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No contract of insurance with member of superannuation scheme — Edington v Board of Trustees

Stanley Drummond *and* ***Emma Brooker*** *THOMSON GEER*

In dismissing a claim by a member of a public sector superannuation scheme for a total and permanent disablement (TPD) benefit, the Queensland Supreme Court (Bond J) has held that in the circumstances of that case, there was no contract of insurance between the trustee of the scheme and the member. The case is *Edington v Board of Trustees of the State Public Sector Superannuation Scheme*.[1]

Background

The background to the case included a long history of litigation.

Under Queensland legislation, the Board of Trustees of the State Public Sector Superannuation Scheme (the Board) administers the State Public Sector Superannuation Scheme (the Scheme), known as QSuper. The Scheme was established by the Superannuation (State Public Sector) Deed 1990 (Qld) (the Deed).[2]

Among other things, the Board provides TPD benefits to Scheme members. The Board is a self-insurer.[3]

In 1994 a person who later became a member of the Scheme was diagnosed with schizophrenia.[4]

On 10 September 2001 he commenced employment with the Queensland Department of Primary Industry. He automatically became a member of the Scheme, with four units of death and TPD cover. Later in 2001, he applied for and was given 17 additional units of death and TPD cover.[5]

The member worked as part of a small team that would search for fire ants by inspecting domestic and commercial premises. In January 2002, in the course of carrying out his duties, he was involved in an incident concerning two Rottweiler dogs. He was able to continue working, but ceased work in July 2002. In September 2002 he made a claim for income protection benefits on the basis that he had damaged his right foot when he was running away from vicious dogs, tried to jump a fence and fell. That claim was admitted and he received income protection benefits.[6]

The member applies for a TPD benefit

In February 2003, the member applied for a TPD benefit. He described his medical condition that prevented him from working as "damaged body anxiety stress phobic nerves feet". In May 2003 a delegate of the Board determined that he was unlikely to work again and was therefore TPD, but he was not entitled to the TPD benefit because the evidence did not establish that his schizophrenia was not related to a medical condition existing before he became a member.[7]

The Board's 2004 decision

The member appealed to the Board against the delegate's decision. In 2004 the Board affirmed the delegate's decision, for reasons expressed in similar terms to the delegate's decision.[8]

First complaint to the SCT

Later in 2004 the member complained to the Superannuation Complaints Tribunal (SCT) against the Board's decision, under the Superannuation (Resolution of Complaints) Act 1993 (Cth) (Complaints Act). In 2006 the SCT affirmed the Board's decision.[9]

First appeal to the Federal Court

The member appealed to the Federal Court. That appeal was dismissed.[10] The member appealed to the Full Federal Court. In 2008 that appealed was allowed by consent, as the Board conceded that the SCT had made an error in concluding that a relationship had been demonstrated between the member's schizophrenia as a pre-existing medical condition and the post traumatic stress disorder which was the basis of the claim under the relevant insurance policy. The SCT's decision was set aside and the matter remitted to the Board.[11]

The Board's 2008 decision

In 2008 the Board affirmed its previous decision that the member was not entitled to a TPD benefit for his 21 units.[12]

Second complaint to the SCT

In 2009 the member complained to the SCT against the Board's 2008 decision. Later in 2009 the SCT affirmed the Board's 2008 decision.[13]

Second appeal to the Federal Court

The member successfully appealed to the Federal Court and the SCT's determination was set aside.[14] The Board appealed to the Full Federal Court, which allowed the appeal and in lieu of the orders made by the Federal Court, ordered that the appeal from the SCT's decision be dismissed.[15]

At this stage the member had exhausted his remedies under the Complaints Act and related appeals to the Federal Court. The Board's 2008 decision and the SCT's 2009 determination remained in effect. The member then embarked on a different approach.

Proceeding in the Supreme Court

In 2011 the member commenced a proceeding in the Queensland Supreme Court. He sought a declaration that the Board's 2008 decision was void for breach of fiduciary duty by it as trustee, that it be set aside, and that a substitute decision be made by order of the court.[16]

The member relied on s 8 of the Trusts Act 1973 (Qld), which provides for the court to review an act, omission or decision of a trustee.

Application for summary disposal

In late 2011, the Board filed an application for summary disposal of the proceeding. This application was dismissed.[17] The Queensland Supreme Court (Mullins J) held that the fact that the SCT had affirmed the Board's 2008 decision did not, as a matter of law, preclude the member from seeking to invoke s 8 of the Trusts Act in respect of the Board's 2008 decision, as affirmed by the SCT. Further, despite the apparent lack of substance in the member's allegations against the Board, the court was not prepared to exercise the discretion to terminate the proceeding summarily.[18]

Questions for separate determination

At the request of the parties, the Queensland Supreme Court (Bond J) set down a number of questions for separate determination.[19]

The court noted that the member's claim involved two broad alternatives: a claim for review of a decision of the Board as a trustee under s 8 of the Trusts Act, and a claim that there was a contract of insurance between the Board and the member which the Board had breached.[20] The questions according fell into two categories: questions about the Board's decision as trustee, and questions about the claim based on a contract of insurance.

The claim for review of a decision of a trustee

It was common ground between the parties that the legislative scheme created a trust. Even so, the court examined the issue. After noting that there were no explicit statements in the legislation that the Board holds property on trust for members of the Scheme, and observing that a trust may arise from legislation which does not expressly so provide, the court concluded that there were sufficient indicia in the legislation and the subject matter with which they deal to justify the conclusion that the Board was to be regarded as a trustee subject to trust obligations.[21]

The court's jurisdiction under s 8 of the Trusts Act was accordingly enlivened (if the merits of the matter otherwise supports an order being made).[22]

The court said that 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 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.[23]

These bases for challenge by a beneficiary under s 8 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.[24]

After referring to the principles applicable to superannuation trustees stated by the High Court in *Finch v Telstra*[25] and by the Victorian Court of Appeal in *Alcoa of Australia Retirement Plan Pty Ltd v Frost*,[26] the court said (among other things) that the trustee's duty in a particular case may require the trustee to observe the requirements of natural justice. The court said:[27]

> 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.

In relation to a trustee's duty to give a member's claim "real and genuine consideration", the court said that real and genuine consideration requires "properly informed consideration". The court expanded on this in the following terms:[28]

> (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.

The member contended that there were four "breaches" by the Board which justified setting aside the Board's decision pursuant to s 8 of the Trusts Act.[29]

None of these breaches were established.

One of the member's arguments was that the Board had not resolved a conflicting body of medical evidence, and that the Board came to a conclusion that no reasonable person could have come to on the evidence before it. The court rejected this. The Board had resolved the conflicting medical evidence, and had come to a conclusion that was reasonably open to it on the evidence was before it.[30]

The claim for breach of a contract of insurance

As mentioned above, in the alternative, the member contended that between the Board and the member there was a contract of insurance which the Board had breached.

The court rejected the member's contention that there was a contract of insurance, primarily because there was no evidence of an intention of the parties to create contractual relations between themselves. When the member joined the Scheme, he became a beneficiary under a trust. There was an intention to create *legal* (ie, equitable) rights and obligations between themselves, but that was not sufficient to justify the conclusion that *contractual* relations were intended, including where the member elects (eg, by providing written notice) to increase the level of insurance and that election is accepted by the Board.[31]

In reaching this conclusion, the court observed the following matters in particular:[32]

> (a) The statutory legal framework which established the trust relationship between the Board and the members of [the Scheme] was already extant before the [member] 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 [member] 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 [Department of Primary Industry].
> (d) Unless some other agreement was struck between the [member] 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 [member's] accumulation account.
> (e) The [member] did not adduce any evidence that there had been any other agreement so struck.

The court noted that contractual and fiduciary relationships may exist between the same parties, but the facts of this case did not demonstrate that the parties intended to bring a contractual relationship into existence in relation to the existing trust structure.[33] A case which reached a different result on different evidence in relation to a different superannuation scheme was *United Super Pty Ltd v Built Environs Pty Ltd*.[34] The court refrained from expressing a view as to the correctness of that decision, in the following terms:[35]

> 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.

As mentioned above, the court found that there was no contract of insurance between the Board and the member. In case the court was wrong about this, the court went on to consider whether, if there was an insurance contract, the insurer had breached it. After noting that the test for review of a decision made by an insurer under an insurance contract is expressed differently from the test for review of a decision made by a trustee, the court said that here, applying the test for an insurer rather than the test for a trustee, the answer would not be any different.[36]

Finally, the court said that if it was wrong about this and there was an insurance contract that the Board had breached, the court could and should decide the question for itself.[37]

The result

In the result, in answering the questions for separate determination the court said (in effect and among other things) that the Board's 2008 decision that the member was not entitled to a TPD benefit should not be set aside, and that there was no contract of insurance between the Board and the member.

Take away points

Several take away points emerge from this judgment. First, the Queensland State Public Sector Superannuation Scheme is a trust, even though there are no explicit statements in the legislation establishing the Scheme that the Board holds property on trust for members of the Scheme.

Second, in a particular case a superannuation trustee's duty to give a member's claim "real and genuine consideration" may require the trustee to give attention to the requirements of natural justice and to give the member a chance to address adverse information and an opportunity to respond to it.

Finally, in the circumstances of this case there was no contract of insurance between the Board and the member.

Stanley Drummond
Adjunct Head of Superannuation and Wealth Management Thomson Geer
sdrummond@tglaw.com.au
www.tglaw.com.au

Emma Brooker
Lawyer
Thomson Geer
ebrooker@tglaw.com.au
www.tglaw.com.au

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Footnotes

1. *Edington v Board of Trustees of State Public Sector Superannuation Scheme* [2015] QSC 245; BC201507957.
2. Above n 1, at [1]–[2].
3. Above n 1, at [3] and [39].
4. *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2012] QSC 211; BC201206091 at [10].
5. Above n 4, at [10]–[11].
6. Above n 4, at [16].
7. Above n 4, at [17].
8. Above n 4, at [18].
9. Above n 4, at [19] and [25].
10. *Edington v Superannuation Complaints Tribunal* [2007] FCA 1989; BC200710926.
11. *Edington v Superannuation Complaints Tribunal* [2008] FCAFC 78; BC200807549.
12. Above n 4, at [30].
13. Above n 4, at [39] and [42].
14. *Edington v Superannuation Complaints Tribunal* [2010] FCA 504; BC201003282.
15. *Board of Trustees of the State Public Sector Superannuation Scheme v Edington* (2011) 119 ALD 472; [2011] FCAFC 8; BC201100227.
16. Above n 4, at [48].
17. Above n 4; For discussion, see S Drummond, "Further judicial review of a trustee's decision that the SCT has already confirmed — Edington v Board of Trustees", (2012) 24(3) *SLB* 65.
18. Above n 4, at [62] and [76].
19. Above n 1, at [9].
20. Above n 1, at [8].
21. Above n 1, at [27]–[28], [33]–[34] and [36].
22. Above n 1, at [41].
23. Above n 1, at [55].
24. Above n 1, at [56].
25. *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254; [2010] HCA 36; BC201007671.
26. *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618; [2012] VSCA 238; BC201207464.
27. Above n 1, at [50](c).
28. Above n 1, at [57].
29. Above n 1, at [87].
30. Above n 1, at [89]–[90], [99] and [133].
31. Above n 1, at [168]–[177], especially at [172]–[173].
32. Above n 1, at [171].
33. Above n 1, at [174].
34. *United Super Pty Ltd v Built Environs Pty Ltd* (2001) 80 SASR 513; [2001] SASC 339; BC200106221.
35. Above, n 1, fn 14. The finding in *United Super* of a contract of insurance between the trustee of the superannuation fund considered in that case and a member of the fund has been widely criticised. See, for example, S Drummond, R Box and P Hopley, "ASIC provides guidance on extended warranties", (2014) 30(8) *ILB* 114, at 117 and fn 28.
36. Above n 1, at [181]–[183].
37. Above n 1, at [190].