

Insurer's actual decision-making process off limits in determining claim for interest — *O'Neill v FSS Trustee Corporation*

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In dismissing a claim by a member of a superannuation scheme for preliminary discovery by the scheme's insurer, the NSW Supreme Court (Slattery J) has held that in the circumstances of that case, the member had sufficient information to decide whether to bring a claim for interest against the insurer under s 57 of the Insurance Contracts Act 1984 (Cth). The case is *O'Neill v FSS Trustee Corporation as Trustee of First State Superannuation Scheme*.¹

Background

Mr O'Neill (the member) was a member of a superannuation scheme which was established for the benefit of serving police officers in the NSW Police Force.²

The trustee of the scheme maintained two group life insurance policies in association with the scheme, with the same insurer.³

From 1989 until 2009, the member was a serving police officer of the NSW Police Force.⁴

From 1990 until 1995, the member was posted to King's Cross Police Station in Sydney, for which he received training about the risks of Hepatitis C and HIV. Following this training, he developed a phobia towards germs and eventually developed a disabling Obsessive Compulsive Disorder.⁵

In 2008, the member submitted a workers compensation claim. In mid-2009, he stopped serving in the NSW Police Force.⁶

In 2010, the NSW Police Force accepted that the member was permanently incapacitated for work and approved his medical discharge.⁷

In 2011, the member applied to the trustee for a total and permanent disability (TPD) benefit. Later in 2011, the member attended an independent medical examination. The doctor's report confirmed that the member suffered from severe Obsessive Compulsive Disorder and that he was TPD.⁸

Later in 2011, the insurer organised covert surveillance of the member, and supplied the doctor with the resultant surveillance report. Following the doctor's

review of the surveillance report, in late 2011, the doctor issued a supplementary report that said the member was "not disabled in any capacity".⁹

In 2012, the trustee informed the member that it was initiating a "Procedural Fairness" process regarding his claim.¹⁰

The Claims Review Committee considers the claim

On 5 February 2013, the insurer informed the trustee that it had decided to decline the member's TPD claim. The trustee invited the member to have the claim considered by the Claims Review Committee. (The Claims Review Committee consisted of an independent chairman agreed by the trustee and the insurer, together with one representative of the trustee and one representative of the insurer. The insurer had agreed to be bound by the outcome of that contractual expert review process.)¹¹

The claim is paid

Later in 2013, the trustee advised the member that his TPD claim had been admitted by the Claims Review Committee. Shortly after, and approximately 32 months after applying for his TPD benefit, the member received a payment from the insurer in satisfaction of his TPD claim.¹²

The member applies for preliminary discovery

In mid-2014, the member filed a Summons in the Supreme Court of NSW against the trustee and the insurer seeking preliminary discovery of documents relating to his potential entitlement to relief against the insurer:

- for interest under s 57 of the Insurance Contracts Act; and
- for the insurer's alleged breach of its contractual obligation to act with the utmost good faith pursuant to either s 13 of the Insurance Contracts Act or its common law duty as an insurer.¹³

The Assistant Registrar refused to order preliminary discovery.¹⁴

The member applies for a review

The member applied for the court to review and set aside the Assistant Registrar's decision, and to order the insurer to give preliminary discovery on the basis of the potential claim for interest under s 57 of the Insurance Contracts Act alone (ie, the member dropped his alternative claim for preliminary discovery on the basis of failure to act with the utmost good faith). Specifically, the member sought:

documents that are or have been in the [insurer's] possession and that relate to the question of whether or not the [member] is entitled to make a claim for relief [pursuant to s 57 of the Insurance Contracts Act].¹⁵

The issues before the court

The member's standing to bring proceedings against the insurer

The member was not a party to the insurance policies issued by the insurer to the trustee. He argued that he had standing to bring proceedings directly against the insurer pursuant to s 52 of the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act).¹⁶

Section 52 specifies covenants which are taken to be included in the governing rules of all registrable superannuation entities under the SIS Act. The trustee was the trustee of such an entity.¹⁷ Relevantly to insurance, s 52(7)(d) provides:

(7) The covenants referred to in subsection (1) include the following covenants by each trustee of the entity:

...

(d) to do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success.

Here, the member argued that he could have enforced s 52(7)(d) by directing the trustee to bring his potential claim against the insurer, and that this meant he had standing to seek preliminary discovery by the insurer directly.¹⁸

The insurer conceded that the member had standing to bring a claim directly against the insurer under s 57 of the Insurance Contracts Act as a person entitled to receive a payment under a contract of insurance.¹⁹

The only remaining issue was whether an order for preliminary discovery was justified in support of the member's potential action for interest under s 57.²⁰

Preliminary discovery

Under r 5.3 of the Uniform Civil Procedure Rules 2005 (NSW), the court may order a party to a proceeding to give preliminary discovery.²¹

The court noted:

The purpose of r 5.3 is not merely to enable an applicant to determine whether a cause of action is available. As Hely J explained in *St George Bank Ltd v Rabo Australia Ltd* (2004) 211 ALR 147 at [26](f), "The question is whether the applicant has sufficient information to make a decision *whether to commence proceedings* in the Court ..." ²² [Emphasis added.]

The court broke down the provisions of rr 5.3(1)(a) and (b) into the following five elements relevant to the member's claim for preliminary discovery:²³

- (1) Whether [the member] may be entitled to make a claim for s 57 relief against [the insurer];
- (2) Whether [the member] has made reasonable inquiries to obtain sufficient information to decide whether or not to commence proceedings against [the insurer];
- (3) If so, whether [the member] is unable to obtain sufficient information to decide whether or not to commence proceedings against [the insurer];
- (4) Whether [the insurer] may have or have had possession of a document or thing that can assist in determining whether or not [the member] is entitled to make such a claim for relief, and
- (5) Whether inspection of such a document would assist [the member] to make the decision concerned.

Element 1 – entitlement to claim

The court noted that the insurer had all but conceded that interest pursuant to s 57 of the Insurance Contracts Act may have been payable to the member.²⁴ Further, the court was satisfied that the member had standing to directly make a claim against the insurer (see above).²⁵ On this element, the court found in the member's favour.

Element 2 – reasonable inquiries

The insurer argued that the member had not made reasonable inquiries to obtain sufficient information to decide whether to commence s 57 proceedings against it.²⁶ On this element, the court also found in the member's favour. The member had made reasonable inquiries to obtain sufficient information.²⁷

Elements 3, 4, and 5 – documents to assist deciding on a s 57 claim

The member argued that a preliminary discovery of documents was necessary as authorities indicated that depending on the individual circumstances of a case, a court *may* consider a range of time periods reasonable for the payment of a claim. The member submitted that the information sought was relevant to the question of whether the insurer had unreasonably delayed its consideration of his claim.²⁸

The insurer argued that in the case of a fully litigated insurance claim, a court would consider objective evidence — not the range of documents which the member sought in a preliminary discovery — and that the application should be refused on that basis. The insurer

said that the principal hearing would be decided on the evidentiary basis of the objective material that had been disclosed by the insurer to the insured in the procedural fairness process, and that it would usually not require discovery.²⁹ The insurer further argued that:

... it would be extraordinary if, after such a principal proceeding, the s 57 question required the reopening of evidence in the proceeding to include material that was not relevant to and not part of the principal proceedings.³⁰

and:

... were [the member's] application here to be upheld it would change the entire course of practice in s 57 interest proceedings and would increase the potential costs of such proceedings beyond the scope of the costs usually expended in the principal proceedings.³¹

The member had previously been provided with informal discovery of the trustee's file in relation to his TPD claim. The member submitted that some of the documents in the respective files of the trustee and insurer may be different.³²

The insurer argued that the member possessed sufficient information to decide whether or not to commence proceedings against it. The insurer submitted:

... if [the member] was granted preliminary discovery in this matter, despite already holding what he described as a "plenary" amount of information regarding his claim, the precedential effect would be that an insurer's claim file would be available by r 5.3 as a matter of course to every insured in every matter.³³

The court's decision

The court said that the insurer's arguments were the more persuasive, and noted that it was unlikely that the member would have been able to use any of the documents sought to advance a potential claim under s 57. The court said:

When the court comes to determining the claim *Sayseng* [v *Kellogg Superannuation Pty Ltd*], *HIH Casualty & General Insurance Ltd (in liq) v Insurance Australia Limited (No. 2)*, *V L Credits [Pty Ltd v Switzerland General Insurance Co Ltd]* and *Fitzgerald [v CBL Insurance Ltd]* are all authorities for the proposition that the court would not examine [the insurer's] actual decision making processes. [The insurer's] file, documents relating to the management or assessment of the applications claim and communications with the Trustee and third parties (to the extent they are not already in [the member's] possession from the Trustee) and contractual arrangements between [the insurer] and the Trustee, as are requested in the Summons, could only go to an issue of [the insurer's] process of actual consideration of this claim. Prima facie this is an impermissible area of enquiry on a s 57 claim and [the insurer] would be justified on such a contested claim in submitting to a court that such documents should not be taken into account.³⁴

The court also noted that the documents already provided by the trustee to the member were sufficient for him to decide whether to advance a potential claim under s 57. The court said:

[The member's] s 57 claim will not be a contest about [the insurer's] own decision-making processes. It will be a contest about how long a reasonable insurer in [the insurer's] position would have taken to process [the member's] claim. This kind of assessment cuts through any deficiencies in [the insurer's] own internal decision-making processes and allows the Court to look at the issue objectively. And there is substantial material for [the member], or any expert engaged by him, to advance the case that the date by which it was unreasonable for [the insurer] not to have paid the claim was a date before the date that [the insurer] apparently concedes payment should have been made, 5 February 2013. [The member] has the principal documents in the chronology from when he first applied to the Trustee for a TPD benefit in February 2011 through until [the insurer] declined to indemnify him in February 2013. The Trustee's files should sufficiently indicate to [the member] what [the insurer] was given, the full nature of the claim presented to it and the timing of the principal communications. This is all that is necessary to provide the platform to decide [the member's] s 57 claim.³⁵

The result

In the result, the court dismissed the member's application for a review of the Assistant Registrar's decision refusing to order preliminary discovery by the insurer, affirmed the Assistant Registrar's decision, dismissed the member's Summons, and ordered the member to pay the insurer's costs.³⁶

Take away point

This decision confirms that in determining a claim for interest under s 57 of the Insurance Contracts Act, the court will not examine the insurer's actual decision-making process. Rather, the relevant question is how long a reasonable insurer in the insurer's position would have taken to process and pay the claim.



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Footnotes

1. *O'Neill v FSS Trustee Corporation as Trustee of First State Superannuation Scheme* [2015] NSWSC 1248; BC201508336.
2. Above n 1, at [1] and [5].
3. Above n 1, at [5].
4. Above n 1, at [6].
5. Above n 1, at [6].
6. Above n 1, at [6].
7. Above, n 1, at [6].
8. Above n 1, at [7].
9. Above n 1, at [8].
10. Above n 1, at [9].
11. Above n 1, at [9]-[10].
12. Above n 1, at [11]-[12].
13. Above n 1, at [13].
14. Above n 1, at [3] and [14].
15. Above n 1, at [14]-[15].
16. Above n 1, at [1] and [22].
17. Above n 1, at [22].
18. Above n 1, at [25].
19. Above n 1, at [26].
20. Above n 1, at [26].
21. Above n 1, at [36].
22. Above n 1, at [38].
23. Above n 1, at [40].
24. Above n 1, at [41].
25. Above n 1, at [42].
26. Above n 1, at [46].
27. Above n 1, at [50].
28. Above n 1, at [51]-[52].
29. Above n 1, at [54].
30. Above n 1, at [54].
31. Above n 1, at [54].
32. Above n 1, at [55].
33. Above n 1, at [56].
34. Above n 1, at [57].
35. Above n 1, at [58].
36. Above n 1, at [61].