

## CASES AND TRIBUNAL DECISIONS

# Federal Court confirms that insurers may withhold reasonable costs from payment into Court

*Swiss Re Life & Health Australia Ltd v Public Trustee of Queensland* [2017] FCA 963

[Link to decision](#)

Where a life insurer can obtain no sufficient discharge with respect to the payment of insurance benefits, it may pay that money into Court pursuant to the provisions of section 215 of the *Life Insurance Act 1995* (Cth) (the '*Life Act*').

One of the circumstances in which a life insurer cannot obtain a sufficient discharge is where the person to whom the benefit would otherwise be payable is allegedly criminally involved in the death of the life insured.

Most recently, this arose in the context of a claim upon a life insurance policy issued by Swiss Re Life & Health (Swiss Re).

## Background

The life insured, referred to in the judgment as "MP", was the mother of "EP" and "AP". The policy issued by Swiss Re to MP provided for the payment of \$115,762 to AP and EP in equal shares in the event of MP's death.

It was alleged that, whilst under 18, AP killed his mother and sister on 28 January 2014 by stabbing them to death. That matter was proceeding through the Queensland justice system and in particular, the Mental Health Court. Hence, the parties were anonymised.

The executor of the estate of EP had been paid half the benefits of the policy, being \$57,881. The unpaid balance would in normal circumstances have been paid to AP, but

in circumstances where he was accused of murdering MP, Swiss Re submitted that it could obtain no sufficient discharge in respect of the payment of the balance of the policy benefit.

## Decision

Chief Justice Allsop of the Federal Court held that the opinion of Swiss Re was a reasonable one in the circumstances and provided the requested declaration that it could pay the balance of the policy benefit into Court pursuant to section 215 of the *Life Act*.

This led to the question of costs. Allsop CJ noted that '*the usual order is that the insurer obtains its costs from the sum in question*'. However he also noted that the benefit in issue was modest, and proposed to make '*an order for a modest and appropriate sum in costs to be paid from the proceeds of the policy*'. He directed Swiss Re to make an application for an amount of costs, supported by submissions and a Bill of Costs.

Shortly thereafter, his Honour delivered a further judgment in which he acknowledged (as he had done in previous judgments – see our [2016 December FSB re Westpac v Mahony](#)) that '*it must be recognised that an insurer is ultimately put in such a position through no fault of its own and so it is both fair and appropriate that an insurer have some indemnification for its reasonable costs*'.

Swiss Re had incurred costs and disbursements of \$20,530 in relation to the application, but recognising the tension between the costs incurred and the modest amount of the insurance proceeds, applied for only \$15,000 to be withheld from the proceeds of the policy.

His Honour noted in his judgment on costs (*Swiss Re Life & Health Australia Ltd v Public Trustee of Queensland (No 2)* [2017] FCA 1146) that Swiss Re's application under section 215 had not been straightforward, due to difficulties in locating AP and effecting service upon him within the Queensland mental health system as a result of both the sensitive nature of the alleged offence and the fact that he was alleged to have committed it as a juvenile. Because he was in detention, it had also been necessary for Swiss Re to make an application for interlocutory orders with respect to substituted service.

It was acknowledged by his Honour that Swiss Re had endeavoured to conduct the application as efficiently as possible, and had also agreed that the matter should proceed on the papers to reduce costs.

His Honour was ultimately satisfied that Swiss Re should be allowed to retain \$15,000 from the monies paid into Court.

## Implications

The judgments of Allsop CJ with respect to this matter emphasise the importance of ensuring proportionality between the amount of costs expended in an application for payment into court and the amount of the insurance proceeds in issue.