SUPREME COURT OF QUEENSLAND

CITATION:	*Rusterholz v Board of Trustees of the State Public Sector Superannuation Scheme* [2011] QSC 276
PARTIES:	**MARCO RUSTERHOLZ** Applicant V **BOARD OF TRUSTEES OF THE STATE PUBLIC SECTOR SUPERANNUATION SCHEME** Respondent
FILE NO/S:	5419/09
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	20 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2011
JUDGE:	Byrne SJA
ORDER:	**The application is dismissed.**
CATCHWORDS:	INSURANCE AND INCOME SECURITY – SUPERANNUATION – REGULATED AND COMPLYING SUPERANNUATION FUNDS – MINIMUM BENEFIT AND MEMBER PROTECTION STANDARDS – Where the respondent administers the superannuation scheme for State public sector employees – Where the applicant was a non-contributing member – Where the applicant seeks declaration of an entitlement for total permanent disablement – Where the applicant did not disclose a pre-existing medical condition – Where the respondent board determined that the applicant was not entitled to total permanent disablement benefit under the scheme – Where competing interpretations of the meaning of the section relevant to the entitlement of the applicant advanced – Where the applicant challenged the decision of the Board on the basis that it failed to properly inform itself of matters relevant to the decision to deny the applicant relief – Where the respondent contended that the applicant should have completed a personal medical statement upon becoming a contributing member of the scheme and should have disclosed the pre-existing injuries –

Whether the applicant was entitled as a non-contributing member who had not lodged a truthful medical statement when joining the defined benefit scheme to benefit under the scheme – Whether the applicant is entitled to declaratory relief

Superannuation Industry (Supervision) Act 1993 (Cth), cited.
Superannuation (State Public Sector) Act 1990, considered.

Board of Trustees of the State Public Sector Superannuation Scheme v Edington [2011] FCAFC 8; (2011) 119 ALD 472, cited.
Finch v Telstra Super Pty Ltd (2010) 242 CLR 254, cited.
Forster v Jododex Aust Pty Ltd (1972) 127 CLR 421, cited.
Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd [2011] NSWCA 204, cited.

COUNSEL: M J Gollan for the Applicant

G Handran for the Respondent

SOLICITORS: Firths – The Compensation Lawyers for the Applicant

Crown Solicitor for the Respondent

State Public Sector Superannuation Scheme

[1] The respondent ("the Board") administers the State Public Sector Superannuation Scheme ("the Scheme") under the *Superannuation (State Public Sector) Deed* 1990 ("the Deed").[1] The Deed is an instrument of delegated legislation made under the *Superannuation (State Public Sector) Act 1990.*

[2] The Scheme provides superannuation, retirement, provident and other benefits to State public sector employees.

Question to be decided

[3] The applicant seeks declaratory[2] relief to establish an entitlement under the Deed to benefits for total and permanent disablement ("TPD").

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1 The Deed has been amended periodically since. Reprint 3, which is the form it took in 2001, matters.

2 There was a right of appeal to the Superannuation Complaints Tribunal and from that Tribunal to the Federal Court: *Board of Trustees of the State Public Sector Superannuation Scheme v Edington* [2011] FCAFC 8; (2011) 119 ALD 472, 474 [5]. It was not suggested that declaratory relief should be refused because of those rights of appeal: cf *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421, 427, 438-439; R.P. Meagher, J.D. Heydon and M.J. Leeming, *Equity Doctrines and Remedies*, 4th ed, (2002), p 626, [19-105]. Nor was reference made to the prospect of refusing declaratory relief on the footing that the benefit could have been pursued in the District Court as a debt (confronting whatever limitations obstacles there may have been).

Applicant starts as non-contributory member

[4] In May 1990, the applicant was employed by the State as a refrigeration mechanic and joined the Scheme as a non-contributing member in the "accumulation" category.

[5] Insurance against the risk of TPD was not a benefit associated with an accumulation account. However, external TPD insurance was offered to Scheme members. A member desiring such cover had to apply for it and, when the policy issued, pay the premium.

[6] The applicant did not bother to get TPD insurance.

Moving to the new account

[7] In 1991, a new account was offered under the Scheme. Called a "defined benefit" account, it was contributory. It differed[3] from an accumulation account in another respect: a defined benefit account Scheme member was automatically covered against TPD, subject to restrictions imposed by the Deed.

[8] The applicant transferred from an accumulation account to a defined benefit account with effect from 30 September 1995.

No TPD Cover purchased

[9] Because the applicant had not paid for TPD cover while an accumulation account member, he had no insurance against TPD when his transfer to the defined benefit account took effect.

No personal medical statement

[10] Members transferring to a defined benefits account could lodge a "personal medical statement" with the Board. The form in use in 1995 inquired about a wide range of ailments and injuries, including:

> "Any trouble or disorder of the joints, ligaments, tendons, bones or muscles" and "any injury to the head, neck, back or spine".

[11] The form also made provision for the member's declaration that:

> "I realise that if I fail to disclose any information which ought to have been disclosed on this statement I may not be covered for…disablement benefits in the first 10 years of contributory membership."

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[3] See, generally, *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 265, [16].

[12] The applicant did not submit a personal medical statement when he transferred to his defined benefits account. Had he done so, his statement, if truthful, would have disclosed that he had injured his lumbar spine and sustained fractures of his right knee, leg and ankle in a motorcycle accident in 1987.

Scheme membership terminates

[13] In February 2001, the applicant, aged 37, ceased employment and his Scheme membership terminated. By then, his medical condition was such that he could not perform his duties.

Two claims against Scheme funds

[14] In March 2007, the applicant lodged claims for payment for income protection[4] and a TPD benefit.

[15] In a claim form for income protection, the applicant described his condition as "lumbar sacral disc prolapse – right leg, ankle knee fractures". He identified the cause of that predicament as: "motor accident 1987". The form also inquired: "when was the condition first diagnosed or date of injury". He answered: "09/01/87".

[16] This claim was supported by a form completed by Dr Zimmerman, a medical practitioner. In response to a request that he list "all medical diagnosis relevant to the claim", Dr Zimmerman wrote:

> "Lumbar spine fracture, fracture comminuted (R) leg and fracture" of a "forearm."

[17] Dr Zimmerman attributed a cause to these medical conditions: "MBA". This abbreviation signifies, it seems, motor bike accident.

[18] The form also inquired as to when the "signs or symptoms of the condition (or a related condition) were first noted". Dr Zimmerman answered: 9 January, 1987.

[19] In completing the form claiming the separate TPD benefit, the applicant described his condition much as he had in his income protection claim. The cause, he wrote this time, was "Motor cycle accident 1987".

[20] In response to the inquiry "Have you been able to work…since you became disabled?", he answered: "Yes. Mid-1987 – late 1989 returned to work as an apprentice. Full time from early 1990 – 2001…as refrigeration mechanic".

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4 This claim is not now pursued.

[21] Invited by the form to state the particular duties he was prevented from doing, the applicant said that his back, leg, knee and ankle became arthritic so that he was unable to freely bend, kneel or twist.

[22] Another medical practitioner, Dr Begum, provided a medical certification dated 31 August 2007. His diagnosis was: "multiple joint fracture followed by pain & disability, pain & osteoarthritic change".

[23] The applicant retained solicitors to pursue his claims for the two benefits.

TPD entitlement

[24] Section 46(1) of the Deed confers an entitlement to a TPD benefit where a member becomes disabled before age 55. The account is to be credited with his and his employer's monetary contributions and earned accruals. These amounts are called "preserved money". Additionally, the member is entitled to:

> "The member's prospective membership benefit if payable".[5]

MPMB conditions

[25] Section 47 of the Deed provides the means for ascertaining the entitlement, if any, to a member's prospective membership benefit ("MPMB"). It stipulates:

> "47.(1) An employed member's prospective membership benefit shall be the applicable percentage as set out in schedule 1 multiplied by prospective membership and shall be payable where -
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> (a) a member has 10 years or more contributory membership; or
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> (b) (i) the member has fewer than 10 years contributory membership; and
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> (ii) the member lodged a personal medical statement at or about the time of entry to membership; and
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> (iii) the board is of the opinion that the total and permanent disablement…was not related to a condition that was disclosed on the personal medical statement or which in the opinion of the board should reasonably have been disclosed on the personal medical statement; or
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> (c) (i) the member has fewer than 10 years contributory membership; and
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> (ii) the member did not lodge a personal medical statement at or about the time of entry to membership; and
>
> (iii) it is established to the satisfaction of the board that the total and permanent disablement…was not related to a condition that ought reasonably to have been disclosed had a personal medical statement been submitted at or about the time of entry to membership.
>
> …

[5] s.46(1)(b) of the Deed.

> (2A) Subsection (1)(b) and (c) do not apply to a member if -
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> (a) the member has transferred to the standard defined benefit category from an accumulation category…; and
>
> (i) the total of the member's period of membership in the accumulation category and period of contributory membership under this chapter is …
>
> (ii) … 10 years.
>
> (2B) If subsection (2A) applies to a member, the member's prospective membership benefit is the lesser of the following –
>
> (a) the applicable percentage stated in schedule 1 multiplied by the member's prospective membership;
>
> (b) the amount of the insurance cover for…total and permanent disablement that applied to the member, immediately before the transfer..."

[26] The applicant did not have at least 10 years contributory membership. So s 47(1)(a) did not confer an MPMB on him. Section 47(1)(b) is not germane either: he had not lodged a personal medical statement.[6] In 2001, however, he was a contributory member with fewer than 10 years contributory membership. So he was entitled to the MPMB if his circumstances were comprehended by s 47(1)(c)(iii). Accordingly, the benefit was payable despite his not having lodged a personal medical statement if the Board were satisfied that his TPD "was not related to a condition that ought reasonably to have been disclosed" if a "personal medical statement" had been submitted.

Delegate's decision

[27] Initially, it fell to a delegate to decide whether the applicant was entitled to TPD benefits.

[28] In September 2007, the delegate accepted that the applicant was totally and permanently disabled, which meant that he was entitled to the preserved money.

[29] The next question was whether the applicant was entitled to an MPMB. The delegate held that he was not.

A challenge

[30] In January 2008, a Scheme Senior Case Manager wrote to the applicant's solicitors to say that the delegate had concluded that the applicant was not eligible for income protection or for the MPMB. A statement of reasons was enclosed together with copies of the certifications by Dr Zimmerman and Dr Begum. These reports, which had been furnished by the solicitors, constituted the entirety of the medical evidence put before the delegate. The solicitors were also advised that there was a right of

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[6] The function and significance of the personal medical statement were not the subject of evidence. However, I was informed, without objection, that a member's responses in the form mattered to reinsurance.

appeal[7] to the Board and that: "You will be responsible for the cost of any additional medical reports you want to obtain to support your appeal."

[31] In June 2008, the solicitors wrote to a claims officer. The letter acknowledged receipt of the delegate's decision and statement of reasons and proceeded to debate the correctness of the decision to decline the MPMB. The letter did not contest the delegate's view that s 47(1) did not confer an entitlement to the MPMB. The challenge was instead founded on the uncontroversial proposition that s 47(2A) was engaged.[8] The solicitors argued that s 47(2B)(a) applied.[9] But the letter ignored the s 47(2B) stipulation that the (2B)(a) formula applied only if its application yielded an amount less than the sum ascertained by adopting the (2B)(b) prescription.

Appeal

[32] The applicant appealed the delegate's decision to the Board, founding his case on the argument advanced in his solicitors' June letter. The Board's reasons record that the sole ground of appeal was that the applicant was entitled to the MPMB "because his period of non-contributory membership in the Accumulation Account and his period of contributory membership in the Defined Benefit Account exceed the ten year pre-existing period".

[33] Consistently with the position that the applicant did not contest the delegate's opinion that there was no right to the MPMB under s 47(1)(c), in the appeal those solicitors did not furnish any evidence – medical or otherwise – to suggest that the disablement was not related to a condition that ought reasonably to have been disclosed had a personal medical statement been submitted. Nor was it suggested that the Board could be satisfied of the matters necessary to bring the applicant within s 47(1)(c)(iii).

[34] The Board dismissed the appeal.

Asking the wrong question

[35] A ground on which the Board is said to have dealt with the appeal inappropriately is that it failed to consider the correct question.

[36] At the outset of its reasons, the Board stated the "Issue to be Resolved" in this way: "is the condition causing Mr Rusterholz's disablement related to the condition which pre-existed his effective insurance date on 30 September 1995". This, Mr Handran was disposed to concede, was not the right question. The Board should

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7 Under s 30 of the Deed, "any person aggrieved by any decision of the…delegate may appeal to the board for reconsideration". The appeal is to "be by way of rehearing". Both sides say that the appeal was to be heard *de novo*.

8 The applicant had, in aggregate, more than 10 years membership in the accumulation and defined benefit categories.

9 Its application was said to carry an entitlement to the amount yielded by applying the s 47(2B)(a) formula to final annual salary.

have considered whether the "total and permanent disablement"[10], not the particular medical condition causing it, was "related to a condition that ought reasonably to have been disclosed had a personal medical statement been submitted …"

[37] As it happens, however, the Board answered the right question rather than the one posed initially. Its reasons record that:

> "The Board determined that the evidence was sufficient to establish that…Mr Rusterholz's disablement is related to the condition which should reasonably have been disclosed had a personal medical statement been submitted at or about the time of entry to contributory membership."

[38] Among the Board's "material findings" were:

> "…based on the medical evidence, the Board believed Mr Rusterholz's disablement is related to the injuries he suffered in the motor vehicle accident which occurred in 1987, and therefore his condition pre-existed his contributory membership insurance date of 30 September 1995."

[39] The Board was also:

> "… satisfied that if Mr Rusterholz had completed a personal medical statement upon becoming a contributory member of QSuper, he should reasonably have disclosed the fractures to his spine, leg and knee caused by the motor vehicle accident in 1987."[11]

[40] In the circumstances, the Board's decision did not miscarry merely because it had initially expressed the issue infelicitously.[12]

Complaints concerning s 47(1)(c)

[41] Particulars of challenges to the Board's approach in deciding the appeal are:

> "Failed to properly inform itself of the matters relevant to a decision as to whether the Total and Permanent disability was not related to a condition that ought reasonably to have been disclosed had a personal medical statement been submitted.
>
> Failure to make enquiries for information, evidence and advice to enable the Trustee to fairly and reasonably answer the question posed by s 47(1)(c)(iii).

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10 "Total and permanent disablement" is defined in s 4 of the Deed to mean "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."

11 Board statement of reasons para 8.

12 This makes it unnecessary to consider whether it would be pointless to remit the matter for reconsideration because the evidence admits of only outcome: that s 47(1)(c)(iii) does not apply in this applicant's situation.

> Failure to put the terms of s 47(1)(c)(iii) to either doctor from whom an opinion was sought."

[42] The strength of the connection between the disablement and the injuries sustained in 1987 was firmly established.

[43] The medical practitioners had said, in effect, that the disabling condition was caused by the injuries sustained in the accident. The applicant himself was quite sure about the link, as he made plain by what he wrote in his claim forms about the relationship between the 1987 injuries and the disablement.

[44] It is no surprise that the applicant's solicitors did not: suggest that the disablement was not related to the 1987 injuries; propose that the Board investigate that connection further; or supplement the material that had been put before the delegate.

[45] Now, however, the applicant contends that the Board, on its own initiative, should have conducted an investigation into whether the applicant's circumstances were within s 47(c)(iii). On his case, the Board was duty bound to ask the treating doctor and, if still unsatisfied after the response, inquire of another, suitably qualified, medical practitioner about the disability, whether it was related to a condition that existed at the time the applicant joined the defined benefit category, and when such a condition had arisen.

No breach of duty[13]

[46] The evidence of a causal connection between disablement and pre-existing injury – all of it furnished by the applicant or his solicitors – was an adequate foundation for the proper consideration of the questions that fell to be decided. Moreover, it was unequivocal: there were no "conflicting bodies of material".[14]

[47] The solicitors did not contend before the Board that it should put itself on inquiry about the trustworthiness of the evidence that they had adduced in the appeal. Moreover, the facts did not expose a reason for the Board to launch its own investigation to question the information put before it as the material upon which the appeal should be decided.

[48] In the circumstances, the Board was not duty bound to set about investigating the reliability of the applicant's evidence.

[49] Then it is suggested that the Board was in breach of duty in failing to ask Dr Begum and Dr Zimmerman for their opinions on the issues that arose under s 47(1)(c)(iii).

[50] There is no substance in this complaint either.

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13 No reference was made to the content of the duties said to have been contravened or to their sources, as to which see, generally, s. 52 *Superannuation Industry (Supervision) Act 1993* (Cth) and *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204.

14 Contrast *Finch* at p 281, [66].

[51] Unsurprisingly, no authority was cited to support the notion that the Board had failed to discharge its responsibilities because it had not asked the doctors to opine on the very issues the Board had to address in considering whether the applicant's circumstances brought his claim within s 47(1)(c)(iii).

[52] In any event, the Board already had sufficient information from the doctors to consider the s 47(1)(c)(iii) questions satisfactorily.

Section 47(2B)

[53] The Board also rejected the claim to an MPMB under s 47(2B), reasoning:

> "As Mr Rusterholz had no insurance cover in the Accumulation Account immediately before his transfer to the Defined Benefit Account, the Board does not accept the argument…that he is entitled to a prospective membership benefit under s 47(2A) and (2B) of the Trust Deed."

[54] When the applicant transferred from the accumulation category to a defined benefit account, he had no insurance cover "for…total and permanent disability". For this reason, the Board apparently considered that "the amount" of such cover "that applied to" him was nothing. More than $160,000 is the sum yielded by application of the formula in (2B)(a). Presumably, the Board thought that the (2B)(b) nil amount must be the "lesser" of those two comparatives.

[55] The applicant challenges that view of the operation of s 47(2B).

[56] To approach the (2B) assessment as the Board did does conform with the meaning naturally suggested by the words used in (2B). It is also consistent with the express recognition in s 46 that a member gets the MPMB only "if payable".

[57] The applicant, however, urges a different construction, contending that if there are two available interpretations, that which better accords with the beneficial intent of the Scheme should be preferred, and that it cannot have been envisaged that a member who satisfied the requirements of (2A) would receive no MPMB.

[58] If the Board's interpretation is correct, someone with less than 10 years contributory membership who had not lodged a truthful personal medical statement, and who had no pre-existing TPD cover, can never receive an MPMB.

[59] The applicant contends that s (2A) is concerned to confer some MPMB on defined benefit members not comprehended by 1(b) and (c) who have a decade of Scheme membership that includes a period with an accumulation account. To see to it that such a member gets some MPMB, on the applicant's case, where, as here, (2B)(b) produces no monetary benefit, it must be ignored and the claimant paid the (2B)(a) amount: in other words, (2B) should be construed to give someone in the applicant's position something by way of MPMB.

[60] That interpretation, however, involves curious consequences.

[61] Take a member who paid TPD insurance premiums while in the accumulation category. If that member had a small amount of cover at the time of transferring to the contributory account, the member would be much worse off financially than someone who had not paid any premium.

[62] The applicant's particular circumstances illustrate the perverse operation of (2B) if the provision is interpreted as he proposes.

[63] For the applicant, "the applicable percentage stated in schedule 1" is 21%. His "prospective membership"[15] was, it seems, 18 years. Twenty-one multiplied by 18 is 378. That 378% is to be applied to final average salary: in the applicant's case, $44,376. The figure yielded is about $176,742.

[64] With an accumulation account, the amount of TPD insurance depended upon the number of $1 units purchased. For someone aged 37, a premium of $1 per week bought $53,200 cover.

[65] On those figures, if the applicant had paid a $1 weekly premium to buy TPD cover while an accumulation category member, he would have received a $53,200 MPMB: that is, the lesser of that sum and about $176,742.[16]

[66] Now posit the applicant's actual circumstances. If his interpretation of (2B) is correct, despite having paid nothing for TPD insurance, he would get $176,742, which sounds absurd.

[67] The Board's view of the effect of (2B) accords with the natural meaning of the words used. It also avoids consequences so capricious that they could scarcely have been intended.

Disposition

The Board was right to dismiss the appeal.

This application, too, is dismissed.

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15 "Prospective membership" is defined, relevantly, to mean "the period expressed in years and any part of a year from the death or disablement of the member to the member's 55th birthday": s. 32.

16 At age 37, the applicant had to purchase four $1 units weekly to obtain an MPMB higher than this.