

SUPREME COURT OF QUEENSLAND

CITATION: *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QSC 312

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: Application

DELIVERED ON: 3 November 2015

DELIVERED AT: Brisbane

HEARING DATE: 1 October 2015 and then on the papers; written submissions received 26 October 2015 and 28 October 2015

JUDGE: Bond J

ORDER:

- 1. The order made on 1 October 2015 that the further hearing of the defendant's application be adjourned to 6 November 2015 is vacated and the determination of the application will proceed on the papers.**
- 2. The plaintiff's amended claim be dismissed.**
- 3. The plaintiff pay the defendant's costs of the proceeding (and of the defendant's application) to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – DISPOSAL OF PROCEEDINGS – where the parties agreed on questions for separate determination – where the defendant brought an application to dismiss the plaintiff's amended claim after Court answered those questions in favour of the defendant – where the plaintiff initially opposed the application and argued that the answers to the preliminary questions did not entirely dispose of the plaintiff's amended claim – where the plaintiff revised its position and neither consented to nor opposed the defendant's application – whether the questions for separate determination justified dismissal of the plaintiff's amended claim

Edington v Board of Trustees of the State Public Sector Superannuation Scheme [2015] QSC 245

COUNSEL: P Black, solicitor, for the plaintiff
G J Handran for the defendant

SOLICITORS: Black & Co Lawyers for the plaintiff
Crown Law for the defendant

- [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. Amongst other things, the Board provides total and permanent disablement (“TPD”) insurance to members of QSuper.
- [3] The Board declined a claim which the plaintiff had made for a TPD benefit under the relevant insurance terms. 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.
- [4] When the proceeding came on to trial before me, the plaintiff sought two broad alternative remedies, namely:
- (a) to have the Court make orders pursuant to s 8 of the *Trusts Act 1973 (Qld)* the effect of which would be to set aside the Board’s decision 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) to ask 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 to ask 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.
- [5] At trial, and at the request of the parties, I did not proceed to determine the entire proceeding. Rather, I set down particular questions for separate determination. By judgment delivered on 21 August 2015 I determined the questions as follows¹:
- Question 1:** Should the decision made by the Board as trustee ... be set aside on the grounds set out in paragraphs 41(f), 44 to 47E and 50 of the further amended statement of claim.

¹ See *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QSC 245.

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.

- [6] On the day I published my reasons for judgment, I ordered that the plaintiff pay the defendant's costs of the hearing before me. In my reasons for that costs order I emphasised that I did not by that order intend to deal otherwise with the costs of the proceeding. I observed that that was a matter that could be dealt with on another occasion, if it was necessary for there to be a determination by a judge on that question.
- [7] By letter dated 25 August 2015, the Board's solicitors submitted to the plaintiff's solicitors that in light of the answers which I had given, "the plaintiff's claim ought be dismissed" and costs should follow the event. The letter sought the plaintiff's consent to an order in the following terms:
- (a) the proceedings be dismissed; and
 - (b) the plaintiff pay the defendant's costs of the proceeding.
- [8] On 18 September 2015, the plaintiff filed a notice of appeal seeking that the orders which I made be set aside and that in lieu thereof the Court of Appeal answer the questions in conformity with the grounds of appeal. As I read the notice of appeal, that would suggest that the plaintiff seeks to have the Court of Appeal answer the questions in this way:

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

Answer: Yes.

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: The claim should be determined by the court.

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

Answer: Yes.

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: Yes.

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: Yes.

- [9] In a further exchange of correspondence between solicitors, the plaintiff's solicitors stated that they did not agree that the answers to preliminary questions dispensed entirely with the plaintiff's claim. They submitted – but without identifying what they were, save to say that they “included paragraphs 46 to 46I of the further amended statement of claim” – that a number of “grounds set out in the pleadings were not agitated at the hearing” and “[a]ccordingly the merits or otherwise of those grounds were not adjudicated upon”.
- [10] The Board did not agree and filed an application seeking the following orders:
- (a) the plaintiff's amended claim be dismissed; and
 - (b) the plaintiff pay the defendant's costs of the proceeding.
- [11] When the application came on before me on 1 October 2015, the Board provided me with written submissions contending that the plaintiff's amended claim should be dismissed “due to findings and answers to separate questions stated for determination in reasons for judgment ... delivered ... on 21 August 2015”. I also heard from counsel on the Board's behalf.
- [12] The plaintiff for his part sought an adjournment of the application by written submissions and oral submissions from his solicitor, essentially on the grounds that as issues of some complexity were concerned, the plaintiff wanted time to be able to obtain advice from his trial counsel, who were then unavailable. In case I refused the adjournment, the plaintiff did submit that –
- (a) paragraphs 46 to 46I of the further amended statement of claim had not been dealt with in my judgment;
 - (b) although the plaintiff's written and oral submissions at the hearing of the separate questions did not specifically raise the allegations set out in paragraphs 46 to 46I of the further amended statement of claim, the plaintiff did not specifically waive reliance upon those paragraphs; and
 - (c) accordingly the findings made in my judgment did not dispense entirely with the plaintiff's claim.
- [13] I determined that it was appropriate to grant the plaintiff the adjournment he sought. I adjourned the defendant's application for further hearing before me on 6 November, and set a timetable for provision of written submissions.
- [14] The Board subsequently indicated it relied on its submissions provided to me for the hearing on 1 October 2015.
- [15] By email dated 28 October 2015, the plaintiff's solicitors advised that, after having had an opportunity to confer with trial counsel, the plaintiff had provided them with instructions with regard to the defendant's application as follows:

1. The plaintiff neither consented to nor opposed the defendant's application for judgment filed 28 September 2015;
 2. The plaintiff did not propose to make any submissions in response to the defendant's application; and
 3. The plaintiff was agreeable to the hearing being vacated and for me to determine the matter in Chambers on the basis of the material which had been placed before the Court.
- [16] The Board's solicitors communicated their agreement that I should proceed to determine the Board's application on the papers.
- [17] Accordingly, I will vacate the order made on 1 October 2015 that the further hearing of the application be on 6 November 2015. The determination of the application will proceed on the papers.
- [18] It seems to me that the Board's application must be resolved in its favour.
- [19] It would, I think, suffice to justify granting the Board the relief it seeks that in response to the Board's application the plaintiff takes the position which I have summarized at [15] above.
- [20] Out of an abundance of caution, I think it is also appropriate to note that the contentions which I have recorded at [12](a) to [12](c) are without merit. The identified paragraphs of the pleading were encompassed by the paragraphs referenced in the wording of the questions which had been posed for my determination, so if those paragraphs had provided any basis for answering the questions in favour of the plaintiff then it would have behoved the plaintiff to advance that contention before me. The plaintiff did not, so the answer which I gave has the result that the plaintiff cannot now contend the contrary.
- [21] By the amended claim the plaintiff claims the following relief:
- (a) a declaration that the decision made by the defendant in its capacity as trustee is void for breach of fiduciary duty; an order that the decision of the defendant be set aside and orders be made by the Court substituting its own decision recognizing the validity of the plaintiff's TPD claim and directing the defendant to pay the amount of the plaintiff's TPD entitlement;
 - (b) in the alternative, damages for breach of contract by the defendant, the measure of which is the amount of his TPD entitlement.
- [22] The prayer for relief in its further amended statement of claim is not expressed in the same terms as the relief sought in the plaintiff's amended claim, but essentially advances the same alternative claims. In the further amended statement of claim the plaintiff claims:
- (a) as a consequence of the breaches of the fiduciary duty and/or the breaches of the contract as aforesaid the plaintiff seeks an order that the opinion of the defendant be set aside; the Court form the opinion required under the Deed and the Insurance Terms and substitute its own opinion and decision which recognize the validity of the plaintiff's TPD claim;
 - (b) consequent upon reforming the opinion and substituting a decision in his favour the Court either order the defendant to pay the amount of the plaintiff's TPD entitlement or award the plaintiff damages arising from the defendant's breach of contract the measure of which is the amount of his TPD entitlement;
 - (c) alternatively, an order that the matter be remitted back to the defendant for determination according to law.

- [23] As to the claims that there should be a declaration of breach of fiduciary duty and on that basis the decision made by the Board as trustee should be set aside and either determined by the Court or remitted back to the Board:
- (a) the answers which have been given preclude the plaintiff from contending that the decision made by the Board as trustee should be set aside on the grounds set out in paragraphs 41(f), 44 to 47E and 50 of the further amended statement of claim;
 - (b) there is no other basis pleaded in the further amended statement of claim on which the plaintiff sought to justify such relief being given or the declaration made;
 - (c) accordingly, those claims cannot be maintained with respect to the Board's decision as a trustee.
- [24] As to the contractual claims:
- (a) the answers which have been given preclude the plaintiff from contending that –
 - (i) there was a contract in existence between the plaintiff and the Board for the provision of insurance benefit;
 - (ii) 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;
 - (b) there is no other basis pleaded in the further amended statement of claim on which the plaintiff seeks to justify such relief being given;
 - (c) accordingly, those claims cannot be maintained with respect to the Board's decision as a trustee.
- [25] The result is that I accept the Board's contention that the answers which I have given to the questions which were posed for determination by me in fact dispose of the claims advanced by the plaintiff in the amended claim. In that event the amended claim should be dismissed.
- [26] There is no reason why costs should not follow the event.
- [27] Accordingly, I order:
- (a) The order made on 1 October 2015 that the further hearing of the defendant's application be adjourned to 6 November 2015 is vacated and the determination of the application will proceed on the papers.
 - (b) The plaintiff's amended claim be dismissed.
 - (c) The plaintiff pay the defendant's costs of the proceeding (and of the defendant's application) to be assessed on the standard basis.