28/92

SUPREME COURT OF VICTORIA

MIE SUPERANNUATION FUND v PETRUCELLI

Nathan J

13, 28 February 1992

CIVIL PROCEEDINGS – DISCRETIONARY TRUST – DISCRETION UNFETTERED – DISCRETION EXERCISED – REASONS GIVEN – WHETHER EXERCISE OF DISCRETION EXAMINABLE BY COURT – TRUSTEE ACTED REASONABLY AND IN GOOD FAITH – WHETHER COURT MAY IMPUGN OR SUBSTITUTE TRUSTEE'S DECISION.

P., a member of the MIE Fund ('Fund') unsuccessfully applied for a TPI pension. Some years later, P. asked the Fund to give reasons for its refusal and the Fund replied: "medical opinion – not total and permanent disablement". Subsequently, P. took action in a Magistrates' Court seeking a lump sum payment for his present disability. The magistrate held that:
(a) as the Fund disclosed its reasons, the court was entitled to examine the Fund's exercise of its discretion; and,

(b) although the Fund at the time acted reasonably and in good faith, having regard to fresh evidence the court was entitled to exercise its own discretion and order the Fund to pay a lump sum to P. Upon order nisi to review—

HELD: Order absolute. Magistrate's order quashed. Complaint dismissed.
Whilst the Fund had an absolute and unfettered discretion to determine whether P. was entitled to a pension, the court had jurisdiction to examine the Fund's exercise of discretion in view of the fact that the Fund disclosed its reasons for the exercise of its discretion. However, once the court found that when the discretion was exercised the Fund acted reasonably and in good faith, the court had no jurisdiction to review the merits of P's case by allowing fresh evidence to be called thereby substituting its exercise of discretion for that of the Fund.
***Karger v Paul* [1984] VicRp 13; (1984) VR 161, applied.**

NATHAN J: [1] This is the return of an Order to Review the decision of a Melbourne magistrate who awarded the defendant (P) a lump sum permanent and total incapacity payment (T & PI) out of the applicant's funds (the Fund). She did so after hearing evidence of P's current state of health and after rejecting the Fund's submission that she lacked the jurisdiction to do so. The question of law is:- Did the magistrate err in finding that the Fund had given reasons why it exercised its unfettered discretion to reject P's claim, and if so, did she have jurisdiction to hear fresh evidence and replace the Fund's discretion with her own?

The question arises in the following way. In August 1983 the defendant injured his back when working in the meat industry. He was a member of the Fund, which under its terms, granted an absolute and uncontrolled discretion to the trustees to determine the entitlement of members to weekly, and T & PI payments. On 13th August 1984 P's local medical practitioner, Dr Linton, reported she was uncertain whether his injuries were permanent. He had been receiving weekly payments. On 30th October 1984, the applicant signed a form of release pursuant to the deed.

Subsequently P must have made a claim for a T & PI payment, and despite the release, the trustees of the Fund considered the same on 16th July 1985. They rejected the claim because of Dr Linton's certificate and also because they had a signed medical opinion from Dr Joslin which reported "not totally and permanently disabled", an opinion confirmed according to Dr Joslin, by an Orthopaedic Surgeon.

[2] Some years later in February 1989, P instructed solicitors to pursue his purported entitlements against the Fund. They wrote to the Fund in February of that year asking the following question - "the reasons why the trust deed determined that P was not entitled to the benefit" (an obvious reference to trustee). The Fund replied - "Medical opinion - NOT TOTAL AND PERMANENT DISABLEMENT". P was dissatisfied with this response and instituted proceedings in the Magistrates' Court. The particulars of demand asserted a request of the defendant to provide

the reasons for its determination, and the reply in the terms to which I have already referred. This pleading was admitted in the Fund's defence to the summons.

The magistrate accepted the invitation of both counsel to decide whether the response to the letter and the pleadings amounted to the giving of reasons by the Fund's trustees why they exercised their unfettered discretion against P. *Karger v Paul* [1984] VicRp 13; (1984) VR 161 was accepted by the parties as authority for the proposition that if a trustee, entitled to exercise an unfettered discretion, declines to give reasons, a court cannot review or examine that exercise of discretion. On the other hand, if reasons are given, the court's supervisory jurisdiction would be enlivened. As I have observed, a subsidiary issue in this case is the extent of that jurisdiction.

Whether reasons given?

I find, as the magistrate did, that the response "medical opinion no permanent disability", is tantamount to the giving of reasons. The question posed by P's solicitors directly asked for the reasons why their client's claim was denied. The response met that enquiry directly and completely, namely that because P's claim was not supported medically, he was not permanently disabled. It was contended by Mr North, one of Her Majesty's counsel, for the Fund, that the response was a conclusion and did not state the grounds upon which that conclusion had been reached. I cannot accept that contention. The words are an unequivocal indication that the trustee was in possession of material and had themselves concluded that P was not entitled to a T & PI payment, they said he was medically disentitled to it. I have used the adverb "medically" because it illustrates the point. It is an adverb of reason and states why P was disentitled. It is not a mere conclusion cf. *Lock v Gordon* [1966] VicRp 23; (1966) VR 185.

"The hearing"

The magistrate then proceeded to hear evidence which went to the merits of P's claim as at the date it was argued before her. P swore he had not worked since the injury in August of 1983, and that he had signed the release because he understood the document related to weekly payments only. In cross-examination he conceded that he had fathered three or four children since injury. Dr Sime, a consultant psychiatrist, gave evidence of examining P in April 1989, and coming to the view that he was permanently disabled at that time and was so disabled in 1983, that is some six years before he examined him. Dr Linton gave evidence that she had signed a medical report in 1984 which contained a question, "Is this person ever likely to resume work in any other job" with the answer, "uncertain", and to a further question, "Is this person ever likely to resume work in **[4]** his normal occupation" she had replied, "no". She opined that P whom she had treated since 1983 was now permanently and totally disabled due to the original incapacitating injury and its psychiatric *sequelae*.

Mr Curren, one of the trustees of the Fund, gave evidence of a meeting of the trustees in 1984 which determined that P's claim be rejected. He said they did so after examining medical reports. The trustees had addressed themselves to the question, "Is the person of a condition then and there within the definition of totally and permanently disabled?" The trustees determined that P was not. They had not considered future prospects. Dr Joslin, called for the applicant, averred his 1985 certificate. He referred to an orthopaedic opinion which supported his view. In cross-examination, he said P was now totally and permanently disabled. Dr Joslin assigned this state to a compensation neurosis.

Magistrate's decision

The magistrate found the trustee had acted in good faith, but on her view of the evidence P was now totally and permanently disabled. She held as there was no evidence of any intervening event which could account for his present disability, the state of affairs had to be related to the incident in 1983. She rejected a contention that subsequent births had added to P's stress, and hence inability to work. The magistrate went on to state that –

> "ordinarily in cases of this kind the discretion should be examined at the time it was exercised. However, in cases of physical injury, it was notorious that a situation could worsen after injury, and this had occurred".

[5] She ordered the Fund to pay P a lump sum.

I find the magistrate strayed into error when she permitted P's claim to be argued *de novo*. In effect, she substituted her discretion in 1991 for that of the trustees, made on more limited material in 1985. She was not at liberty to permit further evidence to be produced relating to P's current state of health. Having found the trustees acted in good faith, and did not find any other defect in their processes, she lacked the jurisdiction to review the merits of the case. For reasons I shall go on to elaborate, her decision must be set aside and I shall direct that the complaint be dismissed.

Court's power to review a trustees "unfettered and absolute" discretion.

In my view *Karger v Paul* [1984] VicRp 13; (1984) VR 161 proffers the most assistance, although it does not deal with the ambit of the court's review powers when trustees voluntarily waive their immunity from having their unfettered discretion examined. In *Karger's Case*, McGarvie J accepted the principle of law that trustees, exercising unfettered discretionary powers, are not bound to disclose to beneficiaries the reasons which actuate their decisions. He recited with approval, as I do, *Re Londonderry's Settlement* (1965) Ch 918, particularly Harman LJ pp928-9 and Salmon LJ pp936-7. In the case before McGarvie J it was contended the trustees' discretion became examinable because the reasons for its exercise were elicited during cross-examination of the trustee. It was contended this amounted to waiving the absolute immunity from examination, an argument rejected by him. In the section of **[6]** his judgment entitled "the grounds on which the exercise of discretion may be examined and reviewed", McGarvie J said this, p163:

> "In my opinion the effect of the authorities is that, with one exception, the exercise of a discretion in these terms (i.e. unfettered and absolute) will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present. Those essential component parts are present if the discretion is exercised by the trustees in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. The exception is that the validity of the trustees' reasons will be examined and reviewed if the trustees choose to state their reasons for their exercise of discretion".

(my emphasis)

McGarvie J considered the nature of the court's review powers where the essential components of the exercise discretion were contested. He did not consider the scope or ambit of the permitted review in those cases where the trustee had voluntarily waived the immunity. That is the task before me now. To do so I commence by referring to what McGarvie J said of the essential component parts at p164:

> "In my view, in this case it is open to the Court to examine the evidence to decide whether there has been a failure by the trustees to exercise the discretion in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. As part of the process of, and solely for the purposes of, ascertaining whether there has been any such failure, it is relevant to look at evidence of the enquiries which were made by the trustees, the information they had and the reasons for, and manner of, their exercising their discretion. However, it is not open to the court to look at those things for the independent purpose of impugning the exercise of discretion on the grounds that their enquiries, information or reasons or the manner of exercise of the discretion, fell short of what was appropriate and sufficient. Nor is it open to the Court to look at the factual situation established by the **[7]** evidence, for the independent purpose of impugning the exercise of the discretion on the grounds the trustees were wrong in their appreciation of the facts or made an unwise and unjustified exercise of discretion in the circumstances. The issues which are examinable by the Court are limited to whether there has been a failure to exercise the discretion in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. In short, the Court examines whether the discretion was exercised but does not examine how it was exercised"

In my view the limitations referred to above are pertinent but not entirely determinative of the restraints to be exercised when reviewing a trustee's discretion where immunity has been waived. This is so because the reasons voluntarily proffered by the trustee may go beyond the parameters referred to. It must be that where trustees have proffered reasons for the exercise of discretion those reasons themselves become examinable by the court. This conclusion aligns itself with commonsense. If trustees willingly, albeit unwarily, proffer the reasons as to how or why their unfettered discretion was exercised that puts into the public domain the propriety of those reasons.

This does not involve the court substituting its own discretion for that of the trustee. The

exercise of discretion means no more than arriving fairly at a conclusion from a number of options or alternatives. The limits of the review function are stated below.

> (1) Whether the reasons relate to or are relevant to the discretion to be exercised.
> (2) Whether the reasons were arrived at in good faith and without an ulterior purpose (see *Karger* and *Beloved Wilkes Charity* (1851) 3 Mac and G 440; 42 ER 330.
> **[8]** (3) Whether the reasons reasonably support the conclusion.
> (4) It is open to the court to look at evidence of the enquiries made by the trustees, the information they had and the manner of the exercise of their discretion, but only so far as to assess the viability of the exercise, not to impugn or replace it.
> (5) It is not open to the court to examine the reasons for the purposes of exercising its own discretion. It is not open to the court to examine the factual situation for the purposes of substituting its own discretion for that of the trustee because the court might consider the trustee unwise or imprudent (see also *Dundee Hospital v Walker* [1952] UKHL 1; [1952] SLT 270; [1952] SC (HL) 78; [1952] WN 180; [1952] 1 All ER 896).
> (6) It follows as a compelling matter of logic that the reviewable discretion is that which was exercised by the trustees at the time.

There are no Victorian authorities which deal with the ambit of the court's review powers where an absolute discretion has been abrogated (see *Trusts and Powers*, DM Maclean 1989 Law Book Co p53). Hence the recited principles are derived from those cases where an ordinary discretion is examined or where one of "the essential components" is lacking.

The position in the United States, however, has been judicially considered, see 76 Am. Jur. 2d par 290 pp512-4 and *Mesler v Holly* 318 So 2d 530, *Hoppe v Hoppe* 370 So 2d 374. The American position is that an unfettered discretion may be reviewed if it is exercised unreasonably and a fairly low threshold of unreasonability seems to apply in some States, but must be extravagantly unreasonable in others. See generally **[9]** *Trusts and Trustees* Bogert, 2d para 560 p209 where *Dundee General Hospitals v Walker* [1952] UKHL 1; [1952] SLT 270; [1952] SC (HL) 78; [1952] WN 180; [1952] 1 All ER 896 is accepted.

It is not open to a court to embark upon a hearing *de novo* as to how a trustee's discretion should be exercised, merely because the trustee waived the immunity. To do so would mean a perpetual state of uncertainty. Opinions of trustees or the opinions of beneficiaries change and waver back and forth as the years pass. The entitlement of persons would expand, contract, revive or be extinguished, depending upon the time the review occurred. This would be an impossible state of affairs.

It follows that only after reviewing whether an abrogated unfettered discretion was exercised in accord with these constraints, can the court decide either to remit the matter to the trustee for consideration in terms of the judgment, or proceed to admit further evidence and exercise the discretion itself. All will depend upon the circumstances and I shall not foreshorten the court's own options by reciting them. It is, however, appropriate to add that here, the magistrate having found good faith and not finding any reason to disturb the discretion, she lacked jurisdiction to either remit or intrude upon it.

It seems the magistrate was enticed into error by concluding that once reasons by the trustees had been given she could embark upon hearing any entitlement P might have had on the basis of fresh evidence, but she had specifically found the trustees motives could not be impugned, and that it had acted in good faith. No attack was made upon the integrity, logic or reasonableness of the trustees exercise of discretion at the **[10]** time they exercised it. No arguments were put that the essential components of the exercise of discretion were lacking, at the time the trustees acted. It follows the magistrate accepted a jurisdiction she did not have, her decision arising therefrom is void and of no effect. Having come to this conclusion I need not deal with the Release. The order to review will be made absolute, the magistrate's Order quashed, the respondent to pay the applicant's costs and I certify pursuant to the *Appeal Costs Fund Act*.

APPEARANCES: For the applicant Meat Industry Employees Superannuation Fund Pty Ltd: Mr AM North QC with Mr P Best, counsel. Gill Kane & Brophy, solicitors. For the respondent Petrucelli: Mr S Tatarka, counsel. Nicholas O'Donoghue & Co, solicitors.
