SUPREME COURT OF QUEENSLAND

CITATION:	*Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QSC 245
PARTIES:	**JOSEPH DAVID EDINGTON** (plaintiff) **v** **BOARD OF TRUSTEES OF THE STATE PUBLIC SECTOR SUPERANNUATION SCHEME** (defendant)
FILE NO/S:	BS8074/11
DIVISION:	Trial
PROCEEDING:	Hearing
DELIVERED ON:	21 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	15 April - 16 April 2015 and further written submissions 13 July 2015
JUDGE:	Bond J
ORDER:	**The questions set down for preliminary determination should be answered as follows:** **Question 1: Should the decision made by the Board as trustee on 25 September 2008 be set aside on the grounds set out in paragraphs 41(f), 44-47E and 50 of the further amended statement of claim.** **Answer: No.** **Question 2: If yes to question 1, should the plaintiff's TPD claim be remitted back to the Board for reconsideration, or determined by the court.** **Answer: In view of the answer to question 1, it is unnecessary to answer this question.** **Question 3: Was there a contract in existence between the plaintiff and the Board for the provision of insurance benefit.** **Answer: No.** **Question 4: If yes to question 3, in forming the opinion that the total and permanent disablement of the plaintiff was related to schizophrenia, did the Board breach the terms of an insurance contract on the grounds contained in**

paragraphs 41(f), 44 to 47E and 50 of the further amended statement of claim.

Answer: In view of the answer to question 3, it is unnecessary to answer this question.

Question 5: If yes to question 4, is the opinion required of the insurer one which becomes a matter for determination by the court?

Answer: In view of the answers to question 3 and 4, it is unnecessary to answer this question.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – PROCEEDINGS BETWEEN TRUSTEES AND BENEFICIARIES OR THIRD PARTIES – where the plaintiff was a member of the superannuation scheme administered by the defendant – where the plaintiff suffered total and permanent disablement – where the defendant denied an insurance benefit because the disablement related to an undisclosed pre-existing medical condition – where the plaintiff applied under s 8 of the *Trusts Act 1973 (Qld)* for an order setting aside the defendant's decision – whether the defendant had breached any duties as trustee

EQUITY – TRUSTS AND TRUSTEES – EXPRESS TRUSTS – NECESSITY FOR INTENTION – where there was no explicit declaration that property held on trust – whether there is sufficient evidence of intention in the relevant Act and subsidiary legislation that the defendant be regarded as a trustee holding the scheme fund on trust for members

EQUITY – TRUSTS AND TRUSTEES – POWERS AND DUTIES – GENERAL MATTERS – where defendant gave reasons for decision –whether test for review where reasons given differs from test for review where reasons not given

EQUITY – TRUSTS AND TRUSTEES – POWERS AND DUTIES – GENERAL MATTERS – where defendant had a duty to obtain sufficient information in order to make a properly informed decision – whether the rules of natural justice are relevant to what the duty requires - whether duty discharged in circumstances – whether decision to deny insurance benefit reasonably open on the evidence before defendant

EQUITY – TRUSTS AND TRUSTEES – POWERS AND DUTIES – GENERAL MATTERS – ROLE OF COURT – whether if defendant had breached its duties as trustee the Court would determine defendant's entitlement or remit the matter to defendant – whether defendant no longer capable of deciding fairly and objectively

CONTRACT – INTENTION TO CREATE CONTRACTUAL RELATIONS – whether a contract of

insurance was in existence between the plaintiff and the defendant – where parties' intention was that the plaintiff would become a member of the existing superannuation arrangements – where existing arrangements intended to create a trustee/beneficiary relationship between the defendant and members - whether parties intention was to create contractual obligations between themselves

CONTRACT – INSURANCE CONTRACT – BREACH – whether if a contract of insurance was in existence the defendant had acted reasonably in considering the plaintiff's claim – whether the defendant's denial of an insurance benefit was unreasonable on the material before it

CONTRACT – INSURANCE CONTRACT – ROLE OF COURT – whether if the defendant had breached contractual duties the Court would determine defendant's entitlement itself or remit to defendant

Superannuation Administration Act 1996 (NSW), s 49
Superannuation (Resolution of Complaints) Act 1993 (Cth), s 14
Superannuation (State Public Sector) Act 1990 (Qld), ss 3, 4, 7, 11, 12
Superannuation (State Public Sector) Deed 1990 (Qld), ss 2, 4, 5, 7, 12, 13, 15, 30, 68, 77, 78, 79, 84, 86, 87
Trusts Act 1973 (Qld), s 8

Alcoa of Australia Retirement Plan Pty Ltd v Frost (2012) 36 VR 618, considered
Armitage v Nurse [1998] Ch 241, cited
Beverley v Tyndall Life Insurance Co Ltd (1999) 21 WAR 327, cited
Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd [2015] NSWCA 104, cited
Briggs v Gleeds [2014] 3 WLR 1469; [2014] EWHC 1178 (Ch), cited
Clay v Clay (2001) 202 CLR 410, considered
Chammas v Harwood Nominees Pty Ltd (1993) 7 ANZ Ins. Cas 61–175, cited
Dixon v LeKich [2010] QCA 213, cited
Edington v Board of Trustees of the State Public Sector Superannuation Scheme [2012] QSC 211, considered
Ermogenous v Greet Orthodox Community (2002) 209 CLR 95, cited
Erzurumlu v Kellogg Superannuation Pty Ltd [2013] NSWSC 1115, considered
F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295, cited
Finch v Telstra Super Pty Ltd (2010) 242 CLR 254, considered
Halloran v Harwood Nominees Pty Ltd [2007] NSWSC 913, cited

Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, considered
Jones v Dunkel (1959) 101 CLR 298, considered
Karger v Paul [1984] VR 161, considered
Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6, cited
Lazarevic v United Super Pty Ltd [2014] NSWSC 96, cited
Legal Services Board v Gillespie-Jones (2013) 249 CLR 493, cited
Manglicmot v Commonwealth Bank Officers Superannuation Corporation (2010) 239 FLR 159, considered
McArthur v Mercantile Mutual Life Insurance Co Ltd [2002] 2 Qd R 197, followed
R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13, cited
Registrar of Accident Compensation Tribunal v Federal Commissioner of Taxation (1993) 178 CLR 145, cited
Sayseng v Kellogg Superannuation Pty Ltd [2003] NSWSC 945, cited
Streeter v Western Areas Exploration Pty Ltd (No 2) (2011) 82 ACSR 1, cited
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152, cited
United Super Pty Ltd v Built Environs Pty Ltd (2001) 80 SASR 513, distinguished

A Review of the Trusts Act 1973 (Qld) (Queensland Law Reform Commission, Discussion Paper WP70, December 2012)

COUNSEL: P W Hackett, with A S Katsikalis, for the plaintiff

S E Brown QC, with G J Handran, for the defendant

SOLICITORS: Black & Co Lawyers for the plaintiff

Crown Law for the defendant

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The plaintiff seeks to reverse the Board's rejection of his TPD claim

[1] **Bond J:** The plaintiff was a member of the State Public Sector Superannuation Scheme, which is popularly known as QSuper.

[2] The principal task of the defendant Board of Trustees of the State Public Sector Superannuation Scheme is to administer QSuper.

[3] Amongst other things, the Board provides total and permanent disablement ("TPD") insurance to members of QSuper.

[4] On 26 August 2004 the Board declined a claim which the plaintiff had made for a TPD benefit under the relevant insurance terms.

[5] The Board determined that the plaintiff had suffered TPD, but rejected the claim because his disablement was related to a pre-existing medical condition which should reasonably have been disclosed by the mechanism provided for by the insurance terms, with the result that the claim was barred under those terms.

[6] The long history of litigation thereafter was detailed in the decision of Mullins J on an interlocutory dispute in this proceeding: see *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2012] QSC 211 at [17] to [47]. Briefly:

(a) On 5 November 2004, the plaintiff sought a review of the Board's decision by the Superannuation Complaints Tribunal ("the Tribunal") pursuant to the *Superannuation (Resolution of Complaints) Act 1993 (Cth)*. On such a review the Tribunal undertakes a hearing *de novo* for the purpose of determining for itself whether or not the decision of a trustee of a superannuation fund was, in its operation in relation to a complainant, fair and reasonable.

(b) On 2 October 2006, the Tribunal affirmed the decision of the Board. The plaintiff's appeal to the Federal Court was dismissed on 14 December 2007. However on 15 May 2008 an appeal from that decision to the Full Federal Court was allowed by consent, previous orders set aside and the matter remitted to the Board to decide the matter, informed by a further medical report favourable to the plaintiff which had not been before the Board when it decided to reject the claim.

(c) On 25 September 2008, the Board again declined the plaintiff's claim. It again determined that the plaintiff had suffered TPD, but again also determined that his disablement was related to a pre-existing medical condition which should reasonably have been disclosed. It resolved to affirm its previous decision that the plaintiff was not entitled to a TPD benefit.

(d) On 15 January 2009 the plaintiff again sought a review of the Board's decision by the Tribunal.

(e) On 11 September 2009, the Tribunal affirmed the decision of the Board. On 21 May 2010, the plaintiff's appeal to the Federal Court was successful, Reeves J determining that the Tribunal had misdirected itself about the nature of its powers of review. On 1 February 2011, the Board's appeal to the Full Federal Court was allowed, with the consequence that the Tribunal's decision affirming the Board's decision of 25 September 2008 was reinstated.

[7] The present proceeding was commenced on 12 September 2011. Having exhausted his remedies under the *Superannuation (Resolution of Complaints) Act* and related appeals to the Federal Court, the plaintiff determined to embark on a different approach with a view to reversing the effect of the Board's continued rejection of his claim.

[8] As eventually formulated before me, that approach had two broad alternatives, namely:

(a) seeking to have the Court make orders pursuant to s 8 of the *Trusts Act 1973 (Qld)* the effect of which would be to aside the Board's decision of 25 September 2008 and then either –

(i) to substitute a decision the effect of which would be to allow the plaintiff's TPD claim; or

(ii) to remit the decision back to the Board for determination according to law; or

(b) asking the Court to find that there was a contract of insurance between the plaintiff and the Board and that contract was breached when the Board rejected the plaintiff's TPD claim and then asking the Court –

(i) itself to form the opinion required under the contract and to substitute a decision in favour of the plaintiff; and

(ii) thereafter, to make either an order for payment of the requisite entitlement under the contract together with interest or an award of damages for breach of contract in an amount equal to the requisite entitlement under the contract together with interest.

Questions are set down for separate determination

[9] At the request of the parties I set down for separate determination (and heard argument concerning) the following questions[1]:

Question 1: Should the decision made by the Board as trustee on 25 September 2008 be set aside on the grounds set out in paragraphs 41(f), 44-47E and 50 of the further amended statement of claim.

Question 2: If yes to question 1, should the plaintiff's TPD claim be remitted back to the Board for reconsideration, or determined by the court.

Question 3: Was there a contract in existence between the plaintiff and the Board for the provision of insurance benefit.

Question 4: If yes to question 3, in forming the opinion that the total and permanent disablement of the plaintiff was related to schizophrenia, did the Board breach the terms of an insurance contract on the grounds contained in paragraphs 41(f), 44 to 47E and 50 of the further amended statement of claim.

Question 5: If yes to question 4, is the opinion required of the insurer one which becomes a matter for determination by the court?

[10] It was common ground that if I answered either questions 2 or 5 in such a way as necessitated a determination by the Court, I would not proceed to make that determination. Instead, I would hear the parties as to the way in which that further determination should be made.

[11] I will address the separate questions in the order they were posed.

Question 1: Should the Board's decision be set aside under the Trusts Act?

The sources of the Board's power to make the impugned decision

[12] The Board is a body corporate created pursuant to s 3 of the *Superannuation (State Public Sector) Act 1990 (Qld)* ("the Act").

[1] I have modified the wording of the questions slightly, to improve their manner of expression. Otherwise they are in the form agreed by the parties.

[13] Pursuant to s 4 of the Act, at all relevant times the Board's principal function was to administer a scheme for the provision of superannuation, retirement, provident or other benefits established under a deed established pursuant to the Act.

[14] Section 7(1) of the Act provided that the powers, authorities, duties or functions of the Board and the exercise of discretion by the Board were, except as specified in the Act, to be as set out in a deed established pursuant to the Act. Section 7(2) provided that, without limitation, the Board had, for or in connection with the performance of its functions, all the powers of an individual.

[15] Section 12 of the Act required the establishment by deed of a scheme for the provision of superannuation, retirement, provident or other similar benefits payable from the State Public Sector Superannuation Fund ("the Fund") and stated that the deed so established was subordinate legislation and could be amended by the Board.

[16] The *Superannuation (State Public Sector) Deed 1990 (Qld)* ("the Deed") was the deed established as required by s 12 of the Act. Relevantly, the Deed provided -

(a) (by Recital A) that in terms of the Act there was to be established by deed a scheme for the provision of superannuation, retirement, provident or other similar benefits payable from the Fund;

(b) (by Recitals B and C) that the Board wished to establish the terms and conditions of the scheme by the Deed and that it would administer and control the scheme subject to the Act and in accordance with the provisions of the Deed;

(c) (by s 2) that the scheme established by the Deed would be known as the State Public Sector Superannuation Scheme;

(d) (by s 5 and the definitions of "employed member" and "member" in s 4) for the circumstances in which a person would become or cease to become a member of the scheme;

(e) (by s 12) that the Board was obliged to "administer the scheme in accordance with the provisions of [the Deed] and the Act for the purpose of providing benefits upon retirement and certain other contingencies for present and future members of the scheme and their dependants";

(f) (by s 13) that powers and authorities of the Board included the power and authority to pay benefits out of the Fund to persons entitled thereto;

(g) (by s 15) in relation to income and expenditure:

(i) there must be credited to the Fund all contributions paid by members; all investment earnings of the Fund; all contributions paid by the Treasurer to the Fund under the scheme; all contributions paid by an employer to the Fund; and all other moneys received by or on behalf of the board in respect of the scheme;

(ii) there must be paid from the Fund benefits payable in accordance with the Deed to persons who are entitled to benefits from the Fund; all the expenses for the establishment, amendment and operation of the Fund incurred from time to time; and all tax payable;

(h) (in chapter 3) in respect of members of an "accumulation category" (and the plaintiff was such a member):

(i) the Board must keep an "accumulation account" for each member (s 77(1)) –

A to which must be credited contributions made for the member; any amounts required under the deed to be paid to the member and any other amount which the board considered was most appropriately dealt with by payment to the account (s 77(2)) and also "after tax earnings derived from investment of the amount in the account" (s 78);

B from which must be debited benefits paid to, or in relation to, the member; reasonable administrative fees and charges; insurance premiums payable by the member; and any other amount payable by the member under the deed which the Board considered was most appropriately dealt with by payment from the account (s 77(3));

(ii) the Board must pay to the member the amount in the member's accumulation account if a "preservation cashing condition" has happened, such condition being defined to encompass, amongst other things the member dying, becoming TPD, retiring or reaching a particular defined age (s 79 and the definition of "preservation cashing condition" in s 68);

(i) (by s 84(1)) the Board must provide insurance against the death or TPD of members of the scheme;[2]

(j) (by s 86) the Board must decide the "insurance terms" on which the insurance referred to in s 84 was provided;

(k) (by s 87) subject to its agreeing otherwise with a member, the Board may deduct premiums for the member's insurance from the member's accumulation account.

[17] In accordance with its obligations so to do pursuant to s 86 of the Deed, the Board decided upon and published the insurance terms for that insurance ("the insurance terms").

[18] The insurance terms relevantly contained:

(a) a term (clause 9.1) which obliged the Board to pay an amount of insurance cover when an insured member suffered TPD;

(b) a term which provided the automatic membership in the insurance arrangements at a particular rate (measured by "units" held) consequent upon becoming an employed member (clause 3.2) and a term which permitted the member voluntarily to increase the amount of cover by the acquisition of more units (clause 10);

(c) terms which governed the calculation of the amount of insurance cover by reference to the number of units held and the age of the insured member (clause 4); and

(d) critically, terms which denied any entitlement to be paid an insurance benefit in certain circumstances involving pre-existing medical conditions (clauses 6, 7 and 9).

[19] It is appropriate to quote in full and to emphasis some parts of the insurance terms:

(a) clause 6.2 (emphasis added):

> No insurance benefit will be paid for a claim unless:
>
> (a) the member has been an insured member for 10 continuous years or more; or
>
> (b)
>
> (i) the member has been an insured member for fewer than 10 continuous years; and

[2] Notably the manner by which the Board had to provide insurance was not mandated. The Deed merely stated in a permissive way that the Board "may enter into a group life assurance policy to provide some or all of the insurance": s 84(3).

(ii) **the member lodged a personal medical statement** at or about the date on which the member became an insured member; and

(iii) **the board is of the opinion that the total and permanent disablement** or death or temporary 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 to have been disclosed on the personal medical statement**; or

(c)

(i) the member has been an insured member for fewer than 10 continuous years; and

(ii) **the member did not lodge a personal medical statement** at or about the date on which the member became an insured member; and

(iii) **it is established to the satisfaction of the board that the total and permanent disablement** or death or temporary 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 date on which the member became an insured member.

(b) clause 6.3:

Without limiting the discretion of the board to grant or refuse a claim, in considering such claim the board may have regard to such medical evidence provided by the insured member as is required by the board.

(c) clause 6.5 (emphasis added):

Where an insured member increases the number of units of insurance, any increase in benefit resulting from the increased number of units will not be paid unless:

(a) the member has held the increased number of units for 10 continuous years or more; or

(b)

(i) the member has held the increased number of units for fewer than 10 continuous years; and

(ii) **the member lodged a personal medical statement** at or about the date of the increase in the number of units; and

(iii) **the board is of the opinion that the total and permanent disablement** or death or temporary 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 to have been disclosed on the personal medical statement** at or about the date of the increase in the number of units; or

(c)

(i) the member has held the increased number of units for fewer than 10 continuous years; and

(ii) **the member did not lodge a personal medical statement** at or about the date of the increase in the number of units; and

(iii) **it is established to the satisfaction of the board that the total and permanent disablement** or death or temporary 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 date of the increase in the number of units.

(d) clause 7.1:

Each insured member shall, as and when required by the board, do all things necessary to enable the board to effect the insurance or consider any claim, and in particular shall supply such evidence as may reasonably be required of the insured member's age, health and other matters affecting the insurance as the board may require.

(e) clause 9.1:

> Upon receipt by the board of proof satisfactory to it that any insured member has died or suffered total and permanent disablement while an insured member and of the age of such 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 the death or total and permanent disablement of the insured member.

[20] Finally, I should observe that clause 1.2 of the insurance terms provided that any term defined in the Act or the Deed would bear the corresponding meaning in the terms unless otherwise defined. Accordingly –

(a) the reference to "personal medical statement" in clauses 6.2 and 6.5 bore the meaning given by s 63(1) of the Deed, namely, a personal medical statement in the form provided by the Board from time to time and furnished by an employed member to the Board; and

(b) the reference to "total and permanent disablement" in clause 9.1 bore the meaning given by s 4 of the Deed, namely "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."

[21] In this case, the plaintiff did not lodge a personal medical statement which disclosed the fact that he had a pre-existing medical condition, namely schizophrenia. The Board's decision rejecting his TPD claim was founded on clauses 6.2(c)(iii) and 6.5(c)(iii) and its finding that the plaintiff's TPD was related to a condition which should reasonably have been disclosed by way of personal medical statement. I observe:

(a) Clauses 6.2(b)(iii) and 6.5(b)(iii) use the language "the board is of the opinion that" in circumstances where a claimant **has** provided a personal medical statement.

(b) Clauses 6.2(c)(iii) and 6.5(c)(iii) use the language "it is established to the satisfaction of the board that" in circumstances where a claimant **has not** provided a personal medical statement.

(c) The different language suggests the possibility that the proper construction of the insurance terms is that there is an onus of proof on the claimant when the claimant has not provided a personal medical statement, but no onus of proof when the claimant has provided a personal medical statement.

(d) There was no suggestion in relation to the impugned decision that the Board had approached its decision making function by treating the plaintiff as bearing an onus of proving the matters referred to in clauses 6.2(c)(iii) and 6.5(c)(iii).

(e) Accordingly I do not find it necessary to determine whether on its proper construction the insurance terms did contemplate such an onus of proof.

[22] The source of the Board's power to make the decision is –

(a) the Act which constitutes the Board and gives it its main functions;

(b) the Deed, specifically identified as subsidiary legislation, which by the Act is nominated as the document which sets out the powers, authorities, duties and functions of the Board and which imposes the duty on the Board to insure members of the Fund; and

(c) the insurance terms promulgated by the Board in exercise of the powers so conferred which contains the specific provisions requiring the particular decision to be made.

Does s 8 of the *Trusts Act* apply in relation to the impugned decision?

Why is it necessary to ask this question?

[23] Question 1 assumes that the Court has jurisdiction under s 8 of the *Trusts Act* in relation to the decision of the Board.

[24] That section provides:

> Any person who has, directly or indirectly, an interest, whether vested or contingent, in any trust property or who has a right of due administration in respect of any trust, and who is aggrieved by any act, omission or decision of a trustee or other person in the exercise of any power conferred by this Act or by law or by the instrument (if any) creating the trust, or who has reasonable grounds to apprehend any such act, omission or decision by which the person will be aggrieved, may apply to the court to review the act, omission or decision or to give directions in respect of the apprehended act, omission or decision; and the court may require the trustee or other person to appear before it and to substantiate and uphold the grounds of the act, omission or decision which is being reviewed and may make such order in the premises (including such order as to costs) as the circumstances require.

[25] For the purposes of analysis, the section may be rearticulated in the following way (emphasis added):

> **Any person**-
>
> (a) **who has**, directly or indirectly, **an interest, whether vested or contingent, in any trust property**; or
>
> (b) **who has a right of due administration in respect of any trust**,
>
> and -
>
> (c) **who is aggrieved by any act, omission or decision of a trustee** or other person **in the exercise of any power conferred by this Act or by law or by the instrument (if any) creating the trust**, or
>
> (d) who has reasonable grounds to apprehend any such act, omission or decision by which the person will be aggrieved,
>
> **may apply to the court to review the act, omission or decision**, or to give directions in respect of the apprehended act, omission or decision; **and the court** may require the trustee or other person to appear before it and to substantiate and uphold the grounds of the act, omission or decision which is being reviewed and **may make such order in the premises (including such order as to costs) as the circumstances require**.

[26] Accordingly the power to make an order under s 8 of the *Trusts Act* does not arise unless the person making the application can properly be regarded as a person falling within the meaning of subparagraphs (a) to (d) of my re-articulation of s 8, as set out at [25] above.

The parties' submissions

[27] During the course of argument before me, I asked the parties how and why it could be thought that the Board held property as a trustee and was told that it was common ground that there was a trust arrangement.

[28] Although I was initially satisfied with that response, after I had reserved my decision and because the question went to the jurisdiction of the Court to make one of the orders sought, I examined the issue a little more closely. I noted:

(a) Although the Board is comprised of a number of natural persons, it is in fact a single entity at law because s 3 of the Act establishes it as a body corporate. Nevertheless, the Board is described in the Act as a "Board of Trustees" (s 2 definition of "board" and s 3) and the Act uses the term "trustee" to refer to the members of the Board (s 2 definition of "trustee" and use of that term *passim*, and s 5).

(b) Section 7 of the Act provides that the powers, authorities, duties or functions of the Board and the exercise of discretion by the Board are, except as specified in the Act, to be as set out in the Deed.

(c) Section 11(5) of the Act refers to the Board's responsibilities in relation to the Fund as "fiduciary responsibilities".

(d) Section 12 of the Act specifies that the purpose of the Deed was to establish a scheme for the payment of particular benefits from the Fund.

(e) The Deed referred to itself as a "trust deed" (s 7).

(f) But despite its self-description as a "trust deed", the Deed does not actually record the trustees as declaring that they held either the Fund or any other property on trust. Nor was there any reference to either the Fund or any property having been settled on them to hold on trust. Nor is there anything in the Act which expressly settles either the Fund or any other property on the Board to hold on trust or which otherwise establishes that the Board should be so regarded.

[29] Obviously enough, the Board's responsibilities concerning the discharge of its functions in relation to the Fund are to be regarded as fiduciary in nature, but it seemed to me that it did not necessarily follow that the Board actually was a trustee holding the Fund as trust property or that the plaintiff was a person falling within the meaning of subparagraphs (a) to (d) of my re-articulation of s 8, as set out at [25] above. Indeed, "…the mere circumstance that, by statute, one party is placed in the position of a fiduciary to a second party does not render the first party a trustee …" as Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ observed in *Clay v Clay* (2001) 202 CLR 410 at [35].

[30] Accordingly, I raised the following questions with the parties:

(a) Is it common ground that the plaintiff has, directly or indirectly, an interest, whether vested or contingent, in any trust property? If so:

(i) What is the trust property concerned?

(ii) Who holds that trust property on trust?

(iii) How was the trust created? For example, if it is thought to be an express trust created by some combination of provisions of the Act and the Deed, then which provisions operate to create a trust? How are the traditional three certainties (of intention, subject matter and object) satisfied?

(iv) What is the nature of the plaintiff's interest in the trust property and how does it satisfy the words of s 8 of the *Trusts Act*?

(b) Is it common ground that the plaintiff has a right of due administration in respect of any trust? If so, what is the trust concerned? In particular:

(i) What is the trust property?

(ii) Who holds that trust property on trust?

(iii) How was the trust created? For example, if it is thought to be an express trust created by some combination of provisions of the Act and the Deed, then which provisions operate to create a trust? How are the traditional three certainties (of intention, subject matter and object) satisfied?

(iv) How does the plaintiff derive the right of due administration in respect of that trust?

(c) Is it common ground that the decision made by the Board on 25 September 2008 is a "decision of a trustee or other person in the exercise of any power conferred by this Act or by law or by the instrument (if any) creating the trust"? If so, how was the power conferred?

[31] I invited the parties to present written or oral responses to my questions or, if they thought it was unnecessary for me to know the answers to the questions, to provide me with submissions justifying that conclusion.

[32] I received written responses from the parties. The Board supplemented its response with detailed written submissions. I summarise the parties' respective responses below:

Question	**Plaintiff's submission**	**The Board's submission**
1. Is it common ground that the plaintiff has, directly or indirectly, an interest, whether vested or contingent, in any trust property? If so:	The plaintiff has a direct contingent interest in trust property.	The plaintiff had an interest in the Fund when there was a balance in his "accumulation account", which formed part of the Fund. That was paid out to him when a "preservation cashing condition" arose, namely his retiring for ill health. The plaintiff currently has no vested or contingent interest, direct or indirect, in any trust property, however given he was a beneficiary of the trust which provided for TPD benefits if the preconditions were satisfied he had and has as a beneficiary an entitlement to due administration of the trust rather than providing an actual entitlement in the trust property.
What is the trust property concerned?	The trust property is: • first, the accumulation account established for the plaintiff pursuant to s 77(1) of the Deed; • second, the benefit (chose in action) associated with the insurance policy acquired by the Board for the plaintiff with the premiums deducted from the accumulation account pursuant to ss 77(3)(d) and 87 of the Deed; • contingent upon the plaintiff becoming entitled to receive either form of trust property in the terms prescribed in the Deed.	As per above
Who holds that trust property on trust	The Board.	As per above
How was the trust created? For example, if it is thought to be an express trust created by some combination of provisions of the Act and the Deed, then which provisions operate to create a trust? How are the traditional three certainties (of intention, subject matter and object) satisfied?	The trust is created by the express terms of the Deed. The traditional certainties of intention, subject matter and object are express and contained in the Deed.	As per above
What is the nature of the plaintiff's interest in the trust property and how does it satisfy the words of s 8 of the *Trusts Act*?	The nature of the plaintiff's interest in the trust property is a direct benefit contingent upon the occurrence of events defined in the Deed that permit either the accumulation account or insurance	As per above

	benefit or part thereof to be paid to the plaintiff.	
2. Is it common ground that the plaintiff has a right of due administration in respect of any trust? If so, what is the trust concerned? In particular:	The plaintiff submits that on the basis submitted in relation to question [1] he also has a right of due administration in respect of the trust.	Yes, the plaintiff had a right for the due administration of the trust.
What is the trust property?	As per answer to question 2.	The trust property is the Fund.
Who holds that trust property on trust	As per answer to question 2.	The trustees constituting the Board.
How was the trust created? For example, if it is thought to be an express trust created by some combination of provisions of the Act and the Deed, then which provisions operate to create a trust? How are the traditional three certainties (of intention, subject matter and object) satisfied?	As per answer to question 2.	The trust was created by a combination of provisions of the Act and the Deed, which together sufficiently reveal the intention to create a trust. The subject matter of the trust, namely the Fund, is certain and clear. The object of the trust is to provide pensions and other benefits to a class which can be ascertained with certainty, namely members of the scheme.
How does the plaintiff derive the right of due administration in respect of that trust?	As per answer to question 2.	The creation of an express private trust gives every person who is an object of the trust a personal equitable right of due administration of the trust.
3. Is it common ground that the decision made by the Board on 25 September 2008 is a "decision of a trustee or other person in the exercise of any power conferred by this Act or by law or by the instrument (if any) creating the trust"? If so, how was the power conferred?	The decision of the Board on 25 September 2008 is a decision by the Board pursuant to s 6(c)(iii) of the insurance terms (prescribed pursuant to s 86 of the Deed) that no insurance benefit will be paid to the plaintiff in respect of his claim for total and permanent disablement.	Yes. The decision by the trustees to decline the plaintiff's claim for a TPD benefit was made in their administration of the scheme, exercising a power under s 7(2)(e) of the Act and ss 13(g) and 30 of the Deed - it was a determination (on appeal) as to whether the plaintiff was entitled to a benefit under Ch 3, Pt 4, Div 2.

Discussion

[33] It is surprising that there are no explicit statements in either the Act or the Deed that the Board holds property on trust for members. Compare, for example, the *Superannuation Administration Act 1996* (NSW), which establishes the SAS Trustee Corporation (or "STC") as the trustee for the State defined benefit public sector superannuation schemes and provides in s 49 (emphasis added):

> (1) **STC is the trustee for the STC schemes** and **is to hold in trust for the persons who are or will be entitled to benefits under the STC schemes all assets held b**y, and all contributions and other money paid or payable to, **STC under this Act** and any Act under which an STC scheme is constituted or established.
>
> (2) **STC is a trustee for the purposes of the *Trustee Act 1925***. Accordingly, subject to this Act, and unless this Act, the *Trustee Act 1925* or any other Act otherwise provides, **STC has the obligations, rights and duties of a trustee under Division 2 of Part 2 of the *Trustee Act 1925***.

[34] Nevertheless, the High Court has held that a trust may arise from legislation which does not expressly so provide: *Registrar of Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 per Mason CJ, Deane, Toohey and Gaudron JJ at 165-166; *Clay v Clay* (2001) 202 CLR 410 at [35] and *Korda v Australian Executor Trustees (SA) Limited* [2015] HCA 6 per French CJ at [6].

[35] In order to answer the question whether the Board is to be regarded as a trustee and subject to trust obligations in relation to the Fund the question is simply whether or not the relevant

provisions of the Act and the Deed, considered in context and having regard to their subject matter, reveal such an intention, even though there is no explicit statement of it: cf *Registrar of Accident Compensation Tribunal v Federal Commissioner of Taxation* per Mason CJ, Deane, Toohey and Gaudron JJ at 164. In that case, their Honours went on to observe (at 165 to 166, citations omitted)[3]:

> And, unless there is something in the circumstances of the case to indicate otherwise, a person who has "the custody and administration of property on behalf of others" or who "has received, as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit" is a trustee in the ordinary sense.

[36] I find that there are sufficient indicia in the Act and the Deed and the subject matter with which they deal to justify the conclusion that the Board is to be regarded as a trustee subject to trust obligations in relation to the Fund. I refer specifically to the following matters:

(a) the Act describes the Board as a "Board of Trustees" (ss 2 and 3); uses the term "appointed trustees" to refer to the members of the Board (s 5); and refers to the Board's responsibilities in relation to the Fund as "fiduciary responsibilities" (s 11(5));

(b) the operative terms of the Deed record "the Trustees" as covenanting and agreeing in the manner set out in the body of the Deed and the Deed self-describes as a "trust deed" (preamble and s 7 of the Deed);

(c) the demonstrated intention of both the Act and the Deed is that the Board is to have the custody and administration of the Fund on behalf of others, namely the members of the Scheme from time to time (ss 7, 11(5) and 12 of the Act and the provisions of the Deed identified at [16] above); and

(d) for that purpose the Fund itself is a fund to be kept separate and specifically reported upon and accounted for (ss 10, 11, 20 of the Act and ss 16 to 19 of the Deed).

[37] The trust property which the Board holds on trust is the Fund, to which monies are debited and credited in the manner which I described at [16] above. The persons for whom the Board holds the property on trust are those persons who fall within the definition of member of the scheme.

[38] Each member has a beneficial interest in the Fund, although the precise form and quantum of the member's beneficial interest is contingent on particular events. Thus, for members falling within the accumulation category, each member has an interest in that much of the Fund as is represented by the balance of that member's accumulation account, contingent upon the member establishing the pre-conditions to an entitlement to being paid. Usually that will occur when a "preservation cashing condition" arises.

[39] So far as TPD insurance entitlements are concerned, if a claimant member meets the prerequisites to entitlement under the insurance terms, then the Board becomes obliged to pay the TPD benefit to that member. It would meet that liability out of the Fund either directly (if, as here, it is self-insured) or indirectly[4] (if it had entered into a group life assurance policy pursuant to s 84(3) of the Deed) by reference to its rights under that policy. Either way, the member is still regarded as having an interest in the assets of the Fund contingent upon particular events. If the contingency is established, the quantum of the interest becomes fixed.

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[3] This passage was also recently referred to with approval by the High Court in *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 per Bell, Gageler and Keane JJ at [113] and in *Korda* per Keane J at [206].

[4] It is not necessary further to explore the proper articulation of the nature of the interest of a member in circumstances involving the existence of a group life assurance policy, because the evidence in this case did not suggest the existence of such a policy.

[40] It follows from the foregoing, that each member of the scheme must be regarded as entitled to the due administration of a trust. Moreover because the source of the Board's power to make the decision which the plaintiff impugns is a combination of the Act and the Deed (which is itself regarded as subsidiary legislation) and the insurance terms which the Board was empowered to make by the Act and the Deed, that decision must be regarded as decision of a trustee in the exercise of a power conferred by law. If a member is aggrieved by the decision the member will be aggrieved in the sense contemplated by s 8 of the *Trusts Act*.

Conclusion

[41] The plaintiff can properly be regarded as a person falling within the meaning of subparagraphs (a) to (d) of my re-articulation of s 8, as set out at [25] above. My jurisdiction to make an order under s 8 of the *Trusts Act* is properly engaged (if otherwise the merits of the matter support an order being made).

The legal principles governing the approach of the Court

Discussion

[42] The insurance terms contemplated that the obligation on the Board to pay the requisite amount of insurance cover was conditioned upon the Board having formed particular evaluative judgments. Thus:

(a) clause 9.1 conditioned the obligation to pay upon the Board having received "proof satisfactory to it" that the member has died or suffered TPD;

(b) where a personal medical statement was lodged by the member at or about the date the member became an insured member (or obtained an increased number of units), clauses 6.2(b)(iii) and 6.5(b)(iii) stated that no insurance benefit would be paid unless the Board formed the "opinion" that the member's TPD was not related to a pre-existing condition which was disclosed (or should reasonably have been disclosed) on the personal medical statement; and

(c) where a personal medical statement was not lodged by the member at or about the date the member became an insured member (or obtained an increased number of units), clauses 6.2(c)(iii) and 6.5(c)(iii) state that no insurance benefit would be paid unless it was "established to the satisfaction of the board" that the member's TPD was not related to a pre-existing condition that ought reasonably to have been disclosed on a personal medical statement lodged by the member.

[43] What rights does a disappointed claimant have where the Board's judgment is adverse to the claimant? Obviously the *Superannuation (Resolution of Complaints) Act* provides one relevant set of rights. But the present applicant has exhausted his rights under that Act. Does an application under s 8 of the *Trusts Act* also provide a chance at a general merits review of the Board's decision?

[44] If the formation of the requisite evaluative judgment by the Board was properly to be regarded as an exercise of discretion by the Board as trustee, then the circumstances in which the Court could review the decision would be tolerably clear.

(a) Although the Court's jurisdiction should not be narrowly construed, the object of Court review pursuant to s 8 of the *Trusts Act* is not to provide a mechanism for the substitution of the Court's opinion for that of the trustee: see the discussion about the constraints on s 8 applications in *A Review of the Trusts Act 1973 (Qld)* (Queensland Law Reform Commission, Discussion Paper WP70, December 2012) at [12.177] to [12.183] and the cases there cited.

(b) Notably, the exercise of the power to review would be governed by the principles outlined by McGarvie J in well-known decision of *Karger v Paul* [1984] VR 161, which – at least as expressed by his Honour (at 163 – 164) - may be summarized in this way:

(i) The court would not itself review a trustee's exercise of discretion where the discretion was exercised in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred.

(ii) An exception to this proposition is that the validity of the trustees' reasons will be examined and reviewed if the trustees choose to state their reasons for their exercise of discretion.

(iii) Subject to that exception, it is not open to the Court to look at evidence of the inquiries which were made by a trustee, the information which the trustee had and the reasons for, and manner of, the trustee's exercising its discretion for the independent purposes of impugning the exercise of discretion on the grounds that –

A the trustee's inquiries, information or reasons or the manner of exercise of the discretion, fell short of what was appropriate and sufficient; or

B the trustee was wrong in its appreciation of the facts or made an unwise or unjustified exercise of discretion in the circumstances.

(c) Although *Karger v Paul* acknowledged the existence of the exception, McGarvie J did not examine the extent to which the approach of the Court changed in circumstances where reasons had been volunteered by trustees. That task was essayed by Rein J in *Manglicmot v Commonwealth Bank Officers Superannuation Corporation* (2010) 239 FLR 159. After a review of the authorities including *Karger v Paul*, Rein J concluded that the principles on which the Court must proceed are the same whether reasons are given or not, although obviously it becomes easier to examine a decision if reasons have been given (*Manglicmot* at [26] to [35]). The question is still whether the exercise of discretion has miscarried in the sense earlier identified. The cases which acknowledge that a court is entitled to examine the "soundness" of the trustees' reasons where the trustees have disclosed (otherwise than in the course of the proceedings in which the discretion is challenged) the reasons for the exercise of their discretion[5], are not to be taken to support any broader basis for review.

(d) Finally, it may be acknowledged that if the trustee came to a conclusion which no reasonable person could have come to on the evidence before the trustee, it may be inferred that there must have been either a failure to exercise power in good faith, or a failure to exercise the power upon real and genuine consideration, or a failure to exercise the power in accordance with the purposes for which it was conferred: *Sayseng v Kellogg Superannuation Pty Ltd* [2003] NSWSC 945 per Bryson J at [62] to [63].

[45] However the *Karger v Paul* principles do not apply in an unqualified way in a superannuation context. In that context, the law seems to be in a state of development.

[46] The following propositions, relevant to the present case, derive from *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254:

[5] See, for example, *Halloran v Harwood Nominees Pty Ltd* [2007] NSWSC 913 at [42] to [43] and cases there cited.

(a) While the term "discretion" is used in the description or characterisation of varied acts or omissions in the law it might be an inadequate description of an inquiry which requires an identification and evaluation of factual matters (*Finch* at [29]).

(b) Where a decision maker is a trustee of a trust with a duty to distribute to those who fall within a particular contractual definition and a duty not to distribute to those who do not, the formation of an opinion whether a claimant falls within the requisite definition is not a matter of discretionary power to think one thing or the other; it is an ingredient in the performance of a trust duty (*Finch* at [30]).

(c) A claimant beneficiary in those circumstances is not to be regarded as the object of a discretionary power of appointment but is to be regarded as the beneficiary of a trust and although the precise form and quantum of his beneficial interest is contingent on particular events the claimant member still has a beneficial interest (*Finch* at [30]).

(d) Accordingly, decisions by trustees in a superannuation context of the nature of those presently being analysed are not discretionary decisions in the sense used in *Karger v Paul* and the principles stated in that case developed and appropriate to other fields are not applicable in that context without qualification (*Finch* at [36] to [37]);

(e) It is not to misapply the *Karger v Paul* principles to form the view (as the trial judge did in *Finch*) that a trustee had failed the *Karger v Paul* test in relation to "good faith and genuine consideration" because the trustee had failed to give the matter "genuine" consideration in that it had failed to pursue sufficient inquiries (*Finch* at [43] to [56]).

[47] The High Court did not articulate all the requisite qualifications to the *Karger v Paul* principles but noted (*Finch* at [66]) as follows (footnotes omitted, emphasis added):

> [66]… There is no doubt that under *Karger v Paul* principles, particularly as they have been applied to superannuation funds**, the decision of a trustee may be reviewable for want of "properly informed consideration". If the consideration is not properly informed, it is not genuine. The duty of trustees properly to inform themselves is more intense in superannuation trusts in the form of the Deed than in trusts of the *Karger v Paul* type.** It is extremely important to the beneficiaries of superannuation trusts that where they are entitled to benefits, those benefits be paid. Here, for example, the applicant was claiming a Total and Permanent Invalidity benefit to support himself for the rest of his life. His claim depended on the formation of an opinion by the Trustee about the likelihood that he would ever engage in "gainful Work": that was not a mere discretionary decision. In the Deed there was a power to take into account "information, evidence and advice the Trustee may consider relevant", and that power was coupled with a duty to do so. 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. **The Scheme is a strict trust. A beneficiary is entitled as of right to a benefit provided the beneficiary satisfies any necessary condition of the benefit. Whether or not it will be decided hereafter that, consistently with s 14 of the Complaints Act, the duty of a trustee in forming an opinion of the present type is a duty to form a fair and reasonable opinion, or even a duty to form a correct opinion, there is because of the importance of the 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. The existence of that duty in a more intense form than exists under *Karger v Paul* principles in their standard application is further support for the correctness of Byrne J's decision**.

[48] Save that in *Finch* the High Court has made explicit at least in relation to strict trusts in a superannuation context that –

(a) in the application of the *Karger v Paul* principles, "real and genuine consideration" requires "properly informed consideration", such that if the consideration is not properly informed it will not be regarded as genuine;

(b) a beneficiary is entitled as of right to a benefit provided the beneficiary satisfies any necessary condition of benefit;

(c) where the form of the deed was such as to condition the entitlement of the benefit on the formation of opinion by the trustee, together with a power in the trustee to take into account relevant information, that power should be construed as coupled with a duty to make relevant inquiries; and

(d) in a superannuation context a deed so expressed will create a high duty on the trustee to make inquiries so as to properly inform itself of the relevant information,

the question of the extent of the qualifications which might be appropriate has not been clarified.

[49] The Victorian Court of Appeal decision of *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618 gave some guidance as to the implications of the "high duty on the trustee" which had been recognised in *Finch*:

(a) It was productive of error for a trustee to proceed on the basis that the claimant beneficiary bears an onus of proof: see *Alcoa* at [47]. (This proposition should not, of course, be elevated to an immutable rule of law. It is fundamental that the scope of a trustee's duties can be narrowed or excluded by the instrument which defines the trustee's duties and powers[6]: see *Clay v Clay* (2001) 202 CLR 410 at [46] and *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 82 ACSR 1 at [70].)[7]

(b) And it will often not be good enough to discharge the duty when faced with inadequate material, for a trustee simply to invite the claimant beneficiary to submit further material. In *Alcoa* Nettle JA (as his Honour then was) put it this way (footnotes deleted, emphasis added):

> [59] …. As the decision in *Finch* has enabled us better to understand, trustees of superannuation funds are no longer to be conceived of in the same way as custodians of charitable or family settlements through the exercise of whose absolute discretion settlors have chosen to channel their beneficence. The economic, industrial and ultimately social imperatives which inform the advent of the superannuation industry, not to mention that beneficiaries of the kind with which we are concerned in one way or the other invariably purchase their entitlements, are productive of legitimate expectations which the law will enforce. **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.**
>
> [60**] So to say does not mean that a trustee is required to do the impossible. Nor is it to suggest that a trustee is expected to go on endlessly in pursuit of perfect information in order to make a perfect decision. The reality of finite resources and the trustee's responsibility to preserve the fund for the benefit of all beneficiaries according to the terms of the deed means that there must be a limit. Like the judge below, I accept that a trustee is not under an obligation to go on endlessly seeking more and more information**. It may also be that a trustee is not required to undertake any inquiries until and unless a claimant puts forward sufficient material to show that there is a case to be investigated. But, in this case, the trustee's failure in neglecting to make further inquiries is palpable. As I have said, the material which Mr Frost put forward in support of his claim went at least as far as establishing that he had a strong prima facie case of entitlement. If the trustee regarded that as insufficient, it was bound to make further inquiries sufficient to confirm or allay its concerns. On the evidence, it could easily have made appropriate further inquiries of Mr Kierce and Mr O'Brien and Alcoa, or perhaps asked Mr Frost in precise terms for exactly what it wanted. Yet it chose to do nothing at all.

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[6] The cases do recognise that there is a minimum standard required of trustees which cannot be the subject of exclusion: cf *Armitage v Nurse* [1998] Ch 241 and like cases. It is not necessary presently to consider the scope of this constraint.

[7] I noted at [21] above that the terms of the insurance terms gave rise to an argument about onus which I have not found necessary to resolve. No doubt the considerations adverted to by the courts in *Finch* and *Alcoa* would provide powerful reasons why the instruments giving rise to a superannuation trust would not be construed as evincing such an intention, unless it was absolutely clear. However, if the language used was sufficiently clear, I would not see any objection in point of principle, to a finding that a claimant beneficiary had an onus.

[50] The plaintiff in this case contended that it was also a corollary of the Board's duty to give the claim real and genuine consideration that "the trustee must make the Claimant aware of the type of material the trustee wishes to consider in reaching its opinion, provide copies of all relevant materials which the trustee itself has (whether or not it intends to rely upon that material), and afford the Claimant the chance to put submissions to the trustee on all materials favourable or unfavourable to the Claimant." As to this proposition:

(a) The plaintiff relied by analogy on cases which have concluded that an insurer's duty of good faith may impose a similar duty on the insurer in analogous circumstances. By way of example, in *Sayseng v Kellogg Superannuation Pty Ltd* [2003] NSWSC 945 Bryson J said at [88]:

> In several decisions it has been held to be unfair for the insurer to act upon detailed and adverse medical reports obtained by the insurer itself without giving the claimant an opportunity to balance the report by obtaining a detailed report from a treating doctor, or giving the claimant a chance to answer the adverse elements in the report. There were holdings to this effect in *Chammas v Harwood Nominees Pty Ltd* (1993) 7 ANZ Ins. Cas 61–175, Hodgson J at 78000 and 78001, in *Wyllie v National Mutual Life Association Ltd* (Hunter J) (18 April 1997 unreported) and in *Beverley v Tyndall Life Insurance Co Ltd* (1999) 21 WAR 327: see Ipp J at [33 to 37] and [84 to 95] and Malcolm CJ at [6], [12] and [13], [14] and [15]. Anderson J who agreed in the result of the appeal did not agree with this holding: see [97, 98].

(b) Of the cases noted by Bryson J, the Full Court decision of *Beverley v Tyndall Life Insurance Co Ltd* is most instructive. Both Malcolm CJ at [12] and Ipp J at [88] referred with approval to observations by Hodgson J in *Chammas* that while the authorities did not require that natural justice in the full sense be given by an insurer, some attention to the requirements of natural justice was part of fairness and reasonableness in dealing with such a case.

(c) I think a similar approach should be taken to assessing whether a trustee in a superannuation context has discharged what *Finch* has described as the trustee's high duty of making inquiries. Even though a trustee is not determining a dispute *inter partes*, the trustee's duty in a particular case may nevertheless require the trustee to give attention to the requirements of natural justice and to give the claimant a chance to address adverse information and an opportunity to respond to it. In such a case, failure to give the claimant the requisite chance would be a failure to make appropriate inquiries.

(d) Whether the proper discharge of the trustee's duty in a particular case did so require, and, if it did, how far the trustee would be required to go in order to discharge it would depend –

  (i) on the circumstances of the particular case; and

  (ii) on the considerations adverted by in *Alcoa* at [60], quoted by me at [49](b) above.

[51] On the present state of authorities, there has not yet been any relevant further expansion of the bases on which the decision of a superannuation trustee may be set aside. In particular, my attention was not drawn to, nor have I found, any authorities post-*Finch* which have examined the questions which *Finch* left open, namely "[w]hether or not it will be decided hereafter that, consistently with s 14 of the Complaints Act, the duty of a trustee in forming an opinion of the present type is a duty to form a fair and reasonable opinion, or even a duty to form a correct opinion …".

[52] In any event, I was not invited to embark on any further qualification of the *Karger v Paul* principles or to seek to resolve the questions left open by the High Court in *Finch*.

Conclusion

[53] It is appropriate to essay a summary of the legal principles which should inform my answer to Question 1.

[54] **First**, the Court's jurisdiction to review a trustee's decision pursuant to s 8 of the *Trusts Act* is one which should not be narrowly construed. It is not appropriate to attempt exhaustively to define the circumstances in which it might be exercised.

[55] **Second**, a decision by a trustee in the position of the Board would be regarded as reviewable and capable of being set aside pursuant to s 8 of the *Trusts Act* if the Court was satisfied that the decision -

(a) was not made in good faith; or

(b) was not made upon a real and genuine consideration of the material before the trustee; or

(c) was not made in accordance with the purposes for which the power to make the decision was conferred.

[56] **Third**, the existence of one or other of these bases for challenge may be inferred if the trustee has come to a conclusion which no reasonable person could have come to on the evidence before the trustee.

[57] **Fourth**, real and genuine consideration requires properly informed consideration. As to this:

(a) A trustee in a superannuation context must discharge a "high duty" to make inquiries concerning matters which the trustee may consider to be relevant.

(b) It will usually be wrong for a trustee to approach this issue on the basis of the claimant beneficiary having any onus of proof.

(c) The trustee's duty in a particular case may require the trustee to give attention to the requirements of natural justice and to give the claimant a chance to address adverse information and an opportunity to respond to it, if the trustee is to discharge its duty to make inquiries.

[58] **Fifth**, the principles on which the Court must proceed are the same whether or not the trustee has volunteered reasons for its decision, although obviously it is easier to examine a decision if reasons have been given.

[59] **Finally**, in exercising the jurisdiction, the Court is not asking itself whether the trustee's decision was correct, or even "fair and reasonable". The object of s 8 is not the substitution of a judge's opinion for that of a trustee. The jurisdiction – at least on the current state of the authorities - is not a general merits review of the trustee's decision.

The impugned decision

Background to the impugned decision

[60] On 10 September 2001, the plaintiff commencing employment with the Queensland Department of Primary Industries ("DPI") as a field assistant in a program which the department was operating for the eradication of fire ants.

[61] As a consequence of the plaintiff's employment by the DPI, he became a member of QSuper. As has already been noted, clause 3.2 of the insurance terms provided automatic membership in the insurance arrangements at a particular rate (measured by "units" held) consequent upon becoming an employed member. It was common ground on the face of the pleadings that the plaintiff acquired 4 units of cover effective from 10 September 2011.

[62] On 10 December 2001, the plaintiff took advantage of clause 10 of the insurance terms voluntarily to increase the amount of cover by the acquisition of more units. It was common ground on the face of the pleadings that the plaintiff acquired 17 units of cover effective from 10 December 2001. There was no evidence before me as to the mechanism by which the plaintiff acquired the additional units. I will apply the presumption of regularity[8] to conclude that the acquisition occurred in the way provided for in clause 10.1 of the insurance terms, namely that by notice in writing to the Board the plaintiff elected to increase the number of units and the insurance cover was varied accordingly effective from the date on which the Board received the notice.

[63] There was no evidence before me as to the way in which the plaintiff paid the requisite insurance premiums, whether before or after the increase in the amount of the cover. The plaintiff pleaded that he had "paid premiums into the Fund for his TPD insurance" in response to which the Board "admitted" that, during the course of the plaintiff's employment with the DPI, it had deducted premiums for the insurance as it was permitted to do by s 87 of the Deed. In light of the absence of evidence, I am unable to make a finding whether the payment occurred by deductions from the accumulation account or by some other agreed mechanism between the plaintiff and the Board (either of which mechanisms are authorized by s 87).

[64] The amount of death and TPD insurance benefits applicable to 21 units of insurance cover was $991,200.

[65] It is common ground that the plaintiff did not submit any "personal medical statement" either at or about the date he first became insured (on 10 September 2001) or at or about the date he increased his insurance (on 10 December 2001).

[66] On 2 January 2002, whilst hurriedly trying to exit a domestic property to escape two Rottweilers when carrying out a fire ant inspection, the plaintiff injured his right ankle. It transpired that the plaintiff had not in fact been at risk of being hurt by the dogs because there had been another fence between them and the plaintiff.

[67] After that incident the following work-related incidents occurred to the plaintiff:

(a) on 19 January 2002 he aggravated his right foot injury whilst walking;

(b) on 7 February 2002 he hurt his right foot walking up a driveway;

(c) on 29 February 2002 he suffered injury to his right foot when he fell after being chased off a property by dogs;

(d) on 31 May 2002 he lost his footing when his right foot gave way while he was climbing through a fence;

(e) on 8 July 2002 he suffered further aggravation of the injury to his right foot walking on uneven or rough ground.

[68] Following the incident on 8 July 2002 the plaintiff visited his doctor who recommended that he take sick leave. After the plaintiff explained to that doctor his symptoms of tiredness and other vague symptoms of back pain, anxiety and stress "which had appeared after the initial dog incident of 2 January 2002, and the fear and anxiety that the further dog incident on 29 February 2002 had aroused in me", the doctor suggested to the plaintiff that apart from the

[8] In *Dixon v LeKich* [2010] QCA 213 at [20] Fraser JA (with whom McMurdo P and White JA agreed) said "The presumption of regularity has been described as '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.'"

foot injury, the plaintiff may also have been "suffering from the effects of post-traumatic syndrome"[9].

[69] The plaintiff's last day of work was 8 July 2002.

[70] The plaintiff made a claim for income protection and was paid benefits from 26 July 2002 to 23 June 2003.

[71] He lodged a claim for TPD insurance benefits on 12 February 2003.

[72] Pursuant to the power so to do conferred on it by s 6F of the Act, the Board had delegated to "the Manager, Claims Management Group" authority to determine the plaintiff's claim to insurance benefits. On 23 May 2003, the delegate declined the TPD claim.

[73] By letter to the plaintiff dated 26 May 2003, the plaintiff was advised of that outcome and also of his right to appeal from the delegate's decision to the Board pursuant to s 30 of the Deed. The plaintiff exercised that right, then withdrew and then reinstated the appeal.

[74] The Board reviewed the delegate's decision in August 2004, and affirmed it. Thereafter –

(a) the plaintiff prosecuted proceedings in the Tribunal and in the Federal Court;

(b) the matter was remitted back to the Board; and

(c) the Board made the decision which the plaintiff presently impugns on 25 September 2008,

in the manner I have summarised at [6] above.

The material which was before the Board

[75] It was common ground between the parties that the folder which was exhibit 1 before me contained:

(a) the documents which were before the Board on 25 September 2008;

(b) the minutes of the Board's meeting on 25 September 2008, which were produced subsequently and dated 23 October 2008; and

(c) a statement of the Board's reasons for the decision made on 25 September 2008.

[76] The documents which the Board had before it on 25 September 2008 were as follows:

(a) A submission to the Board for the purposes of its decision which was made by "QSuper" and signed by QSuper's "Manager Legal Review";

(b) The equivalent submission by QSuper which had been placed before the Board at its meeting on 26 August 2004 together a multiplicity of medical and other reports which were marked as appendices "A" to "R";

(c) A report by a Dr de Leacy Psychiatrist dated 22 October 2005;

(d) A report by Dr Reddan Psychiatrist dated 9 March 2006;

(e) The determination and reasons of the Tribunal in relation to the hearing it conducted in respect of the Board's 2004 decision;

(f) The decision of Justice Collier of the Federal Court on appeal from the Tribunal;

(g) The decision of the Full Federal Court on appeal from Justice Collier;

[9] The quotes are from the plaintiff's letter to the Board dated 2 August 2004, which was before the Board at the time of the impugned decision (and also the 2004 decision).

(h) A further report of Dr Reddan Psychiatrist dated 15 July 2008;

(i) Three submission by the plaintiff's solicitors dated respectively 4 August 2008, 18 August 2008 and 11 September 2008;

(j) A memorandum of advice from Mr McLeod, Barrister dated 22 August 2008;

(k) Two letters from Q-Super's case manager dated 26 May 2003, one to DPI and one the plaintiff.

[77] It is appropriate to make some preliminary observations regarding some of that material.

[78] As to the two QSuper submissions:

(a) As I have mentioned, the Board's 2004 decision was an appeal from a decision of a delegate pursuant to s 30 of the Deed.

(b) The Board's 2008 decision was not an appeal from a decision of a delegate but was occasioned by virtue of the matter having been remitted back to the Board by the Full Federal Court.

(c) Neither of the QSuper submissions were "decisions" of delegates of the Board.

(d) The 2004 QSuper submission was a report which I infer was prepared by a person appointed for that purpose pursuant to the power so to do which was conferred on the Board by s 7 of the Act (which permitted the Board to employ staff "engage consultants; and do anything else necessary or convenient to be done for, or in connection with, the performance of its functions"). It seems to be common ground that the author was a staff member of a wholly owned subsidiary of the Board, namely QSuper Limited.

(e) The 2008 QSuper submission was a similar report which I infer was prepared by a person appointed either pursuant to s 7 or part 3A of the Act (which had been introduced in 2007). Part 3A of the Act created a mechanism by which a particular "government superannuation officer" could be appointed such that the officer could be directed to prepare such reports or could take steps to ensure that particular public service employees were assigned to that task.

[79] As to the reports of Drs de Leacy and Reddan:

(a) A report of Dr Reddan had been before the Board on the occasion of its 2004 determination and was adverse to the plaintiff. It formed one of the appendices to the 2004 QSuper submission.

(b) The report of Dr de Leacy was a report favourable to the plaintiff which had not been before the Board on the occasion of its 2004 determination. It concluded that the post-traumatic stress disorder ("PTSD") which had been caused by a work-related dog incident had rendered the plaintiff TPD within the meaning of the insurance terms. It was critical of the report of Dr Reddan.

(c) The report of Dr Reddan dated 9 March 2006 was a terse responsive report which indicated that she did not change her view. The report dated 15 July 2008 was a longer report. It developed her reasons for not changing her views and specifically referred to the report of Dr de Leacy, including by articulating flaws therein.

[80] As to the submissions by the plaintiff's solicitors dated respectively 4 August 2008, 18 August 2008 and 11 September 2008:

(a) By letter dated 4 August 2008, the plaintiff's solicitors contended that the consequence of the Full Court decision in relation to the Tribunal was that Dr Reddan's report of 15

July 2008 was objectionable and should not be considered by the Board. The letter stated that in light of that submission, the plaintiff did not propose to obtain any further medical evidence and asked that the Board consider the matter.

(b) By letter of 18 August 2008, the plaintiff's solicitors –

(i) reiterated their submissions that it was not contemplated that fresh evidence would be generated for the consideration of the Board;

(ii) contended that the Board's duty as a trustee acting in good faith such that it should not "now seek to overcome what it might perceive to be deficiencies in the case against Mr Edington by obtaining fresh customised evidence from Dr Reddan";

(iii) submitted that the Tribunal found that the operative condition was PTSD or anxiety disorder; and

(iv) concluded with the proposition that the Board should make its deliberation and that the report of Dr Reddan dated 15 July 2008 would not be placed before it for consideration.

(c) By letter dated 11 September 2008, the plaintiff's solicitors –

(i) noted that the Board had advised the plaintiff that its legal advice was that it was necessary to obtain a further report from Dr Reddan and that the plaintiff had been invited to make further submissions in light of the use that would be made of the report;

(ii) reiterated the points that had been made in the previous letter, including that the Tribunal had found that the operative condition was PTSD or anxiety disorder;

(iii) made submissions and criticisms concerning the substance of Dr Reddan's report of 15 July 2008, including by the following (emphasis added):

(i) There is simply no empirical evidence which would point to a change in Mr Edington's mental state when it comes to his schizophrenia. **All the evidence points to Post Traumatic Stress Disorder**.

(j) **There is no evidence that but for the dog attack and its traumatic psychological effects that Mr Edington would not have continued to work with the Fire Ant Authority**. The various matters reported by him as having occurred in the work place did not necessarily point to a steady decline in his capacity to do the work. These complaints may have been most reasonable and his recording of them as he was obliged to do may well have been simply a manifestation of concrete thinking attributable to his stable residual schizophrenia. **That is there is no evidence that Mr Edington could not have continued to work in the absence of the major stressor event in the dog attack**.

In conclusion, Mr Edington has been left with a chronic Post Traumatic Stress Disorder because instead of assisting in treating the problem Q Super decided to have him retired.

(d) The upshot of the foregoing was that by the time the matter came before the Board in 2008, it was both accurate and fair for the Board to regard the plaintiff's position as contending for the proposition that the plaintiff's TPD was due to a PTSD or anxiety disorder which had been caused by the work-related dog incident referred to in Dr de Leacy's report.

The impugned decision

[81] By its statement of reasons in respect of its 25 September 2008 decision, the Board characterised the issue to be resolved as "[w]as Mr Edington's total and permanent disablement related to a pre-existing condition pursuant to the QSuper insurance terms?"

[82] The Board then recorded some background facts; the relevant provisions from the insurance terms; and the evidence which it considered. It then proceeded to summarise what it saw as the parts of the relevant evidence.

[83] The Board determined that –

1. Mr Edington was totally and permanently disabled pursuant to the QSuper Trust Deed.

2. Mr Edington's disablement was related to his schizophrenia which should reasonably have been disclosed had a personal medical statement been submitted at or about the time he became an insured member with 4 units i.e. 10 September 2001 and when he increased his insurance by 17 units i.e 10 December 2001.

Therefore, the Board affirmed its previous decision that Mr Edington was not entitled to the insurance benefit for his 21 units.

[84] The Board's statement of reasons then went on to record what its material findings were. Most relevant were the following (emphasis added):

9. Dr Reddan, Consultant Psychiatrist stated in her report dated 3 May 2003 that:

   (a) Mr Edington will be permanently unable to perform the duties of his position as a field assistant and that the most significant issue which prevents him from returning to that position is the residual symptoms of schizophrenia.

   (b) Mr Edington's anxiety around dogs would not prevent him from returning to some form of work.

   (c) The negative features of Mr Edington's schizophrenia on its own have been and are of sufficient severity to impair Mr Edington's capacity for sustained work.

10. The Board notes that Mr Edington was extremely defensive about his schizophrenia to Dr Reddan and apart from admitting that he may have been hospitalised, once or twice, he refused to provide any details.

11. Dr Reddan, Consultant Psychiatrist further stated in her report dated 3 May 2003 that Mr Edington had told her that his psychiatric history was of absolutely no relevance and that he had only come to Dr Reddan's evaluation to discuss his work related injuries.

12. Dr De Leacy, Consultant Psychiatrist, stated in his report dated 22 October 2005 that although Mr Edington's anxiety symptoms may result from him being more susceptible as a result of his schizophrenia, his current symptoms of stress which had been discussed in this report were not due to schizophrenia but due to a severe stress reaction from the dog incident in 2002.

13. **The Board notes that when Mr Edington was seeking reemployment,** Dr Butler, Psychiatrist, in his report dated 17 July 2003 stated that **Mr Edington recently described a considerable improvement in his physical symptomatology and that he no longer had the marked anxiety associated with exposure to dogs**.

14. The Board notes that **when Mr Edington was appealing to the Superannuation Complaints Tribunal, he was examined by Dr De Leacy, Psychiatrist, who stated in his report dated 22 October 2005 that Mr Edington reported an extreme fear of dogs and that he had a range of symptoms that fulfilled the DSMIV criteria for post traumatic stress disorder by having the requisite number of symptoms from each category of intrusive symptoms, avoidance symptoms and hyperarousal symptoms**.

15. **Dr Reddan, Consultant Psychiatrist, stated in her report dated 15 July 2008 that the dog incident in 2002 was not a severely traumatic event for a diagnosis of post traumatic stress**

disorder. Further, Dr Reddan stated that it was the schizophrenia which prevented Mr Edington from successfully maintaining a longitudinal work history.

16. **The Board prefers the reasoning outlined in the medical reports by Dr Reddan, Consultant Psychiatrist because of the different medical histories given by Mr Edington to Dr Butler and Dr De Leacy**.

17. The Board believes that Mr Edington's current disablement was related to his schizophrenia which was diagnosed before he took out his 21 units of insurance and which should reasonably have been disclosed had a personal medical statement been submitted by him around the dates he received his insurance units in September 2001 and December 2001.

18. With respect to Mr Edington's disablement, the Board is satisfied after having considered all the evidence that it rendered him unlikely ever to be able to work again in a full-time job for which he is reasonably qualified by education, training and experience.

19. The Board notes that Mr Edington was retired on ill health grounds upon the decision of the Department of Primary Industries, and not QSuper.

Should the Court set aside the Board's decision?

[85] I turn to examine the various arguments advanced by the plaintiff as reasons why the Board's decision should be set aside in exercise of power pursuant to s 8 of the *Trusts Act*.

[86] Although the questions for separate determination by me were phrased by reference to grounds set out in particular nominated paragraphs of the pleading, the very extensive written submissions articulated the case in a different way. I propose to answer the questions by dealing with the arguments advanced in the written submissions.

[87] The plaintiff contended that there were four "breaches" by the Board which justified setting aside the decision.

[88] It is convenient to deal with the four breaches somewhat out of the order in which they were presented.

The second and third "breaches"

[89] The plaintiff's argument was that I should form the view that the reasons provided by the Board were not "sound" because:

(a) there was a conflicting body of medical evidence;

(b) the Board was required to resolve the conflicting body of medical evidence; and

(c) the Board had not resolved the conflict.

[90] So expressed, the argument was bound to fail. The Board had obviously resolved the conflict: it had preferred Dr Reddan's view and Dr Reddan's view supported its ultimate conclusion.

[91] The plaintiff's complaint, properly analysed, was not that the Board had not resolved the conflict. Rather its complaint concerned the manner in which the Board had done so.

[92] The plaintiff directed attention to three paragraphs of the findings made by the Board, namely paragraphs 9(a), 15 and 16, which I have quoted at [84] above.

The competing submissions

[93] As to the first two findings, the gravamen of the submissions before me under the heading "the second breach" was not an attack on the accuracy of the proposition that Dr Reddan had in fact made the statements attributed to her. Rather it was an attack on the process by which Dr Reddan had formulated her views and the adequacy of the evidentiary support for them.

The same can be said in respect of what the plaintiff characterised as the third "breach". The plaintiff's submissions on the third breach were as follows:

> 124. As has been described above, the Board reached a decision wholly or heavily reliant on the opinion of Dr Reddan.
>
> 125. Basic analysis of Dr Reddan's opinion plainly demonstrates she relied upon incorrect information. Specifically:
>
> 125.1. Dr Reddan incorrectly understood the Dog Incident to have occurred on 29 February 2002;
>
> 125.2. As a consequence of (1), Dr Reddan incorrectly attributed the incidents occurring on 19 January 2002, 7 February 2002, 29 February 2002, 31 May 2002 and 8 July 2002 as being demonstrative of the plaintiff's "longitudinal history suggest[ing] that Mr Edington stuggled to obtain [and], more relevantly maintain work as a result of his chronic Schizophrenia;
>
> 126. The Board knew or ought to have known Dr Reddan was incorrect because the Board *itself* determined the Dog Incident occurred on 2 January 2002.
>
> 127. Consequently the Board knew or ought to have known Dr Reddan's reliance upon the incident reports was misplaced and the foundation of Dr Reddan's opinion was fundamentally eroded.
>
> 128. With Dr Reddan's opinion so fundamentally eroded, the evidence before the Board was essentially all one way; namely, that the plaintiff's TPD was not related to a condition which ought reasonably to have been disclosed.
>
> 129. In contrast to Dr Reddan, there was a consistent body of objective evidence that his TPD was related to his physical injuries or to his Anxiety / PTSD condition(s), in accordance with the reports of Dr Daunt, Dr Butler, Dr de Leacy, Dr White, Ms Jooste and Ms Michael.

[94] As to the Board's finding in paragraph 16 that it preferred the reasoning of Dr Reddan "… because of the different medical histories given by Mr Edington to Dr Butler and Dr De Leacy", the plaintiff submitted that –

(a) paragraph 16 was "unsupported by anything contained in the [2008 QSuper submission] or otherwise as to how the difference in the medical histories impacted upon the opinions of the different medical practitioners (if at all) and how the same impacted upon the TPD Application";

(b) to conduct a proper analysis, 'the [Board] should have, among other things, considered the "*different medical histories*" that the [Board] said Mr Edington gave to Dr Reddan on the one hand, and to Drs Butler and De Leacy on the other. Then it should have determined whether, and how, those different histories affected the cogency of the various opinions given, to determine whether it was fair and reasonable for the Trustees to accept and rely upon Dr Reddan, but not the other two doctors';

(c) until the Board did the task described in the preceding subparagraph, it could not be said to have discharged its duty as set out in *Finch* and *Alcoa*;

(d) any trustee in the Board's position conducting a real and genuine consideration of the evidence and ensuring that was informed to the extent required for it to conduct a proper consideration of the matters relevant to the formation of the opinion would have been aware of the inaccuracies and deficiencies in the evidence which had formed the basis of the plaintiff's submissions to me.

[95] The Board, on the other hand, submitted that the short answer to any the plaintiff's submission was to be found in the following:

(a) The Tribunal reviewed the merits of Board's decision. The Tribunal had all of the powers, obligations and discretions of the Board, was not restricted to the material before the Board, and considered the matter *de novo*. The plaintiff was represented by

solicitors and counsel, and made detailed written submissions to the Tribunal. Based on its own analysis of the medical reports and findings of fact, the Tribunal affirmed the Board's decision as "fair and reasonable", in the process finding that the plaintiff's TPD was related to schizophrenia.

(b) The plaintiff appealed the Tribunal's decision, but ultimately was unsuccessful. The Full Court of the Federal Court delivered judgment on 1 February 2011 reinstating the Tribunal's decision. The Full Court found that the merits review was properly conducted.

(c) Before the Full Court, the plaintiff had argued that there was "no evidence" that his incapacity was related to schizophrenia. Lander and Kenny JJ said (with the Board's emphasis):

> 56. We interpolate here that the statement that [the Tribunal] preferred the opinions of Drs Butler and Reddan was originally challenged as part of Mr Edington's no-evidence ground – the other related part of the ground being that there was no evidence that, in the absence of an anxiety disorder, Mr Edington's incapacity for work arose from his schizophrenia. **Effectively, both parts of the no-evidence ground focused on the suggested absence of evidence that Mr Edington's work incapacity was related to his pre-existing schizophrenia**.
>
> 57. **We do not consider, however, that there is any relevant deficiency in the Tribunal's approach in this regard**. As already noted, it was common ground that at all times material to this appeal Mr Edington suffered from schizophrenia. In reports dated 3 May 2003 and 15 July 2008, **Dr Reddan expressed the opinion that Mr Edington's ongoing incapacity for work was related to this pre-existing condition. Dr Reddan also considered that Mr Edington did not meet the full criteria for a diagnosis of a Specific Phobia with regard to dogs. Dr Butler did not attribute Mr Edington's incapacity for work to schizophrenia but (as stated in a report dated 13 January 2003) was of the opinion that Mr Edington had not suffered from PTSD and (as stated in a report dated 17 July 2003) that any phobia that had arisen as a consequence of the dog incident had dissipated**.
>
> 58. The **opposing view** to that of Drs Reddan and Butler was that **Mr Edington's incapacity for work was the consequence of PTSD arising out of the dog incident. This was the opinion of Dr de Leacy**: see [19] above. Both Drs Reddan and Butler rejected this possibility since both rejected the existence of PTSD.
>
> 59. The Tribunal's conclusion that the medical condition in the nature of an anxiety disorder attributable to the dog incident was supported by Dr Butler's evidence. **Its conclusion that Mr Edington's incapacity for work was related to his pre-existing schizophrenia was supported by Dr Reddan's evidence**. **The Board of Trustees had also accepted Dr Reddan's evidence in this latter regard. In substance, in concluding as it did, the Tribunal accepted different aspects of the evidence of the medical opinions given by these two medical practitioners. It was open to the Tribunal to approach the matter in this way and, on the basis of Dr Reddan's evidence, to find that Mr Edington's total and permanent disability was related to a pre-existing condition of schizophrenia**. It was therefore open to the Tribunal to make the finding it did, and no error of law is disclosed in this regard.

(d) Whilst I was not bound by these decisions, I should not ignore them.

The approach I will take

[96] I do not think it would be legitimate for me to deal with the plaintiff's argument by giving weight to the views taken by the Tribunal and the Federal Court. The observations by the Tribunal were addressing the question whether the impugned decision of the Board was, in its operation in relation to the plaintiff, fair and reasonable. The observations made in the Full Court of the Federal Court were observations made in an appeal where the principal question was whether there was any error of law in the approach which the Tribunal took to

the discharge of its duty to determine whether the decision made by the Board was fair and reasonable in its operation in relation to the plaintiff. The question before me is not the same. The fact that another court or tribunal may have evaluated the evidence in a particular way for a different question does not seem to me to affect how I should evaluate the evidence which was relevant to the questions before me.

[97] It seems to me that the better course is for me to assess for myself the question whether, for the reasons contended by the plaintiff, I should find that the Board's decision should be set aside. I do so below.

[98] Insofar as plaintiff's submissions focus on the process by which Dr Reddan had formulated her views and the adequacy of the evidentiary support for them, they seek to have me evaluate the merits of the Board's decision to accept those views. As so expressed, the plaintiff's submissions do not articulate a proper basis to review the decision of the Board as a trustee. As I have already explained, the object of s 8 of the *Trusts Act* is not the substitution of a judge's opinion for that of a trustee.

[99] However, the plaintiff's submissions in relation to both the second and third "breaches" can be brought within the bounds of orthodoxy if I regard them as a submission that –

(a) the Board came to a conclusion which no reasonable person could have come to on the evidence before it; and

(b) accordingly, it may be inferred that there must have been either a failure to exercise power in good faith, or a failure to exercise the power upon real and genuine consideration, or a failure to exercise the power in accordance with the purposes for which it was conferred.

[100] That is how I will analyse the plaintiff's submissions in relation to the second and third "breaches".

The two choices which were before the Board

[101] By the time the matter had returned to the Board in September 2008, a great deal of water had already passed under the bridge.

[102] The Board had previously considered a great deal of medical opinion evidence.

[103] The plaintiff had advanced criticism of various medical reports and of the Board's previous reasoning before the Tribunal and, to a lesser extent, before the Federal Court.

[104] The Board had medical reports which it had not previously considered, namely the report of Dr de Leacy, which supported the submission by the plaintiff's solicitors, and the two further reports of Dr Reddan, which did not.

[105] The plaintiff by his solicitors had had the opportunity to criticize Dr Reddan's views and, having done so, contended that the plaintiff's TPD was due to a PTSD or anxiety disorder which had been caused by the work-related dog incident referred to in Dr de Leacy's report.

[106] The result was that on the material before the Board in 2008, it was entirely consistent with the proper discharge of its duty for the Board to regard it as having already been established that the plaintiff was TPD and that the cause of his TPD was psychological. The critical issue was whether or not the TPD related to a pre-existing condition pursuant to the insurance terms. And in that regard, the choice was essentially between:

(a) the medical opinion which supported the conclusion of PTSD due a work-related dog incident; and

(b) the medical opinion that the plaintiff did not suffer from phobic anxiety regarding dogs and the most significant matters preventing his ability to return to work were the negative symptoms of schizophrenia.

The critical medical evidence - introduction

[107] It is necessary only to summarise the critical conflicts in the body of medical evidence before the Board on those choices.

[108] It is appropriate to refer to the medical evidence in three groups –

(a) the medical opinion which supported the hypothesis of PTSD due to a work-related dog incident, namely:

(i) the evidence of the registered psychologist, Mrs Jooste, contained in her letter of 19 November 2002 (which had been wrongly dated 2001) and her report of 11 March 2003; and

(ii) the report of the psychiatrist, Dr de Leacy dated 22 October 2005;

(b) the views of Dr Butler, Consultant Psychiatrist, contained in his reports of 13 January 2003, 17 July 2003, 15 July 2004 which contradicted the hypothesis of PTSD due to a work-related dog incident; and

(c) the reports of Dr Reddan dated 3 May 2003, 9 March 2006 and 15 July 2008 which rejected the hypothesis of PTSD due to a work-related dog incident and attributed causality to the negative symptoms of schizophrenia.

The critical medical evidence – Mrs Jooste

[109] On 19 November 2002, Mrs Jooste diagnosed the plaintiff as "suffering from severe PTSD, depression and panic attacks after he ran away from two Rottweilers while doing surveillance work six months ago. He injured himself when he fell."

[110] On 11 March 2003 Mrs Jooste reported as follows (emphasis added):

> I saw Mr Edington for the first time on the 18th November 2002. Because of a mild intellectual disability, the assessment took some time. **He is suffering from PTSD with depression, a dog phobia and panic attacks after being terrified by two Rotweilers**. He is also suffering from chronic pain, which appears to be related to the event. So far, he had not received treatment for the depression, PTSD, phobia and panic attacks. Since he clearly required urgent counselling, I made a second appointment for the 19th November 2002.
>
> …
>
> **6. Relevance of diagnosis to effects of the Rotweiler Incident.**
>
> **The PTSD, chronic pain, specific phobia and panic disorder symptoms arose after the Rotweiler Incident and are particularly relevant**.
>
> Diagnoses not relevant to the incident: The Residual Schizophrenia has existed for four years. The mild intellectual impairment is probably a lifelong condition, though the Haldol medication may cause side effects that blunt thinking.
>
> The depression is probably long-term but may have been exacerbated after the Rotweiler Incident.
>
> …
>
> **With suitable counselling and therapy, Mr Edington should make a full recovery from the traumatic effects of the Rotweiler Incident.** His original condition, schizophrenia, the mild mental retardation and low working skills would continue as before.

The critical medical evidence – Dr de Leacy

[111] The report of Dr de Leacy provides the strongest support for the plaintiff's claim.

[112] The report was prepared upon the instructions of the plaintiff's solicitors and was based on an interview which took place on 18 October 2005 and an examination of a number of documents. Dr de Leacy noted the diagnosis of schizophrenia and distinguished between positive symptoms of schizophrenia (delusions or hallucinations) and the negative symptoms of the illness (poverty of thought, lack of motivation, difficulty with concentration, concrete thinking and lack of spontaneity). He recorded from the plaintiff's self-reporting, that the plaintiff was no longer suffering from the positive symptoms of his illness but was suffering only from the negative symptoms.

[113] Dr de Leacy summarized the plaintiff's relevant self-reporting as follows[10]:

> In the performance of his duties and in the company with another field agent Mr Edington was required to inspect a property and had entered a gate and on entering the property he became extremely alarmed at becoming aware of the presence of two Rottweiler dogs after becoming aware that the owners were not at home. The dogs were barking and came running down from the balcony down some external stairs. Mr Edington heard the barks and caught a glimpse of them running towards him. **He became terrified and he bought that he might either be killed or torn to pieces. He genuinely feared for his safety or feared serious injury and he reacted to the stress of the situation with disbelief and horror** and he tried to retreat by running and he jumped over a gate but in the process did not realise that the gate was open and the gate opened under the force of his weight and he had a heavy fall when he fell on the ground injuring his back and foot and other parts of his body. He was still frightened that would he be attacked by the dogs but he did not realise that the dogs were actually restrained by another gate. He had
>
> He was extremely upset following this incident and he felt the totally unsupported by his work colleagues who did not assist him in any way. He was in a state of panic and he felt totally flustered because he had dropped all his paraphernalia and was totally flustered and bewildered. He asked his workmates to make an emergency call and they did not comply with his request. He had to attend his own general practitioner, Dr Daunt to have his injuries treated.
>
> He had several days off work and then returned to work and he was theoretically assigned light duties but according to him this was a Catch-22 situation. In effect he was not given light duties and to all intents and purposes will still performing the same duties but was being ostracised by other workers who were lampooning him for being on light duties. He felt that he was becoming the brunt of jokes and being bullied. He was still experiencing extreme stress in relation to the dog incident and workmates were making light of it.
>
> Mr Edington continued work basically in the same capacity having to go into premises but was extremely distraught at the prospect of having to anticipate whether a dog in the present and this prospect would throw him into panic. He managed to work for approximately 12 months under these extremely stressful conditions **and was extremely anxious and always hypervigilant and depressed until a point was reached where he could not work any longer** and he ceased working and eventually was unable to cope and took leave and was eventually was retired medically.

[114] Dr de Leacy formed the view that the plaintiff –

> **He also has a high level of anxiety. He has an intense fear of dogs. He has a range of symptoms that fulfil the DSM IV criteria for Post Traumatic Stress Disorder by a having the requisite number of symptoms from each category of intrusive symptoms, avoidance symptoms and hyperarousal symptoms**.

[115] Dr de Leacy diagnosed the plaintiff as suffering –

(a) Schizophrenia paranoid type chronic;

(b) Post-Traumatic Stress Disorder chronic.

[116] Dr de Leacy also observed –

> The diagnosis of schizophrenia is unchallenged. This there was years now in its chronic phase and Mr Edington suffering only negative symptoms which only include lack of concentration and lack of spontaneity and related features. He does not have any positive symptoms. **He does however have severe anxiety**

[10] All extracts from Dr de Leacy's report referred to in this judgment are as recorded in the original report dated 18 October 2015. , inclusive of the typographical errors contained therein. Emphasis has been added.

symptoms related to the dog incident and fulfils the criteria as laid down in DSM IV there is mentioned earlier in this report where he has endorsed symptoms from all three categories of a re-experiencing, hyperarousal and avoidance. It has been suggested that the alternate diagnosis is specific phobia relating to dogs. There is less merit in this diagnosis. I believe it is more appropriate diagnose PTSD because of the severity of the symptoms. A person suffering a phobia would not experience the level of intrusive, re-experiencing and recollection time symptoms that Mr Edington does. Someone with a phobia would be more likely only to have avoidance symptoms. Additionally a phobia is by definition an irrational fear and in this case the fear is not irrational.

It is important to note that prior to the dog incident, despite his schizophrenia Mr Edington was actually able to work. **His inability to work subsequently is due to the stress produced from the dog incident** and is not related to his schizophrenia. His schizophrenia symptoms have not changed in recent years.

The suggestion of Panic Disorder made by a psychologist appears redundant because the symptomatology would be under the same umbrella as PTSD.

[117] Dr de Leacy observed in relation to the PTSD diagnosis that –

The diagnosis of PTSD rests on satisfying Criterion A of the DSM IV which involves experiencing a stressful incident in which one fears for ones life and reacts with horror and disbelief. The level of severity of this stress can vary and the perception of the likelihood of being killed will vary from person to person. Some people will be more resilient than others and not develop PTSD if exposed to the same stressor as other people. **The main issue is that the person involved fears for his life or personal integrity and reacts with horror. The diagnosis also requires criterion B, C and D to be met in this involves endorsing sufficient symptoms from the categories of re-experiencing, avoidance and hyperarousal respectively. By questioning Mr Edington he endorsed all symptoms except the symptoms of amnesia for aspects of the incident. He thus qualifies for the diagnosis**.

[118] Dr de Leacy concluded that PTSD had rendered the plaintiff totally and permanently disabled for the purposes of the definition under the terms of the insurance terms;

[119] He specifically dealt with Dr Reddan's report of 3 May 2003 and stated –

Dr Reddan does not support the diagnosis of PTSD but attributes Mr Edington's inability to work to his residual symptoms of schizophrenia. I have some difficulties with this report in a number of areas, the first being in the description of index incident where there was a general understatement of the incident in the third paragraph on page 2 of her report. The way he this incident is worded there is no sense of fright or panic. Mr Edington related the story to me in such a way that he was terrified and feared for his life. Mr Edington has poverty of speech and does not say much and may not have volunteered much detail to Dr Reddan. He needs to be put at ease before he relates his story fully. Without a description encapsulating a sense of Mr Edington's terror a diagnosis of PTSD would be unlikely to be made.

The other area that I am at odd with Dr Reddan is where she states that Mr Edington's inability to work use related to his schizophrenia and I believe that she overstates the effect of his impairment from his residual symptoms in relation to the demands of the job. I consider she over-estimated the complexity of the job. She made assessments referring to his position description (which in reality may not be an accurate description of what is actually done in the job) and stated that although he is capable of learning treatment processes he would have significant difficulties using initiative and working in a team and while the work is routine and structured he would be able to function affectively but any requirement to step outside the usual protocol or to respond if anything went wrong would see Mr Edington having problems. She quotes one of the key selection criteria of the position being the ability to think creatively and solve problems. This is all very well to state that Mr Edington might have deficiencies in this area but one must read the position statement in the context of what the position actually is. In reality there would not be any potential to demand creativity in this job! In saying that Mr Edington would lack the capacity to cope if something went wrong one would have to take into account that this would be due to a significant degree to the trauma he has experienced.

Dr Reddan talks about the other functions of the job but the facts remain that he was able to do the job prior to the incident with the dogs and it appears that his schizophrenia symptoms had not changed over that period.

Dr Reddan quotes a report written by Dr Butler dated 13 January 2003 and this report is reported by Dr Reddan to state that Mr Edington was suffering negative symptoms of schizophrenia with some restriction of affect, some slowing of his responses but no evidence of delusional thinking but some evidence to suggest he distrusts others and that he has expressed considerable lack of trust in his workmates. Dr Reddan states that Dr Butler did not support the diagnosis of PTSD however I have cited another letter from Dr Butler dated 15 July 2004 to Q Super where Dr Butler states that although a he noted the ongoing impact of the

> schizophrenia in his report on 13 January 2003 on Mr Edington's retraining and employability it was important to realise the consequences of the dog attack on his ability to work and he now maintains a view that the major cause of the immediate disability was the anxiety and the physical symptoms directly related to the dog attack and that the schizophrenia illness was a secondary issue. At this stage Dr Butler thought his incapacity might not be permanent.

The critical medical evidence – Dr Butler

[120] As to Dr Butler's first report dated 13 January 2003:

(a) Dr Butler had made three diagnoses of the plaintiff:

(i) the primary psychiatric diagnosis was that of Schizophrenia paranoid sub type with ongoing residual negative symptoms;

(ii) the plaintiff also suffered from an anxiety disorder not otherwise specified; and

(iii) the plaintiff suffered from orthopaedic problems identified in other medical reports.

(b) As to the second and third diagnosis the doctor stated (emphasis added):

> The second diagnosis pertains to an **anxiety disorder which resulted from the unfortunate incident whilst working as a Field Officer in Fire Ant Surveillance. Subsequent to that incident he has suffered from some phobic anxiety with relation to exposure to dogs and has experienced some avoidance.** Also there has been an increase in his baseline level of agitation. I have taken his history several times regarding this matter and I do not believe that he has suffered from a fully fledged post traumatic stress disorder, the third diagnosis also pertains to the incident occurring whilst a Field Officer. He received substantial damage to his leg/ankle which has significantly restricted his mobility since. It is not my area of expertise to comment specifically upon it and such information would be required from other practitioners. To my knowledge neither of the last two diagnosis were pre existing prior to 10th December 2001.

(c) Dr Butler thought that all three diagnoses contributed to the plaintiff's work limitation but that "with specific reference to the issue of ill health retirement, … the anxiety disorder and the physical disorder are the most pertinent contributing factors." The doctor noted that the plaintiff was fearful of returning to his work environment both due to the possibility of further injury and due to the perception that other workers were not sympathetic to his condition. He thought that the erosion of trust was to some extent a result of the plaintiff's schizophrenic thought processes but that it also resulted from the traumatic impact of the accident in 2002.

(d) Dr Butler thought that it was the physical disability which precluded the plaintiff's working as a Field Officer for the department, he concluded:

> If Mr Edington's ankle injury does not improve significantly, I believe that he would be permanently unable to perform the duties of his position. I am not sure at this point whether it is likely to be a permanent disability. Regarding his anxiety condition, I think it is likely that he will always have some difficulties "cold calling" yards where dogs are present. Given his underlying psychological vulnerability I would not advise him to re engage in such activity even if his base line anxiety symptoms reduced significantly.
>
> Since the diagnosis of Schizophrenia Mr Edington's work options have been drastically reduced. Previously, he had worked as a painter but the effects of his illness had made it impossible for him to manage sustained work. His limited educational achievements have made it impossible for him to satisfactorily engage in other areas of the work force. His illness limits his capacity to learn new skills, sustain attention, maintain concentration and process information. Hence the sort of job that could be suitable for Mr Edington would be probably part time and involving predominantly manual duties. Hence the issue returns to the likely hood of his recovering physically from his injury.

[121] Dr Butler's second report was dated 17 July 2003. Notably it was prepared after the plaintiff had seen Mrs Jooste and a long time before the plaintiff had seen Dr de Leacy. The report

was produced in the context in which the plaintiff was seeking to develop evidence that he could return to work and was addressed to QSuper. It provided (emphasis added):

> Mr Edington has approached me recently regarding the Prospect of his returning to work in the Fire Surveillance Authority. As you probably know, his employment in the Queensland Public Service has been ceased on the basis of total impairment disability. I have read all the reports by doctor's Olsen, Reddan and Jamieson regarding his symptomatology and disability. I have ongoing concerns about the process of his discontinuation of his employment. If indeed his inability to continue employment is primarily related to his having a schizophrenia illness then it automatically begs the question of what his work performance was like prior to his injury and why appropriate action was not taken at that time. **I noted in my report of the 13th January 2003 that the reasons for his being unable to work at that time were because of his anxiety reaction to a feared dog attack and a physical injury he sustained at the time.** It was also noted that his schizophrenic illness and his limited literacy skills could impair his capacity to engage in alternative employment particularly that of a clerical nature.
>
> **Recently Mr Edington describes a considerable improvement in his physical symptomatology and he no longer has the marked anxiety associated with exposure to dogs.** In my opinion, the most appropriate cause of action would be for him to be reinstated in his previous position provided that his work performance is monitored to determine his ongoing suitability for that position. If he was adequately able to fulfil the various job description requirements of his occupation prior to injury then there is a reasonable chance that he will be able to meet those obligations again. Alternatively further consideration for other duties within the auspices of the Fire and Surveillance Authority could be considered.
>
> Presumably some assistance via Human Resource Management would be useful in assisting his return to that role. I am happy to discuss this matter with you further if required.

[122] Dr Butler prepared a similar report a year later on 15 July 2004. Again the report was directed to QSuper and contained evidence of the plaintiff's report of his current attitude regarding the dog issues. It provided (emphasis added):

> Mr Edington has contacted me over recent times to clarify the issues linked to his premature retirement from the Fire Ant Surveillance Authority. He has not been a client for our service since August 2003 so I shall not make any comment regarding his recent mental state as I have not had direct contact.
>
> Mr Edington's chief concern appears to be his having been denied ongoing Q Super payments on the basis that his schizophrenia was deemed to be a major cause of his inability to work and was a pre-existing condition. At the time of my original reported dated 13th January 2003 I noted the ongoing impact of his schizophrenic illness upon retraining and employability as well as the salient effect of the emotional and physical consequences of the dog attack upon his ability to work specifically with the Fire Ant Surveillance Authority. Conclusions at that time were rather open ended given my limited knowledge of his physical morbidity and incomplete nature of his progressive recovery. I maintain the view that I expressed at the time that the major cause of his immediate disability was the anxiety and physical symptoms directly related to the dog attack and that his schizophrenic illness was a secondary issue.
>
> **Consequently, on the basis of the information supplied by Mr Edington it appears that he has made a substantial physical recovery and no longer has the phobic anxiety regarding dogs. It seems likely that if, his previous position were available he would be able to fulfil the necessary requirements**.
>
> During the middle of 2003 I discussed rehabilitation issues with Mr Edington. He stated that he would like to pursue such an option. However I am not certain what employment prospects he wishes to contemplate and indeed whether he would consider seeking re-employment with the Fire Ant Surveillance Authority. I believe that his major concern is that he was financially disadvantaged because of the limited payments he received during his process of recovery whilst unemployed.
>
> **With respect to this, I believe that the disability prohibiting his unemployment was not directly linked to a pre-existing condition and, has subsequently proved to be a largely temporary impairment**. Therefore if it is feasible I would support any application that Mr Edington may make for reconsideration of the appropriate financial recompense which would have been owing to him if his condition had been deemed to be not pre-existing and not permanent.

The critical medical evidence – Dr Reddan

[123] Dr Reddan has produced three reports.

[124] As to the first report dated 3 May 2003:

(a) It recorded the plaintiff's statement concerning the dog incident in the following manner:

> Mr Edington referred on several occasions during the evaluation to "work-related injuries." He stated that the first injury occurred on 2 January 2002. He stated that he and his partner entered a property at Woodridge and they were initially not aware that there were any dogs on the property and the residence had no warning signs about dogs. He stated that when he and his partner heard some growling from what sounded like two large dogs, they ran off. They did not actually observe the dogs, nor were they chased by them. He stated that as he tried to get over the fence, he slid and crashed to the cement. He stated that the dogs were unable to escape, as there was a gate in the stairwell. He stated that when he fell his partner, Mark, would not assist him. He stated that he got up with great difficulty and was then "wonky" on his legs. He stated that he hobbled over to the other side of the footpath and telephoned his team leader. He stated that his team leader arrived and drove him back to the depot. He stated that by that stage he was in "general pain all over," particularly in his feet and legs. He stated that he was "practically crippled," but none of his work mates would assist him. He stated that he was instructed to go home and apply for WorkCover payments.
>
> Mr Edington reported that he consulted with his general practitioner, who organised an x-ray of his right foot and advised him to take some time off work and rest. He stated that he was off work for two days and then for two months he performed light duties, which consisted of call-outs to householders. He stated that because he developed "a phobia" about dogs, other employees made jokes at his expense. He stated that the other employees were "needling" him and "they were making a big thing out of it, when it was nothing." He stated that he heard that other employees thought that when he was on light duties he was having it "too good." He stated that he felt quite upset and anxious.
>
> Mr Edington reported that he re-injured his foot on a couple of further occasions at work. He stated that he "sprained" his foot and was experiencing a lot of pain, such that as soon as he would get home from work he would go straight to bed. He stated that he consulted with his general practitioner again, but his general practitioner advised him that he should not need any treatment. He stated that finally, on 8 July 2002, he "sprained" his foot again when he was walking over some logs and jumped down. He stated that he consulted with his general practitioner, who recommended that he stay off work. He stated that his general practitioner prescribed medication for his foot for the first time in July 2002. He stated that he has not returned to work.

(b) The plaintiff told Dr Reddan that "he has been told that he suffers from 'a phobia' and 'post-traumatic stress disorder' and that he should be having treatment for the condition." However, Dr Reddan reported that the plaintiff "did not describe an irrational preoccupation with dogs, nor that a fear of dogs prevents him from going out on his regular walks." He told Dr Reddan that although his right foot continued to cause him some aggravation and annoyance it had improved quite a lot.

(c) Concerning the plaintiff's schizophrenia Dr Reddan reported:

> He was extremely defensive about his Schizophrenia. He stated that he was working as a self-employed painter when he became ill, due to personal problems, which he refused to outline, outside stressors and family problems. He refused to describe his symptomatology. He admitted that he may have been hospitalised "once or twice," but again refused to provide any details. He stated that his psychiatric history is of absolutely no relevance and that he had only come to the evaluation to discuss his work-related injuries. In spite of a detailed explanation, Mr Edington refused to discuss the matter further. "I'm not psychotic now and that's all you need to know."

(d) In formulating her opinion Dr Reddan took account of the plaintiff's self-reporting, the examination that Dr Reddan took of the plaintiff's mental state and the relevant accompanying written material. She noted the number of incident reports that had occurred, including the incident report concerning a further dog incident on 29 February 2002. She noted the opinions expressed by the psychologist Mrs Jooste. Dr Reddan agreed with Dr Butler that the plaintiff's self-report and presentation did not support a diagnosis of PTSD. In relation to diagnosis Dr Reddan concluded:

> As previously stated, Mr Edington suffers from Schizophrenia and this is his primary psychiatric diagnosis. He displays residual negative symptomatology. I am unable to provide a detailed history of the course of his condition, as Mr Edington refused to provide any history and Dr Butler's report, although very useful, does not provide detail of his past history. It would appear, however, that the condition was diagnosed in the mid-1990's and has had a significant effect upon Mr Edington's life, in that he has had great difficulties sustaining work and relationships outside his immediate family. He has, however, greatly benefited from long-term neuroleptic medication and he continues to attend the Logan Mental Health Clinic.
>
> Mr Edington's negative symptomatology has resulted in considerable difficulties in him working, and his volitional disturbance is not under his voluntary control. In addition, he is quite prone to persecutory ideation, which is likely to have significantly influenced his ability to work in a team. The accompanying material indicates that Mr Edington had reported a number of injuries at work prior to the fall in late February 2002 and it is likely that, although Mr Edington was very keen to work, working caused him considerable stress.
>
> Although Mr Edington reports significant anxiety about dogs, he does not meet the full criteria for a diagnosis of a Specific Phobia.

(e) Dr Reddan also made some observations and drew some conclusions regarding the state of the plaintiff's then current impairment. She assessed the impairment by reference to the position description that the DPI had produced for the position which the plaintiff occupied. Dr Reddan –

(i) thought that the plaintiff would have significant difficulty using his initiative in working effectively in a team, thereby failing the key selection criteria that he worked productively with others particularly if anything went wrong with the report if there was any disagreement;

(ii) thought that the plaintiff would experience difficulty in problem solving and responding appropriately if something occurred outside usual protocols and thereby failing to meet the selection criteria of being able to think creatively and solve problems effectively;

(iii) concluded that the plaintiff was best suited to fairly routine structured work, which had clearly laid down guidelines and procedures; was unlikely to be able to work effectively in a team over a lengthy period of time or in a situation where he would have to make novel decisions; and that the plaintiff's volitional disturbance, which was one of the negative symptoms of his schizophrenia, represented a significant impairment.

(f) Dr Reddan thought that the plaintiff's reported anxiety about dogs would not prevent him from returning to work and represented a relatively mild impairment which was not permanent.

(g) So far as prognosis for future employment was concerned, Dr Reddan thought the plaintiff would be permanently unable to perform the duties of his position as a field assistant and the most significant issue which prevented him from returning to that position was the residual symptoms of schizophrenia. She concluded that the negative features of the plaintiff's schizophrenia on its own had been and were of sufficient severity to impair the plaintiff's capacity for sustained work.

[125] Dr Reddan's second report was a brief report dated 9 March 2006 which produced some further medical reports including, significantly, Dr de Leacy's report of 22 October 2005, and simply concluded, "This additional material does not cause me to alter the opinions expressed in my report of 3 May 2003."

[126] Dr Reddan's final report expanded upon that response, particularly concerning Dr de Leacy's report. The doctor noted (emphasis added):

Dr de Leacy's report indicates that he evaluated Mr Edington 2½ years after my evaluation, at the request of Mr Edington's solicitors and, in the context of Mr Edington seeking a review of a decision by Q-Super. Dr de Leacy was not entirely aware of Mr Edington's longitudinal history of reported injuries or incidents at work and Mr Edington's history, in 2003, and the accompanying material suggests that he ceased work around the middle of 2002 primarily because of symptoms in his foot.

The longitudinal history suggests that Mr Edington struggled to obtain but, more relevantly, maintain work as a result of his chronic Schizophrenia. The negative symptoms of Schizophrenia are more disabling in the long term than the positive or acute psychotic symptoms. It would appear that Dr De Leacy may not have been aware of Mr Edington's occupational history and the significant impact of his Schizophrenia and his occupational history. Mr Edington began working in the fire ant program in approximately September 2001 but, by 4 January 2002, he was reporting incidents at work. There were subsequent reports of incidents occurring on 19 January 2002, 7 February 2002, 29 February 2002, 31 May 2002 and 8 July 2002. His treating psychiatrist, Dr Butler, had reported that Mr Edington had problems being around other people and, in 2003 he expressed considerable distrust of his work mates. These problems as well as his negative symptoms, are likely to have significantly affected his response to fairly minor injuries and to have made it increasingly difficult for Mr Edington to cope at work.

The incident where Mr Edington and a co-worker entered a yard and heard dogs barking occurred as far as could be determined, on 29 February 2002. At interview on 29 April 2003, Mr Edington reported that he and his co-worker heard growling from what sounded like two large dogs but they did not actually see the dogs nor were they chased by them. He reported that, as he tried to get over the fence, he fell and landed on cement, causing an injury to his right foot. The dogs were actually unable to attack he and his co-worker. Mr Edington described this incident spontaneously without distress or evidence of avoidance. By the time Mr Edington was evaluated by Dr de Leacy 2½ years later, he reported considerably more fear. In any event, although it would have initially been frightening to hear the dogs growling and it would have been appropriate for he and his co-worker to exit the properly quickly, this is not a severely traumatic event for an adult male and a severely traumatic event is required for a diagnosis of PTSD. **Mr Edington described anxiety about dogs but this did not amount to a Specific Phobia which, in any event, would not prevent Mr Edington from returning to work. A Specific Phobia is a treatable condition if he had sought treatment from the mental health clinic where he attends. As previously stated, the referring letter refers to Dr Butler stating that Mr Edington no longer had severe anxiety of dogs as early as 2003.**

Symptoms of PTSD are almost always referred to spontaneously and, in a medicolegal context, it is important not to ask leading questions, as suggestibility is heightened in that context. It should be noted that, when interviewed in 2003, Mr Edington was quite guarded and defensive about his Schizophrenia but not at all about any work related injuries. Dr de Leacy's comments about why Mr Edington did not describe the incident or his symptoms in 2003 the same way as he had in 2005 are personally directed and they reflect a failure to consider other alternative explanations.

Clearly Mr Edington has wanted to work but he suffers from a major mental illness and, as previously stated, the most disabling aspect of Schizophrenia is the negative symptoms rather than the acute psychotic symptoms. It is the Schizophrenia which prevented Mr Edington from, as previously stated, successfully maintaining a longitudinal work history. What is also unclear is whether Mr Edington has ever undergone any investigation or treatment for probable obstructive sleep apnoea, which if present will have significant and progressive effects upon Mr Edington.

The critical medical evidence – conclusion

[127] I have already explained (see [101] to [106] above) that –

(a) it was legitimate for the Board to regard it as having already been established that the plaintiff was TPD and that the cause of his TPD was psychological; and

(b) in order to determine whether or not the plaintiff's TPD related to a pre-existing condition pursuant to the insurance terms, the material before the Board dictated a choice between:

(i) the medical opinion which supported the conclusion of PTSD due a work-related dog incident; and

(ii) the medical opinion that the plaintiff did not suffer from phobic anxiety regarding dogs and the most significant issue preventing his ability to return to work were the negative symptoms of schizophrenia.

[128] The Board's reasons reveal that it chose the latter option. In my view the Board's conclusion was reasonably open to it on the evidence which was before it.

[129] **First**, the presentation the plaintiff made to Mrs Jooste and Dr de Leacy about the psychological impact on him of the two dog incidents differed markedly from the reports which he had made to the psychiatrist with whom he had an existing relationship, namely Dr Butler. The inconsistency was obvious and stark. A reasonable person would have regarded it as extraordinary that the plaintiff could have told Dr Butler in mid-2003 and again in mid-2004 that he no longer had marked anxiety associated with exposure to dogs, yet for the purposes of getting a report to put before the Tribunal he could tell Dr de Leacy completely the opposite thing towards the end of 2005. The inconsistency was something which had in fact been noted by the Tribunal, as was apparent in that body's reasons which were also before the Board.

[130] **Second**, that was what the Board was getting at when, in paragraph 16 of its reasons, it referred to the "different medical histories" given to Dr Butler and Dr de Leacy. That is obvious enough from the paragraphs in the material findings which precede paragraph 16.

[131] **Third**, I regard the plaintiff's criticisms of Dr Reddan's reports to be grossly overstated. I observe as follows:

(a) The evidence before Dr Reddan was that there were two dog incidents: one which occurred on 2 January 2002 and another which occurred on 29 February 2002. The evidence before the Board included the plaintiff's own letter which referred to both incidents being productive of stress[11].

(b) I agree that in a section of Dr Reddan's third report (and to a lesser extent the first report) she seems to have confused the second incident with the first incident and that confusion is a valid criticism of one aspect of her reasoning.

(c) But the confusion does not give rise to the conclusion that no reasonable person in the Board's position could have accepted the reliability of Dr Reddan's analysis.

(d) In evaluating the reliability of the reports, the inconsistency in medical histories was far more significant and the failure of Dr de Leacy even to advert to it was a far weightier criticism of his reasoning than was the impugned aspect of Dr Reddan's reasoning.

(e) For completeness I note that the plaintiff also criticised the fact that in evaluating whether the plaintiff was TPD Dr Reddan assessed the impairment by reference to the position description that the DPI had produced for the position which the plaintiff occupied: see [124](e) above. In my view a reasonable person would regard that as legitimate reasoning by the doctor.

[132] **Fourth**, it seems to me that it was well within the range of reasonable conclusions on the evidence to reject the medical opinion which supported the conclusion of PTSD due a work-related incident dog incident. Having done so, it was also well within that range then to accept the opinion espoused by Dr Reddan which, in turn, justified an adverse conclusion on the central issue. Dr Reddan's views in this regard, find some support in the first report of Dr Butler, who attributed at least some causal significance to the plaintiff's work limitation to the negative symptoms of schizophrenia. It is within the range of reasonable evaluation

[11] See the quote at [68] above.

of his report (once the causal significance of physical symptoms and dog related anxiety had been discounted) so to regard Dr Butler's first report.

Conclusion as to the second and third breaches

[133] I reject the plaintiff's complaint. I find that the Board came to a conclusion which a reasonable person could have come to on the evidence before it. Accordingly, I am not prepared to find the second and third "breaches" to be established.

The first "breach"

[134] The plaintiff advanced the following complaints:

(a) First, I should infer that on 25 September 2008 the Board was presented for the first time with over 200 pages of material including submissions from its delegate. Given that it decided the matter on that day by adopting one of the two options identified in the submissions, and given the absence of any explanation from the Board, I should infer that it cannot have done its duty.

(b) Second, the submissions which the Board's delegate placed before the Board –

(i) wrongly characterised the appropriate resolution of the plaintiff's application to a choice between the two options identified in the submissions;

(ii) that characterization was unfair to the plaintiff because it did not accurately reflect the plaintiff's position;

(c) Third, the plaintiff was not provided with an opportunity to respond to the written submissions made by the delegate.

(d) Fourth, the written submissions made by the delegate were "missing relevant evidence" because "important material facts were not summarised".

[135] Although these complaints appear under the heading "the first breach", they are in fact a multiplicity of separate complaints concerning the 2008 QSuper submission, which I have referred to at [78] above. I will deal with them in order.

[136] As to the first complaint concerning the 2008 QSuper submission:

(a) During the course of the trial I ruled[12] that the plaintiff could not, as part of its breach case, assert that the 2008 QSuper submission was provided to the board for the first time on 25 September 2008. The basis for my conclusion was that that proposition had not been pleaded by the plaintiff and should have been if the defendant was not to be taken by surprise. Even had I not ruled that the plaintiff could not advance this contention I would not have been persuaded by it.

(b) The high point of the plaintiff's argument seemed to be as follows:

(i) The 2008 QSuper submission was headed "Submission to the QSuper Board of Trustees 25 September 2008";

(ii) The subsequently prepared Minutes of Meeting revealed that the meeting took place on 25 September 2008 at 10.40 am but –

A do not reveal how long the meeting took;

B simply record the submission was noted and discussed;

[12] The argument and ruling are to be found at transcript 2-70 line 1 to transcript 2-76 line 21.

C otherwise record the determination which the Board made in the wording of option A as presented by the submission and recording the material findings word for word in the terms of the submission.

(iii) The chair of the Board had handwritten on the submission the words "option A approved" presumably on the day of the meeting.

(iv) The subsequently prepared statement of reasons by the Board recorded the material findings word for word in the terms of the submission.

(v) The Board did not call anyone present at the meeting to explain what occurred.

(vi) I should conclude that the Board rubber stamped the submission without real and genuine consideration.

(c) The 2004 QSuper submission was presented under a heading on each page which said "Subject: Joseph David Edington Board Meeting date: 26.08.2004". The submission was not dated otherwise than by the date referred to in the heading. But it was obvious from the heading of the 2004 QSuper submission that the heading referred to the date of the meeting.

(d) Like the 2004 QSuper submission, the 2008 QSuper submission was not dated otherwise than by the date referred to in the heading. I think it is more likely that the heading on the 2008 submission was intended to operate in the same way as the heading on the 2004 submission; in other words, that it was a submission to the Board Meeting which was to take place on 25 September 2008.

(e) There is no material which reveals that the submission was produced by its author on 25 September 2008. All I am prepared to find is that the document was prepared by its author for the purposes of being placed before the Board at the meeting on 25 September 2008. When that occurred and when it was placed before the Board is a matter of speculation. I am not prepared to apply the rule in *Jones v Dunkel* in the way the plaintiff has suggested. The rule should not be used to fill a gap in the evidence.

[137] As to the second complaint concerning the 2008 QSuper submission:

(a) The submission correctly articulated the issue to be resolved, namely "[w]as Mr Edington's total and permanent disablement related to a pre-existing condition pursuant to the QSuper Insurance Terms". It is true that two options only were presented and that the second option was not framed as the obverse of the finding which constituted option A.

(b) However, that is explicable by reference to the context in which the submission was presented and the submissions which the plaintiff's solicitors had placed before the Board: see my discussion at [80] and [101] to [106] above.

(c) I reject this complaint.

[138] As to the third complaint concerning the 2008 QSuper submission:

(a) The submission was not in the nature of a submission made by one party in a dispute *inter partes*: see my analysis at [78] above. I have inferred that it was part of the Board's decision making process that it would have someone examine and summarise the evidence for the Board's members.

(b) The plaintiff's submission that there was unfairness sufficient to justify the conclusion of breach of the duty to inquire, simply because the plaintiff was not given an opportunity to respond to such a report, misconceives the purpose of the submission and the extent of the relevance in this context of the rules of natural justice.

(c) The plaintiff's solicitors were given an opportunity to make whatever submissions they want to make in response to the further report of Dr Reddan. The plaintiff can hardly complain that it was deprived of the opportunity to make submissions concerning the impact of the different medical histories, when that issue had already been the subject of debate before the Tribunal.

(d) In a different context Lord Diplock said in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369, in terms cited with approval by the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [48]:

> …the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished.

(e) Similarly in this case, I do not think that attention to natural justice required the Board in this case to disclose the details of its internal decision-making process to the plaintiff for commentary. Of course it might have been otherwise if the QSuper submission had identified some critical fact or argument which had not previously arisen. In such a case the Board's duty to inquire may well have extended to require it to give the plaintiff an opportunity to make submissions. But, as I have said, that was not the case here.

(f) I am also mindful of the considerations adverted by in *Alcoa* at [60], quoted by me at [49](b) above, namely that there are limits to how far the duty of inquiry must go in order to ensure that the trustee gives real and genuine consideration to the claim made by the beneficiary. I think those limits would be exceeded if I were to accept the plaintiff's complaint.

(g) Accordingly, I reject this complaint.

[139] As to the fourth complaint:

(a) The failure to summarise all the evidence is not significant. The evidence was before the Board as annexures and there is no basis for a conclusion that the Board did not have sufficient time to examine the evidence beyond the submissions which were placed before it.

(b) The Board submitted (and I agree) that the following observations by Mullins J in the interlocutory decision in this case were apt:

> [68] The applicant's allegation that the Board abrogated its decision making function by adopting the reasons submitted to it by QSuper does not take account of the role of the trustees of the Board in making decisions and the role of QSuper in preparing the material and reports for the purpose of equipping the Board to make decisions. The reliance by the Board on the observations in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 30-31 and 65-66 by analogy is apt. The Board is still bound to give real and genuine consideration to all materials and submissions relevant to the decision that it has to make, but the process by which the QSuper submission with proposed options A and B was prepared and put before it does not of itself indicate that the Board abrogated its decision making function. There is no substance in this allegation.

(c) Of course, the complaint was not limited to inadequate summarisation of the evidence which was before the Board. Exhibit 2 before me comprised three medical reports which had been obtained but which were not actually before the Board at the time of the hearing. All three reports addressing the physical condition of the plaintiff: one concerned the results of X-ray analysis and two reports were from an orthopaedic surgeon.

(d) In my view failure either to provide these reports or even to summarise them was a matter of irrelevance to the issue which was before the Board, in light of the context which I have identified at [80] and [101] to [106] above.

(e) I reject this complaint.

The fourth "breach"

[140] The plaintiff's fourth argument is that by the time of the 2008 Submissions, meeting and reasons, the Board and QSuper had become tainted by bad faith in relation to the plaintiff's claim for a TPD benefit.

[141] The plaintiff's written submissions advert to a number of matters, none of which expressly demonstrated bad faith either on the part of the Board or QSuper, but from which, taken together, I was invited to make a finding of bad faith.

[142] The submission had no foundation whatever. I will address separately each of the eight matters upon which the plaintiff relied.

[143] **First**, the plaintiff complained of the Board reaching a decision not to pay the plaintiff his TPD Benefit, in circumstances where it paid the plaintiff income protection insurance. I am unable to see how this proposition is any sort of indicator of bad faith.

[144] **Second**, the plaintiff complained that the Board was the cause or major contributor to the plaintiff's retirement from the DPI. The plaintiff contended that an examination of the correspondence at the time the plaintiff retired from the DPI gives rise to the conclusion that the retirement occurred because QSuper misrepresented to the DPI that the plaintiff had an entitlement to receive a TPD benefit on his retirement. As to this:

(a) It is true that the correspondence reveals that both the DPI and the plaintiff were told that a total and permanent disability benefit would become payable as at 23 June 2003, the cessation of the plaintiff's employment.

(b) But the letter to the plaintiff reveals that was not a reference to an insurance benefit, but to the benefit constituted by the plaintiff's accumulation account balance.

(c) That proposition might not have been entirely clear to the DPI, but the ambiguity in the letters goes no way towards supporting any inference of bad faith.

[145] **Third**, the plaintiff contended that the circumstances surrounding the defendant entering into consent orders with the plaintiff at the Full Federal Court hearing was peculiar and open to adverse inferences. I am unable to see how the circumstances referred to are capable of amounting to any sort of indicator of bad faith. An order was made by consent and the effect of the order was that the matter was remitted back to the Board to enable the Board to consider evidence it had not previously considered.

[146] **Fourth**, the plaintiff complained that the evidence revealed that QSuper was not satisfied with Dr Reddan's second report and approached her for a third report. Complaints were made as to the adequacy of the instructions provided to Dr Reddan in relation to the third report. As to this:

(a) It is utterly unremarkable that Dr Reddan was asked to provide a third report. The second report was so terse as to be unhelpful. Obtaining further information from her to enable a substantive response to the report of Dr de Leacy was plainly the right thing to do in fulfilment of the Board's high duty to inquire.

(b) The complaints as to the instructions to Dr Reddan go nowhere. She had the relevant material and proceeded to form her own views.

(c) There is no basis whatever to the proposition that this conduct supports an inference of bad faith.

[147] **Fifth**, the plaintiff complained of the fact that, following receipt of correspondence from the plaintiff's solicitors objecting to QSuper obtaining a third report from Dr Reddan, QSuper sought advice from Mr McLeod of Counsel on –

(a) whether Dr Reddan's third report should be placed before the Board; and

(b) whether the material findings which had been drafted by QSuper were sound enough in the event that the Board determined to decline the plaintiff's claim.

[148] As to this:

(a) It is entirely proper that counsel's advice was sought on whether to place Dr Reddan's third report before the Board. It was a proper response to the submission from the plaintiff's solicitors that the report should not be placed before the Board.

(b) One can infer that at the time Mr McLeod was briefed, there must have been a draft of the 2008 QSuper submission in existence. He was asked the question which I have identified at [147](b) but declined to answer it.

(c) Neither of these matters is capable of supporting an inference of bad faith on the part of either QSuper or the Board.

[149] **Sixth**, the plaintiff complained of the fact that the Board adopted verbatim or rubber stamped, the 2008 QSuper submissions. As to this:

(a) During the trial I ruled that the plaintiff was not permitted to contend that the submissions were provided to the Board for the first time on the day of the meeting, but have already said that I would not have been prepard to make that finding in any event: see [136] above.

(b) Although it is true that the minutes and reasons copied verbatim the material which the submissions had set out as findings which justified the conclusion which the Board ultimately reached, that does not provide an evidentiary basis for a conclusion that the Board did anything other than its duty: see [139] above.

(c) There is no basis whatever to the proposition that this conduct supports an inference of bad faith.

[150] **Seventh**, the plaintiff complained that the 2008 QSuper submissions, and the Board's minutes and reasons all gave as the reason for preferring the evidence of Dr Reddan that which was recorded at paragraph 16 of the reasons, quoted at [84] above. There is no basis whatever to the proposition that this conduct supports an inference of bad faith. As I have explained, the reason given was reasonably open on the evidence.

[151] **Eighth**, the plaintiff complained that the Board acted as the contradictor in the various prior proceedings in this matter, including before Collier J in the Federal Court and before the sitting of the Full Federal Court. As to this:

(a) The plaintiff relied on *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 36:

> There is one final matter. Mr. Hughes was instructed by the Tribunal to take the unusual course of contesting the prosecutors' case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this Court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take

> place if and when relief is granted. The presentation of a case in this Court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal.

(b) This principle has no application to the position of the Board. In light of the determination that it had made, the Board had a duty not to pay a TPD benefit to the plaintiff. Its resistance of the plaintiff's claim was consistent with its duty and not a basis for inferring bad faith.

[152] The eight matters adverted to by the plaintiff do not either separately or together support an inference of bad faith on the part of either the Board or QSuper.

Conclusion

[153] Question 1: Should the decision made by the Board as trustee on 25 September 2008 be set aside on the grounds set out in paragraphs 41(f), 44-47E and 50 of the further amended statement of claim.

[154] Answer to question 1: No.

Question 2: If the Board's decision is set aside, who should decide the plaintiff's TPD claim?

[155] In view of my answer to question 1, this question is unnecessary to answer. However, in case I should be wrong in my answer to question 1, it is appropriate to carry out the appropriate analysis.

Discussion

[156] If I was persuaded that I should make an order pursuant to s 8 of the *Trusts Act* to set aside the Board's decision, the question would then arise whether I should remit the claim back to the Board for reconsideration or make a decision that the claim should be determined by the Court. If I favoured the latter course, it was common ground that I would not actually proceed to make the determination without according to the parties a further hearing.

[157] The relevant law was recently articulated in *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2015] NSWCA 104 by Basten JA as follows (citations omitted):

> [18] However, the agreement of the parties that it was appropriate for the court to decide the entitlement of the appellant should not go unremarked upon. In the course of his judgment, Hallen J set out a passage from the judgment of Ball J in *Erzurumlu v Kellogg Superannuation Pty Ltd*, noting:
>
> > If, for any reason, the Trustee has failed to discharge its duties in considering the member's claim, the appropriate order is to refer the matter back to the Trustee. The court generally does not itself seek to execute the trust: *Hannover Life Re of Australasia Ltd v Sayseng*.
>
> [19] That statement was undoubtedly correct: it was what happened, for example, with the approval of the High Court, in *Finch* at trial. However, if "generally" were intended to allow for the exceptional case, there was no discussion at trial as to what might constitute an exceptional case and as to why the trial court was entitled in the present case to make the decision for the trustee.

[158] In *Birdsall* at [49], Meagher JA (with whom Gleeson JA agreed) put the proposition in a characteristically robust way, and, in so doing, gave clear indication of the circumstances in which a Court might itself determine the matter:

> Where a trustee is found to have failed to comply with [its duty as articulated in *Finch*], the task of forming the opinion will be remitted to it for further determination unless that task admits of only one possible outcome or it is concluded that the trustee is no longer capable of approaching the task fairly and objectively.

[159] The plaintiff accepted that the general rule was as expressed in *Erzurumlu*, but contended that because of the extensive opportunities provided to the Board since the lodgement of the TPD Application on 12 February 2003, the Court ought substitute its own decision for that of the Board and not refer the matter back to the Board yet again.

[160] This submission does not meet the requirements of the law. The task before the Board did not admit of only one outcome. Moreover there was no evidence which supported the conclusion that the Board would be no longer capable of approaching the task fairly and objectively. The evidence rather suggests the contrary because the membership of the Board has completely changed with the effluxion of time.

[161] In my view the plaintiff has not demonstrated any circumstances sufficient to justify not referring the matter back to the Board, if otherwise I had been persuaded that the Board's decision should be set aside.

Conclusion

[162] Question 2: If yes to question 1, should the plaintiff's TPD claim be remitted back to the Board for reconsideration, or determined by the court?

[163] Answer to question 2: In view of my answer to question 1, this question is unnecessary to answer.

[164] If I had answered question 1 in the affirmative, I would have concluded that the matter should be remitted back to the Board for further determination.

Question 3: Was there an insurance contract between the plaintiff and the Board?

Discussion

[165] At [34] to [40] above, I explained my reasoning for concluding that –

(a) The Board holds the Fund on trust for those persons who fall within the definition of member of the scheme.

(b) Each member has a beneficial interest in the Fund, although the precise form and quantum of the member's beneficial interest is contingent on particular events.

(c) For members falling within the accumulation category, each member has an interest in that much of the Fund as is represented by the balance of that member's accumulation account, contingent upon the member establishing the pre-conditions to an entitlement to being paid.

(d) So far as TPD insurance entitlements are concerned, the member is still regarded as having an interest in the assets of the Fund contingent upon the happening of the events which meet prerequisites to entitlement under the insurance terms.

(e) Each member of the scheme must be regarded as entitled to the due administration of a trust, including in relation to being able to avail themselves of rights under s 8 of the *Trusts Act* in the event of being aggrieved of a decision to refuse an insurance entitlement.

[166] At [60] to [61] above, I explained the manner by which the plaintiff automatically became a member of the insurance arrangements consequent upon his employment by the DPI. The result of that automatic membership was that he became a member of QSuper having the associated contingent beneficial interest in the Fund, measurable (amongst other things) by reference to the terms of the insurance terms which had been promulgated by the Board.

[167] The plaintiff contends that, in addition to the trust relationship between the plaintiff *qua* member and the Board *qua* trustee, by reason of –

(a) the fact that the Board was a self-insurer and paid TPD benefits direct to members;

(b) the fact that the Board promulgated the insurance terms;

(c) the fact of the plaintiff upon commencing employment with the DPI –

(i) having become a member of the Fund;

(ii) having become automatically entitled to TPD insurance;

(iii) having paid premiums for that insurance;

(d) the fact that in consideration of the payment of the premiums the Board agreed to insure as set out in the insurance terms;

(e) the contents of the terms,

there was also in existence between the plaintiff and the Board a contract for the payment of an insurance benefit by the Board to the plaintiff.

[168] In my view the plaintiff's contention cannot be accepted.

[169] **First**, it a distinct and necessary condition for the existence of a binding contract between two persons that an intention to create contractual relations must be demonstrable. The inquiry into the existence of that condition "may take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and surrounding circumstances": *Ermogenous v Greet Orthodox Community* (2002) 209 CLR 95 per Gaudron, McHugh, Hayne and Callinan JJ at [25].

[170] **Second**, a distinction is to be drawn between intention to create or alter legal obligations and intention to create or alter contractual relations (cf *Briggs v Gleeds* [2014] 3 WLR 1469; [2014] EWHC 1178 (Ch) per Newey J at [134] and [147] to [148]). The indicia of intention referable to one category of legal relationship do not necessarily equate with the indicia of intention necessary to establish another category of legal relationship.

[171] **Third**, the plaintiff's contention does not accurately characterize the matters which, on the *Ermogenous* test, are to be the subject of objective assessment. I observe:

(a) The statutory legal framework which established the trust relationship between the Board and the members of QSuper was already extant before the plaintiff became a member.

(b) The provision of insurance and the promulgation of the insurance terms by the Board was done in fulfillment of an obligation imposed on the Board by law, namely by ss 84 and 86 of the Deed.

(c) The relationship which was established between the plaintiff and the Board on 10 September 2001 was established by operation of law automatically when the plaintiff entered into the contract of employment with the DPI.

(d) Unless some other agreement was struck between the plaintiff and the Board, the Board was entitled by the operation of delegated legislation (namely by s 87 of the Deed) to deduct the premiums from the plaintiff's accumulation account.

(e) The plaintiff did not adduce any evidence that there had been any other agreement so struck.

[172] **Fourth**, viewed objectively in the relevant context, there is no evidence of an intention of the parties to create contractual relations between themselves. There is evidence of an intention to create legal[13] rights and obligations between themselves, but that is not sufficient to justify the conclusion that contractual relations were intended. Rather the evidence supports a conclusion that as at 10 September 2001 an objective assessment of the parties' intention was that the plaintiff would become a member of the existing QSuper

[13] Obviously in this context I use "legal" in the sense which embraces "equitable".

arrangements, arrangements which should be regarded as arrangements intended to create a trustee / beneficiary relationship between the Board and members.

[173] **Finally**, I do not think the plaintiff's contention gains any more strength when one considers the voluntary increase in the amount of insurance cover which took place on 10 December 2001. If, as I have concluded at [62], the increase must have occurred in the way provided for in clause 10.1 of the insurance terms, namely that by notice in writing to the Board the plaintiff elected to increase the number of units and the insurance cover was varied accordingly effective from the date on which the Board received the notice, that conduct would merely evidence an intention by the plaintiff to exercise his existing rights as a beneficiary pursuant to the mechanism which the existing trust arrangements provided. It would not evidence an intention to create contractual relations between the plaintiff and the Board.

[174] I should say that I have not overlooked the fact that high authority establishes that contractual and fiduciary relationships may co-exist between the same parties: see the oft-cited passage from the judgment of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 97. I have merely determined that the facts of this case do not demonstrate that the parties intended to bring a contractual relationship into existence in relation to the existing trust structure. A case which reached a different result on different evidence in relation to a different superannuation scheme is *United Super Pty Ltd v Built Environs Pty Ltd* (2001) 80 SASR 513[14].

[175] The plaintiff's failure to establish the requisite intention to create contractual relations is fatal to the plaintiff's contractual case.

Conclusion

[176] Question 3: Was there a contract in existence between the plaintiff and the Board for the provision of insurance benefit.

[177] Answer to question 3: No.

Question 4: Did the Board breach an insurance contract as alleged?

[178] In view of my answer to question 3, it is unnecessary to answer this question. However, in case I should be wrong in my answer to question 3, it is appropriate to carry out the appropriate analysis.

Discussion

[179] If I had formed the view the requisite intention to create contractual relations had existed, then it would follow that I would have found there was an insurance contract and the contract was contained at least in the insurance terms promulgated by the Board.

[180] The question would then be whether, in forming the opinion that the plaintiff's TPD was related to schizophrenia, the Board breached the terms of an insurance contract on the grounds contained in paragraphs 41(f), 44 to 47E and 50 of the further amended statement of claim.

[181] Hallen J in in *Lazarevic v United Super Pty Ltd* [2014] NSWSC 96 at [101] conveniently drew together relevant principles as follows:

(a) The insurer must consider, and determine, the correct question or questions. This essentially requires the correct interpretation of the policy of insurance.

[14] The differences in context and evidence between that case and the present mean that it is unnecessary for me to express a view on the correctness of the conclusion reached.

(b) If the insurer seeks an opinion from an expert, it must provide the expert with all of the information that is relevant to the expert's opinion.

(c) Where an expert opinion is sought, the expert must also be asked the right questions.

(d) Asking the right questions of the expert, however, does not require the insurer to ask the expert to address specific provisions in the policy. The insurer is itself making the ultimate decision, and not delegating the decision making to the expert. The critical enquiry for the court is whether the insurer, ultimately, has addressed the correct questions either directly, or indirectly with the aid of the expert's opinion, and has taken account of the relevant information either directly, or indirectly, in respect of relevant information assessed by the expert.

(e) The insurer is under a duty to act in good faith and to observe fair dealing in respect of both the trustee and the insured.

(f) As part of this duty, the insurer must have due regard for the interests of the insured. However, this duty is contractual, not fiduciary. This duty is analogous to the duty of a mortgagee exercising a power of sale of mortgage property.

(g) Where a state of affairs governing entitlement of the insured to a benefit is to be determined after a consideration by the insurer, the insurer must act reasonably in considering the matter and in coming to its conclusion.

(h) If the view taken by the insurer can be shown to have been unreasonable on the material before it, the insurer's decision can be successfully attacked.

(i) If the insurer's decision is successfully attacked, the matter upon which its opinion was required becomes one for determination by the court.

[182] It can be seen from the foregoing that, whilst there are many commonalities, the test for review of the decision made by the Board *qua* insurer under an insurance contract is expressed differently from the test for review of the decision made by the Board *qua* trustee, at least insofar as the Court would be permitted to consider –

(a) whether the Board acted reasonably in considering the matter and in coming to its conclusion; and

(b) whether the view taken by the Board qua insurer was unreasonable on the material before it.

[183] The plaintiff advanced its case of breach of contract by reference to the same four alleged "breaches" which I analysed in relation to question 1. In light of the analysis I have already carried out rejecting the plaintiff's case as to those "breaches", I do not see any reason why I would reach any different answer if I analyse the complaints under the test for breach of contract by the Board *qua* insurer.

Conclusion

[184] Question 4: if yes to question 3, in forming the opinion that the total and permanent disablement of the plaintiff was related to schizophrenia, did the Board breach the terms of an insurance contract on the grounds contained in paragraphs 41(f), 44 to 47E and 50 of the further amended statement of claim.

[185] Answer to question 4: In view of my answer to question 3, it is unnecessary to answer this question.

[186] If I had formed the view that there was an insurance contract between the plaintiff and the Board, I would have answered the question in the negative.

Question 5: If the Board did breach an insurance contract, should the Court decide the plaintiff's claim?

[187] In view of my answer to questions 3 and 4, it is unnecessary to answer this question. However, in case I should be wrong in those answers, it is appropriate to carry out the appropriate analysis.

Discussion

[188] The question here is what should happen to the plaintiff's TPD claim, if there was an insurance contract and the Board breached it in the manner which the plaintiff alleged. Is the opinion required of the insurer one which becomes a matter for determination by the court?

[189] The ninth proposition articulated by Hallen J in *Lazarevic* quoted at [181](i) above answers this question. More importantly for present purposes, the Queensland Court of Appeal accepted that the Court had power to decide such a question for itself in *McArthur v Mercantile Mutual Life Insurance Co Ltd* [2002] 2 Qd R 197, although not without some misgivings. Although Basten JA in *Birdsall* at [25] to [28] also suggested that this view of the law might one day have to be reviewed, that task is certainly not one which it would be appropriate for a judge sitting in the trial division to essay.

[190] Accordingly, I would follow *McArthur v Mercantile Mutual Life Insurance Co Ltd* and conclude that if the Board did breach an insurance contract, the Court could and should decide the question for itself.

Conclusion

[191] Question 5: if yes to question 4, is the opinion required of the insurer one which becomes a matter for determination by the court?

[192] Answer to question 5: In view of my answer to questions 3 and 4, it is unnecessary to answer this question.

[193] If I had formed the view that the Board had breached an insurance contract between it and the plaintiff, I would have answered this question: Yes.

The order of the Court

[194] For the reasons articulated above, the questions set down for preliminary determination should be answered as follows:

> **Question 1:** Should the decision made by the Board as trustee on 25 September 2008 be set aside on the grounds set out in paragraphs 41(f), 44-47E and 50 of the further amended statement of claim.
>
> **Answer:** No.
>
> **Question 2:** If yes to question 1, should the plaintiff's TPD claim be remitted back to the Board for reconsideration, or determined by the court.
>
> **Answer:** In view of the answer to question 1, it is unnecessary to answer this question.
>
> **Question 3:** Was there a contract in existence between the plaintiff and the Board for the provision of insurance benefit.
>
> **Answer:** No.
>
> **Question 4:** If yes to question 3, in forming the opinion that the total and permanent disablement of the plaintiff was related to schizophrenia, did the Board breach the terms of

an insurance contract on the grounds contained in paragraphs 41(f), 44 to 47E and 50 of the further amended statement of claim.

Answer: In view of the answer to question 3, it is unnecessary to answer this question.

Question 5: If yes to question 4, is the opinion required of the insurer one which becomes a matter for determination by the court?

Answer: In view of the answers to question 3 and 4, it is unnecessary to answer this question.