



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Wilson v Chan & Naylor Parramatta Pty Ltd [2016] NSWCATCD 20
Hearing dates:	19 January 2016
Decision date:	05 April 2016
Jurisdiction:	Consumer and Commercial Division
Before:	P Boyce, Senior Member
Decision:	The application is dismissed
Catchwords:	Limitation period in contract and tort, cause of action, exercise of due care and skill in provision of supply of accounting services
Legislation Cited:	Consumer Claims Act 1998 Competition and Consumer Act 2010 (Cwlth) Australian Consumer Law
Cases Cited:	Fairey Australasia Pty Ltd v Joyce and Another (1981) 2 NSWLR 314 Read v Brown (1882) 22 QBD 12, Cooke v Gill (1) 24 WR 710 Gibbs v Guild (1882) 9 QBD 59
Category:	Principal judgment
Parties:	Applicant: Stephen Wilson Respondent: Chan & Naylor Parramatta as trustee for Chan & Naylor Parramatta Trust
Representation:	Applicant: Litigant in Person Respondent: Clive Nelson (Director)
File Number(s):	GEN 15/59854
Publication restriction:	Unrestricted

REASONS FOR DECISION

The application

1 The applicant lodged an application with the Tribunal on 2 November 2015 seeking an

order that the respondent pay to the applicant the amount of \$40,000 being damages the applicant alleges that he suffered as a result of the respondent's negligence and breach of contract in providing financial advice.

- 2 The applicant is a financial adviser but brings this application in his own capacity as a consumer.
- 3 The respondent is a supplier of accounting services.

The hearing

- 4 On 12 November 2015 the Tribunal gave directions that the applicant file and serve the documents on which he intended to rely by 3 December 2015. The Applicant filed his documents on 1 and 15 December 2015 and 18 January 2016. The Tribunal grants leave to file the further documents filed on 15 December 2015. The applicant filed an application for leave to amend his application and further submissions on 8 January 2016. The effect of the proposed amendment was to add an additional respondent, Clive Nelson.
- 5 The directions of 12 November 2015 also included a direction to the respondent to file and serve the documents on which it relied by 24 December 2015, extended to 15 January 2016 on 4 January 2016. The respondent filed its documents on 15 January 2016.
- 6 The hearing took place at the Liverpool hearing rooms of NCAT on 19 January 2016.
- 7 At the hearing the applicant represented himself and Clive Nelson appeared as a director of the respondent.
- 8 The applicant sought leave to join Mr Nelson as an additional respondent and to rely on the documents that he filed on 18 January 2016.
- 9 Mr Nelson objected to leave being granted to join him as additional respondent and the tender of the documents filed on 18 January 2016.
- 10 The Tribunal has considered the application for leave to join Mr Nelson.
- 11 The applicant's late application to join Mr Nelson does not permit Mr Nelson to properly answer the allegations made against him. The direction made on 12 November 2015 gave the parties the opportunity to file and serve their respective documents on which they intend to rely. Importantly, the applicant bears the onus of proving his case and the respondent needs to be made aware of the case against it. To grant leave to the applicant to join Mr Nelson would be to deny Mr Nelson procedural fairness. The application for leave to add Mr Nelson as a respondent is accordingly refused.
- 12 The documents filed by the applicant on the day before the hearing date is filed well beyond the allowed time in the directions. Tribunal Direction 6 of 12 November 2015 warns the applicant that documents filed out of time may not be relied upon unless leave is granted. By the late filing of those documents the respondent is denied the opportunity to consider the material raised and provide a considered response. Accordingly, the application for leave to file and serve those documents out of time is

refused.

- 13 The applicant tendered his documents and they were respectively admitted as:
- (1) Exhibits 1- Statutory Declaration of Steven Wilson
 - (2) Exhibit 2-Statutory Declaration of Gerard Mendonca
 - (3) Exhibit 3- Statutory Declaration of Skye Wilson
- 14 The applicant, Mr Mendonca and Ms Wilson gave sworn and oral evidence and were cross examined by Mr Nelson.
- 15 Mr Nelson gave affirmed evidence on behalf of the respondent and was cross examined by Mr Wilson.
- 16 The respondent tendered documents and they were respectively admitted as:
- (1) Exhibit A-Affidavit of Clive Nelson dated 14 January 2016;
 - (2) Exhibit B-Affidavit of Kenneth William Raiss dated 14 January 2016.

Jurisdiction – generally

- 17 The cause of action arose before 1 November 2015 and as such the provisions of the *Consumer Claims Act 1998* (“CCA”) apply.
- 18 The Tribunal has jurisdiction to determine a consumer claim pursuant to the *Consumer Claims Act 1998*.
- 19 A consumer is defined pursuant to s 3 of the CCA as including a natural person to whom a supplier has supplied goods or services.
- 20 Any consumer may apply to the Tribunal for a determination of a consumer claim, pursuant to s 6 of the Act.
- 21 A consumer claim is defined in s 3A of the Act, as follows:
- (1) For the purposes of this Act, a consumer claim is:
 - (a) a claim by a consumer for the payment of a specified sum of money, or
 - (b) a claim by a consumer for the supply of specified services, or
 - (c) a claim by a consumer for relief from payment of a specified sum of money, or
 - (d) a claim by a consumer for the delivery, return or replacement of specified goods or goods of a specified description, or
 - (e) a claim by a consumer for a combination of two or more of the remedies referred to in paragraphs (a)–(d),that arises from a supply of goods or services by a supplier to the consumer, whether under a contract or not, or that arises under a contract that is collateral to a contract for the supply of goods or services.
 - (2) For the avoidance of doubt, a reference in this Act to a consumer claim includes a reference to a claim by a consumer against a supplier (for example, a manufacturer or wholesaler) who is not the direct supplier of goods or services to the consumer if the claim arises from or in connection with the supply of those goods or services by the direct supplier to the consumer.
- 22 Section 3 of the Act defines a supply as follows:
- supply:**
- (a) in relation to goods, includes supply goods by way of a contract for the sale,

exchange, lease, hire or hire-purchase of goods or an alleged contract for the sale, exchange, lease, hire or hire-purchase of goods, and

(b) in relation to services, includes provide, grant or render services for valuable consideration under a contract or for valuable consideration claimed to have been agreed to under an alleged contract.

23 Section 3 of the Act defines services as follows:

services includes any rights (including rights in relation to, and interests in, property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce and, without limiting the generality of the foregoing, includes:

(a) the performance of work (including work of a professional nature), whether with or without the supply of goods,

(b) the provision of gas or electricity or the provision of any other form of energy,

(c) the provision, or the making available for use, of facilities for amusement, entertainment, recreation or instruction,

(d) the letting of premises for vacation or recreational purposes,

(e) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction,

(f) the provision of insurance cover (but not assurance cover in respect of a person's life),

(g) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking,

(h) the provision of credit,

but does not include rights or benefits being the supply of goods or the performance of work under a contract of employment.

The Law

24 The Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010*) ("ACL") provides a guarantee, that:

In the supply of services

S60. If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

25 S236 of the ACL provides that a person who has suffered damage or loss by the action of another person and that conduct has contravened a provision of Chapter 2 of the ACL (that includes s18) is entitled to recover the amount of loss or damage suffered by the action of the other person.

Entities and people referred to in these Reasons for Decision

26 There are various entities and people referred to in the evidence with similar names but they are unrelated entities. For ease of reference the Tribunal sets out those entities as follows:

Capital Business Solutions Pty Ltd ("CBS") – incorporated by Mr Nelson to acquire the Parramatta accountancy practice of CN and after acquisition changed its name to CNP.

Chan & Naylor Capital Pty Ltd ("CNC") - which is the trustee of C & N Platinum Hybrid Trust ("**CNPHT**") of which Kenneth Raiss is a partner and is used by Mr Raiss as a vehicle to give advice on structure and asset protection strategies.

Chan & Naylor Parramatta Pty Ltd (“CNP”) - the respondent, before it changed its name it was known as Capital Business Solutions Pty Ltd (CBS), Mr Nelson is currently a director and has been since on or about 5 November 2005 when he acquired the Parramatta accounting business from CN.

Chan & Naylor Pty Ltd (“CN”) - an independently owned company, but part of the group of entities of similar names and of which Mr Naylor was a director until 5 November 2005;

Cleary Hall Solicitors (“CHS”) – Queensland solicitors to whom CN referred the applicant to establish the GGSF;

Grey Gum Super Fund (“GGSF”) – established by trust deed dated 12 January 2006 the trustee of which is Rivergum Financial Group Pty Ltd and in which Mr Wilson is a beneficiary.

Grey Gum Property Trust (“GGPT”) the trustees’ of which include Mr Wilson.

Mr Brisbane – an independent contractor providing audit services to CNP.

Mr Naylor - a founding director of the CN.

Mr Nelson – a director of CNP.

Mr Raiss – a partner in the business of CNC.

Mr Wilson – the applicant, a director of RFG, trustee of GGPT and beneficiary of GGSF.

Rivergum Financial Group Pty Ltd (“RFG”) – the trustee of GGSF.

Joint Venture Agreement (“JVA”) – a joint venture agreement between GGPT and GGSF dated 12 January 2006 to acquire assets and for the project, which was defined as in Part 9 of the Schedule to the JVA as “The acquisition, retention and if required, the refurbished renovation of residential properties for capital growth and rental income.

The applicant’s case

- 27 Both the applicant and the respondent filed and served bundles of documents in support of their respective cases.
- 28 All of that material filed has been considered by the Tribunal in relation to the matter, even if it has not been specifically referred to in these reasons.
- 29 The applicant brings this claim against the respondent arising from the advice that he was given in relation accounting and taxation advisory and taxation compliance services he alleges were provided by the respondent. The applicant refers in his evidence to a letter of Engagement from Mr Nelson, but that letter is not produced to the Tribunal.
- 30 He alleges that Mr Nelson referred him to Ken Raiss for financial, taxation advice and compliance advice. The applicant then alleges that the respondent failed to warn him of risks associated with or alternatives to that advice and failed to carry out an adequate and accurate assessment of the applicant’s needs and objectives.
- 31 Mr Raiss referred the applicant to CHS, who at the time were the authors of superannuation strategies that were promoted through the financial services industry, in particular CN.
- 32 CHS provided advice on how to establish the proposed structure by letter of 11 October

2005.

- 33 As a result of the advice given by Mr Raiss the applicant caused a self-managed superannuation scheme to be established, GGSF, by deed dated 12 January 2006. The Deed was drawn by CHS.
- 34 At the same time, GGPT was established by Trust Deed, the date of which is not in evidence before the Tribunal.
- 35 GGPT and GGSF entered into a JVA by agreement dated 12 January 2006. The JVA having also been drawn by CHS.
- 36 On 22 August 2006 the trustees of GGPT entered into a contract to purchase land in Queensland for a price of \$220,000 ("Land").
- 37 On 25 August 2006 the trustees of GGPT entered into a contract for the construction of residential premises on the Land for a price of \$179,000. (Land and residential premises together referred to as "Premises")
- 38 On completion of the Premises they were let to third parties as residential premises.
- 39 The rent received from the Premises was deposited to an account and used to service a loan for the purchase of the land and building and secured on the title of the Premises
- 40 As an annexure to Exhibit 1, the applicant adduces an advice prepared by Moore Stephens, Accountants and Advisors dated 5 March 2014 ("MS Report"). It is noted that the advice is prepared and is confirmed that the author confirms that the Expert Witness Code of Conduct in Schedule 7 of the Unfirm Civil Procedure Rules has been read and understood. The Tribunal notes that it does not refer to the Tribunal's President's Procedural Direction 3 as to expert evidence. The author of the expert report was not present at the hearing. Notwithstanding that it is not in the correct form and is unchallenged by the lack of opportunity to cross examine the author, the Tribunal accepts the report as expert evidence.
- 41 The MS Report usefully sets out a succinct summary of the events that followed the establishment of GGSF, GGPT, JVA and acquisition of the Premises.
- 42 Chan & Naylor provided a non-qualified audit report for GGSF for the financial years ended 30 June 2006 to 30 June 2012.
- 43 During that period CNP provided services to the applicant including:
- (1) Promotion of CHS superannuation strategy;
 - (2) Assistance with implementation of CHS advice;
 - (3) Preparation of annual financial statement and income tax returns for GGSF and GGPT;
 - (4) Annual audit of GGSF by Hank Brisbane;
 - (5) Preparation of individual tax returns for the applicant
- 44 MS Report sets out the responsibilities that respondent failed to fulfil as follows:
- (1) That it did not provide the respondent with alternative strategies when he sought advice in 2006.

- (2) By promoting CHS strategy to the respondent the respondent failed to address the on-going need for funding needs of the structure and the financial risks associated with negative gearing;
 - (3) The respondent was not made aware of the subsequent funding requirements in the JVA in order to maintain compliance with the JVA at the time of entering into the JVA nor during the period 2006 to 2012;
 - (4) The respondent only became aware of the need in 2013 when advised by the respondent;
 - (5) The applicant misunderstood the advice of the respondent as to who the owner of the bank account used to collect rent and meet interest obligations was. Resulting in an accumulated debt accruing during that time.
 - (6) To address potential superannuation compliance risks of the proposed strategy including the responsibility of the respondent to ensure that the applicant understood the potential outcome of acting contrary to the ATO's view of the the implication of section 71 of the SISA on a contractual funding arrangement by a superannuation fund with a related party;
 - (7) The report states that Hank Brisbane, as auditor, has not addressed the compliance issues with the applicant. Despite the respondents view that the ATO's interpretation of the SISA is incorrect they have a responsibility to address the risk of acting contrary to the ATO's view and the potential tax penalty;
 - (8) As accountant and advisors to the applicant the respondent did not address management of financial issues necessary in a reasonably complex arrangement such as the JVA;
- 45 The MS Report further identifies that estimated loss on the investment property is \$121,729.56 and a potential tax liability of \$149,886.27 if GGSF is deemed to be a non-complying superannuation fund.
- 46 It is the applicants claim that the respondent should compensate him for loss of \$39,298.00 made up as follow, his quarter share of the:
- (1) cost of advice from Reid Commercial Law in the amount of \$375.00
 - (2) cost of the MS Report in the amount of \$1,375;
 - (3) actual loss suffered as a result of loss on sale of the Premises when sold by the Trustees (of which the applicant is one) of GGPT for a sale price of \$410,000. Less an amount of the secured debt at the time of sale of GGSF of \$240,192.32 and the balance being \$169,807.68. With the amount of the original debt being \$320,000 less the balance of the proceeds of sale of \$169,807.68 and the balance of the loss being \$150,192.32. That amount is the loss suffered by GGSF and the 4 beneficiaries share being \$37,548 each.

The respondent's case

- 47 The respondent evidence and submissions are that it is not liable as alleged by the applicant.
- 48 Clive Nelson is a director of CNP.
- 49 CNP was established in November 2005.
- 50 Clive Nelson was not and never has been a director of CN.
- 51 The applicant had been a client of CN and his files were transferred from CN to CNP in

about November 2005.

- 52 CNP provided to the applicant and his various entities including GGPT and GGSF accounting and auditing services. Within the accounting practice CNP had client managers. The applicant's client manager was Stephanie Yu until April 2006 and she was replaced with Gerard Mendoca who remained as his client manager until August 2012 when he was replaced by Paul Vanderlight.
- 53 In February 2013 Paul Vanderlight identified certain irregularities in the activities of the applicant's entities including:
- (1) GGSF paying interest on loans held in the names of the applicant and his family. The loans related to the unit holding in the trust GGPT that owned the Premises;
 - (2) GGPT was not paying the GGSF its entitlements as per the JVA between the two entities.
- 54 As a result, at a meeting between Mr Nelson and the applicant on 26 March 2013 CNP calculated that the applicant and three family members (the registered proprietors of the Premises owed GGSF \$135,787.00). the applicant now calculates that amount to be \$150,192.32.
- 55 Mr Nelson submits that:
- (1) That Mr Brisbane during the period 2006 until 2012 audited GGSF and qualified his audit with "no opinion is made on the investment strategy or its appropriateness to the fund members"
 - (2) That the applicant cannot demonstrate that there has been any actual loss or damage, as:
 - (a) The applicant and other members of his family in the scheme have had the benefit of the money they ought to have been paying in interest under the JVA;
 - (b) GGPT has had the benefit of entitlements due to GGSF, that it should not have had;
 - (c) GGSF has paid interest it should not have and had no benefit to the entitlements;
 - (d) There should be a reimbursement to GGSF to the JVA and should be amended to reflect the actual arrangement;
 - (e) The ATO has not issued any penalty notices or rectification is not necessary;
 - (f) There are no adverse tax consequences.
 - (3) CNP has not received any commissions from CHS or CNC in relation to the joint venture agreement.

Jurisdiction –Was the application lodged within time?

- 56 Section 7 of the CCA grants the Tribunal jurisdiction in respect of consumer claims. It includes, relevantly, jurisdiction to determine matters where the goods have been supplied within New South Wales. Section 7(4) of the Act deals with the time limitation periods in relation to the Tribunal's jurisdiction. A claim must be made within 3 years of the date of the cause of action accruing.

57 Section 7(4) of the Act states as follows:

(4) Limitation periods

The Tribunal does not have jurisdiction to hear and determine a consumer claim if any of the following apply:

(a) the cause of action giving rise to the claim first accrued more than 3 years before the date on which the claim is lodged,

(b) the goods or services to which the claim relates were supplied (or, if made in instalments, were last supplied) to the claimant more than 10 years before the date on which the claim is lodged.

58 A consumer claim is not limited to a contractual claim; it can include a claim 'arising out of' the contract, whether the cause of action is one which arises out of tort, contract or a legislative provision. *Fairey Australasia Pty Ltd v Joyce and Another* (1981) 2 NSWLR 314.

59 It is to be noted that Yeldham J in *Fairey* was of the view that a distinction between the underlying cause of action was an 'irrelevant consideration'. However, the relevant law being considered in *Fairey* was the *Consumer Claims Tribunal Act 1974*, the predecessor of the *Consumer Claims Act 1998 (NSW)*. Under the legislation applying to this application, the nature of the cause of action is a relevant consideration in relation to the limitation period stipulated pursuant to s 7(4) of the Act.

60 The applicant argues that the cause of action accrued when he became aware that the financial scheme he entered had not been correctly established or operated. He first became aware of that deficiency at the earliest on or about 18 February 2013 and then during a meeting with Mr Nelson on or about 26 March 2013 and has lodged his application within the required time period for the following reasons:

- (1) The cause of action relied upon by the applicant is that the respondent acted negligently;
- (2) The cause of action accrued on the day respondent advised the applicant of the deficiency at the earliest on 18 February 2013 and at the meeting held on 26 March 2013 ;

61 The applicant relies upon an assertion that the respondent has breached the contract and that the respondent breached its duty of care to the applicant and that the claim is also in negligence.

Cause of action

62 A cause of action has been defined as being 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved'. *Read v Brown* (1882) 22 QBD 12, approving the earlier decision in *Cooke v Gill* (1) 24 WR 710.

63 If the cause of action is one for breach of contract, then the date cause of action will accrue is the date of the breach of the contract, as opposed to when the resulting damage is suffered. *Gibbs v Guild* (1882) 9 QBD 59.

64 The applicant lodged his application with the Tribunal on 2 November 2015.

- 65 In the case of a cause of an action in tort, such as negligence, the cause of action accrues when the damage is discovered.
- 66 The particulars of the claim identified by the applicant in his application are also in negligence, alleging that the respondent breached its duty of care to the applicant.

Findings

- 67 The applicant bears the onus of proving his case on the balance of probabilities.
- 68 It is the applicant's contention that in relation to his claim in contract his notes of a meeting with the Mr Nelson on 26 March 2013 at paragraph 12 support his claim that there was breach of contract and that it was a fundamental term of his contract with the respondent to establish the scheme that he should have been warned of any issues such as that "it was concerning Chan and Naylor had never advised from the beginning that the Grey Gum Property Trust would develop a debt arising out of the structure recommended" and at paragraph 18 he asserts that "from the beginning no advice (written or verbal) was received from either Ken Riass or Chan and Naylor that a personal contributions from the members would have to be made under the recommended structure we were advised to use only the funds in our super".
- 69 The applicant asserts that he was not in a position to know that the respondent had breached its contract with the applicant and breached its duty of care until early 2013. That is, if the claim were to lie only in contract then the date that the applicant asserts that he instructed the respondent before November 2005 to seek advice as to his proposed scheme. The date the cause of action accrued would have then been in or about October 2005 As such the time for bringing the claim would be barred as a consumer claim as it is well beyond being within three years of bringing the claim.
- 70 If the applicant maintains his claim in contract then the Tribunal is not satisfied that the claim has been brought within three years of the date the cause of action accrued, that is the date of the contract to provide the advice to establish the scheme, before November 2005.
- 71 In any case, the advice to establish the scheme was not given by the respondent but by Ken Riass of CNC and also on the advice of CHS. The respondent is an entity that was created on 5 November 2005 and that date is after the advice given by Ken Riass and CHS.
- 72 In the claim in tort the applicant The Tribunal is satisfied of the following matters in relation to jurisdiction, on the balance of probabilities:
- (1) The applicant is a consumer, as defined in s 3 of the Act;
 - (2) The respondent is a supplier, as defined in s 3 of the Act;
 - (3) The claim before the Tribunal is a consumer claim, as defined in s 3A of the Act;
 - (4) The goods and services were supplied in New South Wales;
 - (5) The monetary jurisdictional limit of the Tribunal at the time the claim was lodged was \$40,000.00.

- (6) The date the cause of action in tort first accrued was on 18 February 2013, being the date the applicant was first aware of the potential losses that he would suffer as a result of the respondent's alleged failure to advise him. The applicant therefore had a period of three years from that date in which to lodge their claim against the respondent. The applicant lodged his claim on 2 November 2015.
 - (7) The application has therefore been lodged within the time limit stipulated in section 7(4)(a) of the Act.
 - (8) The Tribunal is satisfied that the applicants claim in tort has been brought in time.
- 73 As to that claim, the applicant alleges in his application that the respondent:
- (1) 'Was my accountant;
 - (2) Had an agreement with me to provide me with taxation and accounting services;
 - (3) Had an agreement with me to provide me with advice and implement that advice lawfully;
 - (4) Gave me verbal financial advice even though the respondent was not licensed to give me financial advice;
 - (5) Failed to do an adequate and accurate assessment of my needs and objectives and the advice provided was not appropriate for my circumstances;
 - (6) Failed to warn me about the risks associated with their advice;
 - (7) [Through Clive Nelson] gave me advice to backdate documents but not to disclose unlawful advice. Implementation of advice and audit was unlawful;
 - (8) Gave me advice that was of sole financial benefit to respondent;
 - (9) Owed the applicant a duty of care;
 - (10) Breached that duty of care;
 - (11) Caused the applicant to lose \$40,000.'
- 74 To establish whether the respondent failed to comply with the Australian Consumer Law in providing taxation and accounting services to the applicant the Tribunal has considered the expert evidence of Moore Stephens contained in its report of 4 March 2014. That report acknowledges that it has been prepared in accordance with the Expert Witness Code of Conduct, Schedule 7 of the Uniform Civil Procedure Rules although it has not been prepared in accordance with the Procedural Direction 3 of the President of NCAT. Regardless of the author failing to comply with the Tribunal's directions in regard to expert reports, the Tribunal accepts the report as an expert report for the assistance of the Tribunal making a determination in this application.
- 75 The MS Report refers to an Appendix A, however, the documents listed in Appendix A are not adduced in the evidence of the applicant. Appendix A refers to an Email dated 20.10.2005 at 12.14pm from Ken Raiss to Mr Wilson. The applicant in his notes of the meeting of 26 March 2013 acknowledges that Mr Raiss was the person who gave the advice in relation to the establishment of the scheme promoted by CHS.
- 76 That advice predated the incorporation of the respondent.
- 77 Throughout the MS Report, it refers to "Chan & Naylor". It does not define the entity. On the evidence before the Tribunal, the respondent is a distinct and separate entity.

78 Importantly that report states in its Executive Summary that :

“it is our opinion that Chan & Naylor has failed to provide competent accounting services and in particular has not provided the level of advice and analysis that would be expected in recommending such a strategy as Wilson’s advisor, and later in not highlighting the likely breach of the Superannuation Industry (Supervision) Act 1993 (SISA) as auditor of the Grey Gum Superannuation Fund (the SMSF) [underlining added for emphasis]”.

79 The MS Report does not distinguish between the various “Chan & Naylor” entities. The author of the report was not available for cross examination during the hearing. It is the respondent’s contention that Mr Raiss at the time of the advice being given in relation to the establishment of the scheme was employed by CNH which is a distinct and separate entity from the respondent. Mr Raiss’s evidence (Exhibit B) is that he is a partner of CNP. He is not a partner of the respondent although he is a partner and director of other related Chan & Naylor businesses. The Tribunal is satisfied that Mr Raiss and CNP are independent of and distinct of the respondent.

80 The MS Report then contends that “Chan & Naylor” “not highlighting” the breach of SISA “as auditor of” GGSF. The evidence before the Tribunal is that between the years 2006 and 2012 and at the time the defect in the compliance with SISA was identified the auditor of GGSF was “H C Brisbane” who signed the independent audit reports on 20 November 2006, 31 August 2008, 4 September 2008, 15 September 2009, 11 September 2010, 5 March 2012 and 21 November 2012 for the financial years ending 30 June 2006, 2007, 2008, 2009, 2010, 2011 and 2012 respectively. Each of the certificates given by Mr Brisbane certifies that “the trustees of Grey Gum Superannuation Fund have in all material respects, with the requirements of the SISA or the SISR specified above for the [respective year]”.

81 Mr Nelson’s evidence is that Mr Brisbane is a contractor used by the respondent to carry out independent audits of its self-managed superannuation fund clients. The Tribunal is satisfied that the evidence before it supports the contention that Mr Brisbane is an independent contractor and not an employee of the respondent.

82 The MS Report fails in distinguishing the various entities that it broadly groups together as “Chan & Naylor”. Although there is finding in the report that Chan & Naylor has failed to provide competent accounting services by not identifying the likely breach of SISA it identifies the “Chan & Naylor” as the auditor of GGSF. Those audit reports were certified by Mr Brisbane who the Tribunal accepts on the evidence before it is an independent contractor.

83 The respondent is providing accounting services to the applicant and was entitled to and did rely on the certification of Mr Brisbane. The applicant has not satisfied the Tribunal that the extent of the respondent’s retainer was more than providing annual accounting services and tax return lodgement.

84 Any liability for giving wrong advice in regard to the compliance with SISA rested with other than the respondent. Accordingly, the Tribunal cannot make the finding that the applicant urges it to do against the respondent.

85 On the evidence, the Tribunal is unable to make a finding that the respondent failed to

comply with its obligation to supply its services with all due care and skill or in breach of its duty of care.

Orders

86 The application is therefore dismissed.

P Boyce

Senior Member

Civil and Administrative Tribunal of NSW

5 April 2016

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 28 April 2016