Court of Appeal
Supreme Court

New South Wales

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| Case Name: | MetLife Insurance Limited v Sandstrom |
| Medium Neutral Citation: | [2021] NSWCA 123 |
| Hearing Date(s): | 5 November 2020, 6 November 2020 |
| Decision Date: | 9 June 2021 |
| Before: | Basten JA at [1];<br>Macfarlan JA at [83];<br>Meagher JA at [212] |
| Decision: | (1) Dismiss the appeal from the judgment in the Equity Division of 9 March 2020 and the orders entered on 10 March 2020.<br>(2) Order that the appellant pay the respondent's costs of the appeal.<br>(3) Grant leave to Ms Sandstrom to cross-appeal from the refusal of her application for an indemnity costs order by the judgment in the Equity Division of 19 May 2020.<br>(4) Note the consent of MetLife to the filing of the notice of cross-appeal on 14 July 2020.<br>(5) Dismiss the cross-appeal.<br>(6) Order Ms Sandstrom to pay MetLife's costs of the cross-appeal. |
| Catchwords: | INSURANCE – claim by ex-police officer for total and permanent disability ("TPD") payment – need to provide proof to satisfaction of insurer of TPD under policies – contractual obligations of insurer to assess claim in good faith and act fairly and reasonably – whether insurer breached contractual obligations – whether it was fair of insurer to rely on certain medical opinions as adverse to claimant – whether insurer took into account written submissions of claimant – cumulative effect demonstrated a lack of overall fairness |

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| | COSTS – party/party – exceptions to general rule that costs follow the event – offers of compromise and Calderbank offers – assertion that appellant unreasonably failed to accept respondent's Calderbank offer – whether primary judge erred in refusing to make a special costs order – primary judge did not err in the exercise of his costs discretion |
| Legislation Cited: | Suitors Fund Act 1916 (NSW)<br>Superannuation Industry (Supervision) Act 1993 (Cth), s 52<br>Supreme Court Act 1970 (NSW), s 101<br>Workplace Injury Management and Workers Compensation Act 1998 (NSW), ss 322, 326 |
| Cases Cited: | Hannover Life Re of Australasia Ltd v Jones [2017] NSWCA 233<br>Housman v Camuglia [2021] NSWCA 106<br>HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640; [2004] HCA 54<br>Jones v United Super Pty Ltd [2016] NSWSC 1551<br>MetLife Insurance Limited v MX [2019] NSWCA 228<br>MetLife Insurance Ltd v Hellessey [2018] NSWCA 307<br>TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim (2016) 91 NSWLR 439; [2016] NSWCA 68 |
| Texts Cited: | Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Commonwealth of Australia 2019, Vol 1, pp 269-270 |
| Category: | Principal judgment |
| Parties: | MetLife Insurance Limited (Appellant)<br>Rebecca Sandstrom (Respondent) |
| Representation: | Counsel:<br>S Lloyd SC / S J Walsh (Appellant)<br>B Dooley SC / D E Baran (Respondent)<br><br>Solicitors:<br>HWL Ebsworth Lawyers (Appellant)<br>Norwest Lawyers (Respondent) |

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| File Number(s): | 2020/92075 |
| Decision under appeal: | |
| Court or Tribunal: | Supreme Court |
| Jurisdiction: | Equity |
| Citation: | [2020] NSWSC 200; [2020] NSWSC 581 |
| Date of Decision: | 9 March 2020; 19 May 2020 |
| Before: | Slattery J |
| File Number(s): | 2015/291949 |

*[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*

## HEADNOTE

**[This headnote is not to be read as part of the judgment]**

On 7 July 2011 the respondent (Ms Sandstrom) was medically discharged from the NSW Police Force due to psychological symptoms from which she was suffering as a result of traumatic experiences she had during her service. On 1 August 2011 Ms Sandstrom claimed benefits from the First State Super fund on the basis that she was totally and permanently disabled ("TPD") by reason of post-traumatic stress disorder. The fund trustee sought indemnity from the appellant (MetLife) under two policies of insurance. To be indemnified the trustee needed to provide proof to MetLife's satisfaction that Ms Sandstrom met the TPD definition under the policies. Following extensive communications, MetLife refused the claim by letter of 24 July 2015.

Ms Sandstrom then commenced proceedings in the Equity Division of the Supreme Court against MetLife and the trustee (the claim against the trustee was later discontinued). The primary judge found that MetLife failed to fulfil its contractual duties in dealing with Ms Sandstrom's claim and its determination

was therefore void, that Ms Sandstrom satisfied the TPD definition at the relevant date and made orders against MetLife for payment.

MetLife appealed the primary judge's decision. The issue on appeal was whether the primary judge erred in concluding on three bases (identified as Grounds 2, 3 and 7, relating to whether MetLife properly interpreted certain medical reports and took into account written submissions by Ms Sandstrom's solicitors) that MetLife breached its contractual obligation to assess Ms Sandstrom's claim in good faith and to act fairly and reasonably in making that assessment. Ms Sandstrom also filed a cross-appeal challenging the primary judge's refusal to make a special costs order in her favour.

**The Court (Basten JA and Meagher JA, Macfarlan JA dissenting) dismissed the appeal and cross-appeal.**

In relation to the appeal:

by Basten JA, Meagher JA agreeing and adding observations at [213]-[220]

The primary judge's analysis was correct in relation to Grounds 2 and 3, and, at least in part, in relation to Ground 7: [30], [49], [76]. It was unfair of MetLife to rely on certain medical opinions as adverse to Ms Sandstrom (at least without further explanation) and MetLife did not deal satisfactorily with issues raised by Ms Sandstrom's solicitors in their written submissions (ibid). The cumulative effect of these matters demonstrated a lack of overall fairness on the part of MetLife, resulting in a breach of its contractual obligations: [77]-[78].

by Macfarlan JA, contra

MetLife was entitled not to be satisfied of Ms Sandstrom's permanent disability, having regard to the relevant medical opinions: [174], [179]-[183]. MetLife did take into account the medical opinions referred to in the written submissions by Ms Sandstrom's solicitors: [187], [198], [200]. The primary judge therefore erred in upholding Grounds 2, 3 and 7: [175], [184], [209].

In relation to the cross-appeal:

by Meagher JA, Basten JA agreeing; Macfarlan JA not deciding at [87]

As Ms Sandstrom's cross-appeal was "as to costs only", leave to appeal was required, however leave was not opposed and was granted: [222]. The primary judge did not err in the exercise of his costs discretion: [229]-[232], [79]-[81].

*Housman v Camuglia* [2021] NSWCA 106, referred to.

## JUDGMENT

1 **BASTEN JA:** In July 2011 the respondent, Rebecca Sandstrom, was medically discharged from the NSW Police Force as a result of suffering psychiatric injury in the course of her work as a police officer. As a member of the Police Force, she was covered by a superannuation scheme operated by FSS Trustee Corporation ("First State Super") under the *First State Superannuation Act 1992* (NSW). The benefits available under the scheme included an entitlement for payment in circumstances where the member was "totally and permanently disabled".

2 Ms Sandstrom's entitlement to such a payment was conditional upon satisfaction of the conditions of two group life insurance policies taken out by the Trustee with the appellant, MetLife Insurance Ltd. In circumstances where the conditions of the contract were satisfied, MetLife agreed to pay the Trustee the amount provided for under the policy. The conditions of each policy were relevantly the same; at least MetLife did not submit that anything turned on minor differences in wording.

3 The definition of total and permanent disablement involved the insured member "having provided proof to our [MetLife's] satisfaction" of the elements of the definition.[1] It follows that satisfaction of the specific elements of the definition, in the case of a dispute, did not turn on the determination of a court, but upon the "satisfaction" of the insurer. However, in the case of a dispute, the matter must be referred to a "Claims Review Committee" consisting of one representative of the trustee, a representative of the insurer and an independent "representative" as agreed between the trustee and the insurer or, failing such agreement, as nominated by the Financial Ombudsman.[2] The insurer agreed to abide by the decision of the claims review committee. The

[1] 2005 Policy, Sch 1, cl 6(b).
[2] 2005 Policy, cl 9.2.

insurer was to bear the cost of litigation where a claim was made against the Trustee.[3]

4 On 24 July 2015 MetLife wrote to First State Super and to Ms Sandstrom stating that it was not satisfied that the criteria for total and permanent disablement had been established. Her claim was therefore declined. The Trustee wrote to the respondent on 25 August 2015 noting MetLife's decision and stating that, "having undertaken its own separate analysis", the Trustee had determined that MetLife's decision was "fair and reasonable in the circumstances." This statement presumably reflected the Trustee's obligation under s 52(7)(d) of the *Superannuation Industry (Supervision) Act 1993* (Cth) "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."

5 Ms Sandstrom sought to challenge the decisions of both the Trustee and MetLife in proceedings commenced in the Equity Division of the Court in October 2015. The basis on which she was entitled to do so relied upon well-established authority that MetLife was under a contractual obligation to assess the claim in good faith and to act fairly and reasonably in making that assessment.[4] In the event that she established that MetLife had failed in some aspect of those contractual obligations, the Court is permitted to make its own decision on the merits of the claim.

6 Before the trial judge, Slattery J, Ms Sandstrom was successful in having the decision of the Trustee set aside and in obtaining a favourable decision on the merits of her claim.[5] Proceedings were commenced naming both the Trustee and MetLife as defendants, however, Ms Sandstrom later discontinued her proceedings against the Trustee. On 10 March 2020 the trial judge made an order declaring that MetLife's determination on 24 July 2015 was void and of no effect (order 1), that the plaintiff was, as at 9 March 2011, totally and permanently disabled (order 2) and that MetLife pay the Trustee the assessed benefit under each of two policies (order 3). MetLife appealed from the

[3] 2005 Policy, cl 9.4.
[4] MetLife Insurance Ltd v MX [2019] NSWCA 228 at [76]-[79] (Gleeson JA); Hannover Life Re of Australasia Ltd v Jones [2017] NSWCA 233 at [5]-[9] (Meagher JA). [86], [121] (Gleeson JA).
[5] Sandstrom v FSS Trustee Corporation [2020] NSWSC 200 (Sandstrom).

judgment and orders below, but only challenged the finding incorporated in the first declaration, that its own determination was ineffective. That is, in the event that it lost on that ground, it did not separately challenge the judge's assessment of total and permanent disablement or the amount of the required payment under the policies.

**Issues on appeal**

7 The trial judge upheld Ms Sandstrom's submission that MetLife's determination involved a breach of its contractual obligations on three of the nine grounds relied on by Ms Sandstrom. Those three grounds alleged that MetLife:

> "(2) Isolated one sentence from the medical report of Dr Graham George dated 8 March 2011, when on a proper interpretation of Dr George's report the report satisfied the criteria of 'unlikely ever' within the meaning of the TPD definition;
>
> (3) Interpreted questionnaires by Dr Wong (11 March 2011, 22 March 2011 and 9 May 2011) as being evidence inconsistent with the 'unlikely ever' component of the TPD definition when on a proper reading of that material the 'unlikely ever' component of the definition had been satisfied;
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> …
>
> (7) … despite its assertions that it took into account the written submissions of the plaintiff's legal representatives dated 22 April 2015 did not do so and provided no reasoning as to why the submissions were rejected when it was under an obligation to provide some adequate reasoning."

8 The evidence of the medical practitioners relevant to grounds 2 and 3 has been set out by Macfarlan JA and need not be repeated in full. However, it is necessary to explain elements of the definition of total and permanent disablement under the policies, in order to identify the relevant legal requirements said not to have been complied with.

**Legal requirements**

9 The definition of total and permanent disablement was relevantly in identical terms in both policies and was to the following effect:

> "**6. TOTAL AND PERMANENT DISABLEMENT:**
>
> While covered under this Policy, Total and Permanent Disablement shall have the following meaning:
>
> (a) The Insured Member suffering the loss of use of two limbs or the sight of both eyes or the loss of use of one limb and the sight of one eye (where limb is defined as the whole hand or the whole foot), or

> (b) … the Insured Member having been absent from their Occupation with the Employer through injury or illness six consecutive months and having provided proof to our satisfaction that the Insured Member has become incapacitated to such an extent as to render the Insured Member unlikely ever to engage in any gainful profession, trade or occupation for which the Insured Member is reasonably qualified by reason of education, training experience".

10 There was no dispute that, at the time the determination was made, Ms Sandstrom had been absent from her employment for six consecutive months. Rather, the date on which that temporal requirement was satisfied (9 March 2011) was treated as the date at which total and permanent disablement was to be assessed. The second limb involved both a procedural and a substantive element. The procedural element was the requirement that the claimant provide, proof "to the satisfaction of us", an element referred to above. The substantive element had the following limbs, namely:

(a) identification of the incapacity;

(b) the area of operation of the incapacity, namely engagement in work for reward;

(c) such area being limited by the scope of the claimant's qualifications by reason of "education, training or experience", and

(d) a temporal element, namely that she was "unlikely ever" to engage in such work.

11 So far as the first limb was concerned, there was no dispute as to the basis of her incapacity, namely the PTSD and co-morbidities resulting from her experiences as a police officer, including in particular the fatal shooting of a colleague.

12 As to the second limb, it was not in dispute that engaging in work included part-time employment (or self-employment). However, it fed into the third limb, the limitation by reference to her "education, training or experience", which excluded an assessment of her capability for retraining to achieve different skills to those she possessed at the time of the claim. The scope of that constraint is nevertheless vague.

13 The limitation of the area of work imposed by the requirement to consider the member's qualification "by reason of education, training or experience", is sometimes referred to as the "ETE clause". As noted in *TAL Life Ltd v*

*Shuetrim; MetLife Insurance Ltd v Shuetrim*,[6] one effect of the clause is to limit the scope of the coverage: evidence that the claimant was unlikely ever to be able to work as a police officer was relevant (and accepted by the insurer), but insufficient to satisfy the clause.[7] On the other hand, the clause does limit the range of possible remunerative activity. In *Hannover Life Re of Australasia Ltd v Jones*[8] this Court upheld the reasoning of the primary judge in that case, Brereton J:[9]

> "[71] …. It is not necessary, in order to satisfy the TPD definition, that the insured must be incapable of any regular remunerative work, but only that he or she be incapable of regular remunerative work for which he or she is reasonably fitted *by education, training or experience*. The ETE clause confines the scope of the 'regular remunerative work' from which the insured is disabled to that for which the insured is reasonably fitted *by education, training or experience*. In that phrase, the word 'by' is important – it postulates a connection between the suggested future work, and the insured's past education, training and experience. The concept of an occupation or work 'for which the Insured Person is reasonably fitted by education, training or experience' directs attention to the insured's vocational history to date, and to occupations for which that vocational history *fits* the insured. It refers not to *any* work for which the insured might have physical and mental capacity without further training, but to work for which the insured has been prepared and shaped by education, training and/or experience. The purpose of the provision is to provide a benefit for those who are disabled from following the vocations for which their past education, training and experience has prepared them – not any occupation which may be conceived, however far removed from his or her vocational history, which can be performed without further education, training or experience. The policy insures the capacity of an insured to perform regular remunerative work, not *simpliciter,* but in an occupation for which the insured's education, training and experience has prepared him or her. **In that way, it insures against loss of the ability to pursue those employments or careers for which the insured has been prepared and shaped by his or her past vocational history.** The point is illustrated by the reverse of the current type of situation: a surgeon whose tertiary education was in medicine and whose entire vocational history was in surgery, who lost the fine motor skills required for surgery, but was otherwise physically fit, would not be reasonably fitted *by education, training or experience* for work as a manual labourer, even though he or she might be perfectly capable of performing it without further training.
>
> [72] Thus the first question should be, for what occupations is this claimant fitted by his or her education, training and employment. It is a mistake to first search for occupations which an insured might be able physically and mentally to perform without further education, training or experience, rather than to examine the insured's vocational history and to identify from it the occupation

[6] (2016) 91 NSWLR 439; [2016] NSWCA 68 (Leeming JA; Beazley P and Emmett AJA agreeing) (Shuetrim).
[7] Shuetrim at [66].
[8] [2017] NSWCA 233.
[9] Jones v United Super Pty Ltd [2016] NSWSC 1551; Hannover at [147]-[150] (Gleeson JA, Macfarlan JA and Meagher JA agreeing) emphasis added by Gleeson JA.

> or occupations for which his education, training or experience has prepared the insured.
>
> [150] In this passage, his Honour correctly observed that the ETE clause requires the Insurer to examine the occupations for which the claimant is 'fitted' in the sense of the occupations for which his education, training and experience has prepared him. That naturally is shaped by his vocational history. There is no error in that approach. Contrary to the Insurer's submissions, his Honour correctly focused upon the language of this ETE clause ('*reasonably fitted by reason of education, training or experience*['']), not some different notion of the claimant's capability for his or her 'usual occupation'."

14 This court stated in relation to the passage emphasised at [71]:

> "[148] The Insurer complained that the sentence emphasised in the above passage disclosed error because his Honour's construction read the ETE clause as though it was limited to unfitness for a person's 'usual occupation' and overlooked the import of the phrase 'any employment, business or occupation' in the definition of Regular Remuneration Work. I do not agree. The reference by his Honour to 'prepared and shaped' is to be read in the context of the whole passage. His Honour is to be taken as emphasising that the concept of an occupation or work 'for which the Insured Person is reasonably fitted by education, training or experience' directs attention to the insured's vocational history to date, and to occupations for which that vocational history *fits* the insured, that is, to the link or connection between the suggested job or jobs and the claimant's past education, training or experience.

15 It would thus be erroneous to assess the chance of Ms Sandstrom obtaining future employment solely in terms of her previous employment as a police officer; it would also be incorrect to assess her future prospects by reference to work for which she might become qualified by undertaking further training or education.

16 Of central importance was the assessment of the temporal element, namely that she was "unlikely ever" to engage in such employment. As will be noted, it was not the language which caused difficulty, but rather its application (or absence of application) by the medical practitioners expressing opinions.

17 Construing a similar phrase in *Shuetrim*, Leeming JA stated:

> "[88] … Those words confirm what flows from the ordinary meaning of the language of 'unlikely ever', namely, that where there is a real chance that a person may return to relevant work, even though it could not be said that a return to relevant work was more probable than not, the insurer would not be satisfied that the definition applies. 'Unlikely ever' is, in this context, much stronger than 'less than 50%'.
>
> [89] What follows is this. To make an assessment of TPD, it is not sufficient for the insurer to be satisfied that it is more likely than not that the person will

> never return to relevant work. On the other hand, if there is merely a remote or speculative possibility that the person will at some time in the future return to relevant work, an insurer will not, acting reasonably and in compliance with its duties, be able to be satisfied that the person is not TPD. The critical distinction is between possibilities which are readily contemplatable even though they may not be more probable than not, and possibilities which are remote or speculative. A real chance that a person will return to relevant work, even if it is less than 50%, will preclude an Insured Person being unlikely ever to return to relevant work."

18 Accordingly, Ms Sandstrom bore the onus of satisfying the claims review committee that there was no real chance that she would return to employment. At the time of the claim she was 28 years of age and therefore had an expectation of a further 37 years working life until age 65. What was foreseeable over that time was not easy to assess.

19 The issues raised as to the operation of such policies have broad social implications. As observed by Commissioner Hayne in the *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*,[10] noting that in Australia 40% of premiums for life insurance were represented by group sales:

> "The figures quoted in respect of group sales record policies sold to superannuation trustees. When one looks instead at the number of insurance policies held within superannuation funds, it becomes clear that the majority of life insurance policies on issue in Australia are held through superannuation funds."

The fact that beneficiaries who rely on such cover through the intermediary of a superannuation fund have no entitlement to challenge the merit of decisions of the insurer in court suggests that, if not strict scrutiny, at least careful scrutiny of the evidence as to whether the insurer has properly understood and fairly complied with its contractual obligations should be applied.

**Challenge to acceptance of ground 2**

20 In its reasons for its decision (set out by Macfarlan JA at [97] below) MetLife commenced:

> "As outlined in our procedural fairness letter dated 23 June 2015, there is medical opinion prior to and around the date for assessment of the member's claim (9 March 2011) that she was likely to be able to return to work at some point in the future, external to the New South Wales Police Force.

[10] Commonwealth of Australia, 2019, Vol 1, pp 269-270.

> MetLife notes that one of the first specialist opinions regarding the member's prognosis was made by her treating psychiatrist, Dr David Grace, by way of a questionnaire he completed on 30 January 2011. Dr Grace was asked:
>
> *Q. Do you believe a return to pre-injury duties is a realistic goal and what timeframe is anticipated to achieve this goal?*
>
> *A. I do not believe that a return to pre-injury duties is a realistic goal in [the member's case]. I believe that [the member] will be able to work but not in a job which reminds her of police work.*"

21 It is clear that MetLife's determination turned on the material set out following the first paragraph. The reference in that paragraph to the earlier letter was simply to assure the reader that these matters had been put to Ms Sandstrom for her comment prior to the determination being made. The reasoning then turned to specific passages in the medical reports.

22 This statement in relation to Dr Grace was the subject of ground 1, which was ultimately not pressed. Ground 2 addressed a passage concerning Dr George. Nevertheless there are themes running through the reasons which render it convenient to deal first with Dr Grace, which is relevant to a later issue.

23 There are two matters arising from reliance on Dr Grace's statement set out above. First, the second sentence of his answer, which is no doubt that relied upon by MetLife, was by way of explanation of his firm belief that Ms Sandstrom would not return to pre-injury duties; neither would she, in Dr Grace's opinion return to any job which reminded her of police work. This was not a response to a question which encapsulated the test under the policy. Further, it was addressed to Allianz, which was not a party to the superannuation insurance scheme. It will be seen below that, in relation to material favourable to Ms Sandstrom, preparation for a different purpose was identified as a reason for not placing reliance on it.

24 Secondly, on 14 August 2012 Dr Grace provided a report in response to a request from a person he understood to be a claims assessor for MetLife. The first part of that report contained full details of all the consultations Dr Grace had had with Ms Sandstrom up until that time. As part of his response, Dr Grace answered a number of questions which were formulated partly in terms reflecting the terms of the policy, including the following:

> "**5) If Ms Sandstrom is not currently fit for work, what is your prognosis regarding her prospects for recovery and eventual return to an**

**occupation for which she is reasonably qualified by reason of her education, training or experience?**

Ms Sandstrom is not currently fit to return to any occupation for which she is reasonably qualified by reason of her education, training or experience.

Ms Sandstrom's prognosis for recovery and eventual return to an occupation for which she is reasonably qualified by reason of her education, training or experience is extremely poor.

…

**7) In your professional opinion do you believe that Mrs Sandstrom is able to return to some form of employment part-time or full-time before retirement age of 65 in the next 24 years? If no why?**

Yes, Ms Sandstrom will be able to perform some other form of work with time."

25 It is likely that MetLife placed significant weight on Dr Grace's opinions because he was Ms Sandstrom's treating psychiatrist at the time of her medical discharge. For MetLife to rely upon an opinion given to another insurer for a different purpose, without express reference to Dr Grace's opinion provided to MetLife in response to a question formulated (at least in part) by reference to the terms of the policy, involved unfairness. While the reasons given were not intended or expected to be comprehensive, the omission in this specific respect is clearly significant. In particular, it must have been apparent to MetLife that generalised statements about future possibilities, without reference to the requirements of the policy, were apt to be unhelpful and possibly misleading.

26 Turning to ground 2, the passage in question related to a report of Dr George dated 8 March 2011. After referring to Dr Grace, MetLife's determination continued:

> "The member was then assessed by Dr Graham George, consultant psychiatrist qualified by the New South Wales Police Force (NSWPF), on 8 March 2011. The assessment by Dr George occurred only one day prior to the date of assessment and is the most contemporaneous medical evidence and opinion to the date for assessment.
>
> Dr George concluded that the member's psychological condition would preclude her from returning to work with the NSWPF and recommended that she be medically discharged. However, based on his assessment, Dr George stated that:
>
> > *At some point in the future, [the member] may be able to return to some form of work with a different employer.*"

27 Dr George's opinion of 8 March 2011, addressed to the NSW Police Force, concluded as follows:

> "I believe that medical discharge in this case is the only option.
>
> I believe this young woman has been too greatly traumatised by this particular event. I do not believe that she could recover from it if she had any association with NSW Police Service."

28 It is clear that this was the focus of Dr George's purpose in assessing Ms Sandstrom. However, in the course of answering questions posed for his consideration, the following question and answer were provided:

> "**7. Should you consider the officer to have total and permanent disablement, is the condition of such an extent as to render the member unlikely to ever engage in any gainful profession, trade or occupation in the future?**
>
> I see her as having permanent disablement with respect to her returning to her pre-injury duties. However, I believe that, at some time in the future, she may be able to return to some form of work with a different employer."

29 As the trial judge found, the word "may" was not immediately responsive to the second part of the question. Indeed there is some inconsistency in the question which commences by seeking an opinion as to whether the officer has "total and permanent disablement". Reading the two sentences of the answer together, Dr George is clear as to her "permanent disablement" from returning to preinjury duties, but is uncertain as to whether she will be able in the future to return to "some form of work with a different employer." The use of "may" is consistent with (i) the conclusion that such work is unlikely, in the sense that there is only a remote and speculative possibility, (ii) the possibility of a real chance of such employment, or (iii) an unwillingness to express any position on that question. The trial judge identified the ambivalence and concluded that it was unfair for MetLife to rely upon the answer as adverse to Ms Sandstrom.

30 It may be added that the question omitted any reference to her education, training and experience, as a qualification on the kind of gainful employment which was to be considered. It is clear from the introductory passage in the reasoning of MetLife that it gave significant weight to what it understood to be this opinion because of its proximity to the relevant date for assessment. The primary judge did not err in upholding ground 2.

**Challenge to acceptance of ground 3**

31 Notwithstanding the terms in which it was formulated, ground 3 as relied on before and addressed by the primary judge related to questionnaires answered

by Dr Wong on 11 March 2011 and by Dr Grace on 22 March 2011, and a consultation note of Dr Wong dated 9 May 2011.[11] The relevant passage in MetLife's reasons in this respect read as follows:

> "The member's treating general practitioner, Dr Anita Wong, and treating psychiatrist, Dr Grace, were both provided with a copy of Dr George's report and asked to provide their opinions regarding the member's prognosis.
>
> In a questionnaire completed on 11 March 2011 (2 days after the date of assessment), Dr Wong indicated that she agreed with Dr George's opinion that at some point in the future the member may be able to return to some form of work with a different employer.
>
> In a questionnaire completed on 22 March 2011 (less than two weeks after the date for assessment), Dr Grace indicated that he agreed with Dr George's opinion that at some point in the future the member may be able to return to some form of work with a different employer. Dr Grace added that he believed such a return to work may take place in the foreseeable future.
>
> Later, in her consultation notes dated 9 May 2011, Dr Wong recorded that she had had a discussion with the member's 'financial advisor' (Mr Josh [Cratchley]) regarding the lodgement of the member's 'superannuation claim'. Dr Wong made the following file note of her conversation with Mr [Cratchley]:
>
> > *[the member] will not be able to return to policing but I cannot say she will not be able to return to work in any role in the future*".

32 Dr Wong's opinion of 11 March 2011 was provided in response to a request from the NSW Police Force which attached a copy of Dr George's report of 23 February 2011, which it summarised in 10 propositions. Question 1 asked Dr Wong to tick a yes or no box indicating whether she agreed with the stated comments (referring to those ten propositions). She ticked the "Yes" box indicating that she did agree. The eighth comment read as follows:

> "• Permanent disablement with returning to pre-injury duties; some time in the future may be able to return to some form of work with a different employer".

33 To the extent that ground 2 highlighted problems with this statement in Dr George's report, the same analysis must apply in relation to Dr Wong's opinion. (Dr Wong and Dr Grace received copies of Dr George's earlier report which set out the questions and his specific answers.) It is also doubtful whether any real weight should have been given to this document in circumstances where the penultimate comment simply read "still suffers a", with no object stated. Further, the subject of the agreement sought from Dr Wong was identified in the final comment, as "Medical discharge only option".

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[11] Sandstrom at [140].

34 Of the remaining 3 questions addressed to Dr Wong, questions 2 and 4 concerned the subject of discharge. Thus question 4 asked whether Dr Wong supported a medical discharge, providing a yes/no option, for which she ticked "yes". Importantly, however, question 3 was as follows:

> "3. Can you advise whether you believe that there is any capacity for Ms Sandstrom to return to work in any organisation (in the foreseeable future)?",

to which Dr Wong answered "No".

35 To rely on the opinion of Dr Wong of 11 March 2011 as supporting a possibility that Ms Sandstrom might have a reasonable chance of finding work in the future was unfair. Agreement with Dr George, in the circumstances set out above, was close to worthless; by contrast, when asked a specific question in terms reflecting aspects of the policy, she explicitly answered no. In truth, on no reasonable construction did that document provide support for a negative answer to the criteria for total and permanent disablement.

36 It is clear that the importance attached to contemporaneous opinions, and the fact that Dr Wong was a treating general practitioner at the relevant time, provided a basis for MetLife to give significant weight to her opinions, as its reasons for determination demonstrated.

37 On 22 March 2011, Dr Grace responded to the same questionnaire as that provided to Dr Wong. Like Dr Wong, he ticked the box "Yes" in answer to question 1. There is no doubt from what followed that Dr Grace also saw the form as directed to the question of medical discharge which he, like Dr Wong, concluded was the only available option. The only significant difference between their responses was that Dr Grace answered "Yes" to question 3, which was whether he believed "that there is any capacity for Ms Sandstrom to return to work in any organisation (in the foreseeable future)." That required him to answer a further question by specifying "timeframes and restrictions" to which he responded:

> "Ms Sandstrom is not currently capable of working within any capacity and I believe that within six months of her complete severance from the NSW Police Force she will be ready to commence work elsewhere in some form eg paid employment."

38 The trial judge described Dr Grace's answer to question 3 "as an elegant piece of diplomacy." He continued:[12]

> "His declaring that she will at a future time be 'ready to commence work', is not the same as saying that after commencing work she has a real chance over time of engaging in relevant work for reward. Dr Grace's response can be taken no further than what it says: she will be 'ready to commence work', whatever that means."

39 Dr Grace was clearly focused on the issue of medical discharge. He concluded his answer to the questionnaire with a further comment:

> "Unfortunately I can see no way of rehabilitating Ms Sandstrom for returning to work in the NSW Police Force due to the severe nature of the stressor she has experienced and the profound effect it has had on her."

40 It may be accepted that Dr Grace's answer to the questionnaire from the NSW Police Force provided no assistance to the claimant. However, when apparently asked to provide an opinion in terms of the policy, he stated on 24 June 2011:

> "because of Rebecca Sandstrom's PTSD it is unlikely that Rebecca can ever be gainfully employed in the capacity for which she is reasonably qualified because of her education, training or experience."

41 MetLife did not have to accept this view, which was not supported by reasoning, beyond the statements that she "has been unable to return to police work" and that he did not see her need to avoid contact "changing over time." Nevertheless, it was unfair to rely upon a neutral statement in support of a contrary view to that expressed on 24 June 2011 without adverting to the further opinion, expressed within three months of responding to the questionnaire from the Police Force, and adopting terms apt to apply under the policy.

42 The third document was the consultation note prepared by Dr Wong and dated 9 May 2011. That note recorded something said by Dr Wong in a telephone conversation with Mr Cratchley, a financial adviser to the claimant.

43 The first document signed by Dr Wong (dated 1 August 2011) which was directly relevant to the total and permanent disablement claim of the same date, was in a form provided by the Trustee. Question 4 was in the following terms:

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[12] Sandstrom at [148].

> "4. Do you believe your Patient is ever likely to resume work in his/her own or any other occupation in the future?
>
> a) If so, please provide duties/occupations he/she could perform in the future and indicate whether rehabilitation would assist him/her to return to work.
>
> b) If not, please provide the reasons for your opinion and date this applies from."

44 Dr Wong chose to answer (b) and stated:

> "At this stage she cannot resume work in her own or other occupation. At present she is not even attending[?] to own ADLs."

The "present" was the date of the document, namely 1 August 2011. ("ADLs" presumably referred to activities of daily living.) The question did not contain the qualification as to education, training and experience.

45 It was true, as MetLife noted, that Dr Wong created a note in her patient file for Ms Sandstrom stating that she had spoken to Ms Sandstrom's "financial adviser" and, having received authorisation from Ms Sandstrom, added "pt will not be able to return to policing but I cannot say she will not be able to work in any role in the future".

46 Read in the context of the information provided by Dr Wong to the Trustee, a reasonable understanding of Dr Wong's opinions was that she was unable to express the negative opinion in conclusive terms, namely "will not be able to work".

47 The importance given to the most nearly contemporaneous opinions was permissible, but should have been accompanied by an acknowledgment that many medical conditions take time to stabilise. For example, an assessment of permanent impairment requires a determination that the degree of permanent impairment is, at the time of the assessment, fully ascertainable.[13] An approved medical specialist may decline to make an assessment until satisfied that the impairment is permanent and the degree of impairment is fully ascertainable.[14]

48 In 2012 Dr Wong communicated opinions on a number of occasions to Ms Sandstrom's workers' compensation insurer (or claim manager). On 29 May 2012 Dr Wong responded to a request from MetLife in the following terms:

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[13] Workplace Injury Management and Workers Compensation Act 1998 (NSW), s 326(1).
[14] Ibid, s 322(4).

> "5. **Prognosis regarding return to work for which she is reasonably qualified?**
>
> It is clear from consultation with … Rebecca and her health professionals that she is not capable of returning to any work for which she is reasonably qualified from her education, training and experience."

If the question was as set out above (the request itself does not appear in the evidence available on the appeal) it did not reflect the Policy definition of total and permanent disablement. While that opinion was expressed in the present tense, it appears that no further opinion was sought with respect to the realistic possibility of a change in the future.

49 In these circumstances, and without further explanation, it was not fair of MetLife to rely upon the specific opinion of Dr Wong identified in their reasons for determination without any explanation as to the use made of the other material supplied by her. For these reasons, the trial judge was correct in upholding ground 3.

**Challenge to acceptance of ground 7**

50 It was unfortunate that, as Macfarlan JA explains, both the case presented by Ms Sandstrom's solicitors, and the findings of the trial judge, made factual errors in relation to the numerous medical reports provided for the purposes of the claim. It was also unfortunate that Ms Sandstrom's solicitors did not reply to the second procedural fairness letter of 23 June 2015, with the attached "Information Summary". However, ground 7 alleged that MetLife had failed to address Ms Sandstrom's solicitor's submissions of 22 April 2015, responding to the first procedural fairness letter from MetLife, dated 26 February 2015. Ground 7 accepted that MetLife claimed to have taken the submissions into account but alleged that it had not done so in a way which gave real and genuine consideration to the matters raised.

51 To an extent, the complaint in ground 7 covers similar territory to the substantive issues raised in grounds 2 and 3. That is, the submission is not that all material was not considered, but rather that it was considered on a selective basis which failed to have proper regard to Ms Sandstrom's case as presented in the letter of 22 April 2015. The trial judge dealt with the matter, relevantly for present purposes, by reference to the medical opinions of Dr Grace, Dr Wilkins and Dr Smith. While it is true that this material was not

addressed in the reasons for determination, it may be inferred that MetLife's approach to this material was that set out in the information summary to which no response had been provided. That material was set out chronologically, with comments in the final column reflecting MetLife's preliminary views. It is convenient to follow the same approach and deal with the relevant material chronologically.

52 The fourth item of medical evidence referred to by the solicitors in their letter of 22 April 2015 was a report prepared by Dr Grace on 24 June 2011, to which reference is made above. As the trial judge noted, it was an important document: it was, in MetLife's terms, contemporaneous with the time at which the assessment was to be made, and it expressed an opinion in terms reflecting the language of the definition of total and permanent disablement in the policy. The trial judge stated, wrongly, that it was not referred to in the information summary.[15] It was identified (in its correct chronological place) with the comment:

> "Dr Grace did not appear to attempt to explain his opinion or why it differed from his earlier opinion in which he agreed with the prognosis provided by Dr George."

53 With respect to the opinion of Dr George of 8 March 2011, MetLife commented in the information summary that it was "the most contemporaneous to the date for assessment." However, as noted above, it was not expressed in terms of the policy definition, and was not given for that purpose. By contrast, in relation to WorkCover medical certificates given by Dr Wong certifying that Ms Sandstrom was "totally unfit for work" during specified periods, MetLife noted that such certificates "do not address the specific TPD criteria." That was true; however, if acting fairly, the same observation should have been made with respect to Dr George and a similar qualification with respect to Dr Grace's agreement with Dr George, which has also been considered above, and was noted by MetLife in its information summary.

54 Further, reliance on Dr George's opinion as benefitting from contemporaneity failed to address the submission made by Ms Sandstrom's solicitors in the following terms:

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[15] Sandstrom at [201].

> "The claimant has suffered a very significant psychological illness that has stabilised and continues to significantly curtail her ability to engage in any such employment. It is now almost five years since the incident of 8 September 2010 and her condition has failed to improve or respond to treatment in any meaningful way. Her condition remains largely as it was in the period immediately proceeding [sic] the incident of 8 September 2010."

55 The solicitors also relied upon the report of 5 June 2012 by Dr Wong, responding to suggestions of vocational rehabilitation providers and stating that Ms Sandstrom was not fit to pursue employment as a claims officer/compliance officer, paralegal or as a clerical/administrative assistant. Because Dr Wong described Ms Sandstrom as "currently unfit to return to job for which she is reasonably qualified from her education, training and experience ie as a police officer", MetLife commented that Dr Wong "may have misunderstood the definition of TPD" because she used the term "currently" and not "unlikely ever" and, secondly, considered the type of employment as limited to work as a police officer. That interpretation may have been true, but it disregarded the question in the form provided by the workers' compensation insurer, which Dr Wong was answering, namely:

> "Please outline Ms Sandstrom['s] current capacity for work including any specific limitations that need to be considered."

Further, it did not address the lawyer's submission that:

> "The claimant submits that any alternative employment, although it is denied that she has any capacity for employment on account of her injuries, would require significant retraining outside the ambit of her previous employment."

56 As no issue appears to have been raised before the trial judge in relation to this opinion of Dr Wong, it is not appropriate to rely upon it in dealing with ground 7, although it relates to the assessment of Dr Wong's evidence as a whole, and therefore has significance for grounds 2 and 3.

57 The solicitor's letter relied upon two reports by Dr Selwyn Smith, consultant psychiatrist, dated 12 July and 9 August 2013.

58 Dr Smith's first opinion contained the following findings:

> "3. Given the length of time that Ms Sandstrom has experienced her psychiatric disorder and the poor response to treatment to date I would view her prognosis for recovery as poor.
>
> Ms Sandstrom is likely to retain a significant degree of psychiatric impairment in the light of her exposure to significant distressing and traumatic events.

> 4. In my opinion Ms Sandstrom's psychiatric condition has stabilised that is to say her injuries have become well settled or static with or without treatment and are not likely to remit despite treatment.
>
> …
>
> 6. It is my opinion that the psychiatric injuries that Ms Sandstrom has suffered in the course of her employment has [sic] resulted in a loss of her earning capacity given her pre-injury occupation. She is unable to engage in police work. She has since been discharged hurt on duty from the NSW Police Force. She is unable to engage in alternative work. Her capacity to engage in alternative work is severely restricted because of her psychiatric symptomatologies and the difficulties she would experience on the open labour market."

Dr Smith also referred to reports of Dr Matthew Jones, apparently prepared for an insurer, which were not in evidence:

> "Dr Jones has correctly opined that Ms Sandstrom is not fit to return to her pre-injury duties and would be unable to ever return to any work in the NSW Police Force or any police related work. He noted that she would have very limited capacity to obtain work in the open labour market. I am in agreement with his pessimistic views in regard to her future employment."

59 The information summary set out extracts from paragraphs 3 and 6 of Dr Smith's opinion. It noted that the document had been provided with the solicitor's letter of 22 April 2015. It suggested adverse opinions might be formed on the basis of three concerns, namely (i) the main purpose of the report appeared to have been to support a claim for work injury damages, (ii) Dr Smith first examined Ms Sandstrom two years after the date for assessment, and (iii) Dr Smith was not provided with the vocational assessment reports of Ms Zaki and the Insight Injury Management Group (Zoe Buck).

60 The trial judge appears to have approached these comments, in the absence of contradiction and in the absence of any further reasons dealing with the issues, as providing the reasons for the decision.[16] Despite some misgivings, the judge considered this was a common approach of the parties. It is convenient to deal with the matter on that basis.

61 As to the first matter, it was correct that the report was prepared for a purpose other than addressing the MetLife policy definition, but, as noted above, that was true of other opinions which MetLife relied upon without adverse comment,

[16] Sandstrom at [173].

including those of Dr Grace, Dr George and Dr Wong. As to the second matter, the emphasis given to contemporaneity, and the failure to address the claimant's submission that subsequent events may be helpful in demonstrating that a condition has stabilised, have already been noted.

62 As to the third matter, namely the fact that Dr Smith had not been provided with the vocational counsellor reports, the trial judge concluded that provision of such reports was "unlikely to assist."[17] That depends upon a consideration of the reports.

63 The first vocational assessment (undertaken for workers' compensation purposes) was carried out by Ms Zoe Buck on 18 May 2012. The summary noted that three categories of work had been identified, but added:

> "However, the vocational assessor believed that the member may need to undergo a short retraining course in order to perform work as a 'clerical or administrative assistant'."

As there is nothing said in the "comments" column, it may be inferred that MetLife did not rely upon this report.

64 The second vocational assessment was undertaken by Ms Mira Zaki on 20 June 2012, at the request of MetLife. She identified three different categories of employment. In commenting on her views, MetLife noted that, although the assessment was undertaken well after the relevant date, the claimant's education, training and experience had not changed. Accordingly it treated her vocational options as suitable. The options were (i) inquiries clerk, (ii) general clerk and (iii) sales assistant (general).

65 Two observations should be made about the vocational assessments. First, Ms Buck noted that, on medical grounds, Ms Sandstrom had been certified as "Totally Unfit for Work". Her recommendations were therefore contingent on a variation of that medical opinion. Secondly, although not noted by MetLife, the opinion was stated to be provided for the purposes of identifying "suitable employment and capacity to earn in the open labour market" for the purposes of the *Workers Compensation Act 1987* (NSW). With respect to Ms Zaki, her report stated that "[t]he identified Work Options do not involve a consideration

[17] Sandstrom at [194].

of the Insured's current psychological functional capacity or any psychological restrictions that the Insured's [sic] has been recommended to observe when working."

66 While it is true that Dr Smith did not consider the vocational assessment reports because he did not have them, they were of such a general nature in their suggestions that MetLife could not fairly discount Dr Smith's opinions to any material extent based on that omission.

67 Dr Smith provided a supplementary report dated 9 August 2013. That report did not seek to review the reasoning and background set out in his earlier report, although an additional document identified as "pre-vocational assessment questionnaire", which was undated, was referred to. That was a document prepared by Ms Sandstrom, probably for one of the vocational counsellors, as it refers to her time in the Police Force from May 2006-July 2011. Dr Smith expressed his opinion in the following terms:

> "It is my opinion that Ms Sandstrom as a result of her significant psychiatric symptomatologies, namely the development of a chronic Post-Traumatic Stress Disorder with a comorbid Major Depressive Disorder and Generalised Anxiety Disorder to the point of panic, is totally unemployable.
>
> It is my opinion that Ms Sandstrom satisfies the formal definition of total and permanent disability.
>
> Ms Sandstrom since leaving the NSW Police Force has not engaged in alternative work and in my opinion will not be able to realistically obtain work on the open labour market."

68 The information summary set out the second and third sentences from Dr Smith's report, noted that it had been provided by the solicitor on 22 April 2015, noted that Dr Smith had not been given the two vocational assessments and had not been provided with Dr George's report of 8 March 2011. For reasons already discussed, these comments provided little or no basis for rejecting Dr Smith's views. While it is true that in this respect MetLife took note of the existence of the report provided by Ms Sandstrom's solicitors, it apparently gave the report no weight, but for reasons which did not engage with the substance of the report.

69 Finally, complaint was made as to the treatment of two reports prepared by Dr Greg Wilkins, dated 19 June 2014 and 3 October 2014. With respect to the

first report, the information summary set out two passages, which read as follows:

> "At the time of her most recent assessment [12 June 2014] she expressed significant self doubt about her ability to perform in any job … given her history and presentation … the diagnosis attracted to [the member's] condition a chronic Posttraumatic Stress Disorder and Major Depression … it is highly probable that she will not return to any form of paid employment in the foreseeable future.
>
> She feels that she is currently incapable of performing any duties. At this time, it is not possible to say if [the member] will be capable and fit to work in any capacity in the future. At present she remains unfit for any paid work. She remains emotionally unstable and feels that her capacity to perform any task is greatly diminished…[the member's] prognosis remains guarded."

70 Whilst acknowledging that Dr Wilkins' prognosis was "generally pessimistic" it was said also to be "somewhat ambiguous." The reviewer considered that the prognosis was "guarded", but also that Dr Wilkins was "unable to say whether or not the member would return to paid employment in the future."

71 That review was either quite unfair, or demonstrated a failure to read the whole report. Dr Wilkins expressed the view that "[i]t is highly probable that she will not return [to] any form of paid employment in the foreseeable future."[18] He also stated that her symptoms increased dramatically when she was placed in a position of responsibility or simply presented with the possibility of being responsible for something or to someone, with the result that "it is not possible to outline what employment activities she would be able to perform."[19] Under prognosis, Dr Wilkins concluded that:[20]

> "Given the severity and the duration of her symptoms, her professional and social isolation, the limited nature of her supports and the complexity of her infirmity Ms Sandstrom is likely to remain unwell for an indefinite period."

He also observed:[21]

> "Given Ms Sandstrom's history and her presentation, it would seem likely she was suffering with a Post Traumatic Stress Disorder with mixed symptoms of anxiety and depression that had been precipitated by the ongoing and mounting pressure in relation to any appropriate work for which she is trained."

72 In circumstances where a medical practitioner is not available to be questioned on the meaning of his report, to suggest that ambiguity results from a reference

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[18] Report, par 84.
[19] Report, par 85.
[20] Report, par 88.
[21] Report, par 89.

to the “foreseeable future” is unfair. The report was detailed and careful in its assessments.

73 Secondly, MetLife suggested that Dr Wilkins “placed undue significance on what the member herself regarded as her own capacity … rather than focusing specifically on the TPD criteria.” That appears to have involved a misunderstanding of Dr Wilkins’ reasoning. For example, he treated low esteem as an element of incapacity. Given that the opinion of a consultant psychiatrist who did *not* have a consultation with the patient in order to identify how she viewed possible employment and her likely responses to particular situations would be dismissed out of hand, the criticism seems inapt.

74 Finally, MetLife noted that Dr Wilkins was consulted three years after the date for assessment, a matter which has been addressed above.

75 On 3 October 2014 Dr Wilkins provided a second report. However, it did not take the matter any further and may, as MetLife suggested, have been prepared for a worker’s compensation claim.

76 It follows that the trial judge was correct to uphold the complaint that MetLife had not dealt satisfactorily with issues raised by the solicitors for Ms Sandstrom in their letter of 22 April 2015. It is not necessary to consider in detail particular aspects of the trial judge’s reasoning which involved errors. However, it may be noted that aspects of the reasoning set out above with respect to this ground both draw upon and supplement the reasoning with respect to earlier grounds of challenge.

**Conclusions**

77 The only remaining question is whether the judge was correct to conclude that the elements of unfairness and unreasonableness arising from the way in which MetLife dealt with aspects of the claim were sufficient to constitute a breach of its contractual duties to deal with Ms Sandstrom’s claim fairly, reasonably and in good faith. In my view the cumulative effect of the matters addressed above is sufficient to demonstrate a lack of overall fairness and in part is suggestive of a conclusion reached on other grounds.

78 That is not to say that MetLife was not entitled to be sceptical in considering whether it was satisfied that the claimant was unlikely ever to obtain remunerative work. Her youth, together with the long period over which that assessment needed to be made, warranted a level of scrutiny of the available evidence which might not otherwise have been justified. However, that scrutiny was applied inconsistently, objections being raised to those reports which were supportive of Ms Sandstrom's claim but not in relation to reports which were neutral or suggested a reasonable possibility of future employment, even where the same concern applied. In those circumstances, I would dismiss the appeal from that part of the judge's reasoning which found a breach of contractual duty with respect to the assessment of the claim. As there was no other challenge to the judge's assessment of Ms Sandstrom's claim, the judgment and orders must stand.

**Cross-appeal – costs**

79 On 19 May 2020 the trial judge handed down a further judgment dealing with an application for indemnity costs made by Ms Sandstrom.[22] The application was rejected. On 14 July 2020 Ms Sandstrom filed a cross-appeal challenging the rejection of her claim. Although no summons seeking leave was filed, it was acknowledged that leave to appeal was required as the proposed appeal related to an order as to costs only: *Supreme Court Act 1970* (NSW), s 101(2)(c). The respondent took no issue with the absence of a summons and, while resisting the other orders sought by the applicant, consented to a grant of leave. In the circumstances, that leave should be granted.

80 The application for indemnity costs was based on a *Calderbank* letter dated 28 March 2018, served some two weeks before the beginning of the trial. In circumstances where the amount of the claim under the two polices was not in doubt, the offer turned entirely on the appropriate and reasonable assessment of the prospects of each party in the proceedings. It was not suggested that the offer did not involve a real element of compromise.

81 The trial judge rejected the application on the basis that, in the circumstances as they stood at the time of the offer, rejection was not unreasonable. For the

[22] Sandstrom v FSS Trustee Corporation (No 2) [2020] NSWSC 581.

reasons given by Meagher JA, I agree that the cross-appeal should be dismissed. Costs should follow the event.

**Orders**

82 Accordingly, I would propose the following orders:

(1) Dismiss the appeal from the judgment in the Equity Division of 9 March 2020 and the orders entered on 10 March 2020.

(2) Order that the appellant pay the respondent's costs of the appeal.

(3) Grant leave to Ms Sandstrom to cross-appeal from the refusal of her application for an indemnity costs order by the judgment in the Equity Division of 19 May 2020.

(4) Note the consent of MetLife to the filing of the notice of cross-appeal on 14 July 2020.

(5) Dismiss the cross-appeal.

(6) Order Ms Sandstrom to pay MetLife's costs of the cross-appeal.

83 **MACFARLAN JA:** On 7 July 2011 the respondent, Ms Rebecca Sandstrom, was medically discharged from the NSW Police Force due to psychological symptoms from which she was suffering as a result of traumatic experiences she had during her service, which had commenced in 2005. On 1 August 2011 she claimed benefits from the First State Super fund, of which she was a member and FSS Trustee Corporation was the trustee, on the basis that she was totally and permanently disabled ("TPD") by reason of post-traumatic stress disorder ("PTSD"). The trustee in turn sought indemnity from the appellant, MetLife Insurance Ltd, under two policies of insurance providing cover to the trustee in respect of fund members such as the respondent. Relevantly, the trustee was entitled to indemnity in respect of the respondent's claim if the trustee provided proof to the appellant's satisfaction:

> "that the Insured Member has become incapacitated to such an extent as to render the Insured Member unlikely ever to engage in any gainful profession, trade or occupation, for which the Insured Member is reasonably qualified by reason of education, training or experience" (the "TPD Definition").

The parties to the present proceedings proceeded on the basis that this was to be determined as at 9 March 2011, being the date six months after the respondent's last day of work for the Police Force.

84 Following extensive communications between the appellant and the respondent, the appellant refused the claim by letter to the trustee of 24 July 2015.

85 On 7 October 2015 the respondent commenced proceedings in the Equity Division of the Supreme Court against the trustee and the appellant challenging that decision. After a nine day hearing, Slattery J, by judgment of 9 March 2020, found that the appellant failed to fulfil its contractual duties in dealing with the respondent's claim, set the appellant's decision aside, found that the respondent satisfied the TPD definition and made orders against the appellant for payment ([2020] NSWSC 200). The respondent had discontinued her proceedings against the trustee prior to the hearing.

86 The appellant appeals against his Honour's decision in respect of "Stage 1" of the proceedings which was concerned with whether the appellant's decision should be set aside (see *MetLife Insurance Limited v MX* [2019] NSWCA 228 at [12]). That stage related principally to the manner in which the appellant dealt, or failed to deal, with the opinions of five doctors, being Drs George, Grace, Wong, Wilkins and Smith. The appellant did not pursue an appeal in respect of "Stage 2" of his Honour's findings, concerned with whether, assuming the appellant's decision was set aside, the respondent satisfied the TPD definition and the trustee was entitled to indemnity in respect of the respondent's claim. His Honour decided the Stage 2 issue favourably to the respondent.

87 For the reasons that appear below, I have concluded that the appeal should be allowed. That conclusion renders it unnecessary to deal with the merits of Ms Sandstrom's cross-appeal challenging his Honour's decision not to order that the costs to which she became entitled as a result of her success at first instance be paid on an indemnity basis. The appellant's success on appeal entitles the appellant, instead of Ms Sandstrom, to be paid first instance costs.

**THE CLAIMS ASSESSMENT PROCESS**

88 As already noted, entitlement to indemnity under the insurance policies was conditional on proof to the appellant's satisfaction of the respondent's

incapacity. The policies also provided the following concerning evidence to substantiate the claim:

> "[7.3] It is a condition of payment of any Benefit that the Insured Member provides us with such evidence to substantiate the claim as we may reasonably require. The Insured Member must submit at our expense to a medical examination conducted by a legally qualified medical practitioner appointed by us as we deem necessary. Satisfactory proof of age may be required prior to any payment of Benefits."

89 By letter of 26 February 2015 to the respondent ("the first procedural fairness letter"), the appellant stated that it had been assessing the respondent's TPD claim which had effectively been made on it via the trustee's claim on the appellant. The claim listed some 29 documents that had come into the appellant's possession in the course of the assessment process and invited the respondent to review the list. It identified 16 of those documents as containing "possible adverse information". It invited the respondent "to review [the documents] and make any submissions with respect to [them] that you would like us to take into consideration when making a recommendation on your claim". It enclosed copies of the 16 documents.

90 By the letter, the appellant also invited the respondent "to submit any additional medical information, including medical reports, or other evidence that you believe will assist in the assessment of your claim for total and permanent disability benefit".

91 The respondent's solicitors responded by a 12-page letter dated 22 April 2015 to the trustee. They addressed the material identified in the appellant's letter as possibly adverse and enclosed six further medical reports.

92 The appellant responded to this letter with a 26-page (including schedules) letter of 23 June 2015 ("the second procedural fairness letter"). Under the heading "INFORMATION CONSIDERED" it referred to the attachment of an "Index of the information previously provided to you" and an "Information Summary" of information considered by the appellant in assessing the claim. It continued:

> "The Information Summary does not refer to every document as it is not practicable to do so. The fact that some particular document is not specifically addressed does not mean that it was not included in MetLife's consideration of your claim. If any of the documents referred to in the Information Summary are

> not included in the Index of material Information, and you wish to obtain a copy, please let us know within 14 days of the date of this letter."

93 In the letter the appellant then stated that it had carefully considered the respondent's solicitors' letter of 22 April 2015 and the documents provided with it. It stated that the purpose of its letter was as follows:

> "This letter is intended to provide you with the information we presently have and to invite you to provide any further response and/or provide any further information or submissions you consider appropriate to our assessment of the member's claim."

94 Under the heading "OUR ASSESSMENT", the appellant commented on some of the medical and vocational assessment material. It concluded by stating under the heading "CURRENT POSITION" in respect of each policy:

> "MetLife has not formed the opinion that you have become incapacitated to such an extent as to render you unlikely ever to engage in any gainful profession, trade or occupation for which you are reasonably qualified by reason of education, training or experience."

95 The letter concluded as follows:

> "If you have any additional information you consider supports your TPD claim, or if you wish to make any further submissions about the information provided with this letter, you should do so in writing within 28 days of the date of this letter."

96 The enclosed Information Summary described over 16 pages the principal medical opinions that had been considered and, in respect of many, recorded the appellant's comments on them.

97 The appellant declined the respondent's claim by letter to the trustee of 24 July 2015 ("the decision letter"). After noting that it had not received a response to the letter of 23 June 2015, it continued:

> "**OUR DECISION**
>
> As outlined in our procedural fairness letter dated 23 June 2015, there is medical opinion prior to and around the date for assessment of the member's claim (9 March 2011) that she was likely to be able to return to work at some point in the future, external to the New South Wales Police Force.
>
> MetLife notes that one of the first specialist opinions regarding the member's prognosis was made by her treating psychiatrist, Dr David Grace, by way of a questionnaire he completed on 30 January 2011. Dr Grace was asked:
>
> > *Q. Do you believe a return to pre-injury duties is a realistic goal and what timeframe is anticipated to achieve this goal?*

> *A. I do not believe that a return to pre-injury duties is a realistic goal in [the member's case]. I believe that [the member] will be able to work but not in a job which reminds her of police work.*

The member was then assessed by Dr Graham George, consultant psychiatrist qualified by the New South Wales Police Force (NSWPF), on 8 March 2011. The assessment by Dr George occurred only one day prior to the date of assessment and is the most contemporaneous medical evidence and opinion to the date for assessment.

Dr George concluded that the member's psychological condition would preclude her from returning to work with the NSWPF and recommended that she be medically discharged. However, based on his assessment, Dr George stated that:

> *At some point in the future, [the member] may be able to return to some form of work with a different employer.*

The member's treating general practitioner, Dr Anita Wong, and treating psychiatrist, Dr Grace, were both provided with a copy of Dr George's report and asked to provide their opinions regarding the member's prognosis.

In a questionnaire completed on 11 March 2011 (2 days after the date of assessment), Dr Wong indicated that she agreed with Dr George's opinion that at some point in the future the member may be able to return to some form of work with a different employer.

In a questionnaire completed on 22 March 2011 (less than two weeks after the date for assessment), Dr Grace indicated that he agreed with Dr George's opinion that at some point in the future the member may be able to return to some form of work with a different employer. Dr Grace added that he believed such a return to work may take place in the foreseeable future.

Later, in her consultation notes dated 9 May 2011, Dr Wong recorded that she had had a discussion with the member's 'financial advisor' (Mr Josh Critchley) regarding the lodgement of the member's 'superannuation claim'. Dr Wong made the following file note of her conversation with Mr Critchley:

> *[the member] will not be able to return to policing but I cannot say she will not be able to return to work in any role in the future*

As a result of two vocational assessments, several vocational options have been identified as potentially suitable for the member to pursue given her education, training and experience. These options have included work as an enquiries clerk, general clerk, sales assistant, leisure coordinator, clerical and/or administrative assistant and case manager.

In a questionnaire dated 5 June 2012, Dr Wong believed the member would be fit to work as a case manager.

MetLife has also considered the fact that at the date for assessment the member was 28 years old and, therefore, had a further 37 years before reaching retirement age in which to regain a capacity to return to some form of work within her education, training or experience.

**PBRI Policy**

MetLife has not formed the opinion that the member has become incapacitated to such an extent as to render her unlikely ever to engage in any gainful

profession, trade or occupation for which she is reasonably qualified by reason of education, training or experience.

**FSS Policy**

MetLife has not formed the opinion that the member has become incapacitated to such an extent as to render her unlikely ever to engage in or work for reward in any occupation or work for which she is reasonably qualified by reason of education, training or experience." (Emphasis in original.)

98 In conclusion, the letter noted the existence of an Internal Dispute Resolution Process.

99 A letter in substantially the same terms was sent by the trustee to the respondent on 25 August 2015.

## THE GROUNDS OF CHALLENGE AT FIRST INSTANCE TO THE APPELLANT'S DECISION

100 The hearing at first instance proceeded upon the basis that the respondent's challenges to the appellant's decision on her claim were identified in a document entitled "SPECIFIC GROUNDS OF CHALLENGE AT THE STAGE ONE LEVEL". It is sufficient for present purposes to quote the opening words to this document and the three grounds that were upheld by the primary judge and that are in issue on appeal:

> "In breach of the obligation to act in good faith and fair dealing, act reasonably and fairly as well as undertaking a real and genuine consideration of all of the evidence to fairly deal with the claim (SOC paragraph 23 (i), (iii) & (v)) the defendant:-
>
> …
>
> 2. Isolated one sentence from the medical report of Dr. Graham George dated 8 March 2011 when on a proper interpretation of Dr. George's report the report satisfied the criteria of '*unlikely ever*' within the meaning of the TPD definition (Court Book pg 48).
>
> 3. Interpreted questionnaires by Dr. Wong (11 March 2011, 22 March 2011 & 9 May 2011) as being evidence inconsistent with the '*unlikely ever*' component of the TPD definition when on a proper reading of that material the '*unlikely ever*' component of the definition had been satisfied (Court Book pgs 48-49).
>
> …
>
> 7. In breach of the obligation of good faith, fair dealing and to undertake a real and genuine consideration of the claim the defendant despite its assertions that it took into account the written submissions of the plaintiff's legal representatives dated 22 April 2015 did not do so and provided no reasoning as to why the submissions were rejected when it was under an obligation to provide some adequate reasoning." (Emphasis in original.)

## THE RELEVANT MEDICAL EVIDENCE

101 As noted earlier, the issues on appeal were confined to the primary judge's decision regarding the way in which the appellant dealt with, or did not deal with, the opinions of five doctors. It is sufficient in these circumstances to refer to the documentary evidence of those opinions that was before the appellant in making its decision.

### Dr Graham George

102 Dr George is a consultant psychiatrist who was engaged by the NSW Police Force to undertake a psychiatric assessment of the respondent. He saw her on 23 February 2011 and provided a report of 8 March 2011.

103 The relevant questions posed to Dr George and his answers were as follows:

> "**3. Please provide your prognosis for recovery, as well as a description of what the officer believes she is currently capable of in respect to returning to work with NSWPF in any role and in what capacity.**
>
> She does not see herself returning to work in any capacity.
>
> **4. Please provide your opinion regarding the officer's current ability to return to work as an operational police officer with NSWPF. If yes, in what time frame? If no, please detail relevant barriers and reasons why.**
>
> In general terms, I do not believe that she will return as an operational police officer with NSWPF. One of her abiding thoughts is that she could not go to work each day with the thought that she may not return home at night. She said that being a single mother, she could not do this to her son. These were her own words. This is the single most important reason why I do not believe that she would ever return as an operational police officer.
>
> **5. Does the officer have the capacity to perform permanently restricted duties, either administrative/office based role based within NSWPF?**
>
> I do not believe that she does have the capacity for a reduced role. I believe that, as she has indicated, there would be too many triggers in any working environment, even if it was a relatively benign police environment.
>
> Even being associated with police talk, police uniforms or any other reminders of her police work, I believe could trigger symptoms for her.
>
> She has also struggled with anxiety on a regular basis and suffers panic attacks, at least on a weekly basis. This is a significant disorder for her to overcome in the context of her current symptoms.
>
> **6. Are there any specific triggers to the NSW Police work environment which prevent the officer from returning to the workplace in any capacity?**
>
> I believe that any associations with NSW Police Service would cause her to develop symptoms if she was ever to return to work.

> **7. Should you consider the officer to have total and permanent disablement, is the condition of such an extent as to render the member unlikely to ever engage in any gainful profession, trade or occupation in the future?**
>
> I see her as having permanent disablement with respect to her returning to her pre-injury duties. However, I believe that, at some time in the future, she may be able to return to some form of work with a different employer."

**Dr David Grace**

104 Dr Grace is a consultant psychiatrist who commenced treating the respondent on 27 September 2010. On 30 January 2011 he filled in and signed a form directed to a workers' compensation insurer upon whom the respondent had made a claim. In it, he stated that his diagnosis of the respondent's current psychological injury was "Post-Traumatic Stress Disorder". In response to the question "Do you believe a return to pre-injury duties is a realistic goal and what timeframe is it anticipated to achieve this goal?", he answered:

> "I do NOT believe that return to pre-injury duties is a realistic goal in Ms Sandstrom's case.
>
> I believe that Ms Sandstrom will be able to work but not in a job which reminds her of police work".

105 On 22 March 2011, Dr Grace completed a questionnaire directed to him by the NSW Police Force. The questionnaire referred to an attached copy of the report of Dr George of 8 March 2011 (see [102]-[103] above) and provided a summary of the report which included as one of ten dot points:

> "Permanent disablement with returning to pre-injury injuries; some time in the future may be able to return to some form of work with a different employer."

106 The questionnaire then asked Dr Grace to advise whether he agreed with Dr George's comments. Dr Grace ticked the "Yes" box.

107 In answer to the question "Can you advise whether you believe that there is any capacity for Ms Sandstrom to return to work in any organisation (in the foreseeable future)?", Dr Grace ticked the "Yes" box and added the following:

> "Ms Sandstrom is not currently capable of working within any capacity and I believe however that within six months of her complete severance from the NSW Police Force she will be ready to commence work elsewhere in some form of paid employment."

108 By letter of 24 June 2011 "To Whom It May Concern" Dr Grace said that the respondent had been a patient of his since 27 September 2010 and that:

"Rebecca has been unable return to police work following her work-related traumatic event on 8th September 2010. She is now awaiting medical discharge from the NSW Police Force. She continues to relive the events surrounding the shooting of her fellow officer Constable Bill Crews whenever she is triggered by things like shows on TV, sirens of emergency vehicles or contact with fellow officers. She is suffering from Post Traumatic Stress Disorder (PTSD). This has caused her avoiding any contact with any form of emergency services. I do not see this need to avoid contact changing over time.

I certify that because of Rebecca Sandstrom's PTSD it is unlikely that Rebecca can ever be gainfully employed in the capacity for which she is reasonably qualified because of her education, training or experience."

109 In a report dated 10 December 2011 to First State Super, Dr Grace indicated his agreement with both the following propositions:

"**Normal occupation**

In my opinion, this member … will never be able to be employed in his/her normal occupation due to this incapacity

…

**Any paid employment**

In my opinion, this member … is still able to be employed in some form of paid occupation".

110 In his report of 14 August 2012, Dr Grace gave the following answer to a question numbered 7 posed to him:

"**7) In your professional opinion do you believe that Ms Sandstrom is able to return to some form of employment part-time or full-time before retirement age of 65 in the next 24 years? If no why?**

Yes Ms Sandstrom will be able to perform some other form of work with time.

Clearly whatever Ms Sandstrom does it must not serve as a trigger for memories of the traumatic events she has been involved in or relate to her previous occupation as a policewoman. In the short-term it would appear that Rebecca needs to be involved in work which stimulates as many of her sensory organs as possible in order to help her become mindful (i.e. to focus on external things in the here and now) rather than to be caught up in her head with her preoccupations of past traumatic events. Working with animals such as dogs would be a good way to achieve this. In addition Rebecca would need to be in a non-confrontational environment where she receives guidance but is not answerable to others as her anger is close to the surface and it would not take much to provoke its explosive external expression. Either self-employment or voluntary work with children or elderly people would most likely achieve this. Rebecca would like an occupation where she can nurture and give to others making a positive impact on the lives of others."

**Dr Anita Wong**

111 Dr Wong is a general practitioner whom the respondent commenced to consult in August 2001.

112 On 11 March 2011 Dr Wong completed for the NSW Police Force a questionnaire in the same form as that completed by Dr Grace (see [105] above). Dr Wong also ticked the "Yes" box in response to the question whether she agreed with the comments of Dr George. Dr Wong however ticked the "No" box in answer to the question (Question 3) "Can you advise whether you believe that there is any capacity for Ms Sandstrom to return to work in any organisation (in the foreseeable future)?".

113 On 8 April 2011 Dr Wong completed a "Confidential medical report on permanent incapacity" directed to the trustee. Dr Wong indicated that in her opinion the respondent would never be able to return to her pre-injury occupation but, concerning the possibility of "any paid employment", Dr Wong stated "can't be determined at present". She did this instead of choosing one of the two alternatives she was given, being "will never be able to be employed in any form of paid occupation due to this incapacity" or "is still able to be employed in some form of paid occupation".

114 In a note dated 9 May 2011 in her practice's records, Dr Wong recorded that, with the respondent's authority, she had spoken to a financial advisor, Mr Josh Cratchley, "regarding superannuation" and told him: "pt will not be able to return to policing but I cannot say she will not be able to work in any role in the future".

115 On 27 June 2011 Dr Wong wrote a letter "To whom it may concern" referring to the respondent's PTSD and its consequences and, as a final paragraph, stating:

> "I certify that due to Rebecca Sandstrom's PTSD, it is unlikely that she will ever be gainfully employed in the capacity for which she is reasonably qualified because of her education, training or experience."

116 It is important to note that above this certification Dr Wong had referred to the respondent's traumatic experiences having occurred whilst in the Police Force

and to police-related circumstances subsequently triggering her "catastrophic" PTSD responses. Before the certification, Dr Wong also said:

> "Her education includes a partially completed Bachelor of Arts degree. In May 2005 she decided to train to become a police officer and joined the NSW Police Force in May 2006. She has no other relevant training or work experience."

117 On 21 December 2011 Dr Wong completed a questionnaire from Employers Mutual Limited. In response to the question "[d]o you anticipate Ms Sandstrom will return to suitable duties or pre-injury duties in a different job with a different employer?", Dr Wong answered "not in [the] near future".

118 On 29 May 2012 Dr Wong provided information that had been requested of her by the appellant. Relevant questions and Dr Wong's answers were as follows:

> **"4. Has Rebecca Sandstrom expressed a desire and or made any formal decision not to return to regular work?**
>
> She is interested in returning to work in some capacity and has recently undergone a [vocational] assessment to determine what is suitable.
>
> **5. Prognosis regarding return to work for which she is reasonably qualified?**
>
> It is clear from consultation with … Rebecca and her health professionals that she is not capable of returning to any work for which she is reasonably qualified from her education, training and experience.
>
> **6. Other Comments**
>
> nil
>
> **7. In your professional opinion is Rebecca Sandstrom able to return to some form of employment part time or full time before retirement age of 65 in the next 24 years?**
>
> yes".

Prior to answering the questions, Dr Wong appears to have been provided with, inter alia, a copy of an occupational assessment report of Ms Zoe Buck of Insite Injury Management Group.

119 On 5 June 2012 Dr Wong completed a questionnaire provided by Employers Mutual Limited, a workers' compensation insurer upon whom the respondent had made a claim. In answer to a request to outline the respondent's "current capacity for work including any specific limitations that need to be considered", Dr Wong replied:

> "currently unfit to return to job for which she is reasonably qualified from her education, training and experience ie as a police officer. Her status is completely unfit at present but we are seeking any avenues that she may work without exacerbating her PTSD with your assistance."

120 In response to a request to identify when the respondent's "treatment plan" was expected to be completed, Dr Wong stated "indefinite support required".

121 The form then requested Dr Wong to indicate whether "you approve the following suitable employment options based upon the position described outlined".

122 The first option was "Case Manager", "for various companies who supervise and support 'carers' in the community i.e. Benevolent society". The "Cognitive Demands" indicated in respect of this option were "Strong communication / Excellent interpersonal and organisation skills" and "Ability to work autonomously and in a team (essential)". Dr Wong indicated her approval to this option by circling the word "Yes". She added:

> "She has a lot [of] interest in doing an Applied Behavioural Analysis course which would lead to helping children and families dealing [with] Autism.
>
> Also would be interested in doing a course with delta organisation which trains people for pet therapy."

123 In contrast, Dr Wong indicated a lack of approval in respect of the remaining three options, being "Claim Officer / Compliance Officer", "Paralegal / Law Clerk" and "Clerical and/or Administrative Assistant".

124 In respect of the first of these additional options (option two), Dr Wong added:

> "patient would not be able to face the confrontation the role may involve. Cannot handle role involving good organisation skills at this point in time. Intimidated by having to work in a large-medium scale organisation/corporate setting".

125 In respect of the second (option three), Dr Wong added:

> "Does not have the motivation and organisation skills at this point in time. Feelings of intimidation by the legal profession".

126 In respect of the third (option four), Dr Wong added:

> "would find this role demeaning and have a negative impact on her self-esteem".

127 On 23 July 2012 Dr Wong provided to the worker's compensation insurer her responses to a questionnaire. In relation a question as to the respondent's "current capacity for work", Dr Wong responded "Totally unfit for work".

128 In relation to the respondent's "Long Term Prognosis" Dr Wong responded "never to be fit to [return] to previous employer" but "may be able to redeploy to alternate employer but not at this stage". In relation to the "anticipated timeframe" in which the respondent "will be upgraded to suitable duties and fit to commence job seeking for alternate employment with a new employer", Dr Wong stated "Uncertain".

129 On 12 August 2013 Dr Wong responded as follows to enquiries made of her by Ms Jeorgia Stanton, a case manager at Employers Mutual Limited:

> "8. I believe that Ms Sandstrom would benefit from another attempt at assessing what job roles/educational programs are suitable for her with the view to attempting suitable duties. Before she is upgraded however, I believe a formal vocational assessment with a rehabilitation provider would be required.
>
> 9. Ms Sandstrom will not be able to work in any capacity related to the Police Force or other high stress service industries such as the Ambulance Service, Fire Brigade, security industry etc.
>
> She would be trialled working limited hours particularly initially and this would be subject to constant reassessment.
>
> She would suffer in a highly confrontational environment or one that lacks intellectual stimulation.
>
> Roles suggested in the vocational assessment will need to be discussed with the patient, myself and the rehabilitation provider in a case conference prior to certificate upgrade."

**Dr Greg Wilkins**

130 In his report of 19 June 2014, Dr Wilkins, a treating psychiatrist of the respondent from 2014, said the following:

> "83. The progression of her condition has resulted in her being unable to continue to function in her various roles in her home and hopefully this will in time extend to her being able to venture out her home without the fear which she currently experiences.
>
> 84. At present, given the specialised nature of her condition, the longstanding disabilities and current restrictions to her activities following the development of this condition, it is highly probable that she will not return any form of paid employment in the foreseeable future.
>
> 85. Ms Sandstrom has a fluctuating mental state from day to day she is unable to predict her mood or her ability to perform in any role. Most days she remains volatile and anxious, her capacity for reasoning and sound

> judgements fluctuates. She is easily distressed and she is unable to engage with others for any period of time without becoming extremely anxious and retreating from the situation. When placed in a position of responsibility or simply presented with that possibility of being responsible for something or to someone, these symptoms increase dramatically. It is not possible to outline what employment activities she would be able to perform.
>
> …
>
> 89. Given Ms Sandstrom's history and her presentation, it would seem likely she was suffering with a Post Traumatic Stress Disorder with mixed symptoms of anxiety and depression that had been precipitated by the ongoing and mounting pressure in relation to any appropriate work for which she is trained.
>
> …
>
> 137. She feels that she is currently incapable of performing any duties. At this time, it is not possible to say if Ms Sandstrom will be capable and fit for work in any capacity in the future. At present she remains unfit for any paid work. She remains emotionally unstable and feels that her capacity to perform any task is greatly diminished and is unreliable.
>
> 138. Further treatment may offer some assistance with Ms Sandstrom's adjustment to her current predicament and continue to alleviate her symptoms. It is my opinion that it is Ms Sandstrom's mental condition, which has limited her capacity to perform any work at this time."

131 In his report of 3 October 2014 Dr Wilkins described the nature of the respondent's PTSD but did not refer to her ability, or inability, to obtain employment.

**Dr Selwyn Smith**

132 Dr Smith, a consultant psychiatrist, provided a report dated 12 July 2013 for the purposes of the respondent's workers' compensation claim. Dr Smith expressed the following views:

> "4. In my opinion Ms Sandstrom's psychiatric condition has stabilised that is to say her injuries have become well settled or static with or without treatment and are not likely to remit despite treatment.
>
> …
>
> 6. It is my opinion that the psychiatric injuries that Ms Sandstrom has suffered in the course of her employment has resulted in a loss of her earning capacity given her pre-injury occupation. She is unable to engage in police work. She has since been discharged hurt on duty from the NSW Police Force. She is unable to engage in alternative work. Her capacity to engage in alternative work is severely restricted because of her psychiatric symptomatologies and the difficulties she would experience on the open labour market."

133 Later in his report Dr Smith referred as follows to an earlier report of Dr Matthew Jones:

> "Dr Jones has correctly opined that Ms Sandstrom is not fit to return to her pre-injury duties and would be unable to ever return to any work in the NSW Police Force or any police related work. He noted that she would have very limited capacity to obtain work in the open labour market. I am in agreement with his pessimistic views in regard to her future employment."

134 On the appeal, this Court was informed that Dr Jones' report was not in evidence before the primary judge in relation to Stage 1 of the proceedings, whereas it was in relation to Stage 2. What Dr Smith was referring to appears to be the following opinion of Dr Jones in a report dated 6 April 2013 which is quoted in the respondent's letter dated 22 April 2015 to the trustee:

> "In my opinion, Ms Sandstrom is not fit to return to her pre-injury duties. She would likely be unable to ever return to any work in the Police Force or any Police related work… She would have very limited capacity currently in the open labour market…".

135 Having been supplied inter alia with reports of Drs Grace and Wong, Dr Smith expressed the following opinions in a report dated 9 August 2013:

> "It is my opinion that Ms Sandstrom as a result of her significant psychiatric symptomatologies, namely the development of a chronic Post-Traumatic Stress Disorder with a comorbid Major Depressive Disorder and Generalised Anxiety Disorder to the point of panic, is totally unemployable.
>
> It is my opinion that Ms Sandstrom satisfies the formal definition of total and permanent disability.
>
> Ms Sandstrom since leaving the NSW Police Force has not engaged in alternative work and in my opinion will not be able to realistically obtain work on the open labour market."

**THE PRIMARY JUDGMENT**

136 The primary judge first undertook a thorough examination of case authorities relevant to the respondent's claim. In this Court, the appellant accepted the correctness of what his Honour said, subject to "the qualification that it should be kept in mind that the source of the insurer's duties must be found in the terms of the contract of insurance" and that it should be added to his Honour's discussion that this Court in *TAL Life Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68 at [63] stated that the onus of satisfying the insurer rests on the insured where, as here, the policy requires the insured to provide proof to the insurer's satisfaction.

137 Following *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233 at [121], his Honour accepted that in a challenge to an insurer's failure to be relevantly satisfied, the test to be applied is "whether the opinion formed by the

insurer was not open to an insurer acting reasonably and fairly in the consideration of the claim" (at [38]).

138 By reference to *MetLife Insurance v MX* [2019] NSWCA 228 at [79] and *MetLife Insurance Ltd v Hellessey* [2018] NSWCA 307 at [8], his Honour noted a distinction between "acting reasonably in the formation of an opinion and the formation of a reasonable opinion" (at [42]-[43]). As stated in *Hellessey*, "a decision may be set aside if the process of consideration underlying it was not undertaken reasonably and fairly, even if the outcome itself is not also shown to have been unreasonable on the material before the insurer" (at [8]). The respondent's challenge to the appellant's decision is, at least to the extent that it is pursued on appeal, directed at the process by which it was arrived at, rather than the outcome as such.

139 His Honour also referred to authorities considering whether an insurer has a duty to give reasons. In this Court, the respondent did not contend that the appellant had a duty to give reasons for its lack of satisfaction. She contented herself in this respect with the proposition, as stated in *MX* at [155], that such reasons as are given by an insurer have "evidentiary significance as to whether the Insurer's process of consideration of the respondent's claim was undertaken fairly and reasonably".

140 As to the meaning of the expression "unlikely ever" used in the TPD Definition with reference to the prospect of the respondent obtaining employment in the future, his Honour referred to the authoritative statement of Leeming JA in *Shuetrim* at [111] distinguishing between "a mere expression of hope" of a return to work and the existence of a "real chance" of doing so.

141 Finally, in the portion of his Honour's judgment concerned with legal principles and not contested on appeal, his Honour stated that medical and other expert opinions expressed subsequent to the date on which the insurer is required to assess the claim may be taken into account provided they "are pertinent to [the] claimant's condition as at the relevant assessment date" (at [66]).

142 At first instance, the respondent challenged the appellant's decision on nine specific grounds, of which his Honour rejected six. In this Court, the respondent did not seek by notice of contention to challenge his Honour's decision on

those rejected grounds. The three grounds that his Honour upheld, and therefore found to constitute material breaches of the appellant's obligation to act in good faith and reasonably in forming its opinion, are set out in [100] above. His Honour's reasons for upholding these grounds were as follows.

**Ground 2 – isolation of one sentence from Dr George's 8 March 2011 report**

143 The primary judge rejected the respondent's submission that in Dr George's report of 8 March 2011, his answer to Question 7, that "at some time in the future, [the respondent] may be able to return to some form of work with a different employer" (see [103] above), meant that it was "unlikely ever" that the respondent will return to work (at [132]). His Honour held that the word "may" in this sentence was "consistent with both an 'expression of hope' and 'a real chance' [of later employment] and is simply an unhelpful basis for reasoning to either conclusion" (at [134]).

144 Consistently with this view, his Honour also rejected the appellant's submission that the sentence indicated that the respondent had a "real chance" of returning to work (at [133]) and explained:

> "[135] … Dr George's opinion in his 8 March 2011 report is not able to be interpreted the way that MetLife submits. In his first sentence in answer to Question 7, Dr George affirms that Ms Sandstrom has 'permanent disablement' with respect to police duties. But he takes a more flexible view about other duties, saying she 'may be able to return' to them. As the question asked of Dr George was a direct one, close to the [education, training or experience] wording 'unlikely ever to engage in any gainful profession...', his failure to say a simple 'yes' in his answer might possibly be a basis to infer that he did not agree that she was 'unlikely ever' to engage in relevant work, and therefore, that he must have meant that she had a 'real chance' of returning to work.
>
> [136] But this is so weak an inference that [the] Court is not prepared to draw it. Dr George's failure to answer Question 7 directly and his use of the word 'may' can just as readily be interpreted as him saying: that he does regard her engaging in relevant work as 'unlikely ever'; and that there is only a speculative possibility, or a 'mere hope', that she 'may' one day return. Thus, the words Dr George uses in answer to Question 7 do not provide a sound basis in reasoning for MetLife to conclude in July 2015 that it is not satisfied she is 'unlikely ever' to engage in relevant work. Simply stated, the words are unhelpful to MetLife in whether her return to work is a 'mere hope' or a 'real chance'. To discharge its contractual duty of forming an opinion reasonably, MetLife should not have relied on this sentence, as it did, but should have gone back to Dr George and asked him what he really meant, before relying on the sentence."

145 The primary judge therefore held that this ground of challenge succeeded in part: he found that the appellant should not have relied on the relevant sentence, without further enquiry, but did not accept the proposition forming part of the ground that the opinion contained in the sentence "satisfied the criteria of '*unlikely ever*' within the meaning of the TPD definition".

**Ground 3 – misinterpretation of Dr Wong's "questionnaires"**

146 The primary judge treated this ground as referring to the questionnaires completed by both Dr Grace and Dr Wong (see [105]-[107] and [112] above) as well as to the consultation notes of Dr Wong of 9 May 2011 (see [114] above). The latter were erroneously referred to in the statement of the ground (see [100] above) as a "questionnaire".

147 His Honour did not place significance on Dr Grace's acceptance in his questionnaire of Dr George's opinion because, as he explained in relation to Ground 2, Dr George's opinion was "[equivocal] at best" (at [147]). His Honour did not consider that what Dr Grace went on to say "resolves the equivocation" (at [148], and see [105]-[107] above). Therefore his Honour held that the respondent did not make out Ground 3 with respect to Dr Grace (see [151] quoted in [148] below).

148 In relation to Dr Wong's questionnaire response of 11 March 2011 (see [112] above), his Honour stated:

> "[149] Assessed as a whole, Dr Wong's answers give more assistance to Ms Sandstrom's contentions than MetLife's contentions. Her negative answer to Question 3, which probes whether or not she (Dr Wong) thinks she (Ms Sandstrom) has 'any capacity...to return to work in any organisation (in the foreseeable future)' is evidence directly supporting a conclusion that she is 'unlikely ever' in the sense of there being only a 'remote or speculative possibility' (as it was put in *Shuetrim* at [89]) and not 'a possibility that is readily contemplatable' of engaging in relevant work in the future.
>
> [150] How is this to be reconciled with her answer to Question 1 [ticking "Yes" to agreeing with the comments of Dr George – see [112] above]? Her answers can be assumed to be consistent with one another. In my view, if all one has are these documents, which are all the relevant documents from Dr Wong that are available at Stage I, the only sensible way to read Dr Wong's agreement with the material put before her in Question 1 is that she saw that agreement as not inconsistent with her answer to Question 3. It is likely that she viewed the relevant parts of the summarised material from Dr George in Question 1 in the same way as the Court does: as not being decisive on the question of whether she is 'unlikely ever' to engage in relevant work. So analysed, Dr Wong's answers to Questions 1 and 3 do not contradict one another.

> [151] In my view, Ms Sandstrom has made out Ground 3 with respect to Dr Wong's questionnaire but not with respect to Dr Grace's questionnaire. The MetLife letter of 24 July 2015 cites Dr Wong's 'questionnaire completed on 11 March 2011' as evidence supporting its conclusion. But this misinterprets Dr Wong's responses as inconsistent with the 'unlikely ever' component of the TPD definition. Ms Sandstrom is right that a proper reading of the material suggests that the 'unlikely ever' component of the definition had been satisfied, at least so far as Dr Wong's responses are concerned. MetLife has therefore misused this written material from Dr Wong."

149 His Honour then turned to Dr Wong's consultation notes of 9 May 2011 in which Dr Wong recorded that the respondent "will not be able to return to policing, but I cannot say she will not be able to work in any role in the future" (see [114] above). His Honour considered that this did not support either the view that the respondent was "unlikely ever" to engage in relevant work or the view that she had "a real chance" of engaging in such work in the future. His Honour continued:

> "[155] But MetLife uses this consultation note in its reasoning in its 24 July 2015 decision letter to support its conclusion that the TPD definition is not satisfied. It certainly cites this consultation note in a way that implies it has been so used. In my view, because the note is essentially equivocal on the critical distinction, MetLife was not entitled to use it this way and in doing so failed to act reasonably forming its opinion."

**Ground 7 – failure to take into account the respondent's solicitors' letter of 22 April 2015 and provide reasons for rejecting its contentions**

150 In relation to the second limb of this ground, the primary judge said at [170] that MetLife had accepted that it was "under an obligation to provide adequate reasons" in explaining why the submissions contained in the respondent's solicitors' letter of 22 April 2015 had been rejected. On appeal, the appellant denied that it had made such a concession and the respondent did not contend that the appellant was subject to such a duty – see [139] above. As I consider that the primary judge's reasoning otherwise discloses error in the manner referred to below in upholding this ground, it is unnecessary to address what his Honour said concerning a duty to give reasons.

151 In addressing this ground, the primary judge recorded that the parties agreed that the appellant's second procedural fairness letter (with its attached Information Summary) should be read with the decision letter of 24 July 2015 as the appellant's reasons for its decision, although his Honour doubted the appropriateness of that agreement (at [172]-[173]).

152 Proceeding on the agreed basis, his Honour found that the appellant had breached its contractual obligation to provide "some adequate reasoning" by not satisfactorily identifying why it rejected the respondent's submissions in her solicitors' letter of 22 April 2015 ([169], [178]). His Honour's findings concerning a lack of proper response to that letter were confined to what it said, or did not say, about the medical opinions of Dr Wilkins, Dr Smith, Dr Oldtree Clark and Dr Grace. Of these, Dr Oldtree Clark's opinion can be disregarded in this context because the primary judge found that the appellant's communicated reasoning concerning it was adequate (at [199]). His Honour addressed the opinions of the other three doctors as follows.

*Dr Wilkins*

153 The primary judge said that the appellant's comments in its Information Summary about Dr Wilkins' report of 19 June 2014 (see [96], [130] above) constituted a "not unreasonable assessment that Dr Wilkins' prognosis in this report is 'somewhat ambiguous'" (at [181]). The comments in the Information Summary were as follows:

> "Although MetLife notes that Dr Wilkins' prognosis regarding the member's capacity to return to work in the future is generally pessimistic, it also appears to be somewhat ambiguous. Ultimately though, Dr Wilkins appeared to regard the member's prognosis as guarded and was unable to say whether or not the member would return to paid employment in the future. It also appeared to MetLife that Dr Wilkins placed undue significance on what the member herself regarded as her own capacity to be throughout his report, rather than focusing specifically on the TPD criteria.
>
> In any event, it must be remembered that Dr Wilkins first consulted with the member on 1 May 2014, over three years after the date for assessment."

154 His Honour then referred to "Dr Wilkins' intermediate and significant report of 4 August 2014" (at [184]). The respondent however conceded on appeal that this was an error because there was no such report. The error no doubt resulted from the respondent's solicitors' letter of 22 April 2015 erroneously referring to such report. The quotations in the letter from that non-existent report in fact came from Dr Wilkins' report of 19 June 2014 (as to which, see [130] above).

155 His Honour considered that a sentence he quoted (in fact from the 19 June 2014 and not a 4 August 2014 report) stating that "[i]t is not possible to outline what employment activities [the respondent] would be able to perform" was "well capable of founding an inference that [the respondent's] future

employment is only a ‘remote or speculative’ possibility” (at [184]). His Honour continued:

> “[185] But neither the Information Summary, nor the reasoning in the second procedural fairness letter, nor the 24 July 2015 decision letter, deals with this medical report. Any adequate path of reasoning must explain how contrary material such as this was able to be set to one side when MetLife reached its 24 July 2015 decision. But MetLife’s reasons do not, and MetLife as a result failed to act reasonably in forming its opinion.”

156 On appeal, the respondent conceded that his Honour made a mistake in stating that the report in which this sentence was contained had not been addressed. It had been addressed (see [154] above). Although the appellant did not quote in the Information Summary the particular sentence to which his Honour referred, the parts it did quote were not contended on appeal to be any less favourable to the respondent (see for instance [84] quoted in [130] above).

157 His Honour did not find any breach arising out of Dr Wilkins’ report of 3 October 2014.

*Dr Smith*

158 The primary judge noted that neither the text of the second procedural fairness letter nor the appellant’s decision letter of 24 July 2015 referred to Dr Smith’s opinions (as to which, see [132]-[134] above). The only reference to them was in the Information Summary attached to the former.

159 Having quoted Dr Smith’s opinions expressed in his report of 12 July 2013, the Information Summary noted that the report had been provided for the purposes of a "Work Injury Damages” claim, had been prepared over two years after the date for assessment of the respondent’s claim on the appellant and did not consider either of the vocational assessments that had been obtained. His Honour continued:

> “[191] But Ms Zaki’s and Ms Buck’s vocational assessments do not deal with Ms Sandstrom’s precise medically established restrictions. So the vocational reports, as [leading counsel for the respondent] submits orally, are irrelevant to Dr Selwyn Smith’s medical opinion. What a person in Ms Sandstrom’s position, but without her specific medical disabilities, might have been able to do with her pre-injury working capacity was hardly likely to influence Dr Selwyn Smith’s opinion, which was looking at her specific disabilities. This is not a proper basis for dismissing Dr Smith’s opinion.”

160 His Honour noted that the Information Summary commented in relation to Dr Smith's report of 9 August 2013 that Dr Smith appeared not to have been given the two vocational assessments, nor the report of Dr George of 8 March 2011. His Honour said however that none of these was likely to assist Dr Smith, for reasons already given (see [144], [159] above).

161 His Honour continued:

> "[195] But the 'Content' from Dr Selwyn Smith's 9 August 2013 report does not extract Dr Selwyn Smith's strongest opinion:
>
> 'It is my opinion that Ms Sandstrom as a result of her significant psychiatric symptomatologies, namely the development of a chronic Post-Traumatic Stress Disorder with a comorbid Major Depressive Disorder and Generalised Anxiety Disorder to the point of panic, is totally unemployable.'
>
> [196] 'MetLife comments' do not deal with this main thrust of Dr Selwyn Smith's opinion, which is apt to cover her past, present and future employability, and bear closely upon whether or not the she satisfied the TPD definition."

162 The appellant's Information Summary quoted the second and third paragraphs quoted in [135] above but, as his Honour indicated, did not quote the first paragraph. All three paragraphs were quoted in the respondent's solicitors' letter of 22 April 2015.

*Dr Grace*

163 The primary judge noted that the respondent's solicitors' letter of 22 April 2015 quoted the following from Dr Grace's report of 24 June 2011:

> "I certify that because of Rebecca Sandstrom's PTSD it is unlikely that Rebecca can ever be gainfully employed in the capacity for which she is reasonably qualified because of her education, training or experience".

164 His Honour then stated that Dr Grace's report of 24 June 2011 was not referred to anywhere in the appellant's Information Summary and continued:

> "[202] The material in this report is so directly relevant to and contradictory of MetLife's conclusion that it would have to be dealt with somewhere in MetLife's reasons for its reasons to be an adequate explanation of its decision. Alternatively, the absence of any reference to this highly relevant report and the reference to less directly relevant reports of Dr Grace is a basis to infer it was not taken into account. Either way, by failing to deal with Dr Grace's report of 24 June 2011, MetLife has not acted reasonably in forming its opinion."

165 That report, and the part of it that his Honour quoted, was however in fact referred to in the appellant's Information Summary, with the comment:

> "Dr Grace did not appear to attempt to explain his opinion or why it differed from his earlier opinion in which he agreed with the prognosis provided by Dr George."

*Generally*

166 His Honour summarised the appellant's response, or lack of response, in relation to the medical opinions referred to above, stating (at [205]):

> "MetLife … leaves gaps in its reasoning about the medical reports and fails to take the opportunity it held to explain why it rejected evidence contradicting its conclusion. The Court therefore is left in no position to infer that MetLife had due regard for Ms Sandstrom's interests in reaching its decision."

167 His Honour said also that in the appellant's letters and its Information Summary it appeared to treat medical opinions expressed nearer to the date for assessment as of more weight than those expressed later. His Honour continued (at [207]):

> "By this kind of reasoning MetLife is making a working assumption of demoting, as worthy of only lesser consideration, medical reports that are more distant in time from the assessment date. Such a working assumption is apt to cause probative medical evidence well after the assessment date to be artificially displaced. This may explain why Dr Grace's report of 24 June 2011 and Dr Wilkins' report of 4 August 2014 were apparently ignored."

168 His Honour then referred to the vocational assessments of Ms Zaki and Ms Buck and to the appellant's comment in its decision letter of 24 July 2015 that the assessments show that "several vocational options have been identified as potentially suitable for the member to pursue given her education, training and experience". His Honour continued:

> "[209] But a proper reading of the vocational assessments shows that they did not take into account Ms Sandstrom's actual psychological disabilities as indicated in the medical opinion. Ms Zaki's and Ms Buck's evidence talks about what kinds of jobs Ms Sandstrom's police and pre-police experience would objectively qualify her [for] in the jobs market. They attempt superficial assessments of her stability and presentation. But neither of them had the expertise to medically assess her true disabilities. Leaving aside the need for re-training, as their opinions were not based on Ms Sandstrom's actual attributes, they were no basis to infer, consistent with MetLife's duty, that Ms Sandstrom herself, with her particular psychological disabilities as explained in the medical evidence, could actually do any of these jobs: see *Ziogos* [*v FSS Trustee Corporation* [2015] NSWSC 1385] at [102]. This was another defect in MetLife's reasoning."

**Conclusion**

169 For these reasons, the primary judge found that the appellant's decision of 24 July 2015 was not made in accordance with its contractual duties and should therefore be declared void and be set aside.

**CONSIDERATION OF THE APPEAL**

170 As noted in [100] above, the primary judge found on three bases (being Grounds 2, 3 and 7 of the respondent's challenge to the appellant's decision) that the appellant breached its obligation to act in good faith and reasonably in forming its opinion. On appeal, the appellant challenged his Honour's upholding of each of those grounds and the respondent did not rely on any Notice of Contention to seek to uphold his Honour's decision on any additional basis. In these circumstances, it is convenient to address the appeal by considering whether his Honour was correct to uphold any or all of those three grounds.

**Ground 2 – isolation of one sentence from Dr George's 8 March 2011 report**

171 The primary judge regarded Dr George's opinion that "at some time in the future, [the respondent] may be able to return to some form of work with a different employer" (see [103] above) as equivocal in that it was "consistent with both an 'expression of hope' and 'a real chance' [of later employment] and [was] simply an unhelpful basis for reasoning to either conclusion" (see [143] above). He concluded therefore that the appellant "should not have relied on this sentence, as it did, but should have gone back to Dr George and asked him what he really meant, before relying on the sentence" (see Judgment [136] quoted in [144] above).

172 This opinion of Dr George was referred to in the appellant's decision letter of 24 July 2015, along with other medical opinions, following the statement in the letter that "[a]s outlined in our procedural fairness letter dated 23 June 2015, there is medical opinion prior to and around the date for assessment of the member's claim (9 March 2011) that she was likely to be able to return to work at some point in the future, external to the New South Wales Police Force" (see [97] above). That statement did not state, at least expressly, that all, or indeed any, of the medical opinions referred to thereunder were properly so

characterised. Instead, the statement referred back to the procedural fairness letter.

173 The medical opinions then referred to, including that of Dr George, were followed by the conclusion expressed in respect of each policy that the appellant had "not formed" the required opinion as to permanent incapacity. None of the opinions referred to needed on its own to establish the basis for the appellant's non-formation of that opinion. Rather, reading the letter logically and reasonably, the descriptions of the opinions were given to provide some, but not necessarily conclusive, support for that conclusion.

174 As the issue to be addressed by the appellant was whether it was, acting reasonably and fairly, positively satisfied of the respondent's permanent disability, the opinion of Dr George, who had assessed the respondent at about the date for assessment, that the respondent "at some time in the future… may be able to return to some form of work with a different employer" was supportive of the appellant's non-satisfaction. Particularly is that so when Dr George expressed his opinion in response to a question that specifically asked him about the policy issue of permanent incapacity. Because Dr George was apparently not satisfied of the relevant matter, the appellant, if attention is at this stage confined only to Dr George's opinion, was similarly entitled not to be so satisfied.

175 In these circumstances, I respectfully disagree with the primary judge's view that the appellant "should not have relied on this sentence, as it did, but should have gone back to Dr George and asked him what he really meant". Dr George's opinion was relevant to the question that the appellant was considering. I therefore conclude that his Honour erred in upholding Ground 2.

**Ground 3 – misinterpretation of Dr Wong's "questionnaires"**

176 As noted above, the primary judge treated this ground as referring to the opinions of both Drs Wong and Grace. However as his Honour did not find fault with respect to the appellant's reasoning concerning Dr Grace (see [147] above), it is sufficient for present purposes to only consider Dr Wong's opinions.

177 The appellant's decision letter of 24 July 2015 (see [97] above) relevantly relied on Dr Wong's following opinions:

(1) In her questionnaire of 11 March 2011 Dr Wong agreed with Dr George's opinion, as the decision letter described it, "that at some point in the future the member may be able to return to some form of work with a different employer".

(2) In the same questionnaire (though not quoted in the decision letter), Dr Wong gave a negative answer to the question "whether you believe that there is any capacity for Ms Sandstrom to return to work in any organisation (in the foreseeable future)?" (see [112] above).

(3) In her consultation notes of 9 May 2011, Dr Wong recorded that she told the respondent's financial adviser that "I cannot say she will not be able to return to work in any role in the future". The appellant underlined the words "cannot say" in the decision letter.

(4) Dr Wong indicated in response to a questionnaire of 5 June 2012 that the respondent would be fit to work as a case manager, a position to which reference was made in a vocational assessment.

178 As indicated in [111]-[129] above, Dr Wong expressed the following further opinions recorded in reports which were, with the exception of that of 23 July 2012, before the appellant when it made its decision:

(5) On 8 April 2011, Dr Wong stated as to the possibility of "any paid employment" for the respondent in the future, that it "can't be determined at present".

(6) On 27 June 2011, Dr Wong certified that that "it is unlikely that [the respondent] will ever be gainfully employed in the capacity for which she is reasonably qualified because of her education, training or experience".

(7) On 21 December 2011, Dr Wong opined that the respondent would not be able to return to work in a different job with a different employer "in [the] near future".

(8) On 29 May 2012, Dr Wong expressed the view that whilst the respondent was "not capable of returning to any work for which she is reasonably qualified from her education, training and experience" she will be "able to return to some form of employment part-time or full-time before retirement age of 65 in the next 24 years".

(9) On 5 June 2012, Dr Wong opined that the respondent was "currently unfit to return to [the] job for which she is reasonably qualified from her education, training and experience ie as a police officer". She said further that the respondent was "completely unfit at present but we are seeking any avenues that she may work [in] without exacerbating her PTSD with [the workers' compensation insurers'] assistance".

(10) On 23 July 2012, Dr Wong opined that the respondent would "never be fit" to return to her previous employer but "may be able to redeploy to [an] alternate employer but not at this stage".

(11) On 12 August 2013, Dr Wong opined that the respondent would not be able to work in any capacity related to the Police Force or other high stress industries but "would be trialled working limited hours" in other roles.

179 The primary judge took the view that Opinion (2) above was "evidence directly supporting a conclusion" that the respondent was "unlikely ever" to obtain relevant employment (see Judgment [149] quoted in [148] above). This conclusion did not in my view however have regard to the fact that Dr Wong's opinion was expressed to relate to the "foreseeable future". In those circumstances it was not "evidence directly supporting" the view that the respondent satisfied the TPD definition.

180 In the Judgment at [150] quoted in [148] above, the primary judge sought to reconcile Opinion (2) with Dr Wong's agreement in Opinion (1) with the comments of Dr George. His Honour did so by stating that Dr Wong must have put Dr George's comments aside on the basis that they were neutral, leaving Dr Wong's Opinion (2) able to be read according to its terms. With respect, I see the two opinions as qualified in a similar fashion. Opinion (2) was limited to the "foreseeable future" whilst Opinion (1) said only that "at some time in the future" (that is, perhaps beyond the "foreseeable future") the respondent may be able to "return to some form of work with a different employer".

181 His Honour then concluded that because in the appellant's decision letter it treated opinion (1) "as evidence supporting its conclusion", it misinterpreted Dr Wong's responses as "inconsistent with the 'unlikely ever' component of the TPD definition" (Judgment at [151] quoted at [148] above). As I have however

explained, both of these two opinions provide some support for the appellant's lack of satisfaction and were therefore not inappropriately referred to in its decision letter. Moreover, the decision letter referred to Dr Wong's consultation notes of 9 May 2011 (Opinion (3) above). The statement in them that she could not say whether the respondent would be able to return to work in any role in the future was supportive of the appellant's lack of satisfaction, particularly when the view was expressed to the respondent's financial advisor in circumstances where a more favourable view would clearly have assisted Dr Wong's patient's "superannuation claim". This circumstance indicates that Dr Wong would be unlikely not to express a more favourable view if Dr Wong thought that one was available. The statement in the consultation notes was not, as his Honour said, "essentially equivocal". In circumstances where the appellant had to decide whether it was positively satisfied of the relevant disability, it provided some clear guidance.

182 In addition, what I consider to be the clarity of the view expressed in the consultation notes is supportive of the interpretation I have adopted in respect of Opinions (1) and (2).

183 The absence of error on the part of the appellant in the respect found by the primary judge is supported by reference to Opinions (5) to (11) referred to in [178] above (although I leave Opinion (10) out of account because it was not put before the appellant). The Opinions were each referred to in the appellant's Information Summary (with the exception of the 8 April 2011 and 27 June 2011 reports, which were listed in the "Index to Documents" attached to the second procedural fairness letter and in the first procedural fairness letter respectively) and therefore, on the basis upon which the case was approached below (as to which see [151] above), the references to them there are to be regarded as having being incorporated by the appellant in its reasons for lacking the relevant satisfaction. Read as a whole those further Opinions confirm that Dr Wong was, throughout, of the view that the respondent would not be able to return to any police or similar type of employment but was unable to say that she would not be able to take up some other kind of employment in the future. Dr Wong's certification in Opinion (6), which is in similar terms to the policy provision, is to be read, in its reference to

employment for which the respondent is "reasonably qualified because of her education, training or experience", as a reference to "education, training or experience" in police work. This is clear from the context in which the view is expressed in the letter of 27 June 2011 and is confirmed by what Dr Wong said in Opinions (9) and (11) (see [116] and [178] above).

184 For these reasons, the primary judge erred in upholding Ground 3 of the respondent's challenge to the appellant's decision.

**Ground 7 – failure to take into account the respondent's solicitors' letter of 22 April 2015 and provide reasons for rejecting its contentions**

185 As indicated in [152] above, the primary judge's findings concerning the alleged absence of a proper response to the respondent's solicitors' letter of 22 April 2015 related only to the medical opinions of Drs Wilkins, Smith, Oldtree Clark and Grace, of which Dr Oldtree Clark's opinion was found to have been adequately dealt with and can therefore be disregarded. His Honour's upholding of the ground related therefore only to the opinions of Drs Wilkins, Smith and Grace, to which I now turn.

*Dr Wilkins*

186 The primary judge found that the appellant failed to deal with a report of Dr Wilkins of 4 August 2014 which contained a view that "[i]t is not possible to outline what employment activities [the respondent] would be able to perform" (see [155] above). This sentence was however not in fact in a report of 4 August 2014. Instead, it appeared in Dr Wilkins' report of 19 June 2014 with which the appellant did deal with in its Information Summary attached to the second procedural fairness letter. The primary judge found that what the appellant said in the Information Summary about that report constituted a "not unreasonable assessment that Dr Wilkins' prognosis in this report is 'somewhat ambiguous'" (see [153] above). The sentence upon which his Honour focused was not quoted in the Information Summary. It did not however need to be addressed in the Information Summary separately from Dr Wilkin's other opinions in his report of 19 June 2014 as it did not favour the respondent's position. If anything, it was supportive of the appellant's lack of relevant satisfaction. I do not with respect agree with the primary judge's observation that the sentence was "well capable of founding an inference that [the

respondent's] future employment is only a 'remote or speculative' possibility" (see [155] above).

187 Contrary to his Honour's finding, there was therefore no breach by the appellant relating to Dr Wilkins' opinions. The respondent accepted that this was so because prior to the hearing in this Court, she notified the Court by email that she would not argue against the relevant grounds of appeal (numbered 12 and 13).

*Dr Smith*

188 The primary judge was critical of three aspects of the way in which the appellant dealt with the opinions of Dr Smith.

189 First, his Honour was critical of the appellant's comment that Dr Smith's report of 12 July 2013 did not deal with either of the vocational assessments that had been obtained (see [159] above). His Honour said that those assessments were in fact irrelevant to Dr Smith's opinion because they "[did] not deal with Ms Sandstrom's precise medically established restrictions" and also said, or at least inferred, that the assessments only dealt with the respondent's pre-injury working capacity (Judgment [191] quoted in [159] above).

190 I do not with respect agree with these observations. One of the vocational assessments, by Ms Zoe Buck of Insite Injury Management Group, recorded that the opinions of Dr Grace in a report of 24 January 2012 and Dr George in his report of 8 March 2011 had been used in the making of the assessment. As well, Ms Buck interviewed the respondent (post-injury, on 18 May 2012) and made an assessment of her from an employment point of view. Ms Buck's report was thus clearly premised on assumptions as to the respondent's then medical condition derived from expert opinions and on her own presumably expert vocational assessment of the respondent's post-injury capabilities based on her interview. It was not, as the primary judge suggested, related to the respondent's pre-injury capabilities.

191 It was appropriate for Ms Buck to proceed on assumptions as to the respondent's medical condition as plainly she did not have the medical expertise to assess them herself. Her vocational assessment, as with any

other expert opinion, would of course only be as good as the assumptions on which it was based.

192 The second vocational assessment, that of Ms Mira Zaki of ECA dated 4 July 2012, was, on the other hand, expressly stated not to have involved "a consideration of the [respondent's] current psychological functional capacity or any psychological restrictions that the [respondent] has been recommended to observe when working".

193 The primary judge said that the fact that Dr Smith did not have the vocational assessments was "not a proper basis for dismissing Dr Smith's opinion" (Judgment at [191] referred to in [159] above). However both assessments would have been relevant matters for Dr Smith to consider and the appellant's reference to them in its Information Summary was not therefore irrational. Ms Buck's report identified types of jobs which the respondent might be able to perform notwithstanding her psychological injuries and Ms Zaki's report was relevant to the "reasonably qualified by reason of education, training or experience" part of the policy condition: it identified pre-psychological injury jobs (other than policing) for which the respondent was qualified.

194 Moreover, it was not accurate to say that the appellant "dismissed" Dr Smith's report. Its Information Summary showed that it considered it and expressed some, not irrational, views about it. Despite being invited to do so, the respondent did not respond to this or any other part of the Information Summary.

195 Dr Smith's views in his report of 12 July 2013 were in any event far from decisive on the policy issue. The highest they rose was the view that the respondent "would have very limited capacity to obtain work in the open labour market" (see [133] above). The appellant did not list this report in its decision letter as supporting its lack of satisfaction but showed by its Information Summary that it had taken it into account.

196 Secondly, the primary judge was critical of the Information Summary's treatment of Dr Smith's report of 9 August 2013 because the Summary commented that Dr Smith appeared not to have been given the two vocational assessments, nor the report of Dr George of 8 March 2011. The vocational

assessments were, for the reasons I have given, of at least arguable relevance to the formation of Dr Smith's opinions. Likewise it was not an irrational comment to note that Dr Smith had not seen Dr George's report. Dr George's report of 8 March 2011 was the closest of these reports to the date for assessment of 9 March 2011 and therefore arguably of the most relevance (see [205] below).

197 Thirdly, his Honour criticised the Information Summary for not extracting Dr Smith's "strongest opinion" which was that the respondent was "totally unemployable" (see [161] above).

198 This was not however Dr Smith's strongest opinion expressed in that report. In the report he also expressed the view that the respondent satisfied "the formal definition of total and permanent disability" and "will not be able to realistically obtain work on the open labour market" (see [135] above). These further opinions were quoted and addressed in the Information Summary. His Honour was therefore in error in stating that the Information Summary did not extract Dr Smith's "strongest opinion" and did not therefore deal with the "main thrust" of that report. The omitted opinion (that the respondent was "totally unemployable") was of much less significance to the policy question than the opinions that the appellant did address because, unlike the others, it at least arguably related only to the present position of the respondent, and not to the permanency of her condition. Ground 7 should therefore be rejected insofar as it relates to Dr Smith's opinions – they were taken into account and the appellant did provide its reasons for not acting on them. The sufficiency of those reasons is not an issue on the appeal. It is sufficient to conclude that the appellant addressed the relevant material and expressed not irrational reasons, not for disregarding it (because there is no reason to consider that the appellant did *that*), *but* for not treating it as decisive in favour of the respondent's claim for indemnity.

*Dr Grace*

199 The primary judge stated that Dr Grace's report of 24 June 2011 (which said that it was unlikely that the respondent could "ever be gainfully employed in the capacity for which she is reasonably qualified because of her education,

training or experience" – see [108] above) was not referred to in the Information Summary but was "so directly relevant to and contradictory of MetLife's conclusion" that it needed to be dealt with, with reasons being given for it not being acted upon (see [164] above).

200 The appellant did however address the report in the Information Summary and, in the manner referred to above (see [165]), did explain why Dr Grace's opinion did not require the appellant to be relevantly satisfied. The appellant accordingly established error by the primary judge in relation to Dr Grace's report.

201 The following observations in relation to Dr Grace's opinions which are summarised in [104]-[110] above demonstrate that they did require the appellant to be relevantly satisfied and in fact contradicted the respondent's claim for indemnity. In his reports of 30 January 2011, 10 December 2011 and 14 August 2012 Dr Grace opined that the respondent would be capable of returning to non-police work. He indicated this also in the portion of his 22 March 2011 report quoted in [107] above.

202 The certification that he gave in his letter of 24 June 2011, in similar terms to the policy provision, was, from its context in the letter, clearly based upon the assumption that the "education, training or experience" referred to in the certification was the respondent's education, training and experience as a police officer. This interpretation is confirmed by the other opinions of Dr Grace to which I have just referred. It is also confirmed by the somewhat narrower language used in Dr Grace's certification as compared to the policy provision (compare [108] above to [83] above and see *TAL Life Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68 at [66]).

*Generally*

203 As general matters, the primary judge made two further points.

204 First, he was critical of the appellant appearing to attach greater importance to medical opinions expressed near to the date for assessment as distinct from those expressed later. This approach was evident, for example, in the appellant's comment in its Information Summary that Dr Smith's report of 12 July 2013 was prepared over two years after the date for assessment (after he

had examined the respondent for the first time). His Honour thought that this approach was "apt to cause probative medical evidence well after the assessment date to be artificially displaced" (Judgment at [207] quoted in [167] above).

205 The appellant's approach was not however irrational or unreasonable. The date the opinion was expressed might not have been of crucial significance but it was at least a matter the appellant was entitled to take into account. Opinions expressed after the date to which they relate are utilised in "many fields of law" (*HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640; [2004] HCA 54 at [39]; and see *TAL Life Ltd v Shuetrim* at [150]-[151], cited by the primary judge at [66]).

206 There is however a qualification to their relevance that the subsequent opinion may be of limited weight for reasons as follows, expressed in *HTW* at [40] in the context of valuation law:

> "Finally, although the court is entitled to take into account events after the date of acquisition, it must distinguish among possible causes of the decline in value of what has been bought. 'If the cause is inherent in the thing itself, then its existence should be taken into account in arriving at the real value of the shares or other things at the time of the purchase. If the cause be 'independent', 'extrinsic', 'supervening' or 'accidental', then the additional loss is not the consequence of the inducement.'" (Citations omitted.)

207 The advantage that an opinion expressed close to the date in question has is thus that it is unnecessary to attempt to identify matters occurring after that date which might reduce the opinion's relevance. For a later opinion it might for example, consistently with *HTW*, be necessary to consider whether any supervening and unforeseeable illnesses or marked changes have occurred since the date for assessment.

208 Secondly, the primary judge returned to the vocational assessments and criticised the appellant's reliance on them (see Judgment at [209] quoted in [168] above). I have already indicated why I consider his Honour's observations on this topic to be erroneous (see [190]-[193] above).

209 For these reasons, the appellant has established that his Honour erred in upholding Ground 7.

**ORDERS**

210 As the primary judge erroneously upheld the three bases of challenge to the appellant's decision of 24 July 2015, to which I have referred, the appeal should be allowed.

211 I propose the following orders:

(1) Allow the appeal.

(2) Set aside orders (1) to (4) made on 9 March 2020 and also any subsequently made costs orders.

(3) Judgment for the appellant in the respondent's proceedings against it.

(4) Order the respondent to pay the appellant's costs at first instance and on appeal.

(5) Grant the respondent a certificate under the *Suitors' Fund Act 1951* (NSW), if qualified.

212 **MEAGHER JA:** Each of the three grounds on which the primary judge found that MetLife had breached its obligation to act fairly and reasonably in considering the question identified immediately below is challenged on appeal. That question was whether it was satisfied that Ms Sandstrom fell within the definition of total and permanent disablement (TPD), and specifically whether her incapacity was such that she was unlikely ever to engage in any profession, trade or occupation for which she was reasonably qualified by reason of her education, training or experience. In that context there was no question as to her ever working again as a police officer, or in some similar occupation.

213 I agree with Basten JA that the appeal should be dismissed. I do so for the reasons his Honour gives and add the following additional observations in relation to grounds 2 and 3. I also deal with Ms Sandstrom's cross-appeal directed to the primary judge's refusal to make a special costs order following MetLife's rejection of her Calderbank offer. Accordingly, I agree with the orders proposed by Basten JA.

214 *As to grounds 2 and 3:* It was for Ms Sandstrom to provide evidence in support of her claim, and in engaging with that evidence and determining whether it was so satisfied MetLife was required to act reasonably and fairly. After all, its

liability to pay a total and permanent disablement benefit depended on its being satisfied that Ms Sandstrom's incapacity answered the relevant description.

215 MetLife's rejection letter dated 24 July 2015 asserted that there was "medical opinion prior to and around the date for assessment of [Ms Sandstrom's] claim (9 March 2011) that she was likely to be able to return to work at some point in the future", although not for the police force. Whether evidentiary material answering that description provided support for Ms Sandstrom's claim, left MetLife unable to be satisfied that she was within the definition or enabled it to be positively (and unnecessarily) satisfied that she did not, depended among other things on whether that material addressed Ms Sandstrom's likely capacity at some time to engage in employment for which her past education, training or experience had prepared her.

216 Dr George, a consultant psychiatrist, undertook a psychiatric assessment of Ms Sandstrom at the request of the NSW Police Force, reporting by letter dated 8 March 2011. One of the questions he was asked to address was whether Ms Sandstrom's disablement was such that she was "unlikely ever to engage in any gainful profession, trade or occupation", not the question which MetLife was required to address. Although an affirmative answer to that question would provide support for Ms Sandstrom's claim, a negative answer would not exclude it. The NSW Police Force then asked questions of Ms Sandstrom's treating psychiatrist, Dr Grace, and of Dr Wong, concerning Dr George's assessment. MetLife's use of and reliance on a part of that report is the subject of ground 2 and its use of and reliance on Dr Grace and Dr Wong's responses to the questions asked of them is the principal subject of ground 3.

217 Following MetLife's letter dated 26 February 2015 to Ms Sandstrom inviting submissions and further material in support of her claim, her solicitors responded on 22 April 2015. They in turn referred to Dr George's report of 8 March 2011. There is no reference in that letter, or in MetLife's earlier letter, to the responding letters of Dr Grace and Dr Wong, which are first referred to in MetLife's letter of 23 June 2015 as being part of a body of "contemporaneous medical opinion at and around the date of assessment which is inconsistent

with a conclusion" that Ms Sandstrom was "unlikely ever" to return to some form of work "within her education, training or experience".

218 That evidence also included Dr George's statement that he believed that at some time in the future Ms Sandstrom "may be able to return to some form of work with a different employer". In the face of the ambiguities in that statement and the fact that it was not responding to the question which MetLife was required to address, MetLife acted unreasonably in relying on it, in the absence of further inquiry or clarification, as one of the "contemporaneous" medical opinions described above.

219 The first part of ground 3 is directed to MetLife's reliance on Dr Wong's affirmative answer to question 1 in the questionnaire. That answer is said to include her agreement with Dr George's opinion of uncertain content that at some point in the future Ms Sandstrom may be able to return to some form of work. In circumstances where Dr Wong had answered question 3 in the negative (she did not believe that there was any capacity for Ms Sandstrom to return to work in the foreseeable future), MetLife's reliance on her affirmative answer to question 1 as another of the "contemporaneous" opinions was also unreasonable.

220 The second part of ground 3 is directed to Dr Grace's answers to the same questionnaire, which were also said to have supported Dr George's uncertain opinion. Again, MetLife treated Dr Grace's affirmative answer to question 3 as being inconsistent with a conclusion that Ms Sandstrom would be unlikely ever to return to some form of work within her education, training or experience. Its doing so without addressing or mentioning his contrary opinion given on 24 June 2011, which was directed to the question which MetLife was required to consider, did not have due regard to the interests of the insured and her contractual right to have that question considered fairly and reasonably.

221 *As to the cross-appeal:* By her cross-appeal filed by consent on 14 July 2020, Ms Sandstrom challenges the primary judge's refusal to make a special costs order in the face of the appellant's asserted unreasonable conduct in failing to accept her Calderbank offer dated 20 March 2018 before it expired on 28 March. That offer was to settle her claim for $300,000 inclusive of interest and

costs, together with the discharge of all prior costs orders. At the time that offer was made the proceedings had been on foot since 7 October 2015 and the hearing was due to commence on 16 April 2018.

222 As Ms Sandstrom's cross-appeal is "as to costs only", leave to appeal is required by *Supreme Court Act 1970* (NSW), s 101(2)(c) (cf *Housman v Camuglia* [2021] NSWCA 106). Leave is not opposed and should be granted.

223 The primary judge's reasons first deal with the validity of MetLife's decision of 24 July 2015 declining the claim. Having answered that question in favour of Ms Sandstrom, they then consider whether she satisfied the TPD definition. Whilst the validity of MetLife's decision was to be determined by reference to the evidentiary material before MetLife, the second question required the court to determine for itself whether or not she satisfied the definition at the date for assessment, albeit with the benefit of further medical and other expert evidence, as well as lay evidence.

224 Whether the Calderbank offer was engaged depended on Ms Sandstrom succeeding in both stages of the inquiry and achieving a better outcome than the offer made. That occurred, Ms Sandstrom recovering a total judgment sum of $752,818. The issue for the primary judge was whether it was unreasonable for MetLife to reject Ms Sandstrom's offer, which it was accepted contained a genuine element of compromise. That offer was made following a mediation, also on 20 March 2018. The day after the time for its acceptance expired, Ms Sandstrom served a further statement from herself and a statement (the first) from her husband, Mr Abbott. All of this evidence was relevant to the second of the questions to be addressed.

225 Ms Sandstrom's statement sought to explain her social media and other records considered by one of MetLife's experts, Dr Kneebone, to reveal activities and interactions inconsistent with her self-reported symptoms and disabilities. Mr Abbott gave detailed evidence about Ms Sandstrom's condition and its impacts on their lives from day to day. The primary judge considered that evidence, which described her behaviour over a long period of time and in various circumstances, both to support Ms Sandstrom's self-reporting evidence and to provide insights as to her "employability" (Judgment [488]-[491]).

226 In addition, at the hearing Dr Wilkins gave oral evidence as to the unlikelihood of Ms Sandstrom's condition being improved by particular treatments or of its otherwise improving to the point where she might pursue "a useful ordinary life".

227 In determining whether MetLife's rejection of the offer was unreasonable, the primary judge focused on its prospects of success on the second question by reference to the evidence available at that time. In doing so he did not consider the extent of the compromise involved in Ms Sandstrom's offer. That offer was to accept less than half of the principal amount to which she would have been entitled and was inclusive of costs.

228 His Honour reasoned as follows (*Sandstrom v FSS Trustee Corporation & Anor (No 2)* [2020] NSWSC 581 at [19]-[22]):

> MetLife points out that two components of Ms Sandstrom's evidence, which played an important part in the Court's reasoning in the first judgment, were not available in March 2018 when the Calderbank offer was made. First, Mr Abbott's statement had not been served. As the Court's first judgment shows, the assessment of Mr Abbott's evidence was an important ingredient in the Court's acceptance of the plaintiff's evidence.
>
> The other component of the plaintiff's evidence was the oral evidence of Dr Wilkins. His written evidence did not address the question of whether Ms Sandstrom's condition was unlikely to respond to treatment as thoroughly as did his oral evidence in response to detailed questioning on the issues. His oral testimony was an important basis for the Court's reasoning that the plaintiff was TPD, as the first judgment shows.
>
> Ms Sandstrom submits that there was nothing new or remarkable about this evidence. But MetLife's argument on this issue better reflects the place of these two pieces of evidence in the reasoning in the Court's first judgment.
>
> Had either of them been available in March 2018, they are likely to have been at the forefront of consideration by an offeree such as MetLife, in receipt of the Calderbank offer. The absence of this evidence at that time, in my view, prevents Ms Sandstrom from being able to establish that MetLife's rejection of the offer was unreasonable in the circumstances.

229 Three grounds of appeal are relied on. By the first it is said that the primary judge erred in applying a "retrospective analysis" to the question whether or not MetLife's rejection of the offer was unreasonable. Reference to his Honour's reasoning shows that he did consider the position from MetLife's perspective at the time the offer was made, and on the basis that it did not have the evidence subsequently given. In his Honour's assessment that material was substantially relevant both to the acceptance of Ms Sandstrom's evidence and to whether

she was unlikely ever to be able to engage in work for which she was reasonably qualified, in a case in which that assessment was to be made looking forward over a period of 35 years. His Honour reasoned that as the evidence was material to his assessment, it would equally have been "at the forefront of consideration" by MetLife had it been available at the time the offer was made. In the absence of that material his Honour considered, albeit implicitly, that the material before MetLife was not such as to suggest that its prospects of success were poor or other than reasonable.

230 By the second ground, it is said that his Honour limited his inquiry as to the unreasonableness of MetLife's rejection of the offer to two categories of evidence, as opposed to all of the evidence that was available. This ground does not accurately or fully describe his Honour's analysis, which included that the material available at the time of the offer did not establish (because its prospects of success were insufficiently strong) that MetLife's rejection was unreasonable.

231 The third ground is that in determining whether MetLife acted reasonably, the primary judge took into account an irrelevant consideration, namely the evidence of Dr Wilkins. In essence it is said that Dr Wilkins' ultimate opinion as to Ms Sandstrom being totally incapacitated did not change and had been expressed in his "numerous reports and notes" served by the time of the mediation. It is then contended that the evidence he gave at trial did no more than support that ultimate opinion. This argument does not engage with the primary judge's assessment that Dr Wilkins' further evidence was persuasive in support of the conclusion that Ms Sandstrom satisfied the TPD definition. Accordingly, in his Honour's view it was material to an assessment of MetLife's prospects of success, as was the absence of evidence to that effect at the time of the offer.

232 The primary judge did not err in the exercise of his costs discretion. Accordingly, the cross-appeal should be dismissed with costs.

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