



Equity Division Supreme Court New South Wales

Case Name: **In the matter of APM Security Plan Sickness & Accident Fund (in liq)**

Medium Neutral Citation: [2024] NSWSC 145

Hearing Date(s): 19 February 2024

Date of Orders: 19 February 2024

Date of Decision: 19 February 2024

Jurisdiction: Equity - Corporations List

Before: Black J

Decision: Direct the liquidator to provide short minutes of order to give effect to judgment.

Catchwords: CORPORATIONS – Winding up – application by liquidator for direction as to which rules of fund are operative.

CORPORATIONS – Winding up – application by liquidator for direction as to when fund was dissolved – direction as to entitlement of members and former members to share in distribution of fund assets.

Legislation Cited:

- *Insolvency Practice Schedule (Corporations)* 2016 ss 90-15, 90-20
- *Trustee Act* 1925 (NSW) s 63
- *Corporations Act* 2001 (Cth) s 583
- *Uniform Civil Procedure Rules* 2005 (NSW) reg 6.29

Cases Cited:

- *Hanchett-Stamford v Attorney-General* [2008] EWHC 330; [2009] Ch 173
- *Hickey v Attorney General of the State of New South Wales* [2021] NSWSC 772
- *Re GKN Bolts and Nuts Ltd* [1982] 1WLR 774
- *Re Octaviar Administration Pty Ltd (in liq)* [2015] NSWSC 1556
- *Re William Denby and Sons Ltd Sick and Benevolent Fund* [1971] 1 WLR 973

Texts Cited:

Category: Procedural rulings

Parties: KordaMentha Shelf Co (AMPSPSAF) Pty Ltd
(Plaintiff)
Catherine Margaret Conneely and Scott David Harry
Langdon in their capacity as joint and several
liquidators of the ASPM Security Plan Sickness &
Accident Fund (in liquidation) (Applicants)

Representation: Counsel:
D Stack (Applicants)

Solicitors:
Ashurst Australia (Applicants)

File Number(s): 2022/130874

Publication Restriction:

JUDGMENT

Nature of the application

- 1 By Interlocutory Process filed on 8 November 2023, Ms Conneely (formerly a liquidator of the APM Security Plan Sickness and Accident Fund (in liq) ("Fund") and Mr Scott Langdon, who remains as liquidator of the Fund, seek orders under ss 90-15 and 90-20 of the Insolvency Practice Schedule (Corporations) and under s 63 of the *Trustee Act* 1925 (NSW) ("*Trustee Act*") and in the inherent jurisdiction of the Court. That relief is formulated as, alternatively, declarations as to particular matters or as advice that the liquidators, or now Mr Langdon in his capacity as the remaining liquidator, would be justified in proceeding on specified bases. Essentially, two issues are raised by the application, the first being the identification of the operative Rules of the Fund and, second, a question which was formulated as directed to the date of dissolution of the Fund although, in substance, it raises the issue of the persons who were entitled to be treated as members of the Fund so as to receive a distribution of assets on its dissolution.

Affidavit evidence and chronology

- 2 The Liquidator relies on two affidavits and a substantial volume of documents in support of the application. I first sent out that affidavit evidence and a chronology of events.
- 3 By her first affidavit dated 3 November 2023, Ms Conneely sets out the history of the Fund at some length and identifies possible versions of the Rules of the Fund, tracing the position from the earliest Rules that have been located through later versions, and sets out the steps which were taken in respect of the dissolution of the Fund.
- 4 By her second affidavit dated 5 February 2024, Ms Conneely gives evidence of notice that has been given to members of the Fund and other interested persons in respect of this application, and refers to responses from members and former members which support, in some cases, a distribution to all living members of the Fund and, in other cases, distribution on alternative bases. Ms Conneely also indicated the view that the liquidators had formed as to the appropriate manner of distribution of the balance of assets in the Fund between its members and former members as follows:

“... the Liquidators are of the view that any full members who were made redundant as a result of the May 2012 redundancies ought to be considered as full members, subject to the other directions provided by this Court in relation to the Rules which govern the Fund and the dissolution date of the Fund. The Liquidators' acknowledge that this view may be controversial in the context of the 2005 Rules (and any other Rules), having regard to the provisions which deal with when membership ceases. However, the Liquidators consider it to be the fair and equitable position to adopt because it appears, based on the timeline deposed to above, that the redundancies of the members employed at the Botany Mill were a direct consequence of the closure of B7 and B8 — which occurred just before the proposed dissolution date of the Fund. If the Court is minded to make this direction, I note that the Liquidators will still need to conduct a verification process to determine whether these individuals were full members at the relevant time and whether they were made redundant in the circumstances set out above.”
- 5 I will reach the same view for the reasons noted below, and I will address why, even if it is “controversial”, it is also correct below.

- 6 The exhibits to Ms Conneely's affidavits include an earlier version of the Rules of the Fund, and that document is relevant so far as the benefits specified in that earlier version are less than those paid out and allow it to be excluded as the current Rules of the Fund. Ms Conneely also identifies the 2005 Rules of the Fund which contain membership criteria and identified the objective of the Fund, namely:

"The objective of the Fund is to create and maintain sufficient financial resources, through fortnightly or monthly contributions of its members and the company and investments which will enable The Fund to provide benefits as set out herein."

- 7 Clause 3 provided for membership of the Fund and cl 3.4 provided when membership would cease, including on a member's leaving the employee of the company. As Mr Stack who appears for the Liquidator points out, that clause contemplates that a member would cease to be a member of the Fund when he or she left the employer company's employment. It had the result in this matter that some 73 per cent of members of the Fund ceased to be members when they left its employ after they were made redundant, as I will note below. However, that provision does not deal, expressly or impliedly, with the entitlements of the members upon that of an event occurring, and I will return to the applicable legal principles in that respect below. Clause 3.5 dealt with the category of unfinancial members, which would have relevance if it were found that members entitlements only arose at a later date or that the Fund was dissolved at a time that members were unfinancial.

- 8 Clause 4 provided for contributions and cl 5 sets out the relevant benefits payable to members of the Fund. Appendix A sets out particular benefits that were payable and included provision for maternity payments of \$600 per child. That is significant because, not only were these Rules found within the records of the Fund, but, or at least the records of the employer company, but there is also evidence of payments of maternity benefits in accordance with that provision, which creates a strong inference that that version of the Rules took effect.

9 Ms Conneely's second affidavit exhibits a 2008 version of the Rules of the Fund, which was not found in the Fund's records but as provided by a member of the Fund to the liquidators. That version of the Rules is largely consistent with the 2005 version, with a change to at least one of the benefits payable, and an indication of a change in membership of the committee of the Fund. The fact that document was held by and provided by one of the members indicates the possibility that it may have come into effect.

10 The issues in this application arise because some 73 per cent of members of the Fund were made redundant by the employer company and ceased to be members of the Fund on the installation of new production machinery by that company in mid-2012. In anticipation of that occurring, by a memorandum dated 19 October 2011, a commercial manager of the employer company identified several matters supporting the winding up of the Fund on the one hand or its continuance of the other. The matters that supported a winding of the Fund included that:

"The closure of B7 and B8 [the earlier machines] provides a logical break point for the wind up of the fund with less than 30 out of 115 members moving across to B9 [the new machine]."

11 The matters identified as supporting the ongoing operation of the Fund included positive aspects of its activities.

12 By an email dated 15 June 2012, postdating the redundancy of employees, which was sent to the 30 or so remaining members of the Fund, the employer company noted that:

"Recently [the employer company] made a decision to wind up the [Fund] this decision had been deliberated for the last couple of years. The process by which the winding up will be carried out is yet to be announced and it is likely that the program will take years rather than months to complete."

13 That email referred to the decision of committee members that the Fund should be run in caretaker mode, with a more limited range of activities, and noted that:

"Member deductions will cease and payment of health and medical benefit claims would also cease from that time. Members use of [certain facilities] will

continue as the committee believes this helps in maintaining the facilities. This decision is partly made in view of the large number of members who had to leave the fund in May and June [2012]."

- 14 That email is significant, in several respects. First, it points to a recognition by the employer company of the significance that a large number of members had departed the Fund, in effect, by a forced departure arising from their redundancy when the new production machinery was commissioned. Second, that email points to a significant change in the activities of the Fund, so far as it would continue to be run in caretaker mode, with a narrowed range of activities. Third, it is qualified by the fact that, while that decision had then been made, a long period then passed before it was implemented, after the employer company had sold the business to a third party.
- 15 Ms Conneely points to subsequent activities within the Fund, after mid-2012, which indicate that it then continued in respect of a narrower range of activities, including the use by members of two properties owned by the Fund, for the benefit of its smaller number of remaining members. A document contained in a further exhibit to that affidavit, tendered on a confidential basis, refers to the 32 persons who were remaining members of the Fund as at 13 June 2012, indicating the large number of members who had by that time lost their membership on redundancy, and recording that one of those remaining members was to cease employment later in June 2012. The exhibits to Ms Conneely's affidavits also include financial reports for the Fund continuing into 2014, which record its limited then range of receipts and payments, consistent with the proposition that it continued, beyond 2012, with a limited range of activities, consistent with the earlier reference to it functioning in a "caretaker mode" which I have noted above.
- 16 In late 2020, a member of the Fund wrote to the new owner of the business inquiring as to the position in respect of the liquidation of the Fund. That company responded that no final decision had been made in respect of the future of the Fund, and that member drew attention to an earlier letter, sent by the employer company in 2003 which contemplated that, in the event of a

winding up of the Fund, the monies held in the Fund would be distributed amongst its members on a specified basis.

- 17 The Fund appears to have continued operation on a limited basis until the company which had acquired the business ultimately retained Ms Conneely and Mr Langdon and the firm with which they are associated in order to complete the winding up of the Fund. Ultimately, in May 2022, orders were later made by the Court to wind up the Fund, under s 583 of the *Act* or in its inherent jurisdiction.

The advice that is sought by the Liquidator

- 18 Mr Stack draws attention to the scope of the Court's jurisdiction under s 90-15 of the Insolvency Practice Schedule (Corporations) and the broadly corresponding jurisdiction in respect of a trust under s 63 of the *Trustee Act*. I am satisfied that the jurisdiction under s 90-15 of the Insolvency Practice Schedule (Corporations) is available here, where the Liquidator has been appointed by the Court to wind up the Fund. It is doubtful that the jurisdiction under s 63 of the *Trustee Act* is available, where it appears the Fund is an unincorporated association and not a trust. Mr Stack draws attention to the width of the Court's powers to give directions to a liquidator under s 90-15 of the Insolvency Practice Schedule (Corporations) and to my summary of the applicable principles in *Re Octaviar Administration Pty Ltd (in liq)* [2015] NSWSC 1556 and the cases that have adopted that approach.
- 19 I am satisfied that the Court can, and should, give such a direction to the Liquidator here, where the issues raised have considerable legal difficulty and the uncertainties as to the Rules which apply also warrant such advice. Importantly, it would also be unreasonable to require the Liquidator to proceed to a distribution of monies held in the Fund without advice that will protect him, where he must make a difficult choice between advantaging one or other group of potential recipients of a distribution from the Fund, either to the advantage of the wider group of members and former members of the Fund prior to the redundancy in 2012, if they are permitted to share in the distribution, or of the

smaller group who would likely receive greater amounts if only the remaining members of the Fund after that redundancy were permitted to participate in the distribution.

The applicable Rules

- 20 The first issue, as to which the Liquidator seeks a declaration or a direction from the Court, is the applicable Rules to be applied. It seems to me that it is not necessary to make a declaration as to that matter, where there is a degree of uncertainty in the factual position, and a direction will sufficiently protect the Liquidators in this regard. As Mr Stack points out in submissions, several matters support a finding, preferred by the Liquidator, that the 2005 Rules apply, although a finding that the 2008 Rules apply could also be made on the basis that it is unlikely that they would have been provided to a member unless they had taken effect. Here, as Mr Stack points out, there is little relevant difference between those two versions of the Rules, because the provisions which would be relevant to a distribution to members are the same or substantially the same in both those versions of the Rules.
- 21 On balance, it seems to me that I should order that the Liquidator is justified in proceeding on the basis that the 2005 Rules apply, while recognising a possibility that the 2008 Rules had later been adopted. It seems to me that that view is preferable, where the 2005 Rules were held in the relevant documents relating to the Fund and, second, there is no evidence in respect of the 2008 Rules that they were approved by the necessary meeting of members which would be necessary to bring them into effect, although I recognise that the same might arguably be said in respect of the 2005 Rules. In any event, it seems to me that a direction that the Liquidator is justified in proceeding on that basis can be made, where it is plainly more likely that the 2005 or 2008 Rules applied, given the evidence as to the quantum of benefits paid to which I referred above, and it is marginally more probable that the 2005 rather than the 2008 Rules for the reasons noted above.

Which members and former members should receive a distribution for the Fund

- 22 The second and more complex issue as to which the Liquidator seeks a declaration or direction is directed to which members or former members of the Fund are entitled to share in a distribution of the balance of the Fund. The Liquidator formulates that question as whether the Fund was "dissolved" on 1 July 2012, or whether he would be justified in proceeding on the basis that the Fund was "dissolved" on that date. For reasons that I will explain below, it seems to me to be preferable to approach the question on a somewhat different basis.
- 23 Mr Stack makes comprehensive and helpful submissions which draw attention to relevant English case law and to Australian case law which refers to it. He draws attention to the decision in *Re William Denby and Sons Ltd Sick and Benevolent Fund* [1971] 1 WLR 973 ("*Denby*"), where Brightman J addressed the question when it could be said that a fund was "dissolved" including by informal means. In that case, there were initially some 300 members of the relevant fund, and about 170 of them left a company's employment as a result of industrial difficulties, although at least 124 members continued in employment. His Honour there noted that there were several circumstances in which a fund could potentially be "dissolved" and identified such circumstance as being "where the substratum upon which the society or fund was founded has gone." His Honour there found that the fund had not been dissolved, where at least 124 members of the fund remained in employment and his Honour noted the likelihood that the employer would there employ new staff so that the number of the members of the fund would ultimately be replenished. That finding is plainly distinguishable from the facts in respect of the Fund in issue here, although I recognise this is a question of degree. Here, a substantially larger proportion of members of the Fund were made redundant, and the reduction in membership of the Fund was plainly permanent in character, by reason of the replacement of the previous machines and the redundancies consequential upon in the introduction of the replacement machine.

- 24 In a second decision, *Re GKN Bolts and Nuts Ltd* [1982] 1WLR 774 ("*GKN*"), Sir Robert Megarry VC considered that decision, in a case where a club had essentially ceased its activities over a period of time. Megarry VC also referred (at 776) to the need for the Court to adopt a "broad" approach to a problem of this character and observed that:

"The Courts have to be ready to allow the general concepts of reasonableness, fairness and common sense to be given more than their usual weight when confronted by claims to the contrary which appear to be based on the strict interpretation and strict application of the letter of the rules."

- 25 Megarry VC also recognised that it was possible for a club to be "dissolved spontaneously" although he doubted that mere inactivity was enough to bring about that result, and he questioned the use of the concept of cessation of the "substratum" in that context. It seems to me that the result in that case is of limited assistance here, where it is plain enough that the Fund did not cease its activities, although it significantly narrowed both the number of employees for whose benefit those activities were conducted and the scope of those activities. Here, to the extent that it could be said that the Fund was "dissolved", that is likely to arise from the radical change in the scope of its activities, rather than from a cessation of those activities of the kind contemplated in *GKN*.

- 26 Mr Stack also draws attention to the decision in *Hanchett-Stamford v Attorney-General* [2008] EWHC 330; [2009] Ch 173 where Lewison J referred to *Denby* and *GKN* and also undertook an analysis of the circumstances in which members are subject to contractual restrictions which prevent their claiming their proportionate share of the assets of an unincorporated association. His Lordship there observed (at [47]) that:

"The thread that runs through all these cases is that the property of an unincorporated association is the property of its members, but that they are contractually precluded from severing their share except in accordance with the rules of the association; and that, on dissolution, those who are members at that time are entitled to the assets free from any such contractual restrictions."

- 27 I recognise that this observation is directed, as are several earlier cases, to identifying the point at which the dissolution of the Fund occurs, but it does not seem to me to exclude the possibility that, at some earlier point, there may be

so radical a change in the activities of a fund or the scale or scope of its membership as to free the members from a contractual restriction on their claiming entitlements in the fund.

- 28 As Mr Stack points out, these English cases were referred to without disapproval by Ward CJ in Eq (as the President then was) in *Hickey v Attorney General of the State of New South Wales* [2021] NSWSC 772 (at [34]ff).
- 29 Turning now to the position which might be adopted in respect of the identification of the date on which the Fund was “dissolved”, Mr Stack identified the factors which supported and did not support each of the possible dates of dissolution. If it were necessary to determine the date on which the Fund was dissolved, I would likely here find that it was a date after 1 July 2012 since the Fund continued its activities, although on a limited scale, well after the point at which the employer company and then the Fund's member committee decided to wind up the Fund and that it should be run in caretaker mode from 1 July 2012. As the Liquidator fairly recognises and as Mr Stack points out in submissions, the process of winding up of the Fund then continued over a significant period, during which the Fund engaged in continuing activities of a smaller scale and for the benefit of a smaller number of members.
- 30 However, it seems to me here preferable not to determine this application by seeking to identify a single date of “dissolution” of the Fund but instead to ask the question, at what point were members of the Fund freed of any limitation that would prevent them requiring that they be paid their proper share the assets of the Fund, however that share may be calculated? It seems to me that, having regard to the contractual basis of the Fund and the radical changes which affected its operation in mid-2012, and also taking into account the matters of fairness to which Sir Robert Megarry referred in *GKN*, a change which brought about the exclusion of 73% of the Funds members was so significant that those members who were excluded were no longer restricted from claiming their proper share of the assets of the Fund, whether by an implied term or otherwise. Conversely, the administrators of the Fund and its remaining members could not, from the point of exclusion of those many

members, point to any implied term which would have the unreasonable consequence that remaining members of the Fund obtained a windfall gain by appropriating, albeit not through their own actions, the product of the contributions made by the 73% of the excluded members of the Fund in earlier years. To the extent that a term was identified which had that consequence, it seems to me that it would be so unreasonable that it could not be implied into the Rules of the Fund.

- 31 In the particular circumstances, whether or not the redundancy of such a large proportion of the members of the Fund could properly be characterised as giving rise to a "dissolution" of the Fund, it brought about so radical a redistribution of the assets of the Fund that remaining members were no longer bound by any implied agreement not to claim their proper share of the Fund's assets, as at the date immediately prior to that redundancy taking effect.
- 32 I should therefore give a direction that the Liquidator would be justified in proceeding on the basis that members of the Fund immediately prior to the redundancies which took place in May 2012 were entitled to claim their proper share of the assets of the Fund. That result is consistent with the view expressed by Ms Conneely in her second affidavit, to which I referred above. I do not consider that it is inconsistent with provisions in the Rules which indicate when a member's membership of the Fund ceases, which do not address his or her entitlement to a distribution from the Fund in the unusual situation, arising here, the some 73% of members of the Fund ceased to be members at the same time, as a result of their redundancy.

Orders

- 33 I therefore make the following orders:
1. Order pursuant to s 90-15 of the Insolvency Practice Schedule (Corporations) 2016 that Ms Conneely cease forthwith to be a liquidator of the Fund.

2. Order pursuant to reg 6.29 of the *Uniform Civil Procedure Rules 2005* (NSW) that Ms Conneely be removed as one of the parties to these proceedings.
 3. Order that the liquidator bring in within two business days short minutes of order to give effect to this judgment.
 4. Order that the Applicant's and Ms Conneely's remuneration costs and expenses of and incidental to these orders be paid out of the assets of the Fund.
 5. Order that the exhibits be returned.
- 34 I also bear in mind that the Liquidator has foreshadowed a further application to the Court seeking further advice as to the basis on which the entitlements of members of the Fund will be calculated.

*I certify that this and the preceding 12 pages
are a true copy of the reasons for judgment herein
of his Honour Justice Black.*

MS

Associate

Date: 22 February 2024

