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THE CLOCK IS TICKING

Aggrieved investors still have time to sue

David Huggins
Analysis

In 2009 and 2010, a number of agribusiness schemes collapsed, the most well known of these being Great Southern, Timbercorp, Willmott Forests and the Rewards Group.

Investors almost always borrowed to invest. That means they have been left to pay back, in some cases, very big loans.

Some investors have joined class actions to recover losses or get out of their loans. These actions have either been a complete failure or will only compensate investors for a very small part of their loss.

The problem with class actions is that they only focus on issues that apply to every person who invested in a scheme rather than making a claim based on the particular circumstances of each investor. These circumstances fall into three broad groups.

- The investment was not appropriate. These schemes had a very high level of risk derived from multiple sources. For this reason alone they were not an appropriate investment for most investors. In these circumstances, some investors may have a claim against their adviser on the basis that they should never have been told to invest in these schemes.
- The investor received an inadequate statement of advice from the adviser: Usually this involves an SoA that did not properly set out how these schemes worked, particularly the risks associated with them. Alternatively, some investors didn't receive an SoA at all or they received one after they had made the investment. Investors who fall within this group may be able to make a claim against their adviser on the basis that if their adviser had provided them with a properly drafted SoA at the correct time they would not have made the investment.
- The adviser arranged the finance to make an agribusiness investment: When the adviser did this they were acting as the agent of the lender and the lender is therefore responsible for the adviser's actions. If the adviser didn't comply with the law, the lender may not be able to enforce the loan.

These loans were sometimes transferred by the original lender to a bank. Whether or not the loan has been transferred doesn't make any difference. If the loan should not have been entered, a bank taking on that loan will not be able to enforce it.

Investors have held off making claims because they hoped to recover losses through a class action or hoped the lenders would release them from their loans. Sadly, this has proved to be a false hope.

The class actions have not succeeded and lenders are insisting on being repaid in full with interest.

So investors need to consider whether they have a claim against their adviser and whether they can argue that their loans are not enforceable.

The right to make a claim will end six years after the scheme went into administration.

Depending on the scheme, the time in which to make a claim for compensation or to challenge the enforceability of a loan will start running out from April.

David Huggins is a lawyer who specialises in resolving disputes about poor financial advice

CANSTAR **5-star rated** superannuation products for workers in the career development, first-homeloan stage of life

Product Name	Term deposits available	Total No. of investment funds	Direct share investment available	Financial advice available	Free investment switches	Income protection insurance available	Update details online	Mobile app available	Fees (as at Sept 1, 2014) Member fee ($)	Admin fees
ANZ Smart Choice Super	N	9	N	Y	Unlimited	Y	Y	Y	nil	$50
Bendigo Smart Start Super	N	11	N	Y	Unlimited	Y	Y	Y	98	Built into member fee
ClubPlus Super Personal Division	Y	7	Y	Y	Unlimited	Y	Y	N	93.6	0.1%
EISS Super	Y	5	Y	Y	Unlimited	Y	Y	N	nil	nil
First State Personal Super	N	12	N	Y	1	Y	Y	N	52	0.15%
Local Government Super Accumulation Scheme	N	11	N	Y	nil	Y	Y	N	67.6	0.39%
Sunsuper Solutions	N	21	N	Y	Unlimited	Y	Y	N	65	0.05%

SOURCE: CANSTAR

Why it really is different for women

Justine Davies

In the opening session of the recent Association of Superannuation Funds of Australia conference, the chief executive of QSuper, Rosemary Vilgan, said success for super funds is well-funded members, happy that they can rely on the industry.

On that basis, women who plan to take any time off work for family duties are behind the eight ball from day one.

Take the case of someone who starts work at 21 on a salary of $50,000 and plans to work until 60. This person could expect to have about $1 million in super by the time they retire.

That's based on Canstar's calculations of the current contribution rate of 9.5 per cent, an investment return of 8 per cent a year after fees and today's taxes.

If that person decided to take, say three years off work from 30 to 33, their super nest egg could be reduced by more than $50,000 — all other things being equal.

Five years out of the workforce could result in a super hit of around $120,000 by age 60.

A decade of non-employment, from age 30 to 40, could equate to around $250,000.

Remember, that's as well as the loss of income, rising household expenses, loss of professional development and many other disadvantages women experience when they take time out of the workforce.

In terms of retirement security for women, it probably doesn't quite meet the definition of a well-funded member, happy that they can rely on the superannuation industry.

ASFA chief executive Pauline Vamos, notes that the super system is not delivering as well as it could for women, with ASFA releasing a White Paper last month that, in part, calls for removing the $450-a-month threshold for the super guarantee, adding super payments to family benefits and allowing employers to contribute more to accounts of women without breaching anti-discrimination legislation.

"We must start making policy changes now, to enhance the superannuation experiences of (women) and ensure they are able to accumulate adequate savings for their retirement," Ms Vamos said.

The bad news for current parents-to-be is that change may not happen in the short term.

There are still ways to salvage your super in the meantime. One of them is by paying attention to fees and returns.

Based on Canstar's recent superannuation star ratings report, even a 0.25 per cent cut in ongoing administration fees can potentially make a difference of $60,000 to the retirement nest egg of a worker on average salary.

And an extra half a percent investment return could add more than $100,000.

The bottom line is that the Government may or may not benefit from making legislative changes to boost super balances for women — but women have a lot to gain by taking an active interest in the meantime.

Justine Davies is finance editor at ratings company Canstar

Excess is taxing but that's no reason not to help

DIY super

Monica Rule

I am surprised by some accountants and auditors who do not do all they can to help their self-managed superannuation fund clients with excess contributions tax (ECT) liabilities.

An SMSF trustee recently approached me because he had received a bill for ECT. It appears his trusted accountant simply told him that there was nothing he could do to reverse the Australian Taxation Office decision and he should pay it.

I am sure there are situations where there is nothing anyone can do when an amount contributed into an SMSF is in excess of the contributions caps, but it was not so in this case.

Do it for you: Take an interest in the super law. Picture: Getty Images

There are often occasions when advisers need to carefully assess all the variables to see whether they should object to tax office assessments of their clients' ECT liability.

There are situations where, if the advisers had been more careful, they would have found there was no tax liability in the first place.

With my particular client I discovered that the SMSF trustee, who is also a member of his SMSF, should not have received the ECT bill because he was aged 66 at the time he made the contribution into his SMSF and he had not satisfied the work test.

To satisfy the work test he needed to have worked 40 hours for 30 consecutive days in that financial year prior to making his contributions. His accountant and the SMSF auditor did not pick this up. Had they realised this they could have advised him to remove the money from his SMSF as it was contributed in error. This is completely legal under the superannuation law.

Because they didn't pick this up, he was left with a tax liability that he now has to resolve with the tax office.

Another SMSF member, who received an ECT bill, also should not have received the tax assessment because the money contributed into her SMSF was in settlement of a personal injury claim. The money should not have been treated as a non-concessional contribution and should not have been counted against her non-concessional contributions caps.

This SMSF member had all the necessary paperwork for the payment to be treated as a personal injury payment under the taxation law but probably forgot to inform her accountant and the auditor of the special classification of her contribution when it was paid into her SMSF.

I guess in this case, both parties are to blame. The SMSF member did not realise she needed to inform her accountant of the personal injury payment so it would not be treated as a non-concessional contribution.

As her adviser did not realise she had received a personal injury payment the adviser did not ask the right questions.

I hope these situations highlight why, if you are a trustee of your SMSF, it pays to take an interest in the law. You may need to stay one step ahead of your advisers. At the very least, keep them informed.

SMSF advisers also need to take care to protect clients' interests and check all options.

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