SUPREME COURT OF QUEENSLAND

CITATION:	*Board of Trustees of the State Public Sector Superannuation Scheme v Gomez* [2018] QCA 67
PARTIES:	**BOARD OF TRUSTEES OF THE STATE PUBLIC SECTOR SUPERANNUATION SCHEME** (appellant/cross-respondent) **v** **EDWIN GOMEZ** (respondent/cross-appellant)
FILE NO/S:	Appeal No 6321 of 2017 SC No 1535 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 98
DELIVERED ON:	13 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2017
JUDGE:	Sofronoff P and Fraser JA and Henry J
ORDERS:	**1. The Board's appeal is dismissed.** **2. Mr Gomez's cross-appeal is dismissed.** **3. If the parties have not reached agreement as to costs within two weeks of judgment:** **(a) within three weeks of judgment the parties will each file and serve written submissions, not exceeding four pages, as to the appropriate costs order(s) in the appeal and cross-appeal;** **(b) within four weeks of judgment the parties may file and serve replies to their opponent's submissions, not exceeding two pages.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – PROCEEDINGS BETWEEN TRUSTEES AND BENEFICIARIES OR THIRD PARTIES – where the respondent/cross-appellant claimed a total and permanent disablement ("TPD") benefit under the superannuation scheme administered by the appellant/cross-respondent – where the claim for a TPD benefit under the superannuation scheme was rejected on the basis the claim did not satisfy the definition of TPD – where the trial judge ordered a reconsideration of the Board's decision to decline payment – whether the decisions made by the Board and the Board's delegate were open on the evidence – whether the Trustee's duty to give properly

informed consideration was met – whether the delegation to the Board's delegate was effective

APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where costs were awarded on the basis that the best outcome the respondent/cross-appellant could achieve was remitter back to the Trustee – where the trial judge considered costs were unnecessarily incurred in preparation for trial

Superannuation (State Public Sector) Act 1990 (Qld)
Superannuation (State Public Sector) Deed 1990 (Qld)
Supreme Court of Queensland Act 1991 (Qld)

Alcoa of Australia Retirement Plan Pty Ltd v Frost (2012) 36 VR 618; [2012] VSCA 238, applied
Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd (2015) 89 NSWLR 412; [2015] NSWCA 104, cited
Chammas v Harwood Nominees Pty Ltd (1993) 7 ANZ Ins Cas 61-175, cited
Edington v Board of Trustees of the State Public Sector Superannuation Scheme [2016] QCA 247, applied
Finch v Telstra Super Pty Ltd (2010) 242 CLR 254; [2010] HCA 36, followed
Gilberg v Maritime Super Pty Ltd [2009] NSWCA 325, applied
Hannover Life Re of Australasia Ltd v Colella (2014) 47 VR 1; [2014] VSCA 205, applied
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Jones v United Super Pty Ltd [2016] NSWSC 1551, cited
McLean Bros & Rigg Ltd v Grice (1906) 4 CLR 835; [1906] HCA 1, cited
Repatriation Commission v Hill (2005) 142 FCR 88; [2005] FCAFC 7, cited
TAL Life Ltd v Shuetrim; Metlife Insurance Ltd v Shuetrim (2016) 91 NSWLR 439; [2016] NSWCA 68, cited
Weissensteiner v The Queen (1993) 178 CLR 217; [1993] HCA 65, cited
Wells v Australian Aviation Underwriting Pool [2004] QCA 43, applied

COUNSEL: L Kelly QC, with R Morton, for the appellant/cross-respondent
G Mullins with R Nichols for the respondent/cross-appellant

SOLICITORS: Mills Oakley for the appellant/cross-respondent
Maurice Blackburn for the respondent/cross-appellant

[1] **SOFRONOFF P:** I agree with the reasons of Henry J and the orders his Honour proposes.

[2] **FRASER JA:** I agree with the reasons for judgment of Henry J and the orders proposed by his Honour.

[3] **HENRY J:** Edwin Gomez injured his shoulder when working as a registered nurse in the intensive care unit of the Princess Alexandra Hospital. He asserts this caused him to become totally and permanently disabled.

[4] If his assertions are correct then, as a member of the State Public Sector Superannuation Scheme, he would be entitled to payment pursuant to his insurance under the scheme in respect of such disablement.

[5] However, the scheme's Board of Trustees ("the Board") does not consider Mr Gomez is totally and permanently disabled, a view manifest in decisions:

1. on 9 January 2013, by the Board's delegate, rejecting Mr Gomez's claim for payment under the Scheme ("the first decision");
2. on 26 June 2014, by the Board, affirming the first decision ("the second decision"); and
3. on 10 June 2016, by the Board's delegate, concluding additional material did not indicate a reasonable possibility of a different result and affirming the refusal to pay a total and permanent disablement benefit ("the third decision").

[6] In a claim before the Supreme Court Mr Gomez challenged all three decisions, seeking declarations that the decisions were void and that he was entitled to a total and permanent disablement benefit.

[7] The learned trial judge concluded there was no utility in determining the challenge to the first decision, about which no complaint is made in this appeal. His Honour rejected the challenge to the second decision but set aside the third decision and ordered Mr Gomez's application for reconsideration of the Board's decision to decline payment be remitted to the Board to be considered according to law.

[8] Before this Court the Board appealed his Honour's finding against it in respect of the third decision. Mr Gomez cross-appealed his Honour's finding against Mr Gomez in respect of the second decision. Mr Gomez also cross-appealed some specific findings as to the validity of a delegation by the Board and orders as to costs. Those components of the appeals are addressed in the following sequence in these reasons:

1. appeal against trial judge's decision re second decision;
2. appeal against trial judge's decision re third decision;
3. appeal re delegation issue;
4. appeal re costs.

Background

[9] Mr Gomez was born and raised in the Philippines. He there completed his degree in Bachelor of Science and Nursing in 1994. He worked there as a Registered Nurse until 2002. He then taught tertiary studies in nursing for 12 months, initially as a clinical instructor to fourth year level nursing students in nursing skills in intensive care and emergency and subsequently as a college instructor to third year level nursing students in theoretical nursing in the clinical area.

[10] Mr Gomez immigrated to Australia in 2003, working predominantly in hospitals in New South Wales and Victoria, before commencing employment as a Registered Nurse in the Intensive Care Unit of the Princess Alexandra Hospital in December 2007.

[11] He was working part-time at the Princess Alexandra Hospital when he sustained a shoulder injury lifting a patient on 2 September 2011. He returned to work on a six-week light work program but aggravated his condition when his shoulder struck an obstacle at work. He has not worked at the Princess Alexandra Hospital since 30 March 2012.

[12] His injury was diagnosed variously as an aggravation of joint osteoarthritis in the right shoulder's acromioclavicular joint[1] and as distal clavicle oedema.[2]

[13] The injury caused significant persistent pain with secondary consequences such as difficulty in sleeping and concentrating. The secondary consequences may also have included some anxiety and depression which gradually eased.[3] The most material consequence of Mr Gomez's injury was an inability to raise his arm above shoulder level or to apply material force with it.

[14] The preponderance of medical opinion was that his symptomatology would likely be relieved by a surgical operation, namely an AC joint excision.[4] Mr Gomez was unwilling to undergo surgery because of his perception of the risk associated with intubation.

[15] His workplace was unable to identify an alternative role to place him in and he was designated as an employee requiring placement. He was given the opportunity of a voluntary redundancy or the opportunity of pursuing transfer opportunities within Queensland Health. On 5 July 2013 Mr Gomez opted for voluntary redundancy.

[16] The medical professionals who assessed him noted some improvement over time in his condition, including the level of distracting pain and secondary problems associated with the injury, although in the absence of surgery it was considered the slow improvement in his shoulder's condition would taper off by the end of 2013[5] and his physical condition would become chronic.[6]

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1 Eg report to QSuper of Dr David Douglas, Consultant Occupational Physician, 11 December 2012, AR Vol 1 p 250; report to WorkCover of 20 February 2012 of Dr Hugh English, Orthopaedic Surgeon, AR Vol 1 pp 257-258.

2 Eg letter of Dr John Scott of 13 April 2012, AR Vol 1 p 265.

3 In a report to Carter Capner of 16 October 2012 Consultant Psychiatrist Dr Eric De Leacy opined that Mr Gomez suffered from an adjustment disorder with anxiety and depressed mood (AR Vol 1 p 338). However, even assuming that was an accurate assessment, it is tolerably clear that Mr Gomez's psychological state improved. Consultant Psychiatrist Dr Ljubisavljevic reported to Suncorp on 23 October 2013 that he had found no evidence of major mental illness, no evidence of depression or anxious mood and no evidence of any identifiable DSM-4 diagnosis (AR Vol 2 pp 413-414). Moreover, in a report dated 23 March 2016 Consultant Psychiatrist Dr Wasim Shaikh noted that while Mr Gomez may once have suffered symptoms reflective of an adjustment disorder in response to pain as well as relationship disturbances, "this no longer appears to be the case". He noted Mr Gomez continued to receive some psychological treatment but that was in relation to coping with his pain rather than for a psychiatric disorder. He opined a diagnosis of adjustment disorder or any other psychiatric condition was not appropriate and that if Mr Gomez had earlier suffered from an adjustment disorder, it was of mild severity and temporary in nature (AR Vol 2 pp 498-499).

4 Eg report of 20 February 2012 of Dr Hugh English, Orthopaedic Surgeon, to WorkCover, AR Vol 1 p 258; letter of Dr John Scott of 13 April 2012, AR Vol 1 p 266; letter of Dr John Scott to WorkCover of 23 April 2012, AR Vol 1 p 268; report of Dr Greg Gillette, Orthopaedic Surgeon dated 29 May 2012 to Carter Capner, AR Vol 1 p 328.

5 Eg report to Suncorp of Consultant Occupational Physican Dr Blair Christian of 18 March 2013, AR Vol 1 p 371.

6 Eg report of Dr David Fitzgerald, Consultant Occupational Physician of 5 February 2013 to the PA Hospital, AR Vol 1 p 346.

[17] By the time of the second and third decisions on his application for payment of total permanent disablement insurance, it appeared, despite the earlier optimism of some examining practitioners, that Mr Gomez was unlikely ever to be physically fit to work as a nurse in intensive care or any area of nursing likely to require physical exertion by the shoulder. The critical issue by then was whether he was reasonably qualified by his nursing education, training and experience to be able to work in some kind of sedentary nursing job.

The different nature of the levels of decision-making

[18] The nature of the Board's decision-making in respect of that critical issue is different from the nature of the court's decision-making. It is prudent at the outset to identify the different nature of those levels of decision-making.

The nature of the decision at Board level

[19] The Board, previously constituted as the Board of Trustees under the *Superannuation (Government and Other Employees) Act* 1988 (Qld), was continued as the QSuper Board pursuant to s 3 *Superannuation (State Public Sector) Act* 1990 (Qld) ("the Act").

[20] Section 10 of the Act provided for the continuation of the State Public Sector Superannuation Fund ("the fund") and s 12 required the establishment by a deed of "a scheme for the provision of superannuation, retirement, provident or other similar benefits payable from the Fund" ("the scheme").

[21] The deed so established is the *Superannuation (State Public Sector) Deed* 1990 ("the deed"). Section 12 thereof charges the Board with the responsibility of administering the scheme. The various powers conferred upon the Board by s 13 of the deed predictably include the power to pay benefits out of the fund to persons entitled thereto. Section 23I of the deed empowers the Board to provide insurance to a member against "disablement", which means "any mental or bodily injury, illness, disease or infirmity".[7]

[22] Section 23I provides that disablement includes disablement, that is "total and permanent disablement" ("TPD"). TPD is defined in s 4 of the deed:

> "***Total and permanent disablement*** means disablement of a degree which, in the opinion of the board after obtaining the advice of not fewer than 2 medical practitioners, is such as to render the member unlikely ever to be able to work again in a job for which the member is reasonably qualified by education, training or experience."

[23] Section 23J of the deed obliges the Board to decide the terms on which disablement insurance is provided. Clause 9.1 of the insurance terms so decided relevantly provides:

> "Upon receipt by the board of proof satisfactory to it that any insured member has…suffered total and permanent disablement while an insured member…the board will, subject to these insurance terms, pay the amount of insurance cover in accordance with clause 4 at the date of…total and permanent disablement of the insured member."[8]

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7 Per s 4 of the deed.

8 According to submissions below, see AR Vol 2 p 531 [23]. A copy of the insurance terms was not in evidence. Neither party submitted the terms were relevant to any issue in this appeal.

[24] The nature of the decision to be made by the Board when a member makes application for payment of TPD insurance is informed by the context that the Board is trustee of an employee superannuation scheme, not merely trustee of a discretionary trust.[9] In *Finch v Telstra Super Pty Ltd*[10] limb (b) of the definition of TPD for Telstra's superannuation trust fund was similar to the definition in this case. The High Court there observed:

> "The Trustee … had a duty to distribute to those who fell within the definition of "Total and Permanent Invalidity" and a duty not to distribute to those who did not. That affected its role in relation to the forming of its opinion under limb (b). Forming that opinion was not a matter of discretionary power to think one thing or the other; it was an ingredient in the performance of a trust duty. That duty was owed to the Members, including the applicant."[11]

In light of that context, the High Court concluded the Board has a duty to give properly informed consideration to an application for payment.[12]

[25] The duty to give properly informed consideration also means it will not always be appropriate for the Board to move directly to refusing an application on the basis the Board has not received proof satisfactory to it[13] that the applicant member is totally and permanently disabled. Of course that may be appropriate where it is apparent the lack of satisfactory proof merely reflects the fact TPD has not been suffered. However, if information of substance received by the Board tends to indicate an application may have merit but is inadequate for the purposes of the Board making a properly informed decision, then the Board's duty is to make reasonable inquiry seeking additional information for the purposes of making a properly informed decision.[14] This duty is considered further below.

[26] Once the Board is able to give properly informed consideration to an application the question for it to decide is whether the applicant member is disabled to a degree which meets the definition of TPD in s 4 of the deed. Thus, the Board must decide whether, in its opinion, the applicant's degree of disablement "is such as to render the member unlikely ever to be able to work again in a job for which the member is reasonably qualified by education, training or experience".[15]

[27] Subject to provision to the contrary, a member's entitlement to payment of a TPD benefit is not lost irrevocably if the member applies once and fails.[16] The circumstances in which the emergence of further information may warrant reconsideration of a previously unsuccessful application was explained in *Gilberg v Maritime Super Pty Ltd*,[17] a decision of the New South Wales Court of Appeal. Hodgson JA, with

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9 *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 270-272.
10 (2010) 242 CLR 254.
11 Ibid 270.
12 Ibid 280-281.
13 Per clause 9.1.
14 *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618, 633, 636.
15 The meaning of these words was discussed by Leeming JA, with whom Beazley P and Emmett AJA agreed, in *TAL Life Ltd v Shuetrim; Metlife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439, 459. His Honour concluded that a real, rather than remote or speculative, chance of returning to work, albeit less than a 50 per cent chance, will preclude a member being "unlikely ever" to return to relevant work. The present case does not turn on whether the words of the definition convey that meaning and it is sufficient to simply refer to the words used in the definition.
16 *Gilbert v Maritime Super Pty Ltd* [2009] NSWCA 325, [22].
17 [2009] NSWCA 325.

whom Allsop P and Campbell JA agreed, observed that in an application to reconsider it is relevant for the Trustee to take into account the trouble and expense involved in obtaining further reports and the circumstance that the previous determination was a purportedly final determination. However, he explained that if the further material provided in support of an application did indicate "a reasonable possibility of a different result", then that would justify the expense of seeking further reports.[18]

[28] That decision related to a different statutory scheme than the present, with more specific requirements regarding the receipt of reports. However, the test it propounds for determining whether to reconsider an application – a reasonable possibility of a different result – should be applied here.[19] That is because it derives logically from the duty to give properly informed consideration to an application. If the further information indicates a reasonable possibility of a different result then, until such time as it is considered in addition to the earlier considered information, it can no longer be said the Board has met its duty of giving properly informed consideration to the application.

The nature of the Court's decision

[29] Mr Gomez's claim filed in the Supreme Court sought declarations that the first, second and third decisions were "void and of no effect pursuant to s 8 of the *Trusts Act* 1973 or pursuant to the general law".[20] Section 8 of the *Trusts Act* 1973 (Qld) confers on persons aggrieved by decisions of trustees a right to apply to the court to review the decision and empowers the court to make such orders "as the circumstances require".

[30] The nature of the declarations sought necessarily required consideration of the validity of the decisions below. They required review of those decisions, not a consideration afresh of the merits of Mr Gomez's applications for a TPD benefit.[21]

[31] Such a review has been said to require some attention to the requirements of natural justice as part of the fairness and reasonableness in dealing with such a case.[22] The learned trial judge adopted the analysis of the relevant authorities by Bond J in *Edington v Board of Trustees of the State Public Sector Superannuation Scheme*,[23] observing:

> "[19] It is open to a Court to set aside [the Trustee's] decision if satisfied that the decision:
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> 1. was not made in good faith; or
> 2. was not made upon a real and genuine consideration of the material before the Trustee; or

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18 Ibid [25]-[27].

19 The Board's counsel did not submit otherwise (eg Appellant's Outline of Argument [33]) and it was in fact the test purportedly applied by the Board's delegate.

20 AR 640. A declaration that Mr Gomez was entitled to a TPD benefit was also sought but only in consequential connection with the declarations sought in respect of the decisions, on the premise the Board should have been decided that Mr Gomez had suffered TPD.

21 It was therefore unremarkable that the trial below proceeded similarly to a hearing of an application for judicial review, by reference to documentary evidence of the information which was before the Board or its delegate as the case may be.

22 *Chammas v Harwood Nominees Pty Ltd* (1993) 7 ANZ Ins Cas 61-175, followed in *Beverley v Tyndall Life Insurance Co Ltd* (1999) 21 WAR 327, pp 333, 338, 347-348.

23 [2015] QSC 245, [54-59] (This topic was not expressly considered in the appeal in that matter: *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2016] QCA 247).

3. was not made in accordance with the purposes for which the power to make a decision was conferred.

[20] Such a conclusion may be inferred by a Court if satisfied the Trustee has come to a conclusion no reasonable person would have come to on the evidence before it or that a real and genuine consideration of the issue required properly informed consideration by the making of relevant inquiries…"[24] (citations omitted)

[32] I respectfully agree with those considerations, although they are inevitably a non-exhaustive list, given the requirements of the circumstances of each case will vary. In any event they are considerations relevant to this court's decision-making in this appeal, it being an appeal by way of rehearing pursuant to r 765(1) *Uniform Civil Procedure Rules* 1999 (Qld).

[33] Bearing the different nature of the decision-making tasks in mind I now turn to the four separate components of the appeals.

Appeal against trial judge's decision re second decision

Information before the Board for the second decision

[34] Subsequent to the first decision of 9 January 2013 by the Board's delegate, Mr Gomez's solicitors by letter of 10 February 2014 sought a review of the decision, enclosing new medical evidence and submitting that on the whole of the evidence Mr Gomez satisfied the definition of TPD.[25]

[35] Much of the information before the Board went to uncontentious matters of the kind already summarised under "**Background**" above. The more important materials for present purposes were those going to whether there were sedentary jobs which Mr Gomez was reasonably qualified by education, training or experience to work in. The potential jobs, identified to varying extents in the materials, were General Practice Nurse, Telephone Triage Nurse, Nursing Educator, Pathology Collector/Venepuncture and Health and Safety Officer.

[36] A report to the Princess Alexandra Hospital of 5 February 2013 by Dr David Fitzgerald, Consultant Occupational Physician expressed the opinion Mr Gomez would not be able to resume the full range of duties of his substantial position, observing:

> "In terms of his capacity for work I feel he would probably be able to manage sedentary clerical type duties on a graduated return or an almost full-time basis. However he would be restricted physically in terms of aggravation of his symptoms and should avoid any heavy lifting of more than 10kg, any degree of overhead work or heavy pulling or pushing. … Essentially he could be utilised in a clerical/audit sense. He also has some skills I understand in teaching that might be able to be utilised."[26]

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24 AR 712.
25 AR Vol 1 pp 271-283.
26 AR Vol 1 p 345, p 347.

[37] More comprehensive suggestions of potential work were made in a report to QSuper by Rehabilitation Advisor Karen Stewart on 12 February 2013. She did not examine Mr Gomez for that report and prepared it from a review of file documents only. Her review of Mr Gomez's prior education and training noted there was no specific comment on file regarding Mr Gomez's English literacy and numeracy skills, but she assumed them to be "at least average" based on his successful completion of an overseas qualified nurse's competency assessment course through the New South Wales College of Nursing and his successful employment in Australia as a Registered Nurse.[27] She noted Mr Gomez had worked almost exclusively as a Registered Nurse in public and private hospitals and aged care facilities and more recently had specialised as an Intensive Care Nurse, although she noted he had also worked as teacher/instructor to nursing students in the Philippines for approximately one year.[28]

[38] Ms Stewart opined that the occupation of General Practice Nurse was a suitable alternative to Mr Gomez's pre-disability role, but noted the physical requirements of such a role in medical practices may vary, noting "further medical information will be required to ascertain whether Mr Gomez's functional capacity matches the duties".[29] She opined Mr Gomez had the required education, training and experience to be a competitive applicant for the role of Telephone Triage Nurse, a role which is entirely sedentary. She noted the overall labour market for that occupation was not considered to be strong. Amongst the skills she listed as prerequisites for this position was "strong communication skills".[30] She also opined that the position of Nursing Educator was in keeping with Mr Gomez's education, training and experience, although she noted the labour market demand for such positions was not likely to be high. She concluded:

> "The vocational options of General Practice Nurse, Telephone Triage Nurse and Nursing Educator were identified as being suitable in consideration of Mr Gomez's education, training and experience. Further detail regarding the usual duties, physical demands and remuneration has been detailed in this report. Additional medical opinion is suggested to clarify this suitability from a functional perspective."[31]

[39] Ms Stewart provided a supplementary report on 27 February 2013 in which she identified the position of Pathology Collector/Venepuncture as a potential suitable vocational option for Mr Gomez. She noted the minimum primary qualification for Pathology Collectors/Phlebotomists in Australia was a certificate 3 or 4 in pathology and a current senior first aid certificate. She noted some employers indicated the correct qualification could be completed on the job through in-house training programs. She considered it probable that Mr Gomez already had experience in blood collection and cannulation. She opined the suitability of this occupation needed to be confirmed "both from a functional capacity perspective and in consideration of the policy definition".[32] In concluding her supplementary report she observed:

> "Additional medical opinion is suggested to clarify the suitability of the identified occupations (General Practice Nurse, Telephone Triage

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27 AR Vol 1 p 351.
28 AR Vol 1 p 353.
29 AR Vol 1 pp 354-355.
30 AR Vol 1 p 355.
31 AR Vol 1 p 356.
32 AR Vol 1 p 360.

> Nurse, Nursing Educator and Pathology Collector) from a functional perspective."[33]

[40] In the report of Consultant Occupational Physician Dr Blair Christian to Suncorp of 18 March 2013, Dr Christian opined Mr Gomez was not currently able to undertake work as a General Practice Nurse because, while it involved less physical exertion, it still involved some medium and at times heavy physical activities. He opined Mr Gomez was physically fit to work as a Telephone Triage Nurse, a Nursing Educator, a Ward Clerk/Medical Receptionist and a Pathology Collector/Venepuncture.[34] He noted of the latter role that some blood collecting trolleys are moderately large and require forceful pushing and pulling, a problem which could be avoided by use of a well-functioning smaller light blood collection trolley.[35] Dr Christian also opined Mr Gomez may in addition be well suited to work as a Health Promotion Officer, observing of that role:

> "In some ways the work role would be similar to that of a nursing educator. Mr Gomez would undertake presentations to community groups, regarding issues such as diabetes and so on."[36]

[41] In a report to Mr Gomez's solicitors of 3 June 2013 Dr Maria Salinas, Occupational Health Physician, opined Mr Gomez was unfit to continue as a Registered ICU Nurse or a General Nurse Practitioner in the A&E department or general wards. She opined:

> "[H]e unfortunately will remain unfit for a suitable work within his education, training and/or experience as an ICU Nurse. He can be re-educated and be given additional training/s as a Nurse Supervisor, Nurse Educator, Health and Safety Officer and/or go in a completely different field."[37]

[42] Rebecca Hague, Occupational Therapist, opined on 30 October 2013 in her report, care of Mr Gomez's solicitors, that Mr Gomez was not reasonably qualified by education, training or experience to work as a Nursing Educator.[38] She noted Mr Gomez had reported he was not qualified for such work,[39] that he had no Australian qualification or experience as a Nursing Educator and had only been employed for 12 months in that field 10 years ago.[40] She noted of a job vacancy she had located for a Clinical Nurse Educator in aged care that the holding of a post graduate qualification in education and/or management was an essential skill.[41] Ms Hague considered working as a Nurse in a medical practice was unsuitable for Mr Gomez because of the need to still perform physical work, albeit lighter than in a hospital setting, and also because of his lack of recent experience in working in a medical practice.[42] She acknowledged Mr Gomez would be physically able to work as a Telephone Triage Nurse but noted his absence of prior training or experience in such work and the limited availability of job vacancies in the field.[43] She expressed

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33 AR Vol 1 p 361.
34 AR Vol 1 pp 369-370.
35 AR Vol 1 p 370.
36 AR Vol 1 p 370.
37 AR Vol 2 p 375.
38 AR Vol 2 p 397.
39 AR Vol 2 p 393.
40 AR Vol 2 p 393, p 397.
41 AR Vol 2 p 398.
42 AR Vol 2 p 398.
43 AR Vol 2 p 399.

pessimism about Mr Gomez's future employment prospects because it is common for prospective employers to enquire about the injury and/or compensation history of applicants for employment.[44] She concluded of Mr Gomez:

> "He is not reasonably qualified (in Australia) for work as a nursing educator. He has no prior experience or training (in Australia) for work as a nursing educator or registered nurse in a medical centre. He has no prior experience or training for work as a telephone triage nurse. He has no training, education or experience in lighter roles.
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> Related to his ongoing occupational restrictions he is no longer fit for the occupations detailed above. At the date of my assessment and in my opinion this man is unfit for any occupation for which he is reasonably qualified for by education, training or experience."[45]

The second decision

[43] The request for review of the first decision, which was described as an appeal in some of the correspondence between the parties, culminated in the communication of the second decision by correspondence dated 26 June 2014, stating:

> "The Board of Trustees has considered your client's appeal at its meeting on 26 June 2014. The Board has affirmed the Board Delegate's decision. …"[46]

[44] The enclosed statement of reasons reviewed the information before the Board and ultimately concluded:

> "25. Having regard to the evidence, the Board considers that Mr Gomez is reasonably qualified by his education, training or experience and fit to work as a Telephone Triage Nurse, Nursing Educator, Pathology Collector and Health Promotion Officer. In this regard, the Board prefers the reports of Ms Stewart, Dr Christian and Dr Fitzgerald over the reports of Ms Hague and Dr Salinas because of the consideration given to what transferrable skills that Mr Gomez possesses and the analysis of the capacity of Mr Gomez to work in alternate roles.
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> 26. The Board also considers having regard to the evidence that Mr Gomez is reasonably qualified and fit to work as a General Practice Nurse performing duties such as wound care, administering immunisations, venepuncture and diabetes management provided there is no requirement to help with patient transfers or helping patients in and out of wheelchairs.
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> 27. The Board notes that Mr Gomez claims he is afraid to have shoulder surgery which according to a number of Orthopaedic Surgeons would provide a cure for his symptoms. As the Board believes that there are other nursing related roles for which Mr Gomez is reasonably qualified by his education, training or experience and physically able to perform, the issue of

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44 AR Vol 2 p 399.
45 AR Vol 2 p 400.
46 AR Vol 1 p 294.

Mr Gomez not undertaking surgery is of no consequence to the TPD decision.

28. On review of the medical evidence, the Board is not satisfied that Mr Gomez suffers from a disability which is such as to render him unlikely ever to be able to work again in a job for which he is reasonably qualified by education, training or experience."[47]

The trial judge's decision

[45] The learned trial judge concluded that on the material available to the Board the second decision was reasonably open to the Board, exercising its powers in good faith and having given a real and genuine consideration to the claim in accordance with its duties and obligations under the deed.[48]

[46] His Honour found:

"[45] The material placed before the Board established that whilst the plaintiff had an injury which caused him ongoing pain, discomfort and limitation of movement, the plaintiff's ongoing physical disabilities did not prevent him from undertaking sedentary type duties. Whilst the plaintiff complained of further limitations, in terms of concentration and memory loss as a consequence of his reliance upon narcotic medication and the ongoing effects of constant pain on his sleeping patterns, the material reasonably supported a conclusion that those issues could be adequately and properly addressed to ensure the plaintiff could physically undertake sedentary type occupations.

[46] There was identified in the material a number of occupations which fitted that criteria. The issue for determination was not whether those occupations were freely available. The issue was whether those occupations were occupations for which the plaintiff was reasonably qualified by education, training or experience.

[47] Limitations such as the plaintiff not having previously undertaken such duties did not render those occupations which the plaintiff could not undertake, having regard to his education, training and experience. For example, whilst the plaintiff may not have undertaken previously the duties of a triage nurse, he had extensive experience as an intensive care nurse. That experience would qualify him for undertaking an assessment of a patient in order to assess which patient ought be attended to first. Similarly, the plaintiff's extensive experience as an intensive care nurse rendered him qualified to administer needles and take samples from a patient.

[48] The plaintiff has not established that the second decision was a decision made not in good faith. The plaintiff has also not established that the decision was made without a real and

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47 AR Vol 1 p 310.

48 AR Vol 2 p 721 [44].

> genuine consideration of the issues for determination by the defendant, in accordance with its obligations and duties under the Deed and the Act. The second decision also was not a decision which was so unreasonable that no reasonable Trustee could reach it on the material placed before the defendant.
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> [49] The plaintiff's challenge to the second decision amounts to no more than an assertion that a different decision was open on the evidence. That is not a sufficient basis to set aside the decision of the defendant. The defendant made a reasoned choice between competing bodies of medical evidence, in accordance with its obligations and duties to decide whether the plaintiff satisfied the terms of the Deed. That choice was reasonably open to it. Such a decision is not properly to be interfered with by a Court."[49]

Discussion

[47] It is helpful to preface discussion of Mr Gomez's grounds in this component of the appeal with three observations about the practical implications of the earlier discussed nature of the decision at Board level, particularly the Board's duty to give an application properly informed consideration.

[48] Firstly, the impact of that duty upon the extent and degree of detail in the information required by the Board will inevitably vary with the circumstances of the case. Most obviously it will vary depending upon how clear cut the disabling impact of the injury is upon the member's ability to work in the field for which the member is qualified. To take an extreme example, the Board might readily accept that an applicant nurse whose injury caused permanent blindness, severe brain damage and quadriplegia is unlikely ever to be able to work again in a job for which the nurse is reasonably qualified by education, training or experience. In such a catastrophic case, in meeting its duty, the Board would be unlikely to require any more than the briefest of advices of the minimum two medical practitioners made mandatory by the definition of TPD in the deed. Contrast that example with the case of an applicant nurse with hitherto excellent hearing in both ears whose injury causes say a permanent 25 per cent loss of hearing in one ear only. In such a case the board would think it unlikely, in the absence of comprehensive and detailed information to the contrary, that the extent of disablement would preclude the nurse from working again in a nursing job.

[49] The present case falls between those opposing examples in the spectrum of potential cases. At first blush the injury here presents as unlikely to have deprived Mr Gomez of the ability to apply many of his expert nursing skills. As against this, consideration of discrete transferable skills is far from determinative,[50] for it is the collective capacity of the injured worker to meet whole of job requirements which will better inform the Board's decision. This heralds the practical importance of the Board not merely assuming there must be plenty Mr Gomez can still do in a job in the field of nursing. Rather it is important to focus upon whether he is reasonably qualified by education, training and experience to be able to meet the combined requirements of any such job.

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49 AR Vol 2 pp 721-722 [45]–[49].

50 See for example *Jones v Untied Super Pty Ltd* [2016] NSWSC 1551, [62].

[50] Secondly, the extent to which the Board as a trustee ought make any further inquiries in order to meet its duty to give properly informed consideration to an application will also vary with the circumstances of the case. In *Finch v Telstra Super Pty Ltd*, the High Court observed, in expanding upon the implication of the duty to give properly informed consideration to applications:

> "If the consideration is not properly informed, it is not genuine. … It would be bizarre if knowingly to exclude relevant information from consideration were not a breach of duty. And failure to seek relevant information in order to resolve conflicting bodies of material, as here, is also a breach of duty. …[T]here is because of the importance of the [Trustee's] opinion and its place in the Scheme a high duty on the Trustee to make inquiries "for information, evidence and advice" which the Trustee may consider relevant."[51]

[51] Those observations ought not be taken to suggest that any lack of information or any conflict in information before the Board will oblige it to make further inquiry. The duty to give properly informed consideration does not oblige the board to inquire to a point of factual perfection.[52] Much will depend upon the significance of the lack of information or conflict in information. The ultimate point of any further inquiry is to enable the Board to meet its duty to give properly informed consideration to an application. As was observed in *Alcoa v Frost*[53] by Nettle JA (as he then was), with whom Redlich JA and Davies AJA agreed:

> "Superannuation fund trustees are bound to give properly informed consideration to applications for entitlements and, if that necessitates further inquiries, then they must make them."[54] (emphasis added, citations omitted)

Thus, the Board has a duty to make further inquiry if such inquiry is necessary in order to give properly informed consideration to an application.

[52] Thirdly, the merit or strength of the material advanced by an applicant member may be influential in the Board's consideration of whether or not further inquiries are necessary. In submissions before this court Mr Gomez's counsel was at pains to emphasise there was no onus upon an applicant member to advance information addressing or contradicting information before the Board adverse to the member's application. As a general proposition that is correct, given the nature of the Board's duty to all members, including applicant members.[55] However, sight must not be lost of the fact that ultimately it is necessary, pursuant to clause 9.1 of the terms, for the Board to receive proof satisfactory to it that the member has suffered TPD before paying out a claim.

[53] There is obviously an element of risk involved in a member merely sitting back and hoping that the Board will regard information adverse to the application as unconvincing and or warranting further inquiry. That risk may be low where the

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51 (2010) 242 CLR 254, 280-281.

52 *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618, 633; cited with implicit approval in *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2016] QCA 247, [64].

53 (2012) 36 VR 618.

54 Ibid 633.

55 *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618,630 [47]. Compare *TAL Life Ltd v Shuetrim; Metlife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439, 482 [207] which illustrates the potential importance of the terms of instrument to this issue.

member has already put forward comprehensive information of substance suggesting a strong prima facie case of entitlement. In such a case the Board may be disinclined to act upon information adverse to the application without making further inquiry. However, if the information previously advanced by the member provides only equivocal or incomplete support for the application and the member elects not to advance information contradicting information adverse to the application, the risk will be higher. That is particularly so where it is apparent that if such contradictory information existed the member could procure it. In such a case the Board may logically infer from the paucity of information supporting the application and the lack of contradiction of information adverse to it that it can more safely act upon the adverse information without further inquiry.[56]

[54] Mr Gomez's grounds in respect of this component of the appeal are lengthy. With one inconsequential exception,[57] their factual focus is on Mr Gomez's qualification for the sedentary jobs the Board concluded he was reasonably qualified for. In summary the grounds complain the learned trial judge should have found:

(a) the Board's conclusion was not reasonably supported by the material before it; and

(b) the Board failed to give real and genuine consideration to Mr Gomez's claim, in that it did not ascertain relevant facts or resolve conflicts as to relevant facts.

[55] An obstacle to Mr Gomez's first complaint is that, as the above review of the information before the Board shows, there was information before the Board which supported its conclusion Mr Gomez was at least reasonably qualified by his education, training or experience and fit to work as a Telephone Triage Nurse, Pathology Collector and Health Promotion Officer (though not, for reasons explained below, as a Nursing Educator).

[56] At best for Mr Gomez it can be said some of that information lacked supporting detail and some of it was in conflict with other information. However, the presence of such difficulties is hardly remarkable in factual disputes. It does not follow from their presence that the totality of the information before the Board did not reasonably support its conclusion. A lack of factual detail from one source of information may wane as a concern when considered in combination with other supportive sources of information. Similarly, a conflict in information may be readily resolved without further inquiry where the overall information already available allows a properly informed choice to be made as between rival sources of information.

[57] Whether a lack of detail is so significant as to mean relevant facts cannot be ascertained and whether a conflict in information is so significant as to require further information to resolve it is a matter of degree. In the absence of those features being so significant as to preclude properly informed consideration of the

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56 The logic underpinning such circumstantial reasoning is analogous to that discussed by the High Court in different contexts in *Jones v Dunkel* (1959) 101 CLR 298 and *Weissensteiner v The Queen* (1993) 178 CLR 217.

57 The exception is an allegation in effect that the Board failed to make findings as to all of the non-physical limitations caused by the injury and wrongly found the non-physical limitations were not such as to impede his fitness for sedentary jobs (AR Vol 2 p 734). There is no substance to this complaint. To the extent there once had been secondary consequences of the injury, the materials readily support the conclusion those consequences had diminished over time and were not of such a degree as to have a material bearing on Mr Gomez's capacity to work in sedentary nursing jobs.

application (as they were for the position of Nursing Educator but not for the other three jobs) an obstacle to Mr Gomez's second complaint is the Board's reasons show that, on the face of it, the Board did give real and genuine consideration to the claim.

[58] Turning specifically to the four jobs identified by the Board's reasons, it will be recalled there were limited vacancies for some of those jobs. That is not a determinative consideration. The test of TPD is not directed to the location or extent of vacancies in jobs for which the member is reasonably qualified, it is directed to the member's ability to work in such jobs.[58]

[59] It could be readily inferred from the materials before the Board that Mr Gomez's degree of physical disablement would not deprive him of the physical capacity to perform the positions of Telephone Triage Nurse, Nursing Educator, Pathology Collector and Health Promotion Officer. To the extent the position of Pathology Collector involves the pushing and pulling of trolleys it was open to conclude from Dr Christian's report that any physical capacity concerns could be adequately catered for by the use of small trolleys.

[60] Because the four jobs could adequately accommodate Mr Gomez's degree of disablement the practical factual issue for the Board's consideration was whether Mr Gomez was reasonably qualified by education, training or experience to work in such jobs.

[61] Turning firstly to the position of Health Promotion Officer, the specific information before the Board suggesting Mr Gomez was suited to that job appeared in the report of Consultant Occupational Physician Dr Christian. He opined Mr Gomez "may be well suited" to work in such a position. There was only a very brief explanation advanced in support of this opinion. The report of Occupational Health Physician Dr Salinas seemed to concede without explanation that Mr Gomez may be suited to such work with re-education and or additional training. This was hardly a contradiction of Dr Christian's opinion. Moreover, the first report of Occupational Therapist Rebecca Hague did not specifically address Mr Gomez's suitability for such a job at all. Her opinion, proffered at the conclusion of her first report, that Mr Gomez was unfit for any occupation for which he was qualified, was so general and unrelated to specific information as to carry little weight in isolation.

[62] While some decision makers might have sought more information about Mr Gomez's qualification to work as a Health Promotion Officer it was, in the circumstances, reasonably open to the Board, informed by the largely uncontradicted opinion of Dr Christian, to conclude Mr Gomez was qualified and able to work in such a job.

[63] As to the position of Telephone Triage Nurse, Karen Stewart, Rehabilitation Advisor, opined, with reasons, that Mr Gomez is qualified for such a job. It was not a surprising opinion given Mr Gomez's experience as an intensive care nurse. She acknowledged the position required strong communication skills. Mr Gomez's counsel emphasised there was no direct evidence Mr Gomez possessed such skills, although none of the material, including the reports of specialists who communicated with him, suggested a difficulty with communication. In any event

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58 *Wells v Australian Aviation Underwriting Pool* [2004] QCA 43, [16]-[17]; *Repatriation Commission v Hill* (2005) 142 FCR 88, [58]; *Hannover Life Re Of Australasia Ltd v Colella* (2014) 47 VR 1, [34].

though, the Board was not limited to direct evidence and like any fact finder was entitled to draw inferences. It was reasonable to infer from Mr Gomez's experience as an intensive care nurse that, for the purposes of communications about triage, he would possess strong communication skills. Ms Stewart's reports contained a qualifying clause suggesting "additional medical opinion … to clarify the suitability of the identified occupations from a functional perspective". While not entirely clear, this appears to be a reference to the need to confirm Mr Gomez's physical capacity to function in the positions, which was confirmed by Dr Christian's report. Ms Hague did not directly contradict Ms Stewart's opinion regarding the position of Telephone Triage Nurse, although she noted Mr Gomez had no prior training or experience and that the limited advertisements for such positions suggest previous experience is preferred.

[64] On the face of the information available to the Board it was reasonable to infer Mr Gomez was qualified and able to work as a Telephone Triage Nurse.

[65] Turning to the position of Pathology Collector, that title appears to be the Board's name for the job or jobs variously described in the reports as Pathology Collector/Venepuncture and Phlebotomist. Ms Stewart opined that this job was a potential suitable vocational option for Mr Gomez, although the foundation she proffered for that opinion seemed speculative. Ms Stewart noted the job requires the holding of some certificates which some employers would permit to be completed through in-house training programmes. While she did not explain whether Mr Gomez's qualification, training and experience as a nurse already qualified him to the level required by such certificates, she noted he probably had experience in blood collection and cannulation. Ms Hague and Dr Salinas did not address his suitability for such a job, so Ms Stewart's opinion, with its apparently speculative foundation, was uncontradicted.

[66] The need for certificates in this job was a potentially concerning issue for the Board. In *Hannover Life Re Of Australasia v Colella*[59] Garde AJA, with whom Ashley JA and Beach JA agreed, observed:

> "It has been accepted that inability to perform work does not (apart from a short qualifying or refresher course) require a claimant to undergo a course of retraining in order to make him or her employable. Rather the assessment of TPD takes into account any job or occupation for which the claimant is reasonably fitted having regard to his then current education, training or (sic-and) experience."[60] (citations omitted)

[67] In *Hannover Life Re Of Australasia Ltd and Anor v Dargan*,[61] Bathurst CJ, with whom MacFarlan JA, Meagher JA, Hoeben JA and Tobias JA agreed, reasoned that the word "reasonably" informs the extent of existing qualification required.[62] He concluded an experienced former truck driver who had the education, training and experience to capably pass a test required to hold a certificate to work as a taxi driver was reasonably fitted by his education, training and experience to work as a taxi driver.[63] His Honour acknowledged the need for caution in referring to cases

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59 (2014) 47 VR 1.
60 Ibid [32].
61 (2013) 83 NSWLR 246.
62 (2013) 83 NSWLR 246, 252.
63 Ibid 252-254.

involving differently worded tests - there the relevant words were "reasonably fitted by education, training or experience". However, his Honour's reasoning adopted the reasoning of Hodgson J in *Chammas v Harwood Nominees Pty Ltd*,[64] where the relevant words were, "reasonably qualified by education, training or experience". They are the same words as the test here.[65]

[68] In the present case, the absence of information contradicting Ms Stewart's vaguely explained opinion made it safer for the board to draw the borderline inference that Mr Gonzales' education, training and experience meant he could probably obtain the requisite certificates by on the job training in work for which Mr Gomez was otherwise probably qualified by his experience as a nurse. While another decision-maker may have required further information on the point the conclusion Mr Gomez was reasonably qualified by education, training or experience to work as a Pathology Collector was reasonably open to the Board.

[69] Finally, as to the position of Nursing Educator, Ms Stewart noted Mr Gomez's previous teaching experience in nursing. She considered his education, training and experience was in keeping with the requirements of an advertised position she had located for tutors for the School of Nursing and Midwifery at Griffith University. That position required a bachelor's degree in nursing and current industry experience. It will be recalled Occupational Health Physician Dr Salinas seemed to concede without explanation that Mr Gomez may be suited to such work with re-education and or additional training. Ms Hague noted Mr Gomez had no Australian qualifications relating to working as a nursing educator and opined he was not qualified to work as a nursing educator. In support of that opinion she referred to a job vacancy for the position of "Clinical Nurse Educator-Aged Care" and its requirement the applicant hold post graduate qualifications in education and or management.

[70] The Board did not have sufficient information before it to make a properly informed decision in respect of Mr Gomez's qualification to work as a Nursing Educator. The fact that Mr Gomez once worked in such a job in the Philippines is obviously a relevant consideration, however holding proper educational qualifications is obviously critical in determining whether a person is reasonably qualified to teach. Ms Stewart's and Ms Hague's opposing opinions on this topic each ultimately turned upon reference to the tertiary education qualifications mentioned in only two job advertisements, with them referring to one such advertisement each. Such a conflict in opinions so similarly and thinly premised compels the conclusion that on the information before it the Board could not have given properly informed consideration to whether Mr Gomez was reasonably qualified by education, training or experience to work as a Nursing Educator.

[71] While this final conclusion is at odds with that of the learned trial judge it is academic to the end result because the above conclusions in respect of the other three jobs are not at odds with his Honour's view that the Board's second decision should not be disturbed. The information before the Board was in the circumstances sufficient for the Board to give properly informed consideration to whether Mr

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64 (1993) 7 ANZ Ins Cas 61-175.

65 Compare *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* (2015) 89 NSWLR 412 where the relevant words were "reasonably capable of performing by reason of education, training or experience", which arguably appears to be a more liberal requirement than the words "reasonably qualified by education, training or experience".

Gomez would ever be able to and whether he was reasonably qualified to work as a Health Promotion Officer, Telephone Triage Nurse and Pathology Collector. It was reasonably open to the Board to conclude, as it did, that he is so qualified. It follows from the Board's conclusion that it could not hold the opinion required by the definition of TPD that Mr Gomez's degree of disablement is such as to render him unlikely ever to be able to work again in a job for which he is reasonably qualified by education, training or experience.

[72] This conclusion, favourable to the Board, makes it unnecessary in consideration of this ground to deal with a complaint raised by the Board's submissions that Mr Gomez's arguments in the appeal involved pursuit of an allegation, arguably[66] abandoned below, that the Board should have made further inquiries.

[73] The learned trial judge was correct in declining to interfere with the Board's second decision. Mr Gomez's appeal against the trial judge's decision in respect of the Board's second decision must fail.

Appeal against trial judge's decision re third decision

Information before the Board's delegate for the third decision

[74] By letter to the Board's solicitors of 15 April 2016 Mr Gomez's solicitors sought a review of the second decision. The letter enclosed new medical and other evidence in further support of Mr Gomez's claim, submitting the material "supports that our client meets the relevant Total and Permanent Disablement definition and that his claim should be met".[67]

[75] The additional material included a supplementary report care of Mr Gomez's solicitors by Occupational Therapist Rebecca Hague, dated 14 April 2016. As to the position of Telephone Triage Nurse she noted on performing a job search she was only able to find one vacancy for such a position in Brisbane and one in Sydney. Further, she noted she had conducted a follow-up telephone conversation with Mr Gomez and explained his accent would be a barrier to such employment because a Telephone Triage Nurse requires exceptional communication skills to provide clear health advice and instructions to patients over the phone.[68] Noting his absence of prior experience, the limited number of available positions, the barrier presented by his accent and his absence of additional qualifications that might otherwise advantage him over other applicants with superior communication skills and prior experience, she opined the likelihood of him acquiring work as Telephone Triage Nurse was poor.[69] As to the position of Pathology Collector/ Venepuncture/Phlebotomist, Ms Stewart's report noted the need for a certificate 3 in Venepuncture and a minimum of three years' experience in venepuncture,

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66 "Arguably" in that it does not automatically follow from the pre-trial abandonment of a belated attempt at the express pleading of the point that the existing content of Mr Gomez's pleadings did not adequately raise the point. There is a close connection at law between the duty to give properly informed consideration and the duty to make further inquiry. Mr Gomez's pleadings were complemented by the content of further and better particulars replete with references to the Board taking no steps to resolve conflicts (AR Vol 2 pp 658 [8(b)], 660 [6(a)], 662 [3(a)], 669 [8(b)], 670 [6(a)], 673 [3(a)]), allegations repeated in Mr Gomez's submissions below (AR Vol 2 pp 564 [171(b)], 566 [179(e)], 568 [190(b)], 575 [234(a)]). Such allegations might be thought to impliedly relate to both duties.

67 AR Vol 2 p 418.

68 AR Vol 2 p 439.

69 AR Vol 2 p 440.

qualifications Mr Gomez does not have. She also noted he had never worked in pathology collection or as a Phlebotomist and opined that he was not reasonably qualified or experienced for work as a Pathology Collector or as a Phlebotomist.[70] She reiterated her views previously expressed as to Mr Gomez's suitability for work as a Nursing Educator, adding that his teaching experience in the Philippines would be considered outdated by the preponderance of employers. As to the position of Health Promotion Officer she explained that it was a field involving now recognised undergraduate qualifications in health promotion and public health and in which professionals were required to have an understanding of health sector policies and knowledge of the requirements for planning and implementing health management programs with consideration of a wide range of stakeholders.[71] She opined Mr Gomez was not qualified or skilled for work in this field. She reiterated her view that Mr Gomez is unfit for any occupation for which he is reasonably qualified for by education, training or experience.[72]

[76] The additional material included a statement by Mr Gomez in which he stated he had searched for Nurse Educator positions in Brisbane and found only one advertised and that it required the applicant to have management experience, a post graduate qualification and a minimum of five years' experience within a surgical background, none of which he has.[73] He stated he had discussed the positions of Phlebotomist, Health Promotion Officer, Telephone Triage Nurse and Nurse Educator with his Job Search provider. He stated:

> "She advised me that to be a Phlebotomist I need to complete a qualification; that the position of Health Promotion Officer is rare and you need to be already within the institution and be promoted as you can't directly apply externally; that the position of Telephone Triage Nurse is a very, very rare position and I would need good computer skills and be highly fluent in spoken English; I have only fairly basic computer skills and poor keyboard/typing skills. My spoken English is quite accented and could not be described as highly fluent."[74]

[77] Orthopaedic Surgeon Dr Hugh English, in a short additional report of 13 December 2015 care of Cooper Grace Ward Lawyers, opined, without any accompanying analysis:

> "With appropriate treatment, Mr Gomez would remain fit to work as a nurse supervisor, preadmission nurse, tele-health nurse, practice nurse, nurse educator, pathology collector, medical receptionist and general practice nurse. In terms of general nursing duties in a hospital, he may have some minor restrictions in terms of heavy and repetitive lifting. Nursing duties vary significantly from ward to ward and position to position and this may need to be taken into account."[75]

As with the earlier report of Dr Christian, Dr English's opinion went to fitness and not qualification for such positions.

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70 AR Vol 2 p 440.
71 AR Vol 2 pp 441-442.
72 AR Vol 2 p 442.
73 AR Vol 2 p 449.
74 AR Vol 2 p 449.
75 AR Vol 2 p 487.

Third decision

[78] By letter dated 10 June 2016 the Board's solicitors relevantly advised:

> "I advise that your request for a further review of the QSuper decision to decline a TPD benefit for your client was considered by a Senior Board Delegate on 10 June 2016.
>
> The Senior Board Delegate has determined on a review of the additional material provided by Maurice Blackburn since the last Board decision on 26 June 2014 … that the new material on Mr Gomez's TPD claim does not indicate a reasonable possibility of a different result to the Board's decision made on 26 June 2014.
>
> Therefore the Senior Board Delegate affirmed the refusal of Mr Gomez's TPD and that he is not entitled to a TPD benefit…
>
> The Senior Board Delegate noted that the three reports by Occupational Physicians, Dr Douglas (for QSuper), Dr Fitzgerald (for Qld Health) and Dr Christian (for Suncorp) did not raise any employment issues which might arise out of Mr Gomez's accent. The Senior Board Delegate also noted that the first report dated 30 October 2013 by Ms Hague, who is an Occupational Therapist, did not identify any employment issues arising from Mr Gomez's accent.
>
> The Senior Board Delegate further noted the report dated 23 March 2016 of Dr Shaikh, Psychiatrist who examined Mr Gomez and concluded that he did not currently suffer with a psychiatric condition and that Dr Shaikh from a psychiatric perspective did not see any restrictions in terms of Mr Gomez's occupational capabilities for the employment options set out in his report. …"[76] (emphasis added)

[79] The test purportedly applied by the Board's delegate was therefore the reasonable possibility of a different result test, espoused in *Gilberg v Maritime Super Pty Ltd*,[77] discussed above.

The learned trial judge's decision

[80] In reviewing the third decision the learned trial judge referred to *Gilberg v Maritime Super Pty Ltd*[78] and proceeded to find:

> "[52] The further material provided to the defendant addressed not merely the availability of other occupations for which the plaintiff was qualified by relevant education, training or experience. That material addressed the likelihood of a plaintiff having such transferable skills, having regard to the need for particular educational requirements and the ability to undertake certain types of communication. They were matters which had not been specifically considered by Ms Stewart or any of the medical practitioners who had earlier provided opinions to the defendant.
>
> [53] Those matters were relevant to a consideration of whether the plaintiff, in truth, had the capacity to perform remunerative

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76 AR Vol 2 p 458.
77 [2009] NSWCA 325.
78 [2009] NSWCA 325.

work in those designated occupations as opposed to a capacity to perform work tasks within those designated occupations. As was observed in *Jones v United Super Pty Ltd* having some of the requisite skills does not equate to having a capacity to perform remunerative work.

[54] The defendant, consistent with its obligations and duties under the Deed and Act, had to consider whether, having regard to the plaintiff's particular circumstances, the identified alternate occupations were occupations the plaintiff had the capacity to engage in having regard to his education, training or experience. That consideration had to be more than a theoretical exercise removed from reality. The additional material gave rise to that very consideration. It put forward sufficient material to show there was a case to be investigated further. That case justified the seeking of further opinions from Ms Stewart and the relevant medical practitioners.

[55] Had the Board's delegate given consideration to that aspect of the additional material, there was a reasonable possibility of a different result being reached by the defendant to that of the second decision. The delegate's failure to consider the material in that way breached the defendant's obligation to reconsider its second decision.

[56] That conclusion supports a finding that the defendant breached its duty by failing to properly reconsider the application made to it by the plaintiff for the payment of total and permanent disability benefits. Whilst there remains in that event, a discretion to decline to make an order that the Trustee properly consider the application, the material placed before the defendant was of such a nature that it cannot be concluded there is no reasonable possibility that the defendant, acting reasonably, will accede to the plaintiff's application in the event of a reconsideration."[79] (citations omitted)

[81] The learned trial judge concluded that the plaintiff was entitled to an order "that the defendant properly consider the application for the payment of total and permanent disablement benefits".[80] He relevantly ordered:

"1. The decision of the defendant made on 10 June 2016 be set aside.
2. The plaintiff's application for reconsideration of the defendant's decision to decline his claim for total and permanent disablement benefits be remitted to the defendant to be considered according to law."[81]

Discussion

[82] The reasoning of the learned trial judge and the conclusion he reached was sound. The same conclusion is inevitable in this appeal by re-hearing.

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79 AR Vol 2 p 723 [52]-[56].
80 AR Vol 2 p 724 [57].
81 AR Vol 2 p 725.

[83] The Board's grounds complain the learned trial judge erred in holding the additional information raised a reasonable possibility that a different result to the second decision would be reached and that the Board had breached its duty by failing to properly reconsider the application. The below discussion of the undoubted significance of the additional information received by the Board demonstrates there was no such error.

[84] The grounds were accompanied by subsidiary complaints that the learned trial judge erred by substituting his own opinion on the merits, engaging in reasoning inconsistent with his finding in respect of the second decision and not adequately identifying his reasoning. His Honour's reasoning was quite clear. His reasons indicated he was not engaged in a merits review and his findings clearly focussed not upon the merit of the additional information but its objective significance for the Board's decision-making process.

[85] That his Honour reached a different conclusion for different reasons in respect of the third decision than he did in respect of the second decision is unsurprising in circumstances where significant additional information was available by the time of the third decision. Indeed, the obvious difficulty with the Board's appeal is that the nature of the additional material contained in Ms Hague's further report included material information, on topics clearly relevant to Mr Gomez's capacity to work in the posited jobs, which had not hitherto been before the Board.

[86] Firstly, in respect of the job of Health Promotion Officer, it will be recalled that it was Dr Christian, not Ms Stewart, who had opined with only a very brief explanation that Mr Gomez "may be well suited" to work in such a position. Ms Hague's supplementary report explained Mr Gomez's experience as a Registered Nurse did not mean he was qualified to work in health promotion, a field now recognised by other graduate qualifications in Australia. More particularly, she explained that professionals in this field must have an understanding of health sector policies and knowledge of the requirements for planning and implementing health management programs. She opined Mr Gomez does not possess the qualification or skills for work in such a field. The effect of Ms Hague's supplementary report was to provide information about the specialist knowledge required for the position, a topic of obvious relevance to whether Mr Gomez would be able to work in such a job. The limited information which had hitherto been before the Board in respect of Mr Gomez's suitability for this job simply did not address that important topic at all.

[87] Secondly, as to the position of Telephone Triage Nurse, a position which, even according to Ms Stewart, requires strong communication skills, Ms Hague's supplementary report explained she had conducted a follow-up telephone conversation with Mr Gomez. She reported:

> "In my view, this man's accent will be a barrier to this employment. A Telephone Triage Nurse obviously requires exceptional communication skills to provide clear health advice and instructions to patients over the phone. It would be critical that this communication is effective given the nature of the advice (i.e. there is risk of poor health outcomes if a patient is unable to clearly understand the advice given)."[82]

[88] While Ms Stewart's report prior to the second decision noted the position of Telephone Triage Nurse required strong communication skills, she did not express

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82 AR Vol 2 p 439.

a specific opinion about Mr Gomez's oral communication skills. In fact she had not ever met with him and prepared her report from file documents only. True it is some of the medical practitioners who reported on their consultations with Mr Gomez did not identify any particular communication difficulty but nor were they assessing his communication skills for the purposes of acting as a Telephone Triage Nurse. Here again, Ms Hague provided information about detail on a topic clearly relevant to Mr Gomez's ability to act as a Telephone Triage Nurse, which had not been specifically addressed in any of the materials hitherto before the Board.

[89] Thirdly, as to the position of Pathology Collector, Ms Hague's supplementary report noted Ms Stewart had provided an example position for work as a Pathology Collector which "dictates that the applicant must possess a Certificate III in Venepuncture and a minimum of 3 years' experience in Venepuncture."[83] Ms Hague noted Mr Gomez does not hold such qualifications and has never worked in pathology collection or as a Phlebotomist. She opined he was not reasonably qualified or experienced for such work. Unlike the position in respect of the first two jobs discussed above, this was at least a topic which had been addressed in the materials hitherto before the Board, in the report of Ms Stewart. As earlier discussed, the need for certificates for the position of Pathology Collector was a potentially concerning issue for the Board and the foundation for Ms Stewart's then uncontradicted opinion appeared vague. The contradicting information provided by the supplementary report of Ms Hague clearly undermined the force of the already borderline inference that the need to obtain certificates did not preclude Mr Gomez being "reasonably qualified" to be a Pathology Collector.

[90] As is apparent from the earlier discussed authorities, the word "reasonably" in the phrase "for which the member is reasonably qualified by education, training or experience" may provide some latitude in respect of requirements for on-the-job training and certification. Nonetheless, the phrase focusses upon the extent of the member's existing rather than future qualifications. The provision of Ms Hague's contradictory opinion, supported by an ostensibly straightforward explanation, should have made it obvious to the Board's delegate that at the time of the second decision there had in truth been insufficient information available about the substance of what was required for certification. On the whole of the evidence the true demands of the certification requirement are unclear. In the absence of such information, properly informed consideration could not be given to whether Mr Gomez was reasonably qualified to work as a Pathology Collector.

[91] Finally, as to the fourth mooted job, that of Nursing Educator, this was an area in which the shift in information available was less significant than in respect of the three other positions. In substance, Ms Hague's supplementary report merely reiterated her earlier opinion about Mr Gomez's unsuitability for such work. However, that is of no help to the Board's position for I have already concluded that there was insufficient material before the Board at the time of its second decision for it to have given properly informed consideration to Mr Gomez's suitability for work as a Nursing Educator.

[92] It is unfortunate, and perhaps frustrating from the perspective of the Board or its delegate, that the important relevant information provided in Ms Hague's supplementary report was not provided prior to the second decision. Nonetheless, as the above analysis demonstrates, the additional information in respect of two of the posited

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83 AR Vol 2 p 440.

jobs went to important relevant topics bearing upon Mr Gomez's suitability for those jobs about which the earlier materials before the Board had been silent. In respect of the third of the posited jobs, Ms Hague provided contradictory information of a kind which meant that, in truth, there had not yet been properly informed consideration of Mr Gomez's suitability for that job.

[93] None of this is to suggest that as a result of the additional information the Board ought ultimately arrive at a different conclusion but it obviously indicates there was a reasonable possibility of a different result than the Board's second decision. It was information of such objective importance that the Board had a duty to consider it in fulfilling its duty to give properly informed consideration to Mr Gomez's application.

[94] The probability is that had the Board properly considered it, it would have made further enquiry. However, it is unnecessary to reach a concluded view about that forecast in circumstances where the decision under appeal was merely that the additional material did not indicate a reasonable possibility of a different result to the second decision. That was not a conclusion reasonably open on the materials before the delegate. It could not have been made upon a real and genuine consideration of those materials.

[95] It follows the learned trial judge was correct in concluding that the Board should be ordered to properly consider Mr Gomez's request for reconsideration of his application.

[96] As earlier mentioned the Board's submissions complained Mr Gomez's arguments in the appeal involved pursuit of an allegation, arguably abandoned below, that the Board should have made further inquiries. It appeared those submissions related principally to Mr Gomez's appeal against the trial judge's decision in respect of the second decision, in which context they became academic because Mr Gomez was unsuccessful in that component of the appeal. To the extent the submissions related to the present component of the appeal they are also academic. That is because the decision under appeal was the erroneous decision that the additional material did not indicate a reasonable possibility of a different result to the second decision. Any failure to make inquiries was a step removed from that threshold error.

Appeal re delegation issue

[97] The plaintiff below submitted that the third decision was a nullity, both on the basis there was no power for the defendant to delegate the decision-making process and there was no effective delegation to the person who purported to make the decision.[84]

[98] On this issue the learned trial judge concluded:

> "[T]he affidavit material relied upon by the defendant establishes the decision was made pursuant to a delegation and by an approved delegate."[85]

His Honour did not preface that conclusion with any discussion of the evidence or the issue raised, presumably because he had already found in favour of Mr Gomez for other reasons.

[99] Mr Gomez's ground of appeal on this issue is:

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84 AR Vol 2 p 720 [35].
85 AR Vol 2 p 722 [50].

> "The learned Trial Judge erred in finding the affidavit material relied upon by the appellant established the decisions made on 9 January 2013 and 10 June 2016 were made pursuant to a valid delegation and by an approved delegate when the evidence did not support such a finding."

[100] This ground only has relevance to the third decision, it being a decision made by a purported delegate rather than by the Board. The Board has been unsuccessful in its appeal against the learned trial judge's decision to set aside the third decision and order Mr Gomez's application for reconsideration of the second decision be remitted to the Board to be considered according to law. It is therefore unnecessary for this ground of Mr Gomez's cross-appeal to be determined. However, because there appears to be substance to the point raised by Mr Gomez in respect of this ground and because of the Board's ongoing role in this matter, it is at least prudent to identify the nature and force of the point raised.

[101] The third decision was made by Ms Sharyn Brennan, Acting Manager (Claims Operations).[86] At issue is whether she held a lawfully delegated power to make such a decision. Section 6F (now s 6C) of the Act provided:

> "**Delegation by board**
>
> (1) The board may delegate its powers under this Act to the CEO, a trustee or an appropriately qualified person.
>
> (2) A delegation of a power may permit the subdelegation of the power to the CEO, a trustee or an appropriately qualified person."

[102] The Board's submission in the present case is that the Board did delegate its power to determine entitlement to a TPD benefit to the CEO who, in turn, sub-delegated it to, inter alia, the Manager (Claims Operations), the position in which Ms Brennan was acting at the time of the decision.

[103] Evidence adduced by the Board exhibited the schedules of delegations said to have been in force at the time of the third decision. There are two schedules. The first is the delegation schedule of the operational powers delegated by the Board of Trustees to the CEO.[87] The second schedule is the sub-delegation schedule of operational powers sub-delegated by the CEO.[88] The latter schedule records, in respect of "G14 total and permanent disablement insurance", three sub-delegated authorities:

> "(a) Authority to pay a total and permanent disablement insurance benefit.
>
> (b) Determination of entitlement to a total and permanent disablement benefit and whether or not the disablement is related to a pre-existing condition.
>
> (c) Authority to cancel total and permanent disablement insurance when a member elects to opt out."[89] (emphasis added)

[104] One of the sub-delegates clearly identified in the schedule in respect of that sub-delegation of authority is the Manager (Claims Operations), the position in which Ms Brennan was acting when she made the third decision. It is arguable whether that decision, which was only that there was no reasonable possibility of a different

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86 AR Vol 2 p 481.
87 AR Vol 1 p 100 et sequitur.
88 AR Vol 1 p 117 et sequitir.
89 AR Vol 1 p 122.

result to the earlier determination, was itself a "determination of entitlement". That argument was not raised in the appeal.

[105] Implicit in the use of the terms "authority to pay" and "determination of entitlement" in (a) and (b) above is a distinction as between the authority to pay a TPD benefit and the determination of whether a person is entitled to such a benefit. In any event the sub-delegated authority delegates both powers, so on the face of the sub-delegation schedule there is no irregularity.

[106] There exists a presumption of regularity in the law described thus:

> "It is a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act."[90]

That rule suggests here that proof of the requisite sub-delegation power carries with it a presumption that such a power was lawfully delegated. However, it is in the nature of such a presumption that it can be displaced by the facts of the case.

[107] The presumption here appears to be displaced by evidence of the delegation schedule of operational powers delegated by the Board of Trustees to the CEO, said to have been in force at the time of the third decision. Its delegation of authority, relating to "G14 total and permanent disablement (TPD) insurance", only delegated two powers, namely:

> "Authority to pay a TPD insurance benefit.
> Authority to cancel TPD insurance when a member elects to opt out."[91]

[108] Those two powers co-relate to the powers listed at (a) and (c) in the sub-delegation schedule of operational powers sub-delegated by the CEO, quoted above. That is, the Board's delegation to the CEO does not include the power which appears at (b) in the sub-delegation schedule, namely "determination of entitlement to a total and permanent disablement benefit and whether or not the disablement is related to a pre-existing condition".

[109] That the wording of the sub-delegation schedule makes separate reference to the authority to pay a TPD benefit and the determination of entitlement to such a benefit, suggests that in delegating these two purported powers the CEO treated them as distinct powers. That is, the CEO did not sub-delegate the power to pay on the basis the power to determine was inherent in the power to pay. If they are separate and distinct powers then the CEO had no power to delegate the power to determine an entitlement to a TPD insurance benefit. That is because there is no reference to the power to determine an entitlement to a TPD benefit in the powers delegated to the CEO. On the face of it that remains a determination only the Board can make.

[110] The point of substance to which the present ground therefore gives rise is whether the power to pay a TPD insurance benefit includes the power to determine an entitlement to a TPD insurance benefit. If it does, then it does not matter that the CEO purported to delegate the power to pay by also specifically delegating the power to determine. If it does not, then the CEO's sub-delegation of the power to determine was invalid and Ms Brennan was not lawfully empowered to make the

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90 Per Griffiths CJ in *McLean Bros and Rigg Ltd v Grice* (1906) 4 CLR 835, 850 citing Brewer J in *Knox County v Ninth National Bank* (1893) 147 US 91, 97.

91 AR Vol 1 p 103.

third decision (assuming that decision was a purported "determination"). The reasons below and the parties' submissions in the appeal did not specifically address this point. Moreover the content of the terms on which TPD insurance is provided (terms decided by the Board per s 233 of the deed), which may be relevant to the point, are not in evidence. Had it been necessary to decide the present ground of appeal it would likely have at least been necessary to require further argument addressing this point as well as the question whether the decision was a determination.

Appeal re costs

The order below

[111] In considering costs below the learned trial judge reasoned:

> "[11] Whilst the trial ultimately was conducted on the basis that this Court would determine the issues in dispute between the parties on the material placed before the defendant, with the best outcome the plaintiff could achieve being a remitter back to the Trustee to determine his application properly, substantial costs were incurred by the defendant in preparation for trial on the basis that the defendant was required to meet a claim that the Court itself determine the plaintiff's application for payment of total and permanent disablement benefits. Witnesses were arranged to be available on that basis. The plaintiff's late concession that such relief was not open, whilst shortening the length of the trial, did not obviate the incurring of those costs. That fact is a relevant matter in the consideration of any exercise of the discretion in respect of costs.
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> [12] Another relevant matter is that the plaintiff, until 13 May 2016, was only seeking to challenge the first two decisions of the defendant. The plaintiff offered to settle the proceedings in that form on two occasions. First, on 6 October 2015, in accordance with the principles of *Calderbank v Calderbank*. Second, by formal offer to settle dated 22 February 2016. Both offers were more favourable than the result ultimately achieved by the plaintiff in that the plaintiff was unsuccessful in that aspect of his claim. However, the plaintiff did ultimately succeed in obtaining favourable relief on his amended claim.
>
> [13] A further relevant matter is that whilst the plaintiff did not ultimately succeed in having either the first or second decision of the defendant set aside, the determination of those issues did not substantially increase the length of trial as conducted by the parties. Material relevant to those decisions would properly have been placed before the Court in any event in its consideration of the circumstances in which the defendant was called upon to reconsider the second decision.
>
> [14] Balancing all of those matters, I am satisfied determining costs on the basis of success in respect of particular issues would not be an appropriate exercise of the discretion. …

> [15] Further, it would not be an appropriate exercise of the discretion to order the plaintiff pay the defendant's costs for some parts of the proceeding and for the defendant to pay the plaintiff's costs for other parts. That would not reflect the relevance of earlier steps to the determination of issues at the hearing. In reaching this conclusion, I have had regard to the offers made by the defendant prior to the inclusion in the plaintiff's claim of the request for reconsideration of the second decision.
>
> [16] The relevance of the earlier steps in earlier considerations to a determination of the issues at the hearing also satisfy me it is not appropriate to make a positive costs order in the defendant's favour, notwithstanding those offers. Such a determination would not properly reflect the plaintiff's ultimate success in obtaining an order that his claim for benefits be reconsidered by the defendant.
>
> [17] Instead, it is appropriate, in the exercise of the Court's discretion, to reflect those factors by awarding the plaintiff a part only of his costs, both as to the stage from which costs are to be paid, and the percentage thereof. Such an order reflects the plaintiff's ultimate limited success whilst factoring in that substantial costs were unnecessarily incurred in preparation for trial.
>
> [18] Having regard to those matters, I am satisfied it is appropriate to order, in the exercise of my discretion, that the plaintiff not recover any of his costs of the proceeding up to the filing of the further amended statement of claim on 13 May 2016 wherein he challenged, for the first time, the defendant's refusal to reconsider its second decision. The plaintiff's limited success thereafter is properly to be reflected by an order that the defendant pay 40% of the plaintiff's costs of the proceeding from 13 May 2016, to be assessed on a standard basis."

[112] His Honour went on to observe that the parties agreed in respect of the plaintiff's unsuccessful application of 7 April 2017 that the plaintiff ought pay the defendant's costs of its appearance on that occasion.

[113] His Honour relevantly ordered:

> "…3. The plaintiff pay the defendant's costs of the defendant's appearance at the application on 7 April 2017, assessed on a standard basis.
> 4. The defendant pay 40% of the plaintiff's costs of the proceeding from 13 May 2016 (except for the plaintiff's appearance on 7 April 2017), assessed on a standard basis.
> 5. There otherwise be no order as to costs."[92]

Grounds

[114] Mr Gomez complains the learned trial judge erred in the exercise of his discretion concerning costs in that:

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92 AR Vol 2 pp 727-729.

"(a) the learned Trial Judge proceeded on a misapprehension of the facts by wrongly concluding the trial was conducted on the basis that the best outcome the respondent could achieve was remitter back to the Trustee to determine the application properly;

(b) the learned Trial Judge wrongly determined that substantial costs were unnecessarily incurred in preparation for trial in circumstances where an argument against remitter was reasonably open to the respondent notwithstanding the decision of the respondent to consent to remitter at the commencement of trial;

(c) the learned Trial Judge's conclusion that substantial costs were incurred by the appellant in preparation for trial on the basis the appellant was required to meet a claim that the Court itself determine the application including arranging witnesses to be available:

(i) was not supported by evidence tendered by the appellant; and

(ii) evidence to the contrary was tendered by the appellant;

(d) the order as to costs was disproportionately made against the respondent based on what was concluded to be the limited success of the respondent in circumstances where it was acknowledged by the learned Trial Judge this was not an appropriate case in which to exercise a discretion to award costs in respect of particular issues."[93]

Discussion

[115] This ground of the cross-appeal falls for determination in circumstances where the substantive grounds have failed. The question of whether in these circumstances leave was required by s 64(2) of the *Supreme Court of Queensland Act* 1991 (Qld) for this ground to be heard and determined was not raised in submissions. In the absence of such submissions and given this ground in any event lacks merit it is unnecessary to consider the question.[94]

[116] The appeal in respect of costs involves a challenge to an order that is discretionary in nature and the principles in *House v The King*[95] therefore apply.

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93 AR Vol 2 p 736.

94 Section 64(1) *Supreme Court of Queensland Act* 1991 (Qld) provides that an appeal only in relation to costs lies to this court from the Trial division only by leave of the Judge below. Section 64(2) provides an exception:

"(2) However, if, after an appeal to the Court of Appeal is properly started, the appeal becomes an appeal only in relation to the costs of the original proceeding –

(a) subsection (1) does not apply; and

(b) the appeal may be heard and determined only by leave of the Court of Appeal."

The predecessors to s 64 - s 255 *Supreme Court Act* 1995 (Qld) and s 9 *Judicature Act* 1876 - were differently worded. Those earlier provisions prompted a divergent body of authority as to whether an appellant requires leave to appeal against a costs order where the appeal is part of an otherwise unsuccessful appeal against the substantive elements of the judgment below. Compare, for example, *Saunders v McKenna* [1961] Qd R 425 (a decision which is consistent with the English approach subsequently articulated in *Wheeler v Somerfield* [1966] 2 QB 94); *Thorpe Nominees Pty Ltd v Henderson & Lahey* [1988] 2 Qd R 216; *Re Golden Casket Art Union Office* [1995] 2 Qd R 346 (which did not follow the approach in *Wheeler v Somerfield*).

95 (1936) 55 CLR 499, 504-505.

[117] Grounds (a), (b) and (c) all relate to the topic of remitter. The outcome below involved the remitting of the matter, rather than the learned trial judge deciding Mr Gomez's application for a TPD benefit. As recently as a review on the eve of the hearing, Mr Gomez's counsel informed his Honour "the plaintiff's case has always been that it was seeking both the setting aside of the decisions, and the determination by the court, itself, as to the issue of entitlement to payment".[96] The former relief was described in argument below as the first stage and the latter as the second stage. It is clear that the parties had to that point prepared for the hearing in that understanding of the plaintiff's case. It was planned that witnesses would be called by the plaintiff[97] and expected the hearing would take four days.[98] His Honour was on that occasion sceptical of whether there was a legitimate basis for him to determine the issue of entitlement as well as of the need for witnesses to be called to contend for the setting aside of the decision. It was unnecessary for his Honour to then rule on those issues but his observations seemingly had some impact. By the outset of the hearing counsel had agreed that the listed hearing ought deal with the first stage only and that no witnesses would be called.

[118] The learned trial Judge was not strictly correct in observing counsel for Mr Gomez had made a late concession the second stage of relief sought was not open. While the observation was consistent with the course the case took there was no express concession. How that slip supposedly grounds a proper basis to challenge the costs decision is not apparent. Whether conceded or not, the point was evidently unarguable - no cogent basis was advanced below or on appeal as to how the second stage of relief was ever likely to have been an appropriate option. In the circumstances of this case it was inevitable that at best for Mr Gomez the matter would be remitted.

[119] Mr Gomez's approach to the litigation unnecessarily put the Board to the inevitably substantial cost of preparing for argument and cross-examination of the plaintiff's witnesses at a hearing of the second stage of relief which did not eventuate and was not ultimately pressed for by Mr Gomez. It was reasonable to infer, as the learned trial judge did, that the Board's preparation for the second stage would have included arrangements to meet the potential need to call its own witnesses.[99] These considerations did not call for specific financial quantification. They were merely part of an array of for and against considerations legitimately informing the exercise of the learned trial judge's discretion as to costs. There is no substance to grounds (a), (b) or (c).

[120] As for ground (d), it misconceives the order and the learned trial judge's approach in arriving at it. The complaint that the order was disproportionately made against Mr Gomez is presumably a reference to the fact that the Board was only ordered to pay 40 per cent of Mr Gomez's costs as from the date of challenge to the third decision. That complaint makes no allowance for the fact Mr Gomez was not ordered to pay any of the Board's costs, save for the costs of the occasion of Mr Gomez's failed attempt to seek leave to amend his pleadings. Further, his Honour did not, as the ground suggests, act inconsistently with his view costs ought

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96 AR Vol 1 p18 L5.

97 AR Vol 1 p19 L9.

98 AR Vol 1 p19 L15.

99 The very nature of the second stage of relief supports such an inference, as did, for example, a submission by the Board's counsel at the outset of the hearing, when it was apparent only the first stage was to be heard, that such an approach "would also mean that no party would be calling the oral evidence that was suggested" (AR Vol 1 p24 L20).

not be determined on the basis of success on particular issues. Had he awarded costs on that determinative basis Mr Gomez was unlikely to have received a better costs outcome than the Board. The order actually made, which was more favourable to Mr Gomez than the Board, is consistent with the learned trial judge's reasoned consideration of a variety of relevant considerations including, but not confined to, Mr Gomez's success in respect of the third decision.

[121] No error in the learned trial Judge's reasoning has been demonstrated. Nor in the circumstances of the case does the costs order of itself bespeak error in the exercise of the costs discretion. The appeal in respect of costs must fail.

Orders

[122] The above conclusions have the consequence that neither party has succeeded in their appeals. In a case of this kind there may exist some legitimate basis, of which the court is presently unaware, to contend that costs should not follow the event as they ordinarily would. Failing agreement between the parties as to costs, the court should receive submissions from them as to costs.

[123] I would order:

1. The Board's appeal is dismissed.
2. Mr Gomez's cross-appeal is dismissed.
3. If the parties have not reached agreement as to costs within two weeks of judgment:
   (a) within three weeks of judgment the parties will each file and serve written submissions, not exceeding four pages, as to the appropriate costs order(s) in the appeal and cross-appeal;
   (b) within four weeks of judgment the parties may file and serve replies to their opponent's submissions, not exceeding two pages.