Federal Court of Australia

Wan v BT Funds Management Limited [2022] FCAFC 189

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| Appeal from: |  |
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| File number(s): |  |
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| Judgment of: | **MARKOVIC, MCELWAINE AND MCEVOY JJ** |
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| Date of judgment: | 29 November 2022 |
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| Catchwords: | **SUPERANNUATION** – whether the primary judge and the Australian Financial Complaints **Authority** erred in accepting that the decision of the trustee of a superannuation fund to distribute a member’s superannuation death benefit to his estate rather than the appellant was fair and reasonable – whether the appellant was a “dependant” of the deceased, being either a spouse or in an interdependency relationship with the deceased at the time of his death, for the purposes of s 10 and s 10A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) – construction of the expressions “lives with” and “lives together” for the purposes of the SIS Act – primary judge made no legal error in concluding that the Authority’s determination was fair and reasonable in the circumstances – the Authority’s determination must be read in its proper context – neither the Authority nor the primary judge imported a requirement that the living arrangement had to be full time or permanent, nor did they elevate the significance of “common residence” in their assessment of “dependant” under the SIS Act – neither the Authority nor the primary judge erred in considering the provision made for the appellant in the deceased’s will – a wider construction of the term “dependant” was not required by either the Authority or the primary judge – appeal dismissed with costs. |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 44*Corporations Act 2001* (Cth) ss 1053, 1055, 1056A and 1057*Superannuation Industry (Supervision) Act 1993* (Cth) s10 and s 10A*Federal Court Rules 2011* (Cth) Div 33.2*Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 1.04AAAA and reg 6.22 |
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| Cases cited: | *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280; [1993] FCA 456*Drury v Smith* [2012] NSWSC 1067*Edwards v Postsuper Pty Ltd* [2007] FCAFC 83*Fairbairn v Radecki* (2022) 400 ALR 613; [2022] HCA 18*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16*Minister for Immigration and Ethnic Affairs v Gungor* (1982) 4 ALD 575*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; [1996] HCA 6*Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343; [2000] HCA 9*Moby v Schulter* (2010) FLC 93-447; [2010] FamCA 748*Plaintiff M1/2021 v Minister for Home Affair*s (2022) 400 ALR 417; [2022] HCA 17*Plaintiff M64/2015 v Minister for Immigration and Broder Protection* (2015) 258 CLR 173; [2015] HCA 50*Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 395 ALR 209; [2021] HCA 39*QSuper Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97; [2020] FCAFC 55*Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah* (2001) 206 CLR 57; [2001] HCA 22*Wan v BT Funds Management Limited* [2022] FCA 302*Yesilhat v Calokerinos* [2021] NSWCA 110 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Sub-area:  | Commercial Contracts, Banking, Finance and Insurance |
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| Number of paragraphs: | 70 |
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| Date of hearing: | 9 August 2022  |
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| Counsel for the appellant: | Mr Truong QC with Mr Simon Tisher |
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| Solicitor for the appellant: | Wang Lawyers Pty Ltd trading as Herald Legal |
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| Counsel for the first respondent:  | The first respondent filed a submitting notice  |
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| Solicitor for the first respondent: | Dentons Australia Limited |
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| Counsel for the second respondent: | The second respondent filed a submitting notice save as to costs |
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| Solicitor for the second respondent:  | Arslan Lawyers |
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| Counsel for the third respondent: | Dr Kristine Hanscombe QC with Mr Andrew Dickenson  |
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| Solicitor for the third respondent:  | Clancy & Triado |

ORDERS

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|  | VID 222 of 2022 |
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| BETWEEN: | JING WANAppellant |
| AND: | BT FUNDS MANAGEMENT LIMITEDFirst respondentAUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY LIMITEDSecond respondentMATTHIAS GUY DERODYThird respondent |

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| order made by: | MARKOVIC, MCELWAINE AND MCEVOY jJ |
| DATE OF ORDER: | 29 November 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the third respondent’s costs of and incidental to the appeal as agreed or assessed.
3. The second respondent file and serve any application for costs of and incidental to the appeal within 14 days of the date of this order.

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

REASONS FOR JUDGMENT

MARKOVIC J:

1. I have had the advantage of reading in draft the reasons for judgment of McEvoy J. I agree with the comprehensive reasons given by McEvoy J and with the orders proposed by his Honour for disposition of the appeal.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Markovic. |

Associate:

Dated: 29 November 2022

REASONS FOR JUDGMENT

MCELWAINE J:

1. I have had the considerable benefit of reading the draft reasons for judgment of McEvoy J. I agree with his Honour’s reasons and the orders he proposes. There is nothing that I wish to add.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice McElwaine. |

Associate:

Dated: 29 November 2022

REASONS FOR JUDGMENT

MCEVOY J:

1. By notice of appeal dated 27 April 2022 the **appellant**, Ms Jing Wan, appeals from orders made in *Wan v BT Funds Management Limited* [2022] FCA 302. Those orders dismissed her appeal against a decision of the second respondent, the Australian Financial Complaints **Authority**, which affirmed a decision of the first respondent, BT Funds Management Limited (**the Trustee**), to distribute the superannuation death benefit payable to one of its members,
Mr Maxwell Rodney Walker (**the deceased**), to his estate rather than to the appellant.
2. Before the primary judge the appellant contended that the Authority erred in law by failing to conclude that she was a de-facto spouse of the deceased or in an interdependency relationship with him at the time of his death. Had it been determined that the appellant was the spouse of, or in an interdependency relationship with, the deceased at the time of his death she would have been an object for distribution of his death benefit by the Trustee. By reason of this asserted error the appellant sought to have the Authority’s determination set aside. The appellant also sought a declaration that she was a “dependant” of the deceased, and an order that the entirety of the deceased’s death benefit be paid to her or, alternatively, that the matter be remitted to the Authority with a direction that the appellant was a “dependant” of the deceased.
3. The **third respondent**, Mr Matthias Guy Derody, who is the son of a former partner of the deceased, opposed the appeal from the Authority’s determination in his capacity as the legal personal representative of the deceased’s estate. The third respondent is also a beneficiary of a one third share of the deceased’s residuary estate under his will. The third respondent contended before the primary judge that the Authority’s determination as to the fairness and reasonableness of the Trustee’s decision to distribute the deceased’s superannuation death benefit to his estate was not the subject of any legal error having regard to the broad discretion conferred on the Trustee. On this basis the third respondent submitted that the appeal should be dismissed. The third respondent also opposed the appeal from the orders of the primary judge. Neither the Trustee nor the Authority participated in the appeal before the primary judge, and they have filed submitting notices in this appeal (subject to the questions of costs in the case of the Authority).
4. The primary judge determined that the Authority had made no legal error in finding that the decision of the Trustee was fair and reasonable in all the circumstances and within its power and thus in affirming the Trustee’s decision pursuant to s 1055(3) of the ***Corporations Act*** *2001* (Cth). The central issue in this appeal is whether the Authority’s conclusion that the appellant was not a “dependant” of the deceased within the meaning of s 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) constituted an error of law (whether because the appellant was, in fact, the spouse of the deceased or in an interdependency relationship with him).
5. In broad compass, the appellant challenges the conclusions of the primary judge on the bases that his Honour did not give proper consideration to whether the appellant was in an interdependency relationship or a spousal relationship with the deceased by reference to relevant sections of the SIS Act. She also contends that his Honour should not have had regard to the fact that the deceased had left the appellant one-third of his estate in upholding the Authority’s decision, and that his Honour did not give proper consideration to whether the appellant came within the inclusive definition of the term “dependant” in the SIS Act. The focus of the appeal, however, was on the construction to be given to the expression “lives with” in the context of the definition of “spouse” in s 10 of the SIS Act and the expression “live together” in the context of the attributes of an interdependency relationship in s 10A of the SIS Act. The appellant contended that both the Authority and the primary judge erred in the construction of these expressions. The appellant seeks to have the orders of the primary judge set aside, and for the matter to be remitted to the Authority, with an order that it be determined according to law.
6. For the reasons that follow, I have concluded that the primary judge’s conclusion that the Authority made no legal error in determining that the decision of the Trustee was fair and reasonable and within power was correct, and that it was appropriate for his Honour to have made orders dismissing the appeal from the determination of the Authority. Accordingly, this appeal will also be dismissed.

# the decisions of the trustee and the Authority

1. To understand the Trustee’s decision that the deceased’s death benefit should be payable to his estate rather than to the appellant, it is necessary to describe certain aspects of the deceased’s personal circumstances. It appears to be uncontroversial that the deceased’s health had been declining from around 2015, with the level of care and assistance he required increasing from early 2017. He was admitted to hospital in June 2017 and died, aged 62, on 11 July 2017.
2. The deceased had never been married, and he did not have any children. He had, however, previously been in two long term de-facto relationships. The first of these was with the mother of the third respondent. Although the third respondent is not the biological child of the deceased, he apparently viewed the deceased as his father and prior to his death held the deceased’s medical and financial powers of attorney. The deceased’s other long term relationship was with a Ms Alison Betts. She, like the third respondent, was also a beneficiary of the deceased’s residuary estate under his will.
3. The primary judge recorded (at [9]) the appellant’s position that she had known the deceased since late 2007, visiting him often from about 2012 and moving in to care for him in about mid-2014. The appellant maintained that as the deceased’s health declined, she cared for him and tended to his everyday needs. Although the appellant retained her own residence, which was government provided public housing that had been difficult to acquire, it was her position that she was living with the deceased as his spouse and in an interdependency relationship with him within the meaning of the SIS Act when he died.
4. It would seem that in or around February 2015 the deceased transferred his superannuation benefits into an account managed by the Trustee. Each of his annual member statements, which were sent to him by the Trustee at the conclusion of relevant financial years, recorded a nomination by the deceased of his estate as the sole beneficiary of his death benefit.
5. On 17 May 2017 the deceased made his final will. Under the terms of that will his residuary estate fell to be distributed in equal shares to the appellant, the deceased’s former partner
Ms Betts, and the third respondent. Although the deceased had made a nomination for his estate to be the sole beneficiary of his death benefit, it was common ground that there was no binding death benefit nomination in respect of the deceased’s superannuation benefit held by the Trustee.
6. In these circumstances it was necessary for the Trustee to have regard to the terms of the **Trust Deed**. As the primary judge recorded (at [19]), in this instance cl 6.3(e)(v) of Sch 2 of the Trust Deed stipulated the manner in which benefits were to be paid on a member’s death. Specifically, that clause provided that the Trustee must pay the death benefit to one or more of the deceased member’s dependants, and/or his legal personal representative or such other person permitted by superannuation law, in its absolute discretion. The same clause also expressly stated that the Trustee may take into account any non-binding nomination made by the deceased, although clearly it was not bound by such a nomination. As the primary judge correctly noted, both of these aspects of the Trust Deed are consonant with the requirements of the SIS Act: see, especially, reg 6.22(2) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**).
7. Having regard to the terms of the Trust Deed, the Trustee initially resolved to pay the deceased’s superannuation death benefit to the appellant on the basis that she was his de-facto spouse. However, following an objection made by the third respondent to the effect that the appellant was not a dependant of the deceased, the Trustee instead resolved to pay the death benefit to the estate. There were two further objections by the appellant, but on 30 April 2019 the Trustee affirmed its earlier decision to distribute 100 per cent of the deceased’s superannuation death benefit to his estate rather than to the appellant. The result of this was for the appellant to become entitled to approximately 33 per cent of the deceased’s superannuation death benefit by reason of the operation of his will, rather than the entire 100 per cent of the benefit.
8. The Trustee’s fourth and final decision was made on the following grounds:
9. it did not accept that the appellant was a “dependant” of the deceased as she was not a “de facto spouse” or in an “interdependency relationship” with the deceased within the meaning of s 10 and s 10A of the SIS Act and reg 1.04AAAA of the SIS Regulations;
10. on 30 June 2016 the deceased had re-confirmed his discretionary non-binding nomination for 100 per cent of the death benefit to be paid to his estate; and
11. the deceased’s final will expressed a testamentary intention that his estate be divided equally between the appellant, Ms Betts, and the third respondent.
12. Pursuant to s 1053 of the Corporations Act the appellant sought review of the Trustee’s decision by the Authority.
13. It is important to recognise that the Authority’s role under the legislative scheme in the Corporations Act is to consider whether the Trustee’s decision was fair and reasonable in all the circumstances having regard to the interests of both the applicant for review and of any other person joined as a party to the complaint: s 1055(3) and s 1056A of Corporations Act.
14. The Authority’s powers are, relevantly, prescribed in Div 3 of Pt 7.10A of the Corporations Act. Section 1055 is in the following terms:

**Making a determination**

(1) In making a determination of a superannuation complaint, AFCA has, subject to this section, all the powers, obligations and discretions that are conferred on the trustee, insurer, RSA provider or other person who:

(a) made a decision to which the complaint relates; or

(b) engaged in conduct (including any act, omission or representation) to which the complaint relates.

*Affirming decisions or conduct*

(2) AFCA must affirm a decision or conduct (except a decision relating to the payment of a death benefit) if AFCA is satisfied that:

(a) the decision, in its operation in relation to the complainant; or

(b) the conduct;

was fair and reasonable in all the circumstances.

(3) AFCA must affirm a decision relating to the payment of a death benefit if AFCA is satisfied that the decision, in its operation in relation to:

(a) the complainant; and

(b) any other person joined under subsection 1056A(3) as a party to the complaint;

was fair and reasonable in all the circumstances.

*Varying etc. decisions or conduct*

(4) If AFCA is satisfied that:

(a) a decision (except a decision relating to the payment of a death benefit), in its operation in relation to the complainant; or

(b) conduct;

is unfair of unreasonable, or both, AFCA may take any one or more of the actions mentioned in subsection (6), but only for the purpose of placing the complainant, as nearly as practicable, in such a position that the unfairness, unreasonableness, or both, no longer exists.

(5) If AFCA is satisfied that a decision relating to the payment of a death benefit, in its operation in relation to:

(a) the complainant; and

(b) any other person joined under subsection 1056A(3) as a party to the complaint;

is unfair or unreasonable, or both, AFCA may take any one or more of the actions mentioned in subsection (6), but only for the purpose of placing the complainant (and any other person so joined as a party), as nearly as practicable, in such a position that the unfairness, unreasonableness, or both, no longer exists.

(6) AFCA may, under subsection (4) or (5), do any of the following:

(a) vary the decision;

(b) set aside the decision and:

(i) substitute a decision for the decision so set aside; or

(ii) remit the decision to the person who made it for reconsideration in accordance with any directions or recommendations of AFCA;

(c) if the complainant was unfairly or unreasonably admitted into a life policy fund:

(i) require a party to the complaint to repay all money, or particular money, received under the life policy to which the complaint relates; or

(ii) set aside the whole or part of the terms or conditions of the life policy in their application to the complainant; or

(iii) vary the governing rules of the life policy fund in their application to the complainant; or

(iv) cancel the complainant’s membership of the life policy fund or of any sub-plan of the fund;

(d) if the complainant was unfairly or unreasonably sold an annuity policy, contract of insurance or RSA:

(i) require a party to the complaint to repay all money, or particular money, received under the annuity policy, contract or RSA; or

(ii) set aside the whole or part of the terms or conditions of the annuity policy, contract or RSA in their application to the complainant; or

(iii) vary the terms or conditions of the annuity policy, contract or RSA in their application to the complainant.

*Limitations on determinations*

(7) AFCA must not make a determination of a superannuation complaint that would be contrary to:

(a) law; or

(b) subject to paragraph (6)(c), the governing rules of a regulated superannuation fund or an approved deposit fund to which the complaint relates; or

(c) subject to paragraph (6)(d), the terms and conditions of an annuity policy, contract of insurance or RSA to which the complaint relates.

1. In ***QSuper*** *Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97 (Moshinsky, Bromwich and Derrington JJ) the Full Court considered the nature of the review function conferred on the Authority by s 1055 of the Corporations Act at 113 [64]-[65]:

**The powers conferred by CA s 1055 permit AFCA to set aside or vary a decision made by a trustee in relation to a fund member even where the decision was authorised by the trust deed and any regulating statute. The determining factor is not the lawfulness of the decision, but its fairness or reasonableness “in its operation in relation to the complainant”.** Such a power is more aptly applied in relation to discretionary powers which, by their nature, confer wide decisional freedom on the repository such that a broad range of decisions might legitimately be made from a single set of facts. **In any event, under the scheme where a complainant is aggrieved by a trustee’s decision, AFCA can consider the relevant circumstances and exercise the power or discretion of the trustee afresh so as to correct any perceived unfairness or unreasonableness arising from the original decision’s operation.**

Despite the width of AFCA’s remedial powers, subs (7) requires that it exercise the powers of the trustee or other authorised person within legal confines. It is not entitled to make a decision which is contrary to the terms of the trust or beyond the limits of any relevant statutory regulation. For instance, AFCA could not, standing in the shoes of a trustee, exercise a power in a manner which breached the trustee duty to observe the terms of the trust.

(Emphasis added)

1. In the present case the Authority affirmed the Trustee’s decision, summarising the issues and its key findings in its determination dated 13 August 2020 as follows:

**Was the complainant a dependant of the deceased member at the date of the deceased member’s death?**

The weight of the objective evidence does not support that the complainant and the deceased member were living together on a genuine domestic basis as a couple at the date of the deceased member’s death. There has also been insufficient information provided to demonstrate that the complainant was in an interdependency relationship with the deceased member, or that she was financially dependent upon the deceased member.

**Is the decision of the trustee fair and reasonable?**

The trustee’s decision to pay the death benefit to the estate as it was not satisfied that the complainant was a dependant of the deceased member, was fair and reasonable in its operation in relation to the complainant and joined party, in all the circumstances.

1. The Authority went on, under separate sub-headings, to consider whether the appellant was a dependant of the deceased at the date of his death, whether she was the deceased’s de-facto spouse, whether she was in an interdependency relationship with the deceased, and whether the decision of the Trustee was fair and reasonable. It will be necessary to return to the Authority’s consideration of these matters.

# the decision of the primary judge

1. Pursuant to s 1057 of the Corporations Actthe appellant appealed from the Authority’s determination to this Court. Section 1057(1) provides for an appeal to the Federal Court on a question of law from a determination of the Authority. The Court has power to hear and determine the appeal and make such order as it thinks appropriate: s 1057(3). Without limiting subsection (3), the orders that may be made by the Federal Court on appeal include:
2. an order affirming or setting aside the determination of the Authority: s 1057(4)(a) of the Corporations Act; and
3. an order remitting the matter to be determined again by the Authority in accordance with directions from the Court: s 1057(4)(b) of the Corporations Act.
4. As the primary judge observed, these powers are very similar, or substantially the same, as those applicable to the hearing and determination of an appeal from the Administrative Appeals Tribunal (**AAT**): see s 44(3) and s 44(4) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**); noting that Div 33.2 of the *Federal Court Rules 2011* (Cth), which deals with appeals from the AAT, applies also to an appeal under s 1057 of the Corporations Act.
5. In this connection the primary judge drew attention to cases which have considered the powers of the Court on hearing an appeal from the AAT, referring in particular to *Minister for Immigration and Ethnic Affairs v* ***Gungor*** (1982) 4 ALD 575 at 585-586, where Sheppard J said:

Dealing with the powers of this court on this appeal, it is not correct to see our powers as unlimited. The powers as stated are subject to restrictions, which restrictions are readily apparent if compared with the powers on review of the Tribunal, admittedly acting administratively, and the powers of this court in other jurisdictions, both original and appellate.

…

It is, in my opinion, not correct to say that this court is by [s 44 of the AAT Act] given wide powers to make such order as it thinks fit. Implicit in its powers are a number of restrictions. The appeal is expressly limited to error of law, which alleged error is the sole matter before this court and is the only subject matter of any order made consequent on the appeal. The order which this court can make after hearing the appeal is also similarly restricted to an order which is appropriate by reason of its decision. **It follows that the only order which can be properly made is one the propriety of which is circumscribed by and necessary to reflect this court's view on the alleged or found error of law.** To go further I would see as amounting to exceeding the jurisdiction of this court under this section. A power to make "such order as it thinks appropriate by reason of its decision" is much more restrictive than a power "to make such order as it sees fit" or a power "to make a decision in substitution for the decision" the subject of the appeal. Section 44(5) confirms, though it states that it does not purport to limit, this as an appropriate reading of the power in s 44(4) when it limits its statement of the express power of the court when setting aside a decision to the making of an order remitting the case to be heard again. **Having set aside a decision, it has no express power to substitute what it sees as the correct decision unless such is the appropriate order by reason of its decision on the point of law in the context of the particular proceedings.**

The powers of this court on appeal under s 44 of the AAT Act are limited to consideration of alleged errors of law by the Tribunal and go no further. There is certainly no power to supervise the Tribunal in any other way and, in particular, to deal with the merits of the review. The error of law alleged has to be isolated out, a decision made on this question of law, and such order made and directions given as are appropriate only to the decision of this question of law, and not to the decision under review by the Tribunal.

(Emphasis added)

1. The primary judge reasoned (at [39]), correctly in my view, that it follows that the only occasion on which the Court may substitute its own decision is when the facts as found by the AAT admit, upon the application of the law as laid down by the Court, of only one result: see also in this regard *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 364-365 [59] (Gaudron J), expressing the same constraint as that explained by Sheppard J in *Gungor.*
2. In dismissing the appeal the primary judge accepted that it was permissible and necessary for the Trustee to take into account that the deceased had made a non-binding nomination that involved distributing his superannuation death benefit to his estate. His Honour also concluded that the Trustee was permitted to take into account the fact that the appellant was already a beneficiary under the will as to one-third of the deceased’s estate. The primary judge regarded it as important that the Trustee’s decision has the effect of one third of the deceased’s death benefit being ultimately paid to the appellant in accordance with the terms of his final will.
3. The primary judge accepted that, leaving to one side the Trustee’s discretion, the Authority’s role under s 1055 of the Corporations Act was to consider whether the Trustee’s decision was fair and reasonable in all the circumstances having regard to the interests of not only the appellant, but also any other person joined as a party to the complaint. In his Honour’s view the Authority was entitled to conclude that it was fair and reasonable for the Trustee in exercising its discretion to consider not only the interests of the appellant but also other parties potentially entitled to a distribution under the will if the deceased’s non-binding direction was followed.
4. Ultimately the primary judge determined that the Authority made no legal error in finding that the Trustee’s final decision was within power and fair and reasonable in its effect, having regard to the interests of the appellant as well as to the interests of other parties joined to the complaint. His Honour found that the Authority had carefully considered and weighed the objective evidence against the representations made by the appellant in support of her complaint, and made its determination on that basis. His Honour considered that there was nothing in the Authority’s reasons that revealed any misconception on its part as to its statutory task, and no omission in the consideration of the relevant material that indicated that it had failed to take account of matters raised by the appellant in support of her complaint. On this basis his Honour concluded that there was no demonstrable error that could support a conclusion that the Authority had committed any legal error in upholding the Trustee’s final decision.

# THE APPEAL

1. The appellant advances the following grounds of appeal from the orders of the primary judge:

1. The primary judge erred in failing to find that the Second Respondent (the **Authority**) failed to give proper, genuine and realistic consideration as to whether the Appellant was in an interdependency relationship with the deceased immediately prior to the deceased’s death by:

(a) applying the incorrect statutory test at [185] by erroneously substituting the expressions “lived permanently” and “lived with” for “live together”, being the test mandated in s 10A(1)(b) of the *Superannuation Industry (Supervision) Act* 1993;

(b) in any event, impermissibly finding at [185], consistent with the Authority’s error, that the Authority’s formulation of “lived permanently” meant effectively the same thing or “may equally be described” as “lived with” when in fact those formulations are not synonymous and should not be treated as such and do not in any event address the statutory test of “live together” in s 10A(1)(b) of the *Superannuation Industry (Supervision) Act* 1993; and

(c) not finding that the Authority misconstrued or misapplied the phrase “live together” by requiring the living arrangement to be full time and permanent; one where the maintenance of a secondary residence was considered fatal.

2. The primary judge erred in failing to find that the Authority failed to give proper, genuine and realistic consideration as to whether the Appellant was a spouse of the deceased by:

(a) not finding that the Authority had impermissibly elevated the significance of a common residence to a requirement instead of giving proper, genuine and realistic consideration to whether the Appellant “lives with” the deceased on a genuine domestic basis in a relationship as a couple, an error repeated by the primary judge at [178]; and

(b) repeating the Authority’s error by requiring the Appellant to “live with” the deceased all the time, not merely some of the time as illustrated at [179] which evidence is said to support the Authority’s finding that the deceased did not live with the Appellant or, at [185], that they did not share a common residence (to the extent relevant).

3. In circumstances where the Appellant’s entitlement to one-third of the deceased’s estate formed no basis for the Authority’s determination and was not otherwise relevant to the proceeding below, the primary judge erred in impermissibly finding at [119] that the Appellant’s entitlement to one-third of the deceased’s estate was a “compelling factor” which supported:

(a) the Authority’s conclusion that the First Respondent’s decision was fair and reasonable; and

(b) upholding the Authority’s decision.

4. The primary judge erred in failing to find that the Authority failed to give proper, genuine and realistic consideration as to whether the Appellant came within the inclusive definition of the term “dependent” [sic] in s 10 of the *Superannuation Industry (Supervision) Act* 1993 by confining its examination to whether she was the spouse of the deceased, in an interdependency relationship with him or financially dependent on him, without considering the ordinary and natural meaning of the term which includes emotional, physical and domestic forms of dependency.

1. The appellant dealt with grounds one and two together in oral argument, but notwithstanding the inter-relationship between these two grounds I deal with them, as well as grounds three and four, separately below.

## Ground one: Was there a failure to give proper, genuine and realistic consideration to whether the appellant and the deceased were in an interdependency relationship?

1. The appellant submits that the primary judge erred in rejecting her contention that the Authority failed to give “proper, genuine and realistic consideration” to whether she was in an interdependency relationship with the deceased within the meaning of s 10A of the SIS Act and r 1.04AAAA of the SIS Regulations.
2. I pause at the outset, and in the context of the appellant’s formulation of grounds one, two and four, to note the High Court’s observation in *Plaintiff M1/2021 v Minister for Home Affair*s (2022) 400 ALR 417 at 426 [26] (Kiefel CJ, Keane, Gordon and Steward JJ) and 431 [43] (Gageler J) that labels like “active intellectual process” and “proper, genuine and realistic consideration” must be understood in their proper context. Their Honours emphasised that:

These formulas have the danger of creating “a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision-maker’s] decision can be scrutinised”. That is not the correct approach. As Mason J stated in *Peko-Wallsend*, “[t]he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind”. The court does not substitute its decision for that of an administrative decision-maker.

(Footnotes omitted)

1. Undeterred, however, the appellant points to what she says were two critical legal errors made by the primary judge (at [185]) in determining that the Authority had properly considered whether the appellant and the deceased were in an interdependency relationship. The first, she says, is that although his Honour acknowledged that “… [the Authority] may have used a different formulation to the SIS Act in making its determination, being ‘lived permanently’ as opposed to ‘lived with’”, his Honour was not persuaded that the difference indicated “any substantive misunderstanding on [the Authority’s] part”. The second, she says in any event, is his Honour’s finding that the expression “lived with” means “effectively the same thing” as “lived permanently” or could “equally be described as living permanently” with the person concerned.
2. The appellant maintains that the primary judge’s findings in this respect, taken separately or together and which effectively endorse the approach taken by the Authority, amount to operative legal errors because they misconstrue or misapply the phrase “live together” by impermissibly requiring the living arrangement to be full time and permanent. In support of this submission the appellant points to the statutory language of s 10A(1)(b) of the SIS Act concerning interdependency relationships: “live together”; and reg 1.04AAAA of the SIS Regulations which sets out the various “inclusive” matters to be taken into account, where relevant, in determining whether two persons have an interdependency relationship.
3. The appellant submits, correctly, that there is no statutory requirement that the two persons live together permanently, in any unchanged, indefinite sense. She contends that for the primary judge to have substituted “lived permanently” and “lived with” for “live together” was impermissible and amounts to an error of statutory construction. It is her position that this error is sufficient in itself to allow the appeal, although she contends that it also contributed significantly to his Honour’s “flawed reasoning” which led him to reject the submission that the appellant was in an interdependency relationship with the deceased.
4. In support of the contention that “lived with” does not mean “effectively the same thing” as “lived permanently” or could “equally be described” as “living permanently” with the person concerned, the appellant referred to a series of cases in the context of kindred legislative provisions which demonstrate that persons can live together without physically cohabiting and whilst maintaining their own residence: *Drury v Smith* [2012] NSWSC 1067 at [104]
(Hallen AsJ) [***Succession Act*** *2006* (NSW)]; *Moby v Schulter* (2010) FLC 93-447 at [140] (Mushin J) [***Family Law Act*** *1975* (Cth)]; *Yesilhat v Calokerinos* [2021] NSWCA 110 at [134] (Brereton JA)[Succession Act]; and, most recently and importantly, ***Fairbairn*** *v Radecki* (2022) 400 ALR 613 at 621-624 [32]-[41] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)[Family Law Act]*.*
5. The appellant also submits in this regard that not only did the primary judge and the Authority apply the incorrect test, the Authority had regard to irrelevant considerations: namely, the fact that she maintained her own residence. The appellant contends that in his supervisory role the primary judge did not correct, and implicitly adopted, what she characterised as the Authority’s misguided conclusion that she did not live permanently with the deceased as she maintained her own residence. This failure also, she submits, amounts to appealable error.
6. Plainly the concept of an interdependency relationship in s 10A(1)(b) of the SIS Act uses the language “live together”, and not “lived permanently”, with the person concerned. It may thus be accepted that the legislation does not require that the two persons have a living arrangement together which remains unchanged, indefinitely, and that for the purposes of the SIS Act two persons can live together even without physically cohabiting and while maintaining their own residences.
7. What must be appreciated, however, is that the Authority used the expression “lived [or living] together” several times in its determination. It did so in relation to dependency/interdependency relationship in paragraph 5 on page 2, in paragraph 2 on page 5, and in paragraph 2 on page 10. And it did so as well in paragraph 3 on page 6 and paragraph 5 on page 9 in the spousal context. Reading the Authority’s reasons as a whole, and not minutely and finely with an eye keenly attuned to the perception of error (as to which see *Collector of Customs v* ***Pozzolanic*** *Enterprises Pty Ltd* (1993) 43 FCR 280 at 287 and *Minister for Immigration and Ethnic Affairs v* ***Wu Shan Liang***(1996) 185 CLR 259 at 272), I consider that it was entirely open to his Honour to conclude that the Authority’s reference to “lived permanently” in paragraph 5 on page 10 did not indicate any substantive misunderstanding on the Authority’s part of the relevant question.
8. When the Authority’s reasons are read sequentially, and in their proper context, I do not consider that the Authority or the primary judge imported a requirement that the living arrangement had to be full time or in some sense permanent to satisfy the statutory formulation with respect to interdependency. Indeed, it will be observed that in the Authority’s summary of the issues and its key findings in paragraph 5 on page 2 of its determination, as set out above, the Authority had formed and expressed a view that the weight of the objective evidence did not support a finding that the appellant and the deceased were “living together” on a genuine domestic basis as a couple at the date of the deceased’s death. And this was so also on the question of the existence of an interdependency relationship and the question of financial dependency.
9. Having regard to the totality of the Authority’s reasons I do not accept that the primary judge erred by failing to give “proper, genuine and realistic consideration” to whether the appellant was in an interdependency relationship with the deceased. In my assessment it was well open to his Honour to take the view that the Authority had not applied the incorrect statutory test, as the appellant submitted it had done. In performing its statutory function pursuant to s 1055 of the Corporations Act, the Authority had and expressed a sufficient basis to be satisfied that the Trustee’s decision in relation to whether the appellant and the deceased were in an interdependency relationship and what followed from that was fair and reasonable in all the circumstances: see *QSuper* at 113 [64]-[65]. That determination, when properly understood, cannot sensibly be said to be contrary to law for the purposes of s 1055(7) of the Corporations Act. To accept that it was would be to impose a level of scrutiny in over-zealous judicial review focused on perceived inadequacy in the expression of the underlying reasons of the kind properly to be eschewed and which the High Court has repeatedly warned against: *Wu Shan Liang*, at 272; *Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah* (2001) 206 CLR 57 at 66 [23]; *Minister for Immigration and Citizenship v* ***SZMDS*** (2010) 240 CLR 611 at 634 [85]; *Plaintiff M64/2015 v Minister for Immigration and Broder Protection* (2015) 258 CLR 173 at 195-196 [59]; and, most recently, *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 395 ALR 209 at 233 [115].
10. Ground one therefore is not made out.

## Ground two: Was there a failure to give proper, genuine and realistic consideration to whether the appellant was a spouse of the deceased?

1. The appellant submits also that the primary judge erred in rejecting her contention that the Authority had failed to give “proper, genuine and realistic consideration” to whether she was a “spouse” of the deceased. Two inter-related criticisms of the Authority’s reasons and his Honour’s consideration of those reasons, principally at [178] and [179], are advanced in support of this ground.
2. It must first be observed that, plainly, the question of whether the appellant was a spouse of the deceased is to be resolved by reference to s 10 of the SIS Act: relevantly, whether she, although not legally married to the deceased, lived with him on a genuine domestic basis in a relationship as a couple. The appellant does not dispute that the nature and extent of common residence is one of a series of common law factors that *may* be indicative of whether two persons are living together on a genuine domestic basis in a relationship as a couple. However, she contends that not only did the Authority impermissibly elevate the significance of a common residence in its reasons to an “element” or a “requirement”, rather than simply a relevant factor, the inquiry the Authority engaged with was whether a common residence existed and not whether the appellant and the deceased lived together in the sense contemplated by s 10 of the SIS Act. It is submitted that in so doing the Authority did not properly engage with the inquiry mandated by s 10 of the SIS Act.
3. The appellant submits that the Authority’s inquiry and conclusion about whether the deceased’s residence was a common residence was also impermissibly coloured by the fact that the appellant maintained her government provided housing, as well as by the Authority importing a requirement that to be in a spousal relationship a couple must live together on a full time basis (which is a reference to ground one). The appellant submits that as *Fairbairn* demonstrates, this approach was erroneous as the concept of “living with” for the purposes of s 10 of the SIS Act does not require a finding that the appellant and the deceased where physically living together, let alone that they shared a common residence.
4. The appellant contends that the primary judge failed to correct these errors, and in fact replicated them (at [179]) where he referred to other evidence about the appellant’s living arrangements. It is said that the primary judge’s “tacit approval” of the Authority’s finding that the appellant did not “live with” the deceased (or, to the extent relevant, share a common residence) because she sometimes stayed at her place is contrary to the well settled principles established by the authorities, particularly *Fairbairn*.
5. The first point to be made in answer to these contentions is that I have not accepted that, properly understood, the Authority did import a requirement that to be in a spousal relationship or an interdependency relationship, a couple must live together on a full time basis. The contention that the Authority did this fails to have regard to the totality of the Authority’s reasons and focuses over-zealously on its use of “lived permanently” in an aspect of its consideration of whether the appellant was in an interdependency relationship with the deceased. This aspect of ground two, which assumes the correctness of ground one, fails for the reasons advanced in response to ground one.
6. In assessing the balance of ground two it is necessary to pay careful attention to that part of the Authority’s determination identified by the appellant as the source of the operative errors. The relevant section of the Authority’s determination appears on pages 6-7 of its reasons and is as follows:

*Nature and extent of a common residence*

The complainant has acknowledged that she maintained her own residence, which was provided to her by the government from 2014 through to when the deceased member died. She has explained that, toward the end of 2016, there was a discussion with the deceased member about her continuing to maintain her own residence and the deceased member indicated that he would ‘think about it’. She has explained that due to his declining health she did not raise the issue again.

**There has been no evidence to suggest to me that the deceased member’s residence was a common residence.** It has been accepted that the complainant sometimes stayed at the deceased member’s home and that this increased as his health declined. This would have included having some clothes there, as the photograph submitted by the complainant indicated, **however, this does not suggest that it was a common/shared residence.** **This is particularly the case where the complainant was the recipient of a home provided by the government, which the complainant has stated it would be ‘unimaginably difficult to reapply for’.**

(Emphasis added)

1. As the third respondent notes, this sub-section, appearing under the heading “The complainant was not the deceased member’s de-facto spouse”, is but one aspect of the Authority’s consideration of eight common law factors it identifies as “indicative” of when two people are “living together” on a genuine domestic basis in a relationship as a couple. This qualified description of the significance of these factors in the inquiry (that they are “indicative”) sits uncomfortably with the appellant’s submission that the Authority impermissibly elevated the significance of a common residence to “an element” or “a requirement” rather than a relevant factor, instead of giving proper consideration to whether the appellant “lives with” the deceased on a genuine domestic basis.
2. The Authority’s reference later in its determination to a sexual relationship being an “element necessary” (at page 7) and to financial support being a “requirement” (at page 10) does not (as the appellant contends) rationally support the submission that the Authority elevated the importance of these indicia, including common residence, in establishing when two people are living together on a genuine domestic basis in a relationship as a couple. I do not consider that the use of these expressions, in context, are to be taken as meaning that the Authority regarded the existence of a sexual relationship or the provision of financial support as elements or requirements, rather than relevant factors “indicative” of when two people are “living together” on a genuine domestic basis in a relationship as a couple.
3. Nor do I accept that in the part of the determination set out above the Authority was engaging in an inquiry about whether a common residence existed rather than with the question of whether the appellant and the deceased lived together in the sense contemplated by s 10 of the SIS Act such that it can fairly be said that the Authority did not properly engage with the inquiry mandated by s 10 of the SIS Act. It is clear that in this part of its determination the Authority was doing no more than addressing the evidence on the nature and extent of whether the appellant and the deceased shared a common residence, having regard, amongst other things, to the fact that the appellant had another home. The fact that the appellant did have another home, and that this was noted by the Authority, cannot fairly be said to have coloured the Authority’s analysis about common residence. It was no more than an aspect of the evidence to which the Authority made reference, and it was well within the Authority’s fact finding task to find that the appellant and the deceased did not share a common residence. The Authority’s reasons must be read as a whole, and as I have observed above in relation to ground one, not with an eye keenly focused or an ear keenly attuned to the perception of error: *Pozzolanic*; *Wu Shan Liang* and *SZMDS*. The appellant’s criticisms of the Authority’s reasoning, in as much as they refer to the nature and extent of a common residence and the fact that the appellant maintained her government housing, may reasonably be said to suffer from the *Pozzolonic* vice.
4. A similar observation can be made in relation to the appellant’s submission that in assessing whether the appellant was a spouse of the deceased, the Authority imported a requirement to live together on a full time basis. As the third respondent submits, this construction is not borne out by a fair reading of the relevant part of the Authority’s determination either, and it may readily be accepted that it does not accurately state the law.
5. In light of my conclusions in relation to these matters I do not accept that the primary judge made any relevant failure (at [179]) in his review of the Authority’s determination. In my assessment there is no inconsistency with well settled principles, particularly *Fairbairn*, in this aspect of the Authority’s reasons. Ground two is therefore not made out.

## Ground three: Was it impermissible for the primary judge to take into account the appellant’s entitlement to one-third of the deceased’s estate?

1. The third ground of appeal advanced by the appellant is that in circumstances where her entitlement to one-third of the deceased’s estate formed no basis for the Authority’s determination and was not otherwise relevant, the primary judge erred in finding that her entitlement in this regard was a “compelling factor” which supported the Authority’s determination that the Trustee’s decision was fair and reasonable and in upholding the Authority’s decision.
2. The substance of this complaint is that the matter was before the primary judge by way of judicial review, and the Court’s powers on that review were prescribed by s 1057(3) and
s 1057(4) of the Corporations Act. Thus it is contended that it was for the Authority, not the Court, to determine questions of fact. In this connection it is submitted that the primary judge’s decision to uphold the Authority’s decision and his consideration of the dependency issues raised was impermissibly fettered and influenced by his Honour’s own view of the merits of the matter, namely the appellant’s entitlements under the final will of the deceased.
3. I do not accept this criticism. In the relevant parts of his reasons ([105]-[108], [113]-[119] and [181]) his Honour has done no more than suggest that the aggregate provision made for the appellant objectively reflected an intention on the part of the deceased to make substantial provision for the appellant and that this was a compelling factor supporting the Authority’s conclusion that the Trustee’s decision was fair and reasonable in the circumstances. There is nothing unusual, still less impermissible, about his Honour’s observations in this regard on judicial review, particularly bearing in mind the Authority’s limited statutory function under
s 1055(3) of the Corporations Act: see also, in this regard, *Edwards v Postsuper Pty Ltd* [2007] FCAFC 83 at [15] (Tamberlin, Emmett and Middleton JJ). As the third respondent submits, both the Authority and the primary judge did no more than test the outcome of the Trustee’s decision so far as it concerned the appellant in all the circumstances. His Honour’s unremarkable observations in relation to the aggregate provision made by the deceased for the appellant cannot sensibly be taken to have impermissibly fettered or otherwise infected his assessment of the dependency issues raised by the appeal from the Authority’s determination. They disclose no error.
4. Nor is it correct, as the appellant contends, that the appellant’s entitlement to one-third of the deceased’s estate formed no basis for the Authority’s determination. As the third respondent submits, this aspect of the matter was conceded by the appellant before the primary judge to be something it was open for the Authority to consider, and the Authority did so (see the Authority’s determination at paragraphs 5-7 on page 11). The fact that this may not have been the primary basis of the Authority’s determination (as the appellant contends in reply) is not to the point.
5. For these reasons ground three also fails.

## Ground four: Was there a failure to give proper, genuine and realistic consideration to whether the appellant was a “dependent” [sic] for the purposes of s 10 of the SIS Act?

1. The appellant’s final ground of appeal is that the primary judge erred in not finding that the Authority failed to give “proper, genuine and realistic consideration” to whether she came within the inclusive definition of “dependent” (the statutory language is “dependant”) in s 10 of the SIS Act. It is said that the Authority confined its examination to whether the appellant was the spouse of the deceased, in an interdependency relationship with him, or financially dependent on him, without considering the ordinary and natural meaning of the term which includes emotional, physical and other forms of dependency. It is submitted that the primary judge should have corrected this error.
2. The appellant emphasises that the term “dependent” (“dependant”) is inclusively defined in
s 10 of the SIS Act, and “… in relation to a person, *includes* the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship.” Although the appellant accepts that the Authority recognised that the definition was not exclusive and took its natural meaning (see page 16 of its determination), she submits that the Authority should have adopted a broad construction of “dependant”, not limited to financial dependence. Although the appellant accepts that whether or not a person is wholly or partly dependent on another is a question of fact, she submits that dependency in the form of financial, emotional, physical, educational, social or sexual dependency (or reliance) may be sufficient to establish dependency. She contends that given the inclusive nature of “dependant”, the Authority and the primary judge were wrong to restrict their examination of whether she was a dependant to three categories of dependence without considering the ordinary and natural meaning of the term which is more extensive. The appellant contends also that it was misguided for the primary judge to conclude that to consider emotional dependence would be “manifestly unworkable”, and that given the inclusive nature of the term “dependant”, it is for the legislature, not the court, to confine its ambit.
3. The appellant refers, in support of her argument that a wider construction should have been given to the term “dependant”, to the fact that she was living rent free with the deceased whilst being in a close personal relationship with him and providing emotional support. She says that these facts should have been sufficient to establish that she was a dependant of the deceased within the ordinary meaning of the word.
4. There are various difficulties with this ground of appeal. Accepting (contrary to the submissions of the third respondent) that this argument was at least raised to some extent before the primary judge, as the Authority’s determination makes plain the reality is that the appellant made her claim on the basis that she was the de facto spouse of the deceased member at the date of his death, or in an interdependency relationship with the deceased, and that she was a partial financial dependant of the deceased (see, in particular, pages 5 and 10 of the Authority’s determination). As the third respondent submits, it would seem that the Authority was not asked to consider any broader form of dependency other than financial dependency, and the appellant does not contend otherwise.
5. I accept that it was only before the primary judge, after the Authority had made its determination, that the appellant raised the issue of emotional dependency, or any other broader basis for her claim in the context of the inclusive definition of dependant in s 10 of the SIS Act. The Authority, entirely properly, conducted its assessment on the basis of the claim made and within the parameters which delineated that claim. Had a wider claim been advanced before the Authority, which extended to emotional, physical, educational, social or sexual dependence (or indeed some further form of dependence) in the form identified by the appellant in some of the authorities to which she referred, further investigation of the relevant circumstances would no doubt have been conducted. But this was not how the appellant pressed her complaint.
6. Pursuant to s 1057 of the Corporations Act, the appeal from the Authority’s determination to the primary judge was on the basis that the Authority’s reasons disclosed errors of law. There could be no error of law in the Authority discharging its statutory function on the basis of the case presented to it by the appellant. It cannot be said that it was erroneous for the primary judge to have determined the appeal from the Authority on the basis of the matters argued before him concerning the Authority’s approach to the complaint which was presented to it. Nor can his Honour be said to have fallen into error by not determining the appeal on some other basis which was not argued or developed in any coherent way before the Authority.
7. These considerations would be enough to dispose of ground four. However, it may also be observed that, as the primary judge accepted, the Authority adopted no narrow construction of “dependant” for the purposes of s 10 of the SIS Act in any event. The Authority expressly took into account matters such as whether the appellant was financially dependent upon the deceased before forming a view that the appellant was not a dependant of the deceased. As his Honour observed, that approach is consistent with the broader definition of “dependant” urged on the Court by the appellant. To complain that the Authority failed to adopt a sufficiently wide construction of “dependant” because it did not consider other forms of dependency as well as financial dependency which were not an identified part of the appellant’s case but of which the Authority had at least a general awareness in any event, may fairly be said to amount to a complaint about the merits of the conclusion reached by the Authority. No complaint of this kind could properly have been made before the primary judge, and to the extent it was, his Honour was correct to dismiss it.
8. As to the question of whether the definition of “dependant” in s 10 of the SIS Act should properly be taken to extend to a further category of emotional and other dependence as contended for by the appellant, it is unnecessary in the present circumstances to come to any definitive conclusion about this in order to resolve the appeal. There is, however, much to commend the views expressed by the primary judge at paragraphs [152]-[153] of his reasons that such an extended definition of “dependant”, untethered to any complementary definition in the relevant Trust Deed, may be problematic.
9. For these reasons ground four also fails.

# DISPOSITION

1. Each of the grounds of appeal having failed there will be an order dismissing the appeal. The appellant should pay the third respondent’s costs of the appeal as agreed or assessed.
2. By its submitting notice dated 29 April 2022 the Authority has sought to be heard on the question of costs, although it is not entirely clear why this may be. There will be an order for any application concerning the Authority’s entitlement to its costs of this appeal to be made within 14 days.

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| I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McEvoy. |

Associate:

Dated: 29 November 2022