CASES AND TRIBUNAL DECISIONS

TPD: Reinsurer in the Spotlight

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

Link to decision

The NSWSC has recently delivered a TPD decision in *MX v FSS & MetLife* (plaintiff's name supressed) which may have an impact on the way you engage with your reinsurance stakeholders in the management of 'opinion' based claims (obviously, mainly TPD claims).

Background

The plaintiff was a former police officer who alleged that a work related PTSD condition had rendered him TPD. He was insured for this event under a group policy effected between the two defendants as trustee and insurer respectively. The coverage was a conventional opinion based 'unlikely' ETE clause.

His claim was lodged in 2012 and rejected by the insurer in 2014 and again in 2017.

Proceedings were brought challenging the decisions of the insurer and consent orders were made splitting the hearing into separate stage 1 and stage 2 hearings.

This decision deals only with stage 1 which was whether the insurer's two decisions to decline the claim should be vitiated.

The trustee took no active part in the hearing which was determined by Justice Slattery.

The judgment

The Court vitiated the insurer's first decision on several grounds all flowing from the way the insurer was seen to evaluate the medical, vocational and other evidence in the decline letter.

Specifically, the Court found flaws with the way the insurer expressed its decision in the decline letter noting that it 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'.*

Additionally the Court felt that the insurer failed to 'get to grips' with underlying inconsistencies in the information before it which could have been resolved by seeking out further information from a treating doctor (as to why he did not feel the surveillance footage contradicted his findings) and from a Surf Lifesaving Club (as to whether the plaintiff's volunteer work there had the flavour of paid employment).

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. This according to the Court, was a basis for the decision to be set aside.

The reinsurance issue

Those who follow TPD case law will be all too familiar with the above stage 1 vitiation reasons which have featured in many TPD decisions (which also in technical terms, are probably *obiter* in this judgment). The most novel aspect of this judgment however is the primary basis on which the insurer's first decision was vacated, being a seemingly new ground to vitiate, that being, the insurer was influenced by its reinsurer in exercising its opinion.

In coming to a view on this issue, the Court extensively reviewed both the reinsurance treaty and the reinsurer's '*close involvement*' in the management of the claim. The critical provision of the treaty was a claim approval provision as follows:

'For any Sum Insured above the Claim Handling Limit…the Cedant must before accepting liability for a claim under that Reinsured Policy, obtain [the reinsurer's] *prior approval…'*

Additionally, the critical claim fact was that the reinsurer had made it clear to the insurer that such approval was not being given in this instance.

The Court embarked on a detailed assessment of the impact of the clause on the insurer's obligation to form a reasonable decision under its policy and eventually came to this conclusion at paragraph 269:

'In the absence of any internal evidence that any positive steps were taken to ring fence the decision from such clearly asserted influence, the inference that the decision maker took this consideration (i.e. the reinsurer's refusal to grant approval to pay the claim) *into account is strong, because of the potential commercial consequences for* [the insurer] *of proceeding to decide in the plaintiff's favour without* [the reinsurer's] *approval in breach of Article 18.8.. I infer from all of these matters that* [the insurer] *took into account* [the reinsurer's] *refusal to grant prior approval to an outcome favourable to the plaintiff.'*

This amounted to an *'irrelevant consideration'* which *'breached its obligations of utmost good faith and of acting reasonably in forming an opinion'.* On this basis, the first decision of the insurer was set aside.

Additionally, the failure to disclose the reinsurance arrangement to the plaintiff *'placed the plaintiff at a procedural disadvantage'* (he could have made submissions on it had he known) and was also a basis on which the first decision was vitiated.

Implications

The findings that essentially the insurer failed to spell out clearly why the claim was being refused in the respective decline letters are hardly novel and simply serve to further illustrate the intense judicial scrutiny that such letters are placed under. Whilst the courts are at pains to point out that they do not expect such letters to be of the nature of judgments, their actual criticisms of such letters suggest otherwise.

Care should also be had to ensure that requests for a review of a declined claim when accompanied by fresh information, should be of the nature of a *de novo* review.

Of more wider significance however, are the findings in relation to the reinsurance arrangements.

Specifically, the judgment suggests that, in relation to opinion based decisions by insurers:

- the presence of a reinsurer approval clause in the relevant treaty similar to the one in this case; and
- heavy reinsurer involvement in the claim process culminating in an express desire that the claim should not be accepted; coupled with
- a lack of affirmation that the insurer is acting independently of the reinsurer's views and possible treaty consequences

will place stage 1 opinion clause decisions at risk of being vitiated for taking into account an irrelevant consideration.

It may be that the unique reinsurance factors at play in this case are not replicated in the wider life market. Be that as it may however, as things presently stand and against this background, clearly it is timely to review your reinsurance treaties, reinsurer claim engagement practices and your claim communications to ensure the relevant reinsurance factors which led to the vitiation in this case are not present in your claims book.

The key things to note are that,

- The intense judicial scrutiny of TPD decline letters continues. Such letters need to have the look, flow, comprehensiveness and rigour you would expect from a judgment.
- Reviews of declined TPD decisions need to be carried out on a *de novo* basis.
- In opinion based cases involving high reinsurer involvement, insurers need to be careful that as a matter of impression, perception and fact they are not outsourcing the exercise of their opinion to the reinsurer on the basis that this can be a ground for opinion vitiation.