

CASES AND TRIBUNAL DECISIONS

TPD - *Hearne v Street* Orders No longer Necessary

Gavan v FSS Trustee Corporation [2019] NSWSC 667

[Link to decision](#)

Background

The increased frequency with which life insurers are sued before reaching a TPD decision has in recent times created a dilemma as to how insurers, who are simultaneously defending proceedings as well as trying to make a decision on TPD, should treat documents they seek under subpoena or other compulsory court process.

That is, can the insurer, as well as using such documentation in its defence of the proceedings, also consider such material in forming its opinion on TPD?

The current approach is to use documents for these dual purposes but only after obtaining so called *Hearne v Street* orders from the court.

Obtaining such orders however, appears to be no longer required (at least in NSW) having regard to a recent decision by the Chief Justice in Equity of the NSWSC, Ward CJ, who found that the usual TPD *Hearne v Street* orders are not necessary when a life insurer wishes to use documents produced to the court to assist it in making a decision on TPD.

See link to case [here](#).

Facts

The insurer and the insured had initially agreed on *Hearne v Street* orders in consent orders, which were made by the court, which allowed the insurer to use material produced by subpoena and other process, in the assessment of the TPD claim (a decision on TPD had not yet been made by the insurer).

The insured subsequently had a change of position and in the context of motions filed by both parties dealing with various matters, relevantly asserted that the insurer would be in breach of the *Hearne v Street* undertakings were it to use documents produced to the court, to assess the TPD claim.

Relevantly in response, the insurer argued that it could use court produced documents to assess the TPD claim without the leave of the Court, thus dispensing of the need to obtain the usual *Hearne v Street* orders in the first place.

Findings

His Honour found for the insurer on this *Hearne v Street* point. In short, it was found that in cases where a TPD decision has yet to be made, using documents produced to the court by compulsory process for the purpose of assessing the TPD claim is not a 'purpose unconnected with the litigation in the course of which the documents have been required to be produced'.

Further, because the proposed use was not unconnected, the usual *Hearne v Street* orders did not need to be obtained.

The relevant comments from the judgment on this point are as follows:

91: I consider that, in the circumstances of the present case, use of the documents produced under the notice to produce (or under any earlier subpoena issued in the proceedings for that purpose), in order for the insurer to consider and make a determination as to Ms Gavan's claim to a TPD benefit will not infringe the Harman undertaking because it is not use for a purpose unconnected with the litigation in the course of which the documents have been

required to be produced....

92: ...I accept that there are parallel processes but I see them as connected in the sense that the documents sought will inform and be relevant to the same primary issue. The administrative process (of the insurer determining whether to its satisfaction the TPD definition in the Policies has been met in the present case) is not divorced from the claim to be determined by this Court if the insurer's determination is not in favour of Ms Gavan; and the same material has the capacity to inform both processes. The interconnectedness of the two processes is reflected by the potential for dispute arising from the likely difficulty of MetLife divorcing, from its consideration of Ms Gavan's TPD claim, information already gleaned from the present conduct of its defence of the proceedings instituted by Ms Gavan (noting that, as observed above, the principle extends beyond the documents themselves to use of the information contained in the documents). The potential for dispute down the track, if it be asserted that some information obtained through the compulsive processes of the Court was used improperly for the determination of Ms Gavan's TPD claim (particularly in circumstances where there has hitherto been apparent consent to the use of such information for those purposes), highlights the connection between the two processes.

As indicated above, the judgment also dealt with some other matters but not matters which are presently of any great moment to life insurers.

Implications – *Hearne v Street* Orders No longer Required

The general cautious approach to date has been for insurers to use documents produced to the court for both purposes but only if leave of the court is first obtained to do so, via *Hearne v Street* orders.

Seeking *Hearne v Street* orders, however has created an additional layer of judicial red tape on what are already highly technical two stage proceedings as well as an additional source of angst between insured and insurer.

Whilst this current decision does not carry appellat weight, it is by the chief judge in equity and its intellectual rigour is self-evident. Additionally, the current recent practice of seeking *Hearne v Street* orders in unmade TPD decision cases seems to

be based on a cautious view of *Hearne v Street* rather than any TPD specific case law.

On this basis, insurers should feel comfortable in dispensing with the need to obtain *Hearne v Street* orders in circumstances where they wish to use documents produced to the court by way of compulsory process (such as Subpoena, Notice to Produce or discovery) in the assessment of a TPD claim.

Further, whilst this is a NSW decision, given the universal TPD concepts it deals with, it provides at the very least a basis for revisiting whether *Hearne v Street* orders are required in jurisdictions other than in NSW.