

# SUPREME COURT OF QUEENSLAND

CITATION: *Re: Bundaberg Sugar Superannuation P/L as trustee of the Bundaberg Sugar Ltd Superannuation Plan* [2014] QSC 118

PARTIES: **BUNDABERG SUGAR SUPERANNUATION PTY LTD  
ACN 065 459 494 AS TRUSTEE OF THE BUNDABERG  
SUGAR LTD SUPERANNUATION PLAN**  
(applicant)

FILE NO/S: BS11203/13

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 3 June 2014

DELIVERED AT: Brisbane

HEARING DATE: 25 February 2014

JUDGE: Jackson J

ORDERS: **It is directed and ordered that:**

- 1. upon the proper construction of the Deed of Amendment dated 2 May 2006 and Consolidated Trust Deed and Rules for the Bundaberg Sugar Ltd Superannuation Plan the trustee may:**
  - a. calculate “Net Earnings” or “net earnings” by bringing to account unrealised gains and losses;**
  - b. calculate Net Earnings or net earnings of the Plan as a negative amount;**
  - c. calculate and adjust the following accounts and value by reference to a negative net earnings amount:**
    - i. the “Additional Employer Account”;**
    - ii. the “Additional Member Account”;**
    - iii. the “Rollover Account”; and**
    - iv. the “Transfer Value”;**
- 2. upon the proper construction of the Deed of Amendment dated 2 May 2006 and Consolidated Trust Deed and Rules for the Bundaberg Sugar Ltd Superannuation Plan, the trustee may:**
  - a. determine that the “Net Earning Rate” or “net earning rate” of the Plan is a negative**

rate where the Net Earnings or net earnings of the Plan are a negative amount;

- b. determine an interest rate for the purposes of calculating the Surcharge Liability Accumulation Account which is negative, where the “net earning rate” is negative.

3. the applicant’s costs of the application be assessed on the indemnity basis and paid out of the assets of the Plan.

CATCHWORDS: SUPERANNUATION – PRIVATE SECTOR FUNDS – INTERPRETATION AND CONSTRUCTION – where the trustee of a superannuation fund plan applied for directions as to the proper construction of the trust deed and rules – where accumulation benefits are subject to adjustment by reference to the “Net Earnings” or “Net Earning Rate” of the plan – whether “Net Earnings” and “Net Earning Rate” can be negative

SUPERANNUATION – PRIVATE SECTOR FUNDS – INTERPRETATION AND CONSTRUCTION – where an interest amount is to be added or deducted from the amounts payable under the trust deed and rules by reference to the “Net Earning Rate” of the plan – whether the interest rate may, on proper construction of the trust deed, be negative

SUPERANNUATION – PRIVATE SECTOR FUNDS – INTERPRETATION AND CONSTRUCTION – where accumulation benefit components of a benefit payable are subject to adjustment for the “Net Earnings” of the plan – whether “Net Earnings” include the unrealised gains or losses in value of the assets of the plan assets

*Trusts Act 1973 (Qld), s 96*

*Adams v Lambert* (2006) 228 CLR 409, cited  
*Byrnes v Kendle* (2011) 243 CLR 253, cited  
*Fitzgerald v Masters* (1956) 95 CLR 420, cited  
*Montevento Holdings Pty Ltd v Scaffidi* (2012) 246 CLR 325, cited  
*VBN and Australian Prudential Regulation Authority, re* (2006) 92 ALD 259, distinguished  
*Vision Super Pty Ltd v Poulter* (2006) 154 FCR 185, distinguished

COUNSEL: J D McKenna QC, with D W Marks, for the applicant

SOLICITORS: Minter Ellison for the applicant

[1] **JACKSON J:** The Bundaberg Sugar Ltd Superannuation Plan (“the Plan”) was established by a deed dated 1 August 1955. The Plan has been amended numerous times and is now governed by consolidated trust deed and rules dated and adopted

on 2 May 2006 (“the Plan deed”). The applicant is the trustee of the Plan. The members of the Plan are predominantly current and past employees of companies in the Bundaberg Sugar Group. The questions for decision concern the proper bases of calculation of the entitlements of members of the Plan in accordance with the Plan deed. Notice has been given to present and past members of the Plan who might be affected.

- [2] The trustee applies for directions concerning the property of the trust or respecting the management or administration of the property or respecting the exercise of a power or discretion vested in the trustee under s 96 of the *Trusts Act 1973* (Qld). Such an application is brought to the court on a written statement of facts. They are as follows.

“7. The Plan offers benefits, some of which are of an accumulation nature, and others of a defined benefit nature.

8. The question which has arisen concerns accumulation style components of benefits.

9. Such components are subject to adjustment by reference of the ‘Net Earnings’ or ‘Net Earning Rate’ for the Plan.

10. In relation to Class ‘E’ members, ‘Net Earnings’:

*means the amount of the earnings of the Plan after deducting administrative and other costs as are attributable to the amount of contributions received by the Plan and after allowing for the averaging of the earnings of the Plan at the absolute discretion of the Trustees to take into account possible or actual periodic fluctuations in those earnings.*

11. In relation to Class ‘E’ members, ‘Net Earning Rate’:

*means the rate determined from the Net Earnings.*

12. The applicant has measured Net Earnings by reference to both realised and unrealised elements. In periods of contraction in the financial markets, the performance of the Plan can be negative. This occurred in 2008.

13. The Plan realises a gain or loss when, for example, income is earned from an asset or an asset is sold for a value greater or less than the price at which the Plan acquired the asset.

14. The Plan makes an unrealised gain or loss when an asset such as a unit in a property trust is valued but not sold, and its value is determined to be greater or less than the price at which the Plan acquired the asset or the value for that asset as earlier determined.

15. It has recently been suggested to the applicant that it cannot apply a negative Net Earning Rate, and cannot adjust for negative Net Earnings.
16. Further, some provisions of the constituent trust deed speak of interest being applied to a component of a member account, at a rate determined by reference to the Net Earning Rate.
17. Specifically, in relation to Class 'E' members as an example, the applicant took the view that, given the definition of interest by reference to the Net Earning Rate in the following provisions, a negative adjustment on account of that interest factor was required:

**Surcharge Liability Accumulation Account (Category E, rule 1)**

- (a) In paragraph (a) of the definition of 'Surcharge Liability Accumulation Account' (emphasis added):

*the amount to which any amount of Surcharge or advance instalment of Surcharge or penalty or interest upon an amended assessment of Surcharge paid by the Trustees in respect of the Member has accumulated **with interest at such rate as the Trustees from time to time determine to be the Net Earning Rate of the Plan's assets;***

- (b) In the concluding words of the definition of 'Surcharge Liability Accumulation Account' (emphasis added):

*The Surcharge Liability Accumulation Account may be a negative number. If the amount is a negative number then it shall bear **interest at the Net Earning Rate.***

**Withdrawal benefits (Category E, rule 14)**

- (c) For the purposes of rule 14, and specifically for the components at rules 14.1(a)(ii)(B) and 14.1(b)(i)(B), rule 14.3 says (in part, emphasis added):

*For the purposes of this Rule 14 compound interest additions shall be calculated from the date the Member joins the Plan or 1 July 1987 (whichever is the later) up to and including the date on which the Member ceases to be in the Service of the Employer. **The rate of interest shall be such rate as the Trustees from time to time determine (after considering such advice as they may require) to be the Net Earning Rate of the Plan's assets.** The rate of interest shall not be varied retrospectively. ...*

**Deferred benefits (Category E, rule 15)**

(d) In rule 15 (emphasis added):

*... THEN the amount to which that part of the benefit has accumulated with **compound interest at such rate as the Trustees from time to time determine (after considering such advice as they may require) to be the Net Earning Rate of the Plan's assets shall become payable to or in respect of the Member on the Deferral Date ...***

**Interest - delayed payment (Category E, rule 6.6)**

(e) There is also a provision for interest linked to the Net Earning Rate under rule 6.6, but the trustee is not aware of an occasion when that rule has been applied.

18. Doubt has recently been cast on whether a negative interest adjustment may be made to a component determined by reference to interest as being applied at the Net Earning Rate, in times of negative Net Earnings.
  19. The applicant has taken the view in the past that it is possible for Net Earnings to be negative, and thus possible for a negative Net Earning Rate, and a negative measure of interest, to be applied to the various components affected by those provisions.
  20. However, in the context of negotiations about a successor fund transfer, AMP has raised the question of whether any such negative adjustments are correct. The question arose during a period of due diligence, when the applicant was investigating how to transition member accounts in the Plan to another superannuation provider and was in dialogue with AMP as the potential superannuation provider. The applicant was conducting the investigation because of changes to superannuation regulation, called 'My Super', that made it difficult for the Plan to continue. This was because the increased compliance costs for the Plan's reduced asset value and number of members could not be justified.
- ...
21. The Plan has had a long relationship with AMP. An AMP entity is presently the Plan's administrator, though that entity has only acted in that role for approximately the last five years.
  22. The applicant was incorporated on 7 July 1994 and became the trustee of the Plan. Prior to that, the trustees were individuals.
  23. The 'Rules' contained in Annexure 1 to the Deed of Amendment deal with each of a number of member categories, with a set of Rules for respective categories.

24. The members of the fund, by category, number as follows:

<b>CATEGORY</b>	<b>NUMBER OF MEMBERS ON 1 JANUARY 2008</b>	<b>NUMBER OF MEMBERS ON 1 APRIL 2013</b>
A	7	5
B	18	5
C	44	24
D	2	0
E	168	62
F	6	1
G	2	0
Special Category A	1	1
I	9	0
S	83	62
W	82	20
ES	7	1
BAA & BA	12	0
BB	23	0
NMS	1	0
<b>TOTAL</b>	<b>465</b>	<b>181</b>

25. Between 1 January 2008 and 1 April 2013, 92 members exited the Plan due to the sale of the Bundaberg Sugar Group's North Region business. Other members to exit the Plan did so because they retired or otherwise left the employment of Bundaberg Sugar.
26. Over recent years, the most numerous category of members has been 'E'. It is thus convenient to refer to some specific rules, and to how the applicant has, until now, applied those rules, by reference to the Fifth Part of the Rules, for 'Category E'.
27. Category E members are entitled under the Rules to benefits on the following occasions:
- (a) Retirement on or after the normal retirement date. Rule 7 provides separately for benefit on the Normal Retirement Date, and after the Normal Retirement Date.
  - (b) Early retirement in accordance with Rule 8.
  - (c) Death, where Rule 10 provides separately for death in service prior to the Normal Retirement Date, and on or after the Normal Retirement Date.
  - (d) Total and permanent disablement in accordance with Rule 12.
  - (e) Total and temporary disablement in accordance with Rule 13.
  - (f) Withdrawal prior to the Normal Retirement Date in accordance with Rule 14.

- (g) So called ‘deferred benefits’ in accordance with Rule 15.
28. In turn, each of the categories of benefits for that Category E member is calculated by reference to one or more components.
29. Thus the retirement benefit payable in respect of retirement on the Normal Retirement Date, for a Category E member, comprises:
- (a) A defined benefit component calculated by reference to Final Average Wage.
  - (b) Two accumulation style accounts, the ‘Additional Employer Account’ and the ‘Additional Member Account’, if either exist, which are defined by reference to additional contributions by the employer and by the member, respectively.

In each case the definition in Rule 1 speaks of an amount to which the additional contributions ‘have accumulated after making such allowance as the Trustees shall decide from time to time (after considering such advice as they may require) for Net Earnings to that date’.

- (c) A component, being the amount to which the ‘Transfer Value (if any) has accumulated after making such allowance as the Trustees shall decide (after considering such advice as they may require) for Net Earnings to the date of the member's retirement.’
- (d) The ‘Rollover Account’, a term defined in Rule 1. I explain this as follows:
  - (i) In Rule 1, there is reference to an amount distributed to the member under Rule 6AA.
  - (ii) This refers to shares in AMP to which the Trustees became entitled as a consequence of the demutualisation of the AMP Society, and which were held in the Fund.
  - (iii) The definition of ‘Rollover Account’ in Rule 1 speaks of an amount ‘to which the amount ... has accumulated after making such allowance as the Trustees shall decide from time to time (after considering such advice as they may require) for Net Earnings to that date’.
- (e) The ‘Surcharge Liability Accumulation Account’. That term is also defined in Rule 1. Paragraph (a) of that definition, and the concluding words of that definition, anticipate respectively that an interest rate might be determined by the Trustees by reference to the Net

Earning Rate of the Plan's assets, and that there would be 'interest at the Net Earning Rate'.

30. The wording and structure of each of the other benefits varies according to the benefit offered. However, the point illustrated by the wording set out above is that the accumulation style components are to be adjusted by reference to Net Earnings or the Net Earning Rate, or by interest calculated by reference to the Net Earning Rate.
31. Clause 12 of the Consolidated Trust Deed and Rules deals with the discontinuance of the Plan and provides that the Principal Employer may discontinue the Plan provided it gives one month's written notice to the Trustee of its intention to do so. If the Principal Employer determines to discontinue the Plan, then clause 12 requires the Trustee to do the following:
- ...
- (c) *the Trustee shall cause a valuation to be made of the assets of the Plan (after the payment of all expenses incurred as a result of winding up the Plan);*
- (d) *the Trustee shall allocate to the members such part or whole of the value of the Plan as ascertained by the valuation in such shares and proportions in such manner as they shall determine to be fair and equitable after considering the advice of the Actuary;*
- (e) *the trustee shall then allocate any surplus amount remaining in the Plan to any Member or to any one or more of the Dependants of any Member, or to the Legal Personal Representative (in that capacity) of any deceased Member, or to any Employer in such shares and proportions as the Trustee in its absolute discretion determine;*
- ...
32. Up until 31 December 2005, the applicant 'smoothed' investment returns using a three year averaging formula, so that negative returns were not a feature of the administration of the Plan.
33. The applicant discontinued smoothing in light of two factors:
- (a) competitive pressures after the introduction of the Choice of Fund legislation from 1 July 2005, and
- (b) an inquiry from the regulator, the Australian Prudential Regulation Authority (*APRA*), concerning the use of surplus to facilitate smoothing of investment returns.



34. The applicant took advice from AON Consulting, actuaries, and moved to determination of a crediting rate on a year by year basis.

...

36. AON Consulting's discussion paper concerning the applicant's then 'Investment Fluctuation Reserve', dated 20 April 2005, recommended that:

(a) the applicant change its then policy of smoothing returns, so that the investment fluctuation reserve was fully distributed at 31 December 2005; and

(b) actual earnings be credited thereafter (under Heading 10).

...

38. On 2 September 2005, the Trustee resolved that the historical practice of adjusting member accounts by the 3 year rolling averaging of crediting rates be discontinued effective 31 December 2005 and that from 1 January 2006, members' accounts would be credited with actual investment returns. ....

39. On 20 September 2006 the applicant took advice from AON Consulting regarding the investment return applied to the Surcharge Liability Accumulation Account, the balance of which could be negative.

....

41. With the global financial crisis, the Plan experienced negative returns.

42. The applicant takes advice from AON Consulting concerning determination of the Net Earnings and the Net Earning Rate.

43. In doing so, the applicant takes into account both realised and unrealised gains and losses in the portfolio of assets held.

44. The Plan's portfolio of investments includes real property and shares, as well as other classes of assets. The applicant has noted decreases in value during particular years in relation to some asset classes, contributing to the negative performance mentioned above.

45. The Plan's Net Earning Rate and crediting rate for the years 2005 to 2012 was as follows:

YEAR	NET EARNING RATE (%)	CREDITING RATE (%)
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2005	16.50	16.50
2006	16.90	16.90
2007	10.40	10.40
2008	-21.00	-21.00
2009	10.60	10.60
2010	3.30	3.30
2011	-0.50	-0.50
2012	13.20	13.20

46. As at 1 January 2008, \$90,946,503.00 was under management in the Plan.
47. As at 1 April 2013, \$41,173,285.00 was under management in the Plan.
48. Between 1 January 2008 and 30 April 2013, 424 benefit payments were made from the Plan totalling \$61,539,147.00.
- ...
49. The Net Earning Rate is calculated by AON Consulting, usually at the end of each month, being the end of each reporting period.
50. AON Consulting advises the applicant each time the Net Earning Rate is calculated.
51. The Net Earning Rate is made up of various components, as follows:
- (a) realised earnings, for example dividends on shares, interest from funds on deposit, and rental income from real property These will generally be positive;
  - (b) realised gains or losses on the sale of the Plan's assets;
  - (c) unrealised revaluations of the Plan's assets, that is, increments (increase) and/or decrements (decrease) in the market values; and
  - (d) deductions for associated costs.
52. The applicant then applies the Net Earning Rate to members' accumulation styled accounts.
53. For members who exit the Plan, the Net Earning Rate is used in the calculation of their benefit.
54. While the Net Earning Rate used in the calculation of the benefit may include unrealised components, for example unrealised gains and losses, Net Earning Rate reflects the

actual rate that would be achieved if the Plan assets were sold and realised the ‘marked to market’ values reflected in the Net Earning Rate.

55. However, with the ongoing management of the Plan, it is not possible or practicable to sell a portion of each of the Plan’s assets each time a member exits the plan to represent that member’s respective share of the Plan’s total assets. In effect the calculated rate is deemed to be an actual rate as though a portion of the Plan’s assets were realised at the time of calculating the Net Earning Rate.
56. Therefore if, for example, large numbers of members exited the Plan immediately after 31 December 2008 (when the Net Earning Rate was -21%) seeking accumulation components of their benefits to be calculated without regard to the negative returns encountered, then the assets sold to meet those payments would necessarily only have realised enough to support the benefits by reference to the fund’s actual negative earnings.
57. Considering the advice it has received, the applicant’s view is that applying the Net Earning Rate in this way is the only approach which leads to a sensible result. To refuse to apply a negative Net Earning Rate would lead to the result where, in a situation such as the example in paragraph 56 above, there would be insufficient funds realised to support the benefits payable to exiting members.”

- [3] It is appropriate to consider the relevant questions of construction of the Plan deed by reference to category E members. There is no material difference between the terms of the Plan’s rules concerning category E members and the Plan’s rules concerning the other classes of membership.

### **Negative Net Earnings or Net Earning Rate**

- [4] The core question is the operation of the requirement that a member’s accounts or value for a number of the components of the benefit payable, whether on normal retirement or other withdrawal, are to be adjusted for “Net Earnings” or the “Net Earning Rate” of the Plan.
- [5] In the statement of facts above, I have set out the expressions “Net Earnings” and “Net Earning Rate” using capitalisation to signify that they are defined terms. In fact, in the context of the Plan deed and Rules, “Net Earnings” is the defined expression but the lower case expression “net earnings” is used as well. The same applies to “Net Earning Rate”. However, on reading the whole of the document, in my view, the differences are not intended to signify different meanings according to the use or failure to use capitalisation. Therefore, for simplicity, in these reasons I have used the defined capitalised terms consistently.
- [6] The applicant submits that where the earnings of the Plan are positive, the positive earnings amounts can be applied to the relevant accounts and value, subject to the

deduction of any relevant “administrative and other costs”. Further, having regard to the definition of “Net Earnings”, the applicant submits that the Net Earnings of the Plan can be negative, even if the earnings of the Plan are positive. That could occur where the positive earnings of the Plan are not sufficient to meet the “administrative and other costs” which are to be deducted.

- [7] As the statement of facts illustrates, the questions for determination are not concerned with Net Earnings which are positive. The concern is as to the calculation of the amount of a relevant account or value where the Net Earnings of the Plan over the relevant period are negative, meaning that the Plan suffers a loss. The applicant makes careful and detailed submissions about the meaning and operation of the relevant provisions of the Plan deed, including detailed submissions as to the applicable principles of interpretation of the Plan deed as a trust instrument. With all respect, in my view it is unnecessary to go beyond four references.
- [8] First, in *Byrnes v Kendle*<sup>1</sup> Heydon and Crennon JJ affirmed that “the rules for the construction of contracts apply also to trusts. Although the two institutions are distinct, that is not surprising”.<sup>2</sup> Their Honours’ detailed exposition of the law confirms that general proposition. Second, the reasons of the High Court in *Montevento Holdings Pty Ltd v Scaffidi*<sup>3</sup> confirmed that the enquiry as to meaning is at least initially directed to “the ordinary and natural meaning of the clause” under consideration.
- [9] Third, I would add from *Adams v Lambert*:<sup>4</sup>

“In *Wright v Australian and New Zealand Banking Group Ltd*, Beaumont J pointed out that it is a well settled principle of construction that a written instrument must be construed as a whole, and that, as Dixon CJ and Fullagar J said *Fitzgerald v Masters*, ‘[w]ords may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency’. A striking example of the application of a cognate principle of statutory construction is to be found in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*.” (citations omitted)

- [10] It was also said in *Fitzgerald v Masters*<sup>5</sup> that an interpretation which leads to an “unreasonable result” or an outcome which displays “absurdity or inconsistency” must be avoided.
- [11] The applicant also refers to *Vision Super Pty Ltd v Poulter*<sup>6</sup> and *Re: VBN and Australian Prudential Regulation Authority*<sup>7</sup> and submits that they should be treated as distinguishable from the present case. I agree, but do not consider that it is necessary to expand on that conclusion for present purposes.

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<sup>1</sup> (2011) 243 CLR 253.

<sup>2</sup> (2011) 243 CLR 253, 286 [102].

<sup>3</sup> (2012) 246 CLR 325, 332 [25].

<sup>4</sup> (2006) 228 CLR 409, 417 [21].

<sup>5</sup> (1956) 95 CLR 420, 426-427.

<sup>6</sup> (2006) 154 FCR 185.

<sup>7</sup> (2006) 92 ALD 259.

- [12] The applicant submits that practical considerations support the view that Net Earnings should be construed to include both positive and negative earnings. In particular, for a trust of the present kind to remain solvent, it would ordinarily be necessary that the defined benefit component and accumulation benefit components to be paid to members, as represented by the liabilities of members account balances, be supported by a sufficient level of assets from contributions and investment returns. I agree.
- [13] Further, the applicant submits that if the accumulation benefit components are not adjusted to take account of losses, the question would arise as to who is to bear the burden of any shortfall in the assets of the Plan if a loss is made. If the burden of any losses is to be borne by the assets of the Plan which notionally support the defined benefit component, the resulting risk is that the Plan assets will prove to be inadequate to meet members' entitlements to benefits. The applicant submits that this could not have been the intention of the drafter or settlor of the Plan deed. So far as the Plan is concerned with accumulation benefit components, again I agree. There is nothing in either the text or context of the Plan deed, as revealed by the evidence, that would support the contrary conclusion.
- [14] In my view, therefore, the first important conclusion is that the defined term "Net Earnings" should be construed to include both positive and negative Net Earnings. That meaning of the definition informs the calculation of the amounts of the "Additional Employer Account", "Additional Member Account" and "Rollover Account" as components of a member's entitlement to payment of a benefit on normal retirement or withdrawal.
- [15] I am not dissuaded from that view because the definition of each of those components refers to the amount to which the relevant contributions have "accumulated". The amount is to be that derived "after making such allowance" for Net Earnings as is decided by the trustee. An allowance need not be positive. And in the context of these accounts, each of the account components is an accumulation benefit in nature, as opposed to a defined benefit.
- [16] If it were necessary to consider the point, that view is also consistent with proper accounting practice. The applicant tendered evidence that such practice for a trust like the Plan permits the trustee to determine that the Plan has made negative Net Earnings.
- [17] In my view, once it is determined that Net Earnings can be negative, it logically also follows that the "Net Earning Rate" can be negative. A "rate" of Net Earnings is derived by dividing the amount of the Net Earnings by the amount of the value of assets of the Plan, or expressing the two amounts as a ratio. Although the definition of "Net Earning Rate" is unhelpful, one of the ordinary English meanings of "rate"<sup>8</sup> supports that view, as do the references to the Net Earning Rate "of the Plan's assets" in cls 6.6, 14.3 and 15. If the Net Earnings are negative, the "rate" which is the quotient of the division will be negative.
- [18] The conclusions reached so far are enough to resolve most of the questions which are raised by par (a) of the application. In my view, they extend to the conclusion that it is proper to administer the trust deed by applying a negative adjustment, for

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<sup>8</sup> Shorter Oxford English Dictionary, 6 ed, p 2467.

“Net Earnings”, where that is appropriate, to the “Transfer Value” where that benefit component is payable.

### **Interest adjustments and Net Earning Rate**

- [19] The question whether, for the purposes of calculating the “Surcharge Liability Accumulation Account”, the interest rate may be negative where the Net Earning Rate is negative, is more difficult to answer. That account deals with monies owing by a member to the trustee on account of a liability to pay tax which is reimbursable by the member, and is to be subtracted from the amount of the benefit payable on normal retirement or other withdrawal. In other words, it is a negative amount in the first place. The amount is to be the accumulation of the amounts of surcharge or advance instalments of surcharge “with interest”. The interest is to be applied at the Net Earning Rate of the Plan’s assets, from time to time, as determined by the trustee.
- [20] In context, given that the deduction from the benefit payable is intended to reimburse the tax paid by the trustee, the purpose of the provision for interest is to compensate the trustee for having been kept out of the money paid until the deduction is applied in the calculation of the benefit payable to the member. So, if the calculation is performed on each paid amount over the relevant period at the rate as determined from time to time, the notional adjustment puts the trustee and Plan assets back in the position as if the tax or instalments had not been paid. It might have been thought appropriate to calculate a reduction of the deduction to be made for a period where the Net Earnings were negative. Irrespective, in my view, that is what the application of the Net Earning Rate as determined “from time to time” to the amounts paid requires. Therefore, that is what the calculation of the “Surcharge Liability Accumulation Account” requires.
- [21] The question of payment of interest on the late payment of a benefit under cl 6.6 of the Plan deed is, however, another matter. Where payment to a member is unduly delayed, the trustee is empowered under that clause to add interest to the benefit payable, whether on normal retirement or other withdrawal. The purpose of the payment of interest is to compensate the member for being kept out of the money. The interest is to be the rate determined from time to time determined as the Net Earning Rate. The applicant submits that if the Net Earning Rate is negative, the interest under cl 6.6 may be negative.
- [22] In my view, that submission should be rejected. As a matter of common sense, it adds insult to injury to say that the trustee may exercise a discretionary power to “add” to the benefit payable a sum for interest for late payment which is a negative amount, because the Net Earning Rate is negative. In my view, in this context, the power to add interest only applies where the Net Earning Rate is positive. However, this particular contextual meaning or operation does not, in my view, detract from the conclusion that the “Net Earning Rate” may be negative in the calculation of the “Surcharge Liability Accumulation Account”.
- [23] On withdrawal from the Plan under cl 14, it is provided that a component of the benefit payable, in lieu of the defined benefit component which would have been payable on normal retirement, should be the amount of the withdrawing member’s contributions, “and compound interest” on those contributions. Simplifying, cl 14.3 provides that the compound interest additions should be calculated from the date of

joining the Plan<sup>9</sup> but it does not say at what rests. Second, the rate is to be the Net Earning Rate of the Plan's assets from time to time.

- [24] Again, the question is raised whether the calculation should include a reduction for interest when the Net Earning Rate is negative. In my view, this is a finely balanced question. There is not much specific textual assistance. One indication of meaning is the use of the word "additions". That word is a little inapt to describe the subtraction of a compound interest amount. Contextually, one point about an early withdrawal based only on the member's contributions is that the employer's contributions made under cl 4.3(a) of the Plan deed, in respect of the defined benefit aspect of the Plan, are not included in the amount to be paid, subject to the minimum benefits entitlement under cl 14A. Thus, the failure to reduce the amount payable in respect of the employee's contributions for a period when the Net Earnings are negative is not likely to cause an embarrassment in the value of the assets of the Plan compared to the entitlements of the remaining members. Taking those matters into account, in my view, the better construction is that cl 14.3 does not require a negative adjustment or deduction for a period when the Net Earning Rate is negative.
- [25] I reach that conclusion, notwithstanding that the amount payable under cl 15 for a deferred benefit is the amount "accumulated with interest" at the Net Earning Rate. In that context, a negative Net Earning Rate might be applicable, for reasons similar to the construction I have given to the calculation of the "Surcharge Liability Accumulation Account". I would add that, in my view, a deferred benefit which remains unpaid differs from an undue delay in a payment due to a member. The difference is that a member whose benefit is deferred is not entitled to be paid their benefit until a future date. Until then, they sail on the same sea of investment risk as to the sufficiency of the assets of the Plan, as other members. There is no warrant, in that context, for departing from the ordinary meaning of the text of cl 15 which operates in that way by specifying that the accumulated amount of the deferred benefit is payable "with" compound interest at the Net Earning Rate.

### **Unrealised gains and losses**

- [26] The final question for consideration is whether Net Earnings include unrealised gains or losses in the value of the assets of the Plan. In my view, they do. The nature of the Plan is not unlike, for example, a common fund of the kind administered by licensed trustee companies under statute.<sup>10</sup> In the case of those common funds, statute provides for a monthly valuation mechanism to permit regular entry and exit by beneficiaries.
- [27] It is in the nature of the Plan that there will be beneficiaries of the trust it creates, namely members, who come and go. There must be a valuation mechanism from time to time to facilitate that process. By definition, the periods during which different members contributions and entitlements are invested under the Plan will vary. The determination of value in that context is the setting in which the provision for calculation of the entitlement to benefit on normal retirement or

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<sup>9</sup> Assuming that date was after 1 July 1987.

<sup>10</sup> *Corporations Act 2001* (Cth), Div 3, particularly s 601SCC and *Corporations Regulations 2001* (Cth), Div 2.2, particularly reg. 5D.2.06(c). In Queensland, the relevant provisions before 2009 were contained in the *Trustee Companies Act 1968* (Qld), s 36. There were comparator sections in other States.

withdrawal operates, including, in the case of the accumulation benefit components, by reference to Net Earnings.

- [28] Second, cl 8 of the Plan deed provides that the assets of the Plan may be invested, inter alia, in any investment authorised by law for the investment of trust funds, including the purchase of or subscription for shares, stock, debentures or securities of any kind in any company and the purchase of any real property. The investment time line is not fixed. However, the investments will have market values which will fluctuate. The ability of the trustee to make and withdraw market based investments in a timely way is a significant part of the trustee's powers of investment.
- [29] Third, ordinary accounting principles, including Accounting Standard AAS 25 Financial Reporting by Superannuation Plans, specify that changes in the net market value of investments and other assets including both realised and unrealised gains and losses are to be included in the accounts.
- [30] In my view, the Net Earnings of the Plan are to be calculated having regard to both realised and unrealised gains and losses on ordinary accounting principles. To leave the unrealised gains and losses out of the accounts would skew the investment outcomes of members who remain in the Plan, compared to those who leave the plan for whatever reason. In my view, there is no reason in principle or in the text or context of the Plan deed why that should be done.

### **Conclusion**

- [31] For those reasons, in my view, the substance of the directions sought by pars 1(a) and 1(b) of the application should be made. I have made some changes to the precise forms of the orders sought so as to clarify their meaning and to correct what seem to be unintended errors.
- [32] I will hear the applicant about whether any other direction should be given in the light of these reasons.
- [33] It is appropriate that the applicant's costs of the application, assessed on the indemnity basis, be paid out of the assets of the Plan.