CASES AND TRIBUNAL DECISIONS

Court of Appeal rules on TPD cover cessation

MLC Nominees Pty Ltd v Daffy [2017] VSCA 110

Link to decision

The Supreme Court of Victoria – Court of Appeal has reversed the lower court decision of *Daffy* (VSC), finding for the life insurer. The judgment is highly relevant for determining when the insured TPD event has occurred under what might be termed, a standard TPD insuring clause.

Background

The contest in *Daffy* was whether the insured's TPD claim fell to be determined under a standard 'any occupation' definition or the harder to meet 'activities of daily living' (ADL) definition. The life insurer's group policy in this instance shifted an insured from 'any occupation' TPD definition to an ADL one when their working situation altered.

In this particular case, the trigger for the switch was the insured ceasing to be an employee of a Participating Employer. In that instance, they switched 'schedules'.

The 'any occupation' clause contained a fairly standard 6 month qualification period and then the formation of the opinion as to permanent incapacity for ETE work.

The contest came to be determined, in essence, by when the insured TPD event occurred. That is, was it before or after the insured coverage had switched to the ADL cover, it being accepted that the insured could not meet the ADL definition (but he could meet the 'any occupation' definition).

In what was primarily a construction argument, the lower court found that the 'any occupation cover' responded to the claim. It did so on the basis that whilst it found that the insured had moved to the ADL cover, by this stage, his entitlement to the 'any occupation' TPD benefit had already accrued.

In essence the lower court found the legal right had accrued when the underlying injury occurred.

Court of Appeal – Reversal of the Decision

The Court of Appeal said the case 'involves a pure question of construction' and approached the issues in a distinctly black letter way. Specifically it emphasised that it could not 'attribute different meaning to the words of a policy simply because the court regards the meaning as otherwise working a hardship on one of the parties'.

Approaching the matter in this way, the Court found that the 'any occupation' TPD benefit could not have accrued before the transfer to the ADL schedule because the essential element of the 'any occupation' TPD benefit, being the 6 months qualifying period, had not been met. It said:

> *On any view of the facts, the 'six consecutive months' period referred to in paragraph (b) had not elapsed (or occurred) prior to the termination of Mr Daffy's employment. On the judge's findings, that period did not commence until sometime after the termination of Mr Daffy's employment. Moreover, and in any event, on Mr Daffy's notice of contention, only four days of the requisite six month period had elapsed at the time of his termination.*

The Court noted that this construction placed an extra burden on the insured in satisfying the harder ADL definition but:

> *That, however, is not a sufficient basis upon which one might torture the language of cl 27.1 of the policy so as to hold that in a particular case of injury, a TPD benefit that might subsequently be payable (and paid) under the policy is an accrued benefit at the time of injury, and no matter what part any such injury might ultimately be found to play in any subsequently determined disability. That would deny the requirement in the First Schedule and the Sixth Schedule that the member had been absent from an occupation for six consecutive months. While Mr Daffy pointed to ways in which that requirement could easily work unfairness, it cannot simply be ignored.*

Implications

Determining the date an insured TPD event occurs is often a critical question facing life insurers particularly in the context of claims straddling cover lapses and the switch from 'any occupation' to ADL cover.

Here the lower court, seemingly determined to reach a final result that the more generous 'any occupation' cover applied, 'tortured' the language of the policy to arrive at that result and in effect found that the insured TPD event occurred or accrued when the underlying injury happened. In doing this, clearly it overstepped the mark although its findings in this regard were not dissimilar to the findings of the NSW SC in *Harrison* which decision has not been disturbed.

One should be careful in drawing too much out of this judgment in which the Court was at pains to point out, it was dealing with the construction of a particular policy. Having said that, the judgment clearly supports the proposition that the relevant 6 months qualification period (in TPD definitions similar to the present) must at least commence before the cover ends or switches – in this case the qualification period started after the cover had already switched.

Moreover, it is likely that the case goes somewhat further than this and supports the proposition that the 6 months qualification period must be wholly complete before the cover ends or switches, for the TPD event to have occurred.

Some may say that this latter proposition diverges from the view of the High Court in *Finch* although it should be noted that the Court of Appeal referred to *Finch* in the judgment and seemingly did not feel that it was contradicting this decision. Additionally, the Court of Appeal noted the possible unfairness that could result from this construction (the same unfairness that the High Court noted in *Finch*) but was not swayed by this.