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Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	TAXATION & COMMERCIAL DIVISION
File Number(s):	**2016/0054**
Re:	**George Hart**
	APPLICANT
And	**Commissioner of Taxation**
	RESPONDENT
And	**Sandra Hart**
	JOINED PARTY

DECISION

Tribunal:	**Egon Fice, Senior Member**
Date:	**15 May 2018**
Place:	**Melbourne**

The Tribunal affirms the decision under review.

.....[sgd].....

Egon Fice, Senior Member

SUPERANNUATION *– self managed superannuation fund – whether breach by trustee of Trust Deed – whether breach by trustee of covenants – whether fit and proper person – disqualification – failure to lodge annual returns – breach of in-house asset rule – condition of release not met – breach of related entity provisions – acquisition of superannuation fund assets – arm's length investments – acquisition of real property – acquisition of shares in a foreign company – failure to comply with benefit payment standards – falsifying signatures on superannuation fund documents – payment of benefits due to terminal illness – loans and financial assistance to members – sole purpose test – forfeiture of benefit of members*

Legislation

Superannuation Industry (Supervision) Act 1993
Superannuation Industry (Supervision) Regulations 1994

Cases

Asgard Capital Management Ltd v Maher (2003) 131 FCR 196

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Australian Prudential Regulation Authority v Derstepanian (2005) 60 ATR 518

Australian Prudential Regulation Authority v Holloway (2000) 104 FCR 521

Davies v Australian Securities Commission (1995) 59 FCR 221

Hughes & Vale Pty Ltd v The State of New South Wales (No 2) (1955) 93 CLR 127

Raymor Contractors Pty Ltd v FCT (1991) 91 ATC 4259

Re VCA and Australian Prudential Regulation Authority (2008) 105 ALD 236

Rich v Australian Securities and Investments Commission (2004) 220 CLR 129

Secondary Materials

Commissioner of Taxation, *Self Managed Superannuation Funds Ruling*, SMSFR 2010/1

Commissioner of Taxation, *Self Managed Superannuation Funds Ruling*, SMSFR 2008/2

REASONS FOR DECISION

Egon Fice, Senior Member

15 May 2018

1. As at 30 June 2012 the members and trustees of the Hart Superannuation Fund (the SMSF) were Mr George Hart (Mr Hart), his then spouse, Mrs Sandra Hart (Mrs Hart), and their daughter Ms Kathleen Hart, who later married and used her married name, Stanley. The SMSF was established in October 2003 and registered on or about 14 November 2003. Mr and Mrs Hart were members and trustees on creation of the fund. Ms Kathleen Hart became a member and trustee of the SMSF on 1 April 2007.

2. Ms Louisa C Miller became a member and trustee of the SMSF on 28 February 2013 and Mr Benjamin Guy, from 22 October 2014. Although disputed by Mr Hart, the Commissioner of Taxation (the Commissioner) is of the opinion that Mrs Hart was also a member of the SMSF at that time. Mr Robert Hart became a trustee in December 2011 and ceased as a trustee on 28 February 2013.

3. Mr and Mrs Hart separated in about August 2012 and remain involved in a matrimonial dispute in the Federal Circuit Court (then the Federal Magistrates Court of Australia).

4. There was no dispute that at all relevant times, the SMSF was a regulated superannuation fund within the meaning of s. 19 of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

5. The SMSF's tax agent, who lodged its 2011 and 2012 income tax returns, was ZJL Partners. That same firm purported to be its auditors. The auditor lodged with the Australian Taxation Office (ATO) an Auditor Contravention Report in respect of the 2012 income year. The contravention related to real property situated at 160 Ruffy Road in the State of Victoria (the Ruffy Road property), purportedly acquired by the SMSF in the 2012 income year. The auditor advised that the title of the property was not in the name of the SMSF's trustees.

6. As a consequence of being notified of the contravention, the ATO advised the SMSF in a letter dated 30 September 2014 that it had been selected for an audit regarding the

contravention which was said to be a contravention of s. 52(2)(d) of the SIS Act. That subsection, as it was at that time, provided:

> ***The covenants***
>
> *(2) The covenants referred to in subsection (1) are the following covenants by each trustee of an entity:*
>
> *…*
>
> *(d) to keep the money and other assets of the entity separate from any money and assets, respectively:*
>
> *(i) that are held by the trustee personally; or*
>
> *(ii) that are money or assets, as the case may be, of a standard employer-sponsor, or an associate of a standard employer-sponsor, of the entity;*
>
> *…*

7. In a letter dated 10 April 2015, the ATO notified Mr Hart in his capacity as trustee for the SMSF that it was considering disqualifying him as trustee as he was trustee of the SMSF when the alleged contraventions occurred. The contraventions were said to arise from:

- a breach of s. 66 of the SIS Act which prohibits a trustee or an investment manager of a regulated superannuation fund from intentionally acquiring an asset from a related party of the fund;

- Reg 4.09A of the *Superannuation Industry (Supervision) Regulations 1994* (the SIS Regulations) which requires the trustee of a regulated superannuation fund that is self-managed to keep money and other assets of the fund separate from any money and assets held by the trustee personally or money or assets of a standard employer-sponsor, or an associate of the standard employer-sponsor of the fund; and

- Reg 13.14 of the SIS Regulations which prohibits a trustee giving a charge over or in relation to an asset of the fund.

8. The letter stated that if Mr Hart did not agree with the ATO's position, he should provide it with a position paper stating why.

9. In a letter dated 10 September 2015 the ATO informed Mr Hart that, having considered his response to the position paper sent to him by the ATO, it had decided to disqualify him from acting as a trustee or responsible officer of the SMSF or any other superannuation

entity. The Regulator (in this case the Commissioner) has the power to disqualify individuals pursuant to s. 126A of the SIS Act if satisfied that an individual is not a fit and proper person to be a trustee, investment manager or custodian; or a responsible officer of a body corporate that is a trustee, investment manager or custodian. The disqualification came into effect on 9 September 2015.

10. Section 344 of the SIS Act provides:

> *(1) A person who is affected by a reviewable decision of the Regulator may, if dissatisfied with the decision, request the Regulated to reconsider the decision.*

11. The expression *reviewable decision* is defined in s. 10 (1) of the SIS Act and it includes a decision of the Regulator under s. 126A(3).

12. Mr Hart's then solicitors, Bramich Legal, lodged with the ATO on 5 October 2015 a request for review.

13. In a letter dated 4 December 2015 the ATO noted that the Commissioner refused to revoke or vary the decision made under s. 126A(3) of the SIS Act to disqualify Mr Hart. On 4 January 2016 Mr Hart lodged an application with this Tribunal seeking review of the reviewable decision. Section 344(8) of the SIS Act provides that applications may be made to the Administrative Appeals Tribunal for review of decisions of the Regulator that have been confirmed or varied under subsection (4).

14. The issues I am required to determine on this application are whether:

(a) the correct or preferable decision was that Mr Hart be disqualified under s. 126A(1) because he was a person who had contravened the SIS Act on more than one occasion and the nature or seriousness of his contraventions or the number of contraventions provided grounds for his disqualification; or, alternatively,

(b) the correct or preferable decision was that Mr Hart be disqualified under s. 126A(3) of the SIS Act on the ground that he was not a fit and proper person.

THE CLAIMED CONTRAVENTIONS OF THE SIS ACT

15. Dr P Bender of counsel, who appeared on behalf of the Commissioner, outlined the following contraventions upon which the Commissioner relied:

- failure to lodge annual returns of the SMSF on time for the 2013, 2014, 2015 and 2016 income years

- failure to meet a *condition of release* (set out in Column 2 of Schedule 1 to the SIS Regulations) when paying monies out of the SMSF

- the SMSF made loans, lent or provided financial assistance to relatives in contravention of s. 65 of the SIS Act

- the acquisition of shares by the SMSF in Hart to Hart Fabrications (Philippines) Inc (the Philippines company), a related party of the SMSF, and the grant of a possessory right to Mr Hart or, alternatively, to a partnership which at the relevant time existed between Mr and Mrs Hart, in the nature of the lease of the Ruffy Road property in breach of the in-house assets exception in s. 66(2A) of the SIS Act

- the transfer of monies ($100,000) to the Philippines company indirectly; and monies to Hart to Hart Fabrications Pty Ltd (Hart Fabrications) to build a shed on the Ruffy Road property in breach of s. 65 of the SIS Act

- if no shares were issued in the Philippines company, the transfer of monies ($100,000) to the Philippines company which was not at arm's length and in breach of s. 109 of the SIS Act

- if shares were issued in the Philippines company, an inadequate percentage of shares were allotted for the invested amount

- the Ruffy Road property was acquired by the SMSF from Mr and Mrs Hart, related parties of the fund, when no business was carried on at that property or, alternatively, if a business was carried on at the Ruffy Road property, then it wasn't acquired at market value in breach of s. 66(2) of the SIS Act. The same argument

applies to the acquisition of a shed on the Ruffy Road property by Hart Fabrications

- the Ruffy Road property, following its transfer to the SMSF in 2011, was not kept in the name of all trustees but remained in the names of Mr and Mrs Hart in breach of a general law requirement

- the SMSF may have ceased to be a self-managed super fund in late 2015 because there were 5 members (s. 17A(1) of the SIS Act provides that a superannuation fund, other than a fund with only one member, is a self managed superannuation fund if and only if it has fewer than 5 members)

- failure to comply with Regs 504 and 506 to pay members minimum benefits when their interest in the fund has been forfeited and they ceased to be a member, as was the case with Mrs Hart in 2015

- in breach of the Trust Deed, Mr Hart failed to act in the best interests of all beneficiaries

- Mr Hart, in his capacity as trustee of the SMSF, was required to ensure that the fund was maintained solely for one or more of certain purposes that relate to the provision of retirement benefits (s. 62 of the SIS Act). Mr Hart contravened that section of the Act

- the circumstances in which Mrs Hart ceased to be a member of the SMSF and forfeited any benefits to which she may have become entitled was disputed by the Commissioner and should be regarded as an invalid forfeiture of her benefits

16. There is an alternative argument which I must consider. Mrs Hart maintained that the Ruffy Road property was not acquired by the fund at any time. If I were to find that was the case, I would of course need to reconsider any findings I have made about matters in relation to the Ruffy Road property which the Commissioner considers resulted in a breach of the SIS Act.

RELATED ENTITIES

17. Prior to embarking upon a consideration of the evidence dealing with breaches of the SIS Act and the Trust Deed, I should set out the relationship of all parties involved so that there can be no doubt as to which are related parties for the purposes of the SIS Act. This has particular significance where the SMSF is dealing with what are described as in-house assets. The meaning of the expression in-house asset is set out in s. 71 of the SIS Act. For present purposes, it is sufficient to set out the fundamental proposition which is as follows:

> ***Basic meaning***
>
> *(1) For the purposes of this Part, an in-house asset of a superannuation fund is an asset of the fund that is a loan to, or an investment in, a related party of the fund, an investment in a related trust of the fund, or an asset of the fund subject to a lease or lease arrangement between the trustee of the fund and a related party of the fund but does not include:*
>
> ***…***

18. The expression related party is defined in s. 10(1) of the SIS Act in the following way:

> ***related party**, of a superannuation fund, means any of the following:*
>
> *(a) a member of the fund;*
>
> *(b) a standard employer-sponsor the fund;*
>
> *(c) a Part 8 associate of an entity referred to in paragraph (a) or (b).*

19. Section 70B of the SIS Act deals with Part 8 associates of individuals. Relevantly, it provides:

> *For the purposes of this Part, each of the following is a **Part 8 associate** of an individual (the **primary entity**), whether or not the primary entity is in the capacity of trustee:*
>
> *(a) a relative of the primary entity;*
>
> *(b) if the primary entity is a member of a superannuation fund with fewer than 5 members:*
>
> *(i) each member of the fund; and*
>
> *(ii) if the fund is a single-member self managed superannuation fund whose trustee is a company – each director of that company; and*
>
> *(iii) if the fund is a single-member self managed superannuation fund whose trustees are individuals – those individuals;*
>
> *(c) a partner of the primary entity or a partnership in which the primary entity is partners*

(d) if a partner of the primary entity is an individual – the spouse or a child of that individual;

(e) a trustee of a trust (in the capacity of trustee of that trust), where the primary entity controls the trust;

(f) a company that is sufficiently influenced by, or in which a majority voting interests is held by:

(i) the primary entity; or

(ii) another entity that is a Part 8 associate of the primary entity because of another paragraph of this section or because of another application of this paragraph; or

(iii) 2 or more entities covered by the preceding paragraphs.

20. Section 70D of the SIS Act deals with Part 8 associates of partnerships. It relevantly provides:

> *For the purposes of this Part, each of the following is **a Part 8 associate** of a partnership (the **primary entity**):*
>
> *(a) a partner in the partnership;*
>
> *(b) if a partner in the partnership is an individual – any entity that is a Part 8 associate of that individual because of section 70B;*
>
> *(c) …*

21. Hart to Hart Wines (also referred to as G & S Hart Wines) was a partnership between Mr and Mrs Hart and it carried on a vineyard business at the Ruffy Road property. In an affidavit made in the Federal Magistrates Court of Australia proceeding on 11 April 2014, Mr Hart said that all of the plant and equipment situated at the Ruffy Road property belonged to the partnership and that at the time of making his affidavit, the partnership had not traded for at least three years and did not return a profit. In cross-examination Mr Hart explained that prior to the Ruffy Road property being transferred to the SMSF on about 1 July 2011, there was a vineyard on the property with 10,000 vines and wine was being produced. Clearly, the partnership is a related entity of the SMSF. Despite what Mr Hart said in his affidavit, I had in evidence a document described as a Declaration of Trust made on 4 September 2012 whereby Mr Hart and Ms Kathleen Hart declared they held the Ruffy Road property as trustees for the SMSF.

22. Mr and Mrs Hart were directors of the corporate entity named Hart Fabrications. An extract from the Australian Securities and Investments Commission (ASIC) discloses Mr Hart was appointed a director on 11 June 1986 and ceased to be a director on 2 November 2014. Mrs Hart was appointed a director on 11 June 1986 and ceased to be a

director on 7 June 2011. The company had 12 issued shares, Mr and Mrs Hart holding 6 shares each. Therefore, it is plain that Hart Fabrications was a related entity of the SMSF up until 2 November 2014, when it was deregistered.

23. The Philippines company was incorporated in the Republic of the Philippines on 19 June 2012. The Articles of Incorporation, which were in evidence, name five persons as the incorporators, three of those persons being Filipinos and the remaining two, Mr Hart and Ms Kathleen Hart. Those persons are also named as the directors of that corporation. The Articles document also discloses that Mr Hart subscribed for 750 shares in the company and Ms Kathleen Hart for 125 shares. It also appears those shares were not fully paid. Once again, it is plain that the Philippines company is a related entity of the SMSF.

FAILURE TO LODGE ANNUAL RETURNS

24. I had in evidence a document from the ATO setting out the annual lodgement status of the SMSF. The last return lodged by the SMSF was on 14 March 2013. No returns have been lodged since.

25. Mr Hart was aware of the requirement to lodge annual returns for the SMSF. He said so in the course of his cross-examination. He agreed that no returns had been lodged for the 2013 to 2017 income years. In his witness statement, which was admitted into evidence, Mr Hart said:

> *The fact that the caveat was lodged and that I am unable to discharge the said mortgage has had the consequence that I am unable to lodge the returns for the Trust which is a significant compliance issue. These are all circumstances entirely not of my doing and beyond my control and I cannot arrange for the caveat to be withdrawn and the returns lodged until such time as the matter reaches a final trial date.*

26. Mr Hart had explained that as a consequence of the litigation which was then on foot in respect of their marriage dissolution, Mrs Hart's lawyers placed a caveat on the Title of the Ruffy Road property. There was also a mortgage to the Commonwealth Bank on the Title. The auditor asked Mr Hart to remove the caveat but, of course, he was unable to do so.

27. When asked in cross-examination why that would stop him from lodging annual returns, he referred to the requirement for the caveat to be discharged as a consequence of the audit report. However Mr Hart then said that since he was told by the ATO that he was not

prevented from lodging the annual return simply because there was a caveat over the asset, he agreed that a return could have been lodged. Mr Hart was then referred to his reply to the Respondent's Statement of Facts, Issues and Contentions where he said that further instructions were received on 4 November 2016 indicating that the true reason for failure to lodge was lack of funds. When it was pointed out to Mr Hart that the second statement was inconsistent with the first reason given for not lodging annual returns, he simply claimed it was one of the reasons. Mr Hart also suggested that the statement had been written by his lawyers despite previously stating that he had written it. When this was pointed out, he again changed his evidence. Asked why there was a reference to further instructions being received, Mr Hart pointed out he had a lawyer at one stage helping him but could no longer engage his services.

28. Dr Bender then directed Mr Hart to a Bendigo Bank statement for the account of GH Hart & LC Miller ATF Hart Superannuation Fund Hart Superannuation Fund. That account disclosed a balance of $44,019.40 on 29 May 2014. When asked why that wasn't sufficient to pay for the lodgement of annual returns, Mr Hart said that there were two deposits, one for $44,000 and one for $45,800 which were rollover monies belonging to Ms Miller. Mr Hart said he did not want to touch any of that money because it was her money and Ms Miller was said to have a terminal illness so the money would be paid out to her. However, Dr Bender then pointed out to Mr Hart that irrespective, because Ms Miller was a trustee of the SMSF at that time, she also had an obligation to lodge annual returns. His response was simply that the monies were committed to fulfilling the obligation of paying out her monies as a consequence of her terminal illness. When it was pointed out to Mr Hart that $10,000 of those monies went to the Philippines company, Mr Hart said that what Ms Miller did with her money was up to her.

29. With respect to Mr Hart, his response in relation to the failure to lodge annual returns on time was less than satisfactory. His responses to why he did not lodge those returns as required by the law are indicative of his responses to many of the problems raised by the Commissioner. The first response frequently was to move responsibility to some other person and then, when unsuccessful, to attempt to obfuscate with non-responsive answers.

FAILURE TO COMPLY WITH BENEFIT PAYMENT STANDARDS

30. Part 3 of the SIS Act deals with operating standards. The object is set out in s. 30 in the following way:

> *The object of this Part is to provide for a system of prescribed standards applicable to:*
>
> *(a) the operation of regulated superannuation funds, approved deposit funds and pooled superannuation trust; and*
>
> *(b) the trustees and RSC licensees of those funds in trust.*

31. Section 31 of the SIS Act prescribes standards applicable to the operation of regulated superannuation funds amongst others. The standards that may be prescribed are set out in s. 31(2). Relevant in this case are the following:

> *(2) The standards that may be prescribed include, but are not limited to, standards relating to the following matters:*
>
> *(a) the persons who may contribute to funds;*
>
> *(b) the vesting in beneficiaries in funds of benefits arising directly or indirectly from amounts contributed to the fund;*
>
> *…*
>
> *(g) the preservation of benefits arising directly or indirectly from amounts contributed to funds;*
>
> *(h) the payment by funds of benefits arising directly or indirectly from amounts contributed to the funds;*
>
> *…*
>
> *(k) the application by funds of money no longer required to meet payments of benefits to beneficiaries because the beneficiaries have ceased to be entitled to receive those benefits;*
>
> *(l) the investment of assets of funds and management of the investment;*
>
> *…*

32. Section 34 of the SIS Act provides that each trustee of a superannuation entity must ensure that the prescribed standards applicable to the operation of the entity are complied with at all times. A person who intentionally or recklessly contravenes a prescribed standard commits an offence punishable on conviction by a fine.

33. Part 6 of the SIS Regulations sets out payment standards. It sets out a number of defined terms including the expression *condition of release* which is defined in the following way:

> ***condition of release*** *means a condition of release specified in Column 2 of Schedule 1 and, subject to regulation 6.01B, a member of the fund is taken to have satisfied a condition of release if the events specified in that condition has occurred in relation to the member.*

34. The conditions of release described in Column 2 are conditions which must be met for the release of benefits in a regulated superannuation fund. The Commissioner contended that at no stage had any condition of release been met for any member of the SMSF. Despite that, a number of benefits were paid directly to members or indirectly at their direction or on their behalf.

35. Division 6.2 deals with the payment of benefits. Reg 6.17 provides:

> *For the purposes of subsections 31(1) and 32(1) of the Act, the standards set out in sub regulations (2), (2A) and (2B) are applicable to the operation of regulated superannuation funds and approved deposit funds.*

36. For the purposes of this matter, Reg 6.17(2) provides that a member's benefits in a fund may be paid by being cashed in accordance with Division 6.3. Reg 6.18(1), which is found in Division 6.3, provides that a member's preserved benefits in a regulated superannuation fund may be cashed on or after the satisfaction by the member of a condition of release. Usually, these are paid out on a member reaching 65 years of age or attaining preservation age; or where the member has a terminal medical condition or permanent incapacity. There are also provisions for severe financial hardship and compassionate grounds.

37. In order to determine whether monies were unlawfully taken from the SMSF bank accounts (both the CBA and Bendigo Bank), I need to deal with the issue of whether the Ruffy Road property was in fact transferred in specie to the SMSF on 1 July 2011 as claimed by Mr Hart, but opposed by Mrs Hart.

Acquisition of the Ruffy Road property

38. Article 7 of the Trust Deed provides the following:

> *7.1 The following property and the property for the time being representing the same and the income thereof shall constitute assets of the Fund namely:*
>
> *(a) contributions;*
>
> *(b) any assets transferred to the Trustees pursuant to any arrangements made by the Trustees under the Rules in these Articles, and*

(c) any other monies received or receivable by the Trustees for the purposes of the Fund.

39. A Register Search Statement from LANDATA Victoria discloses that Mr and Mrs Hart became joint proprietors of the Ruffy Road property on 6 September 2006. Also, on that date, a mortgage was granted to the Commonwealth Bank of Australia (CBA) by way of security for purchase monies lent by the bank. The Transfer of Land document lodged with the Land Registry on 21 August 2006 discloses a transfer from the then proprietors to Mr and Mrs Hart for consideration of $260,000. The Register Search Statement obtained on 23 August 2016 discloses no change in the names of the registered proprietors.

40. In a statement given to the ATO by Mr Hart dated 11 November 2014, he described the land as having an area of 20.15 ha which had been predominantly cleared. On the property was a vineyard of 2.8 ha on which were planted about 7000 grapevines. The main dwelling was 11 squares in size. A number of buildings surrounding that dwelling were utilised as shedding for farming equipment. The largest building, 275 m² in size, constructed with a heavy steel structure frame and enclosed with colourbond material, had a concrete floor. Electrical power was connected and the structure was ideal for wine making and bottling facilities.

41. Mr Hart said that prior to transferring the property to the SMSF, it was utilised as a hobby farm. Since then, the property had been under refurbishment and transformation into a wine estate.

42. I had in evidence a document described as a Declaration of Trust which was made on 4 September 2012. That document purports to have been executed by Mr Hart and Ms Kathleen Hart as trustees for the SMSF. Mrs Hart's name does not appear on that document. Mr and Mrs Hart separated shortly prior to that date, in August 2012. Ms Kathleen Hart became a member and trustee of the SMSF on 1 April 2007. Mr Robert Hart consented to become a trustee on 10 December 2011 and resigned as trustee on 28 February 2013.

43. At the time Mr Hart claimed the Ruffy Road property was transferred to the SMSF, the trustees were Mr Hart, Ms Kathleen Hart and Mrs Hart. Ms Kathleen Hart was not registered on title as appears to be required by Article 7 of the Trust Deed. Furthermore, at no stage was Mr Robert Hart or Ms Luisa Miller, when they became trustees, recorded

as a proprietor on the certificate of title. When asked in cross-examination why this was the case, Mr Hart said that the transactions were completed by the SMSF's accountants and Bramich Legal lawyers. In addition, Mr Hart was asked why the property was not transferred into the name of Mr Robert Hart in December 2011. The explanation given by Mr Hart was illogical. He said it was because Mr Robert Hart had no funds in the account at that stage. While that may have something to do with his capacity as a beneficiary, as trustee, the property had to be transferred into his name. When pressed, he suggested that his lawyers were looking at that but he offered no evidence of any such investigation. In addition, as Dr Bender submitted, the Declaration of Trust purportedly made in September 2012 occurred shortly after he and Mrs Hart separated. He suggested that was not coincidental.

44. At the time the Declaration of Trust was executed by Mr Hart and Ms Kathleen Hart, Mrs Hart remained a trustee and beneficiary under the SMSF. In a letter dated 24 March 2014 Bramich Legal wrote to Mrs Hart's then solicitor stating:

> *Your client is placed on specific notice therefore that as and from the date of this correspondence she has no interest in the Superannuation Fund and her member's interest has been forfeited and allocated to Kathleen Hart* ***pursuant to Section 6.7 of the said Trust Deed****.* [Emphasis in original]

45. Despite Mr Hart failing to comply with the provisions under Article 7 of the SMSF Trust Deed, the Ruffy Road property was treated by the trustees as if it was an asset of the fund. That asset having been acquired from members of the SMSF was subject to the provisions set out in Article 7.8 of the Trust Deed. I deal with that issue presently as it raises further possible contraventions of the SIS Act and the SIS Regulations.

46. I find that Mr Hart's failure to comply with Article 7 is a serious breach of the SMSF Trust Deed and it casts considerable doubt upon whether the Ruffy Road property in fact ever became an asset of the SMSF.

47. Regardless of the above mentioned problems, the Detailed Operating Statement for the year ended 30 June 2012 in respect of the SMSF discloses contributions from Mr and Mrs Hart in the amount of $200,000 each. The Trustees Declaration for the 2012 income year was signed by Mr Hart and, purportedly, Ms Kathleen Hart. I use the word purportedly because, as I will explain presently, some doubt was cast upon the authenticity of Ms Kathleen Hart's signature on a number of documents. The Statement of Financial

Position as at 30 June 2012 disclosed the financial interest of the three beneficiaries, Mr Hart, Mrs Hart and Ms Kathleen Hart in the amounts of $362,724, $307,726 and $10,665 respectively. The value of the Ruffy Road property was clearly included in Mr and Mrs Hart's financial interests in the fund.

48. The mortgage over the Ruffy Road property granted to the CBA was not discharged prior to transfer to the SMSF nor was it ever discharged. A Discharge of Mortgage was executed by the CBA on 14 April 2011 but it was never registered on title due mainly to a caveat lodged by Mrs Hart's then solicitor, Mr Michael Smith, on 14 June 2013.

49. In her witness statement lodged with the Tribunal, Mrs Hart questioned how the ATO determined the Ruffy Road property to be an asset of the SMSF. She referred to the fact that the Certificate of Title required each of the trustees at that time, July 2011, to be registered on title. She said this never happened. However, there is some evidence that Mrs Hart accepted that her contributions to the SMSF should be increased by $200,000 on the basis of the transfer of the Ruffy Road property to the Trust.

50. In her cross-examination Mrs Hart was referred to a Transfer of Land form dated 1 July 2011 which cites Mr and Mrs Hart as the Transferor and Mr and Mrs Hart as trustees of the Hart Superannuation Fund has the Transferee. Mrs Hart agreed that the signature appeared to be hers although she did not recall signing the document. Dr Bender then took Mrs Hart to another document apparently prepared by Bramich Legal which is described as a Deed of Transfer. It is dated 8 July 2011. That Deed cites Mr and Mrs Hart as the Transferors and Mr and Mrs Hart as trustees of the SMSF as Transferee. The document is signed by Mr and Mrs Hart in both capacities and bears a witness' signature. When asked about this in cross-examination, Mrs Hart said that the signatures looked like her signature. Nevertheless, Mrs Hart continued to state that she had apparently signed the document but did not believe she had the entire contents in front of her at the time she signed it or that a witness was present to witness her signature.

51. Mrs Hart was also taken to a complaint she lodged with the Financial Ombudsman Service on 30 November 2013. In that complaint Mrs Hart referred to a transfer of the security given in relation to borrowings for the purchase of the Ruffy Road property to her home at Narre Warren. She referred to Mr Hart making her sign a lot of documents but that her house would nevertheless remain protected in the event of financial problems.

However, as she later discovered, that was not the truth and eventually the CBA exercised its legal rights to recover the sum of $280,000 on the sale of her house. She said Mr Hart would often come with numerous documents for her to sign but would not give her the full document so that she could understand what she was signing. She said he insisted on having the documents signed and he didn't have the time for her to read all of those documents. She said that started to happen around 2010. When asked if that might account for her response to the Deed of Transfer of the Ruffy Road property, Mrs Hart said that she strongly believed that if that was her signature, which she didn't deny, the documents were not given to her in that way but rather as financial records.

52. When Mrs Hart was taken to the Declaration of Trust dated 4 September 2012, she agreed that she did not sign that document and the first time she had seen it was when she was joined as a party to this proceeding.

53. While the evidence plainly discloses material which gives rise to serious doubts about the Ruffy Road property becoming an asset of the SMSF, for the purposes of the issues before me on this application, I need not make any finding about that. That is because after July 2011, the Ruffy Road property was treated by Mr and Mrs Hart as an asset of the SMSF. That is sufficient for the purposes of this application as Mr Hart most certainly believed that to be the case. Therefore I shall assess his conduct in accordance with his belief.

Questionable payments made from the SMSF

54. The SMSF had bank accounts with the Bendigo Bank and the CBA. I had in evidence bank statements from the Bendigo Bank between 29 May 2014 and 19 September 2014. The Commissioner referred to a series of payments made to Mr Hart, Ms Miller and Hart Fabrications between 3 June 2014 and 19 September 2014. They amount to $29,687.13 to Mr Hart; $41,333.21 to Ms Miller; and $10,000 to Hart Fabrications.

55. In cross-examination Mr Hart was asked whether he opened a Bendigo Bank account for the SMSF in 2014. Mr Hart responded that an account was definitely opened but he was not sure of the date. He thought it may have been somewhere between 2013 and 2014. When taken to the Bendigo Bank statement in evidence, Mr Hart agreed that account was opened together with Ms Miller. Mr Hart said he was the only signatory on the account. When taken to a payment dated 3 June 2014 in the sum of $10,960.13 which has the

entry: *PAY ANYONE 0078873501G Hart*, Mr Hart agreed that the reference to G Hart was a reference to himself. He also agreed that if G Hart appeared elsewhere in the bank statements, it was a reference to him.

56. Mr Hart was also taken to other references to LC Miller and asked if that was a reference to Ms Miller. Mr Hart agreed that was correct. There were also entries indicating payments to Hart to Hart. Mr Hart said that was not a reference to Hart Fabrications because it was no longer in existence. He said that was a reference to the Philippines company. Mr Hart confirmed that Mrs Hart was unaware of that account when it was opened. However he said that Ms Kathleen Hart was aware of that account when it was opened.

57. Mr Hart was then taken to the table which summarised the withdrawal transactions between 3 June 2014 and 19 September 2014. When asked whether the $29,999 (sic – $29,687.13) were payments made to him from the Bendigo Bank account, Mr Hart said:

> *They were paid into my account, they weren't made to me; they were paid into my account though.*

58. Mr Hart was then asked whether the $41,000 ($41,333.21) was paid to Ms Miller. Mr Hart agreed she received those payments. Similarly, Mr Hart agreed that $10,000 was paid to the Philippines company. He also agreed that those payments were not loans. He said they were payments to Ms Miller. That is, she directed them to be paid into those accounts.

59. When it was put to Mr Hart that the $29,000 payment paid from the SMSF did not meet any condition of release from that fund, Mr Hart disagreed. He said those monies were Ms Miller's payments and that she had directed him to put them into his account at that time. I had no evidence before me from Ms Miller or any other witness to support that statement. Mr Hart said that Ms Miller had claimed due to a terminal illness and that there was provision in the fund (Trust Deed) stating a beneficiary could withdraw all funds if they were terminally ill and were expected to die within two years.

60. Article 5.12 of the Trust Deed provides that a trustee may, in its absolute discretion, pay part or all of a member's benefit to a member or another person in the circumstances provided for in the SIS Regulations, notwithstanding the restrictions imposed by the Trust Deed. A terminal medical condition is a condition of release set out in Column 2 of

Schedule 1 of the SIS Regulations. The expression *terminal medical condition* is defined in Reg 6.01A as follows:

> *For Schedule 1, a **terminal medical condition** exists in relation to a person at a particular time if the following circumstances exist:*
>
> *(d) two registered medical practitioners have certified, jointly or separately, that the person suffers from an illness, or has incurred an injury, that is likely to result in the death of the person within a period (the **certification period**) that ends not more than 24 months after the date of certification;*
>
> *(e) at least one of the registered medical practitioners is a specialist practising in an area related to the illness or injury suffered by the person;*
>
> *(f) for each of the certificates, the certification period has not ended.*

61. When the above requirements were put to Mr Hart, he said he was aware of them. Mr Hart was taken to a report made by Dr Mary Dwyer, a Radiation Oncologist, on 20 August 2013. The report refers to Ms Miller having acquired breast cancer which was described as Grade 3. That report makes no mention of prognosis or life expectancy. Despite that, Mr Hart said that the assessment at Grade 3 indicated Ms Miller had less than 24 months to live. However, when Dr Bender asked Mr Hart whether he was a medical expert, he admitted he was not. He just said he knew *what those things were*. With respect to Mr Hart, as I mentioned in the course of his cross-examination, it is an opinion which he was not qualified to give and therefore I cannot accept it as evidence.

62. Mr Hart also referred to a medical report prepared by Dr Sachin Joshi, a medical oncologist, for the purposes of Ms Miller's application for the Disability Support Pension. In answer to a question asking whether the patient had a medical condition that may significantly reduce life expectancy, Dr Joshi ticked the *Yes* box stating: *Locally Advance (sic) Breast Cancer*. The following question asked whether the average life expectancy of a person with this condition was shorter than 24 months, Dr Joshi again ticked the *Yes* box.

63. I also had in evidence a histopathology report regarding an examination conducted on 28 November 2012. The two tumours assessed were described as invasive ductal carcinoma. It does not contain a prognosis. Finally, I had a Medical Certificate from a Dr Peter Cheung, a General Practitioner, dated 2 June 2014. It stated:

> *This is to certify that **Luisa Miller** consulted me today, and I confirm that she has metatastic (*sic – metastatic) *breast cancer and been having severe financial difficulties.*

64. Mr Hart agreed that none of the medical reports referred to death likely to occur within 24 months. Dr Joshi's statement that the average life expectancy of persons with this condition was shorter than 24 months does not necessarily refer to Ms Miller's condition. It is, with respect, a broad general statement which may or may not apply to Ms Miller. In any event, it is the only medical report which may indicate a life expectancy less than 24 months from the date of that report.

65. However, as Dr Bender submitted, two medical practitioners were required to report that it was likely that Ms Miller would not survive for a further 24 months. I did not have that evidence before me and accordingly must find that Ms Miller did not, at the time the payments were made to her between June and September 2014, have a terminal medical condition as defined in the SIS Regulations.

66. Furthermore, in the absence of evidence other than Mr Hart's oral evidence that payments directed to him and the Philippines company were for the benefit of Ms Miller, those contentions must necessarily fail. That is because not only was there no objective evidence to support those statements, but in any event, Ms Miller did not meet a condition of release permitting her to lawfully receive any money paid out of the SMSF.

67. I also had in evidence CBA bank statements between 1 July 2011 and 31 May 2014. Those statements record the following withdrawals which were of concern to the Commissioner:

(c)	15 September 2011	$1,474
(d)	23 January 2012	$638
(e)	19 June 2012	$9,032.60
(f)	26 July 2012	$100,000
(g)	8 October 2012	$3,539.12
(h)	17 December 2012	$3,102

(i)	7 May 2013	$2,442
(j)	15 May 2013	$18,000
(k)	26 June 2013	$10,000

68. The last mentioned withdrawal of $10,000 was made to meet a payment order made by the Family Court. It was no longer contentious.

69. Mr Hart was directed to the copy of a CBA cheque in the amount of $18,000 drawn on 15 May 2013, payable to Kathleen Maria Hart. Mr Hart agreed those monies came from the SMSF's CBA account. He agreed it was his signature on the cheque. The CBA Bank Statement shows the cheque being presented on 15 May 2013 and debited to the SMSF's account. Dr Bender then referred Mr Hart to a statement made by Mrs Hart which is dated 10 March 2016. Mrs Hart said:

> *On 15th May 2013 Kathleen Standley (Hart), who at the time had $10,665 in the Hart Superannuation Fund, appears to at Mr George Hart's direction, written a cheque 000058 for $18,000, payable to Kathleen Hart from the Hart Superannuation Fund to her account, then transferred to Hart to Hart Fabrications P/L on the 20th May 2012 as a loan.*

70. When asked if that statement was correct, Mr Hart disagreed. He said that if the statement was suggesting that Ms Kathleen Hart was paid $18,000 for her $10,665 in the SMSF, that was incorrect and he assumed that the remainder was paid for some other reason. Mr Hart agreed that Ms Kathleen Hart did transfer the money to Hart Fabrications. He disagreed that it was transferred as a loan. He said that payment was given to Hart Fabrications by Ms Miller as a loan. Mr Hart gave the following explanation:

> *We purchased – Hart Super purchased a building for the Ruffy Road property – toilets and stuff like that – to become the toilets and stuff at the property. We had to pay for it on the spot, to get it at a price. We couldn't access the super account at that particular time. So Ms Miller paid for it, to Country Home Buildings, I think they were called, or Express. And asked us to put the money into Kathleen's account which was moved from the super. So we balanced the payment up for the building. And then asked Kathleen to put it into Hart to Hart. I don't think it was at the same time, to be honest with you. I have explained that in my documents there somewhere.*

71. There was no objective evidence supporting Mr Hart's statement regarding the purpose of the withdrawal and transfer. In her cross-examination Ms Kathleen Hart confirmed that she entered the details on the cheque for $18,000 made payable to her but Mr Hart

signed that check. She agreed that the $18,000 cheque was deposited in her bank account. When asked why that transaction took place, she gave the following explanation, which I found difficult to follow:

> *Actually it was the closest (indistinct) like, Louisa asked if she could use my bank account. It was to do with – she purchased something and asked if she could – the payment was meant to be made to her, but she asked if she could use my bank account, so I agreed.*
>
> *…*
>
> *Her bank account was unsecure, I believe she said. It was accessible by someone else, and she didn't want them to receive her money, so she asked if she could use mine, and put it in there until she decided where she wanted the money to go.*
>
> *…*
>
> *So she asked me to put it in Hart to Hart Fabrications.*

72. When asked why the money was being paid to Hart Fabrications, Ms Kathleen Hart said it was because Ms Miller was the one who paid for the building. She said the building had to do with the SMSF but she didn't remember the particulars. She repeated that the money was then transferred to Hart Fabrications. Ms Kathleen Hart agreed that the monies were not provided as a loan from the SMSF.

73. If what Ms Kathleen Hart said was correct, then the $18,000 sum should appear in Hart Fabrications' bank account. In addition, given that the cheque is clearly crossed *Not Negotiable*, and payable to Kathleen Maria Hart, there should also be evidence of that cheque being deposited in Ms Kathleen Hart's account. It would have been a simple matter for either or both Mr Hart and Ms Kathleen Hart to provide documents substantiating the transaction they claimed occurred. I did not have in evidence any such documents. I did have an invoice from Country Express Homes addressed to the SMSF dated 16 February 2013 for the supply and transportation of what is described as a bathroom unit from Badgers Creek to Ruffy Road. I had no evidence of a loan from Ms Miller to the SMSF.

74. Given the less than satisfactory and convoluted explanation given regarding the acquisition of what appears to be effectively a portable bathroom by the SMSF, I find that the SMSF made the $18,000 payment to Ms Kathleen Hart in contravention of the SIS Regulations. No condition of release was satisfied which would permit the release of those monies from the SMSF.

75. The second withdrawal of funds from the SMSF queried by the Commissioner was raised by a cheque drawn on the SMSF's CBA account on 19 June 2012 for $9032.60. The payee named on that cheque is Hart Fabrications. When Ms Kathleen Hart was asked whether that was her handwriting on the cheque, her vague response was: *Possibly*. She accepted that the handwriting looked the same as that on the $18,000 cheque. She also agreed that the signature on the cheque was that of Mr Hart. Ms Kathleen Hart said she often wrote cheques for Mr Hart and that he would check them over and then sign them. She said she was not a signatory on that account despite being a trustee. When asked why that was the case, she said she never requested or was asked to be a signatory. She did not think it was necessary. When asked who was managing the affairs of the SMSF, Ms Kathleen Hart simply responded *The Hart Super Fund*. When asked who those individuals were, Ms Kathleen Hart suggested it was whoever was involved in the SMSF at the time. When pressed on what her role was, Ms Kathleen Hart said she helped with the books and with the decision-making. On further questioning by Dr Bender, Ms Kathleen Hart said she could not recall what the cheque was for but assumed she did not have a problem with that payment.

76. When Mr Hart was taken to a copy of the cheque for $9,032.60 in his cross-examination, he agreed it was his signature on that cheque. The cheque was presented for payment on the same day that it was drawn, 19 June 2012. The credit to Hart Fabrications' CBA account is recorded on that day. Hart Fabrications had a debit balance of $90,591.18 on that day. Mr Hart agreed that the deposit slightly improved Hart Fabrications' financial position. Mr Hart explained that the payment was for putting in the foundations for what has been described as the shed erected on the property for the purposes of establishing it as a winery. Mr Hart could not recall if an invoice was issued for that amount or whether it was part of the $100,000 contract for the erection of the shed on the property.

77. Once again, the evidence given by Mr Hart and Ms Kathleen Hart in relation to this transaction was unsatisfactory. It points to Mr Hart being the controller of monies in the SMSF and Ms Kathleen Hart simply doing his bidding. I find that the withdrawal of those monies from the SMSF was in breach of the SIS Regulations as it did not meet a condition of release.

78. On 25 July 2012 a cheque was drawn on the SMSF's CBA bank account in the sum of $100,000 payable to Hart Fabrications. The Hart Fabrications' CBA bank account

discloses a deposit of $100,000 on 26 July 2012. On 31 July 2012, there is a withdrawal in Hart Fabrications' CBA account for the full amount, $100,000. In his witness statement Mr Hart said that money was an investment made to obtain an interest in the Philippines company. He said the investment was made by the authority and with the consent of the trustees of the fund, himself, Ms Kathleen Hart and Mr Robert Hart. In her witness statement Mrs Hart said she had no knowledge of this transfer out of the SMSF until after her separation from Mr Hart. She also said no minutes of meetings at which this investment was discussed have been produced.

79. As I have already mentioned above, the Philippines company received a certificate of incorporation on 19 June 2012. Its Articles of Incorporation list Mr Hart and Ms Kathleen Hart as directors together with three other persons, all of them being Filipino nationals. It also sets out the number of shares subscribed by each of those directors. Mr Hart subscribed for 750 shares said to be valued at PHP 75,000 (Philippine pesos) although the shares do not appear to have been fully paid. The amount paid is said to be PHP 18,750. Ms Kathleen Hart subscribed for 125 shares valued at PHP 12,500. Hers were also partially paid up to PHP 3125.

80. Although Mr Hart claimed that the investment was made by the SMSF, there is no evidence on any of the documents before me which discloses that the shares in the Philippines company were held in trust by the SMSF. The shares appear on the documents to have been acquired by Mr Hart and Ms Kathleen Hart in their personal capacity. When Mr Hart was asked in cross-examination to explain the business of the Philippines company, his response was vague, referring to *an infrastructure more type of company*. When asked to explain, he said that it did various contracts, mainly government. When asked what type of contracts, Mr Hart suggested that they related to bridges, navy shipyards and telephone towers. Mr Hart was then taken to the company's Articles of Incorporation where its primary purpose was stated to be, effectively, the business of metal fabrications of commercial and industrial products of every class and description. Mr Hart explained that the company might not be doing the actual work but rather consulted on a project.

81. When asked about the three Filipino nationals who were also directors of the company, Mr Hart said that they were running the company; he was not. Dr Bender then directed Mr Hart to a copy of the Articles of Incorporation of the Philippines company obtained on

12 July 2016 by the Commissioner. Dr Bender noted that the SMSF was not listed as shareholder in that company. When it was put to Mr Hart that the SMSF held no shares in the company, he agreed.

82. Dr Bender also queried the number of shares issued for the AUD $100,000 transferred to the Philippines. That sum was transferred to an ANZ account in the Philippines and it is disclosed on a statement dated 31 August 2012. It resulted in a credit of PHP 4,288,447. Given that the shares had a par value of PHP 100, if all of those funds were put towards the purchase of shares, it should have resulted in a an allocation of 42,885 shares at par value. However the shares appear not to have been fully paid up, as is shown on the document indicating amount paid. In Mr Hart's case, the amount paid was PHP 18,750. If PHP 18,750 was the paid-up amount for 750 shares for Mr Hart and PHP 3125 the paid-up amount for 125 shares for Ms Kathleen Hart, had the full amount of approximately PHP 4,288,447 been applied to the acquisition of shares in the Philippines company, then Mr Hart and Ms Kathleen Hart would have been allotted about 171,540 shares.

83. Dr Bender produced this calculation in a document prepared for the hearing. The calculation is simple. If 750 shares are allotted to an intending shareholder at par value, the cost would be PHP 75,000. The number of shares per peso at par value is calculated by dividing the 750 by 75,000 resulting in 0.01 shares per peso. To calculate how many shares are issued on the amount required to be paid up for those shares, given that they are obviously only partly paid in order to acquire them, one needs to divide 750 by 18,750 resulting in 0.04 shares per peso. Therefore, if PHP 4,300,000 had been applied for the acquisition of shares paid-up to the value required for them to be allotted, that should have produced an allotment of 172,000 shares (4,300,000 x 0.04).

84. When this calculation was put to Mr Hart in cross-examination and he was asked whether the SMSF should have been allotted far more than 4,300 shares for its AUD $100,000 investment, Mr Hart said he did not think that was correct. Although Mr Hart was taken to another letter dated 25 July 2012 from what purports to be a firm of Attorneys at Law in the Philippines, that letter can only be described as very strange. It states the following:

> *As you well know Hart to Hart Fabrications International (Philippines) Inc. Is in the process of amending its Articles of Incorporation, both for the increase in capital stock and for other matters as well. In this regard, we would like to inform you that by an affirmative vote of the stockholders owning or representing at least two thirds (2/3) of the outstanding capital stock held at a meeting for the purpose at the*

principal office of the corporation and approved likewise by the majority directors, Hart to Hart Superannuation Fund has been issued FOUR THOUSAND THREE HUNDRED (4,300) shares at ONE HUNDRED PESOS (PHP 100.00) per share equivalent to 4 MILLION THREE HUNDRED PESOS (PHP 4,300,000.00) or AUS $100,000.

85. To begin with, the stock held by Mr Hart and Ms Kathleen Hart according to the Philippines company's Articles of Incorporation amounts to 35% of its total issued stock. To get to a stockholding of two thirds of the stock, at least one of the two Filipino directors holding 750 shares needed to be present and voting in favour of the proposed increase. There was no evidence or minute from the Philippines company which reports the vote of stockholders as stated in the letter. The next point is that simple arithmetic seems to be beyond the writer of the letter. 4,300 shares at PHP 100 per share amounts to PHP 430,000 and not PHP 4.3 million as stated in the letter. PHP 4.3 million should result in the allocation of 43,000 shares.

86. Plainly, no weight can be given to those documents produced in the Philippines. Not only is the Philippines well-known for its production of fake documents, it is also known for a variety of other corrupt commercial practices. The above seems to be an example of such practice.

87. When Mr Hart was asked in cross-examination why the money went through Hart Fabrications, he said Hart Fabrications had an international transferring account. The SMSF did not have that facility. Despite that statement, Mr Hart produced no evidence of such an account. He said Hart Fabrications trading account, which had a US dollar trading account, could be used to automatically transfer funds to wherever. The problem with that statement is there is no mention of the US dollar amount anywhere in the documents dealing with the share transactions. In fact in a consolidated statement of what is described as a Standard Savings Account as at 2 January 2013 with the ANZ bank in the Philippines, there is mention of Australian dollars in the abbreviated form, AUD. That statement appears to envisage an account for the SMSF held both in Australian dollars and Philippine pesos. The Australian dollar amount appears as zero on that statement.

88. Dr Bender also referred Mr Hart to a statement made by Mrs Hart to the ATO legal department regarding the SMSF. In that statement Mrs Hart said that her lawyer, Mr Michael Smith, in January 2013 discovered that $100,000 had been withdrawn from the SMSF on 25 July 2012. Mrs Hart said she was shocked by that discovery and was

unaware of the transfer of funds. Her daughter, Ms Kathleen Hart visited her in January 2013 and she questioned her about the $100,000 withdrawal. Ms Kathleen Hart did not want to discuss the withdrawal, particularly as she felt pressure of one parent playing off against the other. Mrs Hart said she had to force the issue as she needed to know if her daughter was aware of the withdrawal. She asked her daughter if there had been a meeting of the SMSF's trustees when the decision was made. Ms Kathleen Hart finally broke down and told her that her accountant, Mr Peter Locandro of ZJL Partners, and Mr Hart had a meeting at 4 Kimberly Road Dandenong, Victoria. Ms Kathleen Hart did not sit in on the meeting. After the meeting, Mr Hart requested that his daughter write out a cheque for $100,000 to Hart Fabrications. She assumed she could do this because her father had discussed it with the accountant. Mrs Hart explained to her daughter the gravity of a breach under the SIS Act. Mrs Hart then concluded saying:

> *The Methodology used shows they deceived me, George Hart, Kathleen Stanley (Hart) and Accountant Mr Peter Locandro. Was to have a cheque for $100,000 withdrawn from the Hart Superannuation Fund, subtly paid into Hart to Hart Fabrications P/L, (which is a breach of the SISA Act) and then paid into an account of Hart to Hart Fabrications International P/L. All designed to deceive me and being a wholly fraudulent action.*

89. In cross-examination Mr Hart agreed that he had asked his accountant for advice regarding that transaction. He also agreed that he instructed his daughter, Ms Kathleen Hart, how to go about executing the transaction.

90. Mr Hart was also taken to a document which is headed Minutes of Meeting of the Members of Hart Superannuation Fund held on 18 July 2012. That document states that present were Mr George H Hart, Miss Kathleen M Hart and Mr Robert G Hart. The resolution simply states that all agreed to invest $100,000 in the share purchase of Hart to Hart Fabrications International (Phil). Mr Hart agreed that Mrs Hart was not invited to that meeting. Mr Hart also said that his daughter, Ms Kathleen Hart did attend the meeting.

91. Mr Hart was also referred to a Deed of Assignment of shares in the Philippines company. That deed is said to be between Edgardo Acosta Yaona (Assignor) and Hart Superannuation Fund for Trustees George Hart, Sandra Hart and Kathleen Hart, represented by Mr George Hart (Assignee). The document states:

> ***WHEREAS**, the ASSIGNOR is the owner of **Six Hundred Twenty Five (625)** common shares ("SHARES," for short) with the par value of (AU $100,000.00) equivalent to (PhP 4,351,533.68) in **Hart to Hart Fabrications International***

> ***(Phils), Inc**., a corporation duly organised and existing under Philippine law, with business address at G12 Ciannat Complex, Ciannat Bldg., Marcos Highway, Antipolo City, Philippine;…*

92. Strangely then, the document purports to state that the assignor is willing to sign and the assignees are willing to accept all of the assignor's 562 shares. First, there seems to be a discrepancy between the 625 shares and the 562 shares which form part of the assignment. Secondly, according to the Articles of Incorporation, Mr Yaona was the owner of 750 shares. Thirdly, 625 shares at par value (PHP 100) is worth nothing near AUS $100,000. At the exchange rate in July 2012, 625 shares at par value equates to about AU$1,443. With respect, the document is meaningless. It is, in my opinion, a sham.

93. Just to complete the picture, the purported Deed of Assignment was made by the Trustees I have named above, including Mrs Hart. Mr Hart purported to represent her by signing that Deed. Mrs Hart strongly denied any knowledge of the transaction until she discussed it with her daughter in January 2013. The Deed states it was entered into on 26 July 2012. He did not have Mrs Hart's authority to sign that Deed.

94. In cross-examination Ms Kathleen Hart was taken to her mother's statement. When asked if she could recall having a meeting with Mrs Hart in early 2013 about the withdrawal of $100,000 from the SMSF, she responded: *Not really*. When asked what she meant by that she said she could not remember the withdrawal of the $100,000 amount. When I asked her what she meant by her answer, Ms Kathleen Hart said she did not remember it. Dr Bender attempted to refresh her memory by reading a further extract from her mother's statement. She repeated that she could not remember. When taken to the reference to a meeting between her father, Mr Hart and Mr Locandro the accountant, Ms Kathleen Hart then said she remembered there was a cheque for $100,000 but she did not remember the context. When it was put to her that the cheque was made out to Hart Fabrications, Ms Kathleen Hart said it wasn't for Hart Fabrications but it was probably put into its account.

95. It seems Ms Kathleen Hart's memory improved in the course of some gentle cross-examination from Dr Bender. She agreed that she discussed the drawing of the $100,000 cheque with her father and she remembered it had to do with shares. She also said that because the SMSF did not have an online banking facility, the cheque was made out to Hart Fabrications. Ms Kathleen Hart was also of the view that the investment was a good

investment at the time because it seemed promising. She also admitted that she had not run a company prior to her involvement with Hart Fabrications and she had no experience in investing money in foreign companies at that time. Many of her answers were that she was either unsure or she could not remember. When asked whether she was a director of the Philippines company at the present time, she answered she was not. She was then asked whether she was a director of that company at any time and she answered that she was not even though there was discussion of it at one time. When Dr Bender put to Ms Kathleen Hart that the SMSF was never actually issued with any shares in the Philippines company she said she did not know although she thought the $100,000 was for shares. She did not know how many shares were issued or to whom.

96. Ms Kathleen Hart was then directed to the official record of the Philippines company's Articles of Incorporation. Dr Bender pointed out to her that there were five directors of that company, and she was named as one of those. Her response was:

> *Well, not officially, no. Yes. Like, I – as I said, I was going to be part of the company originally, and then decided against it. So at this point in time, it was still a possibility, and afterwards I decided I didn't want to.*

97. Ms Kathleen Hart was also taken to the minutes of the meeting of members of the SMSF purportedly held on 18 July 2012 at which she is listed as having been present. She could not remember the meeting but she said she remembered the shares.

98. Regrettably, I must say that Ms Kathleen Hart's evidence was far less than satisfactory on all accounts. An issue also arose as to whether she in fact signed documents which were purportedly signed by her where her signature appeared to be quite different to that originally shown on documents. I have more to say about that below.

99. The evidence I have referred to above leads me to find that the withdrawal of $100,000 from the SMSF for the purpose of purchasing shares in the Philippines company did not meet a condition of release. It was paid to Hart Fabrications. When the money found its way into a Philippines ANZ bank account, a small portion of it appears to have been used to acquire shares in the Philippines company although shares were allotted personally to Mr Hart and to Ms Kathleen Hart and not to the SMSF.

Breach of in-house asset rules

100. Part 8 of the SIS Act deals with in-house asset rules applying to regulated superannuation funds. Central to a discussion regarding in-house asset rules is the meaning of an *associated entity*. I have set out the legislative provisions dealing with that at expression [19].

101. Section 71 of the SIS Act sets out the meaning of the expression *in-house asset*. It provides:

> **Basic meaning**
>
> *(1) For the purposes of this Part, an in-house asset of a superannuation fund is an asset of the fund that is a loan to, or an investment in, a related party of the fund, an investment in a related trust of the fund, or an asset of the fund subject to a lease or lease arrangement between a trustee of the fund and a related party of the fund, but does not include:*
>
> *(a)…*

102. Section 83 of the SIS Act, which applies to a regulated superannuation fund, sets out market value ratio limits of acquired in-house assets. Relevantly, it provides:

> *…*
>
> *(2) If the market value ratio of the fund's in-house assets exceeds 5%, a trustee of the fund must not acquire an in-house asset.*
>
> *(3) If the market value ratio of the fund's in-house assets does not exceed 5%, a trustee of the fund must not acquire an in-house asset if the acquisition would result in the market value ratio of the fund's in-house assets exceeding 5%.*
>
> *(4) For the avoidance of doubt, a reference in this section to acquiring an in-house asset includes a reference to making an investment or alone, or entering into a lease or lease arrangement, if the resulting loan or investment, or the assets subject to the lease or lease arrangement, would be an in-house asset.*

103. The calculation of market value ratio of a fund's in-house assets is made using the formula set out in s. 75 of the SIS Act. Essentially, the whole dollar value of in-house asset of the fund is divided by the whole dollar value of all of the assets of the fund expressed as a percentage. Generally, value is assessed at arm's length value. That expression is also defined in s. 73(2) the SIS Act as follows:

> ***"arm's length value"**, in relation to an asset, means the amount that the acquirer of the asset could reasonably be expected to have been required to pay to acquire the asset under a transaction where the parties to the transaction are dealing with each other at arm's length in relation to the transaction.*

104. Mr Hart contended that the SMSF had properly invested in the acquisition of shares in the Philippines company. The Commissioner contended that, primarily, the SMSF did not acquire any shares for the AUD $100,000 withdrawn from the SMSF and transferred to the Philippines. Alternatively, if I were to find that the fund did acquire shares in the Philippines company, the Commissioner contended that the investment was an in-house asset of the fund because the company was a related party of the fund. It was a related party of the fund because it was a Part 8 associate of two members of the fund, that is, Mr Hart and Ms Kathleen Hart. Mr Hart and Ms Kathleen Hart, as directors and shareholders of the Philippines company, sufficiently influenced the company.

105. My findings on examining the evidence regarding the transaction involving the acquisition of the Philippines company and its shares, or as it is described in the Philippines, its stock, were that the SMSF acquired no shares in the Philippines company. Alternatively, should I be wrong about that, I should examine whether that acquisition by the SMSF, assuming it took place, exceeded the 5% limit. I had in evidence the Statement of Financial Position as at 30 June 2012 for the SMSF. That statement includes the Ruffy Road property valued at $400,000. The total available assets to pay benefits was stated to be $681,115. Assuming the $100,000 was invested in the Philippines company, that amounts to 14.68% of its assets. Clearly, it exceeds the 5% in-house asset rule and accordingly is a breach of the SIS Act.

106. The next contention made by the Commissioner is that the Ruffy Road property had a residential house on it but, according to Mr Hart, had not been leased. Section 66 of the SIS Act deals with acquisitions of certain assets from members of regulated superannuation funds which are prohibited. Relevantly, it provides:

> *(1) Subject to subsection (2), a trustee or an investment manager of a regulated superannuation fund must not intentionally acquire an asset from a related party of the fund.*
>
> *(2) Subsection (1) does not prohibit a trustee or investment manager acquiring an asset from a related party of the fund if:*
>
> > *(a)…*
> >
> > *(b) the fund is a superannuation fund with fewer than 5 members – the asset is business real property of the related party acquired at market value; or*
> >
> > *…*

107. When the Ruffy Road property was acquired in July 2011, the fund had three members; Mr and Mrs Hart and Ms Kathleen Hart. The expression *business real property* is a term defined in s. 66(5) of the SIS Act in the following way:

> ***"business real property"**, in relation to an entity, means:*
>
> *(a)any freehold or leasehold interest in the entity in real property; or*
>
> *…*
>
> *(c)if another class of interest in relation to real property is prescribed by the regulations for the purposes of this paragraph – any interest belonging to that class that is held by the entity;*
>
> *where the real property is used wholly and exclusively in one or more businesses (whether carried on by the entity or not), but does not include any interest held in the capacity of beneficiary of a trust estate.*

108. Therefore, unless the Ruffy Road property was used wholly and exclusively for one or more businesses, because it was said to have been acquired by the SMSF from Mr and Mrs Hart who were the registered proprietors, its acquisition by the SMSF would be prohibited.

109. Prior to their separation, Mr and Mrs Hart occupied the house on the Ruffy Road property. On its purported transfer to the SMSF, the entire property, including the house, was required to be used in one or more businesses. Unless it met that requirement, its acquisition by the SMSF was prohibited. Mr and Mrs Hart of course could lease the property from the SMSF which is what the evidence seems to indicate was intended. That is even though there was no evidence of rental being paid to the SMSF. It's Operating Statement for the year ended 30 June 2012 does not disclose any rental income. I had in evidence some downloaded text messages between Mr and Mrs Hart in September 2012. In one of those messages, Mr Hart stated:

> *As for Ruffy Road it is no longer being rented by you and me but only me it belongs to the super not to us in regards the ownership, you don't work on the property and it is not open to the public at this stage.*

110. Although no formal lease document was put into evidence, the Commissioner submitted that there was a lease arrangement in existence between Mr and Mrs Hart and the SMSF. The expression *lease arrangement* is defined in s. 10(1) as follows:

> ***"lease arrangement"** means any agreement, arrangement or understanding in the nature of a lease (other than a lease) between a trustee of a superannuation fund and another person, under which the other person is to use, or to control the*

> *use of, property owned by the fund, whether or not the agreement, arrangement or understanding is enforceable, or intended to be enforceable, by legal proceedings.*

111. Dr Bender submitted that what existed between Mr and Mrs Hart prior to separation and Mrs Hart following separation was an arrangement which could be inferred from the circumstantial evidence. He referred to the Federal Court of Australia (Mansfield J) decision in *Australian Prudential Regulation Authority v Holloway* (2000) 104 FCR 521. Although his Honour there was dealing with a scheme, the same principle should apply. Mansfield J said, at 549:

> *As APRA contended, the finding as to the existence of an arrangement may be inferred from circumstantial evidence, including evidence of the opportunity for parties to reach an arrangement, evidence of conduct concurrent in time, character or result, and evidence of the consequences of that conduct upon the act and upon others: see R v Associated Northern Collieries Ltd (1911) 14 CLR 387 at 400.*

112. I accept Dr Bender's submission. While no rental may have been paid to the SMSF, Mr and Mrs Hart plainly were aware of the need to meet the business real property requirement and that required the property to be available for lease or rent. Therefore, as Dr Bender submitted, the acquisition of the Ruffy Road property by the SMSF constituted the acquisition of an in-house asset. At that time, the SMSF valued the property at about $400,000 when the total assets of the fund were some $681,000. That clearly exceeded the 5% threshold and therefore was a contravention of the SIS Act regarding the acquisition of an in-house asset.

113. There was also an issue regarding the operation of the vineyard and winery conducted by the Hart to Hart Wines partnership. In his reply to the Commissioner's Statement of Facts, Issues and Contentions, Mr Hart said that the winery had in excess of 30,000 litres of storage capacity and that the vineyard had started to improve so that picking fruit required up to 25 pickers per day to keep up with growing demands. Over the following two years materials were purchased to expand the vineyard to an area of 20 acres which would provide for 60,000 litres of bottles of wine for each vintage. When the property was acquired by the SMSF in 2011, an upgrade was designed as it was a requirement for a building suitable to be used as a winery. The construction of the building was contracted to Hart Fabrications and site labour by the company was provided at no cost via an arrangement of a two-year rent free period to the Hart to Hart Wines partnership.

114. Although the Commissioner denied there was any business carried on at the Ruffy Road property after it was acquired by the SMSF, he contended that if there was a business being carried on, then the two-year rent free period also constituted a lease arrangement which contravened the in-house assets rules. I agree with that submission. In an affidavit lodged in the Federal Magistrates Court of Australia in respect of the divorce proceedings between Mr and Mrs Hart, Mr Hart deposed that the G & S Hart Wines had not traded for at least three years and did not return a profit. That affidavit was sworn on 11 April 2014. Therefore, if that statement were true, then no business was being carried on at the Ruffy Road property at the time of its acquisition by the SMSF in July 2011. Alternatively, if there was a business being carried on at the Ruffy Road property at the time of its acquisition, the two-year rent free period granted to the Hart to Hart Wines partnership contravened the in-house assets rule. I should also point out that in the statement Mr Hart made to the ATO in a letter dated 10 November 2014, Mr Hart said that prior to transferring the Ruffy Road property to the SMSF, it was being utilised as a hobby farm. When cross-examined about the inconsistency between that statement and the statement he made in his affidavit to the Federal Magistrates Court of Australia, he said the statement made to the ATO was incorrect.

115. For the prohibition exemption in s. 66(2)(b) to apply, the property of the related party must also be acquired at market value. In a file note of a telephone conversation with Mr Hart, an officer at the ATO said she had asked Mr Hart if there was a valuation done on the property when it went into the SMSF. Apparently Mr Hart said there was a valuation and it was valued around $340,000-$360,000. Mr Hart also said that the SMSF purchased a large shed for the property on which to run the winery and that it was almost operational when they divorced. The shed cost $100,000 and that's why he valued the property at $500,000. Mr Hart said the SMSF treated the acquisition as contributions of $200,000 from himself and Mrs Hart. Despite that, the Commissioner submitted that no valuation had been provided to him.

116. In a letter dated 5 October 2015, Bramich Legal wrote to the ATO stating that Mr Hart instructed Bramich Legal that he acquired the Ruffy Road property at a value represented by his superannuation consultant, namely $400,000. A letter from ZIL Partners, Mr Hart's accountant, dated 24 June 2011 addressed to Bramich Legal states that the market value for the farming property was $400,000. In his letter to the ATO dated 10 November 2014 Mr Hart said that the value of the property at the time of transfer to the SMSF was

determined from information obtained from the property rates notice. That notice discloses the capital improved value of $470,000, significantly higher than that recorded in the fund's accounts. I accept Dr Bender's submission that the property was not at market value. Accordingly, the exemption to the prohibition did not apply to Mr Hart. That acquisition contravened the SIS Act.

Lending and giving financial assistance to members from resources of the fund

117. The Commissioner contended that if the payments made to the SMSF's members from the Bendigo Bank account were loans rather than the payment of benefits, then Mr Hart would in any event contravened s. 65(1) of the SIS Act. Section 65 relevantly provides:

> *(1) A trustee or an investment manager of a regulated superannuation fund must not:*
>
> *(a) lend money of the fund to:*
>
> *(i) a member of the fund; or*
> *(ii) a relative of a member of the fund; or*
>
> *(b) give any other financial assistance using the resources of the fund to:*
>
> *(i) a member of the fund; or*
> *(ii) a relative of a member of the fund.*

118. There was no evidence before me indicating that any monies paid out of the Bendigo Bank to members of the SMSF were required to be repaid. It is difficult to determine the true nature of the payments in question, essentially for the reason that Ms Miller was not called to give evidence and the evidence given by Ms Kathleen Hart was unreliable. Although I did have in evidence an invoice for $18,000 from Country Express Homes for the provision of a bathroom unit, that invoice was made out to the SMSF. The $18,000 cheque was made payable to Ms Kathleen Hart. She was then both a trustee and beneficiary of the SMSF. The $9,032.60 cheque was paid to Hart Fabrications, an associated entity. Therefore, on the evidence before me, I cannot find that the monies withdrawn from the Bendigo Bank account were provided to a member or relative of the SMSF by way of loan or financial assistance.

119. Dr Bender also submitted that Mr Hart contravened the prohibition against providing financial assistance to a member or a relative of the SMSF by:

(l) making a lease arrangement whereby the Hart to Hart Wines partnership obtained use of the Ruffy Road property for two years rent free;

(m) providing indirect financial assistance to himself to enable him to start a business in the Philippines by funds provided through Hart Fabrications to the Philippines company when Mr Hart and Ms Kathleen Hart were directors and shareholders of that company; and

(n) providing financial assistance indirectly to himself through funds provided to Hart Fabrications for the purchase of a shared on the Ruffy Road property.

120. Mr Hart did not dispute, and in fact made, the claim that the Hart to Hart Wine partnership was granted a two-year rent relief for use of the Ruffy Road property and in particular its use as a winery which included use of the shed set up for that purpose. I accept Dr Bender's submission that the grant of rent free period constitutes financial assistance. Significant financial advantages were gained by the entity granted rent relief. That grant to the partnership was a grant to a member of the fund and hence prohibited by s. 65(1)(b) of the SIS Act.

121. The second basis upon which Dr Bender claims a financial advantage was gained by Mr Hart was the acquisition of shares in the Philippines company. The shares were allotted to Mr Hart personally as well as to Ms Kathleen Hart. The SMSF obtained no advantage whatsoever from that transaction. As I have found, it is unclear where the remainder of the $100,000, which was transferred to the Philippines, went. As far as I'm able to determine from the evidence before me, this transaction also offends s. 65(1)(b) of the SIS Act.

122. The third basis referred to by Dr Bender was the payment made to Hart Fabrications for the erection of a shed on the Ruffy Road property. While the precise amount of that expense was not determined, Mr Hart in his cross-examination agreed that it was about $100,000. The bank statements before me disclosed two transactions which are probably related to that acquisition. The first is a deposit in the account of Hart Fabrications on 20 January 2012 in the amount of $44,000. The second is a deposit of $47,716.90 into the account of Hart Fabrications on 2 May 2012. That amount was withdrawn from the SMSF's CBA bank account on the same day. I also had in evidence two invoices from

Hart Fabrications to the SMSF dated 20 January 2012 and 2 May 2012 corresponding to the amounts withdrawn from the SMSF's CBA bank account.

123. Mr Hart also said that the amount of $9,032.60, which was withdrawn from the SMSF's CBA bank account on 19 June 2012 and deposited in Hart Fabrications' CBA bank account on the same day, was a payment for footings related to the erection of the shed. Although Mr Hart's evidence was that the partnership was conducting a business on the Ruffy Road property prior to its acquisition by the SMSF, given the date on which the payments for the shed were made and that the equipment and facilities which were placed in the shed were required in order for the business to operate effectively, I have found that at the time of its acquisition by the SMSF, there was no business being conducted on the Ruffy Road property. It was, as Mr Hart said in his letter to the ATO, being run as a hobby farm. Therefore, I accept Dr Bender's submission that Mr Hart, who was the sole director and shareholder of Hart Fabrications at that time, was provided with financial assistance from the SMSF for the erection of the shed. There was no evidence that the consideration provided was at market value.

Failure to register the Ruffy Road property in the names of all trustees

124. The Commissioner contended that Mr Hart contravened his duty to ensure that the Ruffy Road property, when transferred to the SMSF, was vested in all of the trustees as joint tenants. He said this was a general requirement rather than an obligation under the SIS Act.

125. Nevertheless, Article 7.1 of the Trust Deed provides that any assets transferred to the trustees shall constitute assets of the fund. Article 7.2 provides the assets of the fund shall be held by the trustees upon trust to be applied in accordance with the provisions of the Articles.

126. The registered proprietors on the title to the Ruffy Road property remained Mr and Mrs Hart without the inclusion of the additional trustees at any time. It is therefore arguable that the Ruffy Road property never became an asset of the SMSF although, given what subsequently transpired, that would be an unrealistic approach. It is probably best treated as a breach of the Trust Deed.

Acquisition of goods from related parties

127. I have set out the provisions found in s. 66(1) at [106]. The word *asset* is a defined term, its definition being set out in s. 10(1) of the SIS Act as follows:

> ***"asset"*** *means any form of property and, to avoid doubt, includes money (whether Australian currency or currency of another country).*

128. However, in the definitions found under s. 66(5) of the SIS Act, the expression *acquire an asset* states that it does not include accepting money.

129. The Commissioner has published a *Self Managed Superannuation Funds Ruling* (SMSFR 2010/1) which deals with the acquisition of an asset by a self managed superannuation fund from a related party. Regarding the performance of the service, paragraph 18 states:

> *If a trustee or investment manager enters into a contract with the related party entitling the SMSF to the performance of the service by the related party, the performance of that service is the substance of the transaction and not any rights that the SMSF might also acquire to have that service performed. Therefore, the acquisition of the performance of the service does not contravene subsection 66 (1).*

130. In paragraph 19 of the SMSFR 2010/1 the Commissioner states that if materials which are insignificant in value and function are provided to an SMSF as part of a service, that remains the performance of the service only. Paragraph 19 then goes on to state:

> *If, however, goods or materials are provided to the SMSF that are not insignificant in value and function there is an acquisition of assets (being the goods or materials)…*

131. Examples of the performance of a service and goods insignificant in value and function are set out in paragraphs 57 – 60 of SMSFR 2010/1.

132. The Commissioner's concern in this case is the provision to the SMSF from Hart Fabrications of the shed constructed on the property. The total cost of materials and labour was about $100,000. The shed was acquired from a related party and hence falls within the meaning of an in-house asset (s. 71(1)). Section 66(2A) sets out exceptions to the prohibition of acquiring an asset by the trustee of an SMSF from a related party of the fund. Relevantly, it provides:

> *(2A) Subsection (1) does not prohibit the acquisition of an asset by a trustee or investment manager of a superannuation fund from a related party of the fund if:*

(a) the acquisition of the asset constitutes an investment that:

(i) is an in-house asset of the fund within the meaning of subsection 71(1); or

…; and

(b) the asset is acquired at market value; and

(c) the acquisition of the asset would not result in the level of in-house assets of the superannuation fund exceeding the level permitted by Part 8 [the 5% rule].

133. Dr Bender submitted and I agree, the exception could not apply to the acquisition of the shed because there was no objective evidence which would establish it was acquired at market value. In any event, its value would exceed the level permitted by Part 8.

Failure to comply with the sole purpose test

134. Section 62(1) of the SIS Act sets out the sole purpose test. Relevantly, it provides:

Each trustee of a regulated superannuation fund must ensure that the fund is maintained solely:

*(a) for one or more of the following purposes (the **core purposes**):*

(i) the provision of benefits for each member of the fund on or after the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged (whether the member's retirement occurred before, or occurred after, the member joined the fund);

(ii) the provision of benefits for each member of the fund on or after the member's attainment of an aged not less than the eight specified in the regulations;

…

135. The Commissioner has issued a *Self Managed Superannuation Funds Ruling*, SMSFR 2008/2 which deals with the application of the sole purpose test in s. 62. Of significance in this matter are the following paragraphs:

6. A trustee must maintain an SMSF in a manner that complies with the sole purpose test at all times while the SMSF is in existence. This extends to all activities undertaken by the SMSF during its life cycle, which broadly encompasses:

- *accepting contributions;*
- *acquiring and investing fund assets;*
- *administering the fund (including maintaining structure of the fund);*
- *employing and using fund assets; and*

- *paying benefits, including benefits on or after retirement.*

7. A strict standard of compliance is required under the sole purpose test. The test requires exclusivity of purpose, which is a higher standard than the maintenance of the SMSF for a dominant or principal purpose.

136. SMSFR 2008/2 sets out, at paragraph 12, factors which would weigh in favour of the conclusion that an SMSF **is not being maintained** in accordance with s. 62 because of the provision of benefits not specified in s. 62. Those factors are as follows:

- *Trustee negotiated for or sought out the benefit, even if the additional benefit is negotiated for all sought out in the course of undertaking other activities that are consistent with section 62.*
- *The benefit has influenced the decision-making of the trustee to favour one course of action over another.*
- *The benefit is provided by the SMSF to a member or another party at a cost or financial detriment to the SMSF.*
- *There is a pattern or preponderance of events that, when viewed in their entirety, amount to a material benefit being provided that is not specified under subsection 62 (1).*

137. Dr Bender in his written submissions referred to a number of cases which may assist in determining whether the sole purpose test has been met. The Full Court of the Federal Court of Australia (Davies, Wilcox and Hill JJ) in *Raymor Contractors Pty Ltd v FCT* (1991) 91 ATC 4259 was dealing with the deductibility of payments made to a superannuation fund for eligible employees and dependants. The Court was concerned with establishing the purpose for which those payments were made. Hill J said the following regarding the meaning of the word purpose, at 4270:

The word "purpose" appears in s. 51(1) of the Act only by reference to the purpose of a taxpayer's business.

…

In the context of s. 82AA, purpose is the object which the taxpayer has in view or in mind. There may be a fine distinction between purpose and intention but it is not necessary to explore that distinction … Generally speaking a person will be said to intend the natural and probable consequences of his acts and likewise his purpose may be inferred from them. In the present case the taxpayer's purpose in making the payments in each year of income may be inferred from the objective evidence that in the years of income in question benefits were continually being forfeited and only one person was in fact paid out, that person being a director of the appellant. Coupled with the fact that virtually the whole of the contributions were lent back to the contributing companies these facts suggest that the appellant's purpose was not to benefit those persons who are members of the fund; or certainly that that

was not the sole or dominant purpose in making the contributions in the years in question.

138. Dr Bender submitted that in determining whether the sole purpose test has been met, one can examine the circumstances surrounding the payments into the SMSF and the way in which the fund is invested. He said the manner in which the investment program has been conducted can also be considered. He referred to the decision of Davies J in the *Raymor* case where her Honour said, at 4261:

> *… it was pointed out that, to determine whether a fund was established for the benefit of the employees, regard should be had primarily to the terms of the trust deed, for it was from those terms that the purpose of the trust could be ascertained. However, in those cases, it was also pointed out that, to ascertain whether a fund was being maintained and applied for the benefit of employees, it was proper to examine not merely the terms of the deed under which it was managed and controlled, but also the use made by the trustee of the trust funds and the powers and discretions conferred on the trustee, the extent to which employees actually receive benefits from the fund and the extent to which the funds went to the benefit of persons who are not employees.*

139. Dr Bender submitted that Mr Hart contravened the sole purpose test as a consequence of the following, either individually or in combination:

a) in entering into a lease arrangement for the use of the Ruffy Road property by the Hart to Hart Wines partnership rent-free for two years;

b) the payments made out of the SMSF's Bendigo Bank account to which I have referred above at [118], the $18,000 payment to Ms Kathleen Hart, and the $100,000 said to have been invested in the Philippines company;

c) the $100,000 paid to Hart Fabrications which was then transferred to the Philippines purportedly for the acquisition of shares in the Philippines company of which Mr Hart and Ms Kathleen Hart were directors, without any benefit to the SMSF. As for the acquisition of shares in the Philippines company, there was no evidence of any benefit being derived by the SMSF by way of income or profits from that investment and, the 4300 shares proposed to be allotted to the SMSF did not adequately reflect the outlay of $100,000 for their acquisition;

d) the investment of a significant part of the SMSF's assets in the Ruffy Road property when there was no evidence of income let alone profit being derived from that property – the investment was uncommercial;

e) the expenditure of a substantial portion of the SMSF's liquid assets to purchase/construct the shed on the Ruffy Road property when the property was not producing income/profits;

f) the intention to get the Ruffy Road property ready for the SMSF to use as an active winemaking business when the business previously conducted at that property by the partnership was loss-making and failed. The fact that it was loss-making is reflected in Mr Hart's income tax returns as those losses were carried forward and no income was recorded. If the Hart to Hart Wines partnership continued to operate the business on the Ruffy Road property after its acquisition by the SMSF, there was no return derived by the SMSF. The use of the fund for continuation of a person's activities outside the fund, including business activities, also breached the sole purpose test;

g) In providing $100,000 from the SMSF's fund for the acquisition of shares in the Philippines company, Mr Hart made uncommercial, non-arm's-length investments; and

h) Mr Hart breached a number of covenants in the SMSF Trust Deed.

Non-arm's-length investment

140. Section 109 of the SIS Act requires investments of the superannuation entity to be made and maintained on an arm's length basis. Relevantly, it provides:

> *(1) A trustee or investment manager of a superannuation entity must not invest in that capacity unless:*
>
> *(a) the trustee or investment manager, as the case may be, and the other party to the relevant transaction are dealing with each other at arm's length in respect of the transaction; or*
>
> *(b) both:*
>
> *(i) the trustee or investment manager, as the case may be, and the other party to the relevant transaction are not dealing with each other at arm's length in respect of the transaction; and*
>
> *(ii) the terms and conditions of the transaction are no more favourable to the other party than those which it is reasonable to expect would apply if the trustee or investment manager, as the case may be, were dealing with the other party at arm's length in the same circumstances.*

141. The expression *at arm's length* is not defined in the SIS Act. Weinberg J said this in *Australian Prudential Regulation Authority v Derstepanian* (2005) 60 ATR 518, at 524:

> *The term "at arm's length" is not defined in the SIS Act. Nonetheless, it plainly implies a dealing that is carried out on commercial terms. As counsel for the respondent submitted, a useful test to apply is whether a prudent person, acting with due regard to his or her own commercial interests, would have made such an investment.*

142. Dr Bender submitted that Mr Hart breached s. 109(1) of the SIS Act by contributing funds of the SMSF to the Philippines company. That was because that contribution was not made in an arm's length dealing; the terms and conditions of the contribution were more favourable to the Philippines company and its existing shareholders than if it was an arm's length dealing. That was because the SMSF obtained no shares in return for the funds invested or, alternatively, if it did obtain any shares, then the contribution did not reflect an adequate percentage of the total shares issued based on the $100,000 investment.

143. I have found that the evidence discloses only Mr Hart and Ms Kathleen Hart were allotted shares in the Philippines company according to the most recent Articles of Incorporation document obtained by the Commissioner. As for the document purporting to assign 4300 shares in the Philippines company to the SMSF, I have found that document is seriously defective and more than likely a sham. An assignment of that number of shares for PHP 4,300,000 values each share at PHP 1000. That is 10 times their par value for a share of a company which appears to have no business and has never traded. The entire transaction smacks of a sham. It is plainly not a transaction a prudent person would have made with regard to their own commercial interests. Accordingly, I find that Mr Hart breached s. 109 of the SIS Act by reason of using the SMSF's funds to purchase shares in the Philippines company.

Did the SMSF cease to be a self managed superannuation fund

144. To satisfy the conditions in the SIS Act (s. 17A) to be regarded as a self managed superannuation fund, the fund is required to have fewer than five members and each member must be a trustee.

145. In a letter dated 26 March 2014 from Bramich Legal to Mr Smith, who at that time was acting for Mrs Hart, Bramich Legal notified Mrs Hart that as of the date of the letter she had no interest in the SMSF and her interest had been forfeited and allocated to

Ms Kathleen Hart pursuant to clause 6.7 of the Trust Deed. On ceasing to be a member of the SMSF, necessarily, Mrs Hart ceased to be a trustee.

146. As at November 2015, excluding Mrs Hart, the trustees were Mr Hart, Ms Kathleen Hart, Ms Miller and Mr Benjamin Guy from 22 October 2014. Mr Robert Hart had ceased to be a trustee as at 28 February 2013. If Mrs Hart, despite what is stated in the Bramich Legal letter, remained a trustee, then the SMSF ceased to be a self managed superannuation fund for the purposes of the SIS Act on 22 October 2014.

147. Clause 2.6 of the Trust Deed deals with cessation of membership. It provides:

> *A Member shall cease to be a Member when the total amount payable under the Rules in respect of his membership has been paid or when a Member dies.*

148. Clause 6.5 of the Trust Deed deals with forfeiture of benefits. Relevantly, it provides:

> *Amounts which have not yet become payable out of the Fund shall be forfeited if the member:*
>
> *(a) …*
>
> *(b) in the opinion of the Trustee, has attempted to assign, alienate, charge or encumber all or part of his Member's Benefit.*

149. Clause 6.5(b) only deals with benefits which have not yet become payable out of the fund and which are forfeited on happening of the events described in (b). What happens to the forfeited benefit is set out in clause 6.7. It provides:

> *Benefits forfeited under Rules 6.5 and 6.6 will be credited to a forfeited benefits reserve account and the amount in the account shall be applied by the Trustees as the Trustees may think fit for the benefit of any such person and his Dependants or any one or more of them, provided that where the person is a Member the Trustees shall not make any payment to or for the benefit of the Member or his Dependants until the Member attained such age as is prescribed in the Regulations, other than for personal maintenance and support in case of hardship. Such application of the benefit shall be a discharge to the Trustee for the payment thereof.*

150. There was no evidence that Mrs Hart's benefits were either paid out to her or that they were paid into a reserve account and applied as required under the Trust Deed. In cross-examination Mr Hart was asked if any money had been paid out to Mrs Hart from the SMSF when the alleged forfeiture occurred. Mr Hart responded that it had not. It was

also put to Mr Hart that Mrs Hart's forfeited benefit was never paid into a forfeited benefits reserve account as required under clause 6.7 and Mr Hart agreed it had not. When it was put to Mr Hart that when he started treating Mrs Hart as no longer being a member of the SMSF, he hadn't actually paid out any benefits to her, Mr Hart agreed and said they were forfeited. In fact Mr Hart appeared to understand that a forfeited benefits reserve account required the trustees to put those benefits forfeited into an account and preserved for purposes set out in the Trust Deed. He also acknowledged that at the time, the SMSF did not have sufficient monies to open such an account for Mrs Hart because those monies had, by and large, been dissipated by then. She had received nothing.

151. There was another disturbing element associated with Mrs Hart's purported forfeiture of benefits as a member of the SMSF. Prior to the letter sent to Mr Smith on 26 March 2014, on 19 March 2014 Mark Bramich of Bramich Legal sent an email to Mr Hart setting out his advice regarding forfeiture. Mr Bramich said that he had perused the Trust Deed and particularly clause 6 relating to forfeiture of a member's benefit. Mr Hart was clearly concerned with the caveat which had been placed on the title of the Ruffy Road property by Mr Smith, Mrs Hart's then solicitor. Mr Smith was owed money for legal work done for Mrs Hart and appears to have had every right to lodge that caveat in respect of unpaid fees. It is clear that Mr Hart believed Mrs Hart had attempted to either assign, alienate, charge or encumber all or part of her benefit.

152. This was the advice given by Mr Bramich:

> *The first obvious action which may fall under this section [clause 6.5(b)] is registering a Caveat against the title of the property. The nature of a Caveat is actually to stop parties dealing with the property contained in the title against which the Caveat is lodged. While technically it appears as a registered instrument on the title of Ruffy Road, it does not in fact assign any of the Ruffy Road property nor alienate it from the members, nor charge the property. It is simply a notice to the world of an interest alleged by the Caveator. It is unlikely therefore that simply the act of registering a Caveat would fall within the wording of 6.5 (b). This however does not stop us from making an allegation in this regard and once the allegation is made it will be up to Sandra to lodge an application seeking a declaration that the Fund's purported forfeiture of her interest is void. This will of course place cost pressure on Sandra and Michael Smith's office.*

153. This advice is an egregious breach of Mr Bramich's duty as a lawyer to act ethically. It should be brought to the attention of the Law Institute of Victoria. Despite accepting that there were no grounds whatsoever for the SMSF to forfeit Mrs Hart's benefits under that fund, Mr Bramich nevertheless advised Mr Hart that, knowing significant costs pressure

would be brought to bear on Mrs Hart, it could have the result of having the caveat removed from the title. To say this advice was improper and unethical is an understatement. In addition to the ethical problem, the advice is also incorrect. Mrs Hart did not lodge the caveat as is obvious from the document lodged at the Office of Titles Victoria. The Caveator is named as Michael Jeffrey Smith and the interest claimed is Equitable Interest as Chargee. It had nothing to do with Mrs Hart. Mr Smith is entitled to protect a debt owing to him by Mrs Hart on account of his fees by any lawful means he sees fit. The consequences for Mrs Hart have been catastrophic.

154. In his email Mr Bramich offered to draft a letter to Mr Smith confirming that Mrs Hart committed the breaches set out in Clause 6.5 and that the remaining trustees have determined her interest was forfeited. The conduct of Mr Bramich was dishonest and unacceptable. As a consequence of that letter, Mrs Hart lost approximately $300,000 of her entitlement to benefits from the SMSF.

155. Additionally, Reg 13.16 of the SIS Regulations places restrictions on alteration of accrued benefits. Reg 13.16 (1) provides:

> *For the purposes of subsection 31 (1) of the Act, it is a standard applicable to the operation of regulated superannuation funds that, subject to subregulation (2), a beneficiary's right or claim to accrued benefits, and the amount of those accrued benefits, must not be altered adversely to the beneficiary by amendment of the governing rules or by any other act carried out, or consented to, by the trustee of the fund.*

156. Although there are a number of sub-regulations which allow adverse alterations, they do not apply in this case. They relate to consent given for the alteration or where alteration is necessary to comply with statutory requirements.

157. The expression *accrued benefits* is not defined for the purposes of Part 13 of the SIS Regulations. The Full Court of the Federal Court of Australia (Ryan, Finkelstein and Downes JJ) in *Asgard Capital Management Ltd v Maher* (2003) 131 FCR 196 when dealing with the question before it, said at 201:

> *… Does reg 6.2 impose an obligation upon the trustee to ignore a direction given by beneficiary to pay an accrued benefit (that is, a benefit in which the beneficiary has an absolute interest) to the beneficiary's authorised agent or to any person nominated by the beneficiary?*

158. There are a number of cases that have dealt with discretionary interests which concluded that such interests could not be regarded as an accrued benefit. However that is not the case before me. Mrs Hart became absolutely entitled to the benefit if and when she met any of the conditions of release. I accept Dr Bender's submission that in light of the authorities, I should interpret Reg 13.16(1) as applying to a definite benefit from an accumulation fund as payment is contingent on meeting a condition of release.

159. Accordingly, I find that Mr Hart has breached Reg 13.16(1) of the SIS Regulations. Mrs Hart's right to claim accrued benefits has been altered adversely without her consent. In addition, Mrs Hart remained a member of the fund in November 2015 and therefore it no longer met the requirement for a self managed superannuation fund to have less than 5 members. Mr Hart did not notify the Commissioner when the fund ceased to be a self managed superannuation fund and was therefore in breach of s. 106A of the SIS Act. Mr Hart also failed to comply with Reg 11.07A(2) which requires the trustee, within 28 days of having knowledge of the change, to notify the Commissioner. Ceasing to be a self managed superannuation fund is a notifiable change.

160. Additionally, Dr Bender submitted that Mr Hart had breached the regulations dealing with minimum benefits. Division 5.2 deals with minimum benefits. In an accumulation fund, which was the nature of the SMSF, Reg 5.04(2) is applicable. It provides:

> *If the fund is an accumulation fund, the member's minimum benefits are all of the member's benefits in the fund.*

161. The treatment of minimum benefits is dealt with under Division 5.3 of the SIS Regulations. Reg 5.08(1) provides:

> *For subsections 31(1) and 32(1) of the Act, it is a standard applicable to the operation of regulated superannuation funds and approved deposit funds that the trustee of the fund must ensure that a member's minimum benefits in the fund are maintained in the fund until the benefits are:*
>
> *(a) cashed as benefits of the member, other than for the purpose of the member's temporary incapacity; or*
>
> *(b) rolled over or transferred as benefits of the members; or*
>
> *(c) transferred, rolled over or allotted under Division 6.7.*

162. Therefore, even if, despite my findings, Mrs Hart validly ceased to be a member, as Dr Bender submitted, Mr Hart would have breached the minimum benefit requirements under the SIS Regulations.

Breach of trustee covenants

163. Prior to 1 July 2013, s. 52 of the SIS Act deemed the governing rules of all superannuation entities to contain covenants to the effect of the covenant set out therein, but only if the governing rules did not already contain covenants to that effect. Following changes to the SIS Act, from 1 July 2013 the covenants to be included in governing rules for self managed superannuation funds are controlled by s. 52B of the SIS Act. Section 52B(1) provides that if the governing rules of a self managed superannuation fund do not contain covenants to the effect of the covenant set out in the section, those governing rules are taken to contain covenants to that effect.

164. The Trust Deed of the SMSF sets out the covenants given by the trustees at clause 9.19. Those covenants mirror the covenants set out in s. 52(2) of the SIS Act as it was prior to 1 July 2013. Section 52B, which deals with self managed superannuation funds is, effectively, identical to the covenants set out in the earlier version of s. 52(2). The only difference is that s. 52B(2)(c) is expressed in a positive sense, requiring the trustee to perform the duties and exercise the trustee's powers in the best interests of the beneficiaries rather than ensuring that performance. In any event, the consequence is that the covenants set out in clause 9.19 of the Trust Deed contain all of the covenants required to be taken into consideration.

165. The relevant covenants set out in clause 9.19 are as follows:

> *(a) to act honestly in all matters concerning the Fund;*
>
> *…*
>
> *(c) to ensure that the Trustee's duties and powers are performed and exercised in the best interests of the beneficiary;*
>
> *(d) to keep the money and other assets of the Fund separate from any money and assets, respectively:*
>
> > *(i) that are held by the Trustees personally; or*
> >
> > *(ii)that are money or assets, as the case may be, of an Employer or an associate of an Employer;*
>
> *…*
>
> *(f) to formulate and give effect to an investment strategy that has regard to the whole of the circumstances of the Fund including, but not limited to, the following:*
>
> > *(i) the risk involved in making, holding and realising, and the likely return from, the Plan's investments having regard to its objectives and its expected cash flow requirements;*

(ii) the composition of the plan's investments as a whole including the extent to which the investments are diverse or involve the Funding being exposed to risks from inadequate diversification;

(iii) the liquidity of the plan's investments having regard to its expected cash flow requirements;

(iv) the ability of the Fund to discharge its existing and prospective liability;

…

166. The Commissioner submitted that Mr Hart failed to ensure that he performed his duties and exercised his powers as a trustee in the best interests of beneficiaries. He cited the attempt to confiscate Mrs Hart's member benefits and excluding her as a member of the fund as consequence of their matrimonial dispute as evidence of that failure. I accept that submission as the evidence indicates that the forfeiture of Mrs Hart's member benefit was not only not in the interests of all members of the SMSF, Mr Hart did not act honestly in that matter. Despite his solicitor advising him that there were no grounds for forfeiture, he then appeared to have followed Mr Bramich's advice that pressure could be brought to bear on Mrs Hart to remove the caveat over the Ruffy Road property by resorting to the forfeiture provisions. Both Mr Bramich and, more importantly, Mr Hart, must necessarily have been aware that the caveat was not lodged by Mrs Hart and therefore the entire scheme to dispossess Mrs Hart of a significant sum of money was not only ill-conceived, but probably fraudulent. It was, without question, dishonest.

167. The Commissioner also submitted that Mr Hart used significant funds from the SMSF to purportedly acquire shares in the Philippines company. There was no evidence that the SMSF acquired any shares in that company of which Mr Hart and Ms Kathleen Hart were directors and shareholders. There was no evidence of any return generated by that purported investment and therefore it cannot be said that the investment was in the best interests of all beneficiaries of the fund. That purported investment also appears to run foul of covenant (f) in clause 9.19 dealing with investment strategy. As I have found, this transaction was a sham and therefore there was no attempt made at assessing the risk in acquiring those shares or the return that they could generate.

168. The SMSF acquired and retained the Ruffy Road property even though it was not generating any returns either at the time it was acquired or subsequently. After its acquisition, it appears that the Hart to Hart Wines partnership used the property although they did so rent-free. Also, as the Commissioner submitted, Mr Hart and Mrs Hart, at

various times, used the property for their own purposes. A question also remains regarding whether the Ruffy Road property in fact became an asset of the SMSF and by retaining proprietorship in Mr and Mrs Hart, it could be said that the trustees did not ensure that the assets of the SMSF were kept separate from their personal assets.

169. Significant monies were also spent on the acquisition of a shed for use as a winery on the Ruffy Road property. That investment produced no return to the beneficiaries of the SMSF. It probably produced a return to Hart Fabrications, an asset of Mr Hart. Its acquisition certainly does not accord with the covenant dealing with investment strategy.

170. The Commissioner submitted that almost all of the funds of the SMSF were invested in assets which do not appear to have produced a return for the beneficiaries. I accept that submission as it accords with the evidence and that those investments were inappropriate and without consideration of an appropriate strategy and mix for the fund.

171. The Commissioner submitted that Mr Hart, as trustee of the SMSF, breached a number of other provisions of the Trust Deed. I have found that to be the case. In particular, I have found Mr Hart responsible for the following breaches:

(o) the sole or primary purpose provision which is to provide for payment of old-age pensions (clause 6.1);

(p) the prohibition on acquiring assets from members or from a relative of a member of the SMSF (clause 7.8);

(q) the prohibition on investing in any in-house assets (clause 7.9); and

(r) the failure to lodge annual returns (clause 8.4).

172. The Commissioner has also referred to other statutory obligations which may be relevant when considering whether Mr Hart is a fit and proper person to act as a trustee. Dr Bender referred to taxation debts owed by Hart Fabrications in the amount of $67,519.14 as at July 2015 and a further debt of $4,247.20 as at March 2016. However, the letters drawing Mr Hart's attention to those debts indicate that the ATO had decided not to pursue them at those times. As I had no other evidence before me regarding those debts, I find I should not take them into account for the purposes of considering whether Mr Hart is a fit and proper person to act as a trustee of a self managed superannuation fund.

173. Dr Bender also referred to Mr Hart's skills and competence as a trustee. He submitted that skills and competence may include a proper knowledge of applicable laws and a practical ability to carry out duties competently. This submission is supported by the decision of the Federal Court of Australia (Hill J) in *Davies v Australian Securities* Commission (1995) 59 FCR 221. In that case, his Honour was dealing with the cancellation of registration of an auditor. His Honour said, at 233:

> *Generally speaking it may be said that an auditor who fails to carry out adequately and properly his or her duties or functions as an auditor would not be a fit and proper person to remain registered, even if otherwise that person is a person of good fame and character.*

174. Likewise, a trustee of a self managed superannuation fund who fails to adequately and properly carry out his duties and functions as a trustee due to his lack of skill, competence and knowledge of the relevant legislation, could not be a fit and proper person to be a trustee of such fund. I accept the Commissioner's submission that the failures which the evidence discloses in the case of Mr Hart acting as trustee for the SMSF are both serious and extensive. He does not appear to have the necessary skills or knowledge of the statutory provisions or, even if he can be said to have the skills and knowledge, he most certainly has not exercised those attributes in his capacity as trustee of the SMSF.

175. The Commissioner was also concerned at the lack of candour Mr Hart displayed when dealing with the Commissioner. This goes to the honesty and integrity of Mr Hart and is obviously relevant to whether he is a fit and proper person to be a trustee of a self managed superannuation fund. The Commissioner referred to the following:

(s) making inconsistent valuation assertions to the Commissioner regarding the value of the Ruffy Road property on its acquisition by the SMSF;

(t) stating that the $18,000 cheque drawn on the SMSF's CBA bank account was paid to Country Express Homes when it was in fact paid to Ms Kathleen Hart;

(u) stating that the $9,032.60 cheque drawn on the SMSF's CBA bank account was paid to a contractor for the provision of services when in fact it was paid to Hart Fabrications; and

(v) telling the Commissioner that the Ruffy Road property was not leased after it was acquired by the SMSF when there was evidence that Mr Hart, in an SMS to Mrs Hart, asserted the Ruffy Road property had been rented to him, and prior to

that, to both him and Mrs Hart; and then subsequently stating that there was an arrangement whereby the Hart to Hart Wines partnership was granted a rent-free use of the property for two years.

176. The evidence plainly discloses the above and I have found that to be the case in each of those matters. I find Mr Hart was less than candid with the Commissioner in many of his dealings and communications.

177. Dr Bender also referred to matters raised by Mrs Hart in her capacity as a party joined to this proceeding. Mrs Hart was not legally represented and accordingly, it was appropriate that Dr Bender assist Mrs Hart in putting her case to the Tribunal. There are a number of matters which were raised by Mrs Hart which I have already addressed. However there are additional matters which she raised, some of them which are significantly serious.

178. I had in evidence a document which states it is the minutes of a meeting of members of the Hart superannuation fund on 18 July 2012 where the trustees purported to have agreed to invest $100,000 for the purchase of shares in the Philippines company. When Mrs Hart was taken to that document in her cross-examination and asked whether she had been invited by anyone to attend the meeting of the members, Mrs Hart said she had not. The document does not indicate that Mrs Hart was present however the resolution states that all members of the SMSF agreed. That is plainly incorrect. In her cross-examination Mrs Hart was asked about the three cheques which were in evidence drawn on the SMSF's CBA account. When asked whether she was aware of those withdrawals at the time and whether the SMSF authorised those payments, Mrs Hart said she was not, finding out later and that she did not authorise them. She also said she knew nothing about the $100,000 withdrawal for shares in the Philippines company until it was discovered by her lawyer.

179. Mrs Hart was also referred to the Deed of Assignment purporting to assign shares in the Philippines company to the SMSF. Her name appears on that document as a trustee of the SMSF and it states that Mr Hart represented her and Ms Kathleen Hart. When asked whether she gave authority to Mr Hart to sign the document on her behalf, she said she did not.

180. Mrs Hart also gave evidence that items of equipment and the bungalow which were on the Ruffy Road property were removed by Mr Hart and secreted away. Some of the equipment was kept at the factory where Mr Hart continues to operate, hidden behind big gates. A tractor and other equipment including the bungalow are stored at a Mr Alec Rowan's property. She said that equipment belonged to the partnership and she had not authorised its removal.

181. Mrs Hart raised a further significant issue which was that the signature of her daughter, Ms Kathleen Hart, on many of the trust documents did not appear to be authentic. When taken to what purports to be a trustee and/or member consent form as well as a resignation of member and/or trustee consent form, Mrs Hart said she did not recognise the signature which purports to be that of Ms Kathleen Hart. The date of both of those documents is 28 February 2013. Mrs Hart also said she did not recognise Ms Kathleen Hart's signature on a schedule to a deed of appointment of trustee also dated 28 February 2013.

182. Ms Kathleen Hart's evidence was taken by telephone. Dr Bender directed Ms Kathleen Hart to a trustee consent form signed by her dated 1 April 2007. She confirmed that her signature appeared on that document and that she became a member of the fund in 2007. Dr Bender then directed Ms Kathleen Hart to the resignation of member and/or trustee consent form dealing with Mr Robert Hart's resignation as a trustee. She was then asked if that was her signature on that document. She said it was. When it was put to her that it didn't look like the previous signature, her response was: *It doesn't make it that not my signature*. When Ms Kathleen Hart was referred to the trustee and/or member consent form dealing with Ms Miller, which also purports to have her signature at the bottom, Ms Kathleen Hart confirmed that was her signature. Ms Kathleen Hart was directed to her signature on the deed of appointment of trustee document. When it was pointed out to Ms Kathleen Hart that her mother's signature did not appear on that document and she was asked why that was the case, she was unable to answer. That is despite the fact that Mrs Hart's name appears on that document.

183. Given the obvious inconsistencies in what Ms Kathleen Hart said was her signature, I requested that she produce to the Tribunal a copy of her driver licence and her passport if she had one. These documents were duly produced and taken into evidence. While her passport was in the name of Kathleen Maria Hart, her driver licence was in her married

name, Kathleen M Stanley. The signature on her driver licence reflects her change of name and it is similar to the signature on her passport except for the surname which is written in full on both documents. That document has an expiry date of 30 January 2021. Given the maximum validity period before renewal is required for a New South Wales driver licence is 10 years, it is likely that Ms Kathleen Hart's driver licence was issued to her in January 2011 or later.

184. Her passport was issued on 3 June 2009. The signature on that document appears identical to the signature on the trustee consent form dated 1 April 2007. However it plainly does not even resemble the signatures referred to in the above documents. Nor does it resemble Ms Kathleen Hart's signature on the Articles of Incorporation document for the Philippines company; the SMSF investment strategy document dated 4 September 2012; the Declaration of Trust document also dated 4 September 2012; the Trustees Declaration attached to the SMSF Financial Statements for the year ended 30 June 2012; the letter to the auditor dated 4 September 2012 but apparently signed on 20 March 2013; or the trustee and/or member consent form in respect of Mr George Hart dated 26 March 2014.

185. Immediately prior to the conclusion of her oral evidence, Ms Kathleen Hart, having agreed to provide both her driver licence and passport to the Tribunal, explained that the name on her driver licence was Kathleen Stanley and therefore her signature would not match. That of course was evident when the driver licence was produced. However, and this was not canvassed at the time Ms Kathleen Hart gave evidence because she had not yet produced her driver licence, her signature on the document bears no resemblance to any document which she signed after January 2011.

186. In addition, as Dr Bender pointed out in written submissions, even those signatures which do not resemble her passport signature are themselves inconsistent. Some signatures contain an upward sloping loop at the start of the signature and some have a loop at the start of the signature that slopes downwards towards the left-hand side of the page.

187. When the anomalies were pointed out to Ms Kathleen Hart in her cross-examination, she said she might be able to offer an explanation. She said:

> *… I did, at one stage, sign my name and I did actually alter my signature slightly after it, because it was (indistinct).*

You said you altered it slightly?--- Yes. Like, I'd just like – I think it's a bit more shorthand, because it was a little bit, for one, long to do and I felt like it was a bit easy to copy. So I tried to make it a bit more shorthand, so that it wasn't quite so complicated.

188. With respect to Ms Kathleen Hart, that explanation is illogical. The impugned signatures are simple compared with the signature on her passport and driver licence and are able to be copied easily. Her passport and driver licence signatures are far more difficult to copy.

189. When Ms Kathleen Hart was asked when she changed her signature, she said she did not remember specifically. When pressed by Dr Bender regarding when she changed her signature, indicating that there was a serious issue about it, she responded:

> *… not lying when I say that. It might be because – I know, if I'm – I've given an oath, I wouldn't lie about it. I have no reason to lie about it. It definitely doesn't serve me or anyone else any purpose to lie about it.*

190. In my opinion, that was an unusual response to the question put by Dr Bender. No suggestion was made to Ms Kathleen Hart that she was lying. Dr Bender was simply trying to ascertain when her signature changed, rather dramatically. It was not a slight change as she said in her evidence.

191. With respect to Ms Kathleen Hart, I found her evidence, particularly on this point, to be unreliable. I can place little or no weight on her explanation. Furthermore, it was obvious from her evidence that she simply did what her father asked her to do. She had little or no recollection of many of the matters which she claimed to have dealt with where documents regarding those matters purport to be her signature. For example, in her cross-examination she agreed that she had never run a company or had any knowledge of foreign investments at the time she became a director and shareholder of the Philippines company. When she was asked about whether she was a director of the Philippines company, the following responses were given:

> *Now, you're a director of the Philippines company, aren't you, presently?--- No, not presently.*
>
> *Have you been a director of that company at any stage?--- No, there was discussion at one stage but I decided to go – not to get involved with the company like that.*

192. Despite those answers, the doubtful signature purporting to be that of Ms Kathleen Hart appears on the Philippines company's Articles of Incorporation.

193. At the conclusion of three days of hearing, I adjourned the matter for several weeks to provide Ms Kathleen Hart the opportunity to give further evidence following the provision of her driver licence and passport. The hearing recommenced on 28 November 2017. Dr Bender again took Ms Kathleen Hart to the issue of her being one of the founding directors of the Philippines company. She agreed that her earlier evidence was that she initially authorised Mr Hart to submit her name as a director but then withdrew her consent shortly thereafter. When Dr Bender put to her that, never having been a director of the Philippines company, she would never have signed any documents as a director, Ms Kathleen Hart said:

> *No, I think that I had to sign one when we first started up. I think there was a document when I first agreed to do it and then after I change my mind. From there on out there was nothing.*

194. In response, Ms Kathleen Hart insisted that she should not have been classified as being a director because she pulled out before anything happened. The following exchange between Dr Bender and Mrs Kathleen Hart then ensued:

> *You just said you didn't classify as a director, last time you gave evidence that you hadn't been a director at all. Was that evidence correct or was it not correct?--- It was correct as to how I viewed the matter, yes.*
>
> *What do you mean it was correct as to how you viewed the matter?--- I viewed myself as not having been a director. I didn't actually do anything for the company. I agreed to do it originally and change my mind before anything – like, before I did anything.*
>
> *You have just given evidence that you signed a document originally. Now, you didn't mention that a couple of weeks ago when you last gave evidence. Why didn't you mention it then?--- Nobody asked if I signed a document.*
>
> *They did ask if you'd been a director, Ms Stanley. Can you just confirm, Ms Stanley, whether it actually is correct that you haven't spoken to George Hart about this matter in the last couple of weeks?-- Yes, Correct.*

195. Dr Bender then took Ms Kathleen Hart to what purported to be her signature on the Philippines company's Articles of Incorporation document. The following exchange then took place between Dr Bender and Ms Kathleen Hart:

> *Now, you've told us that you were never a director of the company so is this signature here on this document of forgery?--- No, this was when I originally agreed and then change my mind afterwards.*
>
> *Firstly Ms Stanley, do you actually remember this document?--- Yes, it does seem familiar. It does seem like one that – yes, I believe this is the one that I signed.*
>
> *You've told us previously only a few moments ago that you couldn't really remember what the document was so how come you can suddenly remember*

now, Ms Stanley?--- Because I can see it. I couldn't have described it beforehand but seeing it, like, yes, that's the document.

You actually remember signing this document, Ms Stanley?--- Yes.

The document says it has been signed as a director, so are you saying your evidence you previously gave that you weren't a director, that was false evidence was it?--- Not – I've explained why I said – what I said.

…

Are you saying now that you signed this document despite giving us evidence just a few moments ago that you didn't remember the document, are you saying that you signed it now to protect George Hart?--- No.

…

The signature on the passport is significantly different to the signature on this document on page 557. I'd suggest to you that the vast differences in the signature suggest the signature on page 557 of yours has been forged. What you say to that?--- (Indistinct). [Tribunal notes indicate the response was *never happened*]

196. While it is not possible on the material before me to find that Mr Hart was involved in falsifying Ms Kathleen Hart's signature on documents, the evidence certainly raises a serious suspicion that probably occurred. In the absence of a plausible explanation, I find it is a matter which I should take into account in determining whether Mr Hart is a fit and proper person to act as a trustee of a self managed superannuation fund.

DISQUALIFICATION DECISION

197. The Commissioner determined on 11 September 2015 that Mr Hart should be disqualified from acting as a trustee, responsible officer of a trustee, an investment manager or custodian of a superannuation entity for the purposes of the SIS Act. Although the formal Notice of Disqualification given to Mr Hart only stated that the disqualification was made for the reason that he was not a fit and proper person to be a trustee (s. 126A(3) of the SIS Act), in his opening address to the Tribunal Dr Bender stated that the Commissioner relied also on s. 126A(1) which provides for disqualification of a person who has contravened the SIS Act. I accept that the evidence does support the additional ground for disqualification as submitted by Dr Bender. Furthermore, I find that Mr Hart has had sufficient notice of the additional ground and the opportunity to respond to it. The hearing was held over three continuous days between 8 – 10 November 2017 followed by an adjournment of several weeks and one further hearing day on 28 November 2017. Mr Hart was given the opportunity to adduce further evidence on that day.

198. The object of the SIS Act is set out in s. 3 which provides:

(1) The main 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 this supervision by Emperor, as sick and the Commissioner of Taxation.

199. Section 126A of the SIS Act relevantly provides:

(1) The Regulator may disqualify an individual if satisfied that:

(a) the person has contravened this Act or the Financial Sector (Collection of Data) Act 2000 on one or more occasions; and

(b) the nature or seriousness of the contravention or contraventions, or the number of contraventions, provides grounds for disqualifying the individual.

…

(3) The Regulator may disqualify an individual if satisfied that the individual is otherwise not a fit and proper person to be a trustee, investment manager or custodian, or a responsible officer of a body corporate that is a trustee, investment manager or custodian.

200. It is abundantly clear from my findings on the evidence to which I have referred above that Mr Hart breached the SIS Act and SIS Regulations on numerous occasions while acting as a trustee of the SMSF. Not only were there a significant number of breaches, those breaches were extremely serious. They resulted in Mrs Hart being divested of almost the entirety of her superannuation benefits, amounting to something in the vicinity of $300,000. The breaches also resulted in an almost entire dissipation of the funds in the SMSF which, at one stage, exceeded $600,000. Both the number and seriousness of the contraventions of the SIS Act justify Mr Hart being disqualified from acting as a trustee, investment manager or custodian, or a responsible officer of a body corporate that is a trustee, investment manager or custodian.

201. The second ground on which the disqualification was based was that he is not a fit and proper person to be a trustee, investment manager or custodian, or a responsible officer of a body corporate that is a trustee, investment manager or custodian.

202. As Dr Bender submitted, disqualification orders are made to protect the public interest. They also act as a personal deterrent and general deterrent to others involved in the particular industry concerned. The High Court of Australia in the case *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 dealt with the purpose of disqualification orders in the context of whether they were protective or penalising. While

that question does not arise here, what McHugh J said regarding the purpose of a disqualification order is helpful. His Honour explained, at 148:

> *… I think that the factors that courts take into account when ordering disqualification and fixing periods of disqualification under the corporations legislation make it impossible to hold that the "civil penalty" provisions and, in particular, the disqualification provisions, are purely protective in nature. Despite frequent statements by the judges who administer the legislation that the purpose of the disqualification provisions is protective, what the judges actually do in practice is little different from what the judges do in determining what orders or penalties should be made for offences against the criminal law. Elements of retribution, deterrence, reformation and mitigation as well as the objective of protection of the public inhere in the orders and the periods of disqualification made under the legislation.*

203. The can be no question that the exercise of discretion to disqualify must be exercised bearing in mind the purpose for which the SIS Act was enacted. That was explained by DP SA Forgie in *Re VCA and Australian Prudential Regulation Authority* (2008) 105 ALD 236 where she said, at [537]:

> *Taking into account matters such as these, the discretion must be exercised with the purpose for which the SIS Act was enacted in mind. That purpose was to ensure that Australians increasingly provide for their own retirement. In doing so, streams must have some assurance that their funds will be properly managed in order that they are both preserved and enhanced. Therefore, a further object of the SIS Act is to regulate superannuation entities and those associated with them, such as the trustees, in order to decrease the risk of Australian's losing their funds by imprudent management of them.*

204. Furthermore, use of the expression in s. 126A(3):

> *… may disqualify an individual if satisfied that the individual is* ***otherwise*** *not fit and proper person…indicates that breaches of subsections (1) and (2) may result in a finding that a person is not fit and proper but on different grounds to those set out in subsection (3). It suffices to say that all of the circumstances of the contravening should be looked at from the point of view of determining whether a person is a fit and proper person to be a trustee, investment manager or custodian, or a responsible officer of a body corporate that is a trustee, investment manager or custodian.*

205. The High Court of Australia in *Hughes & Vale Pty Ltd v The State of New South Wales* (No 2) (1955) 93 CLR 127 dealt with the expression fit and proper person. The plurality (Dixon CJ, McTiernan and Webb JJ) said at 156:

> *The expression "fit and proper person" is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgement and indeed for rejection. "Fit" (or "idoneus") with respect to an office is said to involve three things, honesty*

> *knowledge and ability: "honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it" – Coke.*

206. The explanation of the expression *fit and proper person* in the High Court of Australia case *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 is also helpful. Toohey and Gaudron and JJ said, at 380:

> *The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.*

207. In addition to the skills and judgement required of a person who acts as a trustee of a superannuation fund, the covenants given by trustees in their respective trust deeds state clearly the duties imposed on a trustee if that person is to be regarded as fit and proper to act in that capacity.

208. Mr Hart's conduct as a trustee of the SMSF does not evidence any skill or judgement required of a fit and proper person in that capacity. In fact it discloses glaring deficiencies or, possibly, a wanton disregard of the duties which must be met in that capacity. There were numerous breaches of the SIS Act and SIS Regulations. Mr Hart failed to ensure that the SMSF lodged its annual returns for the 2013, 2014, 2015 and 2016 income years within the statutory time limitation. He failed to comply with benefit payment standards set out in the SIS Regulations by deliberately making payments to either members of the fund or associated entities without any regard to the conditions of release of those benefits. The investments made by the SMSF at the direction of Mr Hart were inappropriate and, particularly regarding the Philippines company, reckless. They appear to have been deliberately designed to divest the SMSF of its funds particularly so that Mrs Hart would be deprived of her benefit interest.

209. Mr Hart deliberately or recklessly breached the in-house asset rules prohibiting loans to or investments in related parties. The acquisition of the Ruffy Road property and the purported acquisition of shares in the Philippines company are serious examples. I have found that the purported investment in the Philippines company was a sham. To compound matters, on numerous occasions, Mr Hart has been less than forthright in providing truthful and accurate information to the Commissioner.

210. Mr Hart's purported exercise of the powers found in the forfeiture of benefits provisions in the Trust Deed discloses seriously dishonest behaviour. The legal advice obtained from Mr Bramich made it clear that there was no basis in law for the exercise of the powers set out in clause 6.5. That was because a caveat lodged on the title of the property is not an attempt to assign, alienate, charge or encumber all or a part of a member's benefit. Further, the Caveat was not lodged by Mrs Hart. Additionally, Mr Hart agreed that her benefit entitlements were not credited to a forfeited benefits reserve account in accordance with the Trust Deed. This entire exercise was fraudulent. It was encouraged by Mr Hart's then solicitor, Mr Bramich. Mr Hart then treated Mrs Hart as if she was no longer a trustee or member of the SMSF. He then appointed further trustees which resulted in the SMSF exceeding the number of members permitted for a self managed superannuation fund.

211. Mr Hart breached the prohibition on acquiring goods from related parties and he failed to comply with the sole purpose test.

212. Mr Hart's behaviour can only be described as falling significantly below the standard one would expect from a competent trustee acting for a self managed superannuation fund. I find he is, unquestionably, not a fit and proper person to act in that role. His disqualification by the Commissioner was plainly warranted.

CONCLUSION

213. I have found that, for the detailed reasons I have set out above, the disqualification provisions set out in s. 126A of the SIS Act were enlivened in this case. Furthermore, I have found that the Commissioner properly exercised his discretion to disqualify Mr Hart from acting as a trustee, investment manager or custodian, or a responsible officer of a body corporate that is a trustee, investment manager or custodian of a superannuation

entity. It follows I find the decision made by the Commissioner on 11 September 2015 to disqualify Mr Hart was the correct decision. I affirm that decision.

I certify that the preceding 213 (two-hundred and thirteen) paragraphs are a true copy of the reasons for the decision herein of Egon Fice, Senior Member

.....[sgd].....

Associate

Dated: 15 May 2018

Date(s) of hearing:	**8, 9, 10 and 28 November 2017**
Applicant:	**Self-represented**
Counsel for the Respondent:	**Dr Philip Bender**
Solicitors for the Respondent:	**ATO Review and Dispute Resolution**
Joined Party:	**Self-represented**