SUPREME COURT OF QUEENSLAND

CITATION:	*Syddall v The National Mutual Life Association of Australasia Ltd* [2009] QCA 341
PARTIES:	**ERIC ALBERT SYDDALL** (plaintiff/applicant) **v** **THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED** ACN 004 020 437 (defendant/respondent)
FILE NO/S:	Appeal No 10848 of 2009 SC No 5170 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2009
JUDGE:	McMurdo P and Keane and Muir JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application dismissed.** **2. The applicant is to pay the respondent's costs of the application fixed in the amount of $7,000, in any event.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – FROM INTERLOCUTORY DECISIONS – LEAVE TO APPEAL – the applicant made an application to this Court for a special case stated under s 250 *Supreme Court Act* 1995 (Qld) – whether this Court should hear the application *Supreme Court Act* 1995 (Qld), s 250, s 251, s 254 *Uniform Civil Procedure Rules* 1999 (Qld), r 745, r 781 *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442; [1925] HCA 27, cited *Collins v State Rail Authority of New South Wales* (1986) 5 NSWLR 209; (1988) 34 A Crim R 31, cited *Queensland Dairy Products Stabilisation Board v A C Munroe & Sons Pty Ltd* [1937] St R Qd 347, considered

COUNSEL: The applicant appeared on his own behalf
M Ambrose for the respondent

SOLICITORS: The applicant appeared on his own behalf
Bain Gasteen for the respondent

[1] **McMURDO P:** The applicant, Eric Albert Syddall, has made a claim under a disability insurance policy for which the respondent, National Mutual Life Association of Australasia Ltd, is now responsible if the claim is to be paid. He has brought an action in the Trial Division of this Court against the insurer seeking liquidated damages and other compensation for losses which he states he and his family has suffered. Mr Syddall is self-represented. The case is on the Trial Division's supervised case list. This is not the first time Mr Syddall's case has come before this Court. He has previously brought an assortment of appeals and applications for extension of time to appeal from interlocutory orders of judges of the Trial Division in respect of his action. They were all dismissed or refused with costs on 11 September 2009: see *Syddall v The National Mutual Life Association of Australasia Ltd*.[1] A few days later, on 17 September 2009, Mr Syddall told Daubney J, the judge conducting a supervised case review of his matter in the Trial Division, that he intended to make an application to the Court of Appeal for a special case stated under s 250 *Supreme Court Act* 1995 (Qld). After discussion with Mr Syddall and the insurer's counsel, no doubt in an effort to progress the matter, Daubney J ordered that any such application, together with all supporting affidavits, should be filed and served by 1 October 2009 and that the costs of that review were costs in the cause.

[2] On the last possible day for complying with Daubney J's order, Mr Syddall filed his application under s 250(3) *Supreme Court Act* 1995 in this Court in terms which included:

"**1. DETERMINATIONS SOUGHT:**

(a) The court determine the contract of insurance policy number 289613 which was varied to create policy 010410025 presented as court document 81 SPO04 has been Cancelled From Inception (C.F.I.) by the issuing insurer AC&L in about August 1995 and legally provides no insurance cover or is "*as never taken up*" and is unable to be avoided or further actioned.

(b) The court determine policy 010410025 is not the policy of the claim.

(c) The court determine on the aforesaid premises the contract of insurance policy number 289613 & 010410025 has no legal effect and any material related to the contract of insurance policy number 289613 / 010410025 be disallowed from this matter.

(d) The court determine policy number 010462463 which is the contract of insurance of claim 785592 and which is basis of this matter was created as new business by the issuing insurer AC&L in about August 1995.

(e) The court determine policy 010462463 is solely the policy under claim and is a complete contract wholly in writing standing alone and only materials relating to this contract be allowed.

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1 [2009] QCA 273.

(f) The court determine the insurer did not have in its possession by about 3.5.2001 the medical opinions of Dr Lynam and Dr Winstanley stating they "*consider that you are fit to perform those duties of a computer programmer/database administrator*"

(g) On the aforesaid premises, the court determine the insurer breached section 13 of the *Insurance Contracts Act 1984* (Cth) and acted fraudulently to avoid financial exposure and pursuant to section 14 of the *Act* is unable to rely on avoidance of the contract and is in breach of the contract of insurance.

(i) Further or in the alternative the court determine the appellant was not **involuntarily** unemployed for a period of or greater than 3 months (undertaking voluntary studies and simultaneously paid for his personal exertion) and on the 27.11.2000 was working as a plumber therefore the contract of insurance policy number 010462463 is unable to be avoided on the basis of involuntary unemployment.

(ii) Further or in the alternative the court determine the defendant not being the issuing insurer AC&L and not present at the inception of the contract of insurance is unable to determine the circumstances of the business relationship between the appellant and the insurer working as an agent for AC&L, and as shown by AC&L's disregard for period of time as an insurance agent or entering into a new business, that pursuant to section 291(c) of the *Insurance Contracts Act 1984* (Cth) the contract of insurance policy number 010462463 is unable to be avoided.

(iii) Further or in the alternative the court determine the issuing insurer AC&L did not adequately provide the appellant an understanding of what was relevant to information required by the insurer in making decisions whether to accept the risk of the past contract 289613 / 010410025 and, if so, on what terms until about July 1995 when the appellant was working as an agent.

(iv) Further or in the alternative the court determine the issuing insurer AC&L not entitled to avoid a contract based on unanswered questions pursuant to section 27 of the *Insurance Contracts Act 1984*.

(v) Further or in the alternative the court determine the defendant is not entitled to avoid a contract based section 29 (1)(c) of the *Insurance Contracts Act 1984* as the appellant was an agent for the issuing insurer AC&L and entered the contract regardless of an application or the information which may have previously been provided.

(vi) Further or in the alternative the court determine pursuant to section 29 (3) & (4) of the *Insurance Contracts Act 1984* more than 3 years has past from inception of the contract in about August 1995 and deny the defendant the option of avoiding or varying the contract of insurance.

(vii) Further or in the alternative the court disregard the insurers avoidance of the contract pursuant to

sections 21(1a) and 31 (1) of the *Insurance Contracts Act 1984* that the matters relied on by the defendant to avoid the contract are unrelated to the contract of the claim and the contract 010462463 has not been prejudiced by any failure or misrepresentation or, if the insurer has been so prejudiced, the prejudice is minimal or insignificant and therefore disregard the avoidance.

(h) The court determine the appellant is:
   (i) unable to perform at least one of the duties of his occupation which is necessary to produce income
   (ii) not engaged in any occupation; and
   (iii) at all relevant times under the care of a registered medical practitioner.

(i) Pursuant to the contract of insurance and the *Insurance Contracts Act 1984* (Cth) section 13, 14 15, the court determine medical examinations be conducted only in accordance with the contract of insurance and while the insurer is paying benefits and for the purpose of finding the true health of the insured as being relevant to this and like polices.

(j) The court determine only after legally establishing a claim/application was made fraudulently should an insurer be at liberty to apply section 29 of the Insurance Contracts Act 1984 to avoid a claim or deny benefit. Pursuant to section 4D of the *Crimes Act 1914* (Cth) a penalty is only applicable on conviction.

2. ORDERS SOUGHT:

(a) Pursuant to section 57 of the *Insurance Contracts Act 1984* and reg 32 of the *Insurance Contracts Regulations 1985 (Cth)* and elsewhere the court order the appellant is entitled to interest on outstanding sums being the *10-year Treasury Bond yield* plus *3%*.

(b) Pursuant to section 15 of the *Insurance Contracts Act 1984 (Cth)* the court order by the provisions of the contract of insurance that 7% Escalation be applied in all future payments calculations.

(c) On the aforesaid premises:
   (i) Pursuant to section 15 of the *Insurance Contracts Act 1984* (Cth) award past and future benefit payments and compensation to the appellant.
   (ii) Pursuant to the contract of insurance which provided for the appellant's financial security and peace of mind for both the present and the future, award damages to the appellant for suffering, emotional trauma and distress and other pecuniary and non pecuniary losses and loss of enjoyment of life by the deliberate and/or reckless actions of the defendant to avoid financial exposure from May 2001. Because of s 13, a breach of the duty of good faith no longer allows only the remedy of avoidance and section 15 of the Act provides for **compensatory "*damages*" (Commonwealth)**. Currently 8.5 years approx.
   (iii) Pursuant to the contract of insurance which provided for the insured's family's financial security and peace of mind

for both the present and the future, to the family (5 other members: s 20 of the Act) award damages for suffering, emotional trauma and distress and other pecuniary and non pecuniary losses and loss of enjoyment of life by the deliberate and/or reckless actions of the defendant to avoid financial exposure from May 2001. Because of s 13, a breach of the duty of good faith no longer allows only the remedy of avoidance and section 15 of the Act provides for **compensatory "*damages*" (Commonwealth)**.

(iv) Pursuant section 4B (3) of the *Crimes Act 1914* (Cth) penalise the respondent (up to) 5 times as a corporate body to compensate for incalculable losses, to dissuade this insurer from repeated incidents and to send a clear message to other insurers that such avoidance, practices and deceit is not acceptable and further to dissuade insurers and alike from using the court system for illegitimate purposes and prevent delays in a just and expeditious trial by a financially powerful insurer otherwise able to continue unfettered against a fragile and vulnerable insured.

(v) Order costs in favour of the appellant on an equitable basis."

[3] Mr Syddall's application is not easy to comprehend. But it is clearly a request for this Court to decide questions of fact, issues of law and make final determinations applying the law to those facts in his action against the insurer. This is a task ordinarily undertaken in the course of a trial before a Trial Division judge who then gives reasons for those findings and pronounces final orders. A dissatisfied litigant can appeal to this Court from these final orders under s 254 *Supreme Court Act* 1995. Mr Syddall, however, contends that s 250(3) authorises his extraordinary application to this Court.

[4] Section 250 provides:

"(1) Any judge of the court may subject to any rules of court exercise in court or in chambers all or any part of the jurisdiction of the said court in all such causes and matters and in all such proceedings in any causes or matters as before the commencement of the *Judicature Act 1876* might have been heard in court or in chambers respectively by a single judge of the said court or as may be directed or authorised to be so heard by any rules of court to be hereafter made.

(2) In all such cases any judge sitting in court shall be deemed to constitute the court.

(3) However, every issue of law and every special case stated by consent of parties shall be heard and determined by a single judge in the first instance unless either party shall require that the same be heard and determined by the Court of Appeal in the first instance in which case the same shall be so heard and determined accordingly."

[5] As I understand Mr Syddall's application and his written and oral submissions, he contends that s 250(3) allows any party to require that a case be "determined by the Court of Appeal in the first instance" whether or not the other party or parties consent to that course; and that, as he has brought his application under s 250(3) this Court must now determine it.

[6] After the hearing of Mr Syddall's application and without leave of the Court, he filed further submissions and material. There is nothing in those submissions and material which could not have been placed before this Court at the hearing of the application. They do not seem to add anything of significance. But, in any case, Mr Syddall has not demonstrated any reason why this Court should now receive further submissions and material when the hearing of the application has been completed. In determining this application, I will not consider the further submissions and material filed by Mr Syddall after the conclusion of the hearing of this matter.

Conclusion

[7] Section 250(1) sets out the broad powers of Supreme Court judges.[2] The first part of s 250(3) in its clear terms states the position that ordinarily applies: "every issue of law and every special case stated by consent of parties shall be heard and determined by a single judge in the first instance". As Mr Syddall points out, the second limb of s 250(3) then states: "unless either party shall require that the same be heard and determined by the Court of Appeal in the first instance in which case the same shall be so heard and determined accordingly". But that second limb of s 250(3) is qualified by the first. It does not become effective unless the first limb of s 250(3) is met and all the parties have consented to proceeding in this way.

[8] This construction of s 250(3) is consistent with that adopted by Webb J in construing s 6 *Judicature Act* 1876 (Qld) (repealed) in *Queensland Dairy Products Stabilisation Board v A C Munroe & Sons Pty Ltd*.[3] Section 6 was in like terms to s 250 which superseded it. Webb J concluded that s 6 allowed for issues of law to be referred to the appellate court only where the parties consented or the judge so directed.[4] That construction should also be adopted in respect of s 250(3). The subsection allows parties to consent to a mechanism for bringing an application for determination of an issue or issues of law in the Trial Division to the Court of Appeal. For the subsection to operate, there must be no dispute between the parties as to the facts necessary to consider the issue or issues of law. See, for example, *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia*[5] and *Collins v State Rail Authority of New South Wales*.[6] That is why s 250(3) requires the consent of the parties as to the "issue of law and every special case stated" if it is to be "determined by the Court of Appeal in the first instance".

[9] Mr Syddall claimed in his written submissions which he handed to the Court during the hearing of his application that his contention was supported by *Uniform Civil Procedure Rules* (UCPR) r 745(1)(a). He contended that r 745(1)(a):

> "supplements the context of s 250(3) by indicating the decision of a single judge may be appealed. An appeal of a decision made by

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2 See, however, *Supreme Court of Queensland Act* 1991 (Qld).
3 [1937] St R Qd 347.
4 [1937] St R Qd 347 at 363-364.
5 (1925) 36 CLR 442 at 450.
6 (1986) 5 NSWLR 209 at 211.

more than one judge has no avenue of appeal r 745(2). Considering the monetary value of the case and the implications to insurance business, anything the respondent can appeal will be appealed."

[10] Rule 745 relevantly provides:

"(1) This part applies to an appeal to the Court of Appeal from a decision of—

(a) the Supreme Court constituted by a single judge; …

…

(2) However, rule 765[7] applies only to an appeal from the Supreme Court constituted by a single judge.

…"

[11] Rule 745 contemplates that Trial Division judges will find facts and apply the law to those facts to decide the issue or issues in dispute between the parties, with an appeal from the resulting order to the Court of Appeal if a party is dissatisfied. The rule does not support Mr Syddall's present application.

[12] The UCPR does contain provisions concerning "cases stated" like those to which s 250(3) refers. Rule 781 provides:

"**781 Form and contents of case stated**

(1) A case stated must—

(a) be divided into paragraphs numbered consecutively; and

(b) state the questions to be decided; and

(c) state concisely the facts necessary to enable the Court of Appeal to decide the questions arising or to otherwise hear and decide the questions on the case stated.

…"

[13] When s 250 is read together with the decided cases to which I have referred and UCPR r 781, there can be no doubt that Mr Syddall's construction of s 250(3) is wrong. The insurer has not consented to proceeding in this way. The parties have not agreed on the facts necessary to enable the Court of Appeal to decide any questions of law arising from them or to otherwise hear and decide the issues Mr Syddall raises in his application. His application does not, and in the absence of the insurer's consent and cooperation cannot, comply with r 781. On the contrary, Mr Syddall in his application asks this Court to make findings of fact on critical aspects of his claim against the insurer. Nor has a judge of the Trial Division reserved any point in the case for the consideration of the Court of Appeal: see s 251 *Supreme Court Act* 1995.

[14] For these reasons, Mr Syddall's application is completely misconceived. It must be refused with costs.

[15] Towards the end of the hearing of this application, counsel for the insurer invited this Court, in the event it was successful in resisting Mr Syddall's application and in obtaining a successful costs order against him, to award indemnity costs. He asked this Court to fix those costs in the amount which the insurer's instructing solicitor deposed to in her supporting affidavit: $6,109.50 (excluding GST) for solicitor's fees and $3,850 (including GST) for counsel's fees.

[16] On 6 October 2009, the insurer's solicitor wrote to Mr Syddall clearly stating why this application was hopeless and that, if he proceeded with it, the insurer might put

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[7] Rule 765 (nature of appeal and application for a new trial).

this letter before the Court to seek indemnity costs against him. The insurer's solicitor also stated in the letter that her client desired this action to proceed to trial as soon as possible.

[17] Most of the material relied on by the parties in this application has been filed since 6 October 2009. It may be inferred that a significant amount of the insurer's costs have been incurred since 6 October. It is difficult to reach any conclusion other than that Mr Syddall, at least from the time he received the letter from the insurer's solicitor of 6 October 2009, knew that this application would inevitably fail. He claims he persisted because he wished this Court to finally determine the disputed issues, thus saving the cost and inconvenience of any subsequent appeal. I have doubts about whether that submission is frank, but I am not entirely persuaded that Mr Syddall pursued this application only to cause inconvenience and cost to the insurer. I am not ultimately satisfied that his conduct was such as to warrant an award of indemnity costs against him.

[18] It is, however, entirely appropriate to now fix the insurer's costs of this application. This will avoid any further distraction to the parties from the substantive issues in dispute between them. In doing so, this Court is entitled to take a "broad brush" approach and (applying an appropriate discount) to act on the uncontested evidence provided by the insurer as to its costs were they to be awarded on an indemnity basis. Adopting that approach, I consider that the insurer's costs of this application should be fixed in the amount of $7,000. Mr Syddall should not be required to pay them until the conclusion of the action.

[19] If Mr Syddall continues to bring unmeritorious applications or appeals from interlocutory orders, he will be at risk of future indemnity costs awards without the indulgence of an order that they be paid at the conclusion of the action. And if he genuinely desires to have his claim against the insurer determined, he must now follow, in a timely way, the directions of the judge or judges supervising his case. Misguided frolics like this application achieve nothing but the delay of the trial hearing and unnecessary costs which will ultimately be the responsibility of the losing party.

ORDERS:

1. Application dismissed.

2. The applicant is to pay the respondent's costs of the application fixed in the amount of $7,000, in any event.

[20] **KEANE JA:** I agree with the reasons of McMurdo P and with the orders proposed by her Honour.

[21] **MUIR JA:** I agree with the reasons of McMurdo P and with her proposed orders.