversial exemption items. It was put on behalf of the bankruptcy trustees, that it was a noteworthy feature of s 116(2)(d)(iii) and (iv) that, in contrast to ss 116(2)(d)(i) and inferentially, (ii), there was no express reference to the spouse or de facto partner of the bankrupt. Whilst the bankruptcy trustees conceded that there was an evident beneficial intent in relation to the exemption from property divisible amongst creditors of the items covered by ss 116(2)(d)(iii) and (iv), it was put that the absence of reference fixed to a spouse or de facto partner was indicative of a value judgment as to the limits of Parliament's beneficial intent. In other words, whilst it was Parliament's intention to exempt the interest of a bankrupt in a regulated superannuation fund or, for that matter, a payment from such a fund, the absence of reference to spouse or de facto partner meant that it was no part of that beneficial intention to exempt the interest of a bankrupt's spouse or partner, or a payment from such a superannuation fund.
4. Another submission made, although not pressed with the same rigour as the one just mentioned, for the bankruptcy trustees, was that “interest” in s 116(2)(d)(iii) ought to be construed as “superannuation interest”, as that term is found in the *Superannuation Industry (Supervision) Act 1993* (Cth) (the SIS Act). So to construe that provision would be, in my view, to insert words into the provision which are not there. When one looks at the progressive amendment, not just of s 116(2)(d), but elsewhere of s 116(2), one sees particular progressive value judgments by Parliament reflecting changes in Australian society and provision in that society in respect of benefits for retirement, either by age, invalidity or death, or alternatively, the division of such benefits in the course of resolving a property dispute in a matrimonial cause.
5. In s 116(2)(d) in its present form, one sees, in my view, a modern manifestation of a particular beneficial disposition which has lengthy origins. That beneficial disposition of an earlier time is comprehensively described by Burchett J in *NM Superannuation Pty Ltd v Young* (1993) 41 FCR 182, with whose judgment O’Loughlin J agreed. His Honour made reference, at 183, to the seminal report of the committee chaired by Sir Thomas Clyne, which led to the enactment of the Bankruptcy Act. In that report, at para 156, as Burchett J noted, it was stated:

It has been for many years the policy of Parliaments throughout Australia to give protection to policies of life insurance against the claims of creditors.

1. Earlier, in *Lin, Re; Law v Lin* (1960) 18 ABC 142, in his capacity as a judge of the Federal Court of Bankruptcy and in respect of the then ss 91(b) of the Bankruptcy Act, closely similar, as Burchett J noted, to the then form of s 116(2)(d), Clyne J stated, at 145:

The legislatures of Australia, of both Colony and State, have passed many enactments relating to life assurance policies designed to encourage thrift and to enable persons to make provision for their dependants. The policy of these enactments was expressed in the form of affording protection of these policies against the claims of creditors. This protection varied in manner and extent. One of the first measures of this kind was the Life Assurance Encouragement Act 1862 of the colony of New South Wales. The protection given to life insurance policies against the claims of creditors by the various State enactments has now been superseded by the protection given to such policies by the Commonwealth Parliament.

1. In respect of both the AustSafe Super Fund and the Plum Super Fund and prior to the exercise of their discretion in her favour or, as I have found, in her favour and that of the late Mr Foreman and her dependent children, Ms Morris had no interest in either of those funds. She, or as the case may be, she and her children, were nothing more than objects of a discretionary power. They had a right to the due administration of each of those funds, in accordance with the respective governing deeds, but no more: see *Sainsbury v Inland Revenue Commissioners* [1970] Ch 712 at 725. That interest was not proprietary but, upon the favourable exercise of the discretion, a proprietary interest was created, and that interest was, quite literally, an interest in a regulated superannuation fund, for there is no dispute between the parties that each of the AustSafe Super Fund and the Plum Super Fund is a regulated superannuation fund within the meaning of the SIS Act.
2. Equally, it is common ground that the conditions found in the chapeau to s 116(2)(d) are not applicable. That being so, Ms Morris had in each instance an interest which fell within the terms of the exempting item found in s 116(2)(d)(iii)(A).
3. *Di Cioccio* counsels primary regard to the text of the legislation, as does the High Court authority to which the Full Court refers in *Di Cioccio* at [27]. That textual approach is consistent with a modern manifestation of a beneficial intent long present in bankruptcy law and referred to in earlier authority by Clyne J and Burchett J, as earlier mentioned.
4. A lot of the work done by inclusion of spouse or partner, and perhaps even more than that, in respect of life insurance or endowment insurance policies or the proceeds of the same is done by the use of the unqualified term “interest of the bankrupt” in s 116(2)(d)(iii). And further, by the unqualified reference in s 116(2)(d)(iv) to “a payment to the bankrupt from such a fund”. It is a noteworthy feature of the SIS Act that its definition in s 10 of “beneficiary” in relation to a fund, scheme or trust is not confined to a person who is a member of a fund. Rather, the definition is in these terms:

“[B]eneficiary”, in relation to a fund, scheme or trust, means a person (whether described in the governing rules as a member, a depositor or otherwise) who has a beneficial interest in the fund, scheme or trust and includes, in relation to a superannuation fund, a member of the fund despite the express references in this Act to members of such funds.

That definition is apt to embrace Ms Morris and, for that matter, her children, at least following the favourable exercise of the trustee’s discretionary power. Parliament, in my view, ought to be taken to have been cognisant in the reference to the SIS Act in s 116(2)(d)(iii)(A) of the breadth of persons who under that Act can constitute a beneficiary.

1. There is another path to exemption in respect of each of the payments in that they are literally payments to the bankrupt, in terms of s 116(2)(d)(iv), from a regulated superannuation fund. Again, that breadth of reference rather looks to be a recognition by Parliament of the breadth of persons who may receive payments from superannuation funds. In other words, it is a recognition that the breadth of persons extends to those who are members of funds, as well as to their spouses and their dependents. Construing interest in this unqualified way also accommodates a person who has, by virtue of a flagging or splitting order made by the Family Court or the Federal Circuit Court under part VIIIB of the *Family Law Act 1975* (Cth), an interest in a superannuation fund. To construe interest broadly in that way is consistent with the exemption by ss 116(2)(d)(iva) and (vii) of payments pursuant which have been “split” by the Family Court.
2. Strictly speaking, that leaves as unnecessary to decide, whether in respect of the Plum Super payment, exemption is also conferred by s 116(2)(a). It is possible for a person to be both trustee and beneficiary, but not sole beneficiary. It is therefore possible as a matter of trust law for Ms Morris to have received the payment from the trustee of the Plum Superannuation Fund on terms that she would hold it both for herself and for her children in a way that constitutes her holding the proceeds as a trustee for herself and her children.
3. The terms upon which the trustee of the Plum Super Fund indicated it was disposed to make the payment did not provide for any arbitrary splitting, only for 100% to be held in the manner proposed. That means that the submission made on her behalf that 50% ought to be allocated to her and 50% to her children, or even, perhaps, a one‑third division, ought not to be accepted. That in turn provokes the thought that she is not, in terms of s 116(2)(a), holding the payment entirely in terms of in trust for another person. She is also holding it in trust for herself. It is not possible, though, to dissect that holding and it is certainly held in trust for persons other than herself. It would be an odd reading of s 116(2)(a) to hold that where the property was held in trust for other persons alone it was exempt, but because it was additionally held for the bankrupt, it passed as part of divisible property, thereby defeating the beneficial interests of the other persons.
4. Were it necessary to decide, and because s 116(2)(d)(iii)(A) and (iv) are applicable it is not, I would additionally hold in respect of the Plum Super payment that it was exempt under s 116(2)(a) of the Bankruptcy Act.
5. It necessarily follows from the foregoing that the application made by the bankruptcy trustees must be dismissed.

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| I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 5 August 2016