*FORM5A*

IN THE COUNTY COURT OF VICTORIA AT MELBOURNE COMMON LAW DIVISION - GENERAL LIST

No.CI-16-57741

BETWEEN:

**MARIAM DERHAM** Plaintiff

- and -

**CHAMBER TRUSTEE SERVICES PTY LIMITED**

(ACN 002 088 256)

First Defendant

**BOND INSURANCE LIMITED**

(ACN 250 887 216)

## WRIT

Second Defendant

**Date of document:**

**Filed on behalf of: Prepared by:**

Maurice Blackburn Lawyers

Level 10

456 Lonsdale Street

MELBOURNE VIC 3000

28 July 2016 The Plaintiff

Solicitor's Code: 656

Tel: 03 9605 2700

**DX:** 466 (MELBOURNE) Ref: 555/002251

Email: [lawyer@mauriceblackburn.com.au](mailto:lawyer@mauriceblackburn.com.au)

**TO THE DEFENDANT**

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by -

1. filing a 'Notice of Appearance' in the Registrar's office in the County Court Registry, William Street, Melbourne, or, where the writ has been filed in the office of a Registrar out of Melbourne, in the office of that Registrar; and
2. on the day you file the Notice, serving a copy, sealed by the Court at the plaintiffs address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

THE PROPER TIME TO FILE AN APPEARANCE is as follows -

1. where you are served with the writ in Victoria, within 10 days after service;
2. where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
3. where you are served with the writ in Papua New Guinea, within 28 days after service;
4. where you are served with the writ in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within

30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;

1. in any other case, within 42 days after service of the writ.

IF the plaintiff claims a debt only and you pay that debt, namely,

$ and $ for legal costs to the plaintiff or his

solicitor within the proper time for appearance, this proceeding will come to an end. Notwithstanding the payment you may have the costs taxed by the Court.

FILED

**THE REGISTRAR**

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

- 3 -

1. The address of the Plaintiff is -

8 Johnston Street

Gilroy VIC

3669

1. The address for service of the Plaintiff is -

*Cl-* Maurice Blackburn, Solicitors of Level 10, 456 Lonsdale Street, MELBOURNE, VIC, 3000 (Reference 555/002251)

1. The address of the First Defendant is - Level 96, 12 Collins Street MELBOURNE VIC 3000
2. The address of the Second Defendant is – Level 1, Kings Way

Melbourne VIC 3000

## IN THE COUNTY COURT OF VICTORIA AT MELBOURNE

## Common Law Division General List

## BETWEEN:

## MARIAM DERHAM

- and-

No.

Plaintiff

## CHAMBER TRUSTEE SERVICES PTY LIMITED

(ACN 002 088 256)

First Defendant

## BOND INSURANCE LIMITED

(ACN 250 887 216)

Second Defendant

## STATEMENT OF CLAIM

Date of Document: Filed on behalf of: Prepared by:

MAURICE BLACKBURN

Lawyers,

Level 10, 456 Lonsdale Street Melbourne,

VICTORIA 3000.

28 July 2016 The Plaintiff

Solicitor's Code: 656

Tel: 03 9605 2700

DX: 466 (MELBOURNE) Ref: 555/002251

Email: [lawyer@mauriceblackburn.com.au](mailto:lawyer@mauriceblackburn.com.au)

1. The First Defendant:
   1. is and was at all material times incorporated pursuant to the laws of and capable of being sued in Victoria;
   2. is and was at all material times the Trustee of Bond Super ("the Fund") established by a Trust Deed as amended ("the Trust Deed").
2. The Second Defendant:
   1. is and was at all material times incorporated pursuant to law and capable of being sued in Victoria;
   2. at all material times carried on business as an insurance company.
3. At all material times, there were provisions and rules of the Fund ("the Rules"), inter alia, as follows:
   1. if a Member suffered Total and Permanent Disablement, she would be paid a total and permanent disablement benefit ("the Total and Permanent Disablement benefit");
   2. "Total and Permanent Disablement" had the same meaning as that term had in the policy referred to in paragraph 7 below, except that any reference to the Second Defendant in relation to satisfaction should be taken to be a reference to the First Defendant.

PARTICULARS

The Rules were in writing and may be inspected at the office of the Solicitors for the Plaintiff by appointment.

1. At all material times, the Plaintiff was a Member within the meaning of the Rules of the Fund.
2. At all material times from 1 October 2013, there was a "Bond Super Group Life Insurance Policy" with Policy Number 9986 effected by the First Defendant with the Second Defendant, pursuant to the Rules and under which insurance was in force in respect of the Plaintiff against total and permanent disablement ("the policy").

PARTICULARS

The policy was in writing and may be inspected at the office of the Solicitors for the Plaintiff by appointment.

1. The Plaintiff was specified or referred to in the said policy as a person to whom the insurance cover provided by the contract extended; and the First Defendant held the relevant benefit in trust for the Plaintiff and by reason of section 48A of the *Insurance Contracts Act* 1984 (Cth.), alternatively at common law, the Plaintiff has a right to recover under the said policy.
2. There were terms of the policy, inter alia; that:
   1. when a Covered Person was determined as being a Totally and Permanently Disabled while the Policy was in force the Second Defendant would pay the Insured Cover in respect of that Covered Person ("the Total and Permanent Disablement Benefit"); ·
   2. "Total and Permanent Disablement'', in relation to a Covered Person under age 65 and Employed in Permanent Employment for at least the Minimum Hours, meant the Covered Person having been absent from their Occupation with the Employer through Injury or Illness for 3 consecutive months and having provided proof to the satisfaction of the Second Defendant that the Covered Person had become incapacitated to such an extent as to render the Covered Person unlikely ever to engage in or work for reward in any occupation or work for which she was reasonably qualified by reason of education, training or experience;
   3. "Employed" meant being engaged by the Employer under a contract of employment;
   4. "Permanent Employment" meant a person was Employed by the

Employer under a single and ongoing contract that:

* + 1. was of indefinite duration or was for a fixed term of no less than 6 months; and
    2. required the person to perform identifiable duties; and
    3. required the person to work a regular number of hours each week; and
    4. provided for paid annual leave, sick leave and long service leave;
  1. "Employer" included Smith and Jones Nominees Pty Ltd and John’s Pies East Melbourne;
  2. "Minimum Hours" meant 16 hours per week;
  3. "Injury" meant bodily injury which was caused solely and directly by external, violent and accidental means and was independent of any other cause;
  4. "Illness" meant sickness, disease or disorder;
  5. "Occupation" meant the employment or activity in which the person/Covered Person was principally Employed.

1. At all material times, the Plaintiff was a Covered Person within the meaning of the policy.
2. The amount of the Total and Permanent Disablement benefit under the policy in respect of the Plaintiff was not less than $301,224.00.
3. The Plaintiff was Employed in Permanent Employment for at least the

Minimum Hours.

1. The Plaintiff was absent from her Occupation with the Employer through Injury or Illness for 3 consecutive months.

PARTICULARS

The Plaintiff was born on 2 January 1977. The Plaintiff suffered complex epilepsy with frequent unpredictable episodes of loss of consciousness which had a major impact on daily life. In 2009, she had a right sided lobectomy.

Following the surgery, she had a stroke which resulted in left-sided weakness and loss of peripheral vision. She has trialed all anti-seizure medications but they were and are ineffective in controlling her seizures. Further surgery is impossible. The Plaintiff was also diagnosed with tachycardia and admitted to the Northern Hospital and remained there from 10 July to 17 July 2014. She was again admitted on 12 March 2015 as she collapsed and her heart stopped. She had a pacemaker inserted in February 2015. She worked as Assistant Manager at John’s Pies with both psychologically and physically demanding duties such as supervising other staff, serving customers, cash handling, receiving and making orders, and working varying shifts. She ceased working on the 27 January 2014 because of her medical condition and has been unable to work since.

1. The Defendants should have been satisfied that the Plaintiff had become incapacitated to such an extent as to render her unlikely ever to engage in or work for reward in any occupation or work for which she was reasonably qualified by reason of education, training or experience.

PARTICULARS

The Plaintiff provided the Defendants with evidence of her disability in making the claim set out below. That evidence included the following.

The Plaintiff was born on 2 January 1977. The Plaintiff suffered complex epilepsy with frequent unpredictable episodes of loss of consciousness which had a major impact on daily life. In 2009, she had a right sided lobectomy.

Following the surgery, she had a stroke which resulted in left-sided weakness and loss of peripheral vision. She has trialed all anti-seizure medications but they were and are ineffective in controlling her seizures. Further surgery is impossible. The Plaintiff was also diagnosed with tachycardia and admitted to the Northern Hospital and remained there from 10 July to 17 July 2014. She was again admitted on 12 March 2015 as she collapsed and her heart stopped. She had a pacemaker inserted in February 2015. She worked as Assistant Manager at John’s Pies with both psychologically and physically demanding duties such as supervising other staff, serving customers, cash handling, receiving and making orders, and working varying shifts. She ceased working on the 27 January 2014 because of her medical condition and has been unable to work since.

1. In the premises, the Plaintiff suffered total and permanent disablement within the meaning of the Rules and the policy.
2. The Plaintiff claimed a total and permanent disablement benefit from the First Defendant ("the first Fund claim") and from the Second Defendant ("the first insurance claim").

PARTICULARS

The Plaintiff supported the said claim on that date or later with:

* 1. medical reports by Professor Mark Cook - Neurologist & Epileptologist dated 10 February 2014, 27 April 2014 and 14 October 2014;and
  2. material, particulars of which will be provided after discovery herein.

1. By letter dated 8 September 2014, the Defendants informed the Plaintiff that the Defendants had decided to refuse to pay the benefit claimed ("the frrst Fund and the first insurance decision").
2. The Plaintiff requested the Defendants to review the first Fund and the first insurance decision ("the second Fund and the second insurance claim") and supported the request with:
   1. letters dated29 September 2014, 13 January 2015, 4February2015, 20 February 2015, 25 May 2015, 31 July 2015, 10 August 2015, 8 September 2015, 1 October 2015, 19 October 2015 and 23 November 2015;
   2. authority;
   3. VicRoads letter dated 20 July 2015;
   4. Medicare records;
   5. Medicare PBS History;
   6. medical history from VicRoads.
3. The Plaintiff complied with the demand of the Defendants that she subject herself to medical examinations at the instance of the Defendants by Dr Janaka Seneviratne (Neurologist) on Tuesday 1 September 2015 and by Assoc Prof Jack Gutman (Cardiology) on Tuesday 1 September 2015.
4. By letter dated 10 December 2015 respectively, the Defendants informed the Plaintiff that the Defendants had decided to refuse to pay the benefit claimed ("the second Fund and the second insurance decision").
5. The Defendants gave as reason for the second Fund and the second insurance decision that nor Janaka Seneviratnets report dated 14 September 2015, outlined that due to her ongoing seizures, the Member experiences significant neurological deficits which would make her unsafe to work in her usual occupation on a part-time or full-time basis and it is unlikely that her condition would significantly improve even with the newer antiepileptic medications. Due to the unpredictable nature of seizures as well as already existing cognitive and memory deficits to her temporal lobectomy, she is not fit to perform part-time or full-time duties on a regular basis... [The VIC Roads file indicates that Member still has an active license and that if her condition changes; she has an obligation to report these changes. In addition, the reports of Prof. Cook (treating specialist) state that the Member has not attended for review since October 2014 and therefore cannot comment on her current driving ability. He notes that if she were well, then she may be eligible to drive."

PARTICULARS

The reason was contained in a letter dated 10 December 2015, a copy of which may be inspected at the offices of the Solicitors for the Plaintiff by appointment.

1. The reason for the second Fund and the second insurance decision was not valid.

PARTICULARS

The material referred to in paragraphs 14, 16, 17 and 21 is referred to and repeated. Paragraphs 25 and 27 are referred to and repeated.

1. The Plaintiff requested the Defendants to review the second Fund and the second insurance decision ("the third Fund and the third insurance claim") and supported the request with:
   1. letters dated 12 January 2016 and 5 February 2016;
   2. Report from Dr Uwais Mohamed - treating Cardiologist dated 20 January 2016.
2. By letter dated 7 April 2016, the Defendants informed the Plaintiff that the Defendants had decided to refuse to pay the benefit claimed ("the third Fund and the third insurance decision").
3. The Defendants failed or refused to provide any reason for the third Fund and the third insurance decision.
4. The First Defendant had duties:
   1. to consider a Fund claim made by the Plaintiff;
   2. to exercise any discretion in good faith, with real and genuine consideration and in accordance with the purposes for which the discretion was conferred;
   3. to take into account in considering a Fund claim all the relevant considerations;
   4. not to take into account in considering a Fund claim any irrelevant consideration;
   5. to reach a proper decision in respect of a Fund claim on the evidence before it;
   6. not to reach a decision in respect of a Fund claim under the dictation of any other person;
   7. to make and to do everything that was reasonable to pursue the insurance claim on behalf of the Plaintiff with the Second Defendant;
   8. to give reasons for its decisions;
   9. to exercise, in making the decisions, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the First Defendant felt morally bound to provide, alternatively to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries;
   10. to ensure that the First Defendant's duties and powers were performed . and exercised in the best interests of the Plaintiff;
   11. to make a decision as to whether to accept or reject a Fund claim within a reasonable time and in a timely manner;

(1) to give the Plaintiff an opportunity to comment on and if appropriate rebut material which the First Defendant was to consider before making its decisions.

1. In refusing the first, second and third Fund claims ("the Fund claim"), the First Defendant breached the duties referred to in the last preceding paragraph above.

PARTICULARS

* 1. The First Defendant refused to consider the Fund claim;
  2. The First Defendant failed to exercise any discretion in good faith, with real and genuine consideration and in accordance with the purposes for which the discretion was conferred;
  3. The First Defendant failed to take into account in considering the Fund claim all relevant considerations;
  4. The First Defendant took into account in considering the Fund claim an irrelevant consideration;
  5. The First Defendant failed to reach a proper decision in respect of the Fund claim on the evidence before it;
  6. The First Defendant reached a decision in respect of the Fund claim under the dictation of the Second Defendant;
  7. The First Defendant failed to exercise, in making the decision, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the First

Defendant felt morally bound to provide, alternatively to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries;

* 1. The First Defendant failed to make a decision as to whether to accept or reject the Plaintiff's claim within a reasonable time and in a timely manner;
  2. The First Defendant failed to ensure that the First Defendant's duties and powers were performed and exercised in the best interests of the Plaintiff;
  3. In the alternative to paragraph 19 above, the First Defendant failed to give reasons for its decision;
  4. The First Defendant failed to make the insurance claim on behalf of the Plaintiff with the Second Defendant;

(1) The First Defendant failed to do everything that was reasonable to pursue the insurance claim on behalf of the Plaintiff with the Second Defendant;

(m) The First Defendant failed to give the Plaintiff access to the medical reports which the First Defendant was to consider before reaching its decision.

Further particulars may be provided after discovery herein.

1. In considering the first, second and third insurance claims ("the insurance claim"), the Second Defendant had duties:
   1. to consider the insurance claim with proper regard to the interests of the Plaintiff;
   2. to take into account in considering the insurance claim all the relevant considerations;
   3. not to take into account in considering the insurance claim any irrelevant consideration;
   4. to reach a proper decision in respect of the insurance claim on the evidence before it;
   5. to act towards the Plaintiff, in respect of the insurance claim, with the utmost good faith;
   6. to give reasons for its decision;
   7. to make a decision as to whether to accept or reject an insurance claim within a reasonable time and in a timely manner;
   8. to give the Plaintiff an opportunity to comment on and if appropriate rebut material which the Second Defendant was to consider before making its decision.
2. In refusing the insurance claim, the Second Defendant breached the duties referred to in the last preceding paragraph above.

PARTICULARS

* 1. The Second Defendant failed to consider the insurance claim with proper regard to the interests of the Plaintiff;
  2. The Second Defendant failed to take into account in considering the insurance claim all relevant considerations;
  3. The Second Defendant took into account in considering the insurance

claim an irrelevant consideration;

* 1. The Second Defendant failed to reach a proper decision in respect of the insurance claim on the evidence before it;
  2. The Second Defendant failed to act towards the Plaintiff, in respect of the insurance claim, with the utmost good faith;
  3. The Second Defendant failed to make a decision as to whether to accept or reject an insurance claim within a reasonable time and in a timely manner;
  4. The Second Defendant failed to give the Plaintiff an opportunity to comment on and if appropriate rebut material which the Second Defendant was to consider before making its decision;
  5. In the alternative to paragraph 19 above, the Second Defendant failed to give reasons for its decisions.

Further particulars may be provided after discovery herein.

1. In the premises, the decisions were void and of no effect at law.
2. Further, or in the alternative, the Defendants ought to have decided to pay to the Plaintiff the total and permanent disablement benefits claimed.
3. In the premises, the Plaintiff is entitled to total and permanent disablement benefits pursuant to the claims referred to above.
4. Despite demand therefor, the Defendants have each failed or refused to pay to the Plaintiff any sum or benefit pursuant to the claims referred to above.

# In the premises, the Plaintiff suffered loss and damage.

AND THE PLAINTIFF CLAIMS

1. A Declaration that the decisions of the First Defendant referred to in paragraphs 15, 18 and 22 above and the decision of the Second Defendant referred to in paragraphs 15, 18 and 22 above were void and of no effect.
2. A Declaration that the Plaintiff is entitled to a total and permanent disablement benefit under the Deed as referred to in paragraph 3 above and under the policy as referred to in paragraph 7 above and an Order that the Plaintiff be paid the same by the First and the Second Defendants.
3. Further alternatively to paragraphs A and B above, an Order that each of the Defendants give reasons for the decisions referred to in paragraph A above.
4. Alternatively, damages.
5. Costs.
6. Such other or further Order as this Honourable Court deems fit.

**P.ASPIRE**

# MAURICE BLACKBURN

Solicitors for the Plaintiff

**FORM 1**

*Service and Execution of Process Act 1992*

**NOTICE TO DEFENDANT**

Section 16

PLEASE READ THIS NOTICE AND THE ATTACHED DOCUMENT VERY CAREFULLY

IF YOU HAVE ANY TROUBLE UNDERSTANDING THEM YOU SHOULD GET LEGAL ADVICE AS SOON AS POSSIBLE

Attached to this notice is a Writ ("the attached process") issued out of the County Court of Victoria at Service of the attached process outside Victoria is authorised by the Service and Execution of Process Act 1992,

**YOUR RIGHTS**

If a court of a State or Territory other than Victoria is the appropriate court to determine the claim against you set out in the attached process, you may be able to:

have the proceeding stayed by applying to the County Court of Victoria at .

If you think the proceeding should be stayed or transferred, you should get legal advice as soon as possible.

**CONTESTING THIS CLAIM**

If you want to contest this claim, you must take any action set out in the attached process as being necessary to contest the claim.

If you want to contest this claim, you must also file an appearance in the County Court of Victoria at You have only 21 days after receiving the attached process to do so.

The appearance must contain:

an address in Australia where documents can be left for you or sent to you.

**FORM 1**

*Service and Execution of Process Act 1992*

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The appearance must contain:

an address in Australia where documents can be left for you or sent to you.