INSURANCE ▪ COMMERCIAL ▪ BANKING

CASES AND TRIBUNAL DECISIONS

TPD - Imperfect Decline Reasoning

MX v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme & Anor [2018] NSWSC 923

Link to decision

Background

You will recall that we have previously discussed the 2018 NSWSC TPD decision of *MX v FSS & MetLife*.

In that case, being a split TPD case dealing with stage one only, the NSWSC held that the insurer's two separate TPD declines failed because:

- The reasoning demonstrated in the relevant decline letters left '*pertinent questions unanswered*' and that '*the gaps in this reasoning are such that they do not satisfy the test stated by Ball J in* Ziogos … *and one cannot discern why*… the insurer… *reached the conclusion that it did*'.
- The insurer was influenced by its reinsurer in exercising its opinion and this breached its obligations under the primary insuring clause.
- The second decision was also set aside by the Court on the primary basis that when making this second decision, the insurer did not start *de novo* but rather approached it on the basis as to whether it should change its mind from its first decision to decline.

The insurer appealed and was unsuccessful.

NSWCA's Findings

Dealing with the extent to which the provisions of reasons by an insurer are relevant to stage one TPD declines, the NSWCA dismissed the potential tension between *Newling (No2)* and earlier NSWSC decisions and confirmed the view of Parker J (in *Newling No2*) that if reasons were given, they required no more than an explanation of '*the actual path of reasoning*' by which the conclusion was arrived at.

Moving to the substance of the appeal, the NSWCA dismissed the grounds of appeal in relation to the initial decline because '*It was well open to the primary judge to conclude that the Insurer's reasons for its first decision were inadequate and that the Insurer in breach of its contractual duty had failed to act fairly and reasonably in considering the respondent's claim*'.

That is, the NSWCA found that the insurer's reasons did not explain the '*actual path of reasoning*' for arriving at its decision, and cited competing medical evidence without explaining why it preferred one medical opinion over the evidence of treating doctors.

In relation to the subsequent decline, the NSWCA rejected the lower court finding that the second decision '*was not a genuine reconsideration of the respondent's claim*' on the basis that *'to characterise the second decision as simply whether the Insurer should "change its mind", ignored the substance of the Insurer's reasons'.*

Nonetheless, the NSWCA still agreed with the lower court that the second decline was flawed and could not stand on the basis '*that the reasons given by the Insurer did not purport to weigh the significance of what the respondent had said about his vocational prospects or the nature and reasons for his activities at the Club, and the support for the respondent's account in the affidavit of AX.*

Significantly, the striking feature of the original decision, being the novel finding that reinsurer influence on the insurer (and lack of disclosure of same) was a ground to vitiate the opinion based decline, simply fizzled out before the NSWCA. Specifically, the NSWCA, noting that the respondent had sought to uphold the relevant vitiation findings on grounds other than the reinsurance issues, sidestepped this issue given it '*cannot affect the outcome of the appeal.*'

Implications

- **Giving reasons:** Reasons given by the insurer (in decline letters) must display the '*actual path of reasoning*.' This has now been confirmed in two NSWCA decisions, being *Newling* and this case. The '*actual path of reasoning*' would appear to mean providing explanations as to why decisions are made the way they are, outlining the evidence on which they are based on and why in circumstances of conflicting evidence, one view is preferred over another.
- **TPD decline letters and reasoning:** Generally, being the only evidence submitted by insurers demonstrating the *'actual path of reasoning'* behind a decline, decline letters remain the crucial plank in any decline decision.

This decision confirms they will continue to be placed under the microscope by the courts in stage one TPD hearings. Despite the courts saying they do not expect such letters to be in the nature of judgments ('a judicial standard of reasoning is not required'), the relentless criticism of such letters suggests that they actually do. Insurers should prepare accordingly.

It is useful to note the specific areas in which the decline decisions in this matter were found to be wanting as they are areas which are common to many contentious TPD declines (learnings can flow from this). That is:

- Not considering or not adequately considering, exculpatory evidence from both the respondent and his treating doctors, which explained the potentially damaging surveillance evidence (which indicated work activity).
- Not seeking clarification of qualified views by doctors on the surveillance evidence i.e. the exculpatory evidence was not put to them.
- Not seeking further medical responses from doctors supporting a decline, on the impact of exculpatory evidence on their views.
- Not seeking to explain how the activities observed in the surveillance footage '*bore any relationship to the activities the respondent would be required to undertake in paid employment*.'
- Relying on vocational evidence which does not consider the respondent's psychological condition and restrictions on his job prospects.
- Not stating why one medical view was preferred over another.

- **The Reinsurance Issue:** The NSWCA's finding that it did not need to deal with the reinsurance issue technically means the lower court's novel finding on the impact of reinsurer influence on the primary insurer's decision, stands undisturbed.

That said, it should be noted that as mentioned above, the respondent did not seek to press its appeal on the reinsurance findings and the NSWCA stated 'Counsel (for the respondent) candidly acknowledged that the "reinsurance" issues were unnecessarily the focus of argument on the hearing of the separate question.'

On this basis one may conclude that the reinsurance grounds for vitiation raised by the lower court in this matter, will in time be seen as an idiosyncratic outlier shaped by the specific point in time reinsurance arrangements that applied to these facts, rather than a universal TPD principle.