

CASES AND TRIBUNAL DECISIONS

Indemnity Costs and section 52(7)(d) of the SIS Act

Carroll v United Super Pty Ltd (No. 2) [2018] NSWSC 1101 (18 July 2018)

[Link to decision](#)

The matter of *Carroll v United Super*¹ returned before Slattery J in relation to Mr Carroll's application the insurer and trustee pay indemnity costs of the proceedings. Mr Carroll claimed an entitlement to indemnity costs based on:

- two Offers of Compromise served on the defendants dated 5 February 2015 and 5 October 2016; and
- an argument the trustee was obliged under s.52(7)(d) of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) to commence the proceedings against the insurer, for the benefit of the plaintiff, as it was required to "do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has reasonable prospects of success".

The trustee and insurer opposed Mr Carroll's cost application. The defendants also argued that Mr Carroll should be disentitled to recovering part of his costs due to his conduct in the proceedings.

Offers of Compromise

His Honour considered the late service of Mr Carroll's evidence was relevant to an application based on the Offers of Compromise.

It was noted Mr Carroll served an affidavit outlining his "various work related activities" on 4 November 2016. This was (effectively) the day before the commencement of the hearing. The affidavit was the first time Mr Carroll had explained the nature of his commercial activities and his claimed limitations in conducting those activities. His Honour found:

Without the 4 November 2016 affidavit, the defendants were not able to adequately assess the real strengths and weaknesses of the plaintiff's case, and consequently, their own prospects of success in the proceedings.

His Honour found the plaintiff was not entitled to indemnity costs on either Offer of Compromise.

SIS Act Claim

The Statement of Claim filed in the proceedings included an allegation the trustee had failed "*to do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success: Section 52(7)(d) [SIS Act]*". Although this allegation against the trustee was not abandoned, it was not advanced by Mr Carroll in the main hearing.

Mr Carroll's argument against the Trustee was it had failed to commence proceedings against the insurer on his behalf, despite requesting the trustee do so on two occasions. As a consequence, Mr Carroll claimed he was required to commence the proceedings in his name and the Trustee ought to bear the costs of the proceedings on an indemnity basis.

¹*Carroll v United Super Pty Ltd [2018] NSWSC 403*